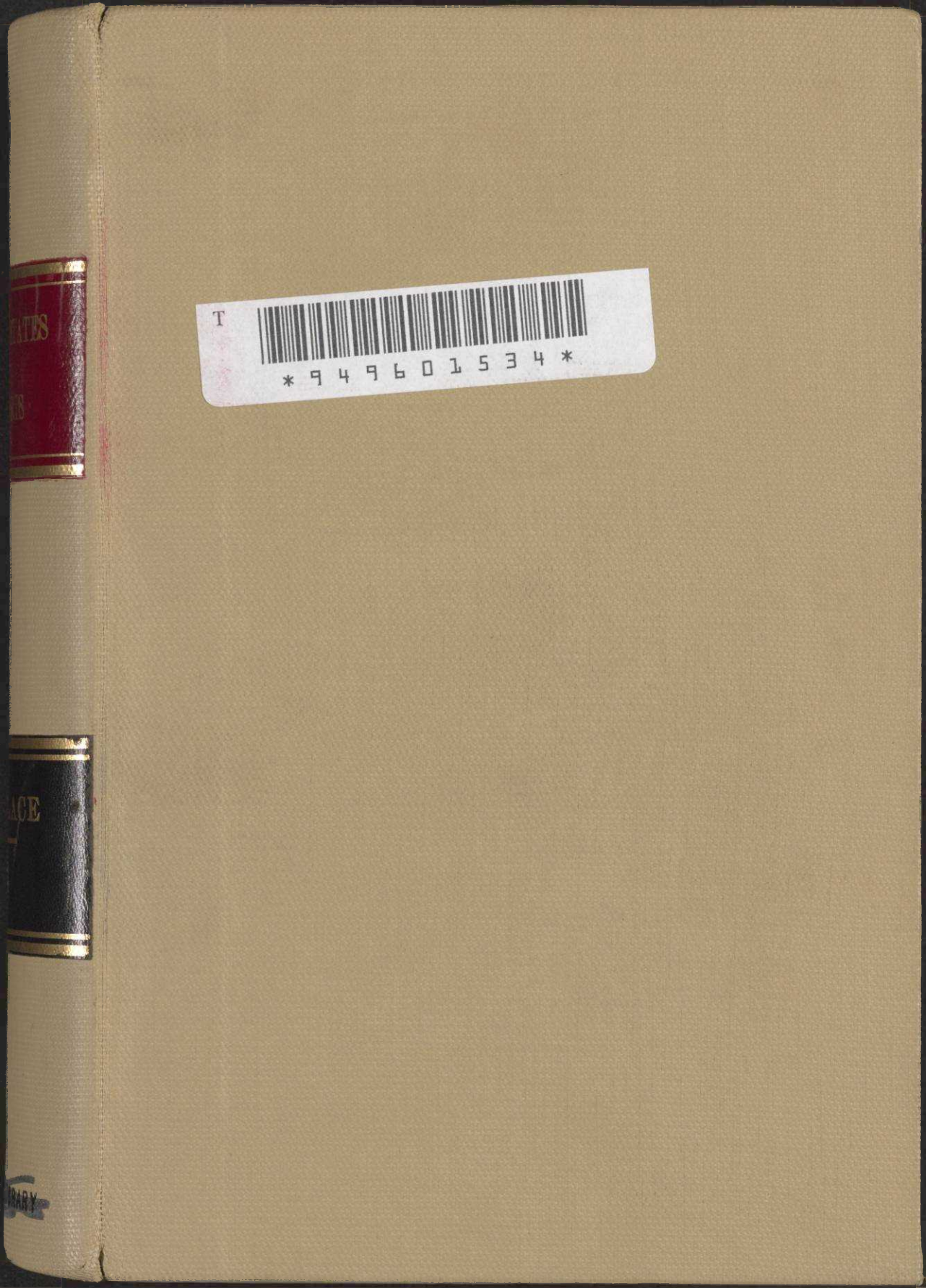
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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1866.

REPORTED BY

JOHN WILLIAM WALLACE

VOL. IV.

THE BANKS LAW PUBLISHING CO.
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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

SALMON PORTLAND CHASE

ASSOCIATES.

HON. JAMES M. WAYNE,
HON. ROBERT COOPER GRIER,
HON. NOAH H. SWAYNE,
HON. DAVID DAVIS,
HON. SAMUEL NELSON,
HON. NATHAN CLIFFORD,
HON. SAMUEL F. MILLER,
HON. STEPHEN J. FIELD.

ATTORNEY-GENERAL.

HON. HENRY STANBERY.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 8, 1867, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1864.
HON. S. P. CHASE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	December 6th. PRESIDENT LINCOLN.
ASSOCIATES.	FIFTH.	1835.
HON. JAS. M. WAYNE, Georgia.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	January 9th. PRESIDENT JACKSON.
	SECOND.	1845.
HON. SAML. NELSON, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	February 14th. PRESIDENT TYLER.
	THIRD.	1846.
HON. R. C. GRIER, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	August 4th. PRESIDENT POLK.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, AND ARKANSAS.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

GENERAL RULES,

MADE AT DECEMBER TERM, 1866.

RULE I.

THAT the amendment to the second rule of this court, which requires the oath prescribed by the act of Congress of January 24th, 1865, to be taken by attorneys and counsellors, be and the same is hereby rescinded and annulled.

RULE II.

That all cases on the calendar, except cases advanced as hereinafter provided, shall be heard when reached in the regular call of the docket, and in the order in which they are entered.

Criminal cases may be advanced, by leave of the court, on motion of either party.

Revenue cases, and cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the Attorney-General.

Two or more cases, also, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

PREFACE.

THE Supreme Court, at its late session, met in the beginning of December, and was engaged in the discharge of its duties till towards the closing part of May; a recess in the month of March having been more, perhaps, a suspension of actual sitting than any remission from judicial labor. Two hundred and fourteen cases were disposed of; including the Southern cases, which had not till now, since 1860, been called. It is probable that no so considerable number of cases has been disposed of at any one term since the court was organized. And the importance of some of the adjudications was not less remarkable than the number of decisions given.

The Thirty-ninth Congress, in view of the facts just referred to, provided for the publication of two volumes of reports. Similar provision had been made in 1850, 1851, 1853, 1854, and 1860, in all which years, as in 1830 and perhaps previously, a second volume was found necessary and was issued.

One purpose of Congress, in its enactment, as understood by the reporter, was that the great constitutional questions in which opinions had been given at the late term—questions on which professional, public, and even judicial opinion, as was known, had been much divided—should be reported with more than usual fulness. They are accordingly here so given. For his ability to present the argument in some of them as fully as he has done—though substance alone is what he has sought to offer—he must acknowledge his great obligation to D. F. MURPHY, Esquire, of the Senate corps of reporters; who, unit-

ing a professional education to the highest skill in phonography, has given to him the means of enlarging and improving from perfect transcripts his own imperfect notes.

The remaining volume of the term will appear so soon as the reporter's ability allows him to prepare and print it. But the labor of getting two large volumes through the press is not a small one; and he must beg excuse from his professional brethren if they should fancy that there is a slight delay.

PHILADELPHIA, June 12th, 1867.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1866.

STEARNS *v.* THE UNITED STATES.

A *certiorari* for diminution of the record allowed under special circumstances, and where the cause had been continued till the next term, although the motion for it was made after more than one term had passed since the entry of the case, and contrary to a rule of the court.

THE fourteenth rule of this court declares that no *certiorari* for diminution of the record shall be awarded unless the motion be made at the first term of the entry of the cause, and "unless upon special cause shown to the court accounting satisfactorily for the delay."

The present case having been continued to the next term, *Mr. Cushing* asked leave, although more than one term had passed since the entry of the cause, to file a suggestion of diminution of the record. He stated that the counsel in the case in California had been unaware of the rule requiring such a suggestion and motion to be made at the *first* term; for which reason they had not sent on the papers at an earlier day; and he submitted the fact as a sufficient reason for granting the motion now, inasmuch as the cause having been already continued till the next term, the granting of it would not cause any delay in the hearing.

In support of this view, he cited *Clark* v. *Hacket** and *Morgan* v. *Curtenius*.†

THE COURT granted leave, and ordered the *certiorari*.

---

* 1 Black, 77.

† 19 Howard, 8.

Syllabus.

BROBST ET AL. *v.* BROBST.

This court cannot take jurisdiction on a certificate of division in a case where the question certified is one of fact and can only be determined by an examination of the evidence in the record.

THIS case came here on a certificate of division from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The record showed a litigation in respect to an alleged fraud in obtaining a deed of large tracts of land by the principal defendant from the complainant. The decree found the fraud alleged, and held the deed null as to the principal defendant, but stated that the judges were opposed in opinion on the question whether his four co-defendants, who claimed by deeds under him, were chargeable as privies to the fraud, and this question was accordingly certified to this court.

Messrs. Brent and Merrick moved to dismiss the case for want of jurisdiction.

The CHIEF JUSTICE: The question is one of fact, and can only be determined by an examination of the evidence in the record; and it has been repeatedly determined that only questions of law upon distinct points in a cause can be brought to this court by certificate.*

An order must be made, therefore, remanding this cause to the Circuit Court, without answer to the question certified, for want of jurisdiction.

EX PARTE MILLIGAN.

1 Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus* for the purpose of inquiring into the cause of commitment, and they have

* Wilson *v.* Barnum, 8 Howard, 261.

jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of *habeas corpus*, to issue the writ, and on its return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.
3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.
4. A petition for a writ of *habeas corpus*, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law and not of discretion.
5. A person arrested after the passage of the act of March 3d, 1863, "relating to *habeas corpus* and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district.
6. The omission to furnish a list of the persons arrested, to the judges of the Circuit or District Court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge.
7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.
8. The guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances.
9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal, for any offence whatever.
10. Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury; and the right of trial by jury, in such cases, is subject to the same exceptions.

Statement of the case.

11. Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*.
12. A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.
13. Suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further.
14. A person who is a resident of a loyal State, where he was arrested; who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

THIS case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress—the Judiciary Act of 1789,* section 14—enacts that the Circuit Courts of the United States

"Shall have power to issue writs of *habeas corpus*. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*," &c.

Another act—that of March 3d, 1863,† "relating to *habeas corpus*, and regulating judicial proceedings in certain cases"—an act passed in the midst of the Rebellion—makes various provisions in regard to the subject of it.

The first section authorizes the suspension, during the Rebellion, of the writ of *habeas corpus*, throughout the United States, by the President.

Two following sections limited the authority in certain respects.

* 1 Stat at Large, 81.

† 12 Id. 755.

Statement of the case.

The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that *the judge* of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute *the judge's* order, under penalty, for refusal or delay, of fine and imprisonment.

The third section enacts, in case lists of persons other than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain *the judge's* order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for dis charge.

By proclamation,* dated the 15th September following

* 13 Stat. at Large, 734.

the President reciting this statute suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States "hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval forces of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service."

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison, at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges; preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"
2. "Affording aid and comfort to rebels against the authority of the United States;"
3. "Inciting insurrection;"
4. "Disloyal practices;" and
5. "Violation of the laws of war."

Under each of these charges there were various specifications. The substance of them was, joining and aiding, at different times, between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate

prisoners of war, &c.; resisting the draft, &c.; . . . "at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis, [and various other places specified] in Indiana, a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy." These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging; and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact, that while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empanelled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war; but during all the time aforesaid, and for twenty years last past, he had been an

inhabitant, resident, and citizen of Indiana. And so, that it had been "wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."

The record, in stating who appeared in the Circuit Court, ran thus:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and files here, in open court, the petition of said Milligan, to be discharged." . . . "At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c."

The prayer of the petition was that under the already mentioned act of Congress of March 3d, 1863, the petitioner might be brought before the court, and either turned over to the proper civil tribunal to be proceeded with according to the law of the land, or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

I. On the facts stated in the petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petitioner?

II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?

III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802,* an act

* 2 Stat. at Large, 159.

which provides "that whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of *either party* or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter; and shall by the said court be *finally* decided: and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the *cause* from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The three several questions above mentioned were argued at the last term. And along with them an additional question raised in this court, namely:

IV. A question of jurisdiction, as—1. Whether the Circuit Court had jurisdiction to hear the case there presented?—2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether *this* court had jurisdiction of the questions raised by the certificate?

Mr. J. E. McDonald, Mr. J. S. Black, Mr. J. H. Garfield, and Mr. David Dudley Field, for the petitioner. Mr. McDonald opening the case fully, and stating and examining the preliminary proceedings.

Mr. Speed, A. G., Mr. Stanbery, and Mr. B. F. Butler, special counsel of the United States, contra. Mr. Stanbery confining himself to the question of jurisdiction under the act of 1802.

ON THE SIDE OF THE UNITED STATES.

I. JURISDICTION.

1. *As to the jurisdiction of the Circuit Court.*—The record shows that the application was made to the court in open

session. The language of the third section contemplates that it shall be made to a "judge."

But, independently of this, the record does not state the facts necessary to bring the case within the act of 1863. It does not show under which section of the act it is presented; nor allege that the petitioners are state or political prisoners otherwise than as prisoners of war; nor that a list has been brought in, or that it has not been brought in. If a list had been brought in containing the name of one of these petitioners, it would have been the judge's duty to inquire into his imprisonment; if no list had been brought in, his case could only be brought before the court by some petition, and the judge, upon being satisfied that the allegations of the petition were true, would discharge him. But there is no certificate in the division of opinion that the judges were or were not satisfied that the allegations of these petitioners were true; nor were the petitions brought under the provisions of that duty. But conceding, for argument's sake, this point, a graver question exists.

2. *As to the jurisdiction of this court.*—If there is any jurisdiction over the case here, it must arise under the acts of Congress which give to this court jurisdiction to take cognizance of questions arising in cases pending in a Circuit Court of the United States and certified to the court for its decision, and then to be remanded to the Circuit Court. This is appellate jurisdiction, and is defined and limited by the single section of the act of April 29, 1802.

The case is not within the provisions of this section.

First. The question in the court below arose upon *the application* for a *habeas corpus*, before there was a service upon the parties having the petitioner in custody, before an answer was made by those parties, before the writ was ordered or issued, while yet there was no other party before the court, except the petitioner. The case was then an *ex parte* case, and is so still. The proceeding had not yet ripened into a "cause."

No division of opinion in such a case is within the purview of the section. The division of opinion on which this

court can act, must occur in the progress of a case where the parties on *both* sides are before the court, or have a status in the case. The right to send the question or point of division to this court can only arise upon the motion of the *parties, or either of them*,—not by the court on its own motion or for its own convenience. The record hardly exhibits the Attorney of the United States, Mr. Hanna, as taking any part.

The parties have an equal right to be heard upon the question in the court below. It must appear to them in open court that the judges are divided in opinion. They must have an equal right to move for its transfer to this court. They must have an equal opportunity to follow it here and to argue it here,—not as volunteers, not as *amici curiæ*, not by permission, but *as parties on the record*, with equal rights.

This record shows no parties, except the petitioner. Its title is *Ex parte* Milligan. The persons who are charged in the petition as having him in wrongful custody are not made parties, and had, when the question arose, no right to be heard as parties in the court below, and have no right to be heard as parties in this court.

In such a case, this court cannot answer any one of the questions sent here, especially the one, "Had the Military Commission jurisdiction to try and condemn Milligan?" For if the court answer that question in the negative, its answer is a *final decision*, and, as it is asserted, settles it for all the future of the case below; and when, hereafter, that case shall, in its progress, bring the parties complained of before the court, silences all argument upon the vital point so decided.* What becomes of the whole argument which will be made on the other side, of the right of every man before being condemned of crime, to be heard and tried by an impartial jury?

Second. This being an *ex parte* application for a writ of *habeas corpus* made to a court, the division of opinion *then* occurring was in effect a decision of the case.

* United States *v.* Daniel, 6 Wheaton, 542; Davis *v.* Braden, 10 Peters, 289

The case was ended when the court declined to issue the writ. It was not a division of opinion occurring in the progress of a case or the trial of a case, and when it was announced to the petitioner that one judge was in favor of granting the writ, and that the other would not grant it—*that* settled and ended the case. The case had not arisen within the meaning of the statute, when from necessity the case and the progress of the case must stop until the question should be decided. And as Milligan was sentenced to be hanged on the 19th May, for aught that appears, we are discussing a question relating to the liberty of a dead man. Having been sentenced to be hanged on the 19th, the presumption is that he was hanged on that day. Any answer to the questions raised will therefore be answers to moot points—answers which courts will not give.*

Third. If the parties had all been before the court below, and the case in progress, and then the questions certified, and the parties were now here, the court would not answer these questions.

1. Every question involves matters of fact not stated in an agreed case, or admitted on demurrer, but alleged by one of the parties, and standing alone on his *ex parte* statement.†

2. All the facts bearing on the questions are not set forth, so that even if the parties had made an agreed state of facts, yet if this court find that other facts important to be known before a decision of the question do not appear, the questions will not be answered.‡

3. The main question certified, the one, as the counsel for the petitioners assert, on which the other two depend, had not yet arisen for decision, especially for final decision, so that if the parties had both concurred in sending that question here, this court could not decide it.

If it be said this question did arise upon the application for the writ, it did not then arise for final decision, but only as showing probable cause, leaving it open and unde-

* 6 Wheaton, 548; 10 Peters, 290.

† Wilson *v.* Barnum, 8 Howard, 262.

‡ United States *v.* City Bank of Columbus, 19 Id. 385.

cided until the answer should be made to the writ. A case, upon application for the writ of *habeas corpus*, has no status as a case until the service of the writ on the party having the petitioner in custody, and his return and the production of the body of the petitioner. No issue arises until there is a return, and when that is made the issue arises upon it, and in the courts of the United States it is conclusive as to the facts contained in the return.*

4. The uniform practice in this court is against its jurisdiction in such a case as this upon *ex parte* proceedings.

All the cases (some twenty in number) before this court, on certificates of division, during all the time that this jurisdiction has existed, are cases between parties, and stated in the usual formula of A. *v.* B., or B. *ad sectam* A.

So, too, all the rules of this court as to the rights and duties of parties in cases before this court, exclude the idea of an *ex parte* case under the head of appellate jurisdiction.

II. THE MERITS OR MAIN QUESTION.

Mr. Speed, A. G., and Mr. Butler: By the settled practice of the courts of the United States, upon application for a writ of *habeas corpus*, if it appear upon the facts stated by the petitioner, all of which shall be taken to be true, that he could not be discharged upon a return of the writ, then no writ will be issued. Therefore the questions resolve themselves into two:

I. Had the military commission jurisdiction to hear and determine the case submitted to it?

II. The jurisdiction failing, had the military authorities of the United States a right, at the time of filing the petition, to detain the petitioner in custody as a military prisoner, or for trial before a civil court?

1. A military commission derives its powers and authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed.†

* Commonwealth *v.* Chandler, 11 Massachusetts 83.

† Dynes *v.* Hoover, 20 Howard, 78; *Ex parte* Vallandigham, 1 Wallace, 243.

2. Martial law is the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief, or supreme executive ruler.*

3. Military law is the rules and regulations made by the legislative power of the State for the government of its land and naval forces.†

4. The laws of war (when this expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello*.

These several kinds of laws should not be confounded, as their adjudications are referable to distinct and different tribunals.

Infractions of the laws of war can only be punished or remedied by retaliation, negotiation, or an appeal to the opinion of nations.

Offences against military laws are determined by tribunals established in the acts of the legislature which create these laws—such as courts martial and courts of inquiry.

The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender.

But the necessities and effects of warlike operations which create the law also give power incidental to its execution. It would be impossible for the commanding general of an army to investigate each fact which might be supposed to interfere with his movements, endanger his safety, aid his enemy, or bring disorder and crime into the community under his charge. He, therefore, must commit to his offi-

* Hansard's Parliamentary Debates, 3d series, vol. 95, p. 80. Speech of the Duke of Wellington. Opinions of Attorneys-General, vol. 8, p. 367.

† Kent's Commentaries, vol. 1, p. 341, note A.

cers, and in practice, to a board of officers, as a tribunal, by whatever name it may be called, the charge of examining the circumstances and reporting the facts in each particular case, and of advising him as to its disposition—the whole matter to be then determined and executed by his order.*

Hence arise *military commissions*, to investigate and determine, not offences against military law by soldiers and sailors, not breaches of the common laws of war by belligerents, but the quality of the acts which are the proper subject of restraint by martial law.

Martial law and its tribunals have thus come to be recognized in the military operations of all civilized warfare. Washington, in the Revolutionary war, had repeated recourse to military commissions. General Scott resorted to them as instruments with which to govern the people of Mexico within his lines. They are familiarly recognized in express terms by the acts of Congress of July 17th, 1862, chap. 201, sec. 5; March 18th, 1863, chap. 75, sec. 36; Resolution No. 18, March 11th, 1862; and their jurisdiction over certain offences is also recognized by these acts.

But, as has been seen, military commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offences therein enumerated.

Assuming the jurisdiction where military operations are being in fact carried on, over classes of military offences, Congress, by this legislation, from considerations of public safety, has endeavored to extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.

As the war progressed, being a civil war, not unlikely, as the facts in this record abundantly show, to break out in any portion of the Union, in any form of insurrection, the President, as commander-in-chief, by his proclamation of September 24th, 1862, ordered:

"That during the existing insurrection, and as a necessary

* Examination of Major André before board of officers, Colonial pamphlets, vol. 18.

means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

"Second. That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission."

This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President.*

This proclamation, which by its terms was to continue during the then existing insurrection, was in full force during the pendency of the proceedings complained of, at the time of the filing of this petition, and is still unrevoked.

While we do not admit that any legislation of Congress was needed to sustain this proclamation of the President, it being clearly within his power, as commander-in-chief, to issue it; yet, if it is asserted that legislative action is necessary to give validity to it, Congress has seen fit to expressly ratify the proclamation by the act of March 3d, 1863, by declaring that the President, whenever in his judgment the public safety may require it, is authorized to suspend the writ of *habeas corpus* in any case throughout the United States, and in any part thereof.

The offences for which the petitioner for the purpose of this hearing is confessed to be guilty, are the offences enumerated in this proclamation. The prison in which he is confined is a "military prison" therein mentioned. As to him, his acts and imprisonment, the writ of *habeas corpus* is expressly suspended.

Apparently admitting by his petition that a military com-

* Brown *v.* The United States, 8 Cranch, 153.

mission might have jurisdiction in certain cases, the petitioner seeks to except himself by alleging that he is a citizen of Indiana, and has never been in the naval or military service of the United States, or since the commencement of the Rebellion a resident of a rebel State, and that, therefore, it had been out of his power to have acquired belligerent rights and to have placed himself in such a relation to the government as to enable him to violate the laws of war.

But neither residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law, even in a time of foreign war, and certainly not in a time of civil insurrection. The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.

These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial, and imprisonment took place; within a military district of a geographical military department, duly established by the commander-in chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent whose becoming soldiers the petitioner conspired with and armed others.

Thus far the discussion has proceeded without reference to the effect of the Constitution upon war-making powers, duties, and rights, save to that provision which makes the President commander-in-chief of the armies and navies.

Does the Constitution provide restraint upon the exercise of this power?

The people of every sovereign State possess all the rights and powers of government. The people of these States in forming a "more perfect Union, to insure domestic tranquillity, and to provide for the common defence," have vested the power of making and carrying on war in the general government, reserving to the States, respectively, only the right to repel invasion and suppress insurrection "of such imminent danger as will not admit of delay." This right and power thus granted to the general government is in its nature entirely *executive*, and in the absence of constitutional limitations would be wholly lodged in the President, as chief executive officer and commander-in-chief of the armies and navies.

Lest this grant of power should be so broad as to tempt its exercise in initiating war, in order to reap the fruits of victory, and, therefore, be unsafe to be vested in a single branch of a republican government, the Constitution has delegated to Congress the power of originating war by declaration, when such declaration is necessary to the commencement of hostilities, and of provoking it by issuing letters of marque and reprisal; consequently, also, the power of raising and supporting armies, maintaining a navy, employing the militia, and of making rules for the government of all armed forces while in the service of the United States.

To keep out of the hands of the Executive the fruits of victory, Congress is also invested with the power to "make rules for the disposition of captures by land or water."

After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.*

During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable;

* Luther *v.* Borden, 7 Howard, 42–45; Martin *v.* Mott, 12 Wheaton, 19.

or, if acting offensively, his resources must be proportionate to the end in view,—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.*

These propositions are axiomatic in the absence of all restraining legislation by Congress.

Much of the argument on the side of the petitioner will rest, perhaps, upon certain provisions—not in the Constitution itself, and as originally made, but now seen in the Amendments made in 1789: the fourth, fifth, and sixth amendments. They may as well be here set out:

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

In addition to these, there are two preceding amendments

* Federalist, No. 26, by Hamilton; No. 41, by Madison.

which we may also mention, to wit: the second and third. They are thus:

2. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

3. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

It will be argued that the fourth, fifth, and sixth articles, as above given, are restraints upon the war-making power; but we deny this. All these amendments are in *pari materiâ*, and if either is a restraint upon the President in carrying on war, in favor of the citizen, it is difficult to see why all of them are not. Yet will it be argued that the fifth article would be violated in "depriving of life, liberty, or property, without due process of law," armed rebels marching to attack the capital? Or that the fourth would be violated by searching and seizing the papers and houses of persons in open insurrection and war against the government? It cannot properly be so argued, any more than it could be that it was intended by the second article (declaring that "the right of the people to keep and bear arms shall not be infringed") to hinder the President from disarming insurrectionists, rebels, and traitors in arms while he was carrying on war against them.

These, in truth, are all peace provisions of the Constitution, and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law.

By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that "no soldier shall be quartered in any house in time of peace

without consent of the owner, or in *time of war*, except in a manner prescribed by law."

This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war. There would seem to be no implied one; on the contrary, while carefully providing for the privilege of the writ of *habeas corpus* in time of peace, the Constitution takes it for granted that it will be suspended "in case of rebellion or invasion (*i. e.*, in time of war), when the public safety requires it."

The second and third sections of the act relating to *habeas corpus*, of March 3d, 1863, apply only to those persons who are held as "state or political offenders," and not to those who are held as prisoners of war. The petitioner was as much a prisoner of war as if he had been taken in action with arms in his hands.

They apply, also, only to those persons, the cause of whose detention is not disclosed; and not to those who, at the time when the lists by the provisions of said sections are to be furnished to the court, are actually undergoing trial before military tribunals upon written charges made against them.

The law was framed to prevent imprisonment for an indefinite time without trial, not to interfere with the case of prisoners undergoing trial. Its purpose was to make it certain that such persons should be tried.

Notwithstanding, therefore, the act of March 3, 1863, the commission had jurisdiction, and properly tried the prisoner.

The petitioner does not complain that he has been kept in ignorance of the charges against him, or that the investigation of those charges has been unduly delayed.

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.

ON THE SIDE OF THE PETITIONER.

Mr. David Dudley Field:

Certain topics have been brought into this discussion which have no proper place in it, and which I shall endeavor to keep out of it.

This is not a question of the discipline of camps; it is not a question of the government of armies in the field; it is not a question respecting the power of a conqueror over conquered armies or conquered states.

It is not a question, how far the *legislative* department of the government can deal with the question of martial rule. Whatever has been done in these cases, has been done by the *executive* department alone.

Nor is it a question of the patriotism, or the character, or the services of the late chief magistrate, or of his constitutional advisers.

It is a question of the rights of the citizen in time of war.

Is it true, that the moment a declaration of war is made, the executive department of this government, without an act of Congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone? These are the considerations which give to the case its greatest significance.

But we are met with the preliminary objection, that you cannot consider it for want of

JURISDICTION.

The objection is twofold: first, that the Circuit Court of Indiana had not jurisdiction to hear the case there presented; and, second, that this court has not jurisdiction to hear and decide the questions thus certified.

First. *As to the jurisdiction of the Circuit Court.* That depended on the fourteenth section of the Judiciary Act of

1789, and on the *Habeas Corpus* Act of 1863. The former was, in Bollman's case,* held to authorize the courts, as well as the judges, to issue the writ for the purpose of inquiring into the cause of commitment.

The act of March 3d, 1863, after providing that the Secretaries of State and of War shall furnish to the judges of the Circuit and District Courts a list of political and state prisoners, and of all others, except prisoners of war, goes on to declare, that if a grand jury has had a session, and has adjourned without finding an indictment, thereupon "it shall be the duty of the judge of said court forthwith to make an order, that any such prisoner desiring a discharge from said imprisonment be brought before him to be discharged."

Upon this act the objection is, first, that the application of the petitioner should have been made to one of the judges of the circuit, instead of the court itself; and, second, that the petition does not show whether it was made under the second or the third section.

To the former objection the answer is, first, that the decision in Bollman's case, just mentioned, covers this case; for the same reasoning which gives the court power to proceed under the fourteenth section of the act of 1789, gives the court power to proceed under the second and third sections of the act of 1863. The second answer is that, by the provisos of the second section, the court is expressly mentioned as having the power.

The other objection to the jurisdiction of the Circuit Court is, that the petition does not show under which section of the act it was presented. It states that the petitioner is held a prisoner under the authority of the President; that a term has been held, and that a grand jury has been in attendance, and has adjourned without indicting. It does not state whether a list has been furnished to the judges by the Secretary of State and the Secretary of War, and, therefore, argues the learned counsel, the court has no jurisdiction. That is to say, the judges, knowing themselves whether the

* 4 Cranch, 75.

list has, or has not been furnished, cannot proceed, because we have not told them by our petition what they already know, and what we ourselves might not know, and perhaps could not know, because the law does not make it necessary that the list shall be filed, or that anybody shall be informed of it but the judges.

Second. *As to the jurisdiction of this court.* Supposing the Circuit Court to have had jurisdiction, has this court jurisdiction to hear these questions as they are certified? There are various objections. It is said that a division of opinion can be certified only in a cause, and that this is not a cause.

It was decided by this court, in *Holmes* v. *Jennison*,* that a proceeding on *habeas corpus* is a suit, and suit is a more comprehensive word than cause. The argument is, that it is not a cause until the adverse party comes in. Is not a suit commenced before the defendant is brought into court? Is the defendant's appearance the first proceeding in a cause? There have been three acts in respect to this writ of *habeas corpus*. The first of 1789; then the act passed in 1833; and, finally, the act of 1842. The last act expressly designates the proceeding as a cause.

Another objection is, that there must be parties; that is, at least two parties, and that here is only one. This argument is derived from the direction in the act, that the point must be stated "upon the request of either party" or their counsel. It is said that "either party" imports two, and if there are not two, there can be no certificate. This is too literal: "*qui hæret in litera hæret in cortice.*" The language is elliptical. What is meant is, "any party or parties, his or their counsel." Again: "either," if precisely used, would exclude all over two, because "either" strictly means "one of two;" and if there are three parties or more, as there may be, you cannot have a certificate. It is not unusual, in proceedings *in rem*, to have several intervenors and claim ants: what are we to do then? The answer must be, that "either" is an equivalent word for "any;" and that who

* 14 Peters, 566.

ever may happen to be a party, whether he stand alone or with others, may ask for the certificate.

The words "either party" were introduced, not for restriction but enlargement. The purpose was to enable any party to bring the case here; otherwise it might have been argued, perhaps, that all parties must join in asking for the certificate. The purpose of the act was to prevent a failure of justice, when the two judges of the Circuit Court were divided in opinion. The reason of the rule is as applicable to a case with one party as if there were two. Whether a question shall be certified to this court, depends upon the point in controversy. If it concerns a matter of right, and not of discretion, there is as much reason for its being sent *ex parte* as for its being sent *inter partes*. This very case is an illustration. Here a writ is applied for, or an order is asked. The judges do not agree about the issue of the writ, or the granting of the order. Upon their action the lives of these men depend. Shall there be a failure of justice? The question presented to the Circuit Court was not merely a formal one; whether an initial writ should issue. It is the practice, upon petitions for *habeas corpus*, to consider whether, upon the facts presented, the prisoners, if brought up, would be remanded. The presentation of the petition brings before the court, at the outset, the merits, to a certain extent, of the whole case. That was the course pursued in *Passmore Williamson's* case;* in *Rex* v. *Ennis*;† in the case of the *Three Spanish Sailors*;‡ in *Hobhouse's* case;§ in *Husted's* case;‖ and in *Ferguson's* case;¶ and in this court, in *Watkins's* case,** where the disposition of the case turned upon the point whether, if the writ were issued, the petitioner would be remanded upon the facts as they appeared.

There may, indeed, be cases where only one party can appear, that are at first and must always remain *ex parte*.

* 26 Pennsylvania State, 9.
† 1 Burrow, 765.
‡ 2 W. Blackstone, 1324.
§ 3 Barnewall and Alderson, 420
‖ 1 Johnson's Cases, 136.
¶ 9 Id. 239.
** 3 Peters, 202.

Here, however, there were, in fact, two parties. Who were they? The record tells us:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gordon, Esq., of counsel for said Milligan, and files here in open court the petition of said Milligan to be discharged. At the same time comes, also, John Hanna, Esq., the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given," &c.

The next day the case came on again, and the certificate was made.

In point of fact, therefore, this cause had all the solemnity which two parties could give it. The government came into court, and submitted the case in Indiana, for the very purpose of having it brought to Washington.

A still additional objection made to the jurisdiction of this court is, that no questions can be certified except those which arise upon the trial.

The answer is, first, that there has been a trial, in its proper sense, as applicable to this case. The facts are all before the court. A return could not vary them. The case has been heard upon the petition, as if that contained all that need be known, or could be known. The practice is not peculiar to *habeas corpus;* it is the same on application for *mandamus*, or for attachments in cases of contempt; in both which cases the court sometimes hears the whole matter on the first motion, and sometimes postpones it till formal pleadings are put in. In either case, the result is the same.

But, secondly, if it were not so, is it correct to say that a certificate can only be made upon a trial? To sustain this position, the counsel refers to the case of *Davis* v. *Burden.** But that case expressly reserves the question.

It is admitted that the question of jurisdiction is a question that may be certified. The qualification insisted upon is

* 10 Peters, 289.

that no question can be certified unless it arose upon the trial of the cause, or be a question of jurisdiction. This is a question of jurisdiction. It is a question of the jurisdiction of the Circuit Court to grant the writ of *habeas corpus*, and to liberate these men; and that question brings up all the other questions in the cause.

Yet another objection to the jurisdiction of this court is, that the case must be one in which the answer to the questions when given shall be final; that is to say, the questions come here to be finally decided. What does that mean? Does it mean that the same thing can never be debated again? Certainly not. It means that the decision shall be final for the two judges who certified the difference of opinion, so that when the answer goes down from this court they shall act according to its order, as if they had originally decided in the same way.

Another objection to the jurisdiction of this court is, that the *whole* case is certified. The answer is, that no question is certified except those which actually arose before the court at the time, and without considering which it could not move at all. That is the first answer. The second is, that if too much is certified, the court will divide the questions, and answer only those which it finds to be properly certified, as it did in the *Silliman* v. *Hudson River Bridge Company** case.

The last objection to the jurisdiction of this court is, that the case is ended; because, it is to be presumed that these unfortunate men have been hanged. Is it to be presumed that any executive officer of this country, though he arrogate to himself this awful power of military government, would venture to put to death three men, who claim that they are unjustly convicted, and whose case is considered of such gravity by the Circuit Court of the United States that it certifies the question to the Supreme Court?

The suggestion is disrespectful to the executive, and I am glad to believe that it has no foundation in fact.

* 1 Black, 583.

All the objections, then, are answered. There is nothing, then, in the way of proceeding to

II. THE MERITS AND MAIN QUESTION.

The argument upon the questions naturally divides itself into two parts:

First. Was the military commission a competent tribunal for the trial of the petitioners upon the charges upon which they were convicted and sentenced?

Second. If it was not a competent tribunal, could the petitioners be released by the Circuit Court of the United States for the District of Indiana, upon writs of *habeas corpus* or otherwise?

The discussion of the competency of the military commission is first in order, because, if the petitioners were lawfully tried and convicted, it is useless to inquire how they could be released from an unlawful imprisonment.

If, on the other hand, the tribunal was incompetent, and the conviction and sentence nullities, then the means of relief become subjects of inquiry, and involve the following considerations:

1. Does the power of suspending the privilege of the writ of *habeas corpus* appertain to all the great departments of government concurrently, or to some only, and which of them?

2. If the power is concurrent, can its exercise by the executive or judicial department be restrained or regulated by act of Congress?

3. If the power appertains to Congress alone, or if Congress may control its exercise by the other departments, has that body so exercised its functions as to leave to the petitioners the privilege of the writ, or to entitle them to their discharge?

In considering the first question, that of the competency of the military tribunal for the trial of the petitioners upon those charges, let me first call attention to the *dates* of the transactions.

Let it be observed next, that for the same offences as those

set forth in the charges and specifications, the petitioners could have been tried and punished by the ordinary civil tribunals.

Let it also be remembered, that Indiana, at the time of this trial, was a peaceful State; the courts were all open; their processes had not been interrupted; the laws had their full sway.

Then let it be remembered that the petitioners were simple citizens, not belonging to the army or navy; not in any official position; not connected in any manner with the public service.

The evidence against them is not to be found in this record, and it is immaterial. Their guilt or their innocence does not affect the question of the competency of the tribunal by which they were judged.

Bearing in mind, therefore, the nature of the charges, and the time of the trial and sentence; bearing in mind, also, the presence and undisputed authority of the civil tribunals and the civil condition of the petitioners, we ask by what authority they were withdrawn from their natural judges?

What is a military commission? Originally, it appears to have been an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose. General Scott resorted to it in Mexico for his assistance in governing conquered places. The first mention of it in an act of Congress appears to have been in the act of July 22, 1861, where the general commanding a separate department, or a detached army, was authorized to appoint a military board, or *commission*, of not less than three, or more than five officers, to examine the qualifications and conduct of commissioned officers of volunteers.

Subsequently, military commissions are mentioned in four acts of Congress, but in none of them is any provision made for their organization, regulation, or jurisdiction, further than that it is declared that in time of war or rebellion, spies may be tried by a general court-martial or military commission; and that "persons who are in the military service of

the United States, and subject to the Articles of War," may also be tried by the same, for murder, and certain other infamous crimes.

These acts do not confer upon military commissions jurisdiction over any persons other than those in the military service and spies.

There being, then, no act of Congress for the establishment of the commission, it depended entirely upon the executive will for its creation and support. This brings up the true question now before the court: Has the President, in time of war, upon his own mere will and judgment, the power to bring before his military officers any person in the land, and subject him to trial and punishment, even to death? The proposition is stated in this form, because it really amounts to this.

If the President has this awful power, whence does he derive it? He can exercise no authority whatever but that which the Constitution of the country gives him. Our system knows no authority beyond or above the law. We may, therefore, dismiss from our minds every thought of the President's having any prerogative, as representative of the people, or as interpreter of the popular will. He is elected by the people to perform those functions, and those only, which the Constitution of his country, and the laws made pursuant to that Constitution, confer.

The plan of argument which I propose is, first to examine the text of the Constitution. That instrument, framed with the greatest deliberation, after thirteen years' experience of war and peace, should be accepted as the authentic and final expression of the public judgment, regarding that form and scope of government, and those guarantees of private rights, which legal science, political philosophy, and the experience of previous times had taught as the safest and most perfect. All attempts to explain it away, or to evade or pervert it, should be discountenanced and resisted. Beyond the line of such an argument, everything else ought, in strictness, to be superfluous. But, I shall endeavor to show, further, that the theory of our government, for which I am contending,

is the only one compatible with civil liberty; and, by what I may call an historical argument, that this theory is as old as the nation, and that even in the constitutional monarchies of England and France that notion of executive power, which would uphold military commissions, like the one against which I am speaking, has never been admitted.

What are the powers and attributes of the presidential office? They are written in the second article of the Constitution, and, so far as they relate to the present question, they are these: He is vested with the "executive power;" he is "commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" he is to "take care that the laws be faithfully executed;" and he takes this oath: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." The "executive power" mentioned in the Constitution is the executive power of the United States. The President is not clothed with the executive power of the States. He is not clothed with any executive power, except as he is specifically directed by some other part of the Constitution, or by an act of Congress.

He is to "take care that the laws be faithfully executed." He is to execute the laws by the means and in the manner which the laws themselves prescribe.

The oath of office cannot be considered as a grant of power. Its effect is merely to superadd a religious sanction to what would otherwise be his official duty, and to bind his conscience against any attempt to usurp power or overthrow the Constitution.

There remains, then, but a single clause to discuss, and that is the one which makes him commander-in-chief of the army and navy of the United States, and of the militia of the States when called into the federal service. The question, therefore, is narrowed down to this: Does the authority to command an army carry with it authority to arrest and

try by court-martial civilians—by which I mean persons not in the martial forces; not impressed by law with a martial character? The question is easily answered. To command an army, whether in camp, or on the march, or in battle, requires the control of no other persons than the officers, soldiers, and camp followers. It can hardly be contended that, if Congress neglects to find subsistence, the commander-in-chief may lawfully take it from our own citizens. It cannot be supposed that, if Congress fails to provide the means of recruiting, the commander-in-chief may lawfully force the citizens into the ranks. What is called the war power of the President, if indeed there be any such thing, is nothing more than the power of commanding the armies and fleets which Congress causes to be raised. To command them is to direct their operations.

Much confusion of ideas has been produced by mistaking executive power for kingly power. Because in monarchial countries the kingly office includes the executive, it seems to have been sometimes inferred that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, even for four years.

So much for that article of the Constitution, the second, which creates and regulates the executive power. If we turn to the other portions of the original instrument (I do not now speak of the amendments) the conclusion already drawn from the second article will be confirmed, if there be room for confirmation. Thus, in the first article, Congress is authorized "to declare war, and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of the land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" "to provide for organizing, arming, and disciplining the militia, and governing such part of them as may be in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline pre-

scribed by Congress;" "to exercise exclusive legislation in all cases whatsoever over . . . . all places purchased . . . . for the erection of forts, magazines, arsenals, dock-yards;" "to make all laws which shall be necessary and proper for carrying into execution the . . . . powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

These various provisions of the first article would show, if there were any doubt upon the construction of the second, that the powers of the President do not include the power to raise or support an army, or to provide or maintain a navy, or to call forth the militia, to repel an invasion, or to suppress an insurrection, or execute the laws, or even to govern such portions of the militia as are called into the service of the United States, or to make law for any of the forts, magazines, arsenals, or dock-yards. If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of Indiana to repel an invasion of that State, or, when called, govern them, it is absurd to say that he could nevertheless, under the same circumstances, govern the whole State and every person in it by martial rule.

The jealousy of the executive power prevailed with our forefathers. They carried it so far that, in providing for the protection of a State against domestic violence, they required, as a condition, that the legislature of the State should ask for it if possible to be convened.*

I submit, therefore, that upon the text of the original Constitution, as it stood when it was ratified, there is no color for the assumption that the President, without act of Congress, could create military commissions for the trial of persons not military, for any cause or under any circumstances whatever.

But, as we well know, the Constitution, in the process of ratification, had to undergo a severe ordeal. To quiet apprehensions, as well as to guard against possible dangers, ten amendments were proposed by the first Congress sitting at

* Const., Art. 4, § 4.

New York, in 1789, and were duly ratified by the States The third and fifth are as follows:

"ART. III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

"ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

If there could have been any doubt whatever, whether military commissions or courts-martial for the trial of persons not "in the land or naval forces, or the militia" in actual service, could ever be established by the President, or even by Congress, these amendments would have removed the doubt. They were made for a state of war as well as a state of peace; they were aimed at the military authority, as well as the civil; and they were as explicit as our mother tongue could make them.

The phrase "in time of war or public danger" qualifies the member of the sentence relating to the militia; as otherwise, there could be no court-martial in the army or navy during peace.

This is the argument upon the text of the Constitution.

I will now show that military tribunals for civilians, or non-military persons, whether in war or peace, are inconsistent with the liberty of the citizen, and can have no place in constitutional government. This is a legitimate argument even upon a question of interpretation; for if there be, as I think there is not, room left for interpretation of what seem to be the plain provisions of the Constitution, then the principles of liberty, as they were understood by the fathers of the Republic; the maxims of free government, as they were

accepted by the men who framed and those who adopted the Constitution; and those occurrences in the history of older states, which they had profoundly studied, may be called in to show us what they must have meant by the words they used.

The source and origin of the power to establish military commissions, if it exist at all, is in the assumed power to declare what is called martial law. I say what is called martial law, for strictly there is no such thing as martial law; it is martial rule; that is to say, the will of the commanding officer, and nothing more, nothing less.

On this subject, as on many others, the incorrect use of a word has led to great confusion of ideas and to great abuses. People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial. A moment's reflection will show that this is an error. Law is a rule of property and of conduct, prescribed by the sovereign power of the state. The Civil Code of Louisiana defines it as "a solemn expression of legislative will." Blackstone calls it "a rule of civil conduct prescribed by the supreme power in the state;" . . . "not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Demosthenes thus explains it: "The design and object of laws is to ascertain what is just, honorable, and expedient; and when that is discovered, it is proclaimed as a general ordinance, equal and impartial to all."

There is a system of regulations known as the Rules and Articles of War, prescribed by Congress for the government of the army and navy, under that clause of the Constitution which empowers Congress "to make rules for the government and regulation of the land and naval forces." This is generally known as military law.*

* See Mills *v.* Martin, 19 Johnson, 70; Martin *v.* Mott, 12 Wheaton, 19 1 Kent's Com 370, note.

There are also certain usages, sanctioned by time, for the conduct towards each other of nations engaged in war, known as the usages of war, or the *jus belli*, accepted as part of the law of nations, and extended from national to all belligerents. These respect, however, only the conduct of belligerents towards each other, and have no application to the present case.

What is ordinarily called martial law is no law at all. Wellington, in one of his despatches from Portugal, in 1810, in his speech on the Ceylon affair, so describes it.

Let us call the thing by its right name; it is not martial law, but martial rule. And when we speak of it, let us speak of it as abolishing all law, and substituting the will of the military commander, and we shall give a true idea of the thing, and be able to reason about it with a clear sense of what we are doing.

Another expression, much used in relation to the same subject, has led also to misapprehension; that is, the declaration, or proclamation, of martial rule; as if a formal promulgation made any difference. It makes no difference whatever.

It may be asked, may a general never in any case use force but to compel submission in the opposite army and obedience in his own? I answer, yes; there are cases in which he may. There is a maxim of our law which gives the reason and the extent of the power: "*Necessitas quod cogit defendit.*" This is a maxim not peculiar in its application to military men; it applies to all men under certain circumstances.

Private persons may lawfully tear down a house, if necessary, to prevent the spread of a fire. Indeed, the maxim is not confined in its application to the calamities of war and conflagration. A mutiny, breaking out in a garrison, may make necessary for its suppression, and therefore justify, acts which would otherwise be unjustifiable. In all these cases, however, the person acting under the pressure of necessity, real or supposed, acts at his peril. The correctness of his conclusion must be judged by courts and juries,

whenever the acts and the alleged necessity are drawn in question.

The creation of a commission or board to decide or advise upon the subject gives no increased sanction to the act. As necessity compels, so that necessity alone can justify it. The decision or advice of any number of persons, whether designated as a military commission, or board of officers, or council of war, or as a committee, proves nothing but greater deliberation; it does not make legal what would otherwise be illegal.

Let us proceed now to the historical part of the argument.

First. As to our own country. The nation began its life in 1776, with a protest against military usurpation. It was one of the grievances set forth in the Declaration of Independence, that the king of Great Britain had "affected to render the military independent of and superior to the civil power." The attempts of General Gage, in Boston, and of Lord Dunmore, in Virginia, to enforce martial rule, excited the greatest indignation. Our fathers never forgot their principles; and though the war by which they maintained their independence was a revolutionary one, though their lives depended on their success in arms, they always asserted and enforced the subordination of the military to the civil arm.

The first constitutions of the States were framed with the most jealous care. By the constitution of New Hampshire, it was declared that "in all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power;" by the constitution of Massachusetts of 1780, that "no person can in any case be subjected to law martial, or to any penalties or pains by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by the authority of the legislature;" by the constitution of Pennsylvania of 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by the constitution of Delaware of 1776, "that in all cases, and at all times, the

military ought to be under strict subordination to, and governed by the civil power;" by that of Maryland of 1776, "that in all cases, and at all times, the military ought to be under strict subordination to, and control of the civil power;" by that of North Carolina, 1776, "that the military should be kept under strict subordination to, and governed by the civil power;" by that of South Carolina, 1778, "that the military be subordinate to the civil power of the State;" and by that of Georgia, 1777, that "the principles of the *habeas corpus* act shall be part of this constitution; and freedom of the press, and trial by jury, to remain inviolate forever."

Second. As to England, the constitutional history of that country is the history of a struggle on the part of the crown to obtain or to exercise a similar power to the one here attempted to be set up. The power was claimed by the king as much in virtue of his royal prerogative and of his feudal relations to his people as lord paramount, as of his title as commander of the forces. But it is enough to say that, from the day when the answer of the sovereign was given in assent to the petition of right, courts-martial for the trial of civilians, upon the authority of the crown alone, have always been held illegal.

Third. As to France—as France was when she had a constitutional government. I have shown what the king of England cannot do. Let me show what the constitutional king of France could not do.

On the continent of Europe, the legal formula for putting a place under martial rule is to declare it in a state of siege; as if there were in the minds of lawyers everywhere no justification for such a measure but the exigencies of impending battle. The charter established for the government of France, on the final expulsion of the first Napoleon, contained these provisions:

"ART. The king is the supreme chief of the state; he commands the forces by sea and land; declares war; makes treaties of peace, alliance, and commerce; appoints to every office and agency of public administration; and makes rules and ordinances

necessary for the execution of the laws, without the power ever of suspending them, or dispensing with their execution."

"ART. The king alone sanctions and promulgates the laws."

"ART. No person can be withdrawn from his natural judges."

"ART. Therefore there cannot be erected commissions or extraordinary tribunals."

When Charles the Tenth was driven from the kingdom the last article was amended, by adding the words, "under what name or denomination soever;" Dupin giving the reason thus:

"In order to prevent every possible abuse, we have added to the former text of the charter 'under what name or denomination soever,' for specious names have never been wanting for bad things, and without this precaution the title of 'ordinary tribunal' might be conferred on the most irregular and extraordinary of courts."

Now, it so happened, that two years later the strength of these constitutional provisions was to be tested. A formidable insurrection broke out in France. The king issued an order, dated June 6, 1832, placing Paris in a state of siege, founded "on the necessity of suppressing seditious assemblages which had appeared in arms in the capital, during the days of June 5th and 6th; on attacks upon public and private property; on assassinations of national guards, troops of the line, municipal guards and officers in the public service; and on the necessity of prompt and energetic measures to protect public safety against the renewal of similar attacks." On the 18th of June, one Geoffroy, designer, of Paris, was, by a decision of the second military commission of Paris, declared "guilty of an attack, with intent to subvert the government and to excite civil war," and condemned to death.

He appealed to the Court of Cassation. Odilon Barrot, a leader of the French bar, undertook his case, and after a discussion memorable forever for the spirit and learning of the advocates, and the dignity and independence of the judges, the court gave judgment, thus:

"Whereas Geoffroy, brought before the second military commission of the first military division, is neither in the army nor impressed with a military character, yet nevertheless said tribunal has implicitly declared itself to have jurisdiction and passed upon the merits, wherein it has committed an excess of power, violated the limits of its jurisdiction, and the provisions of articles 53 and 54 of the charter and those of the laws above cited: On these grounds the court reverses and annuls the proceedings instituted against the appellant before the said commission, whatsoever has followed therefrom, and especially the judgment of condemnation of the 18th of June, instant; and in order that further proceedings be had according to law, remands him before one of the judges of instruction of the court of first instance of Paris," &c.

Thereupon the prisoner was discharged from military custody.

This closes my argument against the competency of the military commission.

It remains to consider what remedy, if any, there was against this unlawful judgment and its threatened execution.

The great remedy provided by our legal and political system for unlawful restraint, whether upon pretended judgments, decrees, sentences, warrants, orders, or otherwise, is the writ of *habeas corpus*.

The authority to suspend the privilege of the *habeas corpus* is derived, it is said, from two sources: first, from the martial power; and, second, from the second subdivision of the ninth section of the first article of the Federal Constitution.

As to the martial power, I have already discussed it so fully that I need not discuss it again.

How, then, stands the question upon the text of the Constitution? This is the language: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The clause in question certainly either grants the power, or implies that it is already granted; and in either case it

belongs to the legislative, executive, and judicial departments concurrently, or to some excluding the rest.

There have been four theories: one that it belongs to all the departments; a second, that it belongs to the legislature; a third, that it belongs to the executive; and the fourth, that it belongs to the judiciary.

Is the clause a *grant* or a *limitation* of power? Looking only at the form of expression, it should be regarded as a limitation.

As a grant of power, it would be superfluous, for it is clearly an incident of others which are granted.

Then, regarding the clause according to its place in the Constitution, it should be deemed a *limitation;* for it is placed with six other subdivisions in the same section, every one of which is a limitation.

If the sentence respecting the *habeas corpus* be, as I contend, a limitation, and not a grant of power, we must look into other parts of the Constitution to find the grant; and if we find none making it to the President, it follows that the power is in the legislative or the judicial department. That it lies with the judiciary will hardly be contended. That department has no other function than to judge. It cannot refuse or delay justice.

But if the clause in question were deemed a *grant* of power, the question would then be, to whom is the grant made? The following considerations would show that it was made to Congress:

First. The debates in the convention which framed the Constitution seem, at least, to suppose that the power was given to Congress, and to Congress alone.

Second. The debates in the various State conventions which ratified the Constitution do most certainly proceed upon that supposition.

Third. The place in which the provision is left indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the second article, which treats of the executive department. It is not in the third, which treats of the judicial department. It is in the first

article, which treats of the legislative department. There is not another subdivision in all the seven subdivisions of the ninth section which does not relate to Congress in part, at least, and most of them relate to Congress alone.

Fourth. The constitutional law of the mother country had been long settled, that the power of suspending the privilege of the writ, or, as it was sometimes called, suspending the writ itself, belonged only to Parliament. With this principle firmly seated in the minds of lawyers, it seems incredible that so vast a change as conferring the grant upon the executive should have been so loosely and carelessly expressed.

Fifth. The prevailing sentiment of the time when the Constitution was framed, was a dislike and dread of executive authority. It is hardly to be believed, that so vast and dangerous a power would have been conferred upon the President, without providing some safeguards against its abuse.

Sixth. Every judicial opinion, and every commentary on the Constitution, up to the period of the Rebellion, treated the power as belonging to Congress, and to that department only.

And so we submit to the court, that the answers to the three questions, certified by the court below, should be, to the first, that, on the facts stated in the petition and exhibits, a writ of *habeas corpus* ought to be issued according to the prayer of the petition; to the second, that, on the same facts, the petitioner ought to be discharged; and to the third, that the military commission had not jurisdiction to try and sentence the petitioner, in manner and form as in the petition and exhibits is stated.

Mr. Garfield, on the same side.

Had the military commission jurisdiction legally to try and sentence the petitioner? This is the main question.

The Constitution establishes the Supreme Court, and empowers Congress—

"To constitute tribunals inferior to the Supreme Court."

"To make rules for the government of the land and naval

forces, and to provide for governing such part of the militia as may be employed in the service of the United States."

For all cases not arising in the land or naval forces, Congress has provided in the Judiciary Act of September 24th, 1789, and the acts amendatory thereof. For all cases arising in the naval forces, it has fully provided in the act of March 2d, 1799, "for the government of the navy of the United States," and similar subsequent acts.

We are apt to regard the military department of the government as an organized despotism, in which all personal rights are merged in the will of the commander-in-chief. But that department has definitely marked boundaries, and all its members are not only controlled, but also sacredly protected by definitely prescribed law. The first law of the Revolutionary Congress, passed September 20th, 1776, touching the organization of the army, provided that no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against him; that he should be tried, at as early a day as possible, by a regular military court, whose proceedings were regulated by law, and that no sentence should be carried into execution till the full record of the trial had been submitted to Congress or to the commander-in-chief, and his or their direction be signified thereon. From year to year Congress has added new safeguards to protect the rights of its soldiers, and the rules and articles of war are as really a part of the laws of the land as the Judiciary Act or the act establishing the treasury department. The main boundary line between the civil and military jurisdictions is the muster into service. In *Mills* v. *Martin*,* a militiaman, called out by the Governor of the State of New York, and ordered by him to enter the service of the United States, on a requisition of the President for troops, refused to obey the summons, and was tried by a Federal court-martial for disobedience of orders. The Supreme Court of the State of New York decided, that until he had gone to the place of

* 19 Johnson, 7.

general rendezvous, and had been regularly enrolled, and mustered into the national militia, he was not amenable to the action of a court-martial composed of officers of the United States.*

By the sixtieth article of war, the military jurisdiction is so extended as to cover those persons not mustered into the service, but necessarily connected with the army. It provides that:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders according to the rules and articles of war."

That the question of jurisdiction might not be doubtful, it was thought necessary to provide by law of Congress that spies should be subject to trial by court-martial. As the law stood for eighty-five years, spies were described as "persons not citizens of, or owing allegiance to, the United States, who shall be found lurking," &c. Not until after the Great Rebellion began, was this law so amended as to allow the punishment by court-martial of *citizens of the United States* who should be found lurking about the lines of our army to betray it to the enemy.

It is evident, therefore, that by no loose and general construction of the law can citizens be held amenable to military tribunals, whose jurisdiction extends only to persons mustered into the military service, and such other classes of persons as are, by express provisions of law, made subject to the rules and articles of war. But even within their proper jurisdiction, military courts are, in many important particulars, subordinate to the civil courts. This is acknowledged by the leading authorities on the subject,† and also by precedents, to some of which I refer:

1. A Lieutenant Frye, serving in the West Indies, in 1743, on a British man-of-war, was ordered by his superior

* And see Houston *v.* Moore, 5 Wheaton, 1.

† O'Brien's Military Law, pp. 222–225.

officer to assist in arresting another officer. The lieutenant demanded, what he had, according to the customs of the naval service, a right to demand, a written order before he would obey the command. For this he was put under arrest, tried by a naval court-martial, and sentenced to fifteen years' imprisonment. In 1746 he brought an action before a civil court against the president of the court-martial, and damages of £1000 were awarded him for his illegal detention and sentence; and the judge informed him that he might also bring his action against any member of the court-martial. Rear Admiral Mayne and Captain Rentone, who were members of the court that tried him, were at the time, when damages were awarded to Lieutenant Frye, sitting on a naval court-martial. The lieutenant proceeded against them, and they were arrested by a writ from the Common Pleas. The order of arrest was served upon them one afternoon, just as the court-martial adjourned. Its members, fifteen in number, immediately reassembled and passed resolutions declaring it a great insult to the dignity of the naval service that any person, however high in civil authority, should order the arrest of a naval officer for any of his official acts. Lord Chief Justice Willes immediately ordered the arrest of all the members of the court who signed the resolutions, and they were arrested. They appealed to the king, who was very indignant at the arrest. The judge, however, persevered in his determination to maintain the supremacy of civil law, and after two months' examination and investigation of the cause, all the members of the court-martial signed an humble and submissive letter of apology, begging leave to withdraw their resolutions, in order to put an end to further proceedings. When the Lord Chief Justice had heard the letter read in open court, he directed that it be recorded in the Remembrance Office, "to the end," as he said, "that the present and future ages may know that whosoever set themselves up in opposition to the law, or think themselves above the law, will in the end find themselves mistaken."*

* McArthur on Courts-Martial, vol. i, pp. 268–271. See also London Gazette for 1745–6, Library of Congress.

2. In *Wilson* v. *McKenzie** it was proved that a mutiny of very threatening aspect had broken out; and that the lives of the captain and his officers were threatened by the mutineers. Among the persons arrested was the plaintiff, Wilson, an enlisted sailor, who being supposed to be in the conspiracy, was knocked down by the captain, ironed, and held in confinement for a number of days. When the cruise was ended, Wilson brought suit against the captain for illegal arrest and imprisonment. The cause was tried before the Supreme Court of New York; Chief Justice Nelson delivered the judgment of the court, giving judgment in favor of Wilson.

A clear and complete statement of the relation between civil and military courts may be found in *Dynes* v. *Hoover*,† in this court:

"If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction and give him redress."

"The courts of common law will examine whether courts-martial have exceeded the jurisdiction given them, though it is said, 'not, however, after the sentence has been ratified and carried into execution.'"

It is clear, then, that the Supreme Court of the United States may inquire into the question of jurisdiction of a military court; may take cognizance of extraordinary punishment inflicted by such a court not warranted by law; and may issue writs of prohibition or give such other redress as the case may require. It is also clear that the Constitution and laws of the United States have carefully provided for the protection of individual liberty and the right of accused persons to a speedy trial before a tribunal established and regulated by law.

* 7 Hill, 95.

† 20 Howard, 82.

To maintain the legality of the sentence here, opposite counsel are compelled not only to ignore the Constitution, but to declare it suspended—its voice lost in war—to hold that from the 5th of October, 1864, to the 9th of May, 1865, martial law alone existed in Indiana; that it silenced not only the civil courts, but all the laws of the land, and even the Constitution itself; and that during this silence the executor of martial law could lay his hand upon every citizen; could not only suspend the writ of *habeas corpus*, but could create a court which should have the exclusive jurisdiction over the citizen to try him, sentence him, and put him to death.

Sir Matthew Hale, in his History of the Common Law,* says:

"Touching the business of martial law, these things are to be observed, viz.:

"First. That in truth and reality it is not a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance: *quod enim necessitas cogit defendit.*

"Secondly. This indulged law was only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, for others who had not listed under the army had no color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

"Thirdly. That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is declared in the Petition of Right (3 Car. I), whereby such commissions and martial law were repealed and declared to be contrary to law."

* Runnington's edition, London, 1820, pp. 42-3; and see 1 Blackstone's Com. 413-14.

In order to trace the history and exhibit the character of martial law, reference may be made to several leading precedents in English and American history.

1. *The Earl of Lancaster.* In the year 1322, the Earl of Lancaster and the Earl of Hereford rebelled against the authority of Edward II. They collected an army so large that Edward was compelled to raise forty thousand men to withstand them. The rebellious earls posted their forces on the Trent, and the armies of the king confronted them. They fought at Boroughbridge; the insurgent forces were overthrown; Hereford was slain and Lancaster taken in arms at the head of his army, and amid the noise of battle was tried by a court-martial, sentenced to death, and executed. When Edward III came into power, eight years later, on a formal petition presented to Parliament by Lancaster's son, setting forth the facts, the case was examined and a law was enacted reversing the attainder, and declaring: "1. That in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer. 2. That regularly when the king's courts are open it is a time of peace in judgment of law; and 3. That no man ought to be sentenced to death, by the record of the king, without his legal trial *per pares.*"*

So carefully was the line drawn between civil and martial law five hundred years ago.

2. *Sir Thomas Darnell.* He was arrested in 1625 by order of the king, for refusing to pay a tax which he regarded as illegal. He was arrested and imprisoned. A writ of *habeas corpus* was prayed for, but answer was returned by the court that he had been arrested by special order of the king, and that was held to be a sufficient answer to the petition. Then the great cause came up to be tried in Parliament, whether the order of the king was sufficient to override the writ of *habeas corpus*, and after a long and stormy debate, in which the ablest minds in England were engaged, the Petition of Right, of 1628, received the sanction of the king. In that

* Hale's Pleas of the Crown, pp. 499, 500; Hume, vol. 1, p. 159.

statute it was decreed that the king should never again suspend the writ of *habeas corpus;* that he should never again try a subject by military commission; and since that day no king of England has presumed to usurp that high prerogative, which belongs to Parliament alone.

3. *The Bill of Rights of* 1688. The house of Stuart had been expelled and William had succeeded to the British throne. Great disturbances had arisen in the realm in consequence of the change of dynasty. The king's person was unsafe in London. He informed the Lords and Commons of the great dangers that threatened the kingdom, and reminded them that he had no right to declare martial law, to suspend the writ of *habeas corpus,* or to seize and imprison his subjects on suspicion of treason or intended outbreak against the peace of the realm. He laid the case before them and asked their advice and assistance. In answer, Parliament passed the celebrated *habeas corpus* act. Since that day, no king of England has dared to suspend the writ. It is only done by Parliament.

4. *Governor Wall.* In the year 1782, Joseph Wall, governor of the British colony at Goree, in Africa, had under his command about five hundred British soldiers. Suspecting a mutiny about to break out in the garrison, he assembled them on the parade-ground, held a hasty consultation with his officers, and immediately ordered Benjamin Armstrong, a private, and supposed ringleader, to be seized, stripped, tied to the wheel of an artillery-carriage, and with a rope one inch in diameter, to receive eight hundred lashes. The order was carried into execution, and Armstrong died of his injuries. Twenty years afterward Governor Wall was brought before the most august civil tribunal of England to answer for the murder of Armstrong. Sir Archibald McDonald, Lord Chief Baron of the Court of Exchequer, Sir Soulden Lawrence, of the King's Bench, Sir Giles Rooke, of the Common Pleas, constituted the court. Wall's counsel claimed that he had the power of life and death in his hands in time of mutiny; that the necessity of the case authorized him to suspend the usual forms of law; that as gov-

ernor and military commander-in-chief of the forces at Goree, he was the sole judge of the necessities of the case. After a patient hearing before that high court, he was found guilty of murder, was sentenced and executed.*

I now ask attention to precedents in our own colonial history.

5. On the 12th of June, 1775, General Gage, the commander of the British forces, declared martial law in Boston. The battles of Concord and Lexington had been fought two months before. The colonial army was besieging the city and its British garrison. It was but five days before the battle of Bunker Hill. Parliament had, in the previous February, declared the colonies in a state of rebellion. Yet, by the common consent of English jurists, General Gage violated the laws of England, and laid himself liable to its penalty, when he declared martial law. This position is sustained in the opinion of Woodbury, J., in *Luther* v. *Borden*.†

6. On the 7th of November, 1775, Lord Dunmore declared martial law throughout the commonwealth of Virginia. This was long after the battle of Bunker Hill, and when war was flaming throughout the colonies; yet he was denounced by the Virginia Assembly for having assumed a power which the king himself dared not exercise, as it "annuls the law of the land, and introduces the most execrable of all systems, martial law." Woodbury, J.,‡ declares the act of Lord Dunmore unwarranted by British law.

7. The practice of our Revolutionary fathers on this subject is instructive. Their conduct throughout the great struggle for independence was equally marked by respect for civil law, and jealousy of martial law.§ Though Washington was clothed with almost dictatorial powers, he did not presume to override the civil law, or disregard the orders of the courts, except by express authority of Congress or the States. In his file of general orders, covering a period of

* 28 State Trials, p. 51; see also Hough's Military Law, pp. 537–540.

† 7 Howard, p. 65. See also Annual Register for 1775, p 133.

‡ In his dissenting opinion.

§ See argument of Mr. Field. *Supra*, p. 37–8.—REP.

five years, there are but four instances in which civilians appear to have been tried by a military court, and all these trials were expressly authorized by resolutions of Congress. In the autumn of 1777, the gloomiest period of the war, a powerful hostile army landed at Chesapeake Bay, for the purpose of invading Maryland and Pennsylvania. It was feared that the disloyal inhabitants along his line of march would give such aid and information to the British commander as to imperil the safety of our cause. Congress resolved "That the executive authorities of Pennsylvania and Maryland be requested to cause all persons within their respective States, notoriously disaffected, to be forthwith apprehended, disarmed, and secured till such time as the respective States think they can be released without injury to the common cause." The governor authorized the arrests, and many disloyal citizens were taken into custody by Washington's officers, who refused to answer the writ of *habeas corpus* which a civil court issued for the release of the prisoners. Very soon afterwards the Pennsylvania legislature passed a law indemnifying the governor and the military authorities, and allowing a similar course to be pursued thereafter on recommendation of Congress or the commanding officer of the army. But this law gave authority only to arrest and hold—not to try; and the act was to remain in force only till the end of the next session of the General Assembly. So careful were our fathers to recognize the supremacy of civil law, and to resist all pretensions of the authority of martial law!

8. *Shay's Rebellion in* 1787. That rebellion, which was before the Constitution was adopted, was mentioned by Hamilton in the Federalist as a proof that we needed a strong central government to preserve our liberties. During all that disturbance there was no declaration of martial law, and the *habeas corpus* was only suspended for a limited time and with very careful restrictions. Governor Bowdoin's order to General Lincoln, on the 19th of January, 1787, was in these words: "Consider yourself in all your military offensive operations constantly as under the direction of the civil

officer, save where any armed force shall appear to oppose you marching to execute these orders."

9. I refer too to a case under the Constitution, the Rebellion of 1793, in Western Pennsylvania. President Washington did not march with his troops until the judge of the United States District Court had certified that the marshal was unable to execute his warrants. Though the parties were tried for treason, all the arrests were made by the authority of the civil officers. The orders of the Secretary of War stated that "the object of the expedition was to assist the marshal of the district to make prisoners." Every movement was made under the direction of the civil authorities. So anxious was Washington on this subject that he issued orders declaring that "the army should not consider themselves as judges or executioners of the laws, but only as employed to support the proper authorities in the execution of the laws."

10. I call the attention of the court also to the case of General Jackson, in 1815, at New Orleans. In 1815, at New Orleans, General Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State legislature insisted on it as the only way to save the citizens and property of the place from the unspeakable outrages committed at Badajos and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in *Johnson* v. *Duncan*,* decided that everything done during the

* See 3 Martin's Louisiana Rep., O. S., 520.

siege in pursuance of martial rule, but in conflict with the law of the land, was void and of none effect, without reference to the circumstances which made it necessary In 1842, a bill was introduced into Congress to reimburse General Jackson for the fine. The debate was able and thorough. Mr. Buchanan, then a member of Congress, spoke in its favor, and no one will doubt his willingness to put the conduct of Jackson on the most favorable ground possible.* Yet he did not attempt to justify, but only sought to palliate and excuse the conduct of Jackson. All the leading members took the same ground.

11. I may fortify my argument by the authority of two great British jurists, and call attention to the trial of the Rev. John Smith, missionary at Demerara, in British Guiana. In the year 1823, a rebellion broke out in Demerara, extending over some fifty plantations. The governor of the district immediately declared martial law. A number of the insurgents were killed, and the rebellion was crushed. It was alleged that the Rev. John Smith, a missionary, sent out by the London Missionary Society, had been an aider and abettor of the rebellion. A court-martial was appointed, and in order to give it the semblance of civil law, the governor-general appointed the chief justice of the district as a staff officer, and then detailed him as president of the court to try the accused. All the other members of the court were military men, and he was made a military officer for the special occasion. Missionary Smith was tried, found guilty, and sentenced to be hung. The proceedings came to the notice of Parliament, and were made the subject of inquiry and debate. Smith died in prison before the day of execution; but the trial gave rise to one of the ablest debates of the century, in which the principles involved in the cause now before this court were fully discussed. Lord Brougham and Sir James Mackintosh were among the speakers. In the course of his speech Lord Brougham said:

"No such thing as martial law is recognized in Great Britain,

* Benton's Abridgment of Debates, vol. 14, page 628.

and courts founded on proclamations of martial law are wholly unknown. Suppose I am ready to admit that, on the pressure of a great necessity, such as invasion or rebellion, when there is no time for the slow and cumbrous proceedings of the civil law, a proclamation may justifiably be issued for excluding the ordinary tribunals, and directing that offences should be tried by a military court, such a proceeding might be justified by necessity, but it could rest on that alone. Created by necessity, necessity must limit its continuance. It would be the worst of all conceivable grievances, it would be a calamity unspeakable, if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded. I know that the proclamation of martial law renders every man liable to be treated as a soldier. But the instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights, with the relations of civil life, to be restored."

Sir James Mackintosh says:*

"The only principle on which the law of England tolerates what is called 'martial law,' is necessity. Its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community."

The next paragraph lays down the chief condition that can justify martial law, and also marks the boundary between martial and civil law:

"While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is usurpation. As soon as

* Mackintosh's Miscellaneous Works, p. 734, London edition, 1851

the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject—if, indeed, the mere statement be not the evidence of its own truth—I appeal to the highest and most venerable authority known to our law."

He proceeds to quote Sir Matthew Hale on Martial Law, and cites the case of the Earl of Lancaster, to which I have already referred, and then declares:

"No other doctrine has ever been maintained in this country since the solemn parliamentary condemnation of the usurpations of Charles I, which he was himself compelled to sanction in the Petition of Right. In none of the revolutions or rebellions which have since occurred has martial law been exercised, however much, in some of them, the necessity might seem to exist. Even in those most deplorable of all commotions which tore Ireland in pieces in the last years of the eighteenth century, in the midst of ferocious revolt and cruel punishment, at the very moment of legalizing these martial jurisdictions in 1799, the very Irish statute, which was passed for that purpose, did homage to the ancient and fundamental principles of the law in the very act of departing from them. The Irish statute (39 George III, chap. 3), after reciting 'that martial law had been successfully exercised to the restoration of peace, so far as to permit the course of the common law partially to take place, but that the rebellion continued to rage in considerable parts of the kingdom, whereby it has become necessary for Parliament to interpose,' goes on to enable the Lord Lieutenant 'to punish rebels by courts-martial.' This statute is the most positive declaration, that where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails in those others, without an extraordinary interposition of the supreme legislative authority itself."

After presenting arguments to show that a declaration of martial law was not necessary, the learned jurist continues:

"For six weeks, then, before the court-martial was assembled, and for twelve weeks before that court pronounced sentence of

death on Mr. Smith, all hostility had ceased, no necessity for their existence can be pretended, and every act which they did was an open and deliberate defiance of the law of England. Where, then, are we to look for any color of law in these proceedings? Do they derive it from the Dutch law? I have diligently examined the Roman law, which is the foundation of that system, and the writings of those most eminent jurists who have contributed so much to the reputation of Holland. I can find in them no trace of any such principle as martial law. Military law, indeed, is clearly defined; and provision is made for the punishment, by military judges, of the purely military offences of soldiers. But to any power of extending military jurisdiction over those who are not soldiers, there is not an allusion."

Many more such precedents as I have already cited might be added to the list; but it is unnecessary. They all teach the same lesson. They enable us to trace, from its far-off source, the progress and development of Anglo-Saxon liberty; its conflicts with irresponsible power; its victories, dearly bought, but always won — victories which have crowned with immortal honors the institutions of England, and left their indelible impress upon the Anglo-Saxon mind. These principles our fathers brought with them to the New World, and guarded with vigilance and devotion. During the late Rebellion, the Republic did not forget them. So completely have they been impressed on the minds of American lawyers, so thoroughly ingrained into the fibre of American character, that notwithstanding the citizens of eleven States went off into rebellion, broke their oaths of allegiance to the Constitution, and levied war against their country, yet with all their crimes upon them, there was still in the minds of those men, during all the struggle, so deep an impression on this great subject, that, even during their rebellion, the courts of the Southern States adjudicated causes, like the one now before you, in favor of the civil law, and against courts-martial established under military authority for the trial of citizens. In Texas, Mississippi, Virginia, and other insurgent States, by the order of the rebel President, the

writ of *habeas corpus* was supended, martial law was declared, and provost marshals were appointed to administer military authority. But when civilians, arrested by military authority, petitioned for release by writ of *habeas corpus*, in every case, save one, the writ was granted, and it was decided that there could be no suspension of the writ or declaration of martial law by the executive, or by any other than the supreme legislative authority.

The military commission, under our government, is of recent origin. It was instituted, as has been frequently said, by General Scott, in Mexico, to enable him, in the absence of any civil authority, to punish Mexican and American citizens for offences not provided for in the rules and articles of war. The purpose and character of a military commission may be seen from his celebrated order, No. 20, published at Tampico. It was no tribunal with authority to punish, but merely a committee appointed to examine an offender, and advise the commanding general what punishment to inflict. It is a rude substitute for a court of justice, in the absence of civil law. Even our own military authorities, who have given so much prominence to these commissions, do not claim for them the character of tribunals established by law. In his "Digest of Opinions" for 1866,* the Judge Advocate General says:

"Military commissions have grown out of the necessities of the service, but their powers have not been defined nor their mode of proceeding regulated by any statute law."

Again:

"In a military department the military commission is a substitute for the ordinary State or United States Court, when the latter is closed by the exigencies of war or is without the jurisdiction of the offence committed."

The plea set up by the Attorney-General for this military tribunal is that of the necessity of this case. But there was

* Pages 131, 133.

in fact no necessity. From the beginning of the Rebellion to its close, Congress, by its legislation, kept pace with the necessities of the nation. In sixteen carefully considered laws, the national legislature undertook to provide for every contingency, and arm the executive at every point with the solemn sanction of law. Observe how the case of the petitioner was covered by the provisions of law.

The first *charge* against him was "conspiracy against the government of the United States." In the act approved July 31st, 1861, that crime was defined, and placed within the jurisdiction of the District and Circuit Courts of the United States.

Charge 2. "Affording aid and comfort to the rebels against the authority of the United States." In the act approved July 17th, 1862, this crime is set forth in the very words of the charge, and it is provided that "on conviction before any court of the United States, having jurisdiction thereof, the offender shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not less than six months, nor exceeding five years."

Charge 3. "Inciting insurrection." In Brightly's Digest,* there is compiled from ten separate acts, a chapter of sixty-four sections on insurrection, setting forth in the fullest manner possible, every mode by which citizens may aid in insurrection, and providing for their trial and punishment by the regularly ordained courts of the United States.

Charge 4. "Disloyal practices." The meaning of this charge can only be found in the specifications under it, which consists in discouraging enlistments and making preparations to resist a draft designed to increase the army of the United States. These offences are fully defined in the thirty-third section of the act of March 3d, 1863, "for enrolling and calling out the national forces," and in the twelfth section of the act of February 24th, 1864, amendatory thereof. The provost marshal is authorized to arrest such offenders, but he must deliver them over for trial to the civil authori-

* Vol. 2, pp. 191-202.

ties. Their trial and punishment are expressly placed in the jurisdiction of the District and Circuit Courts of the United States.

Charge 5. "Violation of the laws of war;" which, according to the specifications, consisted of an attempt, through a secret organization, to give aid and comfort to rebels. This crime is amply provided for in the laws referred to in relation to the second charge.

But Congress did far more than to provide for a case like this. Throughout the eleven rebellious States, it clothed the military department with supreme power and authority. State constitutions and laws, the decrees and edicts of courts, were all superseded by the laws of war. Even in States not in rebellion, but where treason had a foothold, and hostile collisions were likely to occur, Congress authorized the suspension of the writ of *habeas corpus*, and directed the army to keep the peace. But Congress went further still, and authorized the President, during the Rebellion, whenever, in his judgment, the public safety should require it, to suspend the privilege of the writ in any State or Territory of the United States, and order the arrest of any persons whom he might believe dangerous to the safety of the Republic, and hold them till the civil authorities could examine into the nature of their crimes. But this act of March 3d, 1863, gave no authority to try the person by any military tribunal, and it commanded judges of the Circuit and District Courts of the United States, whenever the grand jury had adjourned its sessions, and found no indictment against such persons, to order their immediate discharge from arrest. All these capacious powers were conferred upon the military department, but there is no law on the statute book, in which the tribunal that tried the petitioner can find the least recognition.

What have our Representatives in Congress thought on this subject?

Near the close of the Thirty-Eighth Congress, when the miscellaneous appropriation bill, which authorized the disbursement of several millions of dollars for the civil expenditures

tures of the government, was under discussion, the House of Representatives, having observed with alarm the growing tendency to break down the barriers of law, and desiring to protect the rights of citizens as well as to preserve the Union added to the appropriation bill the following section:

"*And be it further enacted*, That no person shall be tried by court-martial or military commission in any State or Territory where the courts of the United States are open, except persons actually mustered or commissioned or appointed in the military or naval service of the United States, or rebel enemies charged with being spies."

It was debated at length in the Senate, and almost every Senator acknowledged its justice, yet, as the nation was then in the very midst of the war, it was feared that the Executive might thereby be crippled, and the section was stricken out. The bill came back to the House; conferences were held upon it, and finally, in the last hour of the session, the House deliberately determined that, important as the bill was to the interests of the country, they preferred it should not become a law if that section were stricken out.

The bill failed; and the record of its failure is an emphatic declaration that the House of Representatives have never consented to the establishment of any tribunals except those authorized by the Constitution of the United States and the laws of Congress.

A point is suggested by the opposing counsel, that if the military tribunal had no jurisdiction, the petitioners may be held as prisoners captured in war, and handed over by the military to the civil authorities, to be tried for their crimes under the acts of Congress and before the courts of the United States. The answer to this is that the petitioners were never enlisted, commissioned, or mustered into the service of the Confederacy; nor had they been within the rebel lines, or within any theatre of active military operations; nor had they been in any way recognized by the rebel authorities as in their service. They could not have been exchanged as prisoners of war; nor, if all the charges against

them were true, could they be brought under the legal definition of spies. The suggestion that they should be handed over to the civil authorities for trial is precisely what they petitioned for, and what, according to the laws of Congress, should have been done.

Mr. Black, on the same side:

Had the commissioners jurisdiction? Were they invested with legal authority to try the petitioner and put him to death for the offence of which he was accused? This is the main question in the controversy, and the main one upon which the court divided. We answer, that they were not; and, therefore, that the whole proceeding from beginning to end was null and void.

On the other hand, it is necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction both of the subject-matter and of the party, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction nor open to inquiry in any court whatever. Of these two opposite views, the court must adopt one or the other. There is no middle ground on which to stand.

The men whose acts we complain of erected themselves, it will be remembered, into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both state and national, were in the full exercise of their functions.

It is unimportant whether the petitioner was intended to be charged with treason or conspiracy, or with some offence of which the law takes no notice. Either or any way, the men who undertook to try him had no jurisdiction of the *subject-matter*.

Nor had they jurisdiction of the *party*. The case, not

having been one of impeachment, or a case arising in the land or naval forces, is either nothing at all or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the government are answerable for the offences which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3d, 1863, which was passed with reference to persons in the exact situation of this man, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject-matter or of the party, you are bound to relieve the petitioner. It is as much the duty of a judge to protect the innocent as it is to punish the guilty.

We submit that a person not in the military or naval service cannot be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offence.

Our proposition ought to be received as true without any argument to support it; because, if that, or something precisely equivalent to it, be not a part of our law, then the country is not a free country. Nevertheless, we take upon ourselves the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the government, so that it is impossible to detach it without destroying the whole political structure under which we live.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore, in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and

well; and their authority is exclusive; they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress *has*, from time to time, ordained and established certain inferior courts; and, in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. At the time the General Government was created, the States and the people bestowed upon that government a certain portion of the judicial power which otherwise would have remained in their own hands, but they gave it on a solemn trust, and coupled the grant of it with this express condition, that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way, not only violates the law of the land, but he tramples upon the most important part of that Constitution which holds these States together.

We all know that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest, and sober men, learned in the laws of their country, and lovers of justice from the habitual

practice of that virtue; independent, because their salaries could not be reduced, and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of executive influence, it was not intended that they should be wholly irresponsible. For any wilful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquillity was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be safely trusted in criminal cases—especially in prosecutions for political offences, where the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit towards actual crime. This kind of malignity vents itself in prosecutions for political offences, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of spies and delators, who make merchandise of their oaths, and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the Revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Nothing has occurred, indeed, in the history of this country to justify the doubt of

judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench, is embodied in this simple fact, that if the executive officers of this government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the venality of such men as Saunders and Wright. It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury.

We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that, than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially: Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century, the most enlightened states of continental Europe have transplanted it into their countries; and no people ever adopted it once and were afterwards willing to part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the Revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places where trial by jury did not exist became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside and substitute military trials in its place, by Lord Dunmore, in Virginia, and General Gage, in Massachusetts, accompanied with the excuse which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the Continental Congress thundered it into the ear of the world, as an unendurable outrage, sufficient to justify universal insurrection against the authority of the government which had allowed it to be done.

If the men who fought out our Revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have proved themselves recreant to the principles of that liberty of which they professed to be the special champions. But they were guilty of no such thing. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed, in the Federalist, the universal sentiment of his time, when he said, that the arbitrary power of conviction and punishment for pretended offences, had been the great engine of despotism in all ages and all countries. The existence of such a power is incompatible with freedom.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take away the protec-

tion of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over *Magna Charta*, the *Petition of Right*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the executive, nor party rage in the legislature, could change them without destroying the government itself.

Look at the particulars and see how carefully everything connected with the administration of punitive justice is guarded.

1. No *ex post facto* law shall be passed. No man shall be answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

2. For an act which is criminal he cannot be arrested without a judicial warrant founded on proof of probable cause. He shall not be kidnapped and shut up on the mere report of some base spy who gathers the materials of a false accusation by crawling into his house and listening at the keyhole of his chamber door.

3. He shall not be compelled to testify against himself. He may be examined before he is committed, and tell his own story if he pleases; but the rack shall be put out of sight, and even his conscience shall not be tortured; nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sydney.

4. He shall be entitled to a speedy trial; not kept in prison

for an indefinite time without the opportunity of vindicating his innocence.

5. He shall be informed of the accusation, its nature, and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

6. Even to the indictment he need not answer unless a grand jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

7. Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the State and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

8. His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the court. When they are called into the box he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance, by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

9. The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defence.

10. After the evidence is heard and discussed, unless the jury shall, upon their oaths, *unanimously* agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by the law to his offence. It cannot be doubted for a moment that if a person convicted of an offence not capital were to be hung on the

order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, turn up the sleeves of his gown, and let out the prisoner's blood with his own hand.

12. After all is over, the law continues to spread its guardianship around him. Whether he is acquitted or condemned he shall never again be molested for that offence. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions. But in addition to these, certain special regulations were required for *treason*,—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of minions that skulk about under the pay of an executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction. And lastly, the punishment was so limited that the property of the party could not be confiscated and used to reward the agents of his prosecutors, or strip his family of their subsistence.

If these provisions exist in full force, unchangeable and irrepealable, then we are not hereditary bondsmen. Every citizen may safely pursue his lawful calling in the open day; and at night, if he is conscious of innocence, he may lie down in security, and sleep the sound sleep of a freeman.

They are in force, and they will remain in force. We have not surrendered them, and we never will. The great race to which we belong has not degenerated.

But how am I to prove the existence of these rights? I do not propose to do it by a long chain of legal argumentation, nor by the production of numerous books with the

leaves turned down and the pages marked. If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom, under any kind of prescription, I could prove a good long possession in ourselves and those under whom we claim it. I might begin with Tacitus, and show how the contest arose in the forests of Germany more than two thousand years ago; how the rough virtues and sound common sense of that people established the right of trial by jury, and thus started on a career which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion; and all that they suffered of tyranny and oppression, during the period of their subjugation, resulted from the want of trial by jury. If that had been conceded to them, the reaction would not have taken place which drove back the Danes to their frozen homes in the North. But those ruffian sea-kings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes and the wisest monarch that ever sat on a throne, made the first use of his power, after the Saxons restored it, to re-establish their ancient laws. He had promised them that he would, and he was true to them because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power—a kind of power that everybody covets—the power to punish without regard to law. He was obliged to hang forty-four judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the Parliament of that time. During the subsequent period of Saxon domination, no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole population; all orders

of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bocman and socman, master and thrall, copyholder and villein, would have risen in one mass and burnt the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors; but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended finally in the Revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, because the courts were open, and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the state, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford, as Lord Lieutenant of Ireland, tried the Viscount Stormont before a military commission, and executed him. When impeached, he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the king himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I

issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded it; for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody. Yet the Parliament demanded, in their petition of right, and the king was obliged to concede, that all his commissions were illegal. James II claimed the right to suspend the operation of the penal laws—a power which the courts denied—but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offence he saw fit to charge them with, if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury, and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which, a few months afterwards, made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations, on the other side of the Channel, to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Temple Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shout of two hundred thousand men for the triumph of justice and law.

The truth is, that no authority exists anywhere in the world for the doctrine of the Attorney-General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer is against him. All military authors who profess to know the duties of their profession admit themselves to be under,

not above the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to dishonor the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. Court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders.

But this case does not depend on authority. It is rather a question of fact than of law.

I prove my right to a trial by jury just as I would prove my title to an estate, if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed with the sacred name of George Washington, and with thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterwards ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in the country, from that time to this, has taken an oath that he would support and sustain it through good report and through evil. The Attorney-General himself became a party to the instrument when he laid his hand upon the holy gospels, and swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain? This among other things:

"The trial of all crimes except in cases of impeachment shall be by jury."

Again:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

This is not all; another article declares that,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the witnesses in his favor; and to have the assistance of counsel for his defence."

Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words, or what collocation of words in the English language would have that effect? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the judge-advocate, or the head of a department? Shall this inestimable privilege be extended only to men whom the administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offences as those for which Sydney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burnt alive, and John Bunyan was imprisoned fourteen years, and Baxter was whipped at the cart's tail, and Prynn had his ears cut off?

No; the words of the Constitution are all-embracing, "as broad and general as the casing air." The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege—and NO person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions. Here is no attempt to enumerate the particular cases in which men charged with criminal offences shall be entitled to a jury trial. It is simply declared that *all* shall have it. But that is coupled with a statement of two specific exceptions: cases of impeachment; and cases arising in the land or naval forces. These exceptions strengthen the application of the general rule to all other cases. Where the lawgiver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons, and make different exceptions. To exceptions the maxim is always applicable, that *expressio unius exclusio est alterius.*

But we shall be answered that the judgment under consideration was pronounced in time of war, and it is, therefore, at least, morally excusable. There may, or there may not, be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power

lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.

There has been and will be another *quasi* political argument,—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.

Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretence of state necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy.

Of course, it is mere absurdity to say that the petitioner was *necessarily* deprived of his right to a fair and legal trial. But concede for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere *excuse* for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not wilful. But we are now considering the legal effect of their decision, and that depends on their legal au-

thority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them, but expressly forbade them to exercise, and it follows that their act is void, whatever may have been the real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the petitioner, had attempted to deprive him of his property by a sentence of confiscation, would any court in Christendom declare that such a sentence divested the title? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution?

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man is to stand up and dispute it. But there is decisive authority upon the point.*

The counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read *Coke's Institute*, and the opinion of Mr. Justice Grier, in the *Prize Cases*, and they know it to be a settled rule that war cannot be said to exist where the civil courts are open. They will not set up the plea of necessity, for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids.

This, therefore, must be their position: that although there was no war at the place where this commission sat, and no actual necessity for it, yet if there was a war anywhere else, to which the United States were a party, the technical effect of such war was to take the jurisdiction away from the civil courts and transfer it to army officers. Noth-

* See Johnson *v.* Duncan, in the Supreme Court of Louisiana, already referred to by General Garfield, *supra*, p. 52; the case of General Jackson's fine.

ing else is left them. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How then did the military get jurisdiction in Indiana?

They must answer the question by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed, or its operation suspended in one state because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? For no reason, if not because war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a future war what results will follow from your decision indorsing the Attorney-General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tum-

ble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back.

The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind of public employment, state or national, civil or military, should swear, without

reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity, to impose upon them an oath like that, if they intended and expected it to be broken half the time.

These statesmen who settled our institutions, had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the president of Congress when he resigned his commission,—that he had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterwards required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia.

Opposite counsel must be conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. They do so; and argue that, while the Constitution, and the acts of Congress, and *Magna Charta*, and the common law, and all the rules of natural justice remain under foot, they will try American citizens according to what they call the *laws of war*.

But what do they mean by this? Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing to do with the subject. Do they mean that portion of our municipal code which defines our duties to the government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the government owes every citizen a fair legal trial, as much as the citizen owes obedience to the government. When they appeal to international law, it is silent; and when they interrogate the law of the land, the answer is a contradiction of their whole theory.

The Attorney-General conceives that all persons whom he and his associates choose to denounce for giving aid to the Rebellion, are to be treated as being themselves a part of

the Rebellion,—they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient rule would outlaw every citizen the moment he is charged with a political offence. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the men who generally sit in military courts. But this court decided in the *Prize Cases* that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true,—that all who reside inside of our own territory are to be treated as under the protection of the law. If they help the enemy they are criminals, but they cannot be punished without legal conviction.

You have heard much, and you will hear more, concerning the natural and inherent right of the government to defend itself without regard to law. This is fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defence of his authority against the opposition of his own subjects or others; and that is what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defence of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be dragged to the block or driven into exile. A violation of law on pretence of saving such a government as ours is not self-preservation, but suicide.

Salus populi suprema lex. This is true; but it is the safety of the *people*, not the safety of the *ruler*, which is the supreme law. The maxim is revolutionary and expresses simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of government *against* the people.

But this government of ours has power to defend itself

without violating its own laws; it does not carry the seeds of destruction in its own bosom. It is clothed from head to foot in a panoply of defensive armor. What are the perils which may threaten its existence? I am not able at this moment to think of more than these, which I am about to mention: foreign invasion, domestic insurrection, mutiny in the army and navy, corruption in the civil administration, and last, but not least, criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defence against all these? Military force repels invasion and suppresses insurrection; you preserve discipline in the army and navy by means of courts-martial; you preserve the purity of the civil administration by impeaching dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities. You are not compelled to use these weapons against your enemies, merely because they and they only are justified by the law; you ought to use them because they are more efficient than any other, and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this country can exercise any kind of public authority which is not conferred by law; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the army and navy are authorized; they are legal institutions; their jurisdiction is limited, and their whole code of procedure is regulated by act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law, and if one of them goes beyond what is written its action is *ultra vires* and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and it has no law of its own. Its terrible authority is undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. So these commissions have no legal origin and no

legal name by which they are known among the children of men; no law applies to them; and they exercise all power for the paradoxical reason that none belongs to them rightfully.

How is a military commission organized? What shall be the number and rank of its members? What offences come within its jurisdiction? What is its code of procedure? How shall witnesses be compelled to attend it? Is it perjury for a witness to swear falsely? What is the function of the judge-advocate? Does he tell the members how they must find, or does he only persuade them to convict? Is he the agent of the government, to command them what evidence they shall admit and what sentence they shall pronounce; or does he always carry his point, right or wrong, by the mere force of eloquence and ingenuity? What is the nature of their punishments? May they confiscate property and levy fines as well as imprison and kill? In addition to strangling their victim, may they also deny him the last consolations of religion, and refuse his family the melancholy privilege of giving him a decent grave?

To none of these questions can the Attorney-General or any one make a reply, for there is no law on the subject.

The power exercised through these military commissions is not only unregulated by law but it is incapable of being so regulated. It asserts the right of the executive government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that government or its paid dependents may choose to impute an offence. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It operates in different ways; the instruments which it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form. But in all its mutations of outward appearance it is still identical in principle, object, and origin. It is always the same great engine of despotism which Hamilton described it to be.

We cannot help but see that military commissions, if

suffered to go on, will be used for pernicious purposes. I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? What just purpose, then, can they serve? None.

But while they are powerless to do good, they may become omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They would be organized to convict, and the conviction would follow the accusation as surely as night follows the day. A government, of course, will accuse none before such a commission except those whom it predetermines to destroy. The accuser can choose the judges, and will select those who are known to be ignorant, unprincipled, and the most ready to do whatever may please the power which gives them pay and promotion. The willing witness could be found as easily as the superserviceable judge. The treacherous spy and the base informer would stock such a market with abundant perjury; for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, would shock the world with the enormity of its crimes.

ON THE SIDE OF THE UNITED STATES. REPLY.

Mr. Butler:

What are the exact facts set forth in the record, and what the exact question raised by it?

The facts of the case are all in the relator's petition and the exhibits thereto attached, and must, for the purposes of this hearing, be taken to be indisputably true; at least as against him. He is estopped to deny his own showing. Now every specification upon which the petitioner was tried

by the military commission concludes with this averment: "This, on or about," &c.,—the different time and place as applied to the different parties—"at or near Indianapolis, Indiana," or wherever else it may be, "a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

It may be said that these specifications are only the averments of the government against the relator. But they, in fact, are a part of the exhibits of the relator, upon which he seeks relief; are an integral part of the case presented by him, and cannot be controlled by the pretence set up on the other side, that the court should take judicial notice of the contrary. Judicial cognizance of a fact, by the court, as a matter of public notoriety, or of history, is only a mode of proof of the fact; but no proof can be heard, in behalf of the relator, in contradiction of the record.

Therefore, what we at the bar must discuss, and what the court must decide, is, what law is applicable to a theatre of military operations, within the lines of an army, in a State which has been and constantly is threatened with invasion.

Yet a large portion of the argument on the other side has proceeded on an assumption which is itself a denial of the facts stated upon the record. The fact that military operations were being carried on in Indiana, at the places where these occurrences are said to have taken place, is a question that opposite counsel desire to argue, and desire farther that the court should take judicial notice that the fact was not as stated by the record.

Is the question, then, before this court, one of law or of fact? The matter becomes exceedingly important. We do freely agree, that if at the time of these occurrences there were no military operations in Indiana, if there was no army there, if there was no necessity of armed forces there, if there was no need of a military commission there, if there was nothing there on which the war power of the United States could attach itself, then this commission had no jurisdiction to deal with the relator, and the question proposed

may as well at once be answered in the negative. What, then, is the state of facts brought here by the record? For, whatever question may have divided the learned judges in the court below, we here at the bar are divided *toto cœlo* upon a vital question of fact. If the facts are to be assumed as the record presents them, then much of the argument of the other side has been misapplied.

The facts of record should have been questioned, if at all, in the court below. If the fact, stated in the record, of war on the theatre of these events—which in our judgment is a fact conclusive upon the jurisdiction of the military commission—is not admitted, then it is of the greatest importance to the cause that it be ascertained. If that fact was questioned below, some measures should have been taken to ascertain it, before the certificate of division of opinion was sent up. Otherwise the Circuit Court, in defiance of settled practice, and also of the act of 1802, has sent up a case in which material facts are not stated, and there is no jurisdiction under the act to hear.* Certainly we at the bar seem to be arguing upon different cases; the one side on the assumption that the acts of Milligan and his trial took place in the midst of a community whose social and legal organization had never been disturbed by any war at all, the other on the assumption that they took place in a theatre of military operations, within the lines of the army, in a State which had been and then was threatened with invasion.

But the very form of question submitted, "whether upon the *facts stated in the petition and exhibits*, the military commission had jurisdiction to try the several relators in manner and form as set forth;"—not upon any other facts of which the court or anybody else will take notice, or which can be brought to the court in any other way than upon the petition and exhibits,—is conclusive as to the facts or case upon which the argument arises. The question, we therefore repeat—and we pray the court to keep it always in mind—is whether upon the facts stated in the petition and exhibit, the

* See remarks of Mr. Stanbery, *supra*, p. 12.

commission had jurisdiction; and the great and determining fact stated, and without which we have no standing in court, is that these acts of Milligan and his felonious associates, took place in the theatre of military operations, within the lines of the army, in a State which had been and then was constantly threatened with invasion. Certainly the learned judges in the court below, being on the ground, were bound to take notice of the facts which then existed in Indiana, and if they were not as alleged in the petition and exhibits, ought to have spread them as they truly were upon the record. Then they would have certified the question to be, whether under that state of facts so known by them, and spread upon the record, the military commission had jurisdiction, and not as they have certified, that the question was whether they had jurisdiction on the state of facts set forth in the relator's petition and exhibits.

The strength of the opposing argument is, that this court is bound to know that the courts of justice in Indiana were open at the time when these occurrences are alleged to have happened. Where is the proper allegation to this effect upon the record, upon which this court is to judge? If the court takes judicial notice that the courts were open, must it not also take judicial notice how, and by whose protection, and by whose permission they were so open? that they were open because the strong arm of the military upheld them; because by that power these Sons of Liberty and Knights of the American Circle, who would have driven them away, were arrested, staid, and punished. If judicial notice is to be taken of the one fact, judicial notice must be taken of the other also;—of the fact, namely, that if the soldiers of the United States, by their arms, had not held the State from intestine domestic foes within, and the attacks of traitors leagued with such without; had not kept the ten thousand rebel prisoners of war confined in the neighborhood from being released by these knights and men of the Order of the Sons of Liberty; there would have been no courts in Indiana, no place in which the Circuit Judge of the United States could sit in peace to administer the law.

If, however, this court will take notice that justice could only be administered in Indiana because of the immediate protection of the bayonet, and therefore by the permission of the commander of her armed forces, to which the safety of the State, its citizens, courts, and homes were committed, then the court will have taken notice of the precise state of facts as to the existence of warlike operations in Indiana, which is spread upon the record, and we are content with the necessary inferences.

As respects precedents. I admit that there is a dearth of precedents bearing on the exact point raised here. Why is this? It is because the facts are unprecedented; because the war out of which they grew is unprecedented also; because the clemency that did not at once strike down armed traitors, who in peaceful communities were seeking to overturn all authority, is equally unprecedented; because the necessity which called forth this exertion of the reserved powers of the government is unprecedented, as well as all the rest. Let opposing counsel show the instance in an enlightened age, in a civilized and Christian country, where almost one-half its citizens undertook, without cause, to overthrow the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason, and we will perhaps show a precedent for hanging such traitors by military commissions.

This is the value of this case: whenever we are thrown into a war again; whenever, hereafter, we have to defend the life of the nation from dangers which invade it, we shall have set precedents how a nation may preserve itself from self-destruction. In the conduct of the war, and in dealing with the troubles which preceded it, we have been obliged to learn up to these questions; to approach the result step by step.

Opposite counsel (Mr. Black) has admitted that there were dangers which might threaten the life of the nation, and in that case it would be the duty of the nation, and it

would be its right, to defend itself. He classed those dangers thus: first, foreign invasion; second, domestic insurrection; third, mutiny in the army and navy; fourth, corruption in civil administration; and last, crimes committed by individuals; and he says further, there were within the Constitution powers sufficient to enable the country to defend itself from each and all these dangers. But there is yet another, a more perilous danger, one from which this country came nearer ruin than it ever came by any or by all others. That danger is imbecility of administration; such an administration as should say that there is no constitutional right in a State to go out of the Union, but that there is no power in the Constitution to coerce a State or her people, if she choose to go out. It is in getting rid of that danger, unenumerated, that we have had to use military power, military orders, martial law, and military commissions.

The same counsel was pleased to put certain questions, difficult as he thinks to be answered, as to the method of proceeding before military commissions; but no suggestion is made upon the record or upon the briefs, that all the proceedings were not regular according to the custom and usages of war. They have all the *indicia* of regularity. There being then nothing alleged why the proceedings are not regular, we are brought back to the main question.

A portion of the argument on the other side has proceeded upon the mistake, that a military commission is a *court*, either under, by virtue of, or without the Constitution. It is not a court, and that question was decided not long ago. A military commission, whatever it may be, derives its power and authority wholly from martial law, and by that law, and by military authority only, are its proceedings to be adjudged and reviewed. In *Dynes* v. *Hoover*,* this was decided by this tribunal in regard to a court-martial. The conclusion was sustained in *Ex parte Vallandigham*.†

The last quoted case is like the present. Vallandigham was tried by a military commission, and he invoked the aid

* 20 Howard, 781.

† 1 Wallace, 243.

of the court to get away from it. Why did not this court then decide, as opposing counsel assert the law to be, that under no possible circumstances can a military commission have any right, power, authority, or jurisdiction? No such decision was made. It was decided that a military commission "is not a court within the meaning of the 14th section of the act of 1789:" that this court has no power to issue a writ of *certiorari*, or to review or pronounce any opinion upon the proceedings of a military commission; that affirmative words in the Constitution, giving this court original jurisdiction in certain cases must be construed negatively as to all others. Mr. Justice Wayne, in delivering the opinion of the court, says:

In *Ex parte Metzger** it was "determined that a *writ of certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, *but that the proceedings of the military commission* were so; and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raine's case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of *The United States* v. *Ferreira*.†

"The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them; but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States. Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide, and sentence, but there is no original jurisdiction in the Supreme

* 5 Howard, 176. † 13 Id. 48.

Court to issue a writ of *habeas corpus ad subjiciendum*, to review or reverse its proceedings, or the *writ of certiorari* to revise the proceedings of a military commission."

Under such language there is an end of this case.

We have already stated that military commissions obtain their jurisdiction from martial law. What, then, is martial law? We have also already defined it.* But our definition has not been observed. Counsel treat it as if we would set up the absolutely unregulated, arbitrary, and unjust caprice of a commanding and despotic officer. Let us restate and analyze it. "Martial law is the will of the commanding officer of an armed force or of a geographical military department, expressed in time of war, within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military or supreme executive chief." This definition is substantially taken from the despatches of the Duke of Wellington. When he was called upon to answer a complaint in Parliament for this exercise of military jurisdiction and martial law in Spain, he thus defined it.† On another occasion, when speaking of Viscount Torrington's administration as military governor of Ceylon, he said thus:

"The general who declared martial law, and commanded that it should be carried into execution, was bound to lay down distinctly the *rules*, and *regulations*, and *limits* according to which his will was to be carried out. Now he had, in another country, carried on martial law; that was to say, he had governed a large proportion of the population of a country, by his own will. But, then, what did he do? He declared that the country should be governed according to its own national laws, and he carried into execution that will. He governed the country strictly by the laws of the country; and he governed it with such moderation, he must say, that political servants and judges, who at first had fled or had been expelled, afterwards consented to act under his

* *Supra*, p. 14.

† Hansard's Parliamentary Debates, 3d Series, vol. 14, p. 879; and see also, Opinions of the Attorneys-General, vol. 8, p. 366.

direction. *The judges sat in the courts of law*, conducting their judicial business and administering the law *under his direction.*"

It is the will of the commanding officer. Being to be exercised upon the instant, it can have no other source. The commanding officer of an armed force, is another element of the definition.

Martial law must have another distinguishing quality. It must be the will of the commander, exercised under the limitations mentioned in *time of war*, and that is a portion of the definition which is fatal to the authorities read by my brother Garfield, as I shall show.

When is it to be exercised? "When necessity demands and prudence dictates." That is to say, in carrying on war, when in the judgment of him to whom the country has intrusted its welfare—whose single word, as commander of the army, can devote to death thousands of its bravest and best sons—we give to him, when necessity demands, the discretion to govern, outside of the ordinary forms and constitutional limits of law, the wicked and disloyal within the military lines.

In time of war, to save the country's life, you send forth your brothers, your sons, and put them under the command, under the arbitrary will of a general to dispose of their persons and lives as he pleases; but if, for the same purpose, he touches a Milligan, a Son of Liberty, the Constitution is invoked in his behalf—and we are told that the fabric of civil government is about to fall! We submit that if he is intrusted with the power, the will, the authority to act in the one case, he ought to have sufficient discretion to deal with the other; and that the country will not be so much endangered from the use of both, as it would be if he used the first and not the last.

Martial law is known to our laws; it is constitutional, and was derived from our mother country. De Lolme says:*

"In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and

* De Lolme, Stephens' ed. of 1838, p. 972.

authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders."

"The martial law, concerning these tender points, must be *universal*. The jealous regulations, concerning mutiny and contempt of orders, cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced, too, through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system, while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom;—that secret disposition which prompts mankind to resist and counteract their superiors, cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other."

Passing from one of the most learned commentators upon England's Constitution, to one who may be said to have lived our Constitution; who came into life almost as the Constitution came into life; whose father was the second chief executive officer of the nation; conversant with public affairs and executing constitutional law in every department of the government from earliest youth, wielding himself chief executive power, and admitted to be one of the ablest constitutional lawyers of his time—what principles do we find asserted?

Mr. John Quincy Adams, speaking of the effect of war upon the municipal institutions of a country, said:*

"Slavery was abolished in Columbia, first, by the Spanish General Morillo, and, secondly, by the American General Bolivar. It was abolished by virtue of a military command given at the head of the army, and the abolition continues to be law to this day. It was abolished by the laws of war, and not by municipal enactments; the power was exercised by military commanders, under instructions, of course, from their respective

* A.D. 1842. Records and Speeches, p. 34.

governments. And here I recur again to the examples of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge, under the laws of the State of Louisiana. You are going to refund him the money, with interest; and this you are going to do because the imposition of the fine was unjust. Because General Jackson was acting under the laws of war, and because the moment you place a military commander *in a district which is the theatre of war, the laws of war apply to that district.*"

. . . . "I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do, in all such cases, take the precedence."

"I lay this down as the law of nations. I say that the military authority takes for the time the place of all municipal institutions, and slavery among the rest; and that, under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject, not only the President of the United States, but the commander of the army has power to order the universal emancipation of the slaves. I have given here more in detail a principle, which I have asserted on this floor before now, and of which I have no more doubt, than that you, sir, occupy that chair. I give it in its development, in order that any gentleman, from any part of the Union, may, if he thinks proper, deny the truth of the position, and may maintain his denial; not by indignation, not by passion and fury, but by sound and sober reasoning from the laws of nations and laws of war. And if my position can be answered and refuted, I shall receive the refutation with pleasure; I shall be glad to listen to reason, aside, as I say, from indignation and passion. And if, by force of reasoning, my understanding can be convinced, I here pledge myself to recant what I have asserted."

The case of General Jackson's fine was the test case of martial law in this country. What were the facts? On the 15th of December, 1814, General Jackson declared martial law within his camp, extending four miles above and four

miles below the city. The press murmured, but did not speak out until after there came unofficial news of peace. Then it was said that the declaration of peace, *ipso facto*, dissolved martial law; that the General had no right to maintain martial law any longer; and murmurs loudly increased. But, the General said, that he had not received any official news of the establishment of peace; and, until it came officially, he should not cease his military operations for safety of the city. Thereupon what happened? One Louallier was arrested by the military, for alleged seditious language, and Judge Hall interposed with his writ of *habeas corpus*. This was on the 5th of March, 1815. The battle of New Orleans, which substantially removed all danger, was fought on the 8th of January. General Jackson sent his aide-de-camp and arrested Judge Hall. The cry then as now was that the necessity for martial law had ceased; why hold Judge Hall, after the news of peace had come? Why not turn him over to the civil authorities? What next took place? Peace was declared in an official manner; the proclamation of martial law was withdrawn; Judge Hall took his seat on the bench, and his first act was to issue an attachment of contempt for General Jackson, who was accordingly brought before him. When General Jackson offered an explanation of his conduct, the Judge refused to receive it, and fined him $1000. The fine was paid in submission to the law. Years afterwards, Congress proceeded not to excuse, not to explain away that act of General Jackson, declaring martial law, but to justify it. I am surprised to hear it said that nobody *justified* General Jackson. Whether General Jackson was to be excused or to be justified was the whole question at issue between the parties in Congress. A bill was brought in "to indemnify Major-General Andrew Jackson for damages sustained in the discharge of his official *duty*." Some who were in the Senate of that day, said: "We will not justify, we will excuse, this action in General Jackson; we move, therefore, to change the title of the bill into a 'bill for the *relief* of General Jackson.'" But Mr. R. J. Walker, speaking for General Jackson, made a minority report, in

which he put the whole question upon the ground of justification.*

He said:

"That General Jackson, and those united with him in the defence of New Orleans, fully believed this emergency to exist, is beyond all doubt or controversy. If, then, this was the state of the case, it was the duty of General Jackson to have made the arrest; and the act was not merely excusable but justifiable. It was demanded by a great and overruling necessity. . . . . This great law of necessity—of defence of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution. This was the law which justified the arrest and detention of the prisoner; and, however the act may now be assailed, it has long since received the cordial approbation of the American people. That General Jackson never desired to elevate the military above the civil authority is proved by his conduct during the trial, and after the imposition of this fine."

"The title of the bill is in strict conformity with the facts of the case, and, in the opinion of the undersigned, should be retained. The country demands that his money shall be returned as an act of justice. It was a penalty incurred for saving the country, and the country requires that it shall be restored."

The fine was returned with interest.

The case of *Johnson* v. *Duncan*, in the Supreme Court of Louisiana, and cited on the other side, was decided by judges sitting under the excitement of the collision between the military and the judges. As an authority it is of no value. The case of *Luther* v. *Borden*, in which Mr. Justice Woodbury's *dissenting* opinion, strange to say, has been cited by my brother Garfield against the opinion of the court, decides that martial law did obtain in Rhode Island, and sustains General Jackson.

The court say:

"If the government of Rhode Island deemed the armed op-

* Benton's Condensed Debates, vol. 14, p. 641.

position so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed."

We have put in our definition of martial law the words, "in time of war," *tempore belli.* That portion of the definition answers every question, as to when this law may obtain.

Now what was the Earl of Lancaster's case, quoted and so much relied on by the other side? The earl raised a rebellion; and was condemned and executed by sentence of a court-martial, *after the rebellion had been subdued.* Thereupon his brother brought a writ of error, by leave of the king, before the king himself in Parliament, for the purpose of reversing the judgment and obtaining his lands, and among the errors assigned, was this:

"Yet the said Earl Thomas, &c., was taken *in time of peace,* and brought before the king himself; and the said our lord and father the king, &c., remembered that the same Thomas was guilty of the seditions and other felonies in the aforesaid contained; without this, that he arraigned him therefor, or put him to answer as is the custom according to the law, &c., and thus, without arraignment and answer, the same Thomas, of error and contrary to the law of the land, was *in time of peace* adjudged to death, notwithstanding that it is notorious and manifest that the whole time in which the said misdeeds and crimes contained in the said record and proceedings were charged against the said earl, and also the time in which he was taken, and in which our said lord and father the king remembered him to be guilty, &c., and in which he was adjudged to death, was *a time of peace,* and the more especially as throughout the whole time, afore-

said, the Chancery and other courts of pleas of our lord the king were open, and in which *right was done to every man, as it used to be;* nor did the same lord the king in that *time ever side with standard unfurled;* the said lord and father the king, &c., *in such time of peace* ought not against the same earl, thus to have remembered nor to have adjudged him to death, without arraignment and answer."

So that the whole record turned upon the question whether the rebellion being ended, peace having come, the Earl of Lancaster was liable to be adjudged by military commission in time of peace, and it was held that that was against common right.

The Petition of Right is referred to; but it was not, as is supposed, because of the ship-money and the trial of Hampden and others, that this great petition was passed. It was because King Charles had quartered in the town of Plymouth, and in the County of Devon, certain soldiers in time of peace, upon the inhabitants thereof; and had issued his commission that those counties should be governed by "martial law," while the soldiers, in time of peace, were quartered there, and therefore came the Petition cited; and it was adjudged that military commissions, issued in time of peace, should never have place in the law of England; and all the people to that, even to this day, heartily agree.*

Governor Wall's case shows truly that martial law did not protect him for his action under it; but if there ever was a judicial murder, a case where a man, without cause and without right, was put to death, this was the case. Lord Chief Justice Campbell, speaking of it, says:†

"The prosecution brought great popularity to the Attorney-General and the government of which he was the organ, upon the supposition that it presented a striking display of the stern impartiality of British jurisprudence; but after a calm review of the evidence, I fear it will rather be considered by posterity

* Hale's Pleas of the Crown, 42.

† Lives of the Chief Justices; Life of Ellenborough.

as an instance of the triumph of vulgar prejudice over humanity and justice."

Another case cited is that of the Rev. John Smith, of Demerara, who was tried and convicted by a court-martial, for inciting negroes to mutiny in Demerara, six weeks after a rebellion was wholly quelled, and when there seems to have been no necessity for such proceedings, nor any reason that they should be carried on. The excuse of the governor was, that the planters were so infuriated against Mr. Smith that he thought that trying him by court-martial would secure him better justice. I agree that this was no excuse, that no necessity here existed. Brougham and Mackintosh brought all their eloquence to overturn martial law. Their words have been cited; but the other side forgot to state that upon a division of the House of Commons, Brougham and Mackintosh were in a minority of forty-six. So that after a deliberate argument of many days, the great final tribunal of English justice decided that Mr. John Smith's case was rightly tried under martial law. The case is an authority not for, but against, the side which it is cited to support.

It is said that in 1865, Congress refused to pass an act which would throw any discredit on military commissions, or limit their action wherever a rebel or a traitor, secret or open, was to be found upon whom their jurisdiction should operate. If such tribunals for certain purposes were not lawful in the judgment of the House of Representatives; if military commissions had no place in the laws of the land, why the necessity of action by Congress to repeal them?

Reference has been made by opposing counsel to what they consider the views of General Washington; and an argument has been attempted to be drawn from this. Now, the first military commission upon this continent of which there is any record sat by command of Washington himself. Its proceedings were published by order of Congress, and are well known. I refer to André's case. That was not a "court-martial;" there was no order to adjudicate; no find-

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ing; no sentence; only a report of facts to General Washington, and then Washington issued the order, in virtue of his authority as commander-in-chief, which condemned André to death.

But we do not stop there. This may be said to have been the exceptional case of a spy. To give, then, another illustration of what Washington thought of the rights of military commanders in the field, attention may be directed to the trial of Joshua Hett Smith. Smith was the man at whose house Arnold and André met. He was taken and tried by a military court for treasonable practices. The civil courts were open at Tarrytown, at that time; the British Constitution as adopted by our colonial fathers extended over him, but still Washington tried Smith by a military court. In Chandler's Criminal Trials,* Smith gives an account of his interview, when he was first brought before Washington, which I cite in order that the court may understand how the Father of his Country regarded the extent of his powers as military commander. Smith says:

"After as much time had elapsed as I supposed was thought necessary to give me rest from my march, I was conducted into a room, where were standing General Washington in the centre, and on each side General Knox and the Marquis de La Fayette, with Washington's two aides-de-camp, Colonels Harrison and Hamilton. Provoked at the usage I received, I addressed General Washington, and demanded to know for what cause I was brought before him in so ignominious a manner? The General answered, sternly, that I stood before him charged with the blackest treason against the citizens of the United States; that he was authorized, from the evidence in his possession, and from the authority vested in him by Congress, to hang me immediately as a traitor, and that nothing could save me but a candid confession who in the army, or among the citizens at large, were my accomplices in the horrid and nefarious designs I had meditated for the last ten days past."

What now, may I ask, is to be thought of the argument

* Vol. 2, p. 248.

of my opposing brethren, who assert that in civil courts the Constitution does not allow any pressure to be brought upon a man to make him confess, at the same time that they eulogize the military conduct of Washington?

But what redress, it is asked, shall any citizen have if this power—so great, so terrible, and so quick in its effects—is abused? The same and only remedy that he can have whenever power is abused. If that power, under martial law, is used for personal objects of aggrandizement, or revenge; of imprisoning, one hour, any citizen, except when necessity under fair judgment demands, he ought to have an appeal to the courts of the country after peace, for redress of grievance.

It has been said that martial law, and its execution by trials by military commission, is fatal to liberty and the pursuit of happiness; but we are only asking for the exercise of military power, when necessity demands and prudence dictates. If the civil law fails to preserve rights, and to insure safety and tranquillity to the country; if there is no intervention of military power to right wrongs and punish crime, an outraged community will improvise some tribunal for themselves, whose execution shall be as swift and whose punishments shall be as terrible as any exhibition of military power; some tribunal wholly unregulated and which is responsible to no one. We are not without such examples on this continent.

The proclamation of 24th September, 1862,* by which the President suspended the privilege of the writ of *habeas corpus*, and which proclamation was in full force during these proceedings, was within the power of the President, independently of the subsequent act of Congress, to make. *Brown* v. *The United States*† seems full on this point It says:

"When the legislative authority, to whom the right to declare war is confined, has declared war in its most unlimited manner, the executive authority, to whom the execution of the war is confided, is bound to carry it into effect. He has a discre-

* See *supra*, pp. 15–16.

† 8 Cranch, 153.

tion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims. The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President."

However, the subsequent act of Congress* did ratify what the President did; so that every way the view taken of his powers in the case just quoted stands firm.

And the wisdom of this view appears nowhere more than in the present case. The court, of course, can have no knowledge how extensive was this "Order of Sons of Liberty;" how extensive was the organization of these American Knights in Indiana. It was a secret Order. Its vast extent was not known generally. But the Executive might have known; and if I might step out of the record, I could say that I am aware that he did know, that this Order professed to have one hundred thousand men enrolled in it in the States of Indiana, Ohio, and Illinois, so that no jury could be found to pass upon any case, and that any courthouse wherein it had been attempted to try any of the conspirators, would have been destroyed. The President has judged that in this exigency a military tribunal alone could safely act.

We have thus far grounded our case on the great law of nations and of war. Has the Constitution any restraining clause on the power thus derived?

It is argued that the fourth, fifth, and sixth articles to the amendments to the Constitution are limitations of the war-making power; that they were made for a state of war as well as a state of peace, and aimed at the military authority as well as the civil. We have anticipated and partially answered this argument.† As we observed, by the Constitution, as originally adopted, there was no limitation put upon

* See *supra*, p. 4.

† See *supra*, pp. 20–21.

the war-making powers. It only undertook to limit one *incident* of the war-making power,—the *habeas corpus;* and if limit it can be called, observe the way in which that writ is guarded. It is provided that the writ of *habeas corpus*, in *time of peace*, shall not be suspended; it shall only be suspended when, "in case of rebellion or invasion, the public safety requires;" that is, in time of war. It seems to have been taken for granted by the Constitution that the writ is to be suspended in time of war because very different rules must then govern. The language of the Constitution is, that it "shall not be suspended except,"—showing that it was supposed that the war-making power would find it necessary to suspend the *habeas corpus;* and yet no other guard was thrown around it.

By the subsequent amendments there was, as we conceive, but one limitation put upon the war-making power, and that was in regard to the quartering of soldiers in private houses.

In no discussion upon these articles of amendment was there, in any State of the Union, a discussion upon the question, what should be their effect in time of war? Yet every one knew, and must have known, that each article would be inoperative in some cases in time of war. If in some cases, why not in all cases where necessity demands it, and where prudence dictates?

There is, in truth, no other way of construing constitutional provisions, than by the maxim, *Singula singulis reddenda.* Each provision of the Constitution must be taken to refer to the proper time, as to peace or war, in which it operates, as well as to the proper subject of its provisions.

For instance, the Constitution provides that "no person" shall be deprived of liberty without due process of law. And yet, as we know, whole generations of people in this land—as many as four millions of them at one time—people described in the Constitution by this same word, "persons," have been till lately deprived of liberty ever since the adoption of the Constitution, without any process of law whatever.

The Constitution provides, also, that no "person's" right to bear arms shall be infringed; yet these same people,

described elsewhere in the Constitution as "persons," have been deprived of their arms whenever they had them.

If you are going to stand on that letter of the Constitution which is set up by the opposite side in the matter before us, how are we to explain such features in the Constitution, in various provisions in which slaves are called persons, with nothing in the language used to distinguish them from persons who were free.

Mr. Black has said, that the very time when a constitutional provision is wanted, is the time of war, and that in time of war, of civil war especially, and the commotions just before and just after it, the constitutional provisions should be most rigidly enforced. We agree to that; but we assert that, in peace, when there is no commotion, the constitutional provisions should be most rigidly enforced as well. Constitutional provisions, within their application, should be always most rigidly enforced. We do not ask anything outside of or beyond the Constitution. We insist only that the Constitution be interpreted so as to save the nation, and not to let it perish.

We quote again the solemnly expressed opinion of Mr. Adams, in 1836, in another of his speeches:

"In the authority given to Congress by the Constitution of the United States to declare war, all the powers, incident to war, are by necessary implication conferred upon the government of the United States. Now, the powers incidental to war are derived, not from any internal, municipal source, but from the laws and usages of nations. There are, then, in the authority of Congress and the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other,—the war power and the peace power. The peace power is limited by regulation and restraints, by provisions prescribed within the Constitution itself. The war power is limited only by the law and usages of nations. The power is tremendous. It is strictly constitutional, *but it breaks down every barrier so anxiously erected for the protection of liberty, property, and life.*"

It is much insisted on, that the determining question as to the exercise of martial law, is whether the civil courts

are in session; but civil courts were in session in this city during the whole of the Rebellion, and yet this city has been nearly the whole time under the martial law. There was martial law in this city, when, in 1864, the rebel chief, Jubal Early, was assaulting it, and when, if this court had been sitting here, it would have been disturbed by the enemy's cannon. Yet courts—ordinary courts—were in session. It does not follow, because the ordinary police machinery is in motion for the repression of *ordinary* crimes, because the rights between party and party are determined without the active interference of the military in cases where their safety and rights are not involved, that, therefore, martial law must have lost its power.

This exercise of civil power is, however, wholly permissive, and is subordinated to the military power. And whether it is to be exercised or not, is a matter within the discretion of the commander. That is laid down by Wellington,* and the same thing is to be found in nearly every instance of the exercise of martial law. The commanders of armies, in such exercise, have been glad, if by possibility they could do so, to have the courts carry on the ordinary operations of justice. But they rarely permit to them jurisdiction over crimes affecting the well-being of the army or the safety of the state.

The determining test is, in the phrase of the old law-books, that "the King's courts are open." But the King's Court, using that phrase for the highest court in the land, should not be open under the permission of martial law. In a constitutional government like ours, the Supreme Court should sit within its own jurisdiction, as one of the three great coordinate powers of the government, supreme, untrammelled, uncontrolled, unawed, unswayed, and its decrees should be executed by its own high *fiat*. The Supreme Court has no superior, and, therefore, it is beneath the office of a judge of that court, inconsistent with the dignity of the tribunal whose robes he wears, that he should sit in any district of

* See *supra*, p. 91–2.

country where martial law is the supreme law of the state, and where armed guards protect public tranquillity; where the bayonet has the place of the constable's baton; where the press is restrained by military power, and where a general order construes a statute. On the contrary, we submit that all crimes and misdemeanors, of however high a character, which have occurred during the progress and as a part of the war, however great the criminals, either civil or military, should be tried upon the scene of the offence, and within the theatre of military operations; that justice should be meted out in such cases, by military commissions, through the strong arm of the military law which the offenders have invoked, and to which they have appealed to settle their rights.

We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one, for the mild and healthy restraints of the other. Far otherwise. We demand only, that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes that league, and wait, and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources of the government, at the beginning; when the capital is imperilled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of law, is powerless; when the bayonet is called in as the final arbiter; when on its armed forces the government must rely for all it has of power, authority, and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future,—then we ask that martial law may prevail, so that the civil law may again live, to the end that this may be a "government of laws and not of men."

At the close of the last term the CHIEF JUSTICE announced the order of the court in this and in two other similar cases (those of Bowles and Horsey) as follows:

Opinion of the court.

1. That on the facts stated in said petition and exhibits a writ of *habeas corpus* ought to be issued, according to the prayer of the said petitioner.

2. That on the facts stated in the said petition and exhibits the said Milligan ought to be discharged from custody as in said petition is prayed, according to the act of Congress passed March 3d, 1863, entitled, "An act relating to *habeas corpus* and regulating judicial proceedings in certain cases."

3. That on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Milligan in the manner and form as in said petition and exhibits are stated.

At the opening of the present term, opinions were delivered.

Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire

whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3d, 1863, entitled, "An act relating to *habeas corpus* and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued?"

2d. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3d. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But, we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court at their next session to be held thereafter; and shall by the said court be finally decided: And the decision of the

Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law, that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is, whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of *habeas corpus* and to hear and determine it; and it could not be denied; for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case,* construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But, it is maintained with earnestness and ability, that a certificate of division of opinion can occur only in a *cause;* and, that the proceeding by a party, moving for a writ of *habeas corpus*, does not become a cause *until after the writ has been issued and a return made.*

Independently of the provisions of the act of Congress of March 3, 1863, relating to *habeas corpus*, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true, that it is usual for a court, on application for a writ of *habeas corpus*, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters,† turned, was,

* 4 Cranch, 75.

† Page 193.

whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

The Chief Justice, in delivering the opinion of the court, said: "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless; and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges instead of one.

Such a result was not in the contemplation of the legislature of 1802; and the language used by it cannot be construed to mean any such thing. The clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States* v. *Daniel*,* the court, in holding that a division

* 6 Wheaton, 542.

of the judges on a motion for a new trial could not be certified, say: "That the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here; and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of *habeas corpus* was the "*cause*" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right and not of discretion.

But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it.

This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the *cause* of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right"—and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive."

In any legal sense, action, suit, and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But, the true meaning to the term "suit" has been given by this court. One of the questions in *Weston* v. *City Council of Charleston*,* was, whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The

* 2 Peters, 449.

term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens* v. *Virginia*,* he says: "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes* v. *Jennison et al.*† was, whether under the 25th section of the Judiciary Act a proceeding for a writ of *habeas corpus* was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by *habeas corpus* was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing.

The court do not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a *suit*,—the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the act of 1802.

But it is argued, that there must be *two* parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to ena-

* 6 Wheaton, 264.

† 14 Peters, 540.

ble any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for the writ of *habeas corpus*, Mr. Hanna, the District Attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this,—that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal; and sought, in the only way he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to *habeas corpus*, and regulating judicial proceedings in certain cases," approved March 3d, 1863. Did that act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting a law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger.

An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of *habeas corpus*, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of *habeas corpus*. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the

United States, a list of the names of all parties, not prisoners of war, resident in their respective jurisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary under the terms of this law to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, *then* the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred in the last proviso of the section on the court equally with a judge of it to discharge from imprisonment It was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him. Courts are

not, always, in session, and can adjourn on the discharge of the grand jury; and before those, who are in confinement, could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges out of court to grant relief to any party, who could show, that, under the law, he should be no longer restrained of his liberty.

It was insisted that Milligan's case was defective, because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it or anybody but the judges informed of it. Why aver the fact when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore, that under the *Habeas Corpus* Act of 1863 the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and, if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan, were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of *habeas corpus* when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802 which authorized a certificate of division, a final decision

means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be in this country of written constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him; *after* his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction*, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole

people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be de-

prived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times,

and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise

connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country

have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is un-

disputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot en-

dure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons ar

rested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with

it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion. martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the war of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests

and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith* v *Shaw* and *McConnell* v. *Hampden* (reported in 12 Johnson*), are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended, that *Luther* v. *Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II, in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the *old* government, broke open the house of Luther, who supported the *new*, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which *this court* could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking

* Pages 257 and 234.

into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may by exercised by a state."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative The suspension of the privilege of the

writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3d, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

The CHIEF JUSTICE delivered the following opinion.

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case.

We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of *habeas corpus*.

Whether this court has jurisdiction upon the certificate of division admits of more question. The construction of the act authorizing such certificates, which has hitherto prevailed here, denies jurisdiction in cases where the certificate brings up the whole cause before the court. But none of the adjudicated cases are exactly in point, and we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty. We agree, therefore, that this court may properly answer questions certified in such a case as that before us.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the executive department of the government.

This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.

We must inquire, then, what constitutional or statutory provisions have relation to this military proceeding.

The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection. The constitutionality of this act has not been questioned and is not doubted.

The first section authorized the suspension, during the Rebellion, of the writ of *habeas corpus* throughout the United States by the President. The two next sections limited this authority in important respects.

The second section required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. The lists transmitted to the judges were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third section provided, in case lists of persons other

than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

It was made the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

It was under this act that Milligan petitioned the Circuit Court for the District of Indiana for discharge from imprisonment.

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted. The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the Circuit Courts of the Indiana district, while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.

His case was thus brought within the precise letter and intent of the act of Congress, unless it can be said that Milligan was not imprisoned by authority of the President; and nothing of this sort was claimed in argument on the part of the government.

It is clear upon this statement that the Circuit Court was bound to hear Milligan's petition for the writ of *habeas corpus*, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or, in the language of the act, to make the order.

The first question, therefore—Ought the writ to issue?—must be answered in the affirmative.

And it is equally clear that he was entitled to the discharge prayed for.

It must be borne in mind that the prayer of the petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether.

And the express terms of the act of Congress required this action of the court. The prisoner must be discharged on giving such recognizance as the court should require, not only for good behavior, but for appearance, as directed by the court, to answer and be further dealt with according to law.

The first section of the act authorized the suspension of the writ of *habeas corpus* generally throughout the United States. The second and third sections limited this suspension, in certain cases, within states where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue, and under it the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances the writ must be issued, and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive, and left no discretion to court or judge.

An affirmative answer must, therefore, be given to the second question, namely: Ought Milligan to be discharged according to the prayer of the petition?

That the third question, namely: Had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively is an unavoidable inference from affirmative answers to the other two

The military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury without indictment or other proceeding against him.

Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions.

Under it, in such states, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session no person arrested could have the benefit of the writ; and even then no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

We agree, therefore, that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow, that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the

government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution.

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1.) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States.

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war

or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts proposed that "no person shall be tried for any crime by which he would incur an infamous punishment or loss of life until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions.

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that gov-

ernment includes protection and defence as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation, and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections, rather than upon doubtful constructions of legislative powers?

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the Presi-

dent, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed co-operation with the enemy, and war against the national government.

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the ex-

ecution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety,—a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated

as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER concur with me in these views.

McGee v. Mathis.

Where a State, in order to promote the drainage and sale of certain swamp lands belonging to it and which it was desirous of reclaiming, has passed by way of encouraging purchasers, a law that such lands "shall be exempt from taxation for the term of ten years," and issued transferable scrip receivable for them, a repeal of the exemption act, so far as it concerns lands paid for either before or after the repeal, with scrip issued before the repeal, impairs a contract of the State with the holders of such scrip.

Error to the Supreme Court of Arkansas, the case, as stated by the Chief Justice in delivering the opinion of the court, being thus:

In 1850, the United States granted, by act of Congress, to the State of Arkansas, all the swamp and overflowed government lands within its limits, on condition that the proceeds of the lands, or the lands themselves, should be applied, as far as necessary, in reclaiming them for cultivation by means of levees and drains.

The State accepted the grant, and, by an act of the legislature, in 1851, provided for the sale of the lands; for the issue of transferable scrip receivable for any lands, not already taken up, at the time of selection by the holder; for contracts for the making of levees and drains, and for the payment of contractors in scrip or otherwise.

In the fourteenth section of this act it was provided that "to encourage, by all just means, the progress and the completing of the reclaiming such lands, by offering inducements to purchasers and contractors to take up said lands, all said swamp and overflowed lands shall be exempt from taxation for the term of ten years, or until they shall be reclaimed."

In 1855 this section was repealed, and provision was made by law for the taxation of swamp and overflowed lands, sold or to be sold, precisely as other lands.

The plaintiff in error, before this repeal, had become the owner, by transfer from contractors, of a large amount of the scrip issued under the act of 1851, and with this scrip,

after the repeal, took up and paid for many sections and parts of sections of the granted lands lying in Chicot County.

In 1857 another act of the legislature, local in its nature, provided for the making of levees and drains in Chicot County, and authorized a special tax to meet the cost. This special tax was assessed upon the unreclaimed swamp lands of the plaintiff in error, as well as upon other lands, and the defendant in error, under authority of the act, proceeded to take the necessary measures for the collection of the tax.

The Constitution of the United States ordains that "no State shall pass any law impairing the obligation of contracts."

The plaintiff in error filed his bill in the proper State court, alleging that the acts of 1855 and 1857 impaired the obligation of the contract of the State with the United States, expressed in the grant by Congress in 1850 and its acceptance by the State; and also the contract between the State and the levee contractors, and other lawful holders of swamp land scrip, issued under the act of 1851, that such scrip should be receivable for unlocated swamp lands, and that such lands should not be subject to taxation for ten years from the time when taken up, or until reclaimed; and prayed an injunction to restrain the defendant in error from the collection of the taxes authorized by those acts.

In his answer to the bill, the defendant stated that the state and county taxes imposed on the lands of the complainant had been stricken out of the assessment by order of the County Court, and justified his proceeding as sheriff to collect the special levee tax under the act of 1857.

The cause was brought to hearing in the Supreme Court of Arkansas, by whose decree the bill of the complainant was dismissed, and it now came before this tribunal upon writ of error directed to that court.

Mr. Reverdy Johnson, with a brief of Mr. Garland, for the plaintiff in error:

We here controvert the validity of a statute passed through all branches of the law-making power, and afterwards, on

argument, declared valid by the highest court of a State. Coming to such an office, we may be excused for some fulness of argument.

The plaintiff in error asserts that the act of 1857, familiarly known as the *Levee Act*, and under which his lands were taxed, is unconstitutional. And to show this, he maintains:

1st. The fourteenth section of the act of 1851, which exempted swamp lands from taxation for ten years, or until reclaimed, was a contract, it being a part of the law which accepted the grant from Congress.

2d. This levee act misuses and diverts from its proper channel the grant of Congress, inasmuch as the act of Congress of 1850 provides that, as far as necessary to the purpose of reclaiming swamp lands by means of levees and drains, the proceeds of the lands, whether from sale or by direct appropriation in kind, shall be applied in that way.

3d. That having received this scrip *representing swamp land*, which was issued to him on contracts made *prior* to the repeal of the fourteenth section of the act of January, 1851, although his lands were entered with this scrip *after* its repeal, they are as much exempt as if entered before the exempting clause was repealed.

In *The State* v. *County Court of Crittenden*, before the Supreme Court of Arkansas,* it was held that the *fourteenth section* named above was a valid contract under the Constitution. As a contract, from the day of the passage of the act, it held out an *encouragement* to persons to take up these lands. It does not say from the day of entry, but it is general and operates necessarily from the day of its passage. When the legislature passed this law, exemption from taxation became at once one of the conditions of the acceptance of the grant. Until the legislature, by an act for that purpose, accepted the grant from Congress, it was of no avail, and could not be used for the benefit of any one. But when the legislature did accept it, the bounty was in a shape to be used; and whatever the legislature did in that behalf re-

* 19 Arkansas, 360.

lated back to the grant, and the act granting, as well as the one accepting, formed in themselves, together, one act—an entirety. Both stood then as material parts of the whole.

If, as we have contended, the two acts together made the grant complete, and they alone did this, the grant then became a contract, and any future changes of it were nullities.*

If the law repealing the exempting clause stands, it is apparent that the whole grant falls to the ground. If an essential part of the grant be destroyed, it is a contradiction to say the grant still exists. The grant having been completed, the law would always dictate that it should be upheld and carried out. One rule of law is, that the contract should be supported, rather than defeated. And another, that, as in ordinary contracts, modifications or changes must be made by both parties, or with their knowledge and consent. So it is as to grants; the grantor must dispense with a condition before it is waived.

It is evident from the *Levee Act*, that its object was the attainment of the same end, and by the same means—that is, by leveeing—as contemplated by the act of Congress granting these lands to the State of Arkansas. For this object, Congress had put in the hands of the State a fund, by which she was to build these necessary levees, and the State was bound so to apply the fund. Her obligation to do this formed a part of the contract between her and the United States, and the owners of property have the right to have this contract performed by her. The granting act points out the purpose for which the grant was made. No other can be substituted. By the enactment of this levee law, the State declared, that the laying out and building of these levees in Chicot County was necessary. If so, there is a way already provided; that is, under the terms of the grant, the State must apply the lands granted to her. By this act, the State has attempted to discharge her contract in a different manner from that agreed upon. It amounts to this: she withholds the funds given her for a specific purpose, and to

* Fletcher *v.* Peck, 6 Cranch, 87.

that extent she abrogates McGee's right, as well as the right of all property-holders there, under the act of Congress, to have those funds, or lands, applied to the building of levees; and besides this, imposes upon them additional burdens to complete the end which Congress had in view in making the grant. This is in the face of the grant. Every right the citizen or property-holder had under this grant is destroyed; and the grant thus misused and diverted is no bounty, but an oppression.

Under the law, a levee contractor might take his pay in lands, drained and leveed, or in scrip worth so much, *each piece of scrip representing so many acres of land*, and this scrip was made assignable, and could be located on any of the unlocated swamp lands. The law authorizing it stamped it with certain characters and properties; made it assignable, and made it the representative of so much land. No one can contend that any contractor took the scrip for itself, or for any inherent value in it, as so many dollars to him. With its value on its face, its negotiability, &c., it was at last but land. While the law made it the representative of land, it pointed out its ultimate destination, or purposes; that is, location upon swamp land. It gave the holder a right to so much land, and until it was located it had no value of itself. Independent of the idea of locating it, it was worthless. It might go from A. to B., and so on through numberless hands, but the last holder of it never received his rights under it till it was converted. Until then, its offices were incomplete.

We have seen that the law of this grant was a contract. This contract said, if A. will drain and levee 1000 acres of land, so as to reclaim the same, he will be paid therefor, if he desires, in swamp land scrip, with which he may enter lands, and such lands shall not be taxed for a period of ten years, or until reclaimed. A. does the work under this law, or this contract; how can his rights, or those of his assignee in the scrip, if there be one, be modified, restricted, or changed in the least? The original holder has the right, then, and the instrument assigned, or *scrip transferred*, carries

its original legal liabilities into as many hands as it may chance to fall. Such is the well-settled rule as to all assignable paper.* If, then, in a legal as well as a business point of view, the scrip was land; and if the land could not be taxed before the 11th day of January, 1855, how can that be taxed after that date which was the legal result or consequence of scrip issued prior to it? By what authority can the legal characters attaching to this paper, when issued, be changed? It might with equal propriety be said, that a holder of a promissory note, bearing ten per cent. interest upon its face, and allowed by law when it was executed, can be by a subsequent law deprived of the interest on the note, which was a part of the contract called for by settlement, as well as by the paper itself. Yet this cannot be done.† This species of legislation, by which an attempt is made to abridge in any way the rights of a party to a contract already made and entered into, was fully expressed by this court in *Suydam* v. *Broadnax et al.*‡

This scrip issued to the levee contractor, carried along with it, by the law which created it, the contract that its fruits or its results should not be taxed; just as much so as the note we have instanced bears interest, and entitles its holder to receive such interest. Any act which enlarged, abridged, or in manner changed the intention of the parties, resulting from the stipulations in the contract, necessarily impaired it; any deviation from its terms, by postponing or accelerating the period of performance which it prescribed, imposing conditions not expressed in the contract, or dispensing with the performance of those expressed, however minute, or apparently immaterial in their effect upon it, impaired its obligation. The exemption, it is true, does not appear on the face of the scrip, nor does it appear either on the certificate of entry, and in both cases we are to fall back to the law for the exemption. It must be, beyond doubt, that

* Railey *v.* Bacon, 26 Mississippi, 455; Walker *v.* Johnson et al., 13 Arkansas, 522.

† Reid *v.* Renss. Glass Factory, 3 Cowen, 393; 5 Ib. 587.

‡ 14 Peters, 67.

when McGee received his scrip, it was his idea, as also that of the State, that whatever land he should locate with this scrip should be exempt from taxation. Now parties are always presumed to contract upon, and with a view to, the law. And in inquiries of this kind, could there be any doubt as to the law governing the contract, it is important to ascertain what each party did rely on. If this be true, the whole end and object, and the intention of the contract, are destroyed by taxing the land in question.

The case falls within and much resembles *Hawthorne* v. *Calef*, fully considered a year or two since.* It was there decided that a State statute, repealing a former statute which made the *stock* of stockholders in a chartered company liable to the *corporation's* debts, is, as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts.

The point is decided, also, in *Woodruff* v. *Trapnall*,† in this court. There, in 1836, the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the State, and the president and directors of which were appointed by the General Assembly. One section provided, "that bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." In 1845, this section was repealed. The court ruled that the notes of the bank in circulation at the time of the repeal were not affected by it; holding that, by attempting to discharge the contract by the payment of a smaller sum, or at a different time, or *in a different manner*, than the parties had agreed, impairs the obligation by substituting a contract which the parties never entered into, and to the performance of which they never consented.

Curran v. *State of Arkansas et al.*‡ seems also in point. The court there said, that the bills of a bank being payable on demand, there was a contract with the holder to pay them; and laws which withdrew the assets of the bank *into a different channel*, impaired the obligation of this contract.

* 2 Wallace, 10. † 10 Howard, 190. ‡ 15 Id., 304.

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In none of the acts of the Arkansas legislature is the time in which the scrip is to be located limited. The holder of the scrip could wait and use his own option as to the time of locating his scrip. McGee, as such holder, prior to the 11th day of January, 1855, was not entitled merely to the quantity of land represented by this scrip, but, as an encouragement, the additional benefit of an exemption of that land from taxation for ten years from the date of entry.

These lands, then, cannot be taxed for state, county, general, special, or any other purposes. They are entirely free from all taxes for the time named.

Mr. Carlisle, who submitted a brief of Mr. Hemstead, deceased, contra:

I. The question whether the levee law of 1857 impaired any contract, has been decided by the Supreme Court of Arkansas, in *The State* v. *County Court of Crittenden County*, referred to on the other side, where it was held that swamp and overflowed lands sold by the State, under the provisions of the act of 1851, while the 14th section thereof was in force, were, by contract between the State and purchaser, exempt from general taxation for ten years, unless sooner reclaimed, and that the exemption began at *the date of the purchase from the State;*—in other words, that the terms of the sale must be regarded as the controlling fact on which the exemption was to be founded, and that if a sale was made when the 14th section was in force, the exemption applied; but if made *afterwards*, that such lands were taxable for all purposes, like other lands.

This decision is correct, for it is swamp and overflowed *land* that is exempted from taxation, and nothing else; and therefore no contract could spring into being until the land had been purchased from the State.

The contractor for making levees might, indeed, do eitner of two things: take land in kind, or take land scrip. If he took scrip he might locate it, as the law then stood, upon any unselected swamp land in the State. But it did not follow that because a contractor held scrip he might continue

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to hold it as long as he pleased, and finally locate it on swamp land, and then have the land exempted from taxation for ten years.

We concede that lands purchased before the repeal of the fourteenth section of the act of 1851, were not taxable for public purposes for ten years. The Supreme Court of Arkansas said so in the case just referred to and cited on the other side, and that is the law of that case. But we deny that the claims of the plaintiff in error in the case now before this court can receive any benefits from that decision.

That court, in the case we have under review, thus referred to that decision, and thus treated the question. We adopt its language as our argument.

"In the offer of the State the exemption was held out as an inducement to purchasers and contractors to purchase, or, in the language of the act, 'to take up' the *lands*, and not as an inducement to contractors to take *scrip*. Until the offer was accepted, or, in other words, until a purchase was made, there was no contract. Did the State not have a right to withdraw her offer? Was she bound to wait, in order that the holders of the scrip, after speculation had ceased to be desirable, might have an opportunity to secure the exemption? The State was under no obligation, legal or moral, to do so. According to the plain provisions of the act of 1851, the contractor might take land in kind or take land scrip. It was left to his choice to do either. Various considerations might, and doubtless in many instances did, influence the contractor to take scrip instead of land in kind. If he took land it was to be at the price per acre previously fixed by the commissioners, and he was confined in his selection to such lands only as were reclaimed, however undesirable they might be. But if he took scrip, it could, as the law then was, be floated, and with it the contractor could purchase unselected swamp land, lying anywhere within the limits of the swamp land grant, at the same price per acre, even though the land thus purchased should be intrinsically more valuable than those which had been reclaimed. Again: the lands being wild and productive of no present income, the contractor might not be willing to invest the proceeds of his labor in them, and wait indefinitely for the fruits of the investment; whereas the scrip

being assignable, he could, by receiving and selling it, realize its then present cash value. To take land in kind was one thing, and to take scrip was quite another. If the contractor took land, he became a purchaser, and acquired the exemption. But if he took scrip, he did not become a purchaser, and did not acquire the exemption. To hold that the State, in the offer to sell her swamp lands, as expressed in the fourteenth section of the act of 1851, proposed as an inducement to contractors to take *scrip*, that the lands which they might afterwards purchase with it should be exempt from taxation, would not only do violence to a settled rule of construction, which is, that privileges and exemptions granted by the State shall be strictly construed, and that nothing shall be held to have passed except what is clearly and explicitly granted, but would also be at war with what seems to us to be the plain reading of the statute."

The fourteenth section was a gratuity or bounty offered to a small part of the community at the expense of the rest; and while it is true that those who availed themselves of it, by purchasing lands when it was in force, must have its benefits, yet those who did not can have no claim of that sort at all. They, at least, must take the law as they find it when they become the owners of swamp land by purchase from the State. They are not deceived. No faith has been broken. They are only called upon to contribute their mite to the support of a government which protects them and their property.

II. But supposing the fourteenth section had not been repealed, still the exemption in that section must be construed in reference to state and ordinary county taxes alone, and should not be held to embrace special or local assessments. Every exemption of property from taxation must be strictly received, and terms of ambiguity in the grant must operate against the grantee, and in favor of the public. In other words, nothing passes which is not clearly granted.*

It will be observed that the fourteenth section of the act of 1851 exempts lands taken up from "taxation." This term

* Bank *v.* Billings, 4 Peters, 561; Ohio L. & T. Co. *v.* Debolt, 16 Howard, 435.

Argument in favor of the constitutionality.

does not embrace special local assessments where the fund raised is expended for the improvement of the property taxed. Legislative sanction of such assessments is ordinarily procured by the action of the parties interested, and is widely distinguishable from taxation for governmental or public purposes.

In *The State* v. *New Orleans Nav. Co.*,* Judge Martin says:

"The words impost, tax, or duty, must be confined to the idea which they commonly and ordinarily present to the mind,—exactions to fill the public coffers, for the payment of the debt and the promotion of the general welfare of the country, not to a contribution provided to defray the expenses of building bridges, erecting causeways, or removing obstructions in a water-course, to be paid by such individuals only who enjoy the advantages resulting from such labor and expense."

The Ordinance of 1787 declared that

"All navigable waters leading into the St. Lawrence and Mississippi, and the carrying-places between the same, shall be common highways, and forever free, as well to the inhabitants of the territory as the citizens of the United States, or those of any other state that may be admitted into the confederacy, without any *impost*, *tax*, or *duty* therefor."

This provision was literally copied in the act of Congress of March 2d, 1805, and it was held in the case from which Judge Martin's remarks are quoted, that the charter of the New Orleans Navigation Company, which authorized a tax to be levied on vessels navigating the Mississippi, for the purpose of raising a fund to be applied to the *improvement of that navigation*, was not a tax, or impost, or duty within the meaning of the act of Congress, or the ordinance from which it was copied.

Under a law of Louisiana, the owner of land on the Mississippi River was required to construct levees or embankments; and if the owner failed to construct or keep in repair

* 11 Martin, 309.

his portion of the levee, the district inspector had the levee built or repaired, and assessed the cost upon the land of the delinquent proprietor. And in *Crowley* v. *Copley*,* this assessment was held not to be within the act of Congress, which exempted from State taxation all public lands of the United States for five years after sale by the government.

In *The matter of the Mayor of New York*,† certain churches insisted that their lots were exempt from assessments for opening, enlarging, or otherwise improving streets in the city of New York, made pursuant to an act of legislature, passed in 1813. The court said that "these assessments were intended and directed to be made upon the owners of lands and lots who might receive 'benefit and advantage' by the improvement. The exemption granted by the act of 1801 was in the general act for the *assessment and collection of taxes;* and the provisions of that act referred to general and public taxes to be assessed and collected for the benefit of the town, county, or state at *large.* The words of the exemption were, that no church, or place of public worship, nor any school-house, should be taxed by any law of this State. The word 'taxes' meant burdens, charges, or impositions put or set upon persons or property for public uses, and this was the definition which Lord Coke gives to the word talliage,‡ and Lord Holt§ gave the same definition, in substance, to the word 'tax.' To pay for the opening of a street, in a ratio to the benefit or advantage derived from it, was no *burden.* It was no talliage or tax, within the meaning of the exemption."

In *Northern Liberties* v. *St. John's Church*‖ the same question arose, and the Supreme Court of Pennsylvania put the same construction on the word "tax," and held that the church property, though exempt from taxation under the general revenue law, was nevertheless subject to local assessments, appropriated to the improvement of the property itself.

* 2 Louisiana Annual, 329.
† 11 Johnson, 60.
‡ 2 Institutes, 532.
§ Carthew. 438.
‖ 13 Pennsylvania State, 104.

The same principle has been decided by the Supreme Court of Arkansas, in *Washington* v. *The State*,* and by the highest court in Missouri, in *Egyptian Levee Co.* v. *Hardin*.†

The cases, in short, show the uniform construction which the judiciary have put upon the terms, "taxes," and "taxation," as employed in their constitutions and revenue laws. And when we apply the rule, already alluded to, that exemptions must be strictly construed, it becomes clear that the fourteenth section of the act of 1851 did not intend to exempt swamp lands from special local assessments, to be expended for the benefit of the lands themselves, by making and repairing levees to protect them; and if the levee act of 1857 has that object in view only, it is obnoxious to no constitutional objection, whether repealed or unrepealed, and the obligation of no contract was impaired, because, as to that, no contract ever existed.

The CHIEF JUSTICE delivered the opinion of the court, and after stating the case, proceeded:

The first question which requires consideration in the case before us is: Was the levee tax imposed in violation of any contract between the State and the United States?

It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction,—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the Constitution.

The contract required the State to appropriate the lands granted to the purpose of reclaiming them. The lands themselves might be conveyed to the levee contractors for work performed, or the contractors might be paid in money or in scrip representing land. If the State, therefore, after acceptance of the grant, and without applying the lands or their

* 13 Arkansas, 752.

† 27 Missouri, 495

proceeds in money or scrip to the purpose of reclamation, had sought, by means of taxation, to compel purchasers to pay for the levees and drains necessary to reclaim their land, it would certainly be difficult to say that the contract was not violated. But the case before us hardly comes within this description. The allegation and proofs do not show that the State had not applied all the lands granted and their proceeds to the making of levees and drains before proceeding to impose the special tax; and if this was done, and the work of reclamation remained still incomplete, the imposition of such a tax for the completion or preservation of the work, cannot be regarded as inconsistent with the obligation of the contract between the State and the United States.

The next and only remaining question is: Was the levee tax in violation of any contract between the State and the complainant?

It seems quite clear that the act of 1851, authorizing the issue of transferable land scrip and its receipt from locators of land in payment, and the provision in the fourteenth section, offering inducements to purchasers and contractors by exempting from taxation, for ten years or until reclaimed, all the swamp or overflowed lands, constituted a contract between the State and the holders of the land scrip issued under the act.

When the scrip was issued to a contractor, it represented a certain quantity of land untaxable for ten years, unless the land should be sooner made fit for cultivation. When transferred to another person, it represented to him a like quantity of like land. The contract of the State was to convey the land for the scrip, and to refrain from taxation for the time specified. Every piece of scrip was a contract between the State and the original holder and his assigns. Now what was the effect of that contract when made? Did it not bind the State to receive the scrip in payment for swamp land, exempted for a limited time from taxation? The scrip, if not receivable for lands, was worthless. To annul the quality of receivability was to annul the contract. But the

exemption of the lands for which it was receivable from taxation was a principal element in its value; and repeal of the exemption was the destruction of this element of value. This was clearly an impairment of the contract. The State could no more change the terms of the contract by changing the stipulated character of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land.

We are constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the State with the holders of the scrip.

It was strenuously urged for the defendant, that the exemption contemplated by the statute was exemption from general taxation, and not from special taxation for local improvements benefiting the land, such as the making of levees; and many authorities were cited in support of this view. The argument would have great force if the provision for exemption had been contained in a general tax law, or in a law in framing which the legislature might reasonably be supposed to have in view general taxation only. But the provision under consideration is found in a law providing for the construction of levees and drains, and devoting to that object funds supposed to be more than adequate, derived from the very lands exempted, and the exemption is for ten years, or until reclaimed, and is offered as an inducement to take up the lands, and thus furnish those funds. It is impossible to say that this exemption was not from taxation for the purpose of making these levees and drains as well as from taxation in general. Any other construction would ascribe to the legislature an intention to take the whole land for the purposes of the improvement, and then to load it with taxation for the same object, in the hands of purchasers whom it had led to expect exemption from all taxation, at least until the land should be reclaimed.

Statement of the case.

The decree of the Supreme Court of Arkansas must, therefore, be reversed and the cause remanded, with instructions to enter a

DECREE IN CONFORMITY WITH THIS OPINION.

N. B. The same order was made in cases Nos. 28, 29, 30, 31, 32, and 33, argued with the above case, and which the Chief Justice said were governed by its decision.

UNITED STATES v. HOFFMAN.

1. The writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed.
2. Therefore, where the court to which the writ should be issued, has already disposed of the case, so that nothing remains which that court can do, either by way of executing its judgment or otherwise, no prohibition will be granted.
3. And this is true, though the final disposition of the case was made after service on the judge of a rule to show cause why the writ should not issue, and though other cases of the same character may be pending in the same court.

ON a motion for prohibition.

At the last term of this court the relator made application for a writ of prohibition to the judge of the District Court of the Northern District of California, to prevent that court from proceeding further in a certain cause in admiralty. This court, without looking into the question of the alleged want of jurisdiction, granted a rule on the judge of that court to show cause why the writ should not be issued; and an order accompanied the rule, that he should proceed no further in the case until the decision of this court in the premises.

The return of the judge to that rule was now before this court. The substance of it was, that after the rule had been served upon him the libellant in the admiralty suit came into court, and moved for permission to pay all the costs that had accrued, and to dismiss his suit. After hearing

argument the court granted the motion, and the libellant, having paid all the costs of both parties, an order was made dismissing the suit.

The relator now asked that the writ of prohibition might issue notwithstanding the return, and whether it should or not, presented the question to be here decided.

The suggestion of the relator, it may be here mentioned, stated that four other suits in admiralty against vessels owned by him, and founded on libels of the same character as the libel in this case, were pending in the same court.

Mr. Carlisle, in support of the motion:

The only fact stated in the return which can be alleged as cause why the prohibition should not issue, is that the libel has been dismissed by the order of the District Court.

This, however, was done after the rule was issued, and after it had been served, and against the objection of the party here suing for the prohibition, and while the question of the writ was *sub judice*, and was against the express mandate in the rule, that further proceedings in the said District Court upon the said libel be stayed until the further order of this court in the premises. It is therefore wholly impertinent to the return, and is at best mere surplusage.

But if such subsequent proceedings be properly before the court they present no objection to the writ. The law upon this subject is fully stated by Lord Coke, in his second Institute.*

"*Objection.* As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant in the ecclesiastical court after his answer, whereby he affirmeth the jurisdiction of the said court, and submitted himself unto the same; but also after all allegations and proofs made on both sides, when the cause is fully instructed and furnished for sentence; yea, after sentence; yea, after two or three sentences given, and after execution of the said sentence or sentences, and when the party for his long-

* Page 602.

continued disobedience is laid in prison upon the writ of *excommunicato capiendo;* which courses, forasmuch as they are against the rules of the common law in like cases (as we take it), and do tend so greatly to the delay of justice, vexation, and charge of the subject, and the disgrace and discredit of his majesty's jurisdiction ecclesiastical, the judges (as we suppose), notwithstanding their great learning in the laws, will hardly be able in defence of them to satisfy your lordships."

"*Answer.* Prohibitions by law are to be granted *at any time* to restrain a court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary. And it is the folly of such as will proceed in the ecclesiastical court for that whereof that court hath not jurisdiction, or in that whereof the king's temporal courts should have the jurisdiction. And so themselves (by their extraordinary dealing), are the cause of such extraordinary charges, and not the law; for their proceedings in such case are *coram non judice.* And the king's courts that may award prohibitions, being informed either by the parties themselves, *or by any stranger*, that any court temporal or ecclesiastical doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same as well after judgment and execution as before."

And the law continues the same to this day.*

The authorities, however, cited in the note, fall short of the present case, and the books, it is believed, furnish no instance of an inferior court proceeding in any direction or to any degree in the suit before it, while the very question of its jurisdiction was pending upon a motion for a prohibition in a superior court. Still less can any case be found of an inferior court so proceeding in the face of an express mandate to stay all proceedings in the premises until further order.

To allow the prohibition to be defeated in this manner,

* Paxton *v.* Knight, 1 Burrow, 314; Buggin *v.* Bennett, 4 Id. 2035; Roberts *v.* Humby, 3 Meeson & Welsby, 120; Jones *v.* Owen, 5 Dowling & Lowndes, 669.

would not only be against principle and precedent, but injurious and vexatious to the party suing here.

It appears by the suggestion that other suits by libel against the vessels of the same party are pending in the same court, under similar circumstances. If that court has no jurisdiction in the premises, the prohibition in the present case would have disposed of all the others. But if the proceeding set up by the return be sanctioned, the same thing may be repeated in each of those cases; and in this manner onerous costs may be put upon the party suing for, and, as is here assumed, entitled to the protection of this court, while he is still left exposed to the assertion of the same unfounded jurisdiction.

In the analogous case of an injunction, even where the defendant admitting the wrong discontinues it, and promises not to repeat it, the complainant is, nevertheless, entitled to the judgment of the court for his protection.*

By much greater reason should the prohibition issue in this case, as the question is one of jurisdiction, in which the public is concerned, when the writ will issue upon the suggestion of a stranger to correct a usurpation, as the authorities above cited show; whereas, in the absence of the writ, the records of the District Court can only show that the libellant there, for some undisclosed reason, thought proper to withdraw his suit; the judge, by the record, still affirming his jurisdiction, as to which he intimates no doubt in his return.

Mr. Justice MILLER delivered the opinion of the court.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent

* Losh v. Hague, Webster's Patent Cases, 200.

any further proceeding in the prohibited direction. In the case before us the writ, from its very nature, could do no more than forbid the judge of the District Court from proceeding any further in the case in admiralty.

The return shows that such an order is unnecessary, and will be wholly useless, for the case is not now pending before that court, and there is no reason to suppose that it will be in any manner revived or brought up again for action. The facts shown by the return negative such a presumption.

Counsel has argued very ingeniously that the case should be considered as remaining in the court below, in the same position as it was when the rule issued from this court; but we cannot so regard it. By the action of the libellant and the consent of the court, the case is out of court, and the relator is no longer harassed by an attempt to exercise over him a jurisdiction which he claims to be unwarranted. If the return shows no more, it shows that the district judge has no intention of proceeding further in that case. Now, ought the writ to issue to him under such circumstances? It would seem to be an offensive and useless exercise of authority for the court to order it.

The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases.

We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was

directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence.

Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court.

These views are supported by the following cases:

In *United States* v. *Peters*,* which was an application for prohibition to the admiralty, this court suspended its decision to give the libellant an opportunity to dismiss his libel. The court finally issued the writ, but there seems no reason to doubt, from the report of the case, that it would have considered such action by the libellant as an answer to the request for the writ.

In the case of *Hall* v. *Norwood*†—a very old case, when writs of prohibition were much more common than now—a prohibition was asked to a court of the Cinque Ports at Dover. While the case was under consideration, the reporter says: "On the other hand the court was informed that they had proceeded to judgment and execution at Dover, and therefore that they move here too late for a prohibition, and of this opinion was the court, since there is no person to be prohibited, and possessions are never taken away or disturbed by prohibitions." The marginal note by the reporter is this: "Prohibition will not lie after the cause is ended."

The rule heretofore granted in this case is

DISCHARGED.

WALKER v. UNITED STATES.

The jurisdiction of this court to re-examine judgments of the Circuit Courts is limited to cases where the matter in dispute *exceeds* $2000. Where it but equals that sum the jurisdiction does not exist.

THE United States had recovered judgment against Walker in the Circuit Court for the Eastern District of Louisiana, "for the sum of $2000, with interest thereon at the rate of

* 3 Dallas, 121.

† Siderfin, 166.

six per cent.," &c., and the case was now here on writ of error. *Mr. Ashton, Assistant Attorney-General*, citing the twenty-second section of the Judiciary Act of 1789, which gives a right to review in this court over judgments of the Circuit Courts "where the matter in dispute *exceeds* the sum or value of $2000," now moved to dismiss the writ; the matter in dispute, as he argued, not *exceeding* $2000, but being just equal to it. He observed that in *Knapp* v. *Banks*, in this court,* where the motion was to dismiss a writ where the judgment was for $1720, but with interest added exceeded $2000, the court granting the motion had indeed said in its order, "that where the plaintiff in the court below claims $2000 *or* more, and the ruling is for a less sum, he is entitled to a writ." But this, the counsel argued, was said *obiter* only, and could not be maintained.

No one appeared against the motion.

The CHIEF JUSTICE delivered the opinion of the court.

By the terms of the twenty-second section of the Judiciary Act the jurisdiction of this court to re-examine the judgments of the Circuit Court, is limited to cases where the matter in dispute exceeds the sum or value of two thousand dollars.

It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed or the amount of the judgment, or the amount in dispute in this court. It has been long settled, however, that when the judgment is for the defendant or for the plaintiff, and for less than two thousand dollars, and the *plaintiff* sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgment is for plaintiff and not more than two thousand dollars, and the *defendant* prosecutes in error, this court has not jurisdiction, for the amount in controversy, as to the defendant, is fixed by the judgment.† In deter-

* 2 Howard, 73.

† Cooke *v.* Woodruff, 5 Cranch, 13; Wise *v.* Columbian Turnpike Co., 7 Id. 276; Gordon *v.* Ogden, 3 Peters, 33; Smith *v.* Honey, Id. 469.

Syllabus.

mining the jurisdictional sum or amount it is obvious that neither interest on the judgment nor costs of suit can enter into the computation, for costs form no part of the matter in dispute, and interest on the judgment can only arise after rendition, while the jurisdictional amount, if determined by the judgment, is fixed at rendition. And this was settled in *Knapp* v. *Banks*.* In that case some expressions in the opinion and in the order seem to support the idea that if the amount of the matter in controversy is precisely two thousand dollars a writ of error will lie. But the attention of the court was not directed to such a case, and we are not aware that such a case until now was ever before the court. But there is nothing doubtful in the rules applicable to it. This court has no appellate jurisdiction, except such as is defined by Congress. The act of Congress limits this jurisdiction to cases where the matter in dispute *exceeds* two thousand dollars. We can no more take jurisdiction where the matter does not exceed than we can where it is less than that sum. The amount in controversy in the case before us, ascertained in conformity with the settled principles of the court, does not exceed two thousand dollars. We have, therefore, no jurisdiction of the writ of error, and it must be

DISMISSED.

BROWN v. WILEY.

1. Under the act of March 3d, 1863, establishing the Supreme Court of the District of Columbia, the action of that court can be examined here in no case in which like action in the Circuit Court of the district, whose place it supplies, could not be re-examined.
2. Hence, it can be examined only in those cases where there has been a final judgment, order, or decree.
3. The certificate of the finding of a jury on certain issues involving paternity, marriage, and legitimacy, sent from the Orphans' Court to the Supreme Court of the district, which certificate of finding is transmitted

* 2 Howard, 73.

Statement of the case.

by the Supreme Court to the Orphans' Court, is not such a final judgment, order, or decree as this court can re-examine on error.

4. Nor where the finding of the jury was at special term held by a single judge of the Supreme Court of the District of Columbia, under instructions by such judge, and a motion for new trial on exception to such instructions and other grounds has been heard at general term by all the judges and overruled, is such overruling a final judgment, order, or decree, reviewable on writ of error by this court.

A PETITION was filed in the Orphans' Court of the District of Columbia, by John Wiley and Emily his wife, setting forth that the said Emily was the child of Tillotson Brown, deceased, and his sole heir and distributee; that her mother, Elizabeth Brown, the widow of the said Tillotson, had duly administered upon his estate; that a surplus was left in her hands from the assets of the estate, and praying that such portion of the same as the petitioner was entitled to might be paid over to her.

Marshall Brown filed an answer to the petition, setting forth that he was the brother of said Tillotson, and alleging that the said Tillotson was never married to the said Elizabeth Brown, and that if he ever was so married, the petitioner, Emily Wiley, was not his child.

Thereupon the Orphans' Court, on the 10th of February, 1863, sent the following issues to the Circuit Court of the District of Columbia:

1st. Whether the petitioner, Emily Wiley, was the child of the said Tillotson?

2d. Whether the said Tillotson was ever married to the mother of said Emily?

3d. Whether, after the said marriage, the said Tillotson ever acknowledged the said Emily to be his child?

After this, that is to say, March 3d, 1863, an act of Congress abolished the Circuit Court, and established in its stead the Supreme Court of the District of Columbia.*

The issues were submitted to a jury, at a special term of this Supreme Court, November, A.D. 1865, and a verdict rendered thereon in the affirmative on all the questions.

* 12 Stat. at Large, 763.

Statement of the case.

A motion for a new trial was made, on exceptions taken at the trial, which was heard before all the four judges at a general term of the Supreme Court of the District of Columbia, in the manner prescribed by the statute constituting the court.* The motion was overruled, and the cause remanded with directions that the same should be proceeded in according to law.

Thereupon an order was entered by the court, before which the issues had been tried, directing that the finding of the jury on the issues sent from the Orphans' Court be certified by the clerk to said Orphans' Court.

The writ of error in this case was sued out, that the foregoing *order* might be brought up to this court.

It is proper here to remark that, by the eleventh section of the act of March 3d, 1863, abolishing the Circuit Court of the district, and establishing in its stead the Supreme Court, "*any final judgment, order, or decree* of said court may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, *in the same cases* and *in like manner as is now provided by law* in reference to final judgments, orders, or decrees of the Circuit Court of the United States for the District of Columbia;" and that in the Circuit Court referred to, as was provided by the law establishing it (an act of 1801), "*any final judgment, order, or decree*," . . . wherein the matter in dispute exceeded the value of $100, might "be re-examined, reversed, or affirmed in this court." It may also be mentioned, that by the eighth section of the act of 1863, it is enacted, "that if upon the trial of any cause an exception be taken, . . . it may be stated in writing in a case, or in a bill of exceptions, with so much of the evidence as may be material to the questions to be raised. . . . The justice who tries the cause may in his discretion entertain a motion to set aside a verdict and grant a

* The Supreme Court of the district, by the act constituting it, had four justices, before any one of whom any issues of fact triable by a court or jury might be tried (§ 7), it being enacted (§ 9), "that a motion for a new trial, &c., shall be heard, in the first instance, at a general term;" or court in banc.

new trial, upon exceptions, or for insufficient evidence, or for excessive damages."

A motion having been previously made and argued by *Mr. Bradley*, for a *certiorari* to supply an alleged diminution of the record, and by *Mr. Merrick*, *contra*—*Messrs. Brent* and *Merrick* now moved to dismiss the case for want of jurisdiction.

In support of the motion. The right of appeal from the Supreme Court of the district is no greater under the act of 1863 constituting it, than was the right of appeal from the old Circuit Court, under the act of 1801, constituting it. In either case the writ of error lay only to "a *final* judgment, order, or decree." Now, the matter in contest in the Orphans' Court was the right to a certain surplus. The suit between the parties has to remain pending until a decree in the Orphans' Court is pronounced, giving it to one party or to the other. The certificate from the Supreme Court is nothing more than evidence of the finding of a jury upon the trial of the issue. It but certifies a fact; that is to say, that the jury had so found. The case is like *Van Ness* v. *Van Ness*,* A.D. 1848, in which,—on an issue sent out of the Orphans' Court to the old Circuit Court, whose place the Supreme Court of the district supplies, to ascertain whether a certain Mary Ann Van Ness was the wife of J. P. Van Ness, a case, therefore, much like this,—Taney, C. J., says: "The order of the Circuit Court directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment order or decree, in the legal sense of these terms as used by the act of Congress. Certainly, it is not a final judgment; for it does not put an end to the suit in the Orphans' Court, as that court alone can dismiss the petition of the plaintiff which is there pending; and no other court has the power to pass a judgment upon it."

Messrs. Bradley and Davidge contra:

Neither the act of 1801 nor of 1863 requires the final judg-

* 6 Howard, 62.

Argument against the jurisdiction.

ment or order to be rendered in a suit pending in a court as required by the Judiciary Act of 1789, § 22. Whilst under that act only final judgments or decrees can be re-examined, the jurisdiction as respects this district is broader and embraces all final judgments, orders, or decrees.

The only matters in controversy in the Orphans' Court were those embraced in the issues sent for trial into the court below. The verdict of the jury destroyed the claim of Marshall Brown to the succession.

The judgment of the Supreme Court of this district, overruling the exceptions and remanding the cause to the judge holding the Circuit Court to be proceeded in according to law, was, in substance, a judgment or order that the certificate should issue. The inferior tribunal had no discretion. There is a judgment to the effect that there is no error in the exceptions, and ordering the issue, by a subordinate tribunal, of a certificate to another court, upon receipt of which, that court must pronounce a judgment which destroys the claim of the plaintiff in error.

Such a judgment is a final judgment or *order* within the meaning of the act of February 27th, 1801.

As the law stood when *Van Ness* v. *Van Ness* was tried, the Circuit Court had not the power to enter judgment. It could, after the verdict was rendered, grant a new trial, but it could do nothing more. A new trial was not applied for; but, had it been, a mere application to the discretion of the court would not have supported a writ of error.* The Circuit Court had no power to do more than certify the finding of the jury. That really was no judgment or order in any legal sense. It was simply a certificate of a physical fact of record, and is so treated in *Van Ness* v. *Van Ness*.

By the eighth section of the act of 1865, at the trial of any cause, the right to except is allowed. And under that clause the right to a new trial is absolute, if any exception be sustained. The right is not addressed to the discretion of the

* Sparrow *v.* Strong, 3 Wallace, 97–105.

court. To put any such construction upon it, would necessarily destroy the right of appeal to this court.

The distinction, then, between *Van Ness* v. *Van Ness* and the present case is, that in the former the Circuit Court had no control over the verdict, save simply to grant, in its discretion, a new trial, which was never applied for; and the refusal to grant which, if asked, could not support a writ of error. Whilst in this case the verdict was in the keeping of the Supreme Court of the district, whose duty it was, for any error duly excepted to at the trial, to order a *venire de novo*.

Any other construction of the first clause of the eighth section of the act of March 3, 1863, would deprive a party aggrieved of redress of writ of error from this court, which was not the intention of Congress, and expressly declared by the eleventh section of that act.

The CHIEF JUSTICE delivered the opinion of the court.

This cause is before us upon a motion to dismiss the writ of error.

On the 10th of February, 1863, certain issues of fact were sent by the Orphans' Court of Washington County, District of Columbia, to the Circuit Court of the district to be tried by a jury.

These issues were transferred, by the act of Congress of March 3, 1863, to the Supreme Court of the District of Columbia, and were brought to trial in November, 1865, before that court, held by a single judge, in special term. All the issues were determined in the affirmative by the jury, under the rulings of the judge. Exceptions were taken to the rulings, and a motion for new trial was made in general term, before all the judges, and was overruled. Subsequently, an order was made at special term certifying the finding of the jury on the issues to the Orphans' Court.

The record of these proceedings is brought here by writ of error.

The case, in almost every particular, is identical with that

of *Van Ness* v. *Van Ness*.* In that case, as in this, an issue of fact was sent out of the Orphans' Court to the Circuit Court to be tried by a jury; was tried and found in the negative. Exceptions were taken to the rulings upon the trial, and an order was made certifying the finding to the Orphans' Court. The proceeding was brought into this court by writ of error, which was dismissed for want of jurisdiction.

It is true that in the case before us the exceptions were taken to the rulings at special term; and that a motion for new trial was heard at general term, and was denied, whereas it does not appear that there was any motion for new trial in the case of Van Ness, and it was insisted in argument that this difference in proceeding distinguishes the two cases, so that the latter cannot be regarded as an authority in the decision of the former.

We are unable to perceive that the difference is material. The order certifying the finding to the Orphans' Court, in the case of Van Ness, was identical in effect with the two orders overruling the motion for new trial, and certifying the finding in the case before us. In each case the exceptions taken at the trial before the jury were overruled, and nothing was left for action in the court before which the issues were tried; but the cause went to the Orphans' Court for final judgment.

In that case it was held that the order was not one which could, under the act, be re-examined on writ of error, and we see no reason for a different ruling in this.

It was argued that the act organizing the Supreme Court of the district gives this court jurisdiction of this case by writ of error. We do not think so. That act expressly provides that any final judgment, order, and decree of the District Supreme Court may be re-examined upon writ of error or appeal, "in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the District Circuit Court." It is clear, therefore, that the action of the former court can be re-examined here

* 6 Howard, 62.

in no case in which like action in the latter court could not be re-examined.

The only real difference between the two statutes is that the latter gives an appeal from a decision of the single judge at special term, on a motion for new trial, to the whole court at general term, or secures an original hearing of the motion in general term. This is an advantage to the unsuccessful party not formerly enjoyed, but it makes no changes as to re-examination upon appeals or writs of error in this court.

The court has considered the motion for a *certiorari* to supply alleged defects in the record; but, after a careful comparison of the suggestions of counsel with the record before us, and the act establishing the Supreme Court for the District of Columbia, we are satisfied that the granting of the motion would avail nothing to the plaintiff in error. It must, therefore, be overruled. And the writ of error must be

DISMISSED FOR WANT OF JURISDICTION

LOCKE *v.* NEW ORLEANS.

1. A statute which simply authorizes the imposition of a tax according to a previous assessment is not retrospective.
2. Every retrospective act is not necessarily an *ex post facto* law.
3. Such laws embrace only such as impose or affect penalties or forfeitures.

THE legislature of Louisiana enacted, A.D. 1850—

"That each of the municipalities of said city shall be and is hereby empowered to levy a tax on capital on the assessment roll for the year 1848, and a tax on capital on the assessment roll for the year 1849: *Provided*, that the taxes on capital on said assessment rolls, for the years 1848 and 1849, shall not exceed the amounts already imposed by existing ordinances of the said municipalities."

Under the authority of this act the City of New Orleans, having levied a tax on capital owned and employed during

the years mentioned by Locke, brought suit to enforce its payment. One defence set up was that the act was unconstitutional. The Supreme Court of the State having, on appeal from the District Court, whose judgment it affirmed, decided that it was not, the case was now brought here for review.

Mr. Janin for the plaintiff in error. No opposite counsel.

Mr. Justice FIELD delivered the opinion of the court.

The legislature of Louisiana in 1850 passed an act authorizing each of the municipalities of the City of New Orleans to levy a tax on capital within its limits on the assessment rolls of 1848 and 1849, not to exceed the amounts imposed by existing ordinances. The present action was instituted to recover, in part, the amount of the tax levied under this act upon capital owned and employed by the defendant in one of the municipalities. As a defence the defendant, among other things, alleged the unconstitutionality of the act of the legislature authorizing the tax. The District Court, in which the action was brought, gave judgment for the city, and the Supreme Court of the State affirmed the judgment.

The unconstitutionality of the act was asserted from its supposed retroactive operation, upon the notion that the prohibition of the Federal Constitution upon the States to pass an *ex post facto* law extended to all retrospective laws.

There was nothing in the position taken which entitled it to consideration. In the first place the act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment. In the second place, even if the law had been strictly retrospective, it would not have been within the constitutional inhibition. *Ex post facto* laws embrace only such as impose or affect penalties or forfeitures; they do not include statutes having any other operation. The term *ex post facto*, literally construed, would apply to any act

operating upon a previous fact, yet the restricted sense stated is the one in which it has always been held. It was the sense in which it was understood at the time the Constitution was adopted, both in this country and in England.*

JUDGMENT AFFIRMED.

STURDY v. JACKAWAY.

A final judgment pronounced in an action of ejectment, where the claim of title in fee simple absolute by the parties respectively was the sole subject of controversy, instituted and prosecuted under and according to the forms and in the manner prescribed by the statute laws of the State of Arkansas, that is to say, by a suit between the real litigants by name and where the land is accurately described, is a valid legal bar to a like action subsequently instituted between the same parties for the same lands or premises, involving the same identical title and rights to the possession of such lands or premises and none other.

Semble. The doctrine is applicable generally in ejectments, in the form above described, in those States where no provision is made by statute for a subsequent trial.

STURDY brought ejectment against Jackaway in one of the State courts of Arkansas to recover a tract of land in that State, the action being brought not in the English fictitious form used still in some States of the Union, but in the way now more common with us—and which prevails in Arkansas—where the parties sue, as in other cases, in their true names, and where the land claimed is described so as to be capable of complete identification. Judgment was given for the defendant; and the case having gone to the Supreme Court of Arkansas the judgment was there affirmed. He then brought another ejectment for the same premises in the Circuit Court of the United States for the Eastern District of Arkansas, and the defendant having pleaded the former judgment the plaintiff demurred. The judges of the

* 1 Blackstone, 46; Calder *v.* Bull, 3 Dallas, 390.

Opinion of the court.

Circuit Court being opposed in opinion as to the sufficiency of the demurrer, the following questions were certified to the court:

1st. Is said plea good in law as a bar to this action?

2d. Is a final judgment pronounced in an action of ejectment, where the claim of title in fee simple absolute by the parties respectively was the sole subject of controversy, instituted and prosecuted under and according to the forms and in the manner prescribed by the statute laws of the State of Arkansas, a valid, legal bar to a like action, subsequently instituted between the same parties, for the same lands or premises, involving the same identical title and rights to the possession of such lands or premises, and none other?

There was nothing shown by the record or otherwise to indicate that the statute law of Arkansas made a distinction between ejectment and other actions as to the conclusiveness of a verdict and judgment.

Mr. Carlisle, with a brief of Mr. Watkins, for the defendant. No counsel contra.

Mr. Justice GRIER delivered the opinion of the court.

The two questions certified by the court below constitute but one.

It is a well-settled principle of the common law "that in personal actions concerning debts, goods, and effects (by way of distinction from other actions), a recovery in one action is a bar to another. This principle is not true of personal actions alone, but is equally and universally true of all actions, whatsoever *quoad* their subject-matter; and that an allegation on record, on which issue has been once taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once tried and found."*

The action of ejectment was devised for a lessee of a term

* Outram v. Morewood, 3 East, 356.

of years, who was ousted of his term, and who, having but a chattel interest, could not support a real action to recover possession. It was but an action of trespass in effect, and the remedy was in damages only for the dispossession. But afterward the court determined the lessee should not only recover damages, but also his *term*, which soon brought the action into general use; and, by the formal scaffolding of a lease, entry, and ouster, the action was converted into a method of trying, collaterally and incidentally, the title of the lessor.

Hence, as the title of the freehold was never *formally* and *directly* in issue by the pleadings, but only a trespass committed by John Doe on Richard Roe, in forcibly expelling him from a term of years, no verdict between these parties for the supposed trespass could be pleaded in bar to another action of trespass by Thomas Troublesome on Timothy Peaceable.

It was in this way that the doctrine crept in that a verdict and judgment were conclusive only as regards personalty.

Afterwards, when this fictitious scaffolding was demolished in many States, and the parties made their issue in their own names—where there could be no difficulty as to the estoppel—the idea of a difference between rights to real property and personalty still continued in many States to linger, and a single verdict and judgment in ejectment was not considered conclusive. In such States provision was usually made by statute for a second trial.

But where no such provision has been made, the party's privilege to plead his estoppel, according to his right at common law, has always been recognized by the court.*

We find nothing in the statutes of Arkansas, or in their judicial decisions, making any exceptions or difference as to the conclusiveness of a verdict and judgment in real or personal action.

This question must, therefore, be answered

IN THE AFFIRMATIVE.

* See Miles *v.* Caldwell, 2 Wallace, 35; Blanchard *v.* Brown, 3 Id. 245.

RAILROAD COMPANY *v.* ROCK.

1. In a case brought here from a State court, under the twenty-fifth section of the Judiciary Act, the record must show that some one of the matters mentioned in that section was necessarily decided by the court, notwithstanding there may be a certificate from the presiding judge, that such matters were drawn in question.
2. If it appears from the record that the State court might have decided the case on some other ground, this court has no jurisdiction.
3. This court cannot review the decision of a State court upon the general ground, that that court has declared a contract void, which this court may think to be valid.
4. It must be the Constitution or some statute of the State which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution or laws of the United States; and the decision of the State court must sustain the law of the State in the matter in which this conflict is supposed to exist, or the case for this court does not arise.

THIS was a motion by *Mr. Templin* to dismiss a writ of error to the Supreme Court of Iowa, issued under the twenty-fifth section of the Judiciary Act, which gives authority to the Supreme Court of the United States to review final judgments in the highest court of a State "where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution, &c., of the United States, and the decision is against the title, right, &c., specially set up or claimed under such clause."

The case was thus:

Rock, on behalf of himself and the other resident taxpayers of Iowa County, filed his bill in the proper State court against the Missouri and Mississippi Railroad Company, plaintiff in error, and Wallace, county judge of the said county. He prayed that certain bonds, purporting to be the bonds of the County of Iowa, which he alleged to be then in the possession of the plaintiff in error, should be declared void, and that plaintiff should be enjoined from negotiating them; and that the county judge should be en-

Argument against the motion.

joined from levying or collecting any tax to pay said bonds or the interest on them.

The bill of complainant asked for relief on two grounds:

1. That the county judge disregarded the requirements of a certain statute set forth in the bill, in the submission to the vote of the people of the question of issuing the bonds.

2. That the county judge and the Railroad Company, to whom they were first issued, were guilty of fraud in the issue of the bonds.

The court decreed as prayed by Rock, and the Railroad Company appealed to the Supreme Court of Iowa, which affirmed that decree.

More than two years after this affirmance, the chief justice of that court certified that, upon the hearing in that case, there was drawn in question:

1. The validity of the Constitution of the State of Iowa as being repugnant to the Constitution of the United States.

2. That clause of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts.

3. That clause of the Constitution of the United States which provides that said Constitution shall be the supreme law of the land.

And it was further certified, that the decision was against the right claimed under the Constitution of the United States and the several clauses thereof.

The ground of the motion made to dismiss was, that it nowhere appeared by the record that the question of the repugnancy of the laws and Constitution of Iowa to the Constitution and laws of the United States was passed upon; and that the certificate of the judge would not of itself conclude the court on that matter.

Messrs. Grant and Cook against the motion:

In *Armstrong* v. *The Treasurer of Athens Co.*,* the chief justice of the State court attached to the record his certifi-

* 16 Peters, 281.

cate that the decision drew into question the validity of that clause in the Constitution of the United States, which provides that no State can pass a law impairing the obligation of contracts, and that the decision was against the clause. The certificate in the case at bar is drawn up and signed as was that in the authority cited; and this will be seen by reference to that authority.

In that case the court says:

"We presume the certificate of the presiding judge was made by authority of the court, and as the bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise and was decided, the case comes within the fourth clause, and this court must take jurisdiction."

But independently of the certificate we have an authoritative report of the case now brought here from the Supreme Court of Iowa, in the printed reports of that court's decisions. Volume 14th of the series gives us the very case now here on error. It removes all difficulty. The court say that the bill was filed to cancel certain bonds for the want of power in the county judge to issue the same, and because of certain alleged irregularities attending their issue, and they add: "Following *Stokes* v. *Scott Co.*,* and *B. & M. R. R. Co.* v. *Wapello*,† we affirm the judgment below."

Now in both the cases cited and followed, the Supreme Court of Iowa held the bonds unconstitutional while yet unissued, and in the present case it applied this principle of unconstitutionality to bonds issued and in the hands of *bona fide* holders.

The case then fairly presented the constitutional question, and the point which was decided by the Supreme Court of Iowa was, that these bonds (issued and delivered in November, 1858, to *bona fide* holders, and at a time when, as is well known, the Supreme Court of the State held them to be constitutional and valid), were unconstitutional and invalid, null and void. The Supreme Court of Iowa, then, have

* 10 Iowa, 166.

† 14 Iowa, 593, 594.

made a decision in this case which impairs the obligation of contracts. The judicial interpretation of a law is part of the law as much as if written in it.

Mr. Justice MILLER delivered the opinion of the court.

After a very careful examination of the record of the case, we are unable to discover that either the validity of the Constitution of the State of Iowa, or the clauses of the Constitution of the United States mentioned in the certificate, are involved in that record, or were decided by the court. It is probable that counsel, in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the chief justice felt bound to certify, when requested, that they were drawn in question. But if the record does not show that they were necessarily drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument.

In *Lawter* v. *Walker*,* a case was brought here on a certificate from the State court. It was dismissed for want of jurisdiction. The court said: "The twenty-fifth section of the Judiciary Act requires something more definite than such a certificate to give to this court jurisdiction. The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given judgment without deciding it." To the same effect is the case of *Mills* v. *Brown*.†

The bill of complainant claims relief on two grounds:

1. That the county judge disregarded the requirements of the statute, in the submission to the vote of the people of the question of issuing the bonds.

* 14 Howard, 149. † 16 Peters, 525.

2. That the county judge and the Railroad Company, to whom they were first issued, were guilty of fraud in the issue of the bonds.

The court may have held the bonds void on the latter ground, and may have based its decree on that allegation. If so, there can be no pretence that such a ground involves any question of the Constitution of the United States or of the State of Iowa.

In the argument of counsel before us, no attempt is made to show that any provision of the Constitution of the State of Iowa conflicts in any way with the Constitution of the United States. The whole case, in the language of the brief, is put upon the ground that the "Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts;" and the argument goes upon the fundamental error that this court can, as an appellate tribunal, reverse the decision of a State court, because that court may hold a contract to be void which this court might hold to be valid. If this were the law, every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review, and we should thus become the court of final resort in all cases of contract, where the decisions of State courts were against the validity of the contracts set up in those courts.

This, obviously, was not the purpose of the Judiciary Act It must be the Constitution, or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise. No such thing appears in the case before us, which is the case of a citizen of Iowa, suing a corporation of Iowa, in the Iowa courts, their rights being determined either upon a construction of local law in no way in conflict with the Federal Constitution, or else upon a simple question of fraud.

The writ of error must be

DISMISSED.

UNITED STATES *v.* DASHIEL.

1. The loss of public money by a receiver and disburser of it, through felonious taking away, though without fault on his part, does not discharge him or his sureties from obligation on his official bond.
2. Whatever system of pleading may be adopted in a court below, it can hardly justify or require the court to give an instruction contrary to law; especially where the plea relied on as the ground for such instruction constitutes no defence to the action, but is frivolous and would be stricken from the record on motion.
3. Where a plea in answer is but notice of special matter by way of abatement of the amount claimed and so goes to but part of the cause of action, it cannot be relied on as a plea in bar.
4. A motion for a new trial is not a waiver of exceptions.

ERROR to the District Court of the United States for the Western District of Texas.

The suit was brought on the official bond of Dashiel, a paymaster in the army of the United States, and Paschall, one of his sureties, for breach of the condition in not paying over or accounting for public money that came into his hands.

The only defence set up was by way of plea or answer, and in substance is, that Dashiel received of the government $28,000 in gold, at Charleston, S. C., 15th June, 1857, for the purpose of paying off the troops at Forts Dallas and Capron, in Florida, and being compelled to stop at Pilatka several days, some $13,000 of the money were stolen from him —$3320 of which were afterwards recovered—and insists that he is not liable for the remaining $9675 so lost.

On the trial, the government gave in evidence properly authenticated transcripts, from the books and proceedings at the Treasury, of the account of Dashiel, showing a balance against him on the 15th of September, 1858, of $20,085.74 and costs.

The defendant then offered evidence tending to prove the loss of the money set up in the answer or notice, which was objected to on the part of the government, but admitted by the court, and which is set out in the record.

The court, among other things, instructed the jury that

the theft or robbery, if satisfactorily proved, was a good defence, if it did not occur from any want of proper care and vigilance on the part of the officer; under which instruction the jury found a verdict for the government for the balance due, after deducting the $9675.

A motion for a new trial on the part of the plaintiff having failed, the case was now here; the instruction above given being the matter complained of.

Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the United States, plaintiff in error:

It is an adjudicated principle that the felonious stealing, taking, and carrying away the public moneys in the custody of a receiver and disburser of public moneys without any fault or negligence on his part, does not discharge him or his sureties from the obligation of his official bond, and constitutes no defence to an action by the United States on that bond.

United States v. *Prescott et al.** is in point. The defendant was receiver of public moneys at Chicago, and gave bond for the faithful discharge of the duties of his office, which required him to keep safely all the public moneys in his custody, and to pay over the same when required so to do. In the action brought against him and his sureties for the recovery of moneys intrusted to his care, the defendant pleaded that a portion of the same had been stolen from the office without any fault or negligence on his part. On a demurrer by the United States, the question arose, and was certified to this court for its opinion, whether that fact constituted a defence to an action on his official bond for the recovery of the stolen money. The court says: "The liability of the defendant, Prescott, arises out of his official bond and principles which are founded upon public policy. The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him when required; and the question is, whether he shall be exoner-

* 3 Howard, 578.

ated from the condition of his bond on the ground that the money had been stolen from him? The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. Public policy requires that every depositary of the public money should be held to strict accountability. Not only that he should exercise the highest degree of vigilance, but that he 'should keep safely' the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish loss, without laches on his part. As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

In the subsequent case of *United States* v. *Morgan et al.*,* this court applied those principles with the same rigor in an action by the United States against a collector of customs.

A demurrer was made in *United States* v. *Prescott* to a plea such as is here set up, and undoubtedly a demurrer would have lain here.

The ruling and charge of the court below were in direct violation of both the adjudications cited.

Mr. G. W. Paschall, contra:

1. It is insisted by the Attorney-General, that a demurrer lay to this plea, as in the case of *United States* v. *Prescott.* But in the case at bar no demurrer was interposed; no exception was taken to the plea, and thereby the plaintiff virtually admitted that if the facts should be proven they would constitute a good defence. The objection to the evidence came too late. It was good enough for the plea, and, as no demurrer was taken to the plea, it was good enough to admit the evidence.

2. No exceptions were taken to the evidence when offered, or to the charge of the court when given.

* 11 Howard, 160.

Opinion of the court.

3. Even if the bill of exceptions had been taken, or the point reserved, by moving for a new trial the plaintiff waived the objections to the evidence and to the charge; and as this court will not consider the merits of the motion, there is really nothing before the court. The general common-law principle is, that a motion for a new trial does waive the bill of exceptions.

Mr. Justice NELSON delivered the opinion of the court.

The question involved in this case has been already twice decided by this court, and need not again be examined. The decisions will be found in 3 Howard, 578 (*United States* v. *Prescott and others*) and 11 Ib. 160 (*Same* v. *Morgan and others*).

It is insisted on the part of the defendants that as the plea was not demurred to, but went to issue, the evidence of the robbery supported it, and that the court was therefore right in admitting it and in giving the instructions to the jury. We are not advised as respects the system of pleading that may have been adopted in the court below, but whatever it may be it can hardly justify or require the court to give an instruction to the jury contrary to law, and especially when the plea itself, as it is called, constituted no defence to the action, but was frivolous and would have been stricken from the record as such on a proper motion in the court below. This plea in answer is but a notice of special matter by way of set-off, or abatement of the amount claimed against the defendants. It went only to part of the cause of action. To have constituted it a plea in bar of the action the amount beyond the sum lost should have been tendered and brought into court, setting up the theft as to the balance.

It is urged that no exception was taken to the ruling of the court at the trial; but this is a mistake. It was taken in express terms to the particular instruction in question.

It is also insisted that the motion for a new trial in the court below was a waiver of the exception. The practice is every day otherwise.

JUDGMENT REVERSED AND VENIRE DE NOVO.

UNITED STATES v. ALLSBURY.

If a judgment is obtained against a surety, the amount of it being fixed by a judgment previously obtained against his principal, the former judgment cannot be reversed on error as for an amount too small, though the latter should be afterwards reversed as having so been.

ERROR to the District Court of the United States for the Western District of Texas.

Allsbury had become bound as surety in the official bond of Dashiel, paymaster. Suit having been brought on this bond against Dashiel, and Paschall, one of the sureties, to recover what the United States alleged was due, to wit, $20,085, a defence was set up to part of the claim; and the defence being sustained by the court below, the United States had verdict and judgment for but $10,318.22. Error was taken to that judgment, and the judgment reversed. The case next preceding gives report of the matter.

The present suit was brought on the same official bond of Dashiel, against the personal representatives of Allsbury, another of the sureties. The case came on for trial after the trial, verdict, and judgment, just mentioned, against the principal, and Paschall, the other surety, for $10,318.22.

The judgment was pleaded *puis darrein continuance*, in this suit, for the purpose of reducing the recovery to that amount.

It was admitted by the court, and instructions given accordingly, and the jury found a verdict for the above sum.

The correctness of what was thus done was the question now here.

Mr. Stanbery, A. G., submitted the case in behalf of the United States. *Mr. Paschall, contra.*

Mr. Justice NELSON delivered the opinion of the court.

It is unnecessary to refer to authorities to show that the liability of the surety cannot exceed that of his principal; and that amount having been fixed by a judgment at law,

it formed the rule to determine the sum to be recovered in this suit. The verdict and judgment were competent evidence on behalf of the surety for this purpose; indeed, the highest evidence of the fact. Other questions would have arisen if this judgment had been offered against the surety. The counsel for the government, if desirous of recovering a greater amount, should have postponed the trial of this case till the error had been corrected which was committed in the case against the principal. Then he would have been in a situation to avoid the effect of the erroneous judgment. This is the only question presented on the record.

JUDGMENT AFFIRMED.

LEFTWITCH *v.* LECANU.

1. When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, otherwise it will be disregarded.
2. That a copy of a paper is attached to a pleading in the case, which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can this court presume that it is the same paper read in evidence and excepted to.

A STATUTE of Louisiana* enacts "that notaries shall keep a book, in which they shall transcribe all the protests by them made, with mention made of the notices which they shall have given to drawers and indorsers, &c.; which declaration, duly recorded *under the signature* of the notary public *and two witnesses*, shall be received as a legal proof of the notices."

With this statute in force, Lecanu sued Leftwitch and others in the Circuit Court of the United States for the Eastern District of Louisiana, as indorsers of a promissory note. The suit was in the form usual in Louisiana, that is to say, by petition, and the plea was a general denial.

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* Stat. of 1855, p. 48, § 7.

On the trial before a jury, the counsel for the plaintiff below offered in evidence an instrument in writing on the back of the protest, and purporting to be a certificate of the notary, that he had notified the indorsers of the note, which is contained in the record.

The certificate, although it stated in the body of it that it was signed by two persons, Janin and Lenes, the "two witnesses," *had not their signatures to it.*

The counsel for the defendants objected to reading the instrument, on the ground that the certificate was not in conformity with the laws of Louisiana, and, consequently, that it did not prove the notice. The court overruled the objection, and the plaintiff excepted.

The bill of exceptions stated that "plaintiff offered in evidence an instrument in writing on the back of the protest, purporting to be a certificate of the notary, that he had notified the indorsee to this note, *which is hereunto annexed for reference as a part of this bill*, to which certificate counsel for defendant objected," &c. No such paper was, however, found attached to the bill of exceptions, nor in any manner referred to, or marked, or identified as being a part of it, or as the paper which was offered in evidence.

Mr. Gillet, for the plaintiff in error. Mr. Carlisle, contra.

Mr. Justice MILLER delivered the opinion of the court.

The only allegation of error in this record relates to a certificate of a notary public, that he had notified the indorsers of a promissory note of the dishonor of said note.

The bill of exceptions states that "plaintiff offered in evidence an instrument in writing on the back of the protest, purporting to be a certificate of the notary, that he had notified the indorser of the note, *which is hereunto annexed for reference as a part of this bill*, to which certificate counsel for defendant objected," &c. No such paper is found annexed to the bill of exceptions, nor in any manner referred to, or marked, or identified as being a part of the bill of exceptions, or as the paper which was offered in evidence.

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The suit being in the Circuit Court for the District of Louisiana was commenced by petition, and according to the practice in such cases, there is annexed to the petition a copy of the note sued on, and of the protest and certificate of notice to the indorsers. But this is merely a copy attached to, and a part of the pleading, and is certainly not the *paper* which was offered in evidence. It may or may not be a perfect copy of that paper; but whether it is so or not, it is certain that it does not become a part of the bill of exceptions by being attached to the pleading.

If a paper which is to constitute a part of a bill of exceptions, is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions.

There is nothing of the kind here; and as we must presume the ruling of the court to be right, in the absence of anything showing it to be wrong, the judgment must be

AFFIRMED.

MAYOR *v.* SHEFFIELD.

1. Where a corporation is sued for an injury growing out of negligence of the corporate authorities, in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally.
2. If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, they cannot, when sued for such injury, defend themselves by alleging want of authority in establishing the street.

ERROR to the Circuit Court for the Southern District of New York.

The action below was brought by W. P. Sheffield, against the Mayor, &c., of New York, to recover damages for injuries received by him from stumbling over a stump at the

Statement of the case.

edge of the sidewalk around the lower end of the City Hall Park, in the city of New York.

Upon the trial it appeared that on the 16th December, 1857, Sheffield, while crossing, in the evening, the lower end of the City Hall Park, fell over a stump above the level of the sidewalk and broke his thigh-bone; that the stump was about fourteen inches distant from the curb of the sidewalk, and was about six inches high and four inches in diameter at the top.

It also appeared that the place where the stump stood, was, prior to the 18th November, 1847, and had been for more than thirty years, within and a portion of the City Hall Park; but that on the day just named, the Common Council of New York adopted an ordinance authorizing the Committee on Lands and Places, together with the street commissioner, to adjust the lower corner line of the Park, so as to make a curve, &c., and that under this ordinance—to the reading of which the counsel of the city, for reasons which will appear in the argument, excepted—the committee and street commissioner shortened the Park twenty feet, cut down a tree there, and threw those twenty feet—within which the stump of the tree—the stump which had caused the accident, stood—into the public street.

The court charged thus:

"The corporate authority of New York, by virtue of their charter and of the laws, have the charge and control of the streets and sidewalks within the corporate limits, and they are bound to keep them in good and safe condition. If they leave an opening in the sidewalk, as is sometimes done, and a person coming along in the night falls into it, without any want of proper care on his part, the defendants are liable for any injury that may be occasioned. So if an obstruction on the face of the sidewalk, over which a person stumbles—boxes, if you please—left out on the sidewalk on a dark night, or barrels, over which a person stumbles and falls, in the absence of want of care on his part, the defendants are equally liable for the injury. The opening in the one case and the obstruction in the other constitute the negligence, are evidence of negligence on the part of

Argument for the plaintiff in error.

the authorities who have the control of the matter, and in order to escape from the charge of liability, the burden is thrown upon them to disprove negligence.

"If the plaintiff in this class of cases has been himself guilty of negligence, and which materially contributed to the injury, then he cannot recover, even if the defendants have been shown to be guilty of negligence. The plaintiff must be free from fault."

Verdict and judgment having gone for the plaintiff, the case was now here on exceptions to the evidence as above mentioned, and charge.

Mr. O'Gorman for the City, plaintiff in error:

1. The stump over which the defendant in error fell was not in a public street. The judgment of the court below, therefore, cannot be sustained.

(*a.*) The position taken by the plaintiff is that owing to the neglect of the plaintiff in error to remove an obstruction from a public street, the injuries complained of were received and the damages recovered sustained. Now prior to 1847, the place where the accident occurred and the stump stood, was a part of the City Hall Park, and the only evidence that such place ever became a part of a public street is the resolution of the Common Council authorizing the street commissioner to curve the lower end of the Park, and the action of that officer under that resolution in cutting off twenty feet therefrom.

Did this resolution, the action of the street commissioner under it, and the subsequent use by the public of the space cut off from the Park, constitute that space a part of a public street? The resolution cannot have that effect, for the reason that the Common Council had no power to pass it.* Prior to 1847, the space where the accident occurred had been a part of and in use as a public park for more than thirty years; and within the principles established by the authorities cited in the note, it was incompetent for the Com-

* Commonwealth *v.* Alburger, 1 Wharton, 469, 485; Commonwealth *v.* Rush, 14 Pennsylvania State, 186; Lawrence *v.* Mayor, 2 Barbour, 577.

mon Council to diminish the Park by throwing a part of it into the street. The ordinance being void, the act of the street commissioner was without authority.

(*b.*) The space in question as a part of the public park was a portion of the real estate owned by the corporation of the city of New York.

In 1844 this real estate was, by an ordinance duly enacted, pledged to the redemption of the city debt. This pledge was in 1845 confirmed and made absolute by an act of the State Legislature.* The effect of this ordinance and act was to deprive the Common Council of any power to sell or dispose of any of the real estate of the corporation. The same principle which would justify the conversion of a portion of the park into a street would support any other disposition of the public property which the Common Council might choose to make. It is manifest, therefore, that neither the resolution of the Common Council nor the act of the street commissioner could constitute the space in question a part of a public street, for the reason that the resolution was void and the act of the officer unauthorized.

(*c.*) In the city of New York the laying out, opening, altering, and widening of public streets is regulated by statute.†

A statute of the State provides that whenever any street is to be laid out, opened, altered, enlarged, or improved, the mayor, aldermen, and commonalty must apply to the Supreme Court for the appointment of commissioners. It is made the duty of the commissioners to view the lands and tenements required for the improvement, and to make a just and equitable assessment of the loss and damage over the benefit and advantage. The statute further provides that if any lands, tenements, or premises belonging to the mayor, aldermen, and commonalty of the city of New York shall be required for the improvement, they shall be compensated for the loss and damage they sustain in like manner as other owners and proprietors of premises. The stat-

* Revised Ordinances of 1859, chapter 9, p. 190–202. Session Laws of 1845, chapter 225, p. 248, § 5.

† Session Laws, 1813, chapter 86, §§ 176, 178.

ute then enacts, that upon the confirmation by the Supreme Court of the report which the commissioners are required to make, the lands taken shall be appropriated and kept open for a public street forever. Until, therefore, this space in question is shown to have been taken in conformity with requirements of statute, it cannot be regarded as a public street.* The space in question having never been accepted as a part of a public street in the manner provided by law, the corporation were not bound to remove the stump, nor are they liable for the injuries received by the defendant in error.†

2. The charge asserts, that the existence of an obstruction in a street is evidence of negligence and constitutes negligence, and throws upon the defendants the burden of disproving the negligence. Under this charge, no question was left to the jury; for if the existence of the obstruction constitutes the negligence, it is clearly impossible to disprove the negligence without disproving the existence of the obstruction, and the charge was equivalent to saying that in every case in which an obstruction exists in a street, the defendants would be liable.

In addition, it wholly disregards the necessity of notice to the city authorities of the existence of the obstruction.

Mr. W. P. Sheffield, contra.‡

Mr. Justice MILLER delivered the opinion of the court.

1. The first error claimed to be found in the record of this

* Matter of Seventeenth Street, 1 Wendell, 262; City of Oswego *v.* Oswego Canal Co., 2 Selden, 6 N. Y. R. 257; Clements *v.* Village of West Troy, 16 Barbour, 251; Northumberland *v.* Atlantic and St. Lawrence R. R. Co., 35 New Hampshire, 574; Commonwealth *v.* Kelly, 8 Grattan, 632; Holmes *v.* Jersey City, 1 Beasley, 299; Reed *v.* Town of Cornwall, 27 Connecticut, 48; Underwood *v.* Stuyvesant, 19 Johnson, 181.

† Bowman *v.* City of Boston, 5 Cushman, 1.

‡ He cited among other cases, The Mayor, 5 Selden, 163, S. P., The Mayor *v.* Furze, 3 Hill, 612; Rochester White Lead Co. *v.* The City, 3 Comstock, 464; Conrad *v.* Trustees, 16 New York, 158; Rex *v.* Hudson, 2 Strange, 909; Trustees *v.* Merryweather, 11 East, 375; Hobbs *v.* Lowell, 19 Pickering, 409; Cincinnati *v.* White, 6 Peters, 431.

case is based on the proposition of the defendant below, that the *locus in quo* was not a legally established public street, and therefore the city was not liable for its condition. On this point the court ruled adversely to the city.

The facts as shown by the bill of exceptions in reference to this matter are in substance these: The place where the accident occurred was formerly a part of the City Hall Park, the property of the corporation of the city of New York. In November, 1847, the City Council ordered that the lower corner-line of the Park be so adjusted as to make a curve, instead of corners and angles, from Broadway to Chatham Street. The execution of those orders, placed in the street the ground where the plaintiff received his injury, and it became a part of the sidewalk at that place.

It is now argued that this is not a street, because the land was not condemned agreeably to a certain statute of the State for the opening and widening of streets. This statute was intended to secure to private land-owners compensation for their property taken for public uses, and can have no application to the case of an appropriation by the City Council, of land owned by the city to the purpose of a street.

It is also said that the Park is, both by contract and by statute, pledged for the redemption of the city debt, and therefore cannot be thus appropriated. It will be time enough to consider this question when some creditor of the city shall raise it. The legal title and the present use and possession are in the city, and were when the land was converted into a street, and it does not lie in the mouth of the city authorities, under these circumstances, to claim exemption for their negligence in the manner of making this conversion, under the plea that the act was a violation of their duty to public creditors.

If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an inquiry into the regularity of

the proceedings by which the land became a street, or into the authority by which the street was originally established.

2. The second error is supposed to have been found in an exception to the following language of the court in the charge to the jury: "If they (the corporate authorities) leave an opening in the sidewalk, which is sometimes done, and a person coming along in the night falls into it, without any want of proper care on his part, the defendants are liable for any injury that may be occasioned. So, if an obstruction in the face of a sidewalk, over which a person stumbles—a box, if you please, left out on the sidewalk on a dark night, or barrels, over which a person stumbles and falls in the absence of want of care on his part—the defendants are equally liable for the injury. The opening, in the one case, and the obstruction, in the other, constitute the negligence on the part of the authorities who have control of the matter, and, in order to escape from the charge of liability, the burden is thrown upon them to disprove the negligence."

To this charge it is objected that it precluded the defendants from any attempt to show that they were not guilty of negligence, because, if the obstruction constituted the negligence, the existence of the obstruction being proved, no defence could be offered. But this is a verbal criticism not justified by the language of the court, which in the same sentence declares that, in order to escape from liability, the burden is thrown upon defendants to disprove the negligence. No one can read the charge without seeing that the jury must have understood the court as meaning, that the existence of those obstructions was such evidence of negligence as required of the authorities explanations in order to escape liability.

Another objection to this charge is that it ignores the necessity of notice to the authorities of the existence of the obstruction.

It is certainly true, as a general proposition, that before the corporate authorities can be held liable in this class of cases, it must be shown that they knew of the existence of the cause of injury, or had been notified of it, or such a state

of circumstances must be shown that notice would be implied. And it is true that this charge makes no reference to notice whatever. But when we look into the facts of this case, as shown by the bill of exceptions, we discover a very plain reason why this was omitted. The question of notice, as a fact, could not be disputed, and therefore did not arise as a matter on which the jury required instructions.

The city authorities, in converting the part of the Park already mentioned into a street, had cut down a tree, and left the stump standing from six to eight inches above the surface, and from fourteen to eighteen inches inside the curbstone, on the sidewalk. This was done in 1847; and this stump, thus left by the city authorities, who had cut down the tree, remained in that condition until the time of the accident to plaintiff, in 1857.

These facts were uncontradicted, and stronger proof of notice could not be given. It closed the question, and the omission in the judge's charge of any reference to that subject was justified by the testimony. It would have been superfluous.

JUDGMENT AFFIRMED.

CHRISTY v. PRIDGEON.

1 The Mexican colonization law of August 18th, 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new State, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the State, must be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be the opinion of this court of its original soundness. If in courts of other States carved out of territory since acquired from Mexico, a different interpretation has been adopted, the courts of the United States will follow the different ruling, so far as it affects titles in those States.

2 The interpretation within the jurisdiction of a State of a local law, becomes a part of that law, as much so as if incorporated in the body of

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it by the legislature. If different interpretations are given in different States to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one State from what it is in the other.

ERROR to the District Court of the United States for the Eastern District of Texas; the case being essentially thus: By the Mexican colorization law of August 18th, 1824, and the legislation of Coahuila and Texas authorized by it, the Governor of the State just mentioned had power to grant lands for colonization; but it was declared that the territory comprised within twenty leagues of the boundaries of a foreign nation, or within ten leagues of the sea-coast, could not be colonized without the previous approval of the supreme executive power.

In this state of the law, one Miguel Arceniga, a resident of Bexar, made his petition for concession of eleven leagues of land. The petition was dated March 31st, 1831, and the concession of the Governor, granting the quantity asked for, was made on the 6th of April of the same year, accompanied with a direction to the proper local officers to give possession of the land to the grantee, and to issue to him the proper title. Neither document designated the land. A petition to the alcalde, for survey, possession, and title, of the eleven leagues, in the vicinity of the "Red River of the Nachitoches," was followed by the appropriate action of the officer for that purpose, and on the 22d of September, 1835, by the issue to the grantee of a formal certificate of possession and title of the land thus situated. This was before the annexation of Texas to the United States, and the land thus granted laid within twenty leagues of what was then the northern boundary between Texas and the United States. Texas having become part of the Union, one Christy, claiming under the grantee, brought trespass to try title for these eleven leagues, now situated in Harrison County, Texas.

The court ruled that the grant being issued without the previous assent or approval of the supreme executive power of Mexico, was illegal and void, and excluded it from the jury. Thereupon, the jury found for the defendant. The

alleged error in this ruling was the only question before this court.

Mr. T. Ewing, Jr., for the plaintiff in error:

The title, on its face, being valid and complete—its genuineness unquestioned—it comes within the principle declared by this court in *Fuentes* v. *United States*,* that "the public acts of public officers, importing to be exercised by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given, or subsequently ratified;" and in *Delassus* v. *United States*,† that the concession, being regular in form and made by the proper officer, is *primâ facie* evidence that it was within the power of the officer to make it, and that he who alleges that an officer intrusted with an important duty has violated it, must show it.

The chief object of the colonization law, as is known, was to encourage the immigration of foreigners, and their establishment in colonies with liberal bounties of lands. It was decided in *Arguello* v. *United States*,‡ and affirmed in *Cruz Cervantes* v. *The Same*,§ that this law did not restrict the distribution by the States to Mexican citizens of public lands within the littoral and the frontier leagues. As there is no other provision of the constitution or laws of Mexico requiring the assent of the national executive to the disposition of vacant lands in Coahuila and Texas, it was therefore settled by those cases that the State *had* the power, without the assent of the supreme executive, to make the grant in question.

Mr. Adams and Mr. Leech, contra:

The invalidity and nullity of the Mexican grants within the ten coast, and twenty border, leagues of Texas, unless the assent of the supreme executive of Mexico was affirmatively shown to such grants, have been repeatedly and

* 22 Howard, 459.
† 9 Peters, 117, 133.
‡ 18 Howard, 546.
§ Id. 555.

firmly settled by the Supreme Court of Texas, in a series of cases.*

These decisions have, for years, been acquiesced in by the bar and the people, and constitute a rule of property for a very large portion of the State.

The plaintiff in this action undertook a course of litigation to overthrow these decisions; but they have been reiterated and affirmed both in the Supreme Court of Texas,† and in this court, in *League* v. *Egery*,‡ and *Foote* v. *Egery*,§ until it is not possible to conceive a more fixed and settled course of decisions and rule of property than the nullity of grants of this character.

Reply: 1. All the matters necessary to a consideration of the question do not seem to have been presented to this court in *League* v. *Egery*, and *Foote* v. *Egery*, acquiescing in the Texas decisions, and were not considered in its opinion when pronounced.

The first of the Texas decisions was at the December Term, 1848—one year before plaintiff brought this suit. He was the purchaser of the land from the State of Coahuila and Texas, in 1835, and had received complete legal title. Neither Mexico, nor the State of Coahuila and Texas, nor the Republic, nor the State of Texas, ever questioned his title by proceeding for forfeiture, or by a conveyance to a third person, or otherwise. The *custom* of the states and territories of Mexico, while the national colonization law of 1824 was in force, to sell to Mexicans lands in the border leagues, without the assent of the national executive, which is referred to in the Arguello case, and shown in the Texas and California Reports, and in the colonization law of Tamaulipas‖—undisputed as it was by Mexico—shows that the law was never interpreted by the national, state, or territorial

* Edwards *v.* Davis, 3 Texas, 321; Republic *v.* Thorn, Id. 499; 5 Id 410; 9 Id. 556; 10 Id. 316.

† Smith *v.* Power, 14 Texas, 146; Same *v.* Same, 23 Id. 29.

‡ 24 Howard, 264. § Id. 267.

‖ Paschal's Annotated Digest, 769, p. 218.

authorities to impose the condition of national assent on such sales to Mexican citizens. This court, in the Arguello and Cervantes cases, in opinions from which there was no dissent, declared that this interpretation of the law by the national, state, and territorial authorities was right. It may, therefore, be assumed that such is the true interpretation of this law.

Hence, from 1835 to 1849, when this erroneous interpretation was first declared by any judicial tribunal, the plaintiff had a valid legal title by executed contract of purchase.

This court, in the Egery cases, takes the decisions of the Texas courts as *a rule of property in that State.* The court say, "We do not inquire whether a more suitable rule might not have been adopted, nor whether the arguments which led to its adoption were forcible or just. We receive the decisions as having a binding force almost equivalent to positive law." But we submit, that unless those Texas decisions have a binding force, more than equivalent to positive law, they cannot control this case. When the first of these erroneous decisions was made, Texas was a State of this Union, bound by the Constitution, and could not, even by a law, impair the validity of this contract, much less by a decision of its courts, or a series of decisions, which are only "almost equivalent to positive law." If, then, the plaintiff had a valid title before the earliest of these decisions, he has it still unimpaired by them. Decisions settling a rule of property cannot give or take away property, except in the very cases involved in them. They may, and of right ought to have, a persuasive influence on other courts deciding cases which originated in the past, but cannot control them any more than a statute law can control titles acquired in the past.

2. If the constitutional objection were removed, it seems to us not sound policy to give this effect to the Texas decisions. In 1855, nearly contemporaneous with the earliest of these decisions, this court, in the Arguello case, settled the construction of this part of the Mexican colonization law. That decision, affirmed in the Cervantes case, has stood for eleven years as an exposition of the settled law of such

titles in all those states and territories which were acquired from Mexico.

It is, doubtless, still the received construction in those states and territories. Now, because the Texas courts refused to adopt that construction, and pertinaciously adhered to their own, will this court, by adopting the construction of the Texas courts, reverse its decision in the Arguello case, and destroy the titles resting on it? If the interpretation in the Arguello case is to be adhered to in deciding on titles in the states and territories acquired from Mexico, it cannot be abandoned in titles in Texas; for if a grant within the border leagues in California be not impaired by want of assent of the Mexican government, a like grant in Texas cannot be, without conceding to the Texas courts the power of establishing, by a train of decisions, a rule of property which destroys the obligation of contracts.

Mr. Justice FIELD delivered the opinion of the court.

This was an action to try the title to a tract of land situated in the County of Harrison, in the State of Texas.

The plaintiff relied for recovery upon title derived under a grant from the Governor of Coahuila and Texas, made whilst Texas was a province of Mexico. The defendant rested his defence upon the invalidity of the grant in question, and this invalidity was asserted upon the admitted fact that the land it embraces was situated, at the time the grant was made, within the twenty frontier leagues bordering on the United States, and the absence of any evidence tending to show the assent to the grant, or its approval by the national executive of the republic. The court held the grant, without such assent or approval, to be illegal and void, and excluded it from the jury. The ruling in this respect constitutes the only error assigned, which is properly before us for consideration.

The irregularities in the record mentioned by counsel we cannot notice, as they do not constitute the ground of any alleged error.

The absence of the signature of the judge of the court to

the bill of exceptions is not made the subject of objection by the parties, and we hence infer that its omission was a mere clerical error.

The doctrine, that prior possession is sufficient evidence of title to maintain the action against a mere intruder and trespasser, we do not find at all controverted or doubted by the court below.

The only question presented by the bill of exceptions, and this arises upon the ruling mentioned, relates to the validity of the grant produced. The petition to the Governor upon which the grant was made, solicited, by way of sale, eleven leagues from the vacant lands of the department. This bore date in March, 1831. The decree of concession, which followed in April of the same year, gave the quantity as solicited, and directed the proper local officers to give possession of the land to the grantee, and issue to him the appropriate title. Neither the petition nor the concession designated the land; and, in September, 1835, the grantee applied to the alcalde of the district to place him in possession, and to issue to him the title of the eleven leagues in the immediate vicinity of the "Red River of the Nachitoches." By order of this officer the land was surveyed, and on the 22d of the same month formal evidence of title was given to the grantee. The land thus ceded lay within twenty leagues of what then constituted the boundary between the province of Texas and the United States.

The power of the Governor of Coahuila and Texas to make the grant was derived from the Mexican colonization law of August 18th, 1824, and the legislation of the State, which that law authorized. The object of that law was to induce the settlement of the vacant lands of the Republic. To this end the several States were empowered, under certain restrictions, to provide for the colonization of the lands within their limits. Their legislation was, of course, subject to the provisions of the fourth article of the law mentioned, which declares that "those territories comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the sea-coast, cannot be colonized with-

out the previous approval of the supreme general executive power."*

This law of 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new State—as much so as if it had originated in her legislation. It had at the time no operation in any portion of what then constituted the United States. The interpretation, therefore, placed upon it by the highest court of that State must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be our opinion of its original soundness. Nor does it matter that in the courts of other States, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, follow the different ruling so far as it affects titles in those States. The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other. "That the statute laws of the States," says Mr. Justice Johnson, in delivering the opinion of this court in *Shelby* v. *Guy*,† "must furnish the rule of decision of this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsis-

* See translation of the General Colonization Law of August 18th, 1824, in appendix to Halleck's Report, Executive Documents, Senate, of 1849.

† 11 Wheaton, 367.

tencies—as where States have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed upon us, to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are."

In construing the fourth article cited from the colonization law of Mexico, the Supreme Court of Texas has repeatedly held that it operated as a prohibition of any grant of land within the littoral or coast leagues mentioned, without the previous assent of the federal executive of Mexico; that such assent was essential to the validity of a grant within those limits, and that such assent was not to be inferred from the existence of the grant, but must be affirmatively established. A series of decisions to this purport, from an early history of the State down to the present time, is found in the reports of her courts. These decisions have become a rule of property in that State, any departure from which would disturb titles to extensive and densely settled districts of country.* We receive them, therefore, to quote the language of this court, in *League* v. *Egery*, "as having a binding force almost equivalent to positive law."†

JUDGMENT AFFIRMED.

LANFEAR *v.* HUNLEY.

1. The act of Congress of August 16th, 1856, confirming claims in favor of Ambrose Lanfear, confirmed to him whatever he was entitled to by virtue of the original grant referred to in it, conceding that to have been valid. It neither enlarged nor diminished what the grant gave. It extinguished all claim on the part of the United States to the land covered by the surveys; but as regards adverse claimants, it determined nothing, and concluded no one.

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* Goode *v.* McQueen's Heirs, 3 Texas, 241; Edwards *v.* Davis, Id. 321; Smith *v.* Power, 23 Id. 32.

† 24 Howard, 266.

Statement of the case.

2. The twenty-fifth section of the Judiciary Act does not warrant the review of an adjudication upon a mere question of boundary; the fact that the land to which the boundary relates is held by a title derived from an act of Congress does not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the State tribunals, and it is not within the power of this court to reverse their action. In such cases its authority is limited to errors relating to the title.

THIS case was brought here by writ of error to the Supreme Court of Louisiana. The case was thus:

Lanfear brought suit against Hunley in a State District Court of Louisiana, to recover the possession of certain land occupied and claimed by Hunley as his own. The plaintiff relied on a title derived from a Spanish grant in early times to Paul Toups, and subsequently confirmed, as he alleged, by acts of Congress in 1807, 1814, 1820, and with greater particularity by an act of August 18th, 1856, to the children of Toups, and to a certain Daspit St. Amand through whom he claimed. Toups's petition was made in 1795, and was for

"A grant of land on the place called 'Les Coteaux de France,' at a distance of about eleven leagues from the capital, and about three and a half leagues from the river, on the other bank, reaching to a bayou named Crocodile, which runs parallel with the river, and the said land to be taken from the crossing of said bayou as far as the large swamp on the other side of Bayou des Cannes—the whole forming a strip of land about sixteen or eighteen arpents wide, and about two leagues and a half long—bounded on one side by floating prairies and on the other by lakes and marshes."

The land was granted as prayed for. But there having been, as the plaintiff alleged, several bayous in that neighborhood named in former times Bayou Crocodile, though with one exception no longer *now* so named, the question as to the line to which the land extended—a question of boundary alone—became a disputed one.

The first act of Congress, that of 1807, relied on as confirming the claim as set up by Lanfear, the plaintiff, was a

general act, authorizing commissioners to pass on claims to lands granted prior to 1803, limiting such grant to 2000 acres, and leaving locations to be determined. Nor was there anything of a particular kind in the act of 1814, or that of 1820. In 1854, Hawke, a deputy surveyor of the United States, made a survey of the land granted to Toups and confirmed to his children, and so surveyed it as to cover the lands of the defendant, now in dispute, and on the 18th August, 1856, Congress, referring specifically to the survey as made by Hawke, declared the same "confirmed" in favor of Lanfear. The act contained these provisos:

"*Provided*, that such confirmation shall only be construed into a relinquishment of title on the part of the United States, and shall not affect the rights of any third persons claiming title, either under adverse title or as preëmptor; *And provided further, that any person or persons, who are now settled on said lands, or any portion of the lands embraced in the said surveys, shall be entitled to have and maintain an action to test the validity of said surveys*, and the extent of the said claims of the children of Paul Toups and of Daspit St. Amand, numbers 74 and 529, and to have the same determined judicially, in the same manner as though the land on which they are settled had been surveyed as public land, and they had been permitted to enter the same by way of preëmption, it being the true intent and meaning of this act that no person who would be now entitled to a right of preëmption to any part of said land, if the same were the property of the United States, shall be deprived of the same, unless it is judicially decided that the surveys were made in conformity with the legal rights of said Ambrose Lanfear, under the said confirmation."

The State court in which the suit was brought decided against the plaintiff, and the Supreme Court of Louisiana having confirmed that judgment, the case came here for re-examination under the twenty-fifth section of the Judiciary Act, which provides that a final judgment in the highest court of a State—where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against that validity, or

where is drawn in question the construction of any statute of the United States, and the decision is against the right specially set up or claimed by either party under such statute—may be re-examined in this court; enacting further, however, that no other error shall be assigned or regarded as ground of reversal than such as immediately respects the before-mentioned questions of validity or construction.

Messrs. M. Blair and F. A. Dick, for the plaintiff in error, and *Mr. A. G. Riddle, contra*, argued the case on its merits.

Mr. Janin, for the defendant in error, asked to have the case dismissed for want of jurisdiction. Against the right to take the jurisdiction, he said that the act of August 18th, 1856, was the only one which defined the claim in language less vague than the original grant; that the act of 1856, which did define it, referred it to the courts to settle the location of the survey, and what land really passed under the confirmation; that the courts of Louisiana had settled that and nothing else; and that this was not a subject for review. Hence that the writ could not be entertained.

Mr. Justice SWAYNE delivered the opinion of the court.

We are met at the threshold of the investigation by the proposition, on the part of the defendant in error, that this court has no jurisdiction of the controversy between the parties, and that the case must be dismissed.

The defendant in error holds the lands in controversy by the right of preëmption, under the laws of the United States; and it is admitted that his title is valid and must prevail, unless his adversary has proved a better one. The plaintiff in error insists that such a title is shown in the record,—by a grant from the government of Spain to Paul Toups, in 1796, confirmed by the acts of Congress of the 3d of March, 1807, of the 12th of April, 1814, of the 11th of May, 1820, and especially by the act of the 18th of August, 1856.

None of these acts, except the one last mentioned, at-

tempted to fix definitely the locality and boundaries of the grant. That act refers to surveys made by Hawke, in 1854, and confirms them. The plaintiff in error claims according to these surveys. They include the land in controversy. But the confirmation by this act was accompanied by important conditions.

[The learned judge here read the provisos as given, *supra*, p. 206, in the statement of the case.]

These provisos expressly save the rights, whatever they may be, of the defendant in error.

The act, considered in its entirety, confirmed to the plaintiff whatever he was entitled to by virtue of the original grant, conceding that to have been valid. It neither enlarges nor diminishes what the grant gave him. It extinguishes all claim, on the part of the United States, to the land covered by the surveys; but as regards all adverse claimants, it determines nothing, and concludes no one. It gives to the settlers upon the land, in express terms, the right to institute and maintain the litigation necessary to enable them to test the validity of the surveys. It leaves adverse claimants otherwise where they were before Congress legislated upon the subject, and in all respects as if this act had not been passed.

The defendant in error does not deny that a grant was made as alleged by the plaintiff in error, nor that it was confirmed by Congress; but he denies that its boundaries were properly defined by the surveys of Hawke; and he asserts, that if properly located it will not include the land in dispute. The plaintiff in error insists that these surveys conformed to the grant, and that they are made conclusive by the act of 1856.

The Supreme Court of Louisiana gave to this act the same construction which we have given, and proceeded to settle the rights of the parties according to the evidence.

The controversy in that court turned wholly upon the question of the locality of the eastern boundary of the grant. The plaintiff contended that it was a line eighty arpens from the west bank of the Mississippi Ri[illegible]. The defendant al-

leged that it was the Bayou Crocodile. If the plaintiff's claim prevailed, the tract would include the land in controversy; if the defendant's, the opposite result would follow. The court, after an elaborate examination of the subject, sustained the theory of the defendant, and gave judgment accordingly.

Has this court jurisdiction to examine the grounds of this decision?

The case is brought here under the twenty-fifth section of the Judiciary Act of 1789. Our authority is derived from and limited by that section. This court has repeatedly held, that it does not warrant the review of an adjudication upon a mere question of boundary. The fact that the land to which the boundary relates is held by a title derived from an act of Congress does not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the State tribunals, and it is not within the power of this court to revise their action. In such cases our authority is limited to errors relating to the title. If any such are committed, it is our duty to correct them. If there are none, we have no more authority to interpose than in any other case of alleged maladministration of justice by a State court. A party cannot, by setting up an unfounded claim of title, compel us, after deciding the claim against him, to take to ourselves a jurisdiction which, but for such claim, we could not have exercised. Such a result would make the jurisdiction depend, not upon the nature and merits of the case, but upon what the party may choose to allege. In this way, in every case where the title is derived from the United States, and a question of boundary is involved, this court might be constrained to do what it has uniformly held to be beyond the sphere of its power.

In the case before us, the Supreme Court of Louisiana construed correctly the several acts of Congress relating to the subject of the controversy. No greater or different effect would have been given to them here if the case had been brought before us by appeal from a Circuit Court of the

United States. Full effect was given to the title. The error, if any were committed, was in locating it upon the land, and fixing its boundaries. In the performance of this function by that court, no treaty, act of Congress, or authority exercised under the United States, was drawn in question. We cannot, therefore, review the conclusions at which the court arrived.* The section referred to in express terms forbids it.

The decision having been correct upon the only question before us for consideration, the judgment below is

AFFIRMED.

WITHERSPOON *v.* DUNCAN.

1. The different States, as a general rule, have the right of determining the manner of levying and collecting taxes on private property within their limits; and can declare that a tract of land shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed and advertised; and that an erroneous assessment does not vitiate the sale for taxes.
2. Lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained.
3. Lands so entered are liable to taxation; and if the taxes remain unpaid, they may be sold like other lands, even though no patent may as yet have issued.
4. The right to tax attaches as well to donation entries as to cash entries; the particular land in either case, when the entry is made and certificate given, being segregated from the mass of public lands, and becoming private property.

ERROR to the Supreme Court of the State of Arkansas; the case, as stated by the learned justice who gave the opinion of the court, being thus:

The State of Arkansas, on her admission into the Union, made a compact with the General Government not to tax the public lands within the State, nor interfere with their primary disposal by the United States, or with the regula-

* McDonough *v.* Millandon, 3 Howard, 707; Doe *v.* Esclava, 9 Id. 448.

tions adopted by Congress for securing the title in them to purchasers. It was claimed that this compact had been broken by the decision of the Supreme Court of Arkansas in this case.

The facts on which the claim was based were these: On the 23d day of May, 1828, a portion of the public domain, within the limits of the Territory of Arkansas, was, by treaty, ceded to the Cherokee Indians, west of the Mississippi River, and suitable provision made for the removal of the settlers from it. As an indemnity for the loss of improvements and the trouble and expense of removing, each settler who did remove was entitled, by an act of Congress, to enter, at the proper land office in Arkansas, two quarter sections of the public lands of the territory, the sale of which was authorized by law.

The children of Timothy Harrell (one of the settlers on these ceded lands) furnished the requisite proof to the register and receiver of the land office, at Little Rock, of the settlement, removal, and subsequent death of their father, and were, on the 22d day of May, 1830, allowed to enter the lands in controversy. The proper certificate of this donation entry, as it is called, was transmitted, as is usual in land entries, to the General Land Office at Washington; but, for some unexplained reason, a patent was not issued for the lands embraced in it until the 5th day of February, 1846. By mistake, owing, doubtless, to the neglect of the land officers at Little Rock to make the proper cancellation on their books, and to the multiplication of land districts, these same lands were entered at the land office at Washington (within which district they were then included), on the 8th day of June, 1836, by G. W. Denton, who received the usual certificate of purchase. This entry was cancelled by the Commissioner of the General Land Office, on the issue of the patent to the heirs of Harrell, and, in February, 1849, the purchase-money refunded to Denton.

In 1842, these lands were listed for taxation, by the authorities of Arkansas, in the name of Denton, and sold (because the taxes were unpaid) to Duncan and Flanigan, the defend-

ants in error, who received a deed for them after the time for redemption had expired, and, by means of a proceeding peculiar to Arkansas, had their title confirmed by the decree of the proper court of record. Hardy, deraigning title through the heirs of Harrell, filed a bill in equity in the Circuit Court of Clark County, where the lands were situated, to annul the tax title thus acquired, and to quiet his own title. The Circuit Court, at the hearing of the case, dismissed the bill, and on appeal the Supreme Court of the State affirmed the decree.

This writ of error was brought to review that decision.

Mr. Carlisle, with a brief of Mr. Watkins, for the plaintiff in error:

We concede that when land has been sold by the United States, entered and *paid* for by the purchaser, who receives the usual certificate for the purchase-money, and in whose favor the usual patent certificate issues, it becomes the property of the purchaser. Such is the doctrine of *Carroll* v. *Safford.**

But that case was one of an ordinary *cash* entry, and the usual certificates were issued to Carroll, the purchaser. The sale was made and consummated, so far as it could be done by the United States, and in due course of official routine, the patent issued to Carroll, who never pretended that there was any circumstance to vitiate his entry, or give to the officers of the United States charged with the supervision of the Land Department and the issue of patents, any color of authority to cancel it, or excuse for withholding the patent.

In order to make the case, now under consideration, analogous to that, not only must the patent have issued to Denton, in pursuance of his entry, but *he* should be himself the party upon the record, contesting the validity of the tax, upon his own land.

The counsel for defendant, in *Carroll* v. *Safford*, admitted that if from accident or the exceptions which he had before

* 3 Howard, 441.

adverted to, the certificate of purchase should not be matured into a patent, "the purchaser, at tax sale, could not acquire a better title than the holder of the certificate." That is his risk. But, he adds, "in the case of the present complainant it is not pretended that his titles were not perfected. On the contrary, the record brought up here alleges and admits that the patents for his lands were issued before the lands were sold for taxes."

The Supreme Court of the United States, in the case just named, never supposed they were overturning the numerous cases* decided or founded on the proposition that Congress, having power to dispose of the public domain, and to enact all laws and needful regulations respecting the sale thereof, where it has, by its legislation, provided for the issue of patents, they are necessary to complete the title; and, until the patent issues, the fee remains in the United States, and the legal title has not passed. If this be not so, with the same propriety it could be contended that the verdict of a jury is sufficient, without any judgment of the court in pursuance of the finding; or that the existence of a judgment could be proved by parol evidence, without an exemplification of the record.

In most of tax title cases, the simple question has been, whether land, legally sold by an officer of the United States, became subject, under the State laws, to assessment and taxation against the purchaser of it as the owner, before the final emanation of the patent. In all of them the entries have been made in the usual mode of purchase at private sale, and it has not been pretended that there was any illegality or want of authority in the sales, or that the incipient title had failed. On the contrary, the bills to set aside the tax sales have been brought by the purchasers, asserting themselves to be the owners of the land by virtue of the patents which had issued upon their own entries. The whole scope of the decisions is, that by such entry the land

* Stringer v. Young, 3 Peters, 320; Boardman v. Reed, 6 Ib. 328; Bagnell v. Broderick, 13 Id. 436; Wilcox v. Jackson, Id. 498; and Stoddard v. Chambers, 2 Howard, 284.

was sold and appropriated according to law; and the purchaser being for all beneficial purposes the owner of the land, it became subject to taxation as his property. Clearly, the purchase at tax sale would fail, unless the particular title should afterwards be consummated by patent. *Carroll* v. *Safford*, is careful not to omit this reservation. The court say: "It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake."

Until the issue of the patent, the paramount title in all cases remains in the government; and until then all State legislation is subordinate to the primary right of soil and disposition remaining in the Federal Government, and does not profess to interfere with it,* and is contingent upon the issue or withholding of the patent; in regard to which the President, and the officers of the Land Department acting under him, have a discretion.

Now the heirs of Harrell, as we conceive, never had any ascertained right to the land in controversy, until the final decision of the Commissioner of the General Land Office in 1846, confirming their donation claim, and the issue of the patent to them for the lands applied for. Until then the whole subject remained under the control of the Land Department. If rejected, the entry of Denton would have held the land, and he would have received the patent.

The opinion in *Carroll* v. *Safford* proceeds upon the ground, that there is no lawful authority in any officer of the government to vacate a patent certificate upon a cash entry, made in accordance with law, and that it would be an abuse of power to do so; that the certificate imports an actual present sale of the land, and is as binding on the government as a patent; and *therefore* the land becomes subject to be assessed *to the owner of it*, for State taxes. How is it possible for this

* Brock v. Smith, 14 Arkansas, 434, citing Pelham v. Wilson, 4 Id. 289; Hughes v. Sloan, 3 English, 146; Pelham v. Floyd, 4 Ib. 530, and McFarland v. Mathis, 5 Ib. 560.

reasoning to condemn the lands applied for by the heirs of Harrell in 1830, in satisfaction of their claim to a donation—when there was no actual sale for a valuable consideration paid to the United States, and they had received no final certificate or evidence of purchase; when they had no right, as against the government, to possess and enjoy the land; when the President and his subordinates in the Land Department, had not ceased to have a lawful control over the subject of the claim, but had a continuing power to disallow and reject it?

If the government of the United States had the right to cancel the entry of Denton; if it had the right to confirm the donation claim of the heirs of Harrell, and grant them a patent for the land in 1846, all of which is unquestioned—then, and to that extent, the land in controversy, and upon which the State tax was levied in 1842, was the property of the United States. If the land officers of the United States had a jurisdiction and supervising control over the subject of this title, then the patent granted in 1846, under the seal of the United States, must have the effect of investing the patentees with a clear title, an unincumbered estate in the land, or else the tax sale in 1842 was a fundamental wrongful interference on the part of the State with the primary disposal of the land by the United States, and with the lawful regulations prescribed by her for securing title to the rightful owner.

It will not answer to say, that the heirs of Harrell had the best right to the land, because it ultimately prevailed. If the General Government had the right to take the land away from Denton, and give it to the heirs of Harrell, it had such a lawful power of disposal over it as could not be divested, or in the least degree impaired, by the intermediate sale of it for taxes. The government had the power to do effectually and completely what she professed to do, as an act of justice so long delayed. The patent would be a fruitless grant, if it can be effectually defeated by a State tax sale, whose only possible merit may be, that it was made in good faith, and without any intention to violate the compact.

Argument for the defendant in error.

Mr. Reverdy Johnson, contra:

The argument is, that at the time the land was assessed, the fee was in the United States, and the land not therefore subject to taxation. The position is too technical. What title did Harrell's heirs acquire under the certificate of entry of 1830? How is a party regarded who holds this certificate of entry? There are exceptions to the principle, but the general principle itself is that, as soon as the public land is purchased and paid for, it becomes the property of the purchaser, and may be sold and transferred by him (as is constantly the case), before being patented. It is the sale, not the patent, which is important. In *Carroll* v. *Safford*, the court, in speaking of the title under a certificate, says: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a certificate, which could no more be cancelled than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect, there is no difference between the certificate-holder and the patentee."

In *Goodlett* v. *Smithson*,* it was decided, that "the patent is considered as evidence of title, by which it is shown that the prerequisites of sale have been complied with; by the act of entry and payment, the purchaser acquires a legal title, that may be aliened, descend or divested, in the same manner as any other legal title. So, previous to the issue of a patent, the estate of one in lands purchased of the United States, and for which he has received a certificate of payment, may be levied on and sold under execution, issued on a judgment at law, and ejectment can be maintained on such certificate."

With such rights under a certificate of entry, it would be strange, if the lands for which this certificate was given, should not be subject to taxation! If an individual could

* 5 Porter's Alabama, 245.

purchase lands of the United States, settle, improve, and cultivate them, on certificates of purchase, then, in case, from the neglect and delay of the proper department, the patents are not issued for several years, the lands would be exempt from taxation, while lands adjoining were compelled to pay taxes, though their occupant was deriving no greater advantage from the possession and cultivation. A period of sixteen years elapses, during which time a party might have improved and cultivated the land, derived a subsistence from it, accumulated property on it, and wellnigh worn out the land, and yet, he must not pay taxes! Such a thing is possible, and easily to be done. And if this be the law, there is great consideration held out to induce persons not to get patents issued at all.

Mr. Justice DAVIS, after stating the case, delivered the opinion of the court.

It is not the province of this court to interfere with the policy of the revenue laws of the States, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner, or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes.

Of course, the property must, under the compact, be taxable; but if it is, the mode of enforcing payment of taxes is wholly within legislative control. If, therefore, the lands in dispute could be taxed, the decision of the Supreme Court of the State is conclusive that the assessment, sale, and confirmation were regular, and divested the title derived through the heirs of Harrell. The taxability of the lands is, then, the only question which we are authorized to consider and determine.

The plaintiffs in error insist that the State had no power to impose a tax on them until the donation entry was actually confirmed and the patent had emanated. It is conceded that the power had been exercised, from an early period in

the history of the State, to levy and collect a tax upon lands as soon as entered, and not to wait for the emanation of the patent,—a practice that has obtained in nearly all the Western States, whose admission was under a compact similar to that with Arkansas.

Arkansas covenanted to abstain from taxation of the public lands within her limits, and to refrain from legislation that should impede the Federal Government in disposing of them, or interfere with the regulations of Congress for the security of titles. It is clear that the government has not been hindered in selling them, nor Congress obstructed in securing titles; but it is claimed the contract has been violated, because these lands, when taxed, were owned by the United States. In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.

According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this time it would work a great hardship to the State; for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make valuable and lasting improvements, which it

would be difficult to separate from the freehold for the purpose of taxation. If it was the purpose of the acts of Congress, by which the new States were admitted into the Union, to prohibit taxation until the patent was granted, the national authority would never have suffered, without questioning it, the universal exercise of the power to tax on the basis of the original entry.

This question was fully considered by this court in *Carroll* v. *Safford*,* and the views we have presented only reaffirm the doctrines of that case.

But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office and the patent issued.

That Congress has the entire control of the public lands, can dispose of them for money, or donate them to individuals or classes of persons, cannot be questioned. If the law on the subject is complied with, and the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case when the entry is made and certificate given the particular land is segregated from the mass of public lands and becomes private property. In the one case the entry is complete when the money is paid; in the other when the required proofs are furnished. In neither can the patent be withheld if the original entry was lawful.

The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law. If this were not so, those who, through the bounty of Congress, get a title to the soil, *without* money, would enjoy higher privileges and be placed on a better footing than the great body of persons who, by the invitation of the government, purchase lands *with* money. Such a discrimination could never have been contemplated by Congress.

These principles are well illustrated in the case at bar.

* 3 Howard, 450.

The heirs of Harrell, by means of the Cherokee treaty, had a claim to two quarter sections of land in Arkansas. If they furnished proof to the register and receiver of the proper land office of the settlement and removal of their father, and it was accepted and the claim allowed, then they had an equal right to purchase the lands in question with this claim as with money. The claim *was* allowed, the selections made, and a certificate of entry given, and it was their duty to see that the taxes were paid. It is true, that the entry might be set aside at Washington; but this condition attaches to all entries of the public lands.

They took upon themselves the risk of confirmation, and perilled their title when they suffered the lands to be sold for non-payment of taxes. It does not appear from the record why the patent was so long delayed; but the claim was finally approved on the original proofs, and the patent, when issued, related back to the original entry. The lands were, therefore, under the laws of the State, properly chargeable with taxes from the date of the first entry, in 1830.

The judgment of the Supreme Court of Arkansas is

AFFIRMED.

RUTHERFORD *v.* GEDDES.

1. Depositions cannot be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject-matter, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to any such party, and had no right to cross-examine the witnesses.
2. Nor can depositions be read in admiralty any more than at common law, without some sufficient reason being shown why the witness was not produced at the hearing.

APPEAL from a decree in admiralty rendered by the Circuit Court for the Eastern District of Louisiana.

The appellant, Rutherford, was, in 1850, the owner of the steam propeller Stanton, and had put her in charge of the

Statement of the case.

towboat Diana, which was to tow her to sea from New Orleans. The Diana proceeded down the Mississippi with her tow, the Stanton, and on the 23d of January a collision took place between the Diana and the steamship Ohio, coming up the river. The Stanton was struck and sunk, and the Diana greatly injured.

Immediately afterwards, Rutherford, as owner of the Stanton, and the Independent Towboat Company, as owner of the Diana, brought suit in the District Court for the Eastern District of Louisiana, against the Ohio, to recover damages, but in both failed to recover.

At a later date, to wit, in 1854, Rutherford instituted suit in the same court against the Towboat Company, asserting that the collision had been caused by the mismanagement of the towboat.

When the case was at issue, the libellant offered as his principal testimony the depositions taken *on behalf of the Ohio*, in 1850, in the two suits of the libellant, Rutherford, and the Towboat Company against the Ohio; the testimony by the weight of which the District Court decided the two cases in favor of the Ohio. The testimony was objected to by the present respondents, on the ground that they "were not parties to the suit between the libellant Rutherford and the Ohio, and that the libellant herein was not a party to the suit between the Towboat Company and the Ohio." The testimony was received by the District Court. On appeal to the Circuit Court it was rejected; and there not being otherwise, as that court thought, any sufficient evidence of fault on the part of the Diana, the libel was dismissed.

The only question of law considered on review in this court was whether the depositions originally taken, in 1850, on behalf of the Ohio, to show that the collision was attributable to the bad management of the towboat, was properly excluded in the present suit.

It was not shown that effort had been made to procure the attendance or direct testimony of the witnesses, or that they were either dead or absent.

The court below said: "Depositions taken in one cause

may sometimes be used as evidence in another, but it is only under special and particular circumstances. In every case such evidence is regarded as secondary evidence, and its introduction must be preceded by proof to show that the primary evidence could not be procured. It is a general rule that evidence which a witness has given on a trial between parties, is admissible upon the same subject-matter between the same parties on a subsequent trial, if the witness has died in the interim; or if he has gone abroad and has not returned. It is in general essential that the party to be affected by the evidence of depositions, or some person in privity with him, should have had an opportunity of cross-examining the witnesses with reference to the subject-matter. The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties.*

"It is to be observed that no evidence was given to show that any of these witnesses were dead, or that there was any impediment to their examination in this case. In the case of *Rutherford* v. *The Ohio*, the defendants were not parties, and had no power to examine in that particular case; and in the case of the *Towboat Company* v. *The Ohio*, the libellant was no party, and the defendants, though interested in that suit as members of the company, yet were so in a different character from that in which they are parties here.

"But the rule is well established that the cause in which the depositions were taken, must be between the same parties or persons, claiming in privity with them, to authorize their admission in another suit; and that the right to use them must be reciprocal, or neither can claim it. It cannot be asserted that the depositions in the case of the Towboat Company against the Ohio may be used against the libellant in this cause. In *Goodenough* v. *Alway*,† Sir John Leach refused an order to allow depositions in a suit for tithes to be read in a tithe suit against other occupiers of land in the same parish, though the objects of both suits, and the inter-

* 2 Phillips on Evidence, 88.

† 2 Simons & Stuart, 481.

ests of the parties were the same. In *Cazenave* v. *Vaughan*,* Lord Ellenborough said: 'The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties.' This precise question arose in the case of *Rushworth* v. *The Countess of Pembroke*,† where the defendant sought to introduce the depositions taken in a cause to which she was not a party. The court was of opinion—'That the former depositions could not be used, because the countess was not a party to that suit; and as they could not be read against her, no more could they be read for her; and because she was not bound by them, not having been a party to the suit; nor was she in a capacity of examining any witness in it, or preferring interrogatories in it; for that reason, also, she could not make use of the depositions of any that had been witness to it.' The American cases go to the length of those that I have cited: *Harrington* v. *Harrington*, 2 Howard's Missouri, 701; *Boudereau* v. *Montgomery*, 4 Washington, 186; *Heth* v. *Young*, 11 B. Monroe, 278; *Sheridan* v. *Smith*, 2 Hill's N. Y. 538.

"In the case last cited testimony delivered in another cause by a witness called by one of the parties, and when that party was present and expressed no dissent to the statements, was held to be inadmissible. My conclusion is, that all the depositions taken in the cases before mentioned, and used as evidence in this by the libellant against the objections of the defendants, were improperly admitted, and that the exception of the defendants was well taken."

The case was submitted by *Mr. Reverdy Johnson, for the appellant Rutherford, and by Mr. Janin, contra.*

Mr. Justice MILLER delivered the opinion of the court.

On the trial of this case in the District Court the libellant procured a decree in his favor mainly upon testimony found in certain depositions offered by him. To the admission of

* 1 Maull & Selwyn, 4

† Hardres, 472.

these depositions in evidence, the defendants objected, and when the objection was overruled they carried the case by appeal to the Circuit Court.

The Circuit Court excluded the depositions, and if the action of that court was correct in this respect, there can be no doubt that its decree dismissing the libel was the necessary result of the case as it stood on the remaining testimony.

The depositions relied on by appellant were properly ruled out, for the reason that they were taken without notice to defendants, in another suit to which defendants were not parties, and in which they had no right or opportunity to cross-examine the witnesses. Nor were defendants in any manner privies to either party in the former suit, in which the depositions had been taken. This alone, it is well settled, is a sufficient reason for their exclusion.

But when, to this consideration, it is added, that no reason is shown why the witnesses were not introduced in person, it is quite clear that the Circuit Court was right in rejecting the depositions.

The decree of the Circuit Court dismissing the libel is, therefore,

AFFIRMED.

EVANS v. PATTERSON.

1. The court reproves the practice of making bills of exception a sort of abstract or index to the history of the case, and so of obscuring its merits.
2. Where a party claiming land as owner, under the laws of Pennsylvania, brings ejectment in the name of the original warrantee, and recovers, against a father; and subsequently producing a deed-poll from the warrantee, made previously to the date of the ejectment and deraigning title to himself, brings another ejectment in his own name against a son, who on his father's death kept possession of the same land: such two suits are an estoppel and within the act of Assembly of Pennsylvania, of the 13th of April, 1807, which declares that "where two verdicts shall, in any suit of ejectment between the same parties, be given in succession, for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought."

Statement of the case.

3. But where a plaintiff deraigns title regularly from the warrantee, and the defendant shows no title, the question of estoppel is of no importance.

ERROR to the Circuit Court for the Western District of Pennsylvania; the case being thus:

The State of Pennsylvania in 1792 granted a warrant to survey a certain tract of land to William Barker. Barker, the warrantee, conveyed his interests to Daniel Broadhead. Broadhead died, and James Patterson bought his title from his heirs. But he had not, or at least could not find or prove the existence of any "deed-poll" from Barker, conveying the warrant to Broadhead. However, using the name of *Barker*, the warrantee, he brought ejectment in 1831 against a certain Eli Evans and some other persons who were in possession of the land. Evans and these others set up in defence that Barker did not appear, and that his existence was uncertain, and that Patterson, asserting himself as he did, to be owner of the land, could not bring suit in Barker's name. But the court decided that under the peculiar system of land law of Pennsylvania, he could; and he had verdict and judgment accordingly. On error to the Supreme Court of the State (*Ross* v. *Baker*, 5 Watts, 391), that tribunal affirmed the judgment; holding to the doctrine previously declared in *Campbell* v. *Galbraith*,* that in Pennsylvania a beneficial owner was entitled to use the name of a warrantee, though such warrantee was ignorant both of the action and the trust.

For some reason, however, Patterson did not get possession of the land. Eli Evans, against whom the ejectment had been brought, died, leaving a son, Elihu Evans, upon the land. Patterson, who had in the meantime found a deed-poll from Barker, the warrantee, to Broadhead, brought, A. D. 1855, a suit against this Elihu Evans; deraigning the title regularly from the warrantee to himself, and obtaining verdict and judgment. But still he did not get into actual or permanent possession. Elihu Evans yet maintained occupation.

* 1 Watts, 78.

Argument for the plaintiff in error.

Patterson, who was a citizen of Ohio, now brought a third ejectment—the suit below—in his own name against the said Elihu. This was in the Circuit Court for the Western District of Pennsylvania. He put in evidence the records of the two judgments just mentioned, proved his actual ownership at the time when the first suit (that in the name of William Barker), was brought, showed the identity of the land, now demanded with that recovered in the former suits, and that Elihu Evans was a son of Eli Evans, and in possession. He here rested; asserting that he had shown two recoveries for the same land; and claiming the benefit of them under a statute of Pennsylvania, passed 13th April, 1807, which enacts that "where two verdicts shall in any suit in ejectment between *the same parties* be given in succession for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought."

The defendant contended that the first ejectment having been instituted in the name of William Barker, the warrantee, after he had conveyed all his right and title to the land in controversy to Daniel Broadhead, as appeared from the evidence, there was no privity, and therefore the first verdict and judgment should not be counted against him, and prayed the court so to instruct the jury, which the court after argument of counsel declined to do, and charged the jury that if the evidence in the case was believed by them, the plaintiff had two verdicts and judgments for the land in controversy, which were conclusive in favor of his title, and he was entitled to recover.

The case was now here on error; the record showing a long and confused bill of exceptions, with recitals of all the deeds, and minute descriptions of the land and of the tracts bounding it.

Mr. Wilson, for the plaintiff in error:

This record raises two points for consideration:

1st. Whether the estoppel, under the Ejectment Act of Pennsylvania, arising from two verdicts and judgments between the same parties, or their privies, upon the same title,

Argument for the plaintiff in error.

applies to Elihu Evans, the defendant in the second ejectment, who was not a party to the first ejectment, and who was not proved to be privy to the same.

2d. Whether there was, at the time of the first ejectment, in the name of William Barker, in 1831, any privity between James Patterson, plaintiff in the second ejectment, and William Barker, the former plaintiff, since, in the second ejectment, it appeared that William Barker, the warrantee of the land, had, by deed-poll, in 1792, conveyed all his interest in the warrant to Daniel Broadhead, under whom Patterson, plaintiff, claimed title in the second ejectment.

It is not intended, under this second head, to controvert the settled doctrine in Pennsylvania, that so long as the relation of *trustee* and *cestui que trust* subsists between the warrantee and the real owner of the warrant, an ejectment may be maintained in the name of the warrantee, as nominal plaintiff, for the benefit of a real owner of the warrant; but the distinction is taken here, that any fiduciary relation between Barker, warrantee, and Broadhead, alleged owner of the warrant, had ceased as early as 1792, when the former conveyed his title to the latter, and, consequently, no privity between Patterson, claiming under Broadhead, could have existed in 1831.

It will not be denied that the decisions in the Pennsylvania courts, on the statute, have held,

1st. That the ejectment must have been for the same land.

2d. That in the trial the same title should have been passed upon.

3d. That the parties should be the same, or should stand in privity with those who were.

"It is certainly not enough that the former ejectment was upon the same land, on the same title, and under same deed, under which parties at present claim; it is necessary, besides, that the *parties be the same*, or *stand in privity* with those who were."*

Now, the first ejectment, or No. 1, and judgment on ver-

* Timbers *v.* Katz, 6 Watts & Sergeant, 290; Treaster *v.* Fleisher, 7 Id. 137.

dict, is not identical in name as to either plaintiff or defendant with the second ejectment, or No. 2; for in one, William Barker is plaintiff, and in the other, James Patterson.

The only identity or assumed privity, then, of James Patterson and William Barker is, that in *both* cases the warrant of William Barker, dated 3d April, 1792, was adduced in evidence, on the part of the plaintiff below, by which, in one case, No. 1, and *through* which, in the other, No. 2, recovery was asserted and had; in the former, in name of William Barker, the warrantee, as implying a legal title; in the latter, of Patterson, plaintiff, deducing title from Barker by regular mesne conveyance. The first suit, *Barker* v. *Ross*, as it went to the Supreme Court of Pennsylvania, was decided upon the presumption of the existence of William Barker, the warrantee and alleged trustee, without the evidence being given, as it was below in the present suit, that Barker had conveyed all his title and claim to Broadhead in 1792.

This brings us to the consideration of the second point.

The general doctrine in Pennsylvania is peculiar to her system of land adjudications, that ejectment at law may be instituted on either equitable or legal titles. That warrants and surveys are to be deemed as against all *but the Commonwealth*, in the same light as legal estates in the English common law, and the same consequences follow from any conveyance, devise, or assignment made by the warrantee or grantee.*

It follows, then, that a conveyance by deed-poll of a warrantee carries with it all legal or equitable rights—they pass to the grantee or assignee—his relation of legal owner, or trustee of any beneficial owner, cease. Until transfer under the warrant, he attaches to himself a *constructive* legal seizin of the land, with the same advantages as if in the actual possession at common law, to be defeated by disseizin in fact, or by some adverse claim or right.† Afterwards, his grantee or alienee is clothed with the attributes of an owner, and

* Caines *v.* Grant, 5 Binney, 120; Maclay *v.* Work, Id. 158.

† Strimpfler *v.* Roberts, 18 Pennsylvania State, 300.

takes the title, subject only to the consequences of his predecessor's acts during his seizin.* The assignee or alienee can then only maintain suit in his own name.

Applying these principles, the distinctions obviously arising in the case now here on error, and that of *Barker* v. *Ross* as it went to the Supreme Court of Pennsylvania, are appreciable. Chief Justice Gibson, delivering the opinion, says:

"The point raised (the non-existence of William Barker) is disposed of by the decision in *Campbell* v. *Galbraith*, 1 Watts, 78, that the *beneficial* owner may maintain ejectment in the name of a nominal warrantee, ignorant both of the action and the trust, no more being required than to disclose the name of the *actual* party."

In the trial below, in that case, no mesne conveyances whatever were shown from Barker to Broadhead, or to Patterson; no transfer or sale came in evidence. The simple warrant and survey were introduced, Patterson claiming, outside the record, as beneficial owner, without title, legal or equitable. The evidence now discloses the fact, that at the impetration of the writ in the first suit, A.D. 1831, Barker, as a personal owner *in fact*, and not as a *nominal* and *fictitious* trustee, had already by deed-poll, the 12th April, 1792, conveyed the land to Broadhead in fee.

On these facts, thus disclosed, the authority of *Campbell* v. *Galbraith*, cited by Gibson, C. J., is not applicable.

Mr. Patterson, contra, submitted the case.

Mr. Justice GRIER delivered the opinion of the court.

The bill of exceptions (so called) in this case, is a sort of abstract or index to the history of a case tried in the Western District of Pennsylvania. Protesting against attempts at mystifying the merits of a case by such records, we shall proceed to notice the single error which it is supposed that the court has committed in the charge to the jury.

* Blackmore *v.* Gregg, 10 Watts, 225.

The case cannot be made intelligible without a brief notice of the very peculiar land law of Pennsylvania. The proprietors of the province, in the beginning, allowed no one man to locate and survey more than three hundred acres. To evade this rule in after times, it was the custom for speculators in land to make application in the names of third persons, and having obtained a warrant to take from them what was called a "deed-poll," or brief conveyance of their inchoate equitable claim.

Pennsylvania, until of late years, had no courts of equity. Hence, in an action of ejectment, the plaintiff might recover without showing a legal title. If he had a prior inchoate or equitable title, either as trustee or *cestui que trust*, he might recover. The courts treated the applicant, or warrantee, as trustee for the party who paid the purchase-money, or paid even the surveying fees; for the purchase-money, under the location or application system, was not paid at the time, and sometimes never. When the State succeeded to the title of the proprietors, the application system was abandoned, and warrants were granted on payment of the purchase-money for the number of acres for which his warrant called. Hence, where the claimant of the warrant was unable to show his deed-poll, he might recover by showing that he paid the purchase-money; that the warrantee, whose name was used, was therefore trustee for him. And an ejectment might also be maintained in the name of the warrantee, although he had no beneficial interest in the land, and had no knowledge of the institution of the suit. See *Campbell* v. *Galbraith*,* and also *Ross* v. *Barker*,† which was decided on the title now in question.

To come to the history of the present case. Daniel Broadhead was the owner of the warrant in the name of William Barker. He had died intestate. The defendant in error had bought up the titles of the different heirs, and found Eli Evans, the father of the plaintiff in error, and others in possession, claiming title as settlers. But as the *deed-poll* from

* 1 Watts, 78.

† 5 Id. 391.

Barker to Broadhead could not be found, the defendant in error brought his first ejectment in the name of the warrantee, and recovered. The objection was made that Patterson, the defendant in error, could not maintain his suit in such form. But the Supreme Court, in the cases above cited, determined that he could.

Afterwards, finding the same parties or their privies in possession (A. D. 1855), he brought another ejectment in his own name, and having found the lost deed-poll to Broadhead, he was able to deraign his title regularly from the original warrantee, and had another verdict and judgment in his favor.

In the case now before us, Elihu Evans, the plaintiff in error, had succeeded to the claim of his father, Eli Evans. On the trial, the defendant in error had again deraigned his title from Barker, the warrantee, and gave in evidence also his two former recoveries. As he had already shown a title regularly deraigned from the original warrantee, and the defendant Evans had shown no title at all, the two former verdicts were unnecessary, but were conclusive, according to the laws of Pennsylvania, between the same parties and their privies.

The only objection made by Evans was, to the conclusiveness of the two verdicts, because the first suit was in the name of Barker, and, as now appeared by the deed to Broadhead, that Barker had no title. When the recovery was had in his name, it was argued that such "verdict and judgment should not be counted." The record showed that at the time the first ejectment was brought, Patterson had bought up the title from Broadhead's heirs; that the suit was carried on by him in the name of the warrantee for his own use. No objection was made to the admission of the first verdict and judgment, because the parties defendant were not the same, or for want of privity between the defendant and the parties defendant in the former action. But it was contended that the first verdict and judgment "should not be counted against him" for want of privity between the plaintiffs. There was satisfactory evidence that Patterson

was the real party in interest, and conducted both suits, and had recovered, in the first suit, in the name of a trustee, and in the second, in his own name, as "*cestui que trust*" of the equitable estate—as where one suit was in a real or fictitious lease from John Doe, and the other in the name of Richard Roe. The jury were instructed that if they believed the evidence that Patterson was the real party in both suits, the two verdicts and judgments were conclusive.

But the plaintiff below having deraigned title from the warrantee, and the plaintiff in error having shown no title, the question as to the estoppel was of no importance, as the court were bound to instruct the jury, that without its aid their verdict should be the same.

The plaintiff in error, having failed to show any error in the record, the

JUDGMENT IS AFFIRMED.

HUGHES v. UNITED STATES

1. The equity of a preëmption claimant of land under the laws of the United States who has complied with the conditions imposed by those laws, obtained his certificate by the payment of the purchase-money, and retained uninterrupted possession of the property, cannot be defeated by one whose entry was subsequent, although he has fortified his title with a patent; such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the preëmption claimant.
2. A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit.
3. A court of equity will set aside a patent of the United States obtained by mistake or inadvertence of the officers of the land office, on a bill filed for that purpose by the government when the patent *primâ facie* passes the title.
4. Open, notorious, and exclusive possession of real property by parties claiming it is sufficient to put other persons upon inquiry as to the interests, legal or equitable, held by such parties; and if such other persons neglect to make the inquiry, they are not entitled to any greater consideration than if they had made it and had ascertained the actual facts of the case.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

Statement of the case.

The United States in 1848 filed an information in the nature of a bill in equity in the court just named, against one Hughes, for the repeal and surrender of their patent for a tract of land issued to him in 1841; tendering back to him the purchase-money. The case was thus:

By the act of Congress of April 12th, 1814, every person who had inhabited and cultivated a tract of land lying in that portion of the State of Louisiana which had composed the Territory of Orleans, or in the Territory of Missouri, in cases where the land was not rightfully claimed by any other person, and who had not removed from the State or Territory, was entitled to the right of preëmption in the purchase of the land, under conditions and regulations prescribed by a previous act, passed with reference to certain settlers in Illinois. The same right was extended by the act to the legal representatives of the original occupant. Under this act one Goodbee, in 1822, applied to the register and receiver of the land office of the district to become a purchaser of a tract supposed to contain about one hundred and sixty acres, which had been occupied and cultivated by one Beedle, in 1813, under whose settlement he claimed. His right to preempt the tract was recognized by the officers, and, the required price being paid, the usual certificate was issued to him. The land at this time was designated as lot number one, under a special system of surveys authorized by the act of March 3d, 1811. It was some years later before the general system of surveys into ranges, townships, and sections, was extended over the country; and when this took place, the legal subdivision embraced about fifteen acres in excess over the one hundred and sixty. To this excess, as part of the original lot, Goodbee's right of preëmption under the regulations of the General Land Office also attached.

At the time he made his entry, Goodbee was in the open and exclusive possession of the premises, and either he or his grantees subsequently continued in such possession, and cultivated the land, and erected valuable and permanent improvements thereon.

In 1823, the President, by proclamation, ordered the sale

Statement of the case.

of the public lands of the district. The proclamation was general in its terms, embracing all the lands, without excepting such as had been previously preëmpted or reserved, but the parcels preëmpted or reserved were designated by proper entries in the register of the land office. The tract occupied by Goodbee was thus designated, and was not offered at the public sale which took place.

In 1836 Hughes entered this tract at private sale, designating it by section, township, and range,—the proper description under the completed public surveys. The officers of the land office, overlooking, from the difference in its description, the fact that the tract had been previously sold to Goodbee, gave him the usual certificate of purchase and payment, upon which, in April, 1841, a patent was issued by the United States.

To the bill or information filed below, Hughes demurred. The court gave judgment sustaining the demurrer. This judgment having come on appeal here, at December Term, 1850,* was reversed, the demurrer overruled, and the patent to Hughes decreed null and void, and ordered to be surrendered. This decree was afterwards, by consent, set aside, and the cause remanded to the Circuit Court, with leave to the defendant to *answer*, and for further proceedings according to equity. He accordingly did answer; the grounds of defence now set forth being that he had obtained, in the State courts of Louisiana, two several judgments in two distinct suits.

The first was, ejectment brought by him against one Sewall, tenant in possession and claimant of the title under Goodbee, which suit had gone in his favor.

The second one was brought against him by this same Sewall and one Hudson (both claimants under Goodbee), who sought to set aside the patent to Hughes, on the same allegations of fraud, as it was alleged, and the same exhibition of documents, that at their instance were now set forth by the United States, in the bill or information filed in the Circuit Court of the United States.

* 11 Howard, 552.

This second suit was dismissed for want of jurisdiction and absence of proper parties—so far as the petition related to the relief sought by the bill in the present suit—and it was dismissed generally, because it was defective, uncertain, and insufficient in the statement of the cause of action.

In the suit of *Hughes* v. *Sewall*, judgment was given in favor of Hughes, on the ground that the court could not, in that action, look behind the patent to inquire into the equities of the parties. The Supreme Court of Louisiana affirmed this judgment on appeal, but granted a stay of execution until the validity of the patent could be judicially ascertained.

The Circuit Court of the United States below was of opinion that no sufficient defence was shown by the judgments set up, as above stated, and that the United States were entitled to the relief prayed for, and it decreed accordingly.

The case came here by appeal, and was submitted by *Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the United States, and by Mr. Carey, contra.*

Mr. Justice FIELD delivered the opinion of the court.

This suit is brought to vacate the patent to Hughes, and compel its surrender for cancellation. It proceeds upon the ground that the patent was issued in violation of the rights of Goodbee, or parties deriving title under him, and that its existence impairs the ability of the government to fulfil its engagements to him.

By the act of April, 1814, the United States had extended to Goodbee the privilege of purchasing the land, and had prescribed the mode of proceeding to make the purchase, and fixed the price to be paid. When this mode was pursued, and the price was paid, a contract was completed between him and the government, which the latter was bound to execute by a transfer of the title. The patent to Hughes, subsequently issued, stood in the way of an efficient and just execution of this contract. Its operation was either to divest the United States of the legal title, or, by clouding the title,

to impair the security which would otherwise flow from their conveyance. When this case was here on demurrer,* the patent was considered by the court to be a valid instrument conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their engagement to Goodbee or his alienees. Whether regarded in that aspect, or as a void instrument, issued without authority, it *primâ facie* passed the title, and, therefore, it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress.

The power of a court of equity, by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisdiction.

The patentee cannot complain of the proceeding, for the open, notorious, and exclusive possession of the premises, by the parties claiming under Goodbee, when the patentee made his entry and received the patent, was sufficient to put him upon inquiry as to the interests, legal or equitable, held by them; and if he neglected to make the inquiry, he is not entitled to any greater consideration than if he had made it and ascertained the actual facts of the case.

The judgments recovered by Hughes in the State court of Louisiana—one in an action brought by him against Sewall, and one in an action brought against him by Sewall and Hudson—constituted no bar to this suit. The first case was ejectment against Sewall, who was at the time in the occupation of the land, and judgment passed in Hughes's favor, on the ground that the court could not, in that form of action, go behind the patent and inquire into the equities of the parties. On appeal, the judgment was affirmed by the Supreme Court of the State, but was accompanied with

* 11 Howard, 568. See, also, Jackson *v.* Lawton, 10 Johnson, 23.

a stay of execution until the validity of the patent should be judicially ascertained.

The second case was a petitory action, brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent, the annulment of the above judgment against Sewall, then pending on appeal in the Supreme Court of the State, the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was "defective, uncertain, and insufficient in the statement of the cause of action."

It requires no argument to show that judgments like these are no bar to the present suit. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.*

JUDGMENT AFFIRMED.

[See, as to the second point of the syllabus, *United States* v. *Stone*, 2 Wallace, 525.—REP.]

MITCHELL *v.* ST. MAXENT'S LESSEE.

1 A writ of *fieri facias*, tested and issued after the death of the party against whom the judgment is recovered, is void, and confers no power on the ministerial officer to execute it.

* Walden *v.* Bodley, 14 Peters, 156; 1 Greenleaf's Ev., §§ 529 and 530, and authorities there cited.

Argument for the plaintiff in error.

2. The rule applies where the proceedings are commenced by seizing property under a writ of attachment, under the laws of Florida, as at the common law.

ERROR to the District Court of the Northern District of Florida. The case was thus:

On a proceeding on foreign attachment, judgment had been obtained in Florida, November 12th, 1825, against St. Maxent, a non-resident, but who owned certain lands in Escambia County there. St. Maxent died on the 25th day of November, 1825. On the 26th day of November a *fieri facias* was issued. The sheriff returned it December 1st, 1825, "levied on the land" in question. Then followed a *venditioni exponas*, but all proceedings were stayed by injunction. Then, on the 21st of December, 1826, a writ of *fieri facias* against the said St. Maxent was issued, directed to the marshal of the district, and under this the land was sold and conveyed to J. K. Mitchell, or to persons from whom he derived title. The heir of St. Maxent having brought ejectment against Mitchell, the court, on the above state of facts, gave judgment for the heir.

In this court several questions were raised, among them, whether the sale to Mitchell, under the circumstances above stated, was valid.

Mr. Reverdy Johnson, for Mitchell, plaintiff in error:

At common law, if the execution be tested in the lifetime, it may be taken out and executed after death, for the execution related to the judgment, and might be tested immediately after it was rendered.

The doctrine of relation is carried still further; for if defendant die in vacation, judgment might still be entered after his death, and execution issued as of the preceding term.

This rule was limited by the statute of 29 Car. II, to the parties themselves, and *bonâ fide* purchasers were protected from its operation.

In the eye of the law, therefore, it is the judgment which conclusively settles the rights of the parties on the day of its

rendition, and a fiction is resorted to, to prevent a subsequent disability from interfering with its enforcement.

To the like effect is the act of 27th June, 1823, of the Legislative Council, Territory of Florida:* "The service of attachment on lands, &c., shall bind the property attached, and a judgment obtained therein shall have relation to the time of the service of attachment, and the plaintiff shall have priority of payment out of the property attached, except as to valid subsisting liens," &c.

In this case the plaintiff in attachment had a right to an execution, tested the day after the judgment, and it is clear that if it had been so tested, the death could not have vitiated it.

The parties, therefore, have nothing to complain of, and if this irregularity could be taken advantage of at all, as against a *bonâ fide* purchaser at a judicial sale, it must be by a direct proceeding, and not collaterally.

Voorhees v. *Jackson*,† is in many respects parallel to this. The plaintiff in ejectment relied upon his purchase under an attachment suit, which was resisted on the ground that none of the prerequisites required by statute to vest the jurisdiction had been complied with, and defendant had never appeared. The court held, that while the judgment remained in force it was itself evidence of the right to the thing adjudged, and that errors, however apparent, can only be examined by the appellate power. That it would be a well-merited reproach to jurisprudence if an innocent purchaser, who had paid his money on the faith of an order of the court, should not have the same protection under an erroneous proceeding as the party who derived the benefit accruing from it. The purchaser under judicial proceedings pays the plaintiff his demand on the property sold; to the extent of this, he discharges the defendant from his adjudged obligation.

* 26 Pamphlet Acts, 39. Mr. McPherson, of opposite counsel, remarked that this provision had been repealed; referring to acts of the Territory of Florida, 1824, p. 195.

† 10 Peters, 449.

Argument for the plaintiff in error.

The land lying in Florida was under its sovereignty and jurisdiction, without regard to the citizenship of the owner, and the jurisdiction of its courts was ample.

The proceeding was by attachment, and by its levy the plaintiff acquired a right in the specific property consummated by the judgment. It thus became sequestered in the hands of the law, and was held for his benefit as fully as if it had been levied on by a *fi. fa.* The levy of a writ, or a levy of a *fi. fa.*, stand under the same sanctions. Both are solemn judicial orders, executed by the officer of the law, under his official responsibilities; and if this be true, the case of *Doe* v. *Taylor** is conclusive of the question. On the objection to the title in ejectment, that the *venditioni exponas* under which the land was sold was tested subsequent to the death, the court held, that as the judgment operated as a lien on the land, and a prior execution attached "specifically upon the subject of its operation," that "the rights of the parties to the subject-matter were determined, and all controversy closed. The law had taken the subject entirely to itself, to be applied by its own authority and its own rules."

Here the party has his levy and a judgment, which the court in this case regarded as conclusive, and closing all controversy. He may have issued a mere "venditioni;" all he wanted was an order of sale. That he sued out a *fi. fa.*, instead of this, cannot vary the rights of the parties, which were fixed by the levy and judgment.†

An attachment is a proceeding *in rem*. Notice is served upon the thing itself. This is necessarily constructive notice to all who have any interest, or can assert any title. Every such person is considered as a party to the proceeding, and the suit does not abate by death. As soon as such process is commenced, and the arrest of the property is made, it is in the custody of the law. For it is a general rule in proceeding *in rem*, that the custody of the thing in

* 13 Howard, 293.

† Randolph *v.* Carleton, 8 Alabama, 616; Garey *v.* Hines, Id. 839.

controversy belongs to the court in which the suit is pending.*

The judgment of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of property; and no court of co-ordinate jurisdiction can examine into it. If an erroneous judgment binds the property on which it acts, it will not bind the less because its error is apparent. Of this error advantage can only be taken in a court capable of correcting it.†

In *Thompson* v. *Tolmie*,‡ the language of the court was, "When there is a fair sale, and the decree executed by a conveyance, the purchaser will not be bound to look beyond the decree, if the facts necessary to give jurisdiction appear upon the record."

Upon these settled principles, this court held, in the case of *Whiting* v. *Bank of the United States*,§ that the death of the mortgagor, after the decree of foreclosure and sale, but before the sale was made, constituted no ground for a bill of review.

The case now before the court appeals more strongly to its sense of justice. *There*, the application was to a court of equity, which, in affording relief, always compels the party to do equity. *Here*, there is an action at common law, where, if the party succeed, he recovers the land while retaining the purchase-money for which it was sold.

Messrs. Carlisle and McPherson, contra:

"That no individual or public officer can sell and convey a good title to the land of another, unless authorized to do so by express law, is one of those self-evident propositions," said Marshall, C. J., in *Thatcher* v. *Powell*,‖ "to which the mind assents without hesitation, and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid, is a principle which has been repeatedly recognized in this court." St. Maxent,

* Burke *v.* Trewit, 1 Mason, 100.

† Williams *v.* Amroyd, 7 Cranch, 423; Elliot *v.* Pearsal, 1 Peters, 340.

‡ 2 Peters, 169. § 13 Id. 13. ‖ 6 Wheaton, 125.

the defendant in the attachment, having died on the 25th of November, the writ of *fieri facias*, issued and tested on the 21st of December following, without any *scire facias* against his heirs or *terre tenants*, was necessarily void.* This being a principle of the common law, was introduced into Florida by the act of the Legislative Council, passed June 29, 1823, § 1.†

Mr. Justice DAVIS delivered the opinion of the court.

The solution of one question presented by the record is decisive of this case. Does the writ of *fieri facias*, tested and issued after the death of the party against whom the judgment is rendered, confer power on the ministerial officer to execute it? That St. Maxent was the owner of the lands in controversy at the time of his death, and the plaintiffs below are his heirs-at-law, is admitted; but it is claimed that the title was divested by certain proceedings in attachment against him in the courts of Florida, which ripened into a judgment while he was alive. It is a well-settled principle of law, which has often received the sanction of this court, that the decree or judgment of a court, having jurisdiction, is binding until reversed, and cannot be collaterally attacked. But the defect in this case occurs after the judgment, and is fatal to Mitchell's title, for purchasers at a judicial sale are not protected, if the execution on which the sale was made was void. Void process confers no right on the officer to sell, and all acts done under it are absolute nullities.

The writ of *fieri facias* on which Mitchell rests his title, was tested after the death of St. Maxent; and, according to a familiar rule of the common law, it was therefore void. The death of a defendant, before the test of an execution, compels the plaintiff to sue out a writ of *scire facias*, "for the alteration of the person altereth the process."‡ The heirs, devisees, and terre-tenants of the deceased must have

* Erwin's Lessee *v.* Dundas, 4 Howard, 58; Woodcock *v.* Bennett, 1 Cowan, 738.

† Acts, &c., p. 136.

‡ Bacon's Abridgment, Title "*Scire Facias.*"

notice before an execution can regularly issue, for they are the parties in interest, and should have an opportunity to interpose a defence, if any they have, to the enforcement of the judgment. *Erwin's Lessee* v. *Dundas** is an authority in point, and it is unnecessary to refer to any other.

But it is contended that the doctrines of that case have been overturned by the decision of *Taylor* v. *Doe*, reported in 13th Howard. This is an erroneous view of that decision. The court held, in that case, that it is not necessary to revive a judgment by *scire facias*, where an execution regularly issued during the life of the defendant had been levied on land, but that the officer who had made the levy could proceed to sell, under a *venditioni exponas*. *That writ* was regarded as a completion of the previous execution, by which the property had been appropriated, and not as an original or independent proceeding.

It was in the power of the legislature of Florida to have changed the rule on the subject of the test of process; but, having failed to do it, and having adopted the common law of England, the question in issue must be decided by the rules of the common law.†

But it is insisted that the rules of the common law only attach to suits prosecuted in the ordinary way, and do not apply where the proceedings are commenced by seizing property under a writ of attachment. This is a novel view, for the law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it. In Florida the service of the writ of attachment binds the property, and retains it in custody of the law, for the benefit of the attaching creditor, if he obtains a judgment and execution, and the property is to be disposed of as in other cases of property levied upon and taken in execution.‡

As an execution is required, and the law is silent about the manner of its issue, it follows that it is to be tested and

* 4 Howard, 58.

† Laws of Florida, 1822 to 1825, p. 136.

‡ Id. 1823, p. 40

Statement of the case.

issued as writs of *fieri facias* are on judgments obtained through the usual methods of the common law.

The judgment of the court below is

AFFIRMED WITH COSTS.

PEOPLE v. THE COMMISSIONERS.

1. Shares in banks, whether State banks or those organized under the act of June 3d, 1864, "to provide a national currency," &c., are liable to taxation by the State under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared, by statutes creating them, to be exempted from taxation by or under State authority. *Van Allen* v. *The Assessors*,* affirmed.
2. If the rate of taxation by the State on such shares is the same as, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

THESE were two cases which arose upon a *certiorari*, prosecuted, the one by Denning Duer, as relator, the other by Ralph Mead, in the same way, out of the Supreme Court of the State of New York, and directed to the Commissioners of Taxes and Assessments for the City and County of New York, the defendants in error. The relator in the first case was a holder of certain shares of stock in the National Bank of Commerce in New York, a banking association organized under the National Bank Law. The relator in the second case held certain shares in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State. These shares, in both banks, had been assessed in the year 1866, for the purposes of taxation under the

* 3 Wallace, 573.

State laws, by the commissioners, as personal property of the relator, in the place in which the banks were located.

In justification of their proceedings the commissioners relied upon:

First. The enactments, in the form of provisos, in the forty-first section of the National Bank Law, passed June 3d, 1864,* in these words:

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed, by or under State authority, at the place where such bank is located, and not elsewhere; *but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.*

"*Provided further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located."

Secondly. An act of the State of New York, passed April 23d, 1866,† in these words:

"SECTION 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town, or ward, or not; *but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State.*"

The case was heard by the Supreme Court of New York,

* 13 Stat. at Large, 99.

† Laws of New York, for 1866, vol. 2, p. 1647.

on the return of the commissioners, as upon a demurrer thereto. The return stated that the commissioners did assess the relator upon the value of said shares, and included the same in the valuation of his personal estate.

That they made no allowance or deduction on account of investments by the bank in any securities of the United States.

That such a *deduction or allowance was made in assessments upon insurance companies and individuals.*

The Supreme Court gave judgment for the commissioners, which judgment the Court of Appeals affirmed.

The cases were now here for review, under the twenty-fifth section of the Judiciary Act; two questions, among others brought up but not considered by this court, being:

1. Whether the New York statute, of 23d April, 1866, was valid so far as it attempts to authorize the taxation of bank shares where the capital of such bank is invested in United States securities, exempt from taxation under the acts of Congress? a question argued separately in respect to State banks, and to those organized under national laws.

2. Whether the taxation of the shares of the several relators was not invalid, for the reason that an illegal discrimination was made in favor of other State corporations and individuals, citizens of said State?

Besides the two cases reported by name here, there were eight or ten cases in substance very similar to them, the cases being represented by different counsel.

The various relators, plaintiffs in error, were represented by *Messrs. W. M. Evarts, B. D. Silliman, J. E. Burrill, and E. S. Van Winkle.*

On the other side were, *Messrs. C. O'Connor, A. J. Parker, R. O'Gorman, and W. Hutchins.*

For the relators, plaintiffs in error:

I. The case of *Van Allen* v. *The Assessors,** adjudged, in fact, no more than that, under the legislation of New York,

* 3 Wallace, 573.

as *then* existing, a tax could not be laid on shares in the national banks. That was the point of the case. Whether such an act as that passed 23d April, 1866, would be valid so far as it taxed bank shares, where the capital of the banks was invested in Federal securities, was not a question necessarily in the case.

[The counsel then proceeded to discuss at large the first question as related to national banks, upon the assumption that this question was still open in this court for discussion.]

II. There is no act of Congress authorizing the taxation of shares of State banks whose capital is invested in United States securities, and the State, in asserting its right to tax such shares, cannot invoke any power or authority from Congress, but must maintain such right as one of State sovereignty. It is evident from the opinions in *Van Allen* v. *The Assessors*, that the court, in sustaining the assessment and the State law under which it was made, place its judgment upon the proviso in the forty-first section of the act of Congress.

A question is now presented, whether, in the absence of any act of Congress authorizing the taxation of the shares of STATE banks, whose capital is invested in government securities, such taxation by the State can be supported.

On this point we submit:

1. The United States securities, in which the capital of the Corn Exchange Bank, which is a State bank, is invested, are included within the provision of the act of Congress, that such securities, "whether held by individuals, corporations, or associations, shall be exempt from taxation by or under State authority."*

2. It is settled, in adjudications of the Supreme Court of the United States, that the capital of such bank cannot be taxed upon any measure or computation of it which includes the investment in these United States securities, thus exempt by law from State taxation.†

* 13 Stat. at Large, 346.

† Bank of Commerce *v.* Commissioners, 2 Black, 620; Bank Tax Case 2 Wallace, 200.

3. It is also adjudicated by the Supreme Court of the United States, upon a unanimous judgment of that court, that a tax, incompetent to State authority when assessed to the corporation or association as owner, and upon its capital in bulk, is equally incompetent to State authority when assessed to the shareholder as owner, and upon his shares.*

4. The tax complained of by the relators, depending for its validity, as it does, upon the mere vigor of the legislation of the State of New York, and being without aid from any legislation or permission of Congress, is necessarily invalid as respects the investment of the bank, in United States securities, exempt from taxation.

III. In making the assessment, the commissioners discriminated against the shareholders of national banks, and in favor of insurance companies and individuals, by refusing to make to the former the same allowance which is made to the latter on account of investments in United States securities, and have thus assessed "such shareholders at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," in violation of the act of Congress above referred to.

The only permissive legislation of Congress touching the subject of State taxation of the shares of national banks is found in the forty-first section of the National Currency Act of June 3d, 1864.

And the only permissive State legislation touching the taxation of shares of State banks is the act of April 23d, 1866, and by each of said acts it is provided that such taxation shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The two *provisos* of the forty-first section of the act of June 3d, 1864, respectively refer to different subjects.

The first relates to the *valuation* at which the shares shall be assessed; and provides that it shall not exceed the rate of valuation at which other moneyed capital in the hands of individuals shall be assessed.

* Van Allen *v.* The Assessors, 3 Wallace, 573.

Argument for the plaintiffs in error.

The second refers to the rate at which *taxes* shall be imposed on such valuation, after such assessment has been made, and provides that such taxes shall not exceed in rate, or percentage, that imposed on shares in State banks.

The question in this case is not as to any rate, or percentage, at which taxes have been imposed, but as to the rate or value at which the shares have been assessed.

The assessment of the shares held by the relator in the *Bank of Commerce* was invalid, because they were assessed at a greater rate than was assessed on the shares in insurance companies, and at a greater rate than was assessed on the capital of insurance companies; and hence were assessed at a greater rate than "other moneyed capital, in the hands of individual citizens" of New York.

Insurance companies incorporated under the laws of New York are moneyed corporations.* Such companies by the laws of New York are subject to taxation on their capital.† But they were assessed, and could legally be assessed, only upon the balance or residue of their capital and surplus profits, after deducting therefrom the amount of bonds and other securities of the United States held by them.‡

Insurance companies in New York are subject to taxation on their capital, and the owners of stock in such companies are consequently exempt from taxation thereon. The stock so held by them, therefore, could not, under the laws of New York, be included in the valuation of their personal property in the assessment of taxes imposed by or under State authority. It is no answer, however, to say that the bank shares have not been assessed for valuation at a greater rate than insurance shares, because the latter are not assessed at all, and are not subject under the State laws to taxation. Such omission to assess and tax insurance shares is subversive of the principle of the first proviso. Its direct result is to produce the prohibited discrimination.

It is submitted that the reasons above assigned for the re-

* 1 Revised Statutes of New York, 598, § 51. † Id. 414, § 1.

‡ Bank of Commerce *v.* Tax Commissioners, 2 Black, 620; Bank Tax Case, 2 Wallace, 206

versal of the judgment of the State court are sanctioned by the unanimous opinion of this court in *Van Allen* v. *The Assessors.*

In that case the judgment was reversed, because of a non-compliance with the *second* proviso of the forty-first section relating to the *tax.*

In the present case the defect is a parallel non-compliance with the *first* proviso relating to the *assessment.*

For the defendants in error: All the questions involved in the discussion of these cases upon the merits have, in effect, been decided by this court against the positions maintained by the plaintiffs in error.

When the question of the right of the State authorities to tax shareholders in national banks was before the court, in *Van Allen* v. *The Assessors*, it was held, as will be seen by reference to the case, that the right existed, and that the tax would have been legal, except for a single defect in the enabling act passed by the legislature of New York in 1865, which consisted in an omission to re-enact a provision of the act of Congress which required, that "the tax so imposed under the laws of any State upon the shares of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located," and it was then said by the court that that defect "may be readily remedied by the State legislature."

That defect was accordingly remedied by the act of the legislature of New York, passed April 23d, 1866, by which both state and national banks were put on the same footing as to taxation.

That it was then intended, in the decision of *Van Allen* v. *The Assessors*, by this court, to make a final disposition of the question whether the shares of national banks were liable to municipal taxation, is declared by the court itself in the following language: "The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily ar-

gued before us at this term, as well as to the public interest involved, that the question should be finally disposed of." And the court then proceeded to state the grounds and reasons which they said "had led to their judgment in the case."

The report shows that every point was fully considered by all the judges, with a view to a decision of all the questions now attempted to be raised again.

It was held in that case:

1. That it is not a tax upon the Federal bonds, but upon the benefits the shareholder would derive from the new use of them under the privilege conferred upon the associations by the act of Congress.

2. That a tax on the shares is not a tax on the capital of the bank.

3. That Congress has the power to permit the States to levy the tax, and has so legislated as to leave the shares of the stockholder subject to State taxation without any deduction for United States bonds held by the association.

4. That "the State tax under this act of Congress involves no question as to the plighted faith of the government."

It is true, there was another question, a technical one, involved. But that makes the decision none the less authoritative on the other question. Both the questions were equally presented, discussed, and decided; the constitutional power to tax, and the question whether the tax was properly levied. And it makes no difference that the decision of one, standing alone, requires the affirmance of the judgment, and the other called for a reversal, though the judgment was in fact reversed. A decision becomes authority, when it appears that the question was really involved and was fully considered and decided by the court.

But if the question upon the merits is again open for discussion, then we say: [The counsel then discussed the matter upon merits.]

I. In the case of Mead and others of the cases now before

this court, the question is raised whether a municipal tax may be collected from the shareholders of State banks, when the capital of the State bank, or a part of it, is invested in government bonds. Why should it not be?

This tax is levied in accordance with the express provision of the State act of April 23, 1866.

It is not a tax on the capital of the banks, nor on the United States bonds held by the bank. This view is sustained in *Van Allen* v. *The Assessors.*

This taxation is by implication authorized by the act of Congress, which expressly permits shares of stock in national banks, under like circumstances, to be taxed, and then requires that the taxation of shares of both national and state banks shall be placed on the same footing.

And the same reason for it exists as in the case of national banks, because the bonds are in fact put to a use not contemplated in the original contract between the government and the lender, of which use the shareholder receives the benefit in the way of dividends.

II. The only other requirement of the act of Congress was, that the taxes on the shares of the national banks shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

This, too, has been complied with. The statute of the State expressly forbids a higher rate of taxation.

This last proviso does not refer to corporations of any kind, but refers to private individuals—citizens of the State. The tax on bank shares is not to exceed the rate assessed upon other moneyed capital in the hands of such persons.

We submit that the words "moneyed capital" refer only to such moneyed capital as is liable to assessment. They do not refer to bonds of the United States owned by individuals, for they are not moneyed capital liable to assessment. No assessment at all is to be made on such property.

The moneyed capital in the hands of an individual liable to assessment is first to be ascertained. The United States bonds, if he has any, are to be deducted. The balance is his moneyed capital liable to be assessed, and the assessment

is made on it at precisely the same rate as that upon the shares of stock in a bank.

Congress did not say and did not mean all the moneyed capital in the hands of individual citizens, but only that which "is assessed" or, in equivalent words, is liable to assessment.

No other construction could have been intended by Congress—for that body well knew that United States bonds held by individuals were not liable to be assessed by State authority—and that this State had not the power to pass an act which should subject them to State taxation. They will not be supposed to have prescribed an impossibility, or the enacting of an unconstitutional statute as a condition on which alone a State could have the benefit of the privilege tendered by this act of Congress of taxing the shares of national banks.

We assert that, in this proviso, "rate" means the rate per cent. If the assessment on moneyed capital in the hands of individuals is at the rate of two per cent., the assessment on the shares of stock cannot be at a greater rate.

Nor was any different meaning given to this word by this court in the case of *Van Allen* v. *The Assessors* where it occurs in the other proviso. The act of Congress had required that the tax on *the shares* of national banks should not exceed the rate imposed upon *the shares* in State banks. No tax has been imposed by the State upon *the shares* of State banks. They were left, as before, to be assessed on their capital, and this operated unequally, as where assessments were made upon *capital*, certain deductions could be made which could not be made when assessed upon *shares*. The tax therefore on *the shares* of national banks was at a rate exceeding the tax on *the shares* of State banks by the whole amount of the tax. If the rate of taxation was two per cent., that was the excess of rate over the rate on shares of State banks not taxed at all.

It is objected that insurance companies are taxed on their capital, and that the United States bonds held by them, if any, are exempt from taxation. But Congress has made no

requirement as to such corporations. They are neither "banking associations," nor "individual citizens."

It was the policy of Congress to place the national banks upon an equal footing with the State banks with which they were to come in competition. It allowed the national banks to be taxed on "all their shares," but required that the tax should not exceed the rate imposed on the shares of State banks.

The national banks were not to be placed in competition with insurance companies, and needed no special protection as to them.

To protect them, however, against a possible abuse—a legislation which might discriminate unjustly, by authorizing a greater rate per cent. to be assessed on bank shares than on the taxable property of individual citizens,—the proviso last discussed was adopted.

We suppose that the only safeguards attempted to be secured by Congress at all necessary to the protection of the national banks were the two following:

1st. Fairness of competition with State banks.

2d. No discriminating abuse of the taxing power on the rate per cent. as compared with taxable individual capital.

There was no necessity, therefore, for any provision in the act of Congress as to insurance companies. Nor is any amendment called for. Insurance companies stand already upon the same footing as "individual citizens." Their taxable capital is taxed at the same rate as the shares of banks. And so it should be. It was the intention of Congress, as was said in *Van Allen* v. *The Assessors*, to subject "all the shares" of banks to taxation, without deduction for any United States bonds they might hold, because they had availed themselves of the privilege given by that act to use the bonds in a way to secure large profits, but by a use neither contemplated nor permitted at the time of the original contract between the government and the bondholder.

But insurance companies had no such privilege and could make no such use of the bonds. They could only hold them as "individual citizens" did, making no more on them than

was agreed upon when the bonds were issued, viz., simple interest.

Mr. Justice NELSON delivered the opinion of the court.

These cases are writs of error to the Court of Appeals of the State of New York. The relator in the first is an owner of one hundred and fifty-two shares of stock in the National Bank of Commerce in New York.

The capital of the bank consists of one hundred thousand shares of one hundred dollars each, and which is invested in United States securities, and exempt from State taxation. The commissioners of taxes, in making their assessments, valued the shares at par, and imposed upon them the same rate of tax as was imposed upon other personal property in this city.

The commissioners, in their return to the *certiorari*, state that in estimating the value of the shares they made no deduction on account of the investment of the capital of the bank in United States securities. That in the valuation of the personal estate of individuals, these securities held and owned by them were deducted and the tax assessed on the balance; and the like deductions were made from the capital of insurance companies.

The assessment of this tax on the shares of the relator in the Bank of Commerce was carried to the Supreme Court of the State, and, after argument, was affirmed, and thence to the Court of Appeals, where the judgment of the Supreme Court was affirmed. The case is now here on error under the twenty-fifth section of the Judiciary Act.

The first objection taken to the legality of the tax is on the ground that the commissioners in the valuation of the shares refused to deduct the amount of capital of the bank invested in United States securities, and, hence, refused to regard this deduction in the valuation of the shares.

This question has heretofore been considered by this court, and, after full deliberation, determined, in the case of *Van Allen* v. *The Assessors*,* and need not again be examined.

* 3 Wallace, 573.

That case was one of a large class of cases, which were very thoroughly argued, and received, at the time, the most careful examination of the court.

The next, and perhaps the only material question in the case, arises upon a construction of a clause in the first proviso of the forty-first section of the National Bank Act. After referring to the taxation of these shares by State authority, it provides: "But not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States."

It is argued that the assessment upon the shares of the relator is at a greater rate than that of the personal property of individual citizens, upon the ground that allowance was made on account of United States securities held and owned by them, when at the same time the deduction was disallowed to him.

The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens.

This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

The objection is a singular one. At the time Congress

enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions, and think a sound construction of the clause, and one consistent with its words and intent, is also consistent with all the acts of Congress on the subject.

The commissioners, in their return, state that insurance companies created under the laws of the State, and doing business in the city of New York, were respectively assessed upon the balance of their capital and surplus profits, liable to taxation, after deducting therefrom such part as is invested in United States securities.

Another objection taken is, that the taxation of the shares of the relator is illegal, on account of this deduction,—it being a departure from the rate of assessment prescribed in the clause already cited.

The answer is, that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the

deduction of these securities in the assessment of the property of individual citizens is equally applicable to them. These companies are taxed on their capital, and not on the shareholder, at the same rate as other personal property in the State. There is not much danger to be apprehended of a discriminating tax in their favor, prejudicial to the rights or property of the citizen; and, of course, to the rights of the shareholders in these national banks, who stand on the same footing.

The relator in the second case, Ralph Mead, is the holder and owner of twenty-five shares of stock in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State.

The act of April 23d, 1866, imposed a tax on the shares of these banks.

It is insisted that the tax is illegal on account of the refusal of the commissioners to deduct the United States securities in which a portion of the capital stock of the bank was invested.

The general question was distinctly presented in the bank cases of the last term, of which *Van Allen* v. *The Assessors* was one of the class,* and disposed of. It was there said: "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any

* 3 Wallace, 573, 583, and 584.

other property that may belong to him;" and, we add, of course, is subject to like taxation.

It was supposed, on the argument, that this principle was in conflict with that which governed the decision of this court in the case of *Gardner* v. *The Appeal Tax Court*,* but this is a mistake. That case turned upon the construction of an act of Maryland exempting the bank from taxation on account of a large bonus to the State for the extension of the charter. This court held, that upon a true construction of the act, the stockholders were within the scope of the exemption. The court say: "In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears from the eleventh section in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons, on account of the stock which they owned in the banks."

Some other questions were discussed on the argument, besides those we have noticed, but they are questions of which this court cannot take cognizance. We have examined all of them that are here under the twenty-fifth section of the Judiciary Act.

Judgment of the court below AFFIRMED.

The CHIEF JUSTICE: In concurrence with my brothers Wayne and Swayne, I dissent from the opinion just read. The reasons of dissent sufficiently appear in our dissenting opinion in the case of *Van Allen* v. *The Assessors*, read at the last term, and we do not think it necessary to repeat them.

GRAHAM *v.* UNITED STATES.

1. The Mexican law made a formal delivery of possession of real property granted essential, after the execution of the grant, for the investiture of the title.

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* 3 Howard, 133.

2. The proceeding had upon such delivery—called, in the language of the country, the delivery of juridical possession—was usually taken by the magistrate of the vicinage, with assisting witnesses, in the presence of the adjoining land proprietors, and involved, when there was any uncertainty in the description of the premises, a measurement of the land and the establishment of its boundaries.
3. The record of a proceeding of this nature must control the action of the officers of the United States, in surveying the land granted, when the grant is confirmed.

ON the 22d of April, 1841, a grant of land was issued to one Mayors by the Governor of California. The grant describes the land granted as that formerly occupied by Francis Moss, and known by the name of Zayante, bordering on the village of Brancoforte and Mission of Santa Cruz, and as being in extent "longitudinally one league, and latitudinally one-half league, more or less," as explained by an accompanying diagram.

This grant was transferred to the appellants by the grantee, and was by them presented to the Board of Land Commissioners for confirmation, and was confirmed by the board on the 26th of June, 1855. An appeal taken from the decree by the United States was withdrawn on the 9th of February, 1857, and by consent of the district attorney, upon instructions from the Attorney-General, a decree was entered on that day, by the District Court, giving leave to the claimants to proceed upon the decree of the board as a final decree. In the proceedings before the board the claimants produced an original record of juridical measurement, from which it appeared that the grantee was formally put in possession of the premises granted, by the proper officer, to the extent of one square league in length by three thousand varas in width.

The decree of the board describes the land as follows: "The land of which confirmation is made is situated in the County of Santa Cruz, and is known by the name of Zayante, being the same which is now held and occupied by the claimants, and is of the extent of one league in length, and a half league in width, a little more or less, as shown by the original grant, *record of juridical possession*, and map filed in

the case, to all of which reference is hereby made for a more particular description."

In surveying the land confirmed, the Surveyor-General of the United States for California did not follow the measurement contained in the record of juridical possession. The District Court, for that reason, set it aside, and ordered a new survey which should correspond with such measurement. Such survey being made was approved by the decree of the District Court, October 26th, 1863. From this decree the present appeal was taken, and the question presented is, whether this survey embraces the land granted and confirmed.

Mr. Reverdy Johnson, for the appellants.

Mr. Wills, contra.

Mr. Justice FIELD delivered the opinion of the court.

As we have had occasion heretofore to observe,* the Mexican law, as well as the common law, made a formal delivery of possession, or livery of seizin of the property, essential, after the execution of a grant, for the investiture of the title. This proceeding was usually taken by the magistrate of the vicinage, with assisting witnesses, in the presence of the adjoining land proprietors, who were summoned for the occasion. As preliminary to the actual delivery of possession, the land had to be measured and its boundaries estab lished, when there was any uncertainty in the description of the premises. Various regulations for the guidance in these matters of the magistrates were prescribed by law. That which concerns the present inquiry is that they required the magistrate to preserve a record of the measurement, and of all other steps of the proceeding, to have the same attested by the assisting witnesses, and to furnish an authentic copy to the grantee. By this proceeding—called in the language of the country the delivery of juridical possession—the land granted was separated from the public

* Malarin *v.* The United States, 1 Wallace, 289.

domain, and what was previously a grant of quantity, became a grant of a specific tract.

The record of a proceeding of this nature must necessarily control the action of the officers of the United States in surveying land claimed under a confirmed Mexican grant.

In the present case, juridical possession of the land had been delivered to the grantee, and the record was produced and given in evidence. The first survey of the land made by the Surveyor-General of the United States for California, after the confirmation, did not conform to the measurement shown by this record. The District Court, for that reason, set the survey aside, and directed a new survey, which should correspond with that measurement.

To the application of the appellants for a change in the location, the District Court held that there were insuperable objections presented by the action of the officers under the former government, and that it was the duty of the court to locate the land according to the measurement made by the alcalde, and signed by him and the assisting witnesses in the record of proceedings upon the delivery of possession.

We fully concur in this view with the District Court, and, therefore,

AFFIRM ITS DECREE.

BROWN v. BASS.

1 Brown Brothers & Co. had filed a creditor's bill against the Bank of Mississippi before having obtained judgment at law, which, however, was obtained soon after the bill was filed. After this a receiver was appointed and proceeded to take possession of the assets of the bank, to collect debts and compromise with debtors, and with the proceeds to pay the debts of the bank.

2. The defendant, Mrs. Bass, having purchased land upon which the bank had a mortgage, made an arrangement with the receivers by which the latter transferred to her the mortgage and took her notes secured by mortgage on the same land. These notes he passed to Brown Brothers & Co. in part satisfaction of their judgment against the bank. Subsequently, after these proceedings had gone on for twelve years, the creditor's bill filed by Brown Brothers & Co. was dismissed for want of ju-

Statement of the case.

risdiction, because no judgment had been obtained before the bill was filed; and the receiver was ordered to bring into court the assets of the bank which he had received, and the proceeds of such as he had parted with. Failing to do this, because he had surrendered the assets to the debtors, and turned over the proceeds to the creditors of the bank, the bank on his report of these facts obtained a decree for the value of the assets which had come into his possession, including the mortgage surrendered to Mrs. Bass.

3. This suit being brought upon her notes and to foreclose the mortgage given by Mrs. Bass in the settlement with the receiver, she set up in defence,

1st. That the notes were without consideration, because the receiver had no authority to transfer to her the mortgage debt, in settlement of which they were given, and thus that debt was still a charge upon her land.

2d. That if the notes given by her were valid, they belonged to the bank, and not to the complainant, because the receiver had no authority to transfer them to Brown Brothers & Co.

4. *Held* that the bank, by electing to charge the receiver with the value of the securities surrendered by him in the settlement with Mrs. Bass, and Brown Brothers & Co., had affirmed the transaction, and relinquished all claim against Mrs. Bass or her land, and that consequently the defence set up by her was not sustained.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

A bill was filed in the court below to foreclose a mortgage executed by C. R. Bass, now deceased, and Eugenie his wife, on the 22d November, 1851, to Brown, to secure the payment of two promissory notes—one for the sum of $1704.03, and the other for $1703.16—payable respectively 15th January, 1854, and 1855, at a house in New Orleans.

The answer set up, by way of defence, in substance, that Brown, to whom the mortgage and notes were given, was not the legal or equitable owner of the same; but, on the contrary, that the property in them belonged to the Bank of Mississippi, and that the transaction out of which they arose was illegal, and the notes and mortgage in the hands of Brown void. The court below sustained the defence; and the case was now here for review.

Messrs. Carlisle and McPherson for the appellant. Mr. Reverdy Johnson, contra.

Statement of the case in the opinion.

Mr. Justice NELSON delivered the opinion of the court, stating previously the case.

The case is this: In the year 1840, C. R. Bass, the husband, being indebted to the Bank of Mississippi for a considerable amount, gave his notes for the debt, secured by a mortgage of certain real estate in Washington County, State of Mississippi. In 1843, Brown Brothers & Co. filed a creditor's bill against the bank in the Court of Chancery in the State, obtained an injunction, and the appointment of a receiver, with authority to proceed and collect the debts due the bank, and among others this debt of C. R. Bass. At this time Mrs. Bass had become the owner of the equity of redemption of the mortgage to the bank, and was desirous of arranging the suit instituted by the receiver to foreclose the same. An arrangement was agreed on accordingly between her and the receiver, and Brown Brothers & Co., the complainants, by which the notes and mortgage of C. R. Bass were given up to her, in consideration of which she and her husband made to Brown, the complainant, a member of the firm of Brown Brothers & Co., a draft and three promissory notes, amounting in the whole to the sum of $6652.58, secured by mortgage, which mortgage and two of the notes (the draft and the other having been paid) are now the subjects of this controversy.

The receiver, in making this arrangement on behalf of the bank, obtained a credit on a judgment of Brown Brothers & Co. against it for the whole amount of the indebtedness of C. R. Bass, the husband, a sum exceeding $8000. This judgment against the bank amounted to about $159,000, constituting at least two-thirds of all its indebtedness. By this arrangement Mrs. Bass saved more than $1500, and also procured forbearance on her debt. C. R. Bass owed the bank, and the bank, Brown Brothers & Co. The latter accepted the indebtedness of Bass, and accounted for it to the bank by reducing its indebtedness to that amount. This transaction took place in November, 1851, when the notes and mortgage in question were given. The creditor's bill

Statement of the case in the opinion.

of Brown Brothers & Co. had been commenced in June Term, 1843, and after a litigation of some thirteen years the bill was dismissed for want of jurisdiction, in October, 1856. The grounds of the dismissal were, that the judgment at law of Brown Brothers & Co. had not been obtained and execution issued and returned before the commencement of the suit. The receiver had been appointed at the June Term of the court in 1844, and consequently had been engaged in collecting the assets of the bank and converting them into money, to be applied in discharge of its indebtedness, upwards of twelve years at the time the bill was dismissed.

The defence in the case rests upon the effect of the decree dismissing the bill in respect to the past acts of the receiver, in the collection of the debts of the bank, in the settlement with its debtors, and in the general management of its assets for the period mentioned.

On the part of the defendant it is insisted that his acts were void, and are to be so regarded in all subsequent dealings with the assets since the dismissal of the bill; and hence, that the adjustment of the debt of C. R. Bass and the taking of the new securities to Brown were without authority and illegal, or if legal, that the new securities belong to the bank and not to Brown. In order to test the force and validity of these positions it is material to bring into view another branch of this case.

After the dismissal of the bill, and in January, 1857, it was ordered, among other things, that the cause should be retained in court for the purpose of proceeding against the receiver, to enforce and close his account, and to compel the return of the assets of the bank, or their proceeds, into court, and the court recalled a previous order vacating his appointment. And on the 27th January, 1855, it was, among other things, ordered by the court that the receiver should render an account, and "that he should bring into court all notes, bills, choses in action, and moneys, and all other property which came into his hands, and the proceeds thereof, as *well as all securities, notes, bonds, liens, mortgages, as he may*

Statement of the case in the opinion.

have taken and received to secure or in payment of any of said liabilities which came into his hands," &c.

And again, in December, 1857, the receiver was ordered to deliver into court "*all notes, bonds,*" *&c.*, "*and securities of every kind that he may have taken or received by way of substitution or in payment or compromise of any of the debts, notes, choses in action, or securities of any kind which came into his hands as receiver.*"

The receiver, in his report, on the 7th April, 1857, in pursuance of these orders, states that, acting in good faith, and believing that he had power to do so, and with the consent of the complainants in that suit, who, as shown by the answer of the bank, were the principal creditors, and in fact the only creditors, with the exception of note-holders and depositors to a small extent, whose claims had been almost if not entirely extinguished by him, and, as he believes, with the approbation of all parties, he proceeded, by compromises and settlements with various persons, debtors of the bank, instead of collections by law, which were wholly impossible, to settle the various amounts, &c.; that many of the settlements were made with the directors themselves, who were among the principal debtors of the bank. He proceeds:

"Your receiver is advised that if he did not have the power to make said settlements and compromises, the assets so by him arranged and disposed of would still remain the property of the bank; but that he is unable to return the property, for the reason that he is not in possession of the same, having parted with the possession in good faith and in discharge of a supposed duty (in settling the affairs of the bank), and that the court will not require of him a legal impossibility by compelling him to return what he has no control of."

He further states, that he executed a receiver's bond in the sum of $300,000, with undoubted security, in court, and that the rights of any parties to said assets cannot be injured. That many of the settlements and arrangements were made by Brown Brothers & Co., complainants in the creditors'

bill, with directors of the bank, and that transfers were made by the complainants in many instances, as will be seen, of portions of this judgment, on the faith of which your receiver gave up the assets thus settled and arranged, believing that in law and equity he was bound to do so. In other cases the debtors of the bank, and among them some of the directors, made compromises with the complainants; and in such cases your receiver delivered to the complainants the evidences of the indebtedness of such debtors, on obtaining a credit for the full amount of such assets on the judgment.

He closes the report by returning all the assets in his hands undisposed of, and which were described in the statements and exhibits thereinafter referred to; also, the circulation of the bank which he had taken up, and which, if not all, is nearly all of the circulation that was issued by the bank, and that the only other indebtedness of said bank, of any magnitude, is the debt due the complainants.

Exceptions were afterwards taken to this report by the bank, and allowed. It is not material specially to refer to them. And in November, 1859, it was adjudged and decreed that the receiver pay forthwith into court the sum of $125,243.85, the amount of money in his hands, as receiver, unaccounted for; and also the further sum of $227,044.29, being the amount of bonds, bills, assets, &c., which came into his hands as receiver, and unaccounted for—amounting in all to the sum of $349,259.14; and the receiver having failed to pay into court this sum as ordered, a decree was entered, directing a writ of *scire facias* against his sureties, among whom were the complainants, Brown Brothers & Co. The sum adjudged against the receiver and his sureties included the assets surrendered on compromises and settlements, and which had been applied upon the judgment, and, of course, embracing the indebtedness of C. R. Bass to the bank, the settlement in respect to which is the subject of controversy in this suit.

The question upon this state and posture of the case is

whether or not the bank is entitled to a remedy against the receiver and his sureties for this old indebtedness of C. R. Bass, deceased, thus compromised and satisfied by the new and substituted securities, and also against the estate or legal representatives of the deceased, founded upon the original securities, which it is claimed were surrendered without authority?

In our judgment it is not. Even assuming that the compromise and surrender of these old securities and the substitution of the new were not authorized, and might have been set aside and annulled, the bank having elected to charge the receiver with this indebtedness, has thereby affirmed the transaction, and left the parties to the arrangement as they stood when it was entered into.

This result, we think, is clearly deducible from the proceedings on the part of the bank and the decrees of the court. From the report of the receiver, it appears that as it respects this debt, and others in the like condition, it was not in his power to produce before the court either the original or substituted securities. The original were in the hands of the debtors of the bank, to whom they had been surrendered, and the new securities in the hands of third persons to whom they had been delivered. The bank, on the supposition that the acts of the receiver were void, could have pursued its remedy against the original debtors, and perhaps against the persons holding the new securities, if not negotiable and in the hands of *bonâ fide* holders for value, or it could have proceeded by attachment against the receiver and dealt with him until he had exhausted all the means in his power to repossess himself of these securities. But no steps in this direction have been taken. No intimation has been given by any proceeding under the decree dismissing the bill, or otherwise, of an intent to disturb the debtors of the bank or the adjustments by the receiver. It has accepted the proposition of this officer in his report to look to his bond for indemnity against any wrongs or losses sustained in the discharge of the duties of his office. Indeed, it is manifest that a resort to the original debtors or

to the substituted securities for the purpose of collecting or realizing the assets would have been ruinous, not only to the bank but to the debtors. The receiver had been diligently engaged for some thirteen years in the service and had exhausted the resources of the debtors. A second call on them would have been hopeless.

The bank was insolvent, and proceedings were pending to take away its charter. Its organization had been given up as early as 1844, and the business abandoned. In this condition the receiver, under the order of the court, was the only person to deal with its assets, and to administer upon them in a way most beneficial to all concerned.

No doubt this obvious view of the affairs of the institution, together with the complications and inextricable confusion into which the assets had become involved by the dismissal of the chancery suit, led to the election of a remedy against the receiver in preference to a resort against the original debtors.

Another reason for considering the bank concluded by the election is, that no notice has been given to the debtors of an intention to look to them for payment, and at the same time forbidding payment to the holders of the new securities. This notice it was a duty to give, in all fairness, to prevent loss to the debtors. Seven years have elapsed since the decree against the receiver. Doubtless a large portion of these new securities have, in the meantime, been paid. The present appellee, Mrs. Bass, has already paid more than half of her indebtedness upon the new securities.

This absence of any claim against the debtors, as well as against the holders of the substituted securities, shows that great injustice would necessarily result from permitting the defence relied on in the present case. Full value has been received for the notes and mortgage in controversy by Mrs. Bass and by the bank. The old securities were surrendered to her and an equal amount of the indebtedness of the bank extinguished. She has enjoyed the consideration thus paid for some fourteen years without any adverse claim or attempted disturbance of the arrangement. There has been

no eviction or disturbance of possession by an attempt to foreclose the old mortgage against the lands covered by it. She has been in the undisturbed enjoyment of the rents and profits for aught that appears down to the present time. Even as respects Mrs. Bass, and independently of the foregoing considerations, in analogy to the rule applicable to the sale of real estate, or any interest therein, which obliges the purchaser to pay the purchase-money according to his contract, notwithstanding the failure of title, unless evicted or the possession disturbed by paramount title, the payment of the demand in the present case, we think, should be enforced. The principle is as applicable to the sale of personal chattels as to that of real property.

Upon the whole, without pursuing the case further, our conclusion is, that the defendant below has failed to establish the want of title in the complainant to the mortgage which he is seeking to foreclose and the notes accompanying the same, or a title in the Bank of Mississippi, by force of which she may be subjected to a second payment of the same indebtedness. She does not deny but that she owes the debt, nor does she seek to avoid the payment. The question which is important to her and which she desires to have determined is as to the proper party to receive the payment. We think the complainant is that party.

The decree of the court below reversed and the cause remitted, with directions to that court to enter a decree for the complainant in conformity with this opinion.

DECREE ACCORDINGLY.

MITCHELL *v.* BURLINGTON.

1. A provision in the charter of a city corporation authorizing it to borrow money for any public purpose, whenever, in the opinion of the City Council, it shall be expedient to exercise it, is a valid power. *Rogers* v. *Burlington* (3 Wallace, 654) affirmed.
2. Money borrowed by such a corporation to construct a plank-road, if the

road leads from, extends to, or passes through the limits of the corporation, is borrowed for a public purpose within the meaning of the provision.

8. *Havemeyer* v. *Iowa County* (3 Wallace, 294), and *Gelpcke* v. *City of Dubuque* (1 Wallace, 175), affirmed, and the doctrine reasserted, that if municipal bonds, when made, were valid by the constitution and laws of a state as then expounded, by the highest judicial authority whose duty it was to interpret them, no subsequent judicial exposition of an opposite kind, will make them invalid.

ERROR to the Circuit Court of the United States for the District of Iowa.

Mr. Grant, for the plaintiff in error; Mr. Ewing, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Plaintiffs sued the corporation defendants, in a plea of debt, declaring on five bonds of one thousand dollars each, issued by the city on the 23d day of March, 1850, and made payable ten years after date, to E. W. Clark, Brother & Co., or bearer, with interest on the same at ten per cent. per annum. The bonds were signed by the mayor and recorder of the city, and purport to have been issued in pursuance of an ordinance of the city, "to provide for procuring and investing the loan of ten thousand dollars to the city, to be invested in the stock of the Burlington and Mount Pleasant Plank-road Company, and for other purposes." Declaration alleged that the plaintiffs became the lawful owners and holders of the bonds before they were due, and that the defendants were liable to pay to them the amount of the bonds.

Defendants appeared and pleaded, among other defences, as set up in the answer, that the plank-road company mentioned in the declaration was a private corporation; that the bonds were executed for the purpose of procuring money to invest in the stock of that company, and that the obligees of the bonds purchased the same, and loaned the money, well knowing that the proceeds of the bonds were to be used for that purpose. They also set up the defence that

the officers of the city had no authority to issue the bonds, and that the bonds, as against the defendants, were void.

Parties defendant, under the rules of practice which prevail in the court below, may set forth in the answer as many causes of defence as they may have; but when the facts stated in the answer, or any division of the same, are not sufficient to constitute a defence, the plaintiff may demur.* Neither party is allowed to demur generally, but the requirement in all cases is that the demurrer must distinctly specify, as the grounds of objection, the matters of error intended to be argued as defects in the pleading, and no joinder in demurrer is required.†

Pursuant to those rules of pleading, the plaintiffs demurred to the answer of the defendants, and assigned, among others, the following causes of demurrer:

1. That the answer did not allege that *the plaintiffs* knew for what purpose the bonds were to be issued, or to what use the proceeds of the same were to be applied.

2. That the answer is defective, because the allegation that the plank-road company was a private corporation, contradicts the law of the State, of which the court will take judicial notice.

3. That the answer is insufficient, because the defendants, in their corporate capacity, had a right to borrow money, upon a proper vote of their citizens, for any public purpose, and that the construction of the plank-road mentioned in the pleadings was a public purpose within the meaning of their charter; and that, inasmuch as the money was not borrowed for any illegal purpose, the defence set up was no bar to the action.

Such being substantially the state of the pleadings, the court overruled the demurrer of the plaintiffs, and decided that the answer of the defendants disclosed a good defence to the action; and the plaintiffs electing to stand on that demurrer, judgment was rendered for the defendants, and the plaintiffs sued out this writ of error.

* Revised Code of Iowa, 520, 527. † Id. 518.

Opinion of the court.

1. The pleadings raise the question as to the validity of the bonds mentioned in the declaration, and the effect of the decision in the court below was that they were issued without authority. Whether valid or invalid, it is certain that they were issued under the provision in the charter of the city which authorized the corporation defendants to borrow money for *any public purpose*, whenever, in the opinion of the City Council, it should be deemed expedient to exercise that power. Certain important conditions, however, are annexed to the exercise of the power, as appears by the provision itself, but it is unnecessary to examine those conditions, as it is conceded by the defendants that there is no formal objection to the exercise of the authority. All the conditions annexed to the exercise of the power, as expressed in the provision, having been fulfilled, the only questions which, under any circumstances, could arise in the case, are whether the provision is a valid one, and if so, whether the power conferred was exercised for a purpose within the meaning of the provision? Questions of a similar character have been repeatedly before the court, and they have uniformly been decided in the same way. Present defendants presented the same questions to this court at the last term, and the court held that the power to borrow money for any public purpose, within the meaning of the provision, was conferred by the charter in express terms, and that there was nothing in the constitution of the State which limited the authority so conferred, or rendered it invalid. Satisfied with that conclusion, it is not deemed necessary to assign new reasons in its support, or to repeat those adduced in our former opinion.

Proceeds of the bonds in that case had been appropriated in the construction of a railway, and the court held that railways were so far to be considered as in the nature of improved highways, and as indispensable to the public interest and the successful pursuit even of local business, that a State legislature might authorize the towns and counties of a State through which a railway passes to borrow money, issue their bonds, subscribe for the stock of the company, or purchase

the same, with a view of aiding those engaged in constructing or completing such a public improvement, and that a legislative act conferring such authority was not in contravention of any implied limitation of the power of the legislature.* Substantially the same decision, as to the power of the legislature, was made in the case of *Gelpcke* v. *The City of Dubuque*,† and it is proper to remark that the opinion of the court in that case was chiefly founded upon a provision in the charter of that city, expressed in the same words as the provision under consideration in this case. Same question was presented to this court, on a second occasion, at the last term, and the court unanimously held that, unless restrained by the organic law, the legislature of a State had the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan.‡

2. Applying these decisions to the present case, it is clear that nothing remains open for discussion except the question, whether the bonds issued to aid in constructing a plank-road fall within the same principle as those issued granting aid to a railway? Plank-roads are as much highways as railroads, and if authorized to be constructed by the legislature, they are public improvements. Money borrowed to aid in the construction of such a work by a municipal corporation is borrowed for a public purpose, and if the road leads from, extends to, or passes through the limits of the corporation furnishing the aid, the bonds of the corporation given as the means of raising the money, are within the power conferred by that provision.§

3. Attention is also called to the fact, that the courts of the State have recently decided, in several cases, that the city had no authority to issue the bonds; and reference is made to the decisions of this court, where it is held that this

* Rogers *v.* Burlington, 3 Wallace, 654.
† 1 Id. 202.
‡ Thomson *v.* Lee County, 3 Id. 330.
§ Meyer *v.* City of Muscatine, 1 Id. 384.

court follows the decisions of the State courts in the settled construction of their constitutions and statutes.

Similar suggestions, in this class of cases, have several times been presented to this court, and the court has on two occasions carefully examined the subject, and shown to a demonstration that they cannot avail where the bonds, at the time they were issued, were valid by the constitution and laws of the State, as expounded by the courts of the State. Discussion upon that topic is unnecessary, as the point is controlled by those decisions.*

For these reasons, we are of the opinion that the Circuit Court should have sustained the demurrer of the plaintiffs to the answer of the defendants.

The judgment of the Circuit Court is, therefore, reversed, with costs, and the case is remanded for further proceedings in conformity to the opinion of this court.

JUDGMENT ACCORDINGLY.

LARNED *v.* BURLINGTON.

The doctrines of the preceding case affirmed.

ERROR to the Circuit Court of the United States for the District of Iowa.

Mr. Grant, for the plaintiff in error; Mr. Ewing, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

The present case, in many of its features, is like the preceding. It was an action of debt to recover the amount of two bonds, each for one thousand dollars, with interest at the rate of eight per cent. per annum. They were issued

* Gelpcke *v.* Dubuque, 1 Wallace, 202; Havemeyer *v.* Iowa Co., 3 Id. 294.

on the seventeenth day of June, 1852, under an ordinance of the city to authorize a loan, to be invested in the stock of the plank-road company mentioned in the declaration. Allegations of the declaration were substantially the same as in the preceding case. Corporation defendants appeared and demurred to the declaration and showed for cause, (1) That the mayor and recorder of the city had no power to issue the bonds; (2) That the section of the charter of the city mentioned in the declaration conferred no authority on the city to issue the bonds for the purpose stated; (3) That the purpose for which the bonds were issued as alleged, was not a public purpose.

Parties were heard, and the court sustained the demurrer, and the plaintiff electing to stand upon the declaration, the court rendered judgment for the defendants and the plaintiff removed the cause into this court by writ of error. Both parties agree that the questions presented for decision in this case are the same as in the preceding case and it must be decided in the same way. All of the reasons assigned for the decision in that case are equally applicable in this case, and we have but few additional remarks to make in support of our conclusion. Cases involving the validity of the bonds given by municipal corporations as material aid in the construction of railroads, have frequently been before the court, and whenever they have come up they have uniformly received the attentive consideration of the court. Defects in the proceedings of the board of county commissioners were suggested in the case of *Knox County* v. *Aspinwall*;* but the court held that the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock, and that where the bonds on their face imported a compliance with the law under which they were issued, the purchaser and holder for value was not bound to look further for evidence of a compliance with the conditions in the grant of power.

Precisely the same rule was applied to cities in the case

* 21 Howard, 539.

of *Bissel* v. *Jeffersonville*,* where it was again held that it was too late to make such objections as against innocent holders, or even against the railroad, when it appeared that the bonds purporting on their face to have been executed by authority, had been issued and delivered. Very stringent application of the same rule was made in the case of *Mercer County* v. *Hacket*,† which is the last of the series to which reference will be made,—all of these cases, proceeding upon the ground that the construction of a railroad for travel and transportation was a public improvement, and that it was competent for the legislature to authorize municipal corporations to furnish material aid for such a work, and we have no doubt that the views of the court were entirely correct. Like the preceding, the present case has respect to a plank-road, but we repeat, that where such an improvement is authorized by the legislature and is connected with the municipality issuing the bonds, the case properly falls within the same rule. It follows that the declaration was sufficient, and that the demurrer should have been overruled.

The judgment of the Circuit Court is therefore reversed, with costs, and the cause remanded for further proceedings, in conformity with the opinion of this court.

JUDGMENT ACCORDINGLY.

CUMMINGS *v.* THE STATE OF MISSOURI.

1. Under the form of creating a qualification or attaching a condition, the States cannot in effect inflict a punishment for a past act which was not punishable at the time it was committed.
2. Deprivation or suspension of any civil rights for past conduct is punishment for such conduct.
3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed

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* 24 Howard, 299.

† 1 Wallace, 83.

a bill of pains and penalties Within the meaning of the Constitution bills of attainder include bills of pains and penalties.

4. These bills, though generally directed against individuals by name, may be directed against a whole class, and they may inflict punishment absolutely, or may inflict it conditionally.
5. The clauses of the second article of the constitution of Missouri (set forth at length in the statement of the case, *infra*, pp. 279–281), which require priests and clergymen, in order that they may continue in the exercise of their professions, and be allowed to preach and teach, to take and subscribe an oath that they have not committed certain designated acts, some of which were at the time offences with heavy penalties attached, and some of which were at the time acts innocent in themselves, constitute a bill of attainder within the meaning of the provision in the Federal Constitution prohibiting the States from passing bills of that character.
6. These clauses presume that the priests and clergymen are guilty of the acts specified, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath: they assume the guilt and adjudge the punishment conditionally.
7. There is no practical difference between assuming the guilt and declaring it. The deprivation is effected with equal certainty in the one case as in the other. The legal result is the same, on the principle that what cannot be done directly cannot be done indirectly.
8. The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct by legislative enactment, under any form, however disguised.
9. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.
10. The clauses of the second article of the constitution of Missouri, already referred to, in depriving priests and clergymen of the right to preach and teach, impose a penalty for some acts which were innocent at the time they were committed, and increase the penalty prescribed for such of the acts specified as at the time constituted public offences, and in both particulars violate the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law. They further violate that provision in altering the rules of evidence with respect to the proof of the acts specified—thus in assuming the guilt instead of the innocence of the parties; in requiring them to establish their innocence, instead of requiring the government to prove their guilt; and in declaring that their innocence can be shown only in one way, by an expurgatory oath.
11. Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal.

Statement of the case.

IN January, 1865, a convention of representatives of the people of Missouri assembled at St. Louis, for the purpose of amending the constitution of the State. The representatives had been elected in November, 1864. In April, 1865, the present constitution—amended and revised from the previous one—was adopted by the convention; and in June, 1865, by a vote of the people. The following are the third, sixth, seventh, ninth, and fourteenth sections of the second article of the constitution:

SEC. 3. At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by-law of any municipal corporation, no person shall be deemed a qualified voter, who *has ever been in armed hostility to the United States, or to the lawful authorities thereof*, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information; or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies; *or has ever, by act or word, manifested his adherence to the cause* of such enemies, or his *desire for their triumph* over the arms of the United States, or *his sympathy* with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority, or been in the service, of the so-called "Confederate States of America;" or has ever left this State, and gone within the lines of the armies of the so-called "Confederate States of America," with the purpose of adhering to said States or armies; or has ever been a member of, or connected with, any order, society, or organization, inimical to the government of the United States, or to the government of this State; or has ever been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as "bushwhacking;" or *has ever knowingly and willingly harbored, aided, or countenanced any person* so engaged; or *has ever come into or left this State, for the purpose of avoiding enrolment for or draft*

into the military service of the United States; or has ever, with a view to avoid enrolment in the militia of this State, or to escape the performance of duty therein, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a southern sympathizer, or *in any other terms indicating his disaffection to the Government of the United States* in its contest with rebellion, or his sympathy with those engaged in such rebellion; or, having ever voted at any election by the people in this State, or in any other of the United States, or in any of their Territories, or held office in this State, or in any other of the United States, or in any of their Territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State, or in the army of the United States: *nor shall any such person be capable of holding in this State any office of honor, trust, or profit, under its authority; or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society, or congregation.* But the foregoing provisions, in relation to acts done against the United States, shall not apply to any person not a citizen thereof, who shall have committed such acts while in the service of some foreign country at war with the United States, and who has, since such acts, been naturalized, or may hereafter be naturalized, under the laws of the United States; and the oath of loyalty hereinafter prescribed, when taken by any such person, shall be considered as taken in such sense.

SEC. 6. The oath to be taken as aforesaid shall be known as the Oath of Loyalty, and shall be in the following terms:

"I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme

law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.'

SEC. 7. Within sixty days after this Constitution takes effect, every person in this State holding any office of honor, trust, or profit, under the Constitution or laws thereof, or under any municipal corporation, or any of the other offices, positions, or trusts, mentioned in the third section of this Article, shall take and subscribe the said oath. If any officer or person referred to in this section shall fail to comply with the requirements thereof, his office, position, or trust, shall, *ipso facto*, become vacant, and the vacancy shall be filled according to the law governing the case.

SEC. 9. No person shall assume the duties of any state, county, city, town, or other office, to which he may be appointed, otherwise than by a vote of the people; nor shall any person, after the expiration of sixty days after this Constitution takes effect, be permitted to practise as an attorney or counsellor at law; nor, after that time, shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath.

SEC. 14. Whoever shall, after the times limited in the seventh and ninth sections of this Article, hold or exercise any of the offices, positions, trusts, professions, or functions therein specified, without having taken, subscribed, and filed said oath of loyalty, shall, on conviction thereof, be punished by fine, not less than five hundred dollars, or by imprisonment in the county jail not less than six months, or by both such fine and imprisonment; and whoever shall take said oath falsely, by swearing or by affirmation, shall, on conviction thereof, be adjudged guilty of perjury, and be punished by imprisonment in the penitentiary not less than two years.

In September, A.D. 1865, after the adoption of this constitution, the Reverend Mr. Cummings, a priest of the Roman

Catholic Church, was indicted and convicted in the Circuit Court of Pike County, in the State of Missouri, of the crime of teaching and preaching in that month, as a priest and minister of that religious denomination, without having first taken the oath prescribed by the constitution of the State; and was sentenced to pay a fine of five hundred dollars and to be committed to jail until said fine and costs of suit were paid.

On appeal to the Supreme Court of the State, the judgment was affirmed; and the case was brought to this court on writ of error, under the twenty-fifth section of the Judiciary Act.

Mr. David Dudley Field, for Mr. Cummings, plaintiff in error:

My argument will first be directed to that part of the oath which affirms that the person taking it has never "*been in armed hostility to* the United States, or to the lawful authorities thereof, or to *the government of this State;*" . . . and has never "*given aid, comfort, countenance, or support to persons engaged in any such hostility;*" . . . and has never "*been a member of or connected with any order, society, or organization inimical* to the government of the United States, or *to the government of this State.*" If the imposition of this is repugnant to the Constitution or laws of the United States, the whole oath must fall; for all parts of it must stand or fall together. Mr. Cummings was convicted, because he had not taken the oath, as a whole. If there be any part of it which he was not bound to take, his conviction was illegal. The oath is not administered by portions, and there is no authority so to administer it.

My first position is, that this provision of the constitution of Missouri is repugnant to the Constitution and laws of the United States; because it requires or countenances disloyalty to the United States.

Stripping the case of everything not immediately pertaining to the first position, the oath required may be considered as if it contained only these words:

"I hereby declare, on oath, that I have never been in armed

hostility to the government of the State of Missouri, nor given aid, comfort, countenance, or support to persons engaged in any such hostility, and have never been a member of or connected with any organization inimical to the government of this State."

This is not an oath of loyalty to the United States. The government of Missouri has been, in fact, hostile to the United States. This is matter of history. Being in armed hostility to this hostile State government was an act of loyalty to the United States: an act not to be punished, but to be rewarded.

The loyal citizens of the State were obliged to array themselves against its government; they did so; they took up arms against it; they seized its camp and overthrew its forces. Had it not been for this act of hostility the State might have been drawn into the abyss of secession. It was, therefore, an act which was not only lawful but which was required of the citizen by his allegiance to the United States.

The Constitution and laws of the United States require allegiance and active support from every citizen, whatever may be the attitude of the State government. The difference between the Constitution and the Confederation consists in this, chiefly, that under the Constitution the United States act directly upon the citizen, and not upon the State. What the United States lawfully require must be done, though it be the seizure of the State capitol. The State of Missouri could not subject the plaintiff in error to any loss or inconvenience for giving, in 1861, a cup of coffee to the soldiers who under General Lyon marched out to St. Louis to take Camp Jackson.

Let us consider, *in the second place*, the tendency of this oath, in its relation to *possible* occurrences. It certainly is possible for the government of a State to be hostile to the United States. The governments of the eleven States lately in rebellion were so. If the legislature of South Carolina were to pass a law excluding from the pulpit and the offices of religious teachers every person who has been, at any time during the late war, "connected with any organization *in-*

inical to the government" of South Carolina, that law would be held disloyal and unconstitutional. Suppose the legislature of South Carolina were to go further, and enact that no person, white or black, should ever vote in that State, who, during the war, gave aid, comfort, or countenance to persons engaged in armed hostility to the government of South Carolina, would not every lawyer pronounce such a law utterly void?

If such an oath were required in Tennessee, the present President of the United States could not take it, and would be disqualified. If it were required in Virginia, more than one of our generals and admirals would be disqualified. And so of thousands of other citizens of the States lately in rebellion, who fought in the Union ranks, and opposed the governments of their own States.

There may be collisions between the Federal and the State governments, not breaking out, as the last has done, into flagrant war. A State government may attempt to resist the execution of a judgment of a Federal court; and the President may be obliged to call out the militia to assist the marshal. In such event, every man in the ranks will be in armed hostility to the government of the State. But the State cannot make him suffer for it.

This results from the rule of the Constitution, that the instrument itself, and the laws made in pursuance of it, are the supreme law of the land; and whatever obstructs or impairs, or tends to obstruct or impair, their free and full operation is unconstitutional and void.

The second position which I take is, that the provision imposing this oath as a condition of continuing to preach or teach as a minister of the Gospel, is repugnant to that part of the tenth section of the first article of the Constitution of the United States which prohibits the States from passing "any bill of attainder" or "*ex post facto* law."

Here, again, let us take a particular part of the oath, and refer to so much as affirms that the person taking it has never, "by act or word, manifested his . . . sympathy with

those . . . engaged in . . . carrying on rebellion against the United States." Making a simple sentence of this portion, it would read thus:

"I declare, on oath, that I have never, by act or word, manifested my sympathy with those engaged in rebellion against the United States."

It may be assumed that previous to the adoption of this Constitution it had not been declared punishable or illegal to manifest, by act or word, sympathy with those who were drawn into the Rebellion. It would be strange, indeed, if a minister of the Gospel, whose sympathies are with all the children of men—the good and the sinful, the happy and the sorrowing—might not manifest such sympathy by an act of charity or a word of consolation. We will start, then, with the assumption that the act which the plaintiff in error is to affirm that he has not done was at that time lawful to be done.

Test oaths, in general, have been held odious in modern ages, for two reasons: one, because they were inquisitorial; and the other, because they were used as instruments of proscription and cruelty. In both respects they are contrary to the spirit, at least, of our institutions, and are indefensible, except when applied to matters outside of the domain of *rights*, and when *prospective* in their operation. Whatever the people may give or withhold at will, they may have a constitutional right to burden with any condition they please. This is at once the origin and extent of the rule.

When applied to *past* acts, another principle interposes its shield; that is, that no person can justly be made to accuse himself. This is incorporated in the fifth amendment, in the following words:

"No person . . . shall be compelled, in any criminal case, to be a witness against himself."

And although this prohibition is in terms applied to criminal cases, it cannot be evaded by making that civil in form which is essentially criminal in character.

Retrospective test oaths, that is to say, oaths that the per-

sons taking them have not theretofore done certain things, are almost unknown.

Among the constitutional guarantees against the abuse of *Federal* power thrown around the American citizen, are these three: First, he cannot be punished till judicially tried; second, he cannot be tried for an act innocent when committed; and, third, when tried he cannot be made to bear witness against himself.

Two of these guarantees, and the last two, are set also against the abuse of *State* power.

The prohibition to pass an *ex post facto* law is, in the sense of the Constitution, a prohibition to pass any law which "renders an act punishable in a manner in which it was not punishable when it was committed." The question in the present case, therefore, becomes simply this: Is it a punishment to deprive a Christian minister of the liberty of preaching and teaching his faith? What is punishment? The infliction of pain or privation. To inflict the penalty of death, is to inflict pain and deprive of life. To inflict the penalty of imprisonment, is to deprive of liberty. To impose a fine, is to deprive of property. To deprive of any natural right, is also to punish. And so is it punishment to deprive of a privilege.

Depriving Mr. Cummings of the right or privilege, whichever it may be called, of preaching and teaching as a Christian minister, which he had theretofore enjoyed, and of acting as a professor or teacher in a school or educational institution, was in effect a punishment.

It is not necessary to inquire whether it was intended as a punishment. If the legislature may punish a citizen, by deprivation of office or place, on the ground that his continuing to hold it would be dangerous to the State, then every punishment, by deprivation of political or civil rights, is taken out of the category of prohibited legislation. Congress and the State legislatures—for in this respect they lie under the same prohibition—can pass retroactive laws at will, depriving the citizen of everything but his life, liberty, and accumulated capital.

The imposition of this oath was, however, *intended* as a punishment. This is evident from its history and its circumstances. It is patent to all the world that the object of the exclusion was to affect the person, and not the profession. Mr. Cummings may possibly, at some moment during the last five years, have manifested, by act or word, his sympathy with those engaged in carrying on rebellion against the United States; he may have given alms to the wounded rebel prisoners lying in our hospitals, or he may have spoken to them words of consolation; but no reason can be assigned, from all that, why he should not solemnize marriage or teach the ten commandments; nor can any man arrive at the belief that the convention which devised this constitution had any such notion.

Let us turn now to the other prohibition, that against passing any "bill of attainder." This expression is generic, and includes not only legislative acts to punish for felonies, but every legislative act which inflicts punishment without a judicial trial. If the offence be less than felony, the act is usually called a bill of pains and penalties.

It is not necessary that the persons to be affected by a bill of attainder should be named in the bill. The attainder passed in the 28th year of Henry VIII, against the Earl of Kildare and others (chap. 18, A. D. 1536), enacted that "all such persons which be, or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late earl, &c., in his or their false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged, and convicted of high treason."

It is therefore certain, that if Mr. Cummings had been by name designated in the constitution of Missouri, and thereby declared to be deprived of his right to preach as a minister of religion, or to teach in a seminary of learning, for the reason that he had done some of the acts mentioned in the oath, such an attempt would have been in contravention of the prohibition against passing a bill of attainder; and it is equally certain, that if he had been thereunder judicially

convicted for doing the same things, being not punishable when done, the conviction would have been in contravention of the other prohibition against passing an *ex post facto* law.

Does it make any difference that these results are effected by means of an oath, or its tender and refusal? There is only this difference, that these means are more odious than the other. The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly; or as Coke has it, in the 29th chapter of his Commentary upon Magna Charta, "*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.*"

The constitutional prohibition was intended to protect every man's rights against that kind of legislation which seeks either to inflict a penalty without a trial or to inflict a new penalty for an old matter. Of what avail will be the prohibition, if it can be evaded by changing a few forms? It is unquestionably beyond the competency of the State of Missouri, by any legislation, organic or statutory, to enact in so many words, that if Mr. Cummings on some occasion, before it was made punishable, manifested by an act or a word sympathy with the rebels, therefore he shall, upon trial and conviction thereof, be deprived of the right (or privilege) which he has long enjoyed, of preaching and teaching as a Christian minister. It must be equally incompetent to enact, that all those Christian ministers, without naming them, who thus acted, shall be thus deprived. And this is because it is prohibited to the State to pass an *ex post facto* law. It is also unquestionably beyond the competency of the State, to enact in so many words, that because Mr. Cummings, on some occasion, after it was made punishable, manifested such sympathy, therefore he shall, without trial and conviction thereof, be deprived of his profession. It must be equally incompetent to enact that all those Christian ministers who have thus acted shall be thus deprived. And this because it is prohibited to the State to pass a bill of attainder.

It does not help this kind of legislation that its taking effect was made to depend on the neglect or refusal to take a prescribed oath; nor help it, to declare that the omission to take the oath is deemed a confession of guilt. If Mr. Cummings had even admitted in the presence of the convention his alleged complicity, that would not have dispensed with a judicial trial.

The legal positions taken on the part of Mr. Cummings may be thus restated. He is punished by deprivation of his profession, for an act not punishable when it was committed, and by a legislative instead of a judicial proceeding. If this is held to be constitutional because it is not done directly, but indirectly, through the tender and refusal of an oath, so contrived as to imply, if declined, a confession of having committed the act, then the prohibition may be evaded at pleasure. You cannot imagine an instance of oppression, that the Constitution was designed to prevent, which may not be effected by this means. Suppose the case of a man tried for treason, and acquitted by a jury. The legislature may nevertheless enact, that if the person acquitted by a jury does not take an oath that he is innocent, he shall be deprived of political and civil rights or privileges. Suppose that the legislature of New York were to pass an act disqualifying from preaching the Gospel, or healing the sick, or practising at the bar, all who during the last year were "connected with any organization inimical" to the administration of the State government. Such an act would of course be adjudged inconsistent with the Federal Constitution. But suppose, instead of passing the law in this form, it should be in the form of requiring an oath from every person desiring to preach the Gospel, or to heal the sick, or practise at the bar, that he had not been connected with such an organization, would that make the case any better? You can punish in two ways: you can charge with the alleged crime, and proving it, punish for it; or you can require the party to purge himself on oath; and if he refuses, punish him by exclusion from a right, privilege, or employment.

Mr. Montgomery Blair filed a brief, on the same side, and after citing several authorities, and enforcing some of the arguments of Mr. Field, thus referred especially to the opinions of Alexander Hamilton.

Mr. John C. Hamilton, in his "History of the Republic of the United States,"* says:

"The animosity natural to the combatants in a civil conflict, the enormities committed by the Tories, when the scale of war seemed to incline in their favor, or where they could continue their molestations with impunity; the inroads and depredations which they made on private property and on the persons of non-combatants, and the harsh and cruel councils of which they were too often the authors, appeared to place them beyond the pale of humanity. This was merely the popular feeling.

"In the progress of the conflict, and particularly in its earliest periods, *attainder* and confiscation had been resorted to generally . . . as a means of war; but it was a fact important to the history of the revolting colonies, that acts prescribing penalties usually offered to the persons against whom they were directed the option of avoiding them by acknowledging their allegiance to the existing government."

But there were exceptions to this wise policy. In New York, especially, there was a formidable party who indulged the worst feelings and went to the greatest extremes. The historian of the Republic thus narrates the matter:

"Civil discord," says this author, "striking at the root of each social relation, furnished pretexts for the indulgence of malignant passions; and the public good, that oft abused pretext, was interposed as a shield to cover offences which there were no laws to restrain. The frequency of abuse created a party interested in its continuance and exemption from punishment, which, at last, became so strong that it rendered the legislature of the State subservient to its views, and induced the enactment of laws *attainting* almost every individual whose connections subjected him to suspicion, who had been quiescent, or whose

* Vol. 3, p. 24.

possessions were large enough to promise a reward to this criminal cupidity."

"Two bills followed. One was entitled, 'An act declaring a certain *description of persons* without the protection of the laws, and for other purposes therein mentioned.' On its being considered, a member, a violent partisan, . . . moved an amendment prescribing a *test oath*, which was incorporated in the act. It disfranchised the loyalists forever. The Council of Revision rejected this violent bill, on the ground that the 'voluntary remaining in a country overrun by the enemy,' an act perfectly innocent, was made penal, and was retrospective, contrary to the received opinions of all civilized nations, and even the known principles of common justice, and was highly derogatory to the honor of the State, and totally inconsistent with the public good."

The act nevertheless was passed. In regard to the test oath, General Hamilton said:

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at the elections, is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law. It is that right by which we exist, as a free people, and it will certainly therefore never be admitted that less ceremony ought to be used in divesting any citizen of that right than in depriving him of his property. Such a doctrine would ill suit the principles of the Revolution which taught the inhabitants of this country to risk their lives and fortunes in asserting their liberty, or, in other words, their right to a share in the government. Let me caution against precedents which may in their consequences render our title to this great privilege precarious."

General Hamilton further remarks:

"The advocates of the bill pretend to appeal to the spirit of Whigism, while they endeavored to put in motion all the furious and dark passions of the human mind. The spirit of Whigism is generous, humane, beneficent, and just. These men inculcate revenge, cruelty, persecution, and perfidy. The spirit of Whigism cherished legal liberty, holds the rights of every individual sacred, condemns or punishes no man without regu-

lar trial and conviction of some crime declared by antecedent laws, reprobates equally the punishment of the citizen by arbitrary acts of the legislature as by the lawless combinations of unauthorized individuals, while these men are the advocates for *expelling* a large number of their fellow-citizens, unheard, untried, or, if they cannot effect this, they are for disfranchising them in the face of the Constitution, without the judgment of their peers and contrary to the law of the land. . . . Nothing is more common, than for a free people in times of heat and violence to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of *disfranchisement, disqualification*, and *punishments* by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure, by general descriptions, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious, without *hearing or trial*, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense. . . . The people are sure to be losers in the event, whenever they suffer a departure from the rules of general and equal justice, or from the true principles of universal liberty."

There is another sentiment of the great statesman and lawgiver which may be deemed not inappropriate to the present unhappy times. He says:

"There is a bigotry in politics as well as in religion, equally pernicious to both. The zealots of either description are ignorant of the advantage of a spirit of toleration. It is remarkable, though not extraordinary, that those characters throughout the States who have been principally instrumental in the Revolution are the most opposed to persecuting measures. Were it proper, I might trace the truth of these remarks from that character who has been THE FIRST in conspicuousness, through the several gradations of those, with very few exceptions, who either in the civil or military line, have borne a distinguished part in the war."

Argument for the State.

Mr. G. P. Strong, contra, for the State, defendant in error.

I. The separate States were originally possessed of all the attributes of sovereignty, and these attributes remain with them, except so far as the people may have parted with them in forming the Federal Constitution.*

The author of the Federalist, No. 45, says:

"The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

II. Among the rights reserved to the States which may be considered as established upon principle, and by unvarying usage beyond question or dispute, is the exclusive right of each State to determine the qualification of voters and office-holders, and the terms and conditions upon which members of the political body may exercise their various callings and pursuits within its jurisdiction. Authorities already cited establish this proposition; so, also, do others.†

III. The provisions of the second article of the Constitution of Missouri come within the range of these reserved rights, and are neither "bills of attainder," or of pains and penalties, nor "*ex post facto* laws," nor "laws impairing the obligation of contracts." They are designed to regulate the "municipal affairs" of the State, that is, to prescribe who shall be voters, who shall hold office, who shall exercise the profession of the law, and who shall mould the character of the people by becoming their public teachers.

Bills of pains and penalties, and *ex post facto* laws, are such as relate exclusively to crimes and their punishments.‡

* Declaration of Independence: Art. 2, Articles of Confederation; Art. 10, Amendments to the Constitution of the United States. Federalist, No. 45, p. 216, Masters, Smith & Co.'s edit. of 1857. Calder *v.* Bull, 3 Dallas, 386; City of New York *v.* Miln, 11 Peters, 102, 139.

† Federalist, No. 45; Butler *v.* Pennsylvania, 10 Howard, 415; City of New York *v.* Miln, 11 Peters, 102, 139; In re Oliver, Lee & Co.'s Bank, 21 New York, 9.

‡ 1 Blackstone's Commentaries, 46; Sewall *v.* Lee, 9 Massachusetts, 367, citing "Conspirator's Bill;" 2 Woodeson, 41, p. 621; Chase, J., in Calder

The true interpretation of these laws by our own courts is settled by numerous cases in addition to those already cited.*

Not one of these examples of bills of pains and penalties, or *ex post facto* laws, bears any resemblance to the constitutional provisions which the court is now called to pass upon. They were, in terms, acts defining and punishing crimes. They designated the persons to be affected by them, and did not leave it *optional* whether they would suffer the penalty or not.

IV. Every private calling is subject to such regulations as the State may see fit to impose. The privilege of appearing in courts as attorneys-at-law, and the privilege of exercising the functions of a public teacher of the people, have always been the subjects of legislation, and may be withheld or conferred, as may best subserve the public welfare. Private rights have always been held subordinate to the public good.

Even the freedom of religious opinion, and the rights of conscience which we so highly prize, are secured to us by the State constitutions, and find no protection in the Constitution of the United States.

If any State were so unwise as to establish a *State religion*, and require every priest and preacher to be licensed before he attempted to preach or teach, there is no clause in the Federal Constitution that would authorize this court to pronounce the act unconstitutional or void.†

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v. Bull, 3 Dallas, 390, 391; Paterson, J., Id. 397; Carpenter *v.* Commonwealth of Pennsylvania, 17 Howard, 456, 463; The Earl of Strafford's Case, 3 Howell's State Trials, 1515; Sir John Fenwick's Case, 7 and 8 Wm. III, ch. 3; Bishop of Rochester's Case, 9 Geo. I, ch. 17.

* Ross's Case, 2 Pickering, 165; Rand's Case, 9 Grattan, 738; Boston *v.* Cummins, 16 Georgia, 102; Charles River Bridge *v.* Warren Bridge, 11 Peters, 420.

† Austin *v.* The State, 10 Missouri, 591; Simmons *v.* The State, 12 Id. 268; State *v.* Ewing, 17 Id. 515; The State of Mississippi *v.* Smedes & Marshall, 26 Mississippi, 47; The State *v.* Dews, R. M. Charlton, 397; Coffin *v.* The State, 7 Indiana, 157, 172; Conner *v.* City of New York, 2 Sandford, 355; Same case, 1 Selden, 285; Benford *v.* Gibson, 45 Ala. 521; West Feliciana Railroad Co. *v.* Johnson, 5 Howard's Mississippi, 277.

V. But we are told that this is not an oath of loyalty to the government of the United States, because it requires a declaration that the party has not taken up arms against the government of the State.

The Constitution of the United States is a part of the government of the State. It is as much the Constitution of the people of Missouri as the State constitution. Those who defended the one defended the other. The State government was never hostile to the Federal government. The hostility of Governor Jackson was individual and personal, and was intended to subvert both State and Federal governments.

Mr. Hamilton says:* "We consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole."

Chief Justice McKean† also says: "The government of the United States forms a part of the government of each State. These (the State and National) form *one complete* government."

Mr. Jefferson,‡ speaking of the State and Federal governments, says: "They are coördinate departments of one simple and integral whole."

Mr. J. B. Henderson, on the same side, for the State, defendant in error:

Do the provisions of the second article of the Missouri constitution conflict with the Constitution of the United States? The acts objected to are not acts of a State legislature. Even in regard to the constitutionality of such acts it has ever been thought a delicate duty to pass. If doubt exists, that doubt is always given in favor of the law. If ordinary acts of legislation are to be presumed valid, and are to be set aside only when patient examination brings them, beyond doubt, into conflict with the supreme law of the land, how much stronger the presumption in favor of the

* Federalist, No. 82.

† 3 Dallas, 473.

‡ Letter to Major Cartwright, June 5, 1824; Jefferson's Works, vol. 4, p. 396.

act of the people themselves in framing such organic laws as they may think demanded by the exigency of the times and necessary to their safety?

The tenth amendment to the Constitution of the United States provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

No question, therefore, can arise as to the power of the people of Missouri to adopt the provisions in question unless they fall within the powers delegated to the United States, or are prohibited to the States by the Federal Constitution. The subject-matter of them is clearly not within the powers delegated to the United States, but belongs to that class of legislation reserved to the States or to the people, and unless it be directly prohibited to the States by some clause or clauses of the Federal Constitution the provisions must be held valid. Among the powers prohibited to the States is one in the tenth section of the first article of the Constitution, which provides "that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." This clause is chiefly relied on to avoid the provisions alluded to in the constitution of Missouri.

It has been decided that bills of pains and penalties, which inflict a milder degree of punishment, are included within bills of attainder, which refer to capital offences. It has been said by an accurate writer* that in cases of bills of attainder, "the legislature assumes judicial magistracy, weighing the enormity of the charge and the proof adduced in support of it, and then deciding the political necessity and moral fitness of the penal judgment." He says these acts, instead of being general, are levelled against the particular delinquent; instead of being permanent they expire, as to their chief and positive effects, with the occasion. Now, do these provisions fall within this definition? *To be obnoxious as bills of attainder, the provisions must operate against some particular delinquent, or specified class of delinquents, and not against*

* Woodeson, Lecture 41.

the whole community. They must not be permanent laws, operating as a rule to control the conduct of the whole community, but must expire upon the infliction of punishment on the individual or individuals named. Before these provisions can be called bills of attainder, it must appear that they criminate the defendant for the commission of some act specified in the third section of the second article of the Constitution; and that they assume to pronounce the punishment for that act. The law itself must assume to convict him.

If any means be left by which the defendant can escape the punishment prescribed in the act, the act cannot be a bill of attainder; for a bill of attainder assumes the guilt and punishes the offender whatever he may do to escape. If the act in question applies as well to the entire community as to him, and operates upon all alike, only prescribing an oath, which may or may not be taken by him and others, as a condition of a future privilege, it is in no sense a bill of attainder.

If any objection really exist against these provisions of the Missouri constitution it is because they are retrospective in their operation. Whether they are *ex post facto* laws is, therefore, the chief question for our examination.

Before proceeding to that examination, an argument of one of the counsel for the plaintiff must be noticed. He errs not perhaps in logical deduction, but in the statement of premises.

He argues thus: Mr. Cummings had the right to preach. A test oath is prescribed for a person following his profession which he cannot truthfully take, hence he has to forfeit his right to preach.

This is called a punishment, for the acts of which he is guilty, and of which he cannot purge himself by oath. The punishment, then, consists in the forfeiture of this assumed right to preach the Gospel. Of course, punishment must be impending to make the objection apply. The real objection to an *ex post facto* law is not that it declares a past innocent action a crime, but in the fact that it undertakes, after so

declaring, to punish it. The Constitution of the United States steps in to prevent the punishment, not the passage of the act. Now, if the supposed forfeiture pronounced by the act is no punishment at all in the eye of the law, the objection ceases.

What is this thing we call punishment for crime in this country? Punishment under our institutions, legally considered, must affect person or property. It must take the "life" of an individual, impose restraints on his "liberty," or deprive him of his "property." Common sense teaches us that no man is punished by the loss of something that never was his absolute property. If I retake from my neighbor what I had granted him during my pleasure, I inflict no loss on him. He loses nothing. I gain nothing. The thing may be of value, but it is mine. If the thing taken has no value, although he may not have received it of me, he does not suffer. Punishment is to inflict suffering. This view of the subject is strengthened by the language of the fifth article of Amendments to the Federal Constitution, and by similar language in each State constitution. This article declares, first, that prosecutions, except in particular cases, shall be commenced by presentment or indictment of a grand jury. Coming to the trial, it is next provided, that no man shall be twice tried for the same offence, nor compelled to be a witness against himself, and then, in the same connection, it provides that he shall not "be deprived of his life, liberty, or property, without due process of law." The latter part of the clause evidently refers to the punishment of crime. *To punish one, then, is to deprive him of life, liberty, or property. To take from him anything less than these, is no punishment at all.* These are natural rights, and to take them away is what we properly call punishment. All other rights are conventional, and may at any time be resumed by the public, in the most summary way, without any regard to due process of law. Hence, public offices have always been taken away from the incumbents, by the sovereign act of the people, without consulting the incumbents, without informing them, without hearing them in their defence, and yet

nobody ever supposed this to be a punishment of the incumbents. It is not a punishment, because it deprives them of no property whatever. The public, it is true, had given them a trust, but the public had created that trust for their own purposes, and the public can resume it whenever necessity or convenience require it. And the public alone can judge of that necessity or convenience.

Let us now proceed to the examination of *ex post facto* laws.

Story, J.,* defines an *ex post facto* law to be one "whereby an act is declared a crime, and made punishable as such, which was not a crime when done: or whereby the act, if a crime, is aggravated in enormity or punishment, or whereby different or less evidence is required to convict an offender than was required when the act was committed." This court, in the case of *Fletcher* v. *Peck*, said:

"An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed."

In *Watson et al.* v. *Mercer*,† this court said:

"The phrase *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed."

Each and every act enumerated in the third section may have been committed, and yet no provision of this State constitution attempts to punish it. Indeed, it makes no provision to punish even in the future the commission of such acts as are therein specified. The acts enumerated are not denounced in the constitution as crimes at all, nor is any punishment whatever attached to their commission. How, then, is this test oath an *ex post facto* law? It does not operate on the past. If one stands on his past record, however guilty he may be, this provision cannot touch him. If

* Commentaries on the Constitution. † 8 Peters, 110.

he is ever punished for what he has done, it must be according to some previous existing law, and not under this act. This act does not deal with the past. It looks only to the future. If it refers to the past at all, it is only for the purpose of ascertaining moral character and fitness for the discharge of high civil duties, which give credit and influence in the community, and can never be safely intrusted in the hands of base or incompetent men.

But to proceed with the definition. Justice Washington, delivering the opinion of the court in *Ogden* v. *Saunders*,* speaking of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, said: "The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character."

In *Calder* v. *Bull*, the first great case involving a definition of the term *ex post facto*, in this court, Chase, J., delivered the opinion of the court, and gave a definition which has been ever since substantially adopted as the law. He said, it is:

"*First.* Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

"*Second.* Every law that aggravates a crime and makes it greater than it was when committed.

"*Third.* Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

"*Fourth.* Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the commission of the offence in order to convict the offender."

Does this provision of the State constitution assume to declare any act already done by the defendants, at any time, to be criminal? Is it, in any sense, a criminal law to operate upon the past? If it had declared that previous acts of practising law, innocent as they were when done, should

* 12 Wheaton, 267.

now be offences, and might be punished in the courts, the provision could not, and should not, be enforced. If the provision had declared that any person guilty of a previous expression of sympathy with the public enemy, or of previously enrolling himself as disloyal, to evade military service in the Union forces, or of seeking foreign protection as an alien against military service, might now be indicted and punished therefor, by fine and imprisonment, or both, I could well understand an argument against its validity. But this provision does no such thing. It declares no past act of the defendant to be an offence, nor does it prescribe for any such act any forfeiture whatever, much less the deprivation of a property right. What is a criminal law? It defines an offence, and fixes the punishment, and the mode of inflicting it. If it stamps as crime an innocent past action it is no law. But if it looks only to the future, and gives the choice to the citizen to violate it or comply with it, it is a valid law, at least so far as this prohibition is concerned. This act, it is true, defines an offence, but the offence defined is one that cannot be committed before the expiration of sixty days after the act shall have been adopted. No man is compelled to be guilty. That is not the case under an *ex post facto* law. In such cases there is no option for the victim. The act to be punished is done, and cannot be undone.

A punishment is also denounced in the act, but that punishment is to be applied only to acts of the future. This act, then, does not make a crime of an action which was innocent when done, and proceed to punish it, and it cannot in that respect be classed as an *ex post facto* law.

If one be guilty of treason, of course he cannot in such case take the oath, and must therefore stand excluded. It is not a new or additional penalty or forfeiture for the crime of treason. It was not so intended. In its true purpose, such an act is not a criminal law at all, much less an *ex post facto* law. It is an act to fix the qualifications of voters, and applies to the innocent as well as to the guilty. If a man, having long enjoyed the franchise, be excluded by the sov-

ereign act of the people, unless he will take an oath that he can read and write, is it to be construed an act to punish ignorance, or an act to preserve the purity and usefulness of the ballot-box? If an act were passed vacating the offices of all sheriffs who had not practised law for five years under a license, before their election, is the act void?

But we are told that this act alters the legal rules of evidence, and receives less testimony than was necessary at the time the act was committed to convict the offender. If perjury be committed, and at the time of its commission two witnesses are required to convict, we can understand that a subsequent act authorizing a conviction on the testimony of one witness is not valid. We can well understand that a law which makes testimony competent, that was not competent at the time of the act, is void. But the law will not be declared void until its obnoxious provisions are attempted to be enforced in some specific case, that is, until a case arises. The difficulty here is that plaintiffs in error insist that they are on trial for the offences, or rather the acts of disloyalty, named in the third section. But they are not now on trial, for no conviction or judgment therefor can follow these proceedings. The taking of the oath is not an acquittal of the offences or acts enumerated. The refusal to take it is not a conviction, nor does it tend to a conviction. This act has nothing to do with the trial or conviction of the offender for past actions; it fixes no rule or rules of evidence by which a conviction may be had more easily, for there can be no trial or conviction at all under the act for anything previously done.

The Constitution provides that no person "shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." It is insisted that the provisions of the Missouri law conflict with this clause, which clothes in language a great principle of national right. If, on the trial of the case of Mr. Cummings, he had been compelled to testify against himself, there would be some ground for the complaint. We have already attempted to show that he is not

deprived of life, liberty, or property under this law. He is surely not deprived of life or liberty, and the right to pursue his profession is not such an absolute right of property as to be above the control and regulation of State law. It is said he is punished without the right of trial "by an impartial jury," and without the right "to be confronted by the witnesses against him;" without the right of "compulsory process for obtaining witnesses" in his favor, and without that other invaluable right, "the assistance of counsel" in his defence. Suppose it were so, what has this court to do with it? These great rights are only secured by the Constitution "in all criminal prosecutions" set on foot by the United States and not in those set on foot by the States. And now, in the present prosecution against Mr. Cummings for violating the act itself, or in any prosecution that may be hereafter instituted against him, or other persons, for such violation, if any of these rights shall be denied them we may say the act is unjust, but that is the end of it. The State may do acts of injustice if it chooses. We must trust something to the States. Mr. Cummings, however, had the right of trial by jury; the right to be confronted with the witnesses against him; the right of process to compel the attendance of his witnesses; and even those beyond the limits of our own country will know that he has had "the assistance of counsel," for he was ably defended in the courts of the State, and they who now defend him are known wherever enlightened jurisprudence itself is known.

Whenever prosecutions arise under these provisions, there will, doubtless, be granted, in Missouri, to the accused, all these guarantees of constitutional liberty. The State cannot deny them to one of its citizens without denying them to all; and to suppose a people so lost to common sense as to deprive themselves, voluntarily, of these great and essential rights, necessary to a condition of freedom, is to suppose them incapable of self-government.

But an objection is also urged which is well calculated to excite interest. The rights of conscience are sacred rights. They are too often confounded, however, with the unre-

strained license to corrupt, from the pulpit, the public taste or the public morals. However this may be, the American people are exceedingly sensitive on the subject of religious freedom; and whenever the people are told, as they have been in this case, that the indefeasible right to worship God according to the dictates of conscience is about to be invaded, the public mind at once arouses itself to repel the invasion. The first article of the amendments to the Constitution is in these words:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The third clause of the sixth article declares that

"No religious test shall ever be required as a qualification to any office or public trust under the United States."

Story, J., commenting on these provisions, says:

"The whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."

The Jew, the infidel, and the Christian are equal only in the national councils. The States may make any discrimination in favor of any sect or denomination of Christians, or in favor of the infidel and against the Christian. North Carolina had the right to exclude the Catholic from public trusts; and other States have the right, so long exercised, to deny ministers of all denominations a place in their legislative halls. Congress cannot establish a national faith; but where are the limitations on the powers of the States to do so? There are none, unless they be found in this provision against bills of attainder and *ex post facto* laws—a provision which, in its present interpretation, saps and withers every right once fondly claimed by the States. In the formation of State constitutions, I have never doubted the power to regulate the modes of worship or prescribe forms for the public observance of religion. Hence it is that the bills of right, to be found in all the State constitutions, attempt to

secure this great right of free and unrestricted worship against the caprice or bigotry of State legislators. But within the limits of the State constitution, when thus framed, the legislature has entire control of the subject.

It is said these oaths are unprecedented. They are, no doubt, extraordinary, perhaps unprecedented; but the provisions themselves are no more extraordinary than the circumstances which called them into existence. These last are not known to all, and indeed are known fully but to few. I must ask the privilege of departing so far from the line of strict legal argument as partially to state them. Such a statement is indispensable truly to understand this case.

The bare recital of these provisions, I am aware, has fallen harshly on the public ear. Loyal men in other States hesitated to justify them, while the disloyal hastened to denounce them. Beyond the limits of Missouri, they, perhaps, have had but few advocates. But beyond those limits, no man knows the terrible ordeal through which her people passed during the late Rebellion. To appreciate their conduct properly, one must have been on the soil of the State, and that alone is not sufficient: he must have been an active participant in the struggle for national life and personal security. The men of Missouri, at an early day in this war, learned to be positive men. They were for, or they were against. When the struggle came, each man took his place. The governor and the legislature were disloyal. A convention called by that legislature, merely to give character to the mockery of secession, proved to be loyal, and refused to submit an ordinance of secession to a pretended vote of the people. Hence came a fierce war of opinion. The first great contest was for political power. Each party saw the absolute necessity of obtaining it. With it, ultimate success might be achieved; without it, success was impossible. In the midst of this controversy, while the issue was yet in doubt, Fort Sumter was attacked, and civil war suddenly broke upon the land. In Missouri, it was a hand-to-hand contest, each party fighting for the possession of power,

and each feeling that expulsion was the penalty of failure. Acts of the grossest treason were committed; but no man could be found who confessed himself present, or who would speak the truth against his neighbor. His silence, however, made him no less earnest. Neighbors and friends of long standing separated and joined hostile forces. Each county had its military camps, and each municipal township its opposing military and political organization. Traitors and spies came from the confederate armies of Arkansas and Texas to organize regiments secretly in the State, and found shelter and food in the houses of the disloyal. Organized armies sprang into existence around us, and joined the advancing hosts, to assist in the work of devastation and death. Some who did not themselves go into open rebellion from prudential reasons, some too old to bear arms, urged others to go, and furnished means and money to equip them. Some acted as spies in their respective neighborhoods, and sent secret information to the enemy, which often sealed the fate of their neighbors. The merchant in his store-room talked treason to his customers; the school teacher instilled its poison into the minds of his pupils; the attorney harangued juries in praise of those whose virtue demanded the great charters of English liberty, and denounced the spirit of this age for its submission to usurpation and tyranny. And even the minister of heaven, forgetting of what world his Master's kingdom was, went forth to perform the part allotted to him in this great work of iniquity.

No man was idle. No man could be idle. Men might be silent, but they were earnest; because life, and things dearer than life, depended on the issue. The whole man, mental and physical, was employed. The whole community was alike employed, and every profession, and every avocation in life was made subservient to the great end,—the success or overthrow of the government. On the day when the delegates to the convention which framed this constitution were elected, General Price, at the head of twenty thousand desperate men from Arkansas, Texas, Louisiana, and Missouri, was sweeping through the State, leaving be-

hind him smouldering ruins and human suffering; and he and they who made this desolate path, were received with shouts of joy and approbation by thousands of citizens, who sought by the ballot, on that day, to give lasting welcome to the invaders.

I have referred to these things to vindicate the people of Missouri against the charges which have been made against them, and to show the reasons and the reasonableness of their action.

Mr. Reverdy Johnson, for the plaintiff in error, Mr. Cummings, in reply:

I. Is the provision in the constitution of Missouri obnoxious to the objection of being *ex post facto?*

Opposing counsel seem to suppose that the clause in the Federal Constitution which would prevent an *ex post facto* law is not applicable to the organic law of a State. They argue that even if a provision such as is contained in the constitution of Missouri would be void in a statute law of the State, yet it is not void when in her constitution.

There is no warrant for the distinction. The ninth section of the first article of the Constitution of the United States restrains Congress from passing any bill of attainder or any *ex post facto* law, and the great men by whom that instrument was framed were so well satisfied that legislation of this description was inconsistent with all good government, that they deemed it necessary to impose the same restriction upon the States; and this they did by providing that "no State"—not *no legislature of a State*, but that "*no State*"—should pass any *ex post facto* law or any bill of attainder. If we consult the contemporaneous construction—and which has ever been received almost as conclusive authority upon its meaning—given it by the Federalist, we will find* that it was not thought necessary to vindicate the Constitution upon the ground that it contained a provision of this description. It was thought sufficient to say that the provision

* Number 44, by Mr. Madison.

was but a declaration of a fundamental principle of free government, a principle without which no such government could long exist, and that it was adopted not because there was any doubt in regard to it upon the part of the convention, or because any doubt was entertained what would be the public opinion in relation to it, but because it was so universally held to be important that it was deemed necessary not only by express constitutional provision to inhibit to Congress the power to pass such laws, but to prohibit the States at any time from doing so either.

It can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void; and the only question, therefore, is whether the constitution of Missouri, in the particular which is involved in this case, is not liable to the objection of being *ex post facto*.

My brothers of the other side suppose that there is no *punishment* imposed by the constitution of Missouri upon one who refuses to take the oath. They do not mean, surely, no punishment in the general sense of the term; that he whose livelihood depends on his profession is not, in the general acceptation of the term, punished if he is not permitted to pursue it; that he whose business it is, claiming to derive his authority from a higher than any human source, to preach peace on earth, good will to men, is not punished when he is told that he shall do neither; that a man is not punished when he is prevented from teaching his own child (for this oath comprehends that act) the ways which he believes are the only ways that lead to perpetual happiness in the future; cannot teach him what he deems to be man's duty to man and man's duty to God;—without taking an oath which any State from party, political, or religious prejudice, may think proper to prescribe.

A prohibition of the sort here enacted, operating to the extent that it does, is not only punishment but most severe punishment; perhaps the most severe.

And, if it is a punishment in fact, why is it not a punishment that falls within the inhibition of the Constitution?

The inhibition is absolute and as comprehensive as language can make it.

Now what does the constitution of Missouri assume? It assumes that there are persons in the State of Missouri who have been guilty of disloyalty to the United States. Opposing counsel argue that it was of importance to the future welfare of Missouri, when the constitution was adopted, that such a provision as this should be incorporated in her fundamental law. And why? Because, as they assert, there were secret, silent, insidious traitors in her midst; traitors, also, whose hands were red with the blood of loyal citizens. The argument, therefore, as well as the provision itself, assumes that crime has been committed, and that it is important to the State that all who have been guilty of that crime shall forever be excluded from any of the offices or the employments mentioned in the third section of the second article of the constitution. Then it was put there evidently for the *purpose of disfranchising* those who were thus assumed to be guilty. Whether they were guilty or not, and how they were to be punished if that guilt should be established by due course of law, is one question. Whether, if guilty, they could be punished in the way in which they are punished by this constitution is a different question. If they are guilty, and are so to be punished, how that guilt is to be established is a third question.

How was their guilt to be established, according to the requirements of the constitution, if the charge of treason was made against them? By two witnesses. What would be the effect upon an individual if he was convicted? No disfranchisement. Capacity to hold office as far as any positive legal disability was concerned—capacity to appear as attorney—capacity to pursue his religious pursuits; all would remain unaffected.

What does this provision in the constitution of Missouri do? It assumes that it is not sufficient that society is secured by such punishment as the previous law provided. If the court should think proper in its discretion to award the punishment of imprisonment, and the party survives,

he cannot be punished again in any way in the remainder of his life. If he seeks employment afterwards, the question of prior guilt may be held to affect his character; but that found to be fair and he trustworthy, the road to honor and to office may be open to him. This constitution of Missouri says that this is not enough; that the public safety demands that, if he is guilty, he shall be excluded from all offices in that State; not only from all offices, but from all employments; not only from professional employment, but from carrying on the avocation with which, in his own belief, heaven itself has endowed him; not only that, but from being an officer in any municipal or other corporation, although he may own nearly all the stock, and from holding any trust.

Is that not *ex post facto?* The very definition of such a law, which opposing counsel have given upon the authority of this court in the case of *Calder* v. *Bull*, and in the subsequent cases, brings such a provision within it. Even if we were to stop here, any law, and, as has been already shown, any constitution, which imposes a punishment for crime in addition to that which the existing law at the time of its commission imposed, is *ex post facto.*

But that is not all. It not only imposes an additional punishment, but it changes altogether the evidence by which, under the previous law, the crime was to be established. Two witnesses to the same overt act were necessary to prove the offence of treason. This constitution says, in effect, that "it is true that hundreds and thousands in the State of Missouri have been guilty of acts of disloyalty which would subject them to punishment for treason under the existing law; and it is true that they may be punished under that law effectively, provided the government which thinks proper to prosecute them can establish their guilt by such evidence as the constitution demands; but that will not answer our purpose; we cannot accomplish our end in that mode; we not only propose to aggravate the punishment, but we propose to establish the crime by evidence which is now inadmissible for that purpose." And what is that evi-

dence as they themselves present it? "You, Mr. Cummings, desire to preach, to solemnize marriage, to bury the dead, to administer the sacrament of the Eucharist, to console the dying; you shall not do either, unless you will swear that you have not committed the offence: you must purge yourself by your own oath, or, as far as we are concerned, we find you guilty. We believe you are guilty; and if you are guilty, we do not mean that you shall execute your religious functions at all. And we make the fact of your refusing to swear that you are innocent conclusive evidence of your guilt, and punish you accordingly."

Now, Congress has treated an exclusion from the right to hold office as a punishment. The act of the 10th April, 1790, defines and punishes perjury, and for punishment, it is declared that the party shall undergo "imprisonment not exceeding three years, and a fine not exceeding eight hundred dollars; and shall stand in the pillory for one hour, and be *thereafter rendered incapable of giving testimony in any of the courts of the United States until such time as the judgment so given against the said offender shall be reversed.*"* It is plain that to take from him the privilege of being a witness was considered a punishment. By the twenty-first section, the crime defined is that of attempting to corrupt a judge, and as punishment, it is declared that the party "shall be fined and imprisoned, and *shall forever be disqualified to hold any office of honor, trust, or profit under the United States.*" In accordance with the impression that that was not only punishment, but punishment of a very severe nature, we find in the act of July 17, 1862,† "an act to suppress insurrection, to punish treason," &c., passed of course whilst the Rebellion was in full force, this provision:

"That every person guilty of either of the offences described in this act shall be *forever incapable and disqualified to hold any office under the United States.*"

Counsel on the other side maintain that the exclusion of

* 1 Stat. at Large, p. 116, § 18.

† 12 Stat. at Large, pp. 589–590, § 3.

the priest from the right to preach or to teach is not *ex post facto* legislation within the meaning of those terms in the Constitution, because it is not the legal consequence of any crime; something having no connection with the crime. They admit, therefore, that if the punishment can attach itself to the crime, and it be a punishment not known to the laws at the time the crime was committed, it is void. Now, what does the State constitution do? Does it not exclude because of the crime, in consequence of the crime, and only in consequence of the crime? If it does, it is, in the judgment of Missouri, or in the judgment of its constitution, a punishment of the crime just as effectually as if a party was tried upon an indictment and convicted, and the law authorized a party, upon that conviction, to be excluded from the right to practise or to preach. That no proceeding, judicial in its nature, is provided for, can make no difference; a proceeding still more effective is provided. A proceeding by indictment might or might not accomplish the end; the two witnesses required might not be found; the party might, therefore, be acquitted. His guilt might be in his own bosom, and no witness could be found, and, consequently, he would be acquitted. And as its object was to strike at the crime, and remove those who were supposed to be loyal in the State of Missouri from the contamination of the crime or of the criminal, it requires him to swear that he has not committed it, and tells him, "Not swearing, we find you have committed the crime, and will punish you accordingly."

Suppose that, instead of excluding Mr. Cummings from the practice of his calling, it had said that if he did not answer he should be subjected to a pecuniary penalty, a fine, or to imprisonment, both or either; would not that be void because of the restriction? And if so, must not this be held void, provided we agree with Congress in the opinion contained in the two acts already referred to, that exclusion from the right to hold office is "punishment?"

The degree, the extent, the character of the punishment, has nothing to do with the fact of punishment. Admit that Mr. Cummings and all standing in like relation are punished

by this State constitution, and the constitution falls just as absolutely as if, instead of ordaining that persons should be punished by not being permitted to exercise and carry on their occupations, it had said, "if you do not swear to your innocence we infer you to be guilty, and we fine and imprison you." It would be as much in that case, and not more, a consequence of the crime, as it is in this case. And once hold it to be consequential upon the crime, and you bring it within the inhibition, provided the punishment which it does inflict is not the punishment which the law inflicted at the time the crime is alleged to have been committed.

As a member of that Church which claims to have its authority directly through a regular and unbroken apostolic succession from the Author of our religion, Mr. Cummings is found in the enjoyment and practice of all the privileges belonging to the function and of all the sacred rights which are incident to it. The Constitution of the United States, to be sure, so far as the article which proclaims that there shall be no interference with religion is concerned, is not obligatory upon the State of Missouri; but it announces a great principle of American liberty, a principle deeply seated in the American mind, and now almost in the entire mind of the civilized world, that as between a man and his conscience, as relates to his obligations to God, it is not only tyrannical but unchristian to interfere. It is almost inconceivable that in this civilized day the doctrines contained in this constitution should be considered as within the legitimate sphere of human power. "This question," it has been truly said by another clergyman sought to be restrained by this constitution, "is not one merely of loyalty or disloyalty, past, present, or prospective. The issue is whether the Church shall be free or not to exercise her natural and inherent right of calling into, or rejecting from, her ministry whom she pleases; whether yielding to the dictation of the civil power she shall admit those only who, according to its judgment, are fit for the office, or, admitting those to be fit, whether she shall not be free to admit those also who, though

at first not fit, afterwards become so through pardon and forgiveness.

"The question is whether the Church is not as much at liberty and as fully competent nowadays as at the beginning to call in as well the saints as those who were sinners, as well the Baptist and Evangelist as St. Peter and St. Paul, the denier and persecutor of the Redeemer, as well as his presanctified messenger and beloved disciple. With all these questions the State itself has nothing to do. Their decision is the high and unapproachable prerogative of the Church, under the guidance of its Redeemer, who alone is the searcher of hearts, and whose power it is to recall or reject whom he pleases."

My associate, in his opening of the case, has stated that the State government of Missouri was at one time, 1861, hostile to the government of the United States; and that loyal citizens were obliged to take up arms and overthrow it. No doubt the fact must be so admitted. Governor Claiborne Jackson, holding the executive authority of the State under a proper election, and the judiciary and the legislative departments of the same State holding their respective authorities under a proper election, held in pursuance of a constitution then existing and not disputed, were at one time in the full possession of all the sovereignty of the State of Missouri, as far as that sovereignty was delegated by the people to its government. The Representatives of the State elected during the continuance of that constitution were received here. Their Senators were here, chosen by that legislature, and their credentials testified by the then governor. Their courts were in session under the authority of that constitution.

Under the decision in *Luther* v. *Borden*,* the court cannot go beyond these facts for the purpose of ascertaining in what condition, politically, Missouri was, for the purpose of answering the inquiry, what was the government of Missouri in 1861? Then it is plain that this oath calls upon the party

* 7 Howard, 1

to swear that he has been loyal to two governments of Missouri, one of which was directly opposed to the other.

Opposing counsel, indeed, say that the government of Missouri does not mean the government strictly speaking of the State of Missouri, constituted by the people of the State of Missouri; but that the government of Missouri is a compound, according to their view, consisting of the constitution and laws of Missouri and the Constitution and laws of the United States. But the argument is without force. When a law speaks of a State government it does not mean the government of the United States. Nor does it mean to include any authority over the people of a State which the government of the United States may possess by virtue of the Constitution of the United States. It means that political institution created by the people of the State for the government of the people of the State, without any regard at all to the other inquiry, over what subjects the people of that State have a right by government to assume jurisdiction.

If this is so, and it be true that a State government is one government as contradistinguished from all others, and that the government of the United States is another government as contradistinguished from a State government, then an oath which requires a party to swear that he has committed no act of hostility against the State government, and no act of hostility as against the government of the United States, is an oath which, if he has committed acts of hostility against the State government, renders it impossible that he can enjoy the franchise made dependent upon the failure to exercise any acts of hostility. Yet that is this oath.

It is said that what Missouri has done, in regulating the qualifications of those who are to hold office and pursue certain professions, is simply the right to define the qualifications which Missouri, in the exercise of her sovereignty, thinks proper to demand. Is it so? In one sense it is so; but is that the sense in which the provision has been incorporated in the constitution? To prescribe age, property qualifications, or any other qualification that anybody has

an equal opportunity of acquiring, is one thing; to disqualify because of imputed crimes, is quite another thing. The powers of government exerted in the doing of these two things are entirely distinct. In the one, the power to regulate the qualifications for office, or for the pursuit of callings, only is involved; in the other, the power of forfeiture under the power to punish is involved, and those two powers are altogether distinct. The one is the power which belongs to every government to define and punish crime. The other, that which belongs to every free government to provide for the manner in which its agents are to be chosen, and the conditions upon which its citizens may exercise their various callings and pursuits.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The oath prescribed by the constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts, against which it is directed, constitute offences of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offences in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever "been in armed hostility to the United States, or to the lawful authorities thereof," but, among other things, that he has ever, "by act or word," manifested his adherence to the cause of the enemies of the United

States, foreign or domestic, or his *desire* for their triumph over the arms of the United States, or his *sympathy* with those engaged in rebellion, or has ever *harbored* or *aided any person* engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever *entered* or *left* the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, *in any terms*, his *disaffection* to the government of the United States in its contest with the Rebellion.

Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

And every person holding, at the time the constitution takes effect, any of the offices, trusts, or positions mentioned, is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust, or position shall *ipso facto* become vacant.

No person, after the expiration of the sixty days, is permitted, without taking the oath, "to practice as an attorney or counsellor-at-law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages."

Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions" specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the Rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices, and practising certain callings, and that it is therefore within the power of the State to adopt them. On the other hand, it is contended that they are in conflict with that clause of the Constitution which forbids any State to pass a bill of attainder or an *ex post facto* law.

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes,

except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

These are general propositions and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success." It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the Rebellion constitute any evidence of the unfitness of the attorney or counsellor to practice his profession, or of the professor to teach the ordinary branches of education, or of

the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms —life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10

a pardon, by which the chief magistrate, reciting that Mr. Garland, "by taking part in the late Rebellion against the government, had made himself liable to heavy pains and penalties," &c., did thereby

"Grant to the said A. H. Garland a FULL PARDON AND AMNESTY for all offences by him committed, arising from participation, direct or implied, in the said Rebellion, conditioned as follows: This pardon to begin and take effect from the day on which the said A. H. Garland shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865; and to be void and of no effect if the said A. H. Garland shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor; and that he first pay all costs which may have accrued in any proceedings hitherto instituted against his person or property. And upon the further condition that the said A. H. Garland shall notify the Secretary of State in writing that he has received and accepted the foregoing pardon."

The oath required was taken by Mr. Garland and annexed to the pardon. It was to the purport that he would thenceforth "faithfully support, protect, and defend the Constitution of the United States and the union of the States thereunder; and that he would in like manner abide by and faithfully support all laws and proclamations which had been made during the existing Rebellion with reference to the emancipation of slaves."

Mr. Garland now produced this pardon, and by petition filed in court asked permission to continue to practise as an attorney and counsellor of the court, without taking the oath required by the act of January 24th, 1865, and the rule of the court. He rested his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affected his status in the court, was unconstitutional and void; and,

2d. That, if the act were constitutional, he was released from compliance with its provisions by the pardon of the President.

Argument for the Petitioner.

Messrs. Reverdy Johnson and M. H. Carpenter, for the petitioner, Mr. Garland, who had filed a brief of his own presenting fully his case.

I. In discussing the constitutionality of any law of Congress, the real question is, would the act accomplish a result which the Constitution forbids? If so, no matter what may be the form of the act, it is unconstitutional.

This court, in *Green* v. *Biddle*,* *Bronson* v. *Kinzie*,† and in *McCracken* v. *Hayward*,‡ has held, that although the States may legislate at pleasure upon remedies merely, yet if the practical effect of such legislation, in a given case, be to burden the right of a creditor unreasonably, or withdraw the debtor's property from the reach of the creditor, then such law is unconstitutional, as impairing the obligations of the contract. In *Bronson* v. *Kinzie*, C. J. Taney says:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. *But if that effect is produced*, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. *In either case it is prohibited by the Constitution.*"

Again he says:

"And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or incumbered it with conditions *that render it useless or impracticable to pursue it.*"

In the Passenger Cases,§ this court held that State laws, nominally mere health or police laws, were unconstitutional, *because, in their effect*, they amounted to a regulation of commerce; and, therefore, were an exercise of power vested exclusively in the Federal government.

* 8 Wheaton, 1.
† 1 Howard, 311.
‡ 2 Id. 608.
§ 7 Howard, 283.

The judges of this court hold office during good behavior. An act of Congress passed to-day, requiring them to take an oath that they were not above forty years of age, and providing, as the act in question does in relation to attorneys, that, "after the 4th March next, no justice of this court should be admitted to his seat, unless he should take such oath, even if he were previously a justice of said court," would be a palpable violation of the Constitution, because it would amount to a disqualification to any man above forty years of age, and be equivalent to providing that no justice of this court should remain in office beyond that age; while the Constitution provides that the judges shall hold during good behavior.

The Constitution provides,* that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." Now, an act of Congress, or of a State, declaring that before any heir should enter into his ancestral estates he should take an oath that his ancestor had not been attainted of treason, would violate this provision; and could be intended for no other purpose.

Assault and battery is a crime punishable by fine of $50, but not with disqualification to hold office. Suppose A. to-day commits that offence, is tried and fined. To-morrow, Congress passes a law that no person shall be admitted to hold any office of honor, profit, or trust until he shall subscribe an oath that he has never committed the crime of assault and battery. Is it not apparent that such act, in its practical operation, would be *ex post facto*, as adding to the punishment of assault and battery an important penalty not attaching when the crime was committed?

These are instances, and many might be cited, illustrating the proposition that an act is unconstitutional, which accomplishes a result forbidden by, or in conflict with, the Constitution.

II. What, then, is the result accomplished by the act com-

* Article iii, § 3.

plained of, and how does that result accord with the spirit and provisions of the Constitution?

This may be considered—

(1.) With reference to the petition; and

(2.) Upon principle generally.

1. Conceding, for the purpose of this argument, that the petitioner has been guilty of treason, for which, on conviction in the manner provided in the Constitution (on the testimony of two witnesses to the same overt act, or on confession in open court), he might have been punished with death.

The President has fully pardoned him for this offence; and the constitutional effect of that pardon is to restore him to all his rights, civil and political, including the capacity or qualification to hold office, as fully in every respect as though he had never committed the offence. Previous to the Rebellion, the petitioner was not only qualified to be, but actually was a member of this bar. In consequence of his supposed treason, and only in consequence of that, he subjected himself to the liability of forfeiture of that office; but the pardon wipes out both the crime and the liability to punishment, and restores the petitioner to the rights he before possessed, including the right to practise at this bar. This act of Congress, however, fixes upon this petitioner, as a consequence of the offence, a perpetual disqualification to hold this or any other office of honor, profit, or trust. In other words, the act accomplishes a result in direct opposition to the constitutional effect of the pardon. Dropping names and forms and considering the substance of things, the President says, by his pardon: "You shall not be precluded from practising in the Supreme Court in consequence of your crime; I pardon you." The act says: "You shall never practise in the Supreme Court without taking an oath which will be perjury, and then, on conviction of that, that shall disqualify you." The President is trying to pardon, and Congress to punish the petitioner for the same offence; and the only question is, which power prevails over the other?

Argument for the Petitioner.

To examine this subject we must consider first the nature and effect of the pardon granted to the petitioner; and secondly, the character and effect of the oath prescribed by the act. If it can be shown that the pardon, in its constitutional effect, extinguishes the crime and precludes the possibility of punishment; and that the oath in effect fixes a disqualification, which is in the nature of a penalty or punishment for the same offence, then, of course, the conflict between the two is established, and we presume it will be conceded, in that case, that the pardon must prevail.

First, the pardon. The Constitution provides* that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." This language is plain. "Offences," means "all offences;" and then the express exception of cases of impeachment is a repetition of the same idea.

In *United States* v. *Wilson*,† Chief Justice Marshall, speaking of the pardoning power, says:

"As this power had been exercised from time immemorial by the Executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

This court, delivering its opinion by Mr. Justice Wayne, in *Ex parte Wells*,‡ quotes this language of Chief Justice Marshall with approval, and says further that the power granted to the President was the same that had before been exercised by the Crown of England. Now let us turn to the English and American authorities.

In Sharswood's Blackstone§ it is said:

"The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed

* Article ii, § 2.
† 7 Peters, 150.
‡ 18 Howard, 315.
§ Vol. 2, p. 402.

to that offence for which he obtains a pardon; it gives him a new credit and capacity; and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor or felon."

Bacon's Abridgment says:

"The stroke being pardoned, the effects of it are consequently pardoned."

And refers to Cole's Case, in the old and accurate reporter Plowden.* Bacon says, also:†

"The pardon removes all punishment and legal disability."‡

In Bishop's Criminal Law it is said:§

"The effect of a full pardon is to absolve the party from all the consequences of his crime, and of his conviction therefor, direct and collateral; it frees him from the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided."

In the Pennsylvania case of *Cope* v. *Commonwealth*,‖ the court says:

"We are satisfied, however, that although the remission of the fine imposed would not discharge the offender from all the consequences of his guilt, a full pardon of the offence would."

In the Massachusetts case of *Perkins* v. *Stevens*,¶ it is said:

"It is only a full pardon of the offence which can wipe away the infamy of the conviction, and restore the convict to his civil rights."

And quoting from the attorney-general of that State, the court approves the following language:

"When fully exercised, pardon is an effectual mode of restoring the competency of a witness. It must be fully exercised to

* Page 401. † Pages 415–16, notes *a* and *b*.

‡ See, too, Gilbert on Evidence, 128; Brown *v.* Crashaw, 2 Bulstrode, 154; Wicks *v.* Smallbrooke, 1 Siderfin, 52.

§ § 713. ‖ 28 Pennsylvania State, 297.

¶ 24 Pickering, 280.

produce this effect; for if the punishment only be pardoned or remitted it will not restore the competency, and does not remove the blemish of character. There must be a full and free pardon of the offence before these can be released and removed."

In other cases* a pardon was held to render the convict a competent witness, upon the ground that the pardon removed not only the punishment but the stigma of guilt.

These authorities show that the people intended to, and in fact did, clothe the President with the power to pardon all offences, and thereby to wash away the legal stain and extinguish all the legal consequences of treason—all penalties, all punishments, and everything in the nature of punishment.

The President, for reasons of the sufficiency of which he is the sole and exclusive judge, has exercised this power in favor of the petitioner. The effect of the pardon, therefore, is to make it impossible for any power on earth to inflict, constitutionally, any punishment whatever upon the petitioner for the crime of treason specified in the pardon.

III. The act applied to the petitioner, in substance and effect, visits upon him a punishment for his pardoned crime. It will be conceded that the effect of this act is to exclude the petitioner from this and from all civil office. That a permanent disqualification for office is a grievous punishment need not be argued in America.

In the matter of Dorsey,† a motion was made for the admission of Dorsey as an attorney, and to dispense with administering to him an oath in relation to duelling, required by an act of 1826. This act provided that "all members of the general assembly, all officers and public functionaries, elected or appointed under the constitution or laws of the State, and all counsellors and attorneys at law," before entering upon their office, should take an oath that they had never been engaged in any duel, and that they never would be.

* Jones *v.* Harris, 1 Strobhart, 162, and People *v.* Pease, 3 Johnson's Cases, 383.

† 7 Porter, Alabama, 293.

The report of the case occupies about two hundred pages, and is an able and elaborate discussion of this subject, and a full authority for the position we take in this case. It was there held:

1. That in that case the law prescribed a qualification for holding office, which an individual never could comply with, and that such act, as to him, was a disqualification.

2. That such disqualification was punishment.

3. That the retrospective part of the oath was unconstitutional.

4. That as a part of the oath was unconstitutional, and the court could not separate it, the whole oath was unconstitutional, and the petitioner was entitled to be admitted without taking it.

Goldthwaite, J., says:*

"I have omitted any argument to show that disqualification from office, or from the pursuits of a lawful avocation, is a punishment; that it is so, is too evident to require any illustration; indeed, it may be questioned whether any ingenuity could devise any penalty which would operate more forcibly on society."

In *Barker* v. *The People*,† a New York case, the chancellor says:

"Whether the legislature can exclude from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined, and according to my views of that question there may be an exclusion by law, in punishment for crimes, but in no other manner, and for no other cause."

In same case, in Supreme Court, where the opinion was delivered by Spencer, C. J., it is said:

"The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences."

* Pages 366, 368

† 3 Cowen, 686.

Indeed, the very act we are considering provides this punishment for those who shall be convicted of perjury for taking the test oath falsely.

And more than all, the Constitution of the United States* itself is to the same effect. It says:

"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States."

For the highest crimes, then, and on trial in the most solemn form known to the Constitution, the only punishment is disqualification.

These authorities, as we assert, establish:

1. That the pardon absolves the petitioner from all punishment for his offence; and,

2. That the act in question does, in its operation upon the petitioner, disfranchise him from holding office; and

3. That such disfranchisement is in effect a punishment for the same offence for which he has been pardoned; and, therefore,

4. That the act and the pardon are in conflict, and the pardon must prevail.

IV. The foregoing objections are conclusive as regards Mr. Garland; but it might be omitting a duty that every lawyer owes his country, not to call attention to other general objections to this act.

1. What right has Congress to prescribe other qualifications than are found in the Constitution; and what is the limit of the power? Of course the power is conceded to make perpetual or limited disqualification one of the penalties of crime, applying the act prospectively. Such was the act sustained in *Barker* v. *The People*, before cited; but where does Congress get the power to disfranchise and disqualify any citizen, except as punishment for crimes, whereof the party shall have been duly convicted?

* Article I, § 3.

Congress can exercise none but actually delegated powers, or such as are incidental and necessary to carry out those expressly granted. If this act is constitutional, then there is no limit to the oaths that may be hereafter prescribed. The whole matter rests in the discretion of Congress. A law requiring every public officer to swear that he voted for a particular candidate at the last election, or leave his office, would be more wanton, but not less constitutional, than the one we are considering; for if it is in the constitutional power of Congress to require these disfranchising oaths to be taken, then Congress alone can determine their nature. There is no appeal from its determination of any matter within its constitutional province.

2. The Constitution provides:*

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; except," &c. . . . "Nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law," &c.

Now, suppose murder or treason to have been in fact committed by a public officer, but that there is no witness to establish the fact. Can Congress pass a law requiring him, as a condition to his further continuance in office, or ever after holding any office, to take an oath that he has not committed murder or treason? If so, all the consequences which can follow from conviction on impeachment, viz., incapacity to hold office, may be visited upon the guilty party without indictment, trial, or witnesses produced against him, and without any process of law whatever; and Congress may by *ex post facto* laws brand the most trifling offence, or even a difference of political opinion, with total disqualification to hold office. Such rapid administration of justice might often reach a correct result, and disfranchise a guilty man whose absence from office might not endanger the Republic; but

* Article V, Amendments.

the question is, is it a constitutional method of establishing and punishing guilt?

3. The petitioner's right to practise in this court is property. In *Wammack* v. *Halloway*,* it was held by the court unanimously, that "the right to exercise an office is as much a species of property as any other thing capable of possession; and to wrongfully deprive one of it, or unjustly withhold it, is an injury which the law can redress in as ample a manner as any other wrong; and conflicting claims to exercise it must be decided in the same manner as other claims involving any other right, if either of the claimants insist on a jury."

In *Ex parte Heyfron*,† it was held to be "error to strike an attorney from the roll on motion without giving him notice of the proceeding," the court saying: "It is a cardinal principle in the administration of justice, that no man can be condemned, or divested of *his rights*, until he has had an opportunity of being heard."

In the matter of Cooper,‡ it was held that the court, in passing upon the admission of an applicant to practise as an attorney, acted judicially, and its decision was reviewable in the appellate court.

In *Ex parte Secombe*,§ this court say (by C. J. Taney):

"It rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. *The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility;* but it is the duty of the court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

These cases show that the petitioner has a vested right

* 2 Alabama, 31. † 7 Howard's Mississippi, 127.

‡ 22 New York, 67. See, also, Strother *v.* State, 1 Missouri, 554 or *772

§ 19 Howard, 9.

in his office as an attorney of this court, of which he can only be deprived by some regular judicial proceeding. He may be removed for cause; but the adjudication of the court in the premises is a judicial judgment, which may be reviewed on appeal.

Depriving the petitioner, therefore, of his office by an enforcement of this act of Congress, is depriving him of his property without due process of law.

*Mr. R. H. Marr, also for the petitioner:**

I. The President has granted to the petitioner a "full pardon and amnesty." Here are two words, and the meaning of them is different.

The meaning of the word pardon has been discussed and is well known. The word "amnesty" is not of frequent use in the English law; for the clemency which is expressed by that word is usually exercised in England by what they call an act of indemnity. Let us inquire into its meaning.

Neither the English law nor our law throws great light upon the matter. It may be well to trace its history, and to see how it was understood originally, how it has been uniformly understood since, and is now understood, by some of the most polished nations of the world. If we turn our attention to France, particularly, so long and so often the sport of political storms and revolutions, we shall find in her jurisprudence abundant light to guide us in our inquiry as to the meaning and effect of the amnesty.

The word comes from the Greek, *Αμνηστια*, and means oblivion, the state or condition of being forgotten, no longer remembered. When Thrasybulus had overcome and dethroned the Thirty Tyrants, he induced his followers, by his

* Mr. Marr had himself filed a petition similar to that of Mr. Garland, for permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of Congress and the rule of the court. He had been engaged in the Rebellion, but had received a full pardon from the President. It was understood that the decision upon Mr. Garland's petition would also embrace, in principle, his. The argument here given is from the brief filed in his own case.

persuasive eloquence, and by the influence which his noble virtues gave him, to pass an act of perpetual oblivion in favor of an oligarchical party, from whom they had suffered atrocious wrongs; to forget, to remember no longer, the past offences, grievous as they were; and this act of clemency, running back to about the year 403 B. C., he called *Αμνηστια*.

The Romans, too, had their amnesty, which they called *Abolitio*, and which is thus defined in their law: "*Abolitio est deletio, oblivio, vel extinctio accusationis.*"

This high prerogative was exercised by the kings of Spain from a very remote period; and its effect* is, to condone the penalty, and to obliterate, efface the mark of infamy.

From an early period, this prerogative has been exercised by the kings of France, and its effect has been the subject of the most minute judicial investigation.

Merlin† defines the word: "*Grace du souverain, par laquelle il veut qu'on oublie ce qui a été fait contre lui ou contre ses ordres.*"

Fleming & Tibbins, in their Dictionary,‡ define it: "*Pardon qu'on accorde à des rebelles ou à des déserteurs.*"

In the matter of a person named Clemency,§ the Court of Cassation say:

"If the effect of letters of pardon is limited to the remission of the whole or a part of the penalties pronounced against one or more individuals; if they leave the offence still subsisting, as well as the culpability of the pardoned, and even declare the justice of the condemnation, it is otherwise with respect to a *full and complete amnesty*, which carries with it the extinction of the offences of which it is the object; of the prosecutions commenced or to be commenced; of the condemnations which may have been or which may be pronounced; so that these offences, covered with the veil of the law, by the royal power and clemency, are, with respect to courts and tribunals, *as if they had never been committed*, saving to third persons their right to reparation, by civil action, for injury to them."

* Tapia, Febrero Novíssimo, tomo 8, p. 56, § 14.

† Répertoire de Jurisprudence, Tit. "Amnistie."

‡ Tit. "Amnistie."

§ De Villeneuve & Carrette, vol. 1825, 1827, part 1, p. 185.

Clemency had been guilty of theft, in a time of great scarcity; and was amnestied. She afterwards committed the same offence, and the prosecution insisted on inflicting upon her the accumulated penalties due to a repetition of the offence. But the court held that the first offence had been so completely annihilated by the amnesty, that it could not be considered in law as having ever existed or been committed, insomuch that the offence for which she was then prosecuted, though in reality a repetition of the first, could be considered in law only as a first offence, and punished as such.

Girardin was married in 1822. In 1834, by judgment of the court of assizes of the department to which he belonged, he was condemned by default, and sentenced to death for some political offence; and civil death was a consequence of that judgment. In 1840, an amnesty was declared by royal ordinance, in favor of all under condemnation for political crimes or offences.

Supposing, as the effect of the civil death pronounced against him operated a dissolution of his marriage, that it was necessary to have it celebrated anew, Girardin instituted some proceeding, in the nature of a *mandamus*, against the mayor of his town, to compel the performance of the marriage ceremony; and the court of first instance ordered the new celebration to take place.

The mayor appealed; and the royal court reversed the decision, upon the ground that:

"The amnesty had annihilated the sentence pronounced against Girardin, had abolished the past, and had reintegrated the amnestied in the plenitude of his civil life; that, consequently, he is to be regarded as having never been deprived of civil life; and that the new celebration would be in some sort an act of derision, and contrary in every respect to the sanctity of marriage."*

By writ of error, Girardin sought, in the Court of Cassa-

* De Villeneuve & Carrette, 1840, part 2, p. 372, &c.

tion, the highest judicial tribunal in France, a reversal of the judgment of the royal court. But the Court of Cassation rejected the writ of error, and affirmed the judgment of the royal court. The court say:

"Since the object of the amnesty is to efface, completely, the past—that is to say, to replace the amnestied in the position in which they were before the condemnation had been incurred, it follows that it produces the complete re-establishment of the amnestied in the enjoyment of the rights which they had before the condemnation, saving the rights of third persons."*

It may be said generally, we think, that pardon is usually granted to an individual; amnesty to a class of persons, or to a whole community. Pardon usually follows conviction, and then its effect is to remit the penalty. Amnesty usually precedes, but it may follow trial and conviction, and its effect is to obliterate the past, to leave no trace of the offence, and to place the offender exactly in the position which he occupied before the offence was committed, or in which he would have been if he had not committed the offence.

II. The President had the right to grant an amnesty. The Constitution gives him unlimited power in respect to pardon, save only in cases of impeachment. The Constitution does not say what sort of pardon; but the term being generic necessarily includes every species of pardon, individual as well as general, conditional as well as absolute. It is, therefore, within the power of the President to limit his pardon, as in those cases in which it is individual and after conviction, to the mere release of the penalty—it is equally within his prerogative to extend it so as to include a whole class of offenders—to interpose this act of clemency before trial or conviction; and not merely to take away the penalty, but to forgive and obliterate the offence.

It is worthy of remark, that Congress stands committed as to the extent of the pardoning power, and the mode of exercising that power by proclamation. By the act approved

* Id. 1850, part 1, p. 672–3

17th July, 1862, entitled "*An act to suppress insurrection,*" &c., section 13, it is declared, that

"The President is hereby authorized, at any time hereafter, by proclamation, to extend to persons who may have participated in the existing Rebellion in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare."

Mr. Speed, contra, for the United States:

Gentlemen present themselves here who were once practitioners before this court, but who confess in form that they have been traitors, and virtually confess that they have forfeited the privileges which they had under the rules of this court. Confessing all this, they maintain their right to take the original oath again, and to come back to practise before this court because they have been pardoned by the President.

Who is a counsellor or attorney? Opposing counsel seem to think that a man has a natural right to practise law; the same sort of right that he has to locomotion, and even to life. But this, we submit, is not so. The last-mentioned rights were given to us by the Creator; and government is made to preserve them. The government does not give the right to life, nor the right to locomotion, though it protects us all in the exercise of both. We sometimes call the privilege to practise law a right, but this is a mere manner of speaking; for it is, in truth, but a privilege; a privilege created by the law; held under the law, and according to the terms and conditions prescribed in the law. Not being a natural right, and one so protected, but a right received, and upon conditions and terms, the question in this case is, can the legislature or this court prescribe such conditions as are stated in this oath?

Whence came the power of this court to exact of an attorney an oath of any kind? No oath is prescribed in the Constitution, nor in the Judiciary Act of 1789. Whence comes the power? Under the act of 1789 this court is doubtless

vested with the power to prescribe one. Under that power this court prescribed the old* oath. But why that oath any more than any other oath? What part of the Constitution restrains the court to the point of prescribing this oath, and this oath only? None. Then if the court could prescribe this old oath, can it not prescribe another and different oath? No, say opposing counsel, it cannot; and especially it cannot prescribe a retroactive oath.

But really there is no retroaction about this law. Every qualification is retroactive in one sense. A man presents himself to qualify under the old rule as a counsellor and attorney of this court. What is the question? It is as to his past life, as to his past conduct, and as to his then sufficiency because of his past life and past conduct. His "private and professional character shall appear to be fair," said the rule. Moreover, we submit that every man stands here with a continuing condition of that sort upon him. The condition attaches every hour in which any man stands before the courts. It is not simply that he *is*, at the time he takes it, a man whose private and professional character appears fair. Could any gentleman, having committed yesterday an offence for which, if the court knew when he was admitted that he had been guilty of, he would not have been admitted —could he stand here to-day and contend that an exclusion on account of that offence would be retroactive? The qualification does not infer as a necessity that the counsellor admitted will both *then* and *for all future time* be qualified. He may disqualify himself. Being once qualified, he must live up to that rule which qualified him at the first. Suppose a member of the bar of this court, having been once qualified for admission, were guilty of perjury before this court, does he ever afterwards continue qualified? There is, then, nothing retroactive in this qualification.

Is it a penalty? No; only a qualification. Take it as an original matter, say the opposing counsel, it is one thing; take it as a question retroactive, it is another thing. But

* See it, *supra*, p. 336.

it is always an original question whether this court cannot change its rules and repeat the qualification, either as to moral qualities, as to professional skill and ability, and even as to political crimes. Who doubts that it is competent for the court to-morrow morning to read a rule here that shall require every gentleman who practises at this bar to submit his pretensions for sufficiency over again? But the power to make the rule contains the power to repeal the rule; the power to make the rule and repeal the rule contains the power to modify and to change the rule as the court may see proper to do.

Under the act of 1789, then, it was competent for this court, by the authority given under that act, to pass such a rule as that objected to, and to make such a rule applicable not only to those who present themselves in the future, but applicable to all who appear here with a previous license to practise law.

But if under the act of 1789 the court cannot make the rule, we have the act of Congress of 24th January, 1865. Cannot the legislature prescribe the qualifications which the counsellor shall have; the length of time he shall have been at the bar; the number of books, or the very books, that he shall have read and understood; that he shall not practise in this court at all, unless he shall have practised in the Federal courts in the several States; that he may practise in this court though he had never appeared before the Supreme Court of a State? Where is the limit? Congress has the power. How can you limit that power? Can you limit it because Congress may abuse that power? Opposing counsel argue about this government becoming a government of faction, a government of party, &c., if these powers exist in Congress. This court has said too often, and it is too familiar to the judges for me to do more than mention it, that the fact that a power may be abused is no argument against its existence.

It is said Congress cannot exact *such* an oath of office from attorneys, or from any one else; but on the face of the Constitution there is such a power given. The word "oath"

occurs but three times in the Constitution; once it prescribes an oath to be taken by the President; next, it is declared that the senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; "*but no religious test*, it is ordained, *shall ever be required as a qualification to any office or public trust under the United States.*" Why this exception? Simply because the framers of the instrument knew that if the exception was not put in the instrument, there would be the ability to require a religious test. That one sort of oath alone is forbidden by the Constitution. From that provision it is to be inferred that other oaths may be exacted. The inference extends to senators and members of the House of Representatives; it even reaches to that point—a point not now before the court. Some persons have argued that this oath in the Constitution cannot be changed by the Senate or House of Representatives; that all the Senate or House have to do, is to inquire as to the age and residence of the party. Have not the Senate a right to go beyond that? Have they not the right to expel a man from the body? Take the case of Breckenridge, who was expelled; the Senate recording upon its journals that he was a traitor. Could that man present credentials, and demand that he should be formally admitted, even though he might be again expelled? It was in our view of the Constitution that Chief Justice Marshall, in *McCulloch* v. *The State of Maryland*,* says, that the man would be insane who should say that Congress had not the power to require any other oath of office than the one mentioned in the Constitution.

As to the expediency and the propriety of passing such an act as that of 24th January, 1865, that involves a question of duty in Congress, with which this court has nothing to do. It would seem that, in times such as we have had, some oath ought to be required that would keep from this bench and

* 4 Wheaton, 416.

from this bar men who had been guilty, and were then guilty, of treason. There was a late associate justice upon this bench, a gentleman for whom personally all had high regard. He left this bench and went off to the Confederacy. Suppose he had not resigned; suppose that this judge had come back here and demanded to take his seat on the bench; could you have received him in your conference-room either pardoned or unpardoned? Would the court regard itself as discharging its duty, if it took him into conference, guilty, as he confessed himself to be, of treason? I know that the court would not.

Will the judges admit men to minister at the bar of justice, whom they would not admit like men among themselves? Will they say that it is *un*constitutional to keep such men from the bar by an oath like this, but that it is quite constitutional to keep them from the bench? If a man has a right, without taking this oath, to come here among us, and stand at this bar, and exercise all the functions of an attorney and counsellor in this court because he has a pardon, would not a judge, though guilty confessedly of treason, have a like right to return to the bench;—if he had been pardoned? Why could he not do it? Only because this thing of office, this thing of privilege, is a creature of law, and not a natural right. Being a creature of law, no man can, like a parricide, stab that law, and claim at the same time all its privileges and all its honors. He would destroy the very government for which he asserts a right to act. This he cannot do. The case of *Cohen* v. *Wright** bears strongly in our favor. There the constitution of California prescribed an oath, to be taken by "members of the legislature and all officers, executive and judicial." It then declared that "no other oath, declaration, or test, shall be required as a qualification for any office or public trust." On the 25th April, 1863, the legislature passed an act, declaring that a defendant in any suit pending in a court of

* 22 California, 225. The report, as here given, is extracted from a printed statement of Mr. Henderson's argument in Cummings *v.* Missouri.

record might object to the loyalty of the plaintiff; and thereupon the plaintiff should take an oath, in addition to other things, that he had not, since the passage of the act, aided or encouraged the Confederate States in their rebellion, and that he would not do so in the future. In default of his taking the oath, his suit should be absolutely dismissed, and no other suit should be maintained by himself, his grantee, or assigns, for the same cause of action. All attorneys-at-law were required to take the same oath, and file it in the county clerk's office of their respective counties; and to practise without taking it, was declared a misdemeanor. A few days after the passage of the act, an action of assumpsit was brought in one of the courts on a contract, which, as would seem from the opinion in the case, existed at and before the passage of the act. The plaintiff was required to take the oath; and having refused to do so, his case was dismissed, and judgment rendered that it should not again be brought. The attorney appearing in the cause refused to take the oath, and he was debarred. Both questions were passed on by the Supreme Court, and the oath sustained as equally applicable to both litigants and attorneys. The court say, in reference to attorneys, that the legislature "has the power to regulate as well as to suppress particular branches of business deemed by it immoral and prejudicial to the general good. The duty of government comprehends the moral as well as the physical welfare of the state." In reference to the objection that litigants are deprived of rights by a process not known as "due process of law," which is guaranteed by the California constitution, the court say: "As one State of the Union, California has the right to deny the use of her courts to those who have committed or intended to commit treason against the nation."

The California case, indeed, was, we admit, decided on a prospective statute; and the court, in that case, say there would be a doubt if it was retroactive. Upon that subject, as we have said before, we have no doubt; because the license and privilege of every gentleman here, at the bar, is upon a continuing condition, and is subject to the power of this

court, subject to the power of Congress to change the rule, there being no natural, inalienable right to occupy the position.

Mr. Stanbery, special counsel of the United States, on the same side, and against the petitioner:

I. A pardon is not, as argued, all-absorbing. It does not protect the party from all the consequences of his act. What is the old Latin maxim that governs pardon? *Rex non potest dare gratiam cum injuriâ et damno aliorum.* A pardon, while it absolves the offender, does not touch the rights of others. Suppose that there is a penal statute against an offence, and the policy of the law being to detect the offender, there is a promise of reward to the informer, upon his conviction, to be had. If a pardon is given to that offender, what is the consequence upon the informer, who draws his right simply out of the offence and the conviction of the offence? Does it take away his right to the fine, or the liability to pay him the fine? If the fine is half to the informer and half to the public, what is the effect? The half to the public is gone, but the half to the informer is not gone. There is one consequence arising out of the offence that the pardon does not reach.

Put another case. Suppose a man is indicted and sent to the penitentiary for life, and that the consequence of the confinement is declared by law to be that he is *civiliter mortuus*—dead in the estimation of the law. During his confinement his wife is released from the bonds of matrimony. She is a widow in the estimation of the law; her husband is dead, so far as the law can see. She marries again. After all that comes executive clemency, makes the offender a new man, pardons the offence, and, if you please, all the consequences. The man is no longer *civiliter mortuus;* again he is *probus legalis*, or *legalis homo;* but shall he have his wife, however willing she may be? Does this pardon divorce the newly-married parties, and annul their marriage? Does it make the first husband just the man he was, and with all the rights he had when he committed the offence? No.

Suppose it is some ecclesiastical penalty that has been incurred; that some incumbent has lost his office as a part of the punishment of the offence, and afterwards the king chooses to pardon him. What does Baron Comyns say, in that case, as to restoration to rights?*

"A pardon to the parson of a church of all contempts for acceptance of a plurality does not restore him to the former church."

"So a pardon does not discharge a thing consequent, in which a subject has an interest vested in him; as if costs are taxed in a spiritual court, a pardon of the offence does not discharge the costs."

Pardon is forgiveness, but not necessarily restoration; it restores many things—not all things. For centuries, it has been a question in England, whether a pardon makes a man fit to sit in the jury-box, where the offence involves a forfeiture of his right to sit in the jury-box; and so whether a pardon restores a man to competency as a witness, when the crime of which he stands convicted excludes him from being a witness? On that question, I should suppose that much depends on the terms of the pardon.

What are the rights of this court and the rights of Congress, also, with regard to those who are to practise here? There are certain things in which neither the executive department nor yet the legislative department can interfere with this bench; and I am glad it is so. No law can deprive your honors of your places here during life or good behavior. No President can remove a judge from this bench; and thank God it is so. No law of Congress can remove a judge from this bench. I know there have been laws of Congress that have removed United States judges from lower benches than this, but their validity has been always questioned. But no Congress has ever dared to pass a law to remove a judge from this bench, or to abolish this bench, or change the structure of the Supreme Court of the United States.

* Vol. 5, p. 244.

What next? Congress, it is certain, cannot interfere with your proper judicial functions. Wherever anything is commanded of you by Congress that interferes with the upright and impartial and unfettered judicial authority that you have, such a law is void, and invades your department, just as distinct and unassailable as the power of Congress itself or the executive power itself; so that if this law, which prescribes an oath to be taken by counsellors of this court, invades the proper and exclusive power of this court—if Congress has no right to say what lawyers shall practise here or what shall be their qualifications—if that is a matter exclusively for this court, then, undoubtedly and beyond all question, this is a void law.

But let us consider what Congress may really do with regard to this court and with regard to its officers; let us see the great field over which legislation walks undisturbed in reference to it. Who made this number of ten judges here? Congress. And they can put twelve here, or twenty, if they see fit. One they cannot take from here by act of Congress, but only by impeachment after due trial. What further can they not do? They fix your salaries; but the moment the law is passed and approved, the salary so fixed is beyond their power to reduce, not to increase. They may force the judges to take more, but they cannot require them to take a dollar less.

What next can they do? This court sits here in this Capitol. Is that not by authority of law? Why is there a chief justice to preside here? Was he made by this bench? Not at all; but made by law. Why are the judges sitting here now to hold a term? Of their own motion? Not at all; but under the authority of law. Why are the judges required to visit all the circuits, at great personal inconvenience perhaps? On their own motion? No; by authority of law.

Passing from the bench. What is the clerk? An officer of this court, appointed by this court; but under what authority? By law. Who pays him? He is paid by law. What is he? An office merely of this court, or an officer

of the United States under the laws of the United States? He is the latter in every respect. Then, your marshal; who sends him here, and compels him to be here? Congress. It is by authority of law. All the machinery of the court, so far as its officers are concerned, comes to you by statute. The statute says you shall have one marshal, not two; one clerk, not three.

A class remains; the attorneys and counsellors that practise here. Under what authority is it that we have attorneys and counsellors here, and that they have rights to be heard here? Did your honors give us these rights? Is it by grant from this court that there are counsellors and attorneys here? No. It comes by act of Congress. The Constitution is silent upon it. The word "attorney" is not mentioned, and the word "counsel" is only mentioned in it as the right of a person accused of crime. It is an act of Congress that creates us and gives us the right to appear here as attorneys and counsellors at law under certain limitations. Congress has imposed very few upon us. Congress very wisely have given to the court the power to receive or to exclude, and to lay down the terms upon which a counsellor shall be admitted.

But when you are exercising that power with regard to attorneys and counsellors you are exercising a power granted by Congress, and we stand here as attorneys under that law and say to your honors, "Admit us; here are all the things that you have required and all that the law has required; admit us." Is it not so, that in everything in which Congress has given you the power over us, to admit us or to exclude us, you get that power by law? Who prescribes the oath of the attorney? Is that left to the court merely, or has that been exercised by Congress? The original oath required of attorneys is not found in the Constitution. The Constitution, upon the subject of oaths to be administered, relates only to oaths of office of persons appointed or elected to office under the Federal authority. Attorneys, as it is admitted on the other side, are not such officers, and the oath pointed out by the Constitution has nothing to do with

lawyers. But Congress undertook, in the original Judiciary Act, to say that in all courts of the United States the parties may plead and manage their own causes personally, "or by the assistance of such counsel or attorneys-at-law *as by the rules of the said courts* respectively shall be permitted to manage and conduct causes therein." Congress gives power to the court to prescribe the oath; and to exercise over its counsel all wholesome control.

What further may Congress do? If under the authority thus given to you over attorneys you have a right to prescribe an additional oath, may not Congress do the same thing? Is there any constitutional objection there? Has Congress exhausted all its power with reference to such a body of men as attorneys and counsellors in the courts of the United States, so that it can do nothing further and lay down no further rule for admission or exclusion, for oath, for bond, for security? Not at all. The very first exercise of the power under which we take our first right to be attorneys and counsellors here remains; it is not exhausted; and no one can assign any reason at this moment why Congress, in its power over the attorneys and counsellors of this court, may not prescribe rules of admission, residence, and a thousand other things, that might be fixed under a constitution like ours. In the States we do not leave so much to our courts in regard to attorneys and counsellors as Congress has, very wisely, I think, left to this court. We prescribe almost everything there by statute; fix all the qualifications through the legislative department, to be observed as to those who practise before the judicial department.

Then I take it as clear, so far as these persons are concerned, these attorneys and counsellors at law, that there is a power in this court to prescribe oaths and additional oaths, and just as clear a power in Congress to prescribe oaths and additional oaths.

Having shown that the subject-matter of an oath to be taken by attorneys and counsellors of this court is within the competency of legislative authority and regulation, quite

as fully as it is within the competency of this court by virtue of the Judiciary Act; having shown that there is no constitutional objection to the exercise of this power by Congress, and that the only possible objection that can be taken to it, is that Congress has once exercised the power by law; when I have shown that that exercise of power did not exhaust the power of the legislature, then I have shown that so far this is a valid law and a valid oath. All that it is necessary for me to say is this: if the rule is valid, the law, which has somewhat more of solemnity and force than a rule, is equally valid. I do not ask for it any greater validity, but equality, so far as mere validity is concerned in the passage of the law or the passage of the rule. If I am right here, what will the bench say to a pardon of the President, who, when a lawyer is ejected from this court as unfit to practise here, grants a pardon for the very offence for which the court has ejected him? For instance, the lawyer may have committed forgery or perjury, things which make a man, when convicted of them, very unfit to practise as an attorney and counsellor at law. In consequence of that, the court may disbar him. Then the President pardons him, absolves him from the conviction of perjury and forgery, and, according to the position of the opposite side, restores him at once to his right to be here, and defies the rule which you have made, and your authority to exclude him. If that cannot be done in opposition to a rule, can the same thing be done in opposition to a law passed by the legislative body that had authority over the subject-matter? Clearly not.

II. Now, passing over the question of the power of Congress to do it, was it not eminently fit that such a law should be passed at the time; that Congress, then charged with the duty of saving the country, should exclude from its courts members of the bar in actual rebellion against it? It was eminently proper then. What! only exclude those who have not yet committed treason, and make them swear that they will not commit treason; and have no power to exclude those who have committed treason, and who come to de-

mand as a right to practise here, with the admission on their lips that they are traitors, and, if you please, mean to continue traitors; for I am speaking of the thing as it was in 1862, when that law was passed. What! after treason is committed, and the traitor comes here *flagrante delicto*, without pardon, if you please, asking no clemency, comes here to practise law, and this oath is opposed to him, he says, "It does not bind me; I have committed treason, it is true; I have never recanted; I have not been pardoned; but that oath is unconstitutional, so far as I am concerned, and takes away my high privilege of practising in this court at this time." He says that it is *ex post facto* and void, because it makes a thing a crime which was not a crime at the time! Does it impose a criminal penalty with regard to penal matters? That is the meaning of penalty in that sense. We have now here before us a law that simply says, that a party who has committed a certain act shall not practise law in the courts of the United States. Is that making a new crime? Is that adding a new penalty in the sense of criminal penalties? Not at all. The act prescribing the oath does not say, that when a man comes here and admits that he has committed the offence, the court shall try and punish him for that offence. It says, that in order to practise he shall take an oath that he has never committed treason, that he has never joined the Rebellion. That is all. He may take the oath or not as he pleases. No one compels him to take it. Is it a penalty, when he must invoke the penalty on his own head if there is penalty? That oath does not punish him, nor authorize anybody to punish him, nor say that he has done anything heretofore that is punishable in the sense of crime or delict. He may stay away; no one can touch him. He may choose to practise in the State courts; and that is well. All that the law says is, "If you come *here*, we require you, before we give you the privilege to appear in *this* court, to state under oath that you have not been in rebellion against this government." That is the whole of it.

Reply for the Petitioner.

Mr. Reverdy Johnson, in reply, for the petitioner:

I. The ninth clause of the first article of the Constitution declares that no "*ex post facto* law shall be passed." So solicitous were the framers of the Constitution to prohibit the enactment of such laws, that they imposed upon every State government the same restriction. They considered laws of that character to be "contrary to the first principles of the social compact, and to every principle of sound legislation." So says Mr. Madison in the 44th number of the Federalist. In the same number he tells us that, however obvious this is, "Our own experience has taught us nevertheless that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Mr. Hamilton, in the 78th number of the same work, advocates the necessity of an independent judiciary, upon the ground of its being "essential in a limited constitution," and adds: "By a limited constitution I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass *no bills of attainder, no ex post facto laws, and the like.* Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts, contrary to the manifest tenor of the Constitution, void. Without this, all the reservations of particular rights or privileges would amount to nothing." Is not the act in question, in its application to Mr. Garland, an *ex post facto* law? These terms are technical, and were known to the common law of England when the Constitution was adopted. Their meaning, too, was then well understood. An English writer says that such a law is one "made to meet a particular offence committed." Another defines it to be "a law enacted *purposely* to take cognizance of an offence already committed." The same meaning was given to it as early as 1798, in *Calder* v. *Bull.** And in the subsequent case of *Fletcher* v. *Peck*,† it

* 3 Dallas, 386.

† 6 Cranch, 138.

was again defined and adjudged to be a law which renders "an act punishable in a manner in which it was not punishable when it was committed." This definition, as is truly said by Chancellor Kent, is "distinguished for its comprehensive brevity and precision;" and Kent correctly tells us that "laws passed after the act, and affecting a person by way of punishment, either in his person or estate, are within the definition."*

The design, therefore, of this restriction was to prohibit legislation punishing a man, *either in his person or estate*, for an act for which there was no punishment provided when the act was done, or from imposing an additional punishment to that which was then imposed, or to supply a deficiency of legal proof by admitting testimony less than that before required, or testimony which the courts were before prohibited from admitting. With this understanding of the term, is not the act of 1865 an *ex post facto* law? Does it not punish Mr. Garland for an act in a manner in which he was not punishable when it was committed? Does it not punish him in fact? Educated for the profession, his hopes centred in his success in it, his highest ambition being to share its honors, his support and that of his family depending upon success; can any man doubt that a law which deprives him of the right to pursue that profession, which defeats such hopes, which deprives him of the opportunity to gratify so noble an ambition, and which deprives him of the means of supporting himself and those dependent upon him, inflicts a severe, cruel, and heretofore in this country an unexampled punishment?

Our statutes, indeed, are full of provisions showing that, in the judgment of Congress, similar consequences are punishments to be inflicted for crime. Disfranchisement of the privilege of holding offices of honor, trust, or profit, is imposed as a punishment upon those who are convicted of bribery, forgery, and many other offences. And how crushing is such punishment! To be excluded from the public ser-

* 1 Kent's Commentaries, 409.

vice makes the man virtually an exile in his native land; an alien in his own country; and whilst subjecting him to all the obligations of the Constitution, holds him to strict allegiance and denies him some of its most important advantages. Can the imagination of man conceive a punishment greater than this? And this is not only the effect of the act, but such was its obvious and declared purpose. When it was passed the country was engaged in a civil war of unexampled magnitude, begun and waged for the purpose of destroying the very life of the nation, of dissevering the government which our fathers provided for its preservation. In 1865 nearly all the members of the legal profession in the Southern States had adopted the heresy of secession as a constitutional right, and were, or had been, either in the military or civil service of the Confederate government, or had given voluntary "aid, countenance, counsel, or encouragement to persons engaged in armed hostility" to the United States, or had yielded a voluntary support to some "pretended government, authority, power, or constitution within the United States hostile or inimical to the same;" and this was known to Congress. However criminal such conduct may have been; however liable the parties were to prosecution and punishment by the laws then in force, the particular punishment inflicted by the act of 1865 could not have been awarded. That act does not repeal the laws by which such conduct was then punishable, but imposes (and such was its sole and avowed purpose) the additional punishment of disfranchisement. The law assumes that the acts which the oath it prescribes is to deny, have been done by lawyers, and that such acts are crimes to be punished by a denial or forfeiture of their right to appear as counsel in the courts of the Union. Its very design, therefore, and its effect is to inflict a punishment for the imputed crime additional to that which the laws in force when the crime was committed provided. It falls, then, within the conceded definition of an *ex post facto* law, and is therefore void. It is also obnoxious to the same objection, because it changes "the legal rules of evidence and receives different testimony

than was requisite for the conviction of the offender at the time the offence was perpetrated."* This is evident. The offence imputed is treason, of which the party at the time of its commission could not have been convicted by refusing to take such an oath as this act requires, or any other, but only upon "the testimony of two witnesses to the same overt act, or on confession in open court."†

II. The act is also in conflict with that part of the fifth article of the amendments of the Constitution which provides that no person "shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Within the meaning of the first part of this clause, every charge of crime against a party constitutes a "criminal case." No matter how made, if it becomes a subject of legal inquiry, the party cannot be compelled to testify. The purpose is to prevent his being called upon to prove his guilt; to prevent his being examined in relation to it against his will. Any law, therefore, which, in terms or in effect, makes him "a witness against himself" is within the clause. That a law directly compelling him to testify would be within it, will be admitted; and it is a rule of construction especially applicable to a constitutional provision intended for the protection of the citizen, that what cannot be done directly, cannot be done indirectly. Where the protection is intended to be complete, it cannot be defeated by any evasion. What, in this particular, does this law provide? It does not say that Mr. Garland shall be compelled "to be a witness against himself;" but it does the same thing by providing that his guilt is to be considered conclusively established unless he will swear to his innocence. His refusal to swear that he is not guilty is made the evidence of his guilt, and has the same operation as his admission of his guilt. If this is not a clear evasion of the clause, and fatal to the protection it is designed to afford, there can be no evasion of it. The law in question says, that unless the lawyer, who is already a

* 1 Kent's Commentaries, 409.

† Constitution, Article ii § 3.

counsellor, will swear to his innocence of the imputed acts, he shall not continue to be such counsellor, or, if he was not before one, he shall not be admitted to that right. It constitutes, therefore, his oath the evidence of his innocence, and his refusal to take it conclusive evidence of his guilt. That this is its effect, if authority be needed, is decided in the Pennsylvania case of *Respublica and Gibbs*,* and the Rhode Island case of *Green and Briggs*.† The reasoning upon the point in those cases, and especially that of Pittman, J., in the latter case, is conclusive.

And here allow me to read an extract from a speech of the late Lord Erskine.‡ It was made during the troubles we had with England and France, growing out of the Berlin and Milan decrees, and the orders in council. It was said there that parties were not obliged to do what those laws required, and as they were not obliged the laws did them no harm. Lord Erskine replied:

"Is it not adding insult to injury to say to America that her shipping is not compelled to come into our ports, since they may return back again! Let us suppose that his majesty had been advised, while I was a practiser at the bar, to issue a proclamation that no barrister should go into Westminster Hall without passing through a particular gate at which a tax was to be levied on him. Should I have been told gravely that I was by no means compelled by such a proclamation to pass through it? Should I have been told that I might go back again to my chambers with briefs, and sleep there in my empty bag, if I liked? Would it be an answer to a market gardener in the neighborhood of London, if compelled to pass a similar gate erected in every passage to Covent Garden, that he was by no means compelled to bring his greens to market, as he might stay at home with his family and starve?"

And that is what we are practically told is the ground on which this law is to be upheld. The right to be a counsellor in this court, it is said, is not a natural right; that it grows

* 3 Yeates, 429. † 1 Curtis, 311.

‡ Hansard's Parliamentary Debates, First Series, folio 10, p. 966.

out of legislation; that it may be given, or it may not be given; and as it may not be given, the legislature (in whom the power is supposed to reside), if it thinks proper to give it at all, may give it on such terms as it may prescribe; and opposing counsel apply that doctrine even to a case in which the right exists, for that is the condition of the gentleman whom I am here representing. He has got your judgment, and the legislature undertakes to say to him, "You shall no longer enjoy that right, unless you will swear that you have not done the things stated in the oath which we require you to take;" and he is gravely told, "You are not obliged to take it." Certainly, he is not obliged to take it. No man is obliged to follow his occupation; but unless he takes it he must starve, except he have other means of living.

III. The act is void, because it interferes with the rights and powers conferred on the judicial department of the government by the third article of the Constitution. By that article the entire judicial power of the United States is vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish, and the judges are to hold their 'office during good behavior,'" receiving a compensation for their services which cannot be diminished.

When the Constitution was adopted, it was well known that courts could not properly discharge their functions without the aid of counsel; and it was equally well known that such a class of men, in a free government, was absolutely necessary to the protection of the citizen and the defence of constitutional liberty, whenever these might be involved, as history had proved they often were, in prosecutions instituted by government. The existence and necessity of this class, for the protection of the citizen, is recognized in the amendment last referred to, securing to the accused, in a criminal prosecution, "the assistance of counsel for his defence." And, further, by the thirty-fifth section of the Judiciary Act, passed by a Congress in which were many of the distinguished men who framed the Constitution, parties are secured "the assistance of such counsel or attorneys-at-

law as, by the rules of the said courts (courts of the United States), respectively, shall be permitted to manage and conduct causes therein." As before stated, Mr. Garland, having complied with the terms of your second rule, was admitted as a counsellor of this court. Has Congress the authority to reverse that judgment without this court's assent? This the act does, if it be compulsory upon the court. The decision in *Ex parte Secombe** is, that the relations between a court of the United States and the attorneys and counsellors who practise in it, and their respective rights and duties, are regulated by the common law; and that it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counsellor, and for what cause he ought to be removed. Let us consider this question for a few moments.

1st. The admission of counsel, and dismissal when admitted, is evidently, by the act of 1789, esteemed a power inherent in the courts, and to be exercised by them alone; and in the decision just quoted, it is held to be one resting "exclusively" with the courts. This being so, the propriety of its exercise cannot be questioned by any other department of the government. Belonging exclusively to the courts, their judgment is conclusive.

2d. If this was not the rule, and Congress has authority to interfere with or revise such judgments, if they can annul them by legislation, as is done by the act in question, then they possess a power which may be so used as to take from the courts the benefit of counsel, and thereby necessarily defeat the right secured to the accused in criminal prosecutions, of having "the assistance of counsel for his defence." A power of this description is, I submit, wholly inconsistent with the jurisdiction conferred upon the judicial department of the government, and fatal to the objects for which that department was created, and is directly in conflict with the provision of the amendment just referred to.

* 19 Howard.

IV. If I understand the Attorney-General, the only ground upon which he maintains the validity of the act of 1865, is that the right to be attorneys and counsellors of this court, or of any court of the United States, is not a natural one, but one given by law only; a right to be regulated at any time by law, or not be given at all, or, when given, to be at any time taken away. Without stopping to inquire whether these propositions are correct, I deny, with perfect confidence, that Congress can prohibit the appearance of counsel in the courts of the Union. The sixth amendment of the Constitution, before quoted, secures to the accused, in a criminal case, "the assistance of counsel for his defence." This security is, therefore, not dependent upon, or subject to, the power of Congress. They have no more authority to deny an accused the assistance of counsel, than they have to deny him a jury trial; or the right "to be informed of the nature and cause of the accusation;" or "to be confronted with the witnesses against him;" or "to have compulsory process for obtaining witnesses in his favor." The right to have counsel is as effectually secured as is either of the other rights given by the amendment. If that, therefore, can be taken away or impaired by legislation, either or all of the other rights can be so taken away or impaired. It is true that courts, by the common law, possess authority to adopt rules for the admission of counsel; but this is to enable them, for their own advantage and the benefit and protection of suitors, to obtain, not to exclude, lawyers of competent legal learning and of fair character. They have no right to use the power so as to exclude them. On the contrary, it is one which it is their duty to execute to obtain competent counsel. It would be not only in conflict with the Constitution, but inconsistent with the principles of a free government, that there should exist a power to deny counsel. In a free country, courts without counsel could not for a moment be tolerated. The history of every such government demonstrates that the safety of the citizen greatly depends upon the existence of such a class of men. The courts also require, for the safe and correct exercise of

their own powers, their aid. The preservation of liberty itself demands counsel. In all the revolutionary struggles of the past to attain or retain liberty, success, where it has been achieved, has been ever owing greatly, if not principally, to their patriotic efforts. Congress would, therefore, but convert themselves into a mere assemblage of tyrants, regardless of the safety of the citizen, recreant to the cause of freedom, and forgetful of the guarantees of the Constitution, if they attempted to deny to the courts and to the citizen the assistance of counsel.

V. Conceding, for argument sake, the constitutionality of the act, Mr. Garland is saved from its operation by the President's pardon, with the terms of which he has complied. By the second section of the second article of the Constitution, power is given to the President "to grant reprieves and pardons for offences against the United States, except in cases of impeachment." With that exception the power is unlimited. It extends to every offence, and is intended to relieve the party who may have committed it or who may be charged with its commission, from all the punishments of every description that the law, at the time of the pardon, imposes.

That the law in question is a penal one I have already proved. That the penalty which it imposes is for the offence imputed to Mr. Garland, and of which he was technically guilty, is also, I hope, made clear; for the offence is the one assumed by the law, and in denying to him the right to continue a counsellor of this court, that denial was designed as penalty. This being the design and effect of the law, there can be no possible doubt that Mr. Garland is saved from that penalty by his pardon.

May it please the court, every right-minded man—I should think every man who has within his bosom a heart capable of sympathy—who is not the slave to a narrow political feeling—a feeling that does not embrace, as it ought to do, a *nation's* happiness—must make it the subject of his daily thoughts and of his prayers to God, that the hour may come,

and come soon, when all the States shall be again within the protecting shelter of the Union; enjoying, all of them, its benefits, contented and happy and prosperous; sharing all of them, in its duties; devoted, all, to its principles, and participating alike in its renown; that hour when former differences shall be forgotten, and nothing remembered but our ancient concord and the equal title we have to share in the glories of the past, and to labor together for the even greater glories of the future. And may I not, with truth, assure your honors that this result will be hastened by the bringing within these courts of the United States, a class of men, now excluded, who, by education, character, and profession are especially qualified by their example to influence the public sentiment of their respective States, and to bring these States to the complete conviction which, it is believed, they most largely entertain—that to support and defend the Constitution of the United States, and the government constituted by it, in all its rightful authority, is not only essential to their people's happiness and freedom, but is a duty to their country and their God.

Mr. Justice FIELD delivered the opinion of the court.

On the second of July, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, except the President, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, Congress, by a supplementary act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after the fourth of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney,

unless he shall have first taken and subscribed the oath prescribed by the act of July 2d, 1862. It also provides that the oath shall be preserved among the files of the court; and if any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offence.

At the December Term, 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the States to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of Congress.

In May, 1861, the State of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the State from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that confederacy was received as one of its members.

The petitioner followed the State, and was one of her representatives—first in the lower house, and afterwards in the senate, of the congress of that confederacy, and was a member of the senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the Rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of January 24th, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate gov

ernment. He rests his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows:

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may, or may not, have been offences according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the war of the Rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged

in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. In the case of Cummings against The State of Missouri, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here

what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case.

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.* Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of

* Ex parte Heyfron, 7 Howard, Mississippi, 127; Fletcher *v.* Daingerfield, 20 California, 430.

judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission.* "Attorneys and counsellors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex parte Secombe*,† a *mandamus* to the Supreme Court of the Territory of Minnesota to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed, that "it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The

* 22 New York, 81.

† 19 Howard, 9.

question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings* v. *The State of Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."*

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes

* Article II, § 2.

him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.*

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded.

AND IT IS SO ORDERED.

* 4 Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, c. 37, §§ 34 and 54.

Mr. Justice MILLER, on behalf of himself and the CHIEF JUSTICE, and Justices SWAYNE and DAVIS, delivered the following dissenting opinion, which applies also to the opinion delivered in *Cummings* v. *Missouri*. (See *supra*, p. 316.)

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal, or essentially modify it.

For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation, and of the state, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and by violating the Constitution, has rendered void its attempt at legislation. In the case of an act of Congress, which expresses the sense of the members of a coördinate department of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the act of Congress or in the provision of the constitution of Missouri, upon which this court has just passed, but entertaining a

strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the State of Missouri.

The Constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article iii, section 1, of that instrument, says that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." Section 8 of article i, closes its enumeration of the powers conferred on Congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department thereof."

Under these provisions, Congress has ordained and established circuit courts, district courts, and territorial courts; and has, by various statutes, fixed the number of the judges of the Supreme Court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the act of 1789, commonly called the Judiciary Act, passed by the first Congress assembled under the Constitution, it is among other things enacted, that "in all the courts of the United States the parties may plead and manage their causes personally; or by the

assistance of such counsel or attorneys-at-law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class, may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practise law in the courts as a profession, is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every State in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practise law, but the continuance of the right is made, by these laws, to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right, upon evidence of bad moral character, or specific acts of immorality or dis-

honesty, which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the States, or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practise in the national courts, that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects; one which looks to the past conduct of the party, and one to his future conduct; but both have reference to his disposition to support or to overturn the government, in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon

race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.

In illustration of this truth, I venture to affirm, that if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that Rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in Congress, and in the States, to enact the laws which are the subject of consideration, but insist that the Constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the Congress and to the States. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid Congress and the States, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of Congress, and the provision of the constitution of the State of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the Constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their

peculiar characteristics, as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the Constitution.

The word attainder is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our Constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attainted*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the Constitution were directing their prohibition; for after having, in article i, prohibited the passage of bills of attainder—in section nine, to Congress, and in section ten, to the States—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section three of article iii, concerning the judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an atten-

tive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry.*

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our Constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to Congress and to the States

* See Story on the Constitution, § 1344.

It remains to inquire whether, in the act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen*, and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the Rebellion; but this is manifestly incorrect, as the oath is exacted alike from the

loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence, and inflicts no punishment—can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the Constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson* v. *Mercer*,* "*Ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively."†

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws

* 8 Peters, 88.

† Calder *v.* Bull, 3 Dallas, 386; Fletcher *v.* Peck, 6 Cranch, 87; Ogden *v.* Saunders, 12 Wheaton, 266; Satterlee *v.* Matthewson, 2 Peters, 380.

which come within the meaning of that clause of the Constitution into four classes:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offence to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws, and retrospective laws;" and proceeds to show that, however unjust the latter may be, they are not prohibited by the Constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all:

1st. That they contemplate the trial of some person charged with an offence.

2d. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding.

It is simply an oath of office, and it is required of all office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

No *trial* of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, *ex post facto* laws.

Webster's second definition of the word "punish" is this:

"In a loose sense, to afflict with punishment, &c., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offences mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law!

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose trans-

gression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*.

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The State, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the act of Congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, "*Nemo debet bis vexari, pro unâ et eadam causâ*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates this

principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the States require as a qualification for voting that the voter shall be a *white male* citizen. Is this a punishment for all the blacks who can never become white?

Again, it was a qualification required by some of the State constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification to which they can never attain, for every year re-

moves them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the State of New York, was deprived of that office by this provision of the constitution of that State, and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbid by law to practise in the courts, yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its existence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition, that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

I am willing to concede that the presidential pardon relieves the party from all the penalties, or in other words, from all the punishment, which the law inflicted for his offence. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. If it is a qualification which Congress

had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor-at-law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath, deserve to be relieved from the prohibition of the law; but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings* v. *The State of Missouri*, allusions have been made in the course of argument to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the States; but on the contrary, in the language of Story,* "the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions."

* Commentaries on the Constitution, § 1878.

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli.*

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, inclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language: "The Constitution (of the United States) makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

In that case an ordinance of a mere local corporation forbid a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by

* 3 Howard, 589.

the voluntary action of many of those persons affected by the laws under consideration; nor, on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which Congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

BARROWS *v.* KINDRED.

Although when statute abolishing its fictitious forms places the action of ejectment on the same footing with other actions, as to the conclusiveness of the judgment, the court will give effect to the same; yet where a plaintiff in ejectment is defeated in one suit, where he claimed through a power of attorney rightly ruled out on the trial as void, he will not be held to be concluded in a subsequent action where he claims under a new deed made by the executors themselves. Having acquired a new and distinct title, he has the same right to assert it, without prejudice from the former suit, as a stranger would have had it passed to him.

ERROR to the Circuit Court of the United States for the Southern District of Illinois; the case being thus:

The statute of Illinois regulating the action of ejectment abolishes all fictions. Its twenty-ninth section provides that "every judgment in the action of ejectment rendered upon a verdict shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter named," exceptions not material to be noticed. With this statute in force, the plaintiff in error brought an action of ejectment against the defendant in error in the court below, and upon the trial produced a chain of title, consisting of a patent

from the United States to Whitney, a deed from Whitney to Vose, the will of Vose, and a deed *from his executors* to the plaintiff. *This deed was dated March* 18*th*, 1861.

The validity of these several links was not denied. They made the chain of title complete, and *primâ facie* entitled the plaintiff to recover the premises in controversy.

The defendant, thereupon, gave in evidence the record of a judgment relating to the same premises—rendered in a former action of ejectment—wherein the plaintiff in error was the plaintiff, and James R. Gordon was defendant. The judgment was in favor of the latter. *This suit was begun on the* 12*th June*, 1858, *and ended June* 5*th*, 1859.

The defendant also proved that he was in possession as the tenant of Gordon; that in the former action set forth in the record in question the plaintiff, Barrows, gave in evidence the same patent from the United States to Whitney, the same deed from Whitney to Vose, a power of attorney from the executors of Vose to S. A. Kingsley, authorizing him to sell and convey the premises, a deed from the executors *by Kingsley as their attorney in fact*, to Scroggs, and a deed from Scroggs to the plaintiff. *This power of attorney from the executors, and the deed executed by Kingsley, were ruled out as void.*

The defendant proved, further, that the deed from the executors of Vose to the plaintiff was given upon the same consideration as the former deed by their attorneys in fact to Scroggs.

The evidence being closed, the plaintiff asked the court to charge the jury, that the record and evidence relating to the former trial constituted no bar to his right to recover in this action. This the court refused to do, and thereupon charged that the record in connection with the evidence did constitute a bar. The jury found accordingly for the defendant.

To the admission of each of the several parts of this evidence, to the refusal of the court to charge as asked, and to the charge given, the defendant excepted.

The correctness of these instructions was the question now before this court.

Argument for the conclusiveness.

Mr. Grimshaw, for the plaintiff in error:

In the first action, the plaintiff was beaten; because, after deducing title in fee from the government to Vose, he failed to trace title from Vose to himself; because—in point of fact, as we may here state—Vose's executors, who had power to sell, had delegated it without authority of law to an attorney, who had conveyed to the plaintiff. And in the second action plaintiff was again beaten, after he had acquired title directly from the executors, subsequent to the judgment in first suit, because he had been beaten in the first suit for want of title, when he commenced the first action.

The present plaintiff was properly defeated in the first suit, because, although he traced title from the government to Vose, he failed to trace it to himself.

In the second suit, by title acquired from Vose, through his executors, who had power to convey, he showed title in himself, acquired after the former judgment, and regularly derived from the government through Vose to himself.

He should not be defeated in the first suit, because when he brought that suit he had *no title*, and then defeated in this suit, because, after the first suit had terminated, he acquired a paramount legal title.

The trial, as far as the plaintiff is concerned, relates to the state of title as it existed in plaintiff when he brought his suit. If he fails in his suit, defendant goes "without day;" but no title is *established* by plaintiff's defeat.*

Mr. Browning, contra:

The statute has given to the judgment in ejectment the same conclusive effect that other judgments have. Similar statutes exist in a number of the States, and many cases decided under them may be referred to.†

* Smith *v.* Sherwood, 4 Connecticut, 279; Easten *v.* Rucker, 1 J. J Marshall, 234.

† Miles *v.* Caldwell, 2 Wallace, 44; Blanchard *v.* Brown, 3 Id. 245; Gibson *v.* Manly, 15 Illinois, 140; Frazer *v.* Weller, 6 McLean, 12; Beebe *v.* Elliot, 4 Barbour, 457; Marvin *v.* Dennison, 1 Blatchford, 160; Edwards

The object of the statute is to put an end to litigation, and give repose to society by preventing the same precise question from being twice litigated between the same parties or their privies; and, in applying the statute, the court looks to the *claim* of the party and the *issue joined* upon it, and not to the accidents of the trial, to determine whether the first judgment is a bar to the second suit.

Here the plaintiff is the same; the defendant in the second suit is the tenant of the defendant in the first suit; the land sued for is the same; the interest claimed in it the same; the plea the same; putting the title, and that only, in issue in both suits.

The *title*, therefore, was the thing in issue; and the rule is, that when a matter is once put in issue, the verdict and judgment, whilst they stand, estop the parties from retrying the same issue.

And the effect is the same, whether the parties were prepared for trial or not. The force of the judgment, as an estoppel, is in no degree impaired by the failure of the plaintiff to produce evidence to support his claim.*

Mr. Justice SWAYNE delivered the opinion of the court.

The question of error in the instructions given by the court is the hinge of the controversy between the parties. The statute of Illinois regulating the action of ejectment abolishes all fictions. The twenty-ninth section provides that "every judgment in the action of ejectment rendered upon a verdict shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commence-

v. Roys, 18 Vermont, 478; Sims *v.* Smith, 19 Georgia, 124; Wood *v.* Jackson, 8 Wendell, 35; Hall *v.* Dodge, 38 New Hampshire, 351; Chamberlain *v.* Carlisle, 26 Id. 540.

* Marriott *v.* Hampton, 7 Durnford & East, 269; Bateman *v.* Willoe, 1 Schoales & Lefroy, 204; Le Guen *v.* Governeur & Kemble, 1 Johnson's Cases, 495; White *v.* Ward, 9 Johnson, 232; Grant *v.* Button, 14 Id. 377; Gaines *v.* Hennen, 24 Howard, 621–22; Outram *v.* Morewood and Wife, 3 East, 346; Eastmure *v.* Laws, 5 Bingham's New Cases, 451.

ment of such action, subject to the exceptions hereinafter named."

It is not claimed that the exceptions referred to affect this case.

Where a judgment is rendered for the plaintiff, the title upon which he recovered is thereby established, and the construction and effect of the statute are obvious. He must recover in all cases, if at all, upon the strength of his own title, and not upon the weakness of his adversary's. It is not incumbent upon the defendant to show any title. Where a plaintiff shows no title, and is therefore defeated, it is not easy to perceive how any title can be said to have been established in the action, or how, under the statute, the result can affect his right to bring a new action for the same premises. We are not advised of any authoritative interpretation of the statute, in this aspect, by the courts of Illinois. If one were shown we should follow it. But, in the view which we take of this case, it may be conceded that the judgment has the same effect upon the parties, and those in privity with them, as a judgment in a common-law action. As a general proposition, such a judgment is a bar to any future litigation between the parties, and all claiming under them, touching the subject involved in the controversy. It is conclusive of their rights, and shuts the door to further inquiry. This is an elementary principle of all civilized jurisprudence. It has been, and will be, applied in this court upon all proper occasions. It is a principle of repose, and fruitful of good. When the legislature of any State has seen fit to divest the action of ejectment of its ancient characteristics, and to place it upon the same footing with other actions, we have not failed to give full effect to the legislative intent by maintaining the conclusiveness of the judgment, as in other cases.

But, in our judgment, this principle has no application to the case before us.

The suit between Barrows and Gordon was commenced on the 12th of June, 1858, and terminated on the 5th of June, 1859.

The deed from the executors of Vose to Barrows bears date on the 18th of March, 1861. Upon the trial of the case of *Barrows* v. *Gordon* the power of attorney from the executors and the deed executed by Kingsley were properly ruled out as void. They were not in the case. Barrows had no title to the premises in controversy, and judgment was given against him. This may be admitted to be conclusive as to his want of title at that time, and, whether the decision of the court as to the power of attorney and the deed made under it was erroneous or not, it would have been a bar to another action attempted to be maintained upon the same state of facts. But this did not deprive Barrows of the right to acquire a new and distinct title; and, having done so, he had the same right to assert it, without prejudice from the former suit, which would have accompanied the title into the hands of a stranger. At the termination of that suit the executors had not passed the title to any one. They did not transfer it for more than a year afterwards.

How, then, can it be said to have been involved in or in anywise affected by the prior litigation? The plaintiff could no more be barred than any other person who might have subsequently acquired the title. In refusing to instruct, and in instructing, as appears by the record, the court committed an error.

The judgment is therefore reversed, with costs, and the cause will be remanded to the court below, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

UNITED STATES *v.* HATHAWAY.

Staves for pipes, hogsheads, and other casks, the growth and produce of the province of Canada, imported in November, 1863, from Canada into the United States, were not free from duty under the reciprocity treaty of 1854 between the United States and Great Britain, by which "timbers and lumber of all kinds, round, hewed, and sawed, unmanufac-

Argument in favor of the duty.

tured in whole or in part," were to be admitted free of duty. They were liable to pay 10 per cent. *ad valorem*, imposed by the sixth section of the act of July 14th, 1862.

THIS was a certificate of division of opinion between the judges of the Circuit Court of the United States for the Eastern District of Michigan.

The suit was brought to recover a duty of ten per centum *ad valorem*, under the tariff act of 14th July, 1862, on *staves for pipes, hogsheads, and other casks*, imported by the defendants in November, 1863, from Canada into the United States.

These articles were exempt from duty by the twenty-third section of the act of March 2d, 1861.* But a duty of ten per centum *ad valorem* was imposed by the sixth section of the act of July 14th, 1862.

By the reciprocity treaty of 1854, between this country and Great Britain, it was stipulated that the following, among other articles, were to be admitted free of duty: "Timber and lumber of all kinds, round, hewed, and sawed, *unmanufactured in whole or in part.*"

It was admitted, on the trial, by the defendants, that they had imported from Canada West, at the time charged in the declaration, into the United States, a quantity of white-oak timber *split* in the form of pipe and hogshead staves at the place of importation, and that they were the growth and produce of the province of Canada.

The main question upon which the judges divided in opinion was, whether, under the reciprocity treaty of 1854, between the United States and Great Britain, and the acts of Congress on the subject, the article of staves, as above described, were liable to duty?

The government had held that the article being *split* wood was not exempt, but was liable to pay ten per cent. under the act of July 14th, 1862.

Mr. Stanbery, A. G., and Mr. Ashton, Assistant A. G., for the United States:

These articles are not comprehended by the treaty, unless

* 12 Stat. at Large, 196.

it should appear—1st, that they are *timber* or *lumber;* 2d, that they are either *round, hewed,* or *sawed* timber or lumber; and, 3d, that they have not been subjected to any process of manufacture.

The second and third conditions are evidently not here fulfilled. The articles are not round, hewed, or *sawed,* but *split* timber; and they are also manufactured articles, having been made by hand, and with a special design or purpose, into the shape and form in which they were imported. The process of splitting, though requiring the most common labor, is, we contend, a process of manufacture. The splitting has reduced round or hewed timber into articles of commerce, ready and fit for immediate conversion, by machinery and the employment of a higher art, into other articles of manufacture and commerce. They were not split and sold as mere lumber capable of being used for any purpose whatever; but they were split and sold for the particular use for which they were imported by the defendant.

Literally, anything to which the handiwork of man has been applied becomes *manufactured.* The older dictionaries confine the meaning of the word entirely to this conversion or character given by touch of hand. The word etymologically means made by hand; but we now largely give it also the sense of being made by machinery.

Mr. Newberry, contra:

The most convenient form for removal from the forests and for transportation, into which oak and other straight-grained hard-wood timber can be reduced, is that of the rough-split pipe and hogshead stave, so called, and such form is also best adapted for the preservation of wood in seasoning, &c.

To reduce the timber into such form does not require skilled labor of the mechanic, but requires only the most common unskilled labor.

Timber split in this form, though called "rough-split pipe and hogshead staves," is not wholly or *mainly* used for the manufacture of hogsheads, pipes, or other casks, but is used

in the manufacture of many articles manufactured wholly or in part of wood, and used also, extensively, as tonnage and in the storage of cargoes of ships and vessels.

By coopers, such timber is known as "coopers' timber," and is considered and treated as raw material.

In the light of these facts this timber must be held to be unmanufactured, raw material, as much so as any sawed lumber. The fact that timber thus split is commonly *called* by a name which would seem to indicate a manufactured article is of no consequence whatever. Lumber sawed into particular forms takes such names as, for example, "flooring," "siding," "deck plank," "lath," &c., &c. Yet such lumber is not held to be manufactured. Staves are but a species of lumber. Webster, in his dictionary, defines "lumber" to be "timber sawed or split for use, as bearers, joyce, boards, planks, *staves*, and the like." The labor necessary to be expended to reduce the timber to the form of sawed lumber is evidently greater and more skilled than that necessary to reduce it to the form of rough-split pipe or hogshead staves, so called. What reason, then, could have operated to induce a discrimination in the treaty in favor of the former? We submit that none can be imagined, and that none was contemplated or intended.

Mr. Justice NELSON delivered the opinion of the court.

The construction given to the clause of the treaty by the government excluded the article in question from the free list, and subjected it to the duty of the existing tariff law, which was in the present instance the act of 1862. The regulations of the Secretary of the Treasury declared, that articles of wood entered under the designations of the treaty remained liable to the duty, if manufactured, in whole or in part, by planing, shaving, turning, splitting, or riving, or any process of manufacture, other than rough-hewing or sawing.*

We think this a sound construction of the words of the

* Reg. 1857, p. 498, § 2, Art. 921.

clause. The treaty admits free of duty, "timber and lumber of all kinds," with certain specified limitations, "round, hewed, and sawed;" which limitations, as respects this branch of the clause, are determined either by the form, or by the work bestowed on the article,—the timber or lumber must be round, hewed, or sawed; if neither, then the article is not brought within the description, and if otherwise brought within it, there is still a further limitation,—"unmanufactured, in whole or in part." The article may be round, hewn, or sawed, but if it has undergone the process of manufacture, even in part, it is taken out of the free list.

In the present case the article is prepared by splitting for the hand of the cooper, in the manufacture of the pipe or hogshead, a process which has the effect to relieve him from much of the labor that would otherwise be required in adapting it to the use intended. It has been already reduced to the proper form and size—a work which, in the first stages of the manufacture of the hogshead, must be done, and by which a considerable advance is made in fitting and finishing it for the market.

As this treaty has been annulled, the question is no longer of any general importance; and as we concur in the interpretation given to it by the Secretary of the Treasury, it is unnecessary to extend this opinion.

The court answer the question

IN THE AFFIRMATIVE.

NOTE.

At the same time with the preceding case was disposed of another, coming, like it, from the Circuit Court of the United States for the Eastern District of Michigan, on a division of opinion of the judges. It was thus—

UNITED STATES v. QUIMBY.

Split white-ash timber, chiefly designed to be used in the manufacture of long shovel handles, the growth and product of the Province of Canada, and imported from there into the United States, were not free from duty

Syllabus.

under the Reciprocity Treaty of 1854; but were chargeable with a duty of 20 per cent. *ad valorem*, under the twenty-fourth section of the act of March 2d, 1861.

This suit was brought to recover the duties on "split timbers" imported from Canada into the United States, and claimed to be exempt under the Reciprocity Treaty, as in the case just disposed of. The treaty exempts from duty "timber and lumber of all kinds, round, *hewed*, and *sawed*, *unmanufactured*, in whole or in part."

The articles consisted of six hundred and sixteen cords of *split* white-ash timber, chiefly designed to be used in the manufacture of long shovel handles.

The main question was whether the said timber was liable to duty, or whether it was made free of duty by the Reciprocity Treaty.

Same counsel as in the United States v. *Hathaway, just preceding.*

Mr. Justice NELSON delivered the opinion of the court.

The case falls within the construction of the treaty in the case of the *United States* v. *Hathaway.*

The article, we think, is chargeable with a duty of twenty per centum *ad valorem*, under the twenty-fourth section of the act of March 2d, 1861, which imposes this duty "on all articles manufactured, in whole or in part," not otherwise provided for.

The court answer the question, in the certificate of division of opinion,

IN THE AFFIRMATIVE.

GILMAN *v.* LOCKWOOD.

Certificates of discharge granted under insolvent laws passed by a State cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. *Baldwin* v. *Hale*, 1 Wallace, 223, and *Baldwin* v. *Bank of Newbury*, Id. 234, affirmed.

ERROR to the Circuit Court of the United States for the District of Wisconsin. The case was a submitted one.

Mr. Carpenter, by brief, for the plaintiff in error. No opposite counsel.

Mr. Justice CLIFFORD delivered the opinion of the court.

Amended plea of the defendant admitted, as the declaration alleged, that the plaintiff, when the note was made and delivered, was a citizen of the State of New York; and that the defendant was a citizen of the State of Wisconsin, where the note is dated and was executed. Action was assumpsit to recover the amount of a certain promissory note, described in the notice of claim annexed to the declaration. Defendant pleaded his discharge in insolvency from all his debts prior to the commencement of the action under the insolvent laws of the State where he resides, and where the contract was executed between the parties. Plaintiff demurred specially to the plea, and the defendant joined in demurrer.

Causes of demurrer shown were:

First. That the plea tendered an immaterial issue.

Second. That the insolvent court exceeded its jurisdiction in attempting to determine the rights of the plaintiff under this contract, as he was a citizen of another State, and never became a party to the proceedings in insolvency.

Third. That the discharge in insolvency set up in defendant's plea is nugatory, because the insolvent law of the State as to the plaintiff is unconstitutional and void.

Circuit Court overruled the demurrer and rendered judgment for the defendant; whereupon the plaintiff sued out this writ of error and removed the cause into this court.

State legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where

the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one State cannot discharge the contracts of citizens of other States; because such laws have no extra territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceedings, has no jurisdiction of the case.*

Unquestionably, the decision in those cases controls the present case, and renders further remarks upon the subject unnecessary. Demurrer should have been sustained.

JUDGMENT REVERSED with costs, and the cause remanded for further proceedings in conformity to the opinion of this court.

THE MOSES TAYLOR.

1. A contract for the transportation of passengers by a steamship on the ocean is a maritime contract, and there is no distinction in principle between it and a contract for the like transportation of merchandise. The same liability attaches upon its execution both to the owner and the steamship.
2. The distinguishing and characteristic feature of a suit in admiralty, is that the vessel or thing proceeded against itself is seized and impleaded as the defendant, and is judged and sentenced accordingly. By the common law process, property is reached only through a personal defendant, and then only to the extent of his title.
3. A statute of California, which authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, to that extent attempts to invest her courts with admiralty jurisdiction.
4. The judicial power of the United States is in some cases unavoidably exclusive of all State authority, and in all others it may be made so at the election of Congress.
5. The provision of the ninth section of the Judiciary Act, which vests in the District Courts of the United States exclusive cognizance of civil causes of admiralty and maritime jurisdiction, is constitutional.
6. The clause of the ninth section, saving to suitors "the right of a common

* Baldwin *v.* Hale, 1 Wallace, 223; Baldwin *v.* Bank of Newbury, Id. 234

law remedy, where the common law is competent to give it," does not save a proceeding *in rem*, as used in the admiralty courts. Such a proceeding is not a remedy afforded by the common law.

A STATUTE of California, passed in 1851, and amended in 1860, provides that all steamers, vessels, and boats, shall be liable—

1st. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

2d. For supplies furnished for their use, at the request of their respective owners, masters, agents, or consignees.

3d. For materials furnished in their construction, repair, or equipment.

4th. For their wharfage and anchorage within the State.

5th. For non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, masters, agents, or consignees.

6th. For injuries committed by them to persons or property.

And that the "said several causes of action shall constitute liens upon all steamers, vessels, and boats, and have priority in their order, herein enumerated," with preference over all other demands.

The statute also provides that actions for demands arising upon any of the grounds above specified, may be brought directly against such steamers, vessels, or boats; that the complaint shall designate the steamer, vessel, or boat by name; that the summons may be served on the master, mate, or any one having charge of the same; that the same may be attached as security for the satisfaction of any judgment that may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, the steamer, vessel, or boat, may be sold by the sheriff, and the proceeds applied to the payment of the judgment.

With this statute in force, the steamship Moses Taylor, a vessel of over one thousand tons burden, was owned, in 1863, by Roberts, of the city of New York, and was employed by him in navigating the Pacific Ocean, and in car-

rying passengers and freight between Panama and San Francisco. In October of that year, one Hammons entered into a contract with Roberts, as owner of this steamship, by which, in consideration of $100, Roberts agreed to transport him from New York to San Francisco as a steerage passenger, with reasonable despatch, and to furnish him with proper and necessary food, water, and berths, or other conveniences for lodging, on the voyage. For alleged breach of this contract Hammons brought this action, *a proceeding against the vessel*, in a court of a justice of the peace within the city of San Francisco; such courts at that time having, by statute of California, jurisdiction of these cases where the amount claimed did not exceed $200, which it did not here. The breach alleged was that the plaintiff was detained at the Isthmus of Panama eight days; and that the provisions furnished him on the vessel were unwholesome, and that he was crowded into an unhealthy cabin, without sufficient room or air for either health or comfort, in consequence of the large number of steerage passengers, more than the vessel was allowed by law to have or could properly carry, to his damage, &c.

The agent of the vessel filed an answer in which he denied the allegations of the complaint, and asserted that the court had no jurisdiction; because the cause of action, as against the said vessel, was one of which the courts of admiralty had exclusive jurisdiction; for that the vessel was used exclusively in navigating the high seas, and that the said cause of action, if any, arose on the high seas.

The justice decided that he had jurisdiction, and gave judgment for the $200 claimed. The case was then taken to the County Court, where the objection to the jurisdiction was again made and again overruled. The court found as fact that Hammons had been carried on the steamer Illinois from New York to Aspinwall, thence, after the delay alleged, on railway across the Isthmus to Panama, and from there on the Moses Taylor to San Francisco; and, in substance, that the other facts alleged were as stated in the complaint. Whereupon, final judgment was entered in ac-

cordance with the decision, and from that judgment the defendant, owner of the vessel, brought this writ of error.

Messrs. W. M. Evarts and Edwards Pierrepont for the plaintiff in error:

I. An agreement to transport a man or a horse over the ocean is a "*maritime contract*," and comes under the admiralty and maritime jurisdiction.*

It cannot be doubted that Hammons could have proceeded against the steamer *in rem* in the District Court of the United States, for the cause of action against the steamer set forth in the complaint.

II. The proceeding in this case is not according to the common law, but with every trait and incident of a suit in admiralty, *in rem*. The vessel is arrested and impleaded as the "*reus*" or defendant.

III. The admiralty jurisdiction of the Federal courts is exclusive, and any intrusion of a State court within such admiralty jurisdiction is unconstitutional.

The first section of the third article of the Constitution of the United States, is as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

And the first clause of the second section of the same article is in these words:

"The judicial power shall extend . . . . to all cases of admiralty and maritime jurisdiction."

The ninth section of the Judiciary Act of 1789 declares that—

* The Schooner Tiltan, 5 Mason, 465; Plummer *v.* Webb, 4 Id. 380; Drinkwater *v.* The Brig Spartan, Ware, 91; Steel *v.* Thatcher, Id. 149; De Lovio *v.* Boit, 2 Gallison, 465; The Sloop Mary, 1 Paine, 673; Davis *v.* A New Brig, Gilpin, 473, 1 Kent's Com. 370, 371; New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 Howard, 344; Bazin *v.* Liverpool Steamship Company, 5 American Law Register, 465.

"The District Courts shall have, *exclusively* of the courts of the several States, ... cognizance of *all civil causes of admiralty and maritime jurisdiction;* . . . . saving to suitors, in all cases, the right of a common law remedy, *where the common law is competent to give it.*"

This exclusive jurisdiction has for seventy years been the settled law; and has been repeatedly affirmed by the courts.

In *Martin* v. *Hunter*,* this court says:

"It is manifest that the judicial power of the United States is, unavoidably, in some cases, exclusive of all State authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals. The *admiralty and maritime jurisdiction is of the same exclusive cognizance.*"

In *Cohen* v. *Virginia*,† it was conceded that the Federal courts had the "*exclusive* admiralty and maritime jurisdiction."

In *Martin* v. *Hunter*, Mr. Justice Johnson says:

"With regard to *admiralty* and *maritime jurisdiction*, it would be difficult to prove that the States could resume it, if the United States should abolish the courts vested with that jurisdiction."

An affirmation of this exclusive jurisdiction will be found in the opinion of Chief Justice Marshall, in *Slocum* v. *Mayberry*;‡ and of Story, J., in *Gelston* v. *Hoyt*;§ and of Justices Wayne and Catron, in *Waring* v. *Clarke*,‖ all cases in this court.

Of the validity of the clause in the ninth section of the Judiciary Act, which attributes exclusive admiralty jurisdiction to the District Courts of the United States, no serious question has ever been made, until the Supreme Court of California claimed for the State full admiralty jurisdiction.

But this claim was but an incident of the more extrava-

* 1 Wheaton, 337. † 6 Id. 314, 315, 325. ‡ 2 Id. 9.
§ 3 Id. 246. ‖ 5 Howard, 451.

gant pretensions of the same court to entire judicial, and, indeed, political independence of the State of California; pretensions subsequently abandoned by that court.*

The case of *Warner* v. *The Uncle Sam*,† places the concurrence of admiralty jurisdiction upon more temperate grounds; but its reasoning, upon examination, will be found fatal to its conclusion.

IV. It must be deemed a settled point, in constitutional law, that the whole grant of judicial power may become an exclusive jurisdiction in the courts of the United States, at the election and in the discretion of Congress.

The whole frame of the Judiciary Act, in its attribution of jurisdiction to the various Federal courts, recognizes and is shaped upon this idea.

Messrs. M. H. Edmonds, O. L. Lane, and W. W. Cope, contra, for the defendant in error:

We maintain:

1st. That this is not a case of admiralty or maritime jurisdiction.

2d. That the grant of such jurisdiction to the Federal courts, contained in the Constitution, is not exclusive.

3d. That these proceedings in the State court fall within the exception contained in the Judiciary Act of 1789, saving to suitors a common law remedy in all cases where the common law is competent to give it.

I. In admiralty, a vessel is not liable for torts, or breaches of contract in which it is in no way instrumental. And courts of admiralty do not take cognizance of torts committed on land. Nor is a contract for the transportation of passengers, made on land, to be performed partly on land and partly by water, as in this case, a "maritime contract." It may be urged that the substantial portion of the voyage was on the sea; for, while the admiralty jurisdiction was

* In Ferris *v.* Coover (11 California, 175), this pretension, advanced by the earlier judges of the Supreme Court of California, was exploded in an elaborate opinion rendered by Baldwin, J.; Field J., concurring.—REP.

† 9 California, 697.

confined to tide-water, it was held to be sufficient if the substantial portion of the voyage was within the ebb and flow of the tide, though its commencement or termination might be beyond.* But in those cases *the entire voyage was by water*, and made in *one* vessel. The contract in this case is an entirety, to carry from New York to San Francisco, requiring for its fulfilment two steamers and a railway. The *land* carriage is a substantial part of the voyage. It obviates the necessity of a long and tedious voyage by water, and gives to that route its chief value. It is of no consequence whether the land transit between the two oceans be long or short. The court will not determine the question of jurisdiction, by a comparison of the distances by land and by water. If this contract is of admiralty cognizance, so is an agreement for the transportation of passengers from Liverpool to San Francisco, *via* New York, Chicago, and Salt Lake. There is no difference in principle between the two cases. In both, the voyage by water forms a substantial part of the contract, and so does that by land.

If a passenger contract is of admiralty cognizance at all, it is because it comes substantially within the definition of an affreightment.† But affreightments relate exclusively to voyages by water. And it was conceded by Nelson, J., in the case just cited, that a contract "must be wholly of admiralty cognizance, or else it is not at all within it." He also expressly admits the correctness of the argument for the claimant, that "it is not enough that the contract includes an obligation, or some obligation of a maritime nature; but that it must, as an entirety in all its material and substantial parts, be for the performance of maritime services, or else the case is wholly without the limits of the admiralty jurisdiction." Assuming this to be the law, the agreement, in this case, is not as an entirety, a maritime contract.

Again, in a proceeding *ex contractu*, in the admiralty, there

* The Robert Morris, 1 Wallace, Jr., 33.

† The Pacific, 1 Blatchford, C. C. R. 569; Id. 360.

must not only be a maritime contract, but also a maritime cause of action. In other words, the ship must be bound for the performance of the contract, otherwise no cause of action *in rem* can exist.* It cannot be contended that the Moses Taylor was bound for the performance of an entire contract, according to the principles of admiralty and maritime law. It was only by force of the statute that she could have been held liable—at least for the breaches occurring on the Isthmus, inasmuch as she does not *appear* to have been the instrumental cause of the detention. And this court can presume no fact necessary to sustain the admiralty jurisdiction.†

II. The validity of State laws of the character of the statute of California has been expressly adjudicated in numerous cases.‡ And this court virtually concedes their validity: First, by basing thereon a portion of the admiralty jurisdiction of the District Courts;§ and, subsequently, by amending the twelfth rule in admiralty, so as to retain jurisdiction *in personam*, but leaving the enforcement of the lien *in rem* to the State courts.‖ No case has ever arisen calling for the determination of the question by this court. *Martin* v. *Hunter*, and *Cohen* v. *Virginia*, cited on the other side, were upon the question, whether a writ of error would lie to a State court? And in *Slocum* v. *Mayberry*, the question was not raised by the defendant in error. The judgment of the State court was affirmed, on the ground that the Embargo Act did not authorize the seizure of the cargo, and that replevin would lie for it in the State court.

In *Gelston* v. *Hoyt*, the only question presented was the legality of the ruling of the State court rejecting evidence of forfeiture, on the ground that the judgment of the United

* The Pacific, 1 Blatchford, C. C. R. 587.

† Peyroux *v.* Howard, 7 Peters, 341.

‡ Thompson *v.* Steamboat, 2 Ohio, N. S. 26; Owen *v.* Johnson, Id. 142; Keating *v.* Spink, 3 Id. 105; Steamboat *v.* McCraw, 31 Alabama, 659; Warner *v.* Uncle Sam, 9 California, 697; Taylor *v.* The Columbia, 5 Id. 268.

§ Gen. Smith, 4 Wheaton, 439; Peyroux *v.* Howard, 7 Peters, 324.

‖ McGuire *v.* Card, 21 Howard, 248; The St. Lawrence, 1 Black, 522.

States court was conclusive on that question. And the ruling of the State court was affirmed. *Waring* v. *Clarke* is not in point. In that, and in most of the cases where the question of admiralty jurisdiction has been discussed, the question was, whether it extended to such a case, not whether it was *exclusively* vested in the District Courts.

It is not denied that *dicta* may be found asserting or assuming such exclusive jurisdiction. But there is no case in which that question has been adjudged.

As an original question, it is submitted that it has no foundation in principle. The origin of all the misunderstanding on the subject lies in the Judiciary Act. Congress, throughout that act, legislated upon the supposition, that whatever jurisdiction was by the Constitution vested in the Federal courts might be made exclusive.* And judges and commentators have not always been sufficiently alive to the distinction between an act of Congress and a constitutional grant; and have assumed the jurisdiction to be exclusive without inquiry, because Congress declared it so. And because the language of the Judiciary Act raised a doubt of the jurisdiction of the State tribunals, suitors have usually sought redress in the District Courts, whose jurisdiction was unquestioned; and hence has arisen a sort of negative acquiescence in a doctrine often asserted, but never demonstrated nor decided; not such a general acquiescence, however, as counsel for the plaintiff in error seems to believe. The cases already cited, and many others asserting the validity of State laws, like the present, are sufficient to rebut any presumption of acquiescence. It is also well known that most of the States bordering on navigable waters have similar laws, and that the courts of such States have hitherto exercised almost unquestioned jurisdiction under such laws, by proceedings *in rem*.

The determination of this important question must, after all, depend upon the true construction to be given to the Constitution.

* Story on the Constitution, § 1751.

Among the most approved rules of interpretation to determine the exclusiveness of Federal authority, are the following: 1. Where the grant is exclusive in its terms 2. Where the power is prohibited to the States. 3. Where there is a direct repugnancy, or incompatibility, in its exercise by the States.*

"In all other cases," says Story, J., in *Houston* v. *Moore*,† "a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar power existing in the States."

It is not to be denied that Judge Story was disposed to concede to the admiralty courts their full measure of jurisdiction. He frequently speaks of it as exclusive, not because made so in terms, nor because it is prohibited to the States, but on account of a supposed repugnancy, or incompatibility, in its exercise by the States.

Houston v. *Moore* decided that the act of the State of Pennsylvania providing for the trial by a State court-martial, of certain military offences, was not repugnant to the Constitution and laws of the United States. No other question was raised or determined, but the learned justice, who dissented from the opinion of the court, mentions the exclusiveness of admiralty jurisdiction, incidentally, by way of argument, citing *Martin* v. *Hunter*, in which the opinion was delivered by himself, and in which he says:

"It is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all State authority; and in all others may be made so at the election of Congress. . . . . The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases, where previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise concurrent jurisdiction."

* Story on the Constitution, § 436, 447; 1 Kent's Com. 396

† 5 Wheaton, 49.

Argument in favor of State jurisdiction.

Misled by this case, Chancellor Kent expressed the opinion in his Commentaries, that "whatever admiralty and maritime jurisdiction the District Courts possess, would seem to be *exclusive*." His attention thus aroused, Mr. Justice Story noticed the "mistake," as he terms it, in a note to section 1762, of his Commentaries on the Constitution. He there rejects the discretionary power of Congress, as well as the exclusive jurisdiction of the admiralty, and says:

"There is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive, and there is as little ground upon general reason, to contend for it."

Chancellor Kent, in acknowledging the correction, charged his error upon Story, J., himself, or rather upon the case of *Martin* v. *Hunter*, as above stated, and concludes by saying:

"But we are taught by the note in the Commentaries referred to, that the State courts have all the concurrent cognizance which they had originally, in 1787, over maritime contracts, and that this concurrent jurisdiction does not depend, as declared in 1 Wheaton, 337, on the pleasure of Congress, but is founded on the 'reasonable interpretation of the Constitution.' "*

Again, the Federalist shows† that the grant of jurisdiction to the Federal courts was not intended to be exclusive; and at all events that "the State courts would be divested of no part of their primitive jurisdiction, further than may relate to an appeal."

It may, therefore, be considered as established—

1. That the grant of admiralty and maritime jurisdiction in the Constitution, is not exclusive in its terms.

2. That it is not prohibited to the State courts.

3. That if intended to be exclusive, such intention must be found in some repugnancy or incompatibility in the exercise of like powers by the State tribunals.

* 1 Kent's Com. 377, note c, 9th ed., marginal paging.

† Nos. 81 and 82.

4. That if not intended to be exclusive, Congress cannot make it so, if the result would be to divest the State courts of any part of their primitive jurisdiction.

It is well known that at the time of the adoption of the Constitution, whatever admiralty jurisdiction existed in this country, was exercised by the State courts, with the exception of piracies and felonies on the high seas and *appeals* in cases of capture. Before the Revolution each colony had its court of admiralty. During the Revolution and up to the adoption of the Constitution, this jurisdiction was vested in and exercised by the States respectively, subject to the power of Congress as contained in the Articles of Confederation,* to establish courts for receiving and determining finally *appeals* in all cases of capture, and courts for the trial of piracies and felonies committed on the high seas.

At that time then "admiralty and maritime cases" as clearly belonged to the State courts as those of chancery and common law. They belonged to the State courts independently of the Articles of Confederation, and did not in any manner "grow out of" the Constitution itself. When therefore by the provisions of that instrument, cognizance of such cases was granted to the Federal courts without *words* of exclusion, the principle of exclusion must be found, if found at all, in the incompatibility of the exercise of like powers concurrently by the State and Federal courts. If not found there, it is not contained in the Constitution. And what the Constitution permits in this regard, either expressly or by implication and reasonable inference, Congress cannot prohibit.

Now let us examine this question of incompatibility. The rule, as stated by Story, in his Commentaries on the Constitution,† is this:

"The power is exclusive in the National Government where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. The principal difficulty lies not so

* Article 9, § 1.

† §§ 437, 438.

much in the rule, as in its application to particular cases. But unless from the nature of the power, or from the obvious results of its operations, a repugnancy *must* exist, so as to lead to a *necessary* conclusion, that the power was intended to be exclusive, the true rule of interpretation is, that the power is merely concurrent."

This repugnancy therefore may exist either in the *nature* of the power, or its practical operations. That conflicts may arise in the exercise of *acknowledged* concurrent powers is conceded.

In such cases the Constitution provides the remedy in the declared supremacy of the Constitution and laws of the Union, and the supervisory control of the Supreme Court. In the exercise of concurrent *judicial* powers, courts have also adopted a rule of judicial comity eminently calculated to prevent such conflicts. It is, that the court which first obtains possession or custody of the thing by attachment or proceeding *in rem*, shall retain it. Such was the case of the *Robert Fulton*.* That was a case of admiralty cognizance. And the libel was dismissed because an attachment under the Boat and Vessel Act of the State, had previously been levied on the vessel, and she was in the custody of the sheriff when the libel was filed.

The following are given as samples of concurrent powers: The power to lay taxes,† though expressly given to Congress. So by the Constitution Congress has the power to lay and collect duties, imposts, and excises which "shall be uniform throughout the United States." But the license laws of Massachusetts, Rhode Island, and New Hampshire, forbidding the sale of spirituous liquors, in less than certain large quantities, were held not to be repugnant to this clause, nor to that regulating commerce.‡

So the States are not deprived of the power of regulating pilots, when such regulation does not interfere with the acts of Congress. So the *power* granted to Congress to establish

* 1 Paine, 626.

† Story on the Constitution, § 438.

‡ The License Cases, 5 Howard, 504–577.

uniform laws on the subject of bankruptcies does not deprive the States of the power to pass bankrupt laws. So offences against the military laws of the United States by persons called into the service of the United States, may be tried by State courts-martial, where the act of Congress does not *expressly* vest exclusive jurisdiction in the courts-martial thereby authorized.*

So the State courts have unquestioned concurrent cognizance of nearly all the cases mentioned in the third article of the second section of the Constitution.

Cases affecting ambassadors, &c., are of exclusive Federal cognizance, and *rightfully*, because they *grow out of the Constitution itself.* Most of the other enumerated cases do not, and are, therefore, properly left by the Judiciary Act where the Constitution left them,—to the cognizance of the State and Federal courts concurrently. It is not easy to conceive what practical difficulties could arise in the exercise of concurrent admiralty powers, greater than have occurred in other cases and been surmounted.

To sustain the third proposition, we cite the cases under the second head, declaring and conceding the validity of these local laws.†

Mr. Justice FIELD delivered the opinion of the court.

This case arises upon certain provisions of a statute of California regulating proceedings in civil cases in the courts of that State.‡ The sixth chapter of the statute relates to actions against steamers, vessels, and boats, and provides that they shall be liable—1st, for services rendered on board of them, at the request of, or on contract with, their respective owners, agents, masters, or consignees; 2d, for supplies furnished for their use upon the like request; 3d, for materials furnished in their construction, repair, or equipment; 4th, for their wharfage and anchorage within the State; 5th,

* Houston *v.* Moore, 5 Wheaton, 1.

† See, also, Cashmere *v.* De Wolf, 2 Sandford Supreme Court (N. Y.), 379, Percival *v.* Hickey, 18 Johnson, 291; Blake *v.* Patton, 15 Maine, 173.

‡ Laws of California of 1851, p. 51.

for non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, agents, masters, or consignees; 6th, for injuries committed by them to persons or property; and declares that these several causes of action shall constitute liens upon the steamers, vessels, and boats, for one year after the causes of action shall have accrued, and have priority in the order enumerated, and preference over all other demands. The statute also provides that actions for demands arising upon any of these grounds may be brought directly against the steamers, vessels, or boats by name; that process may be served on the master, mate, or any person having charge of the same; that they may be attached as security for the satisfaction of any judgment which may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, they may be sold, with their tackle, apparel, and furniture, or such interest therein as may be necessary, and the proceeds applied to the payment of the judgment.

These provisions, with the exception of the clause designating the order of priority in the liens, and their preference over other demands, were enacted in 1851; that clause was inserted by an amendment in 1860.

In 1863, the steamship Moses Taylor, a vessel of over one thousand tons burden, was owned by Marshall O. Roberts, of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carrying passengers and freight between Panama and San Francisco. In October of that year the plaintiff in the court below, the defendant in error in this court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport him from New York to San Francisco as a steerage passenger, with reasonable despatch, and to furnish him with proper and necessary food, water, and berths, or other conveniences for lodging, on the voyage. The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by the Moses Taylor, but the case

was tried upon the supposition that such was the fact, and we shall, therefore, treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco. For alleged breach of this contract the present action was brought, under the statute mentioned, in a court of a justice of the peace held within the city of San Francisco. Courts held by justices of the peace were at that time by another statute invested with jurisdiction of these cases, where the amount claimed did not exceed two hundred dollars, except where the action was brought to recover seamen's wages for a voyage performed, in whole or in part, without the waters of the State.*

The agent for the Moses Taylor appeared to the action, and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, and also traversed the several matters alleged as breaches of the contract.

The justice of the peace overruled the objection to his jurisdiction, and gave judgment for the amount claimed. On appeal to the County Court the action was tried *de novo* upon the same pleadings, but in all respects as if originally commenced in that court. The want of jurisdiction there, and the exclusive cognizance of such causes of action by the courts of admiralty were again urged and were again overruled; and a similar judgment to that of the justice of the peace was rendered. The amount of the judgment was too small to enable the owner of the steamer to take the case by appeal to the Supreme Court of the State. That court has no appellate jurisdiction in cases where the demand in dispute, exclusive of interest, is under three hundred dollars, unless it involve the legality of a tax, impost, assessment, toll, or municipal fine.† The decision of the County Court was the decision of the highest court in the State which had jurisdiction of the matter in controversy. From that court, therefore, the case is brought here by writ of error.

* Laws of California of 1853, p. 287, and of 1856, p. 133.

† Constitution of the State, Art. VI, sec. 4, as amended in 1862.

Opinion of the court.

The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise. The same liability attaches upon their execution both to the owner and the ship. The passage-money in the one case is equivalent to the freight-money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction.

The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that State has decided in several cases. In *Averill* v. *The Steamer Hartford*,* the court thus held, and added that "the proceedings in such actions must be governed by the principles and forms

* 2 California, 308.

of admiralty courts, except where otherwise controlled or directed by the act."

This jurisdiction of the courts of California was asserted and is maintained upon the assumed ground that the cognizance by the Federal courts "of civil causes of admiralty and maritime jurisdiction" is not exclusive, as declared by the ninth section of the Judiciary Act of 1789.

The question presented for our determination is, therefore, whether such cognizance by the Federal courts is exclusive, and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the ninth section of the act of Congress.

The Constitution declares that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects."*

How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of *Martin* v. *Hunter's Lessee*,† Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited, between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime

* Article II, § 2.

† 1 Wheaton, 334.

jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to *all cases;* but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts,—a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all State authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil

causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a Federal or a State court, at the option of the plaintiff; and if brought in the State court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts.

Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment.

By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts.

The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. "The admiralty jurisdiction," says Mr. Justice Story, "naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and do-

mestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home."*

The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common-law remedy, where the common law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.

It follows, from the views expressed, that the judgment of the County Court must be reversed, and the cause remanded, with directions to dismiss the action for want of jurisdiction.

AND IT IS SO ORDERED.

SEMPLE *v.* HAGAR.

1. When a want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an examination of the questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction.
2. Where two parties held patents for land from the United States, under Mexican grants, both of which included the same lands in part, and one of the parties brought a suit in a State court to vacate the patent of the other, to the extent of the conflict of title, and the State court refused to entertain jurisdiction of the question, and dismissed the complaint, this court has no jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the judgments.

SEMPLE filed a bill against Hagar in one of the State courts of California. The bill alleged that he, the complainant

* Commentaries, § 1672.

Argument in favor of dismissal.

Semple, had obtained a patent from the United States for a tract of land, based upon a Mexican grant for the same land, known as the "Colus" grant; that the land so granted had been surveyed by the United States, and included certain lands enumerated; that the defendants claimed part of the same land under a Mexican grant known as the "Jimeno" grant, for which a patent had also been issued by the United States to the defendants; that the surveys of the said grants overlapped; that the grant of the "Jimeno" tract had been obtained by fraud and was a cloud on the complainant's title. The prayer of the bill was that the court might declare "the said fraudulent grant, commonly called the 'Jimeno Rancho,' void, and of no effect, as issued upon false suggestions, and without authority of law."

The defendant demurred to this bill, setting forth nine several grounds of demurrer, and among them these:

1st. That the court had no jurisdiction of the subject of the action.

2d. That there was a defect of parties plaintiff.

3d. That there was a defect of parties defendant.

The court below made a decree dismissing the bill; a decree which on appeal the Supreme Court of California, the highest court of equity of the State, affirmed.

The case was then brought here as being within the twenty-fifth section of the Judiciary Act, which enacts that the final decree in the highest court of law or equity of a State, &c., where there is drawn in question the validity of an authority exercised under the United States and the decision is against the validity, or drawn in question the construction of any clause of a statute or commission held under the United States, and the decision is against the title specially set up by either party under such statute or commission, may be reviewed in this court.

Mr. Wills, for the defendant in error, now, and in advance of the case being regularly called, moved—the record being a short one, and of but ten pages—to dismiss the writ of error for want of jurisdiction. He thus argued:

Opinion of the court.

1. The State courts of California had no jurisdiction of the subject of the action. This court has held, in *Field* v. *Seabury*,* that the question of the validity of a patent for land is "a question exclusively between the sovereignty making the grant and the grantee." The courts of California, carrying out this doctrine, have held, that "a patent imports absolute verity, and that it can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the authority of the government."†

2. It has been decided by the court, in *Moreland* v. *Page*,‡ that this court has not jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the judgment of a State court, when the question involved relates to the proper boundary between two tracts of land, although the owners of both had valid grants from the United States.

Mr. Reverdy Johnson, for the plaintiff in error, contra, argued in support of the jurisdiction; contending, also, that the question, whether the jurisdiction did or did not exist, was one which the court would not settle in this preliminary way; that the question could not be settled without a thorough examination of the record; and that this could not be made until the case came up in regular order; that then, when the court would understand the whole matter, it could better decide the delicate matter of jurisdiction.

Mr. Justice GRIER delivered the opinion of the court.

In all cases of a motion to dismiss the writ of error for want of jurisdiction, the court must necessarily examine the record to find the questions decided by the State court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record,

* 19 Howard, 332.

† Leese *v.* Clarke, 18 California, 571; Same *v.* Same, 20 Id. 423. See, also, Beard *v.* Federy, 3 Wallace, 479.

‡ 20 Howard, 522.

and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits.

In the case before us, the want of jurisdiction is patent; it requires no investigation of a long bill of exceptions. It was not decided by the court below on its merits, if it had any. It furnishes no reason for a postponement of our decision of the question.

If, in such cases, the court would postpone the consideration of the question of jurisdiction, we would put it in the power of every litigant in a State court to obtain a stay of execution for three years, or more, by a frivolous pretence that it comes within the provisions of the twenty-fifth section of the Judiciary Act. In many States, all the land titles originated in patents from the United States; and if every question of boundary, of descent, of construction of wills, of contracts, &c., and which may arise in State courts, may be brought here on the mere suggestion that the party, against whom the State court gave their judgment, derived title under a patent from the United States, we should enlarge our jurisdiction to thousands of cases, and increase, unnecessarily, the burdens of this court, with no corresponding benefit to the litigant. It is plain that, in such cases, there is not "drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States."

We have here a very brief record, and, on the facts of the case, we cannot shut our eyes to the total want of jurisdiction, under the twenty-fifth section, or any other section of the Judiciary Act.

It is plain, that if the court had assumed jurisdiction, and had declared the defendant's patent void, for the reason alleged in the bill, the defendant would have had a case which might have been reviewed by this court, under the twenty-fifth section, and one on which there might have been a question and difference of opinion. But it is hard to perceive how the twenty-fifth section could apply to a judgment of a State court, which did NOT decide that ques-

tion, and refused to take jurisdiction of the case. The matter is too plain for argument.

MOTION GRANTED.

SUPERVISORS *v.* UNITED STATES, EX RELATIONE

1. On application by a creditor for *mandamus* against county officers to levy a tax to pay a judgment, the defendant cannot impeach the judgment by setting up that interest was improperly given in it. This would be to impeach it collaterally.
2. The statute of Illinois, which enacts that when a judgment is given against a county, the county commissioner shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts," cannot be taken advantage of on error, in case of an application for a *mandamus* to levy a tax to pay a judgment, where such a warrant was applied for and refused, and where there are no funds in the county treasury with which to pay the judgment.
3. Where power is given by statute to public officers, in permissive language —as that they "*may*, if deemed advisable," do a certain thing—the language used will be regarded as peremptory where the public interest or individual rights require that it should be.

ERROR to the Circuit Court of the United States for the Northern District of Illinois, the case being thus:

A statute of Illinois, of February 16th, 1863, enacts as follows:

"The board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable*, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

With this statute in force, the State Bank, relator in the

case, was the holder of certain coupon bonds of the County of Rock Island, originally issued and negotiated in payment of stock of the Warsaw and Rockford Railroad Company, for which the county had subscribed. They were issued pursuant to law.

The coupons representing the interest for one year were paid by the county; the necessary tax having been levied and collected for that purpose. Subsequent payments, however, were not made, and at the March Term, 1863, the relator recovered a judgment in the court below, upon coupons overdue and unpaid, for $2554, and costs. Nothing was paid upon it, and there was no money in the county treasury which could be so applied.

The relator subsequently requested the supervisors to collect the requisite amount by taxation, and to give him an order on the county treasury for payment. They declined to do either.

He then applied to the court below for a *mandamus*, compelling the supervisors, at their next regular meeting, to levy a tax of sufficient amount to be applied to pay the judgment, interest, and costs, and when collected to apply it accordingly. An alternative writ was issued.

The supervisors made a return, wherein numerous objections were taken to the issuing of a mandatory writ. Among them were:

1. That the court below, in rendering judgment, had allowed *interest* on the coupons, from the day they became due.

2. That the respondent had no power to pay the judgment except by issuing an order on the treasurer of Rock Island County; the ground of this objection being a statute of Illinois, which enacts, that when a judgment is rendered against a county, no execution shall issue, but that the county commissioners' court shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts."

3. In substance, that the respondent had levied and collected the regular county taxes, and that the same had all been needed and used for the ordinary current expenses of the county.

The court below disallowed the return, and ordered that a peremptory writ should issue, commanding the respondents, at their next meeting for levying taxes, to levy a tax of not more than one hundred cents on each one hundred dollars' worth of taxable property in the county, but of sufficient amount fully to pay the judgment, interest, and costs; and that they set the same apart as a special fund for that purpose; and that they pay it over without unnecessary delay to the relator.

The main question here in the case was whether, under the act of February 16th, 1863, the respondents were compellable to levy and collect, by taxation, the amount specified in the order of the court below; that is to say, in other words, whether that expression of the statute, "*may, if deemed advisable*," was permissive merely, or, under the circumstances of this case, obligatory.

The case was submitted on briefs.

Mr. Cook, for the Supervisors, plaintiffs in error:

I. Under the law, as settled in Illinois, counties cannot be required to pay interest in any case, unless they specially contracted to pay it.*

II. Under the statutes of Illinois, there is but one mode in which payment of a judgment against a county can be coerced, and that is by obtaining a county order from the county authorities upon the county treasurer. A statute provides this way, and provides none other. Necessarily, therefore, it is the only mode in which a judgment can be proceeded in.

III. The statute of February 16th, 1863, says the board of supervisors "may, if deemed advisable, levy a special tax."

If not deemed advisable, the tax is not to be levied, because these words cannot be rejected, and while they remain there is no room for construction.

* Madison County *v.* Bartlett, 1 Scammon, 71; Pike County *v.* Hosford, 11 Illinois, 175; City of Pekin *v.* Reynolds, 31 Id. 529.

If the statute had simply said, "*may levy a tax*," it might then well be argued, that in cases where the interests of a third party were concerned the court would construe may to mean *shall*, and would enforce the levy. But it is not so here. They *may*, upon a condition, and that condition is, that the board and none other shall deem it advisable. This statute does not repeal any other, but is in addition—it is cumulative.

Suppose the statute had read, "*shall*, if deemed advisable,"—certainly its effect would not be in the least changed; because it would still be necessary that the plaintiff deem it *advisable* before it should levy.

If the words "*may*, if deemed advisable," vest discretion in the plaintiff, then it cannot be controlled by the court. If they vest the discretion in the court to determine when it is advisable to levy a tax, then the board of supervisors could not, in any case, levy a tax under that statute, unless the court had first found it advisable and issued its mandate to that effect directing it to be done.

A statute ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant.*

In *The King* v. *The Mayor*,† Holroyd, J., observes: "By the charter, the mayor and aldermen are to elect such and so many free burgesses *as they shall think fit*. It is not competent, therefore, to the court to grant a mandamus directing them to elect any."

In *The Commonwealth* v. *The County Commissioners*,‡ the first section of an act made it the duty of the assessors to receive from parents the names of children residing in their townships, and whose parents were unable to pay for their schooling, &c. The second section directed the assessor to send the list to the teachers of schools within his township, &c., "whose *duty* it shall be to teach *all* such children as may come to their schools, in the same manner as other children

* James *v.* Dubois, 1 Harrington, 285; Hutchen *v.* Niblo, 4 Blackford, 148; Opinion of the Justices, 22 Pickering, 571; McCay *v.* Detroit and Erie Plank Road Co., 2 Michigan, 138; Pearce *v.* Atwood, 13 Massachusetts, 336.

† 2 Barnwall and Cresswell, 584.

‡ 5 Binney, 536.

shall be taught. It required the teachers to keep a day-book and to enter in it the number of days each child should be taught, and the amount of stationery furnished for the use of the child, "from which book he shall make out his account against the county on oath or affirmation, agreeably to the usual rates of charging for tuition in such schools; which account, after being so examined or revised, he shall present to the county commissioners, who, *if they approve thereof*, shall draw their order on the county treasurer for the amount, which he is hereby directed to pay out of any moneys in the treasury."

Upon a motion for *mandamus* against the commissioners, the court says:

"The law has vested the commissioners with the power of approving or disapproving of the account, and we cannot take it away from them."

The *mandamus* was refused.

In *The People* v. *Supervisors of Albany*,* a leading case, a statute directed supervisors to allow a constable for certain services "so much money as the *supervisors shall judge he reasonably deserves to have.*"

On motion for *mandamus*, to allow a certain sum claimed, the court says:

"In the present case, whatever may be thought of the reasonableness of the allowance of the supervisors to the applicant, he has no legal right to any particular sum. He has no right to any money for the services performed but such as the supervisors shall in their discretion judge him entitled to. Should we grant a peremptory *mandamus* what would be its command? Certainly not to allow any specific sum. That would be taking upon ourselves a discretion which the legislature have vested in the supervisors; we could only command them to examine the applicant's account, and, in the words of the statute, allow him for his services *such sum as they shall judge he reasonably deserves to have;* and this has been already done. Where a discretionary

* 12 Johnson, 416.

power is vested in officers, and they have exercised that discretion, this court ought not to interfere, because they cannot control, and ought not to coerce that discretion. This may be a hard case, and the party may be remediless; but that consideration cannot induce us to grant an unfit, and, as I believe, a nugatory remedy."

In a note to Johnson's Cases,* the subject is very fully treated, and the authorities cited. It is said:

"The writ of *mandamus* will not lie to control the discretion of an inferior officer, for otherwise superior tribunals would draw to themselves all matters of judgment, and officers would in reality have none at all.

"Whenever a discretionary power is vested in officers, and that discretion has been exercised, the court ought not to interfere, because they cannot control and ought not to coerce that discretion.

"The writ of *mandamus* will lie to corporations, as to inferior tribunals and officers, to compel them to exercise their discretion, though not to direct the manner of its exercise."

In *United States* v. *Seaman*, in this court,† Taney, C. J., giving the opinion of the court, says:

"The rule to be gathered from all these cases is too well settled to need further discussion. The *mandamus* cannot issue in a case where discretion and judgment are to be exercised by the officer."

Similar principles were declared in *United States* v. *Guthrie*.‡

In the case at bar it will be observed that the relator demanded the levy of the tax, and that the board of supervisors, plaintiffs in error, refused to make it.

It thus appears that the board has exercised the discretion

* Vol. 2, pp. 217–232.

† 17 Howard, 230.

‡ Ib. 304; and see Towle *v.* The State, 3 Florida, 202; Chase *v.* Blackstone Canal Co., 10 Pickering, 246; Ex parte Black, 1 Ohio State, 30; McDougal *v.* Bell, 4 California, 178; McGee *v.* Board of Supervisors, 10 Id 376; The City *v.* McKean, 18 B. Monroe, 17.

vested in it by the law of February 16th, 1863, and deemed it unadvisable to levy the tax to pay the defendant's debt.

Mr. James Grant, contra:

I. This being a *mandamus* to collect a judgment, any error in the judgment to collect which it is brought, only comes collaterally in question, and therefore the question is not before this court.

II. As to the second point, we answer that the county treasurer has no funds; and that this *mandamus* was brought to compel the board of supervisors to levy a tax, to provide them. The argument, as to the *method of paying debts* when the money is at hand to do it with, has nothing to do with the question of raising the money to pay them with, when no money can otherwise be had.

III. Passing to the important question in the case, we insist that the words "if deemed advisable" have the same legal signification as the word "may" alone, or "shall have power," and no other.

In *Mason* v. *Fearson*,* in this court, the words "it shall be lawful," are construed as mandatory. In laying down the rule for the construction of words of permission, the court says: "Whenever it is provided that a corporation or officer 'may' act in a certain way, or that it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons."†

And, again:

"Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is em-

* 9 Howard, 237.

† Citing Rex & Regina *v.* Barlow, 2 Salkeld, 609; The King *v.* The Inhabitants of Derby, Skinner, 370; Blackwell's Case, 1 Vernon, 152–154; Newburg Turnpike Co. *v.* Miller, 5 Johnson's Chancery, 113; City of New York *v.* Furze, 3 Hill, 612–614; Minor et al. *v.* The Mechanics' Bank, 1 Peters, 64.

powered to do for others, and it is beneficial to them to have done, the law holds he ought to do."

In *The Commonwealth* v. *The City of Pittsburg*,* Grier, J., on the circuit, says:

"It is absurd to argue that conferring such a power (taxation to pay bonds) is imposing no duty. The select and common council are public agents, created to perform a public trust. One of the purposes of their creation is, that they may provide for the payment of the debts of the city. It is true that the act of February 7th, 1863, only declares that the city *shall have power* to make provision for the payment of the principal and interest of the money borrowed, by the assessment and collection of a tax, but in the statute the word 'may' means 'must' or 'shall' in cases where the public interest and right are concerned, and where the public or third parties have a claim *de jure*, that the power should be exercised."

The argument for the plaintiff in this case is based on a mistaken idea of what discretion is. An examination of authorities will show that disputed facts are necessary to found a "discretion," or a "deliberative judgment," (in the sense used in the authorities) upon. In the case of *The People* v. *Supreme Court of New York*,† the nature of a "discretion" that cannot be controlled by the courts is discussed. The court says:

"It is that discretion which is not and cannot be governed by any fixed rules. We will not act upon our judgment in opposition to the judgment of a board of supervisors as to what is a reasonable compensation for services performed by a constable. . . . . It is to their judgment and discretion and not to ours, which the legislature has left that matter."

They add, that had the board of supervisors refused to grant anything on the ground that they had no discretion, or that the officer had no right to any compensation, they

* American Law Register, vol. 3, 292. † 5 Wendell, 125.

would have interfered to "set them in motion and determine the law, for they are legal duties and legal rights if they exist at all."

It appears from authorities* that if the facts are not disputed, there is no "discretion" to exercise, and in this case the facts are admitted. If it is contended that the supervisors are to render a deliberative judgment on the law, we answer, that by the constitution of Illinois,† they can have no judicial powers, and if they could have such power, it can be controlled by the court.‡

We think that an examination of the authorities cited by the plaintiff in error, will show that in every case cited, the respondents were to judge of facts more or less uncertain, or otherwise were invested with judicial powers.

In *The Commonwealth* v. *The County Commissioners*, cited on the other side, the court say:

"The law has vested the commissioners with the power of approving or disapproving of the account, and we cannot take it away from them."

The law provided that the commissioners should draw an order *if they approved of the bill.*

In *The People* v. *Supervisors of Albany*, the applicant by law was to have such sum as they (the supervisors) shall judge he reasonably deserves to have. The supervisors had passed the claim, and the court says, this was a discretion left to the supervisors, which we cannot control, that the relator was not entitled to any particular sum, and that the amount to which he was entitled was by the very contract to be determined by the supervisors.

The case of *United States* v. *Seaman*, is decided on the ground, that the superintendent of printing was obliged "to

* The People *v.* The Supreme Court, 10 Wendell, 275–290; Anon., 2 Halst. 160; Rex *v.* Justices of Worcestershire, 1 Chitty, 649; Rex *v.* Justices of Carnarvon, 4 Barnwall & Alderson, 86; Rex *v.* Justices of Monmouthshire, 4 Barnwall & Creswell, 844.

† Article ii, Sections 1 and 2, and Article v, Section 1.

‡ 5 Ohio State, 538; State of Ohio, Ex. rel., &c., *v.* Chase.

examine evidence, and form his judgment before he acted; and whenever that is to be done, it is not a case for a mandamus."

In the case of *United States* v. *Guthrie*, the court says:

"The only legitimate inquiry for our determination upon the case before us is this: Whether under the organization of the Federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of *disputed* or *controverted claims* against the United States."

The decision of the Circuit Court, overruling the application, was approved.

After examining a great number of cases (though not perhaps all the authorities quoted by plaintiff in error), we find none in conflict with the position assumed in this argument.

Mr. Justice SWAYNE delivered the opinion of the court, having first stated the case.

We have not had the benefit of an oral argument upon either side. The case was submitted upon printed briefs. We shall confine our examination to the points thus brought to our attention.

In the return of the respondents to the alternative writ numerous objections were taken in regard to which their brief is silent. We take it for granted they have been abandoned, and shall not consider them.

I. It is said the court below, in rendering the judgment, allowed interest upon the coupons from the time they became due.

The judgment cannot be thus collaterally questioned. It can be impeached only in a proceeding had directly for that purpose.*

* Bank of Wooster *v.* Stevens, 1 Ohio State, 233.

II. A statute of Illinois provides that when a judgment is rendered against a county no execution shall issue, but that the county commissioners' court shall draw a warrant upon the treasurer for the amount, "which shall be paid as other county debts."

Such a warrant was applied for and refused, after the rendition of the judgment. If the judgment of the court below is sustained, a warrant can yet be issued when the fund to pay the judgment is provided, if a warrant be necessary to complete the obedience of the respondents in paying over the money according to the command of the writ. There is nothing in the objection as a matter of error.

III. The important question in the case is whether the respondents are compellable to levy and collect, by taxation, the amount specified in the order of the court below.

The writ, if issued, must conform to the order.

The court below proceeded upon the act of February 16th, 1863. We have not found it necessary to consider any of the other acts referred to in the briefs.

That act declares that "the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may*, *if deemed advisable*, levy a special tax, not to exceed in any one year one per cent. upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, "*may*, *if deemed ad-*

visable," which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

In *The King* v. *The Inhabitants of Derby*,* there was an indictment against "diverse inhabitants" for refusing to meet and make a rate to pay "the constables' tax." The defendants moved to quash the indictment, "because they are not compellable, but the statute only says that *they may*, so that they have their election, and no coercion shall be." The court held that "*may*, in the case of a public officer, is tantamount to *shall*, and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt."

In *The King and Queen* v. *Barlow*,† there was an indictment upon the same statute, and the same objection was taken. The court said: "When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall:* thus, 23 Hen. VI, says the sheriff *may* take bail. This is construed he *shall*, for he is compellable to do so."

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

In *The Mayor of the City of New York*‡ and in *Mason* v. *Fearson*,§ the words "it shall be lawful" were held also to be mandatory.‖

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the

* Skinner, 370.

† 2 Salkeld, 609.

‡ 3 Hill, 614.

§ 9 Howard, 248.

‖ See The Attorney-General *v.* Locke, 3 Atkyns, 164; Blackwell's case, 1 Vernon, 152; Dwarris on Stat. 712; Malcom *v.* Rogers, 5 Cowen, 188; Newburg Turnpike Co. *v.* Miller, 5 Johnson's Chancery, 113; Justices of Clark County Court *v.* The P. & W. & K. R. T. Co., 11 B. Monroe, 143; Minner et al. *v.* The Merchants' Bank, 1 Peters, 64; Com *v.* Johnson, 2 Binney, 275; Virginia *v.* The Justices, 2 Virginia Cases, 9; Ohio ex rel. *v.* The Governor 5 Ohio State, 53; Coy *v.* The City Council of Lyons, 17 Iowa, 1.

language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category.*

The Circuit Court properly awarded a peremptory writ of mandamus. We find no error in the record. The judgment below is

AFFIRMED.

DAVIDSON v. LANIER.

1. It is not required that a writ of error be allowed by a judge. It is enough that it is issued and served by copy lodged with the clerk of the court to which it is directed.
2. A mistake in the date of the writ of error is not important, when it is clear that such mistake is a clerical one merely, and when, from the judgment described and the number given to it, the party cannot be misled.
3. A statute declared by its title to be "an act to suppress private banking," and making it penal to "erect, establish, institute, or put in operation, or to issue any bills or notes for the purpose of erecting, establishing, or putting in operation any banking institution, association, or concern," covers with its prohibition not only the primary steps in establishing and putting into operation the bank, but also the whole range of its transactions, by which illegitimate currency is imposed on a commu-

* The People *v.* Sup. Court, 5 Wendell, 125; The People *v.* Sup. Court, 10 Wendell, 289; The People *v.* Vermilyea, 7 Cowen, 393; Hull *v.* Supervisors, 19 John, 260.

nity; and contracts made in furtherance of such transactions are as void as those made to give it original operation.

4. A bill of exchange drawn in one State upon a party in another, the known and common purpose of both parties being to carry on a business declared unlawful by statute of the first State, is void as to the drawer in the hands of a party to the bill having notice of its true character.

5. As between the parties the delivery of negotiable paper, signed and indorsed in blank, authorizes the receiver to fill it up in conformity with the authority given him; but it does not authorize him to do more, nor give him power to fill it up at pleasure. In a suit by the drawee upon such paper against drawer or indorser, the burden of proof, that an agreement as to filling up had been violated, is on the defendant; but if he can make the proof it will avail him.

ERROR to the District Court of the United States for the Northern District of Mississippi; the suit having been by Lanier, curator of the succession of John J. McMahon, of New Orleans, against Davidson, on a bill of exchange drawn as was alleged, by Davidson and others, and judgment having been given in favor of the plaintiff.

The case, as stated by the Chief Justice, was thus:

A statute of Tennessee, enacted in 1827, and entitled "An act to suppress private banking," made it penal to erect, establish, institute, or put in operation, or to issue any bills or notes for the purpose of erecting, establishing, or putting in operation, any banking institution, association, or concern.

In January, 1856, this act being in force, several persons, of whom one Richard M. Kirby seems to have been the principal, undertook to establish a banking association or company in Memphis, Tennessee, under cover of a charter granted by the State of Arkansas for a corporation styled "The Cincinnati and Little Rock Slate Company." Their object was to issue bills for circulation as money, and use them in the cotton trade.

About the time of the organization of the company, Kirby visited McMahon, of whose estate the defendant in error is curator, at New Orleans, and exhibited the charter and explained the views of the company, whereupon McMahon agreed to act as its treasurer and financial agent.

In pursuance of this arrangement, circulating notes of the

company, to the amount of twelve thousand dollars, were sent to McMahon, who used them, as far as he could, for currency. He also made advances to the company by accepting and paying bills drawn on him; and, in the result, became its creditor in a sum somewhat exceeding eleven thousand dollars.

At the time of the arrangement with McMahon, Davidson, the plaintiff in error, and one J. B. Ellis, were members of the company, but afterwards withdrew. Subsequently, however, upon the request of Kirby, Davidson, with two others, consented to sign, and Ellis consented to indorse several bills of exchange in blank, and among them that on which the suit below was brought. All the bills seem to have been addressed to McMahon as drawee. Shortly before, or very soon after this transaction, H. M. True, the secretary and treasurer of the company at Memphis, absconded, taking with him all the cash in his possession.

There was some obscurity, and, perhaps, some contradiction of evidence in the record, as to the time and purpose of signing and indorsing the blank bills of exchange. Kirby stated that they were signed and indorsed before the absconding of True, to enable himself to protect the circulation of the company. Another witness said that they were signed and indorsed after that event, at the suggestion of Kirby, to relieve McMahon from the consequences of True's theft; but this witness said, also, that he only knew the object of the bills from a statement by Kirby, made when the other parties were not present, and was not confident as to the time of signing and indorsement.

However these things may have been, it was certain that the bills were sent by Kirby to McMahon, in July, 1856, and were filled up some months later, after vain attempts to obtain payment of the balance due him.

All the bills, when they went into McMahon's hands, seemed to have had engraved on their face the formal parts of a bill of exchange, with the name of the place of date, "Memphis, Tenn.," and the direction to the drawer, "John J. McMahon, New Orleans;" and all but one seemed to have

borne the words, "Exchange for $1000," in the upper left hand corner. In other respects, as to time of date, amount to be paid, and time of payment, they were left blank. The one now in controversy was filled up with the date, "July 15th, 1856;" with the time of payment, "eight months after date;" with the sum to be paid, "eight thousand nine hundred and ninety-two dollars and forty-four cents;" and with a stipulation for "eight per cent. interest from maturity until paid." Thus filled up, the bill sued on read as follows:

"Exchange for $8992.44.

"MEMPHIS, TENN., July 15th, 1856.

"Eight months after date of this, our first of exchange (second unpaid), pay to the order of J. B. Ellis eight thousand nine hundred and ninety-two dollars and forty-four cents, value received, and charge the same to account of your obedient servants, with eight per cent. interest from maturity until paid.

"JAS. R. FERGUSON,
J. LOCKE,
THOMAS J. DAVIDSON.

"To JOHN J. MCMAHON, New Orleans."

Indorsed: "J. B. ELLIS, Ripley, Miss.
RICHARD M. KIRBY."

Upon the trial, the court charged the jury, that if McMahon's object in advancing his money was to enable the company to put into operation a banking company in violation of the laws of Tennessee, the jury must find for the defendant; and, also, that if McMahon agreed with Kirby to redeem the circulation, intending thereby to enable the company to go into operation, and the company did go into operation, issuing bank notes in pursuance of that agreement, then the transaction was illegal, and the plaintiff could not recover.

But the following instructions, numbered in the record 5th, 6th, and 7th, were also given by the court:

5. "If, at the time the bills were given, the holder, McMahon, knew that the money would be used for the purpose of carrying on a banking company contrary to the laws of Tennessee, and if the banking company was then in opera-

tion, then the consideration of the bills is not affected by the use made of the proceeds of the bill, and the plaintiff is entitled to recover, unless the defence is sustained on some other ground."

6. "The signing of a bill of exchange in blank, is the giving of the holder an unlimited authority to fill it up at pleasure, and the party so drawing or indorsing is bound by the act of the party filling up the same."

7. "If the bills sued on were signed in blank, and delivered to Kirby to be sent in blank to McMahon, that would authorize him, McMahon, to fill up the bills and insert any rate of interest that was lawful, and the jury should find for the plaintiff, unless the defence is made out and sustained on some other ground."

It was upon these instructions, considered in connection with the evidence, that the questions to be decided in this case arose.

Before arguing the merits, a motion to dismiss the writ of error was made.

The judgment of the District Court for $11,312.42 was rendered on the 6th of June, 1860. On the 7th a writ of error was sued out, and a copy was lodged with the clerk of the court on the same day, and bond for supersedeas given in double the amount of the judgment. A citation was also issued, dated 16th April, which was served on the 14th September, 1860, and the record, with the writ of error and the citation, was returned to the next term of this court. Another citation and apparently another writ of error, were issued on the 7th of June. Of the last-mentioned writ and citation there seemed to have been no service.

The case was submitted in behalf of the plaintiff in error on the record. Mr. Brent for the defendant in error:

I. *Motion to dismiss.* The grounds are: because it does not appear that the writ of error was "allowed" by the judge, which it ought to be.*

* Yeaton v. Lenox, 7 Peters, 221.

Argument for the defendant in error.

Because the citation returned here as the original, which was served on the 14th September, 1860, is on its face tested 16th April, 1860; nearly two months prior to the judgment, which it professes to bring up.

This citation, when served, gave notice to the defendant in error to appear and answer a writ filed at its date (16th April, 1860). No such writ had then been filed in this case, nor indeed had the judgment been rendered.

It may be here stated that on the 16th April, 1860, when this citation bears date, there was a judgment in same court dated 5th December, 1859, being the judgment in another case (No. 52), between the same parties, brought up to this court in immediate sequence to this, and in principle just like it, and *it* is properly described in this citation.

The appeal bond returned in this case was designed to be a *supersedeas*, from the amount of its penalty, &c. In such a case, the judge signing the citation is required to "take good and sufficient security that the plaintiff in error shall prosecute his suit with effect," &c. But here it does not appear that the judge approved the bond or exercised any judgment touching the security. He was an attesting witness, but as such he merely authenticates the signatures.

In the case of a *supersedeas* appeal bond, where it does not appear to have been taken or approved by the judge, the writ of error must be dismissed.*

II. *On the merits, or matters presented by the four instructions.*

As respects the fifth and immediately preceding, or fourth instruction, the defence rested on the statute of Tennessee.

The case shows that McMahon (on whose estate Lanier is curator), residing in New Orleans, agreed to accept the drafts of a banking house in Memphis, Tennessee, and that this action is brought for the money paid in New Orleans by McMahon. The place of performance of McMahon's contract, therefore, was Louisiana, and its validity is to be tested by the laws of Louisiana, and not of Tennessee.† If

* Boyce *v.* Grundy, 6 Peters, 777; Judiciary Act, § 22.

† Bell *v.* Bruen, 1 Howard 169; Cox *v.* United States, 6 Peters, 172.

this be so, the whole defence of the plaintiff in error was inadmissible.

But the law of Tennessee manifestly intended to punish *only* the parties engaged in the institution of an unincorporated association and in issuing its currency; it did not intend to prohibit the recovery of money paid in good faith by a non-resident of that State upon the security of bills of exchange drawn on him by *individuals*, and which he honored for their accommodation. The contract to pay for money advanced upon personal security is valid, although the occasion for this contract arose out of the illegal act.*

As respects the sixth and seventh instructions, the ground of the assignment of error probably is that they were too broad. We think them obviously right.

The CHIEF JUSTICE delivered the opinion of the court, and after stating the case went on thus:

Before proceeding to consider the questions arising on the instructions regarded in connection with the evidence, a motion to dismiss the writ of error must be disposed of.

It is objected to the writ of error that it was not allowed by any judge; but this is not required. It is enough that it was issued and served by copy lodged with the clerk of the court to which it was directed.

It is objected to the citation that it was dated 16th April, which was before the date of the judgment; but it is clear, from the number which it bears, taken in connection with the judgment it describes, that it was issued after the rendition on the 6th of June. The date must have been a mere clerical error, and the service on the 14th of September was regular and sufficient.

The fact that another writ of error and another citation, not served, were issued, cannot prejudice the writ and citation which were duly issued and served.

It is also urged that the appeal bond was not approved by the judge. But it is a fair inference, from the acts of the

* Catts *v.* Phalen, 2 Howard, 376; Slaughter *v.* Groves, 15 Peters, 449.

judge, in signing the citation, and in witnessing the appeal bond, that he approved of the security. The Judiciary Act does not, in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given. This court will take care, on application, that the rights of the defendant in error be not prejudiced by the omission, but will not dismiss the writ except on failure to comply with such terms as it may impose.*

The motion to dismiss in this case must be denied.

The first question upon the merits arises upon the fourth and fifth instructions. The court had already charged in substance that a contract in consideration of aid to be given in putting in operation an illegal banking company in Tennessee was void. From the fifth instruction, taken in connection with those which preceded, and with the evidence, the jury must have understood that in the judgment of the court a contract in consideration of aid in promoting the objects and effecting the purposes of an illegal banking company, when once in operation, was valid.

We think this construction of the statute of Tennessee too narrow. The intention of the act was declared by its title. It was an act to suppress private banking. Its object was the protection of the people against the evils of an unauthorized currency—than which hardly any object of legislation is more important. The currency measures all values, and is the medium, directly or indirectly, of all exchanges. To keep it sound, and to guard it as far as possible from fluctuation, are among the most imperative duties and among the most difficult problems of government.

In the construction of this act it was the duty of the court below, as it is ours here, to give effect to its obvious intention, if that can be done without disregarding settled rules of interpretation.

What, then, is the true sense of the prohibition to erect, establish, institute, or put in operation any banking com-

* Martin v. Hunter's Lessee, 1 Wheaton, 361; Catlett v. Brodie, 3 Id. 553.

pany, or to issue any bills or notes with intent or purpose to do so? What is meant by putting in operation or establishing a banking company? We think that this language has a much wider import than mere commencement of business. To establish a company for any business means complete and permanent provision for carrying on that business, and putting a company in operation may well include its continued as well as its first or original operation.

This construction is supported by the prohibition to issue bills or notes. Taking the act of establishment and putting in operation, in the restricted sense of the instructions, the issue of circulation could not precede but must follow those acts. The prohibition of such issues, therefore, must be taken as proof that the legislature did not use the words in that sense.

The emission and circulation of unauthorized notes and bills as money was the main object and business of the company, and it was precisely this object and business which the legislature intended to defeat and prohibit.

We must construe the act, therefore, as covering with its penal prohibition the whole range of devices by which illegitimate currency is imposed on the community. It prohibits the use of such currency during the whole period of the establishment of an illegal company, and applied as completely to the last as to the first step of its operations. Any other construction would frustrate the legislative intent and leave the great mischief, which the statute was made to prevent, wholly without restraint or check.

It was quite clear, upon the evidence, that McMahon entered into the transaction, which resulted in the bill sued on, in the expectation of profit from aiding the operation of the prohibited banking company. He was engaged with its officers and stockholders in the scheme of imposing upon the community a prohibited and fraudulent currency. His name was upon its circulating bills, and his credit promoted their circulation. His curator cannot look to the law for remedies against his associates in this illegal undertaking.

With this view of the statute and of the evidence we can-

not distinguish this case from that of *Brown* v. *Tarkington*,* decided at the last term. In that case we held that notes given for a balance found due on a settlement of accounts with an illegal banking company, and for advances to redeem its circulation, could not be enforced in favor of a payee who had been participant in the illegal business. The bill in this case, in our judgment, is of the same character.

It was urged in argument that the contract we have been considering was made in Louisiana, and not invalid by the laws of that State. But this is not so. The bill of exchange was made in Tennessee. It bears date at Memphis, and was signed there; and the contract of the defendant below was to be performed there. We by no means say that it would be valid if made in Louisiana. It is not necessary to consider that question; the laws of Tennessee determine the question of its validity, and we think that according to those laws it was invalid.

In our judgment, therefore, the fifth instruction was erroneous.

The sixth and seventh instructions remain to be considered. The sixth announced, without qualification, the proposition that the holder of a bill of exchange, signed and indorsed in blank, has unlimited authority to fill it up at pleasure and bind the signer and indorser by his act.

This instruction cannot be sustained. The delivery of a bill of exchange signed and indorsed in blank only authorizes the receiver, as between himself and the drawer and indorser, to fill it up in conformity with the authority given him. If there has been no agreement, the authority is general; if there has, it must be pursued. The burden of proof that there was an agreement, and that its terms have been violated, is, in such a case, upon the defendant; but if he can make the proof it will avail him. No person, unless authorized, either directly or by just inference from the nature of the transaction, can fill up a blank bill for his own benefit, nor can such a bill be enforced against the drawer

* 3 Wallace, 377.

and indorser in favor of any one who takes it in bad faith; that is, with knowledge that it has been filled up without authority or in fraud.*

It is highly probable that the court below intended that its instructions should be taken with this limitation; but it was too general in its terms, and was, we think, calculated to mislead the jury.

The seventh instruction directed the jury in substance to find for the plaintiff if satisfied that the bill was signed in blank and delivered to Kirby to be sent to McMahon. It asserted that McMahon had the right in the case supposed to fill up the bill with any amount due him and make the drawers and indorsers liable on the bill to himself.

It is doubtless true that, subject to the limitations just stated, the delivery of a signature in blank is in general an authority to the holder to fill it up as he thinks proper. This rule, in its application to negotiable instruments, was very clearly stated by Mr. Justice Clifford in *The Bank of Pittsburgh* v. *Neal*,† as follows: "Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or in other words, it is the act of the principal, and he is bound by it."

But the instruction before us went much further. It asserted the right of a drawee to fill up a blank bill and hold the drawers and indorsers, and this without any other authority than such as is implied in the fact that the bill was sent to him by the last indorser with the consent of the other indorser and of the drawers.

* 3 Kent's Com. 119; 10 Smedes & Marshall, 590.

† 22 Howard, 107.

Now it is quite clear that this fact implies no such authority. The only inference to be drawn from the circumstance that the bill was sent to McMahon in blank is that it was sent to him for acceptance. The structure of the paper excludes any other hypothesis. If, having received the bill in blank, he had accepted it and negotiated it to a third person, without notice of facts impeaching its validity between the antecedent parties, those parties would have been bound to the holder. But he, as drawee, could not transfer the bill to anybody without previous acceptance, and still less could he treat it as an obligation to himself.

We think there was error in these instructions as well as in the fifth.

The judgment of the District Court must, therefore, be reversed and the cause remanded for new trial in

CONFORMITY WITH THIS OPINION.

NOTE.—Another case, No. 52 of the Term, between the same parties, and where the questions were the same, was disposed of in the same way.

The CHIEF JUSTICE delivered the opinion of the court.

In this case, also, there is a motion to dismiss the writ of error; but, on looking into the record, we find that the writ was duly sued out and served, bond given, citation issued and served, and the record, with a copy of the citation and of the writ of error, brought up and filed in this court at the next term. There is no ground for the motion, and it is denied.

Upon the merits the case is the same with that just decided. The suit below was upon three bills of exchange, each for $1000; but otherwise blank as to signatures and indorsements, which were the same as upon the bill in the other case. The bills were sent by Kirby to McMahon, and were by him filled up in precisely the same manner as the other bill.

The charges of the court were substantially the same as in the other case, and the judgment is reversed for the same errors, and the cause

REMANDED FOR A NEW TRIAL.

BRADLEY *v.* THE PEOPLE.

A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed. And where a State imposes on the State banks a tax on their *capital* (the *shares* in the hands of the shareholders being exempt from tax), it cannot lay a tax on the *shares* of banks, organized under the act of June 3d, 1864, to provide a national currency. *Van Allen* v. *The Assessors* (3 Wallace, 573), affirmed.

THIS was a writ of error to the Supreme Court of Illinois.

The case came before that court on an appeal from a decision of the Board of Supervisors of the County of Peoria, by which they had refused to assess a state and county tax on the shares of Bradley and Howell in the First and Second National Banks of Peoria. The appeal was taken by the auditor of public accounts, in behalf of the State.

The Supreme Court reversed this decision of the board, and held the shareholders liable to the tax. The ground of exemption relied on, both before the supervisors and the Supreme Court, was want of authority in the board, within the forty-first section of the National Bank Act of June, 1864, and particularly within the second proviso of that section, which declares that the tax imposed on the shares of any banking associations under that act "shall not exceed the rate imposed upon the *shares* in any of the banks organized under the authority of the States."

The act of the State, dated February 14th, 1857, and under which the tax was assessed, provides for taxing the *capital stock* of the banks, together with the surplus profits or reserved funds. No tax was imposed specifically on the *shares* held by the stockholder.

Messrs. Dexter and Walker, for the shareholders, plaintiffs in error:

The State has adopted as *its* policy, in the case of its banks the policy of taxing the capital and property of the bank as an entirety to the corporation itself, and thereby of

relieving the shares in the hands of the holder. This may be not only the most simple, direct, and economical method, but also the more usual one of charging this kind of property with its proportionate burden for the support of the government.

But whether the better mode or not, it is *the one* and the *only* one prescribed or authorized by the legislature of the State, and if the property in question is to be taxed at all, it must be assessed to the corporation, as part of one entire and indivisible thing. The statute is, of course, in derogation of the common law, and one by which the property of the citizen is taken and appropriated to the purpose of the government. The precise mode prescribed for the imposition of the tax must therefore be pursued.

The conclusion is then inevitable, that the shares of the capital stock of banks and banking associations in the State of Illinois, in the hands of the shareholder, are not subject to taxation, but are exempt therefrom.

Now Congress provides that on any tax imposed on shares of National banks in the hands of the holder, *the rate* of "such taxation *shall not exceed the rate imposed upon the shares of any of the banks* organized under the authority of the State where such association is located." And if on the *shares* of banks organized under the law of the State, there is *no rate* of taxation, it follows that no taxes whatever could be imposed on the shares in question.

Mr. Palmer, contra:

Neither the National government, the creator of the species of property now taxed, nor the shareholders can be interested in the *methods* which may be adopted by the State for the imposition of the tax.

The objects of the government and the rights of the shareholders are secure under any modes which only impose the same rate of taxation upon the shares in National banks, that is imposed upon the shares in any banks organized under the laws of the State.

The inquiry then is: Do the laws of Illinois impose or is

Reply against the tax.

it proposed under those laws to collect from the plaintiffs in error any greater rate of taxation than is imposed upon shareholders in State institutions?

It is said that this is a tax not upon shares, but upon capital. But what difference does it make whether the shares are taxed to the several shareholders or the capital stock, which *is* the aggregate of all the shares, taxed to the corporation? "The amount assessed by either mode is precisely the same. The shares represent the capital stock, and the capital stock represents the shares. If listed by the shareholder he would pay the tax directly, and if listed by the bank he would pay the same amount indirectly, as in that case the bank would apply, for that purpose, what would otherwise go to the shareholder as a portion of his dividend on his stock. It only accomplishes the same end in a different mode. It is, in this case, a tax on the shares of the capital stock and at the same rate."

The shares in the State banks are taxed, and at the same rate as the shares of the banks created by the National banking law; and in no event *can* the shares in the local banks be taxed at a different rate from the shares in the National banks under existing State legislation. Where all the shares in a National bank are taxed, it can only equal the value of its capital stock, and that is the measure of the amount required to be assessed on the stock of the State banks.

Reply: It is said that the entire capital, which includes all the shares, is taxed as a whole, and that this, so far as the rate is concerned, is equivalent to taxing the shares. But the answer to this is, that under well-known principles of law, the statute laying the tax is to be strictly construed. The mode of taxation designated must therefore be scrupulously adhered to, and for it there is and can be no substitute or equivalent.

Again, a tax levied upon the entire capital of a bank, which includes all the shares, is not the same thing or equivalent to a tax levied upon the shares in the hands of

the stockholders. "The corporation," says this court, in *Van Allen* v. *The Assessors*,* "is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purpose for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations." A striking exemplification may be seen in the case of *The Queen* v. *Arnoud*.† The question related to the registry of a ship owned by a corporation. Lord Denman observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

Mr. Justice NELSON delivered the opinion of the court.

The question raised in this case came before us in the case of *Van Allen* v. *The Assessors*,‡ from New York, where the statute taxing the State banks was substantially like that of Illinois. We there held the tax unauthorized for the defect stated.

It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which were exempt from State taxation, it was not easy to see that the tax on the capital was an equivalent to a tax on the shares.

We see no distinction between the two cases, and the judgment of the court below must be reversed, and the

* 3 Wallace, 584.

† 9 Adolphus and Ellis, New Series, 806.

‡ 3 Wallace, 573, 581.

Statement of the case.

proceedings remanded, with directions to enter a judgment affirming the decision of the board of supervisors.

JUDGMENT ACCORDINGLY.

Mr. Justice DAVIS took no part in the decision of this case.

THOMPSON *v.* BOWIE.

On an issue as to whether certain promissory notes, dated on a particular day, were given for money lost at play and therefore void, it is not allowable to prove that the party giving them was intoxicated on the day of the date of the notes in suit, and that when intoxicated he had a propensity to game.

THOMPSON sued Bowie, in the Supreme Court for the District of Columbia, on three promissory notes for $1000, all dated on the 1st January, 1857, and all drawn payable to and indorsed by one Steer.

The defence was, that the notes were given for a gaming consideration, and were, therefore, void even in the hands of a *bonâ fide* holder, under the statute of 9th Anne, ch. 14, § 1, in force in the district;* which statute makes such notes "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

The defendant did not offer any direct evidence tending to establish the defence; but resorted to and relied on proof of a circumstantial sort, or such as he so regarded. It consisted of the following facts, tending to prove which the court below allowed evidence to be given.

1st. That Steer, the payee of the notes, was the keeper of a gambling-house, in Washington City, at the date of the notes.

2d. That, at the time of the making of the notes, Steer

* See Kilty's Report of Statutes, p. 248.

was not engaged in any other business than gambling, nor was he the owner of any property.

3d. That another note of the defendant, of the same date (January 1st, 1857), as those sued on, of the same amount ($1000), as those sued on, was given, payable to the order of one Campbell, who was not only a frequenter of the gaming-house of Steer, but also in his employment as a dealer of faro.

4th. That the body of all four of said notes was in the handwriting of one J. R. James, who was a professional gambler, and a frequenter, among other such places, of the gambling-house of the said Steer.

5th. That on the night of the 31st of December, 1856 (New-Year's eve), the defendant, being at a social entertainment, became greatly intoxicated—so much so that he was unfit to transact any business; and that he was in that condition when with the witnesses he left the place of the entertainment, between one and two o'clock in the morning of the 1st of January, 1857, and was no more seen by them that day.

6th. That whenever the defendant was under the influence or excitement of wine or spirits, he had a propensity to gamble; and was in the habit of going into gambling-houses, faro banks, &c., and there gambling, but not at other times; that, in the knowledge of the witness, he was always in this condition when he frequented such places; that the witness was a great deal with the defendant during the sessions of Congress; that he was in the witness's room almost every night, and frequently, when in liquor, would leave the witness to go with his friends to gambling-houses, and request the witness to go with him.

7th. That, at the date of the notes, the defendant was wealthy.

On this testimony, and without the plaintiff endeavoring to rebut this case, or to show in what manner he obtained possession of the notes, the case was given to the jury, who rendered a verdict in favor of the defendant.

On error here, one question among others, and the chief

question, was as to the admissibility of the evidence tending to show, that when the defendant was under the excitement of ardent spirits he had a propensity to game; was in the habit of going into gaming-houses, &c., and of there gaming, but not at other times; and that, in the knowledge of the witness, he was always in this condition when he frequented such places.

Messrs. Brent and Merrick, for the holder of the notes, plaintiff in error:

In addition to numerous errors of the court, there was palpable error in its admitting the evidence to show that when the defendant was under the excitement of ardent spirits he was in the habit of going to gaming-houses, and, so far as the witness knew, was always in this condition when he went there. The testimony simply tended to prove a *propensity;* a propensity to game. Now, such a propensity, even if admitted, did not tend to prove that the notes sued on were given for a gaming debt. If A. has his money stolen, assuredly he could not recover it from B. by proving that B. had a propensity to steal. *Jackson* v. *Smith*,* in the Supreme Court of New York is in point. There, a man named Norris was in the habit of lending money at usurious rates of interest; and the court considered it "altogether probable" that a loan in question "was a loan of that description." They held, however, that "the fact of Norris's general character or habit as a usurer" was not "a legal foundation" for a verdict which found a particular transaction, not otherwise proved so to be, usurious.

Messrs. W. S. Cox and S. L. Phillips, contra:

Three notes of a wealthy gentleman, all of the same date, in the same handwriting, for a like amount, and of a regular series of thirty, sixty, and ninety days, given at one time and in the same transaction, are found payable to a professional gambler at a time when he is a keeper of a public

* 7 Cowen, 719.

gaming-house, and has no other ostensible business, and a man of no property with which he might engage in lawful commerce. The body of each of these notes was in the handwriting of one J. R. James, a professional gambler and frequenter of the gaming-house of the said payee; and a fourth of the same series and like handwriting as the others, of the same date, and for the same amount, is found payable to the order of one Campbell, who was not only a frequenter of the gaming-house of the said Steer, but in his employment as a dealer of faro. We ask, is it not a fair inference from these facts that these notes had their origin in the gaming-house of the payee, and in the ordinary business which was carried on there? But these facts do not stand alone. Early in the morning of the very day the notes were given—New-Year's day, a day of festivity, and with many of excess—the defendant was in a grossly intoxicated state, and was no more seen by his friends that day; and we show that when intoxicated he exhibited an invariable habit of frequenting gaming-houses, a thing which he did at no other time.

The case presents, therefore, many circumstances, all interlacing and depending upon each other, and all pointing towards the same result; all reconcilable with the hypothesis of the defence, and improbable with any other. And we submit that each and every item of the evidence was admissible, including the one so particularly objected to.

This court has lately decided, in the two important cases of *Cliquot's Champagne* and *Fennerstein's Champagne*,* the same principle of establishing one fact by another, although occurring as between third parties. In those cases, it is submitted no such necessary connection appears as is to be found in this.

The main question, however, now more particularly raised is this: Does evidence of the invariable habit or propensity of the defendant to game when intoxicated, and of the fact of intoxication at a certain time, tend, in connection with

* 3 Wallace, 114; and Id. 145.

the other facts of this case, to prove a transaction of that date to have been the result of gaming? We submit that it does.

The foundation for the admission of all presumptive evidence is the known relation between like causes producing like effects; and wherever it is known that a certain cause usually produces the same effect, the rules of evidence admit either to prove the other.

It has been often decided by the courts in civil as well as criminal cases, that wherever a particular trait of character is involved, or is illustrative of the matter disputed, there the character of the party in that particular trait may be given in evidence.* Thus, honesty in cases of felony, peaceable disposition, or quarrelsomeness when drunk, in those of riot, &c., chastity in those of seduction and criminal conversation, &c., &c. By the admission of such testimony, the courts recognize the principle contended for,—that a man known to act usually in a certain manner, under certain circumstances, will be presumed to act in the same manner when shown to be subjected to the same circumstances.

We have called this impulsion to gaming a "propensity," but it is hardly doing justice to our case thus to style it.

The true question is this, rather; and in presenting it we trust that in this age of physiological science we shall not be thought to be dealing with the question in a manner too abstruse and not practical.

This, we say, is the true question: "Is the fact that an individual, who, when influenced by a certain and sufficient cause affecting his nervous organism to such an extent as to override or paralyze the judgment and will, has—in every instance where known to be so influenced—been found to act in a certain manner, admissible as evidence to show that on another occasion, when under the same exciting cause, he probably acted in the same manner?"

We submit that it is.

This law of universal causation is that which governs all

* McNabb v. Lockhart, 18 Georgia, 495; 1 Greenleaf on Evidence, § 54.

material organism, and is the great law upon which all human life is built. It exists with such a uniformity that all men accept it as the surest method of *à priori* judgment and courts of justice adopting its principle as a means of investigating truth, as soon as they find that an isolated fact is the result of a certain cause, admit the like circumstances as proof of similar effects. Now, what is the cause of the peculiar effect attempted to be proved in this case? What influence did the cause in this case, to wit, the taking of ardent spirits, have on the defendant, and how is this influence produced?

Man is essentially a corporeal or material being. His mind is either the result of material organization, consisting of nervous centres, or it is so intimately connected with them as to be incapable of exhibiting life or power when disconnected from them. And it is the universal experience of all physiologists that this connection is so intimate as to show that what affects the nerves immediately affects the phenomena of the mind.

Now, it is known in science, or more properly in *materia medica*, that there are certain things which directly affect these nervous centres of the body; chief among these are strychnia, and alcohol, and the opiates. These taken into the body at once produce visible and marked effects on the mind. The question then arises, are these effects uniform in their character? The great law of like causes producing like effects answers this question that they must be. When not altered by countervailing or repellent circumstances, the action of strychnia, of opium, or of alcohol on the corporeal frame, will be as unalterable and uniform in their character as the revolutions of the planets or the law of gravitation. And such is the general experience of human nature. It is common knowledge, that some men are invariably excited to laughter and hilarity when intoxicated, others to quarrelling, others with the same regularity to morose conduct; some to one particular line of conduct, and others to some other.

How this effect of alcohol, strychnia, or the opiates is pro-

duced is not known as a matter for certain. The investigations of scientific men have, however, discovered that when these substances are taken there is either, on the one hand, a paralysis partial or total of the nerves, or an undue stimulation into action, and which is so great that the influence of the *cerebrum*, where the willing power of man is located, is not able to control this excited condition of the nervous system. This influence is so great that in cases of alcoholic stimulation, or opiate paralysis, the judgment as well as the other powers are affected. When in this situation, the individual acts not as one in full possession of his will, but from *irresistible impulse which he cannot control*, and which physiologists have termed the reflex action of the nervous centres.

The manner in which these various substances affect the nerves is, however, not important to the inquiry, it is only important to show that taking alcohol into the system is matter acting on matter, and to such an extent as, either from an enfeebled or paralyzed will, to be no longer under its restraint or control. In other words, when an individual is deprived of his will and is at the same time acted upon by extraneous circumstances, he becomes no more than any other piece of matter, and the law of causation will apply with full force.

It is obvious, then, and in this view of the case, that such cases as *Jackson* v. *Smith*, the authorities cited on the other side, and all similar cases, as to the admission of the general character of a person, when it is not put in issue by the nature of the action, do not apply to this case.

In those cases it was not matter acting on matter, alcohol upon the nervous centres of the brain, but certain ideas of self-interest, morality, fear, or what not, acting on the will of the individual; and the courts say that when the question is not involved by the very nature of the action, the evidence is too uncertain to be relied upon, because it is impossible to tell with any certainty what were the causes or the motives influencing the will, and how far the will, it being an intellectual capacity, is acted upon by them.

The rule admitting presumptive evidence does not require that this connection between the two facts should be invariable and absolutely certain, but only that it should exist in a majority of cases, or so often as to warrant the court in saying that some reasonable inference might be drawn from it.

And for this reason it need not be shown that the defendant always gamed when intoxicated, for then the proof of intoxication would be proof positive of the gaming, but the fact that he usually gamed when intoxicated, and at no other time, is admissible to show the probability of the fact.

If the habit, or the influence of the ardent spirits on the defendant, was not established to the satisfaction of the jury, then it went for nothing. The court here must decide upon the offer, and if the offer was right in theory, it was for the jury alone to say if this condition of intoxication, on the occasion in question, or this influence of alcohol was established to their satisfaction.

Mr. Justice DAVIS delivered the opinion of the court.

Thompson brought suit in the court below to recover on three promissory notes, purporting to be given on the first day of January, 1857, by Bowie to Steer, and indorsed to him. Bowie sought to avoid their payment on the ground that they were founded on a gaming consideration, and therefore void, even in the hands of an indorsee, without notice, because the statute of 9th Anne, avoiding gambling contracts, was in force in the District of Columbia, where they were executed. There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defence. A brother of the defendant was called by him, and allowed to testify; that whenever his brother was under the influence of liquor, he had a *propensity to gamble*, and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, and payable to the keeper of a gaming-house, the inference

is fair and reasonable, that they were given for money won at play.

Did the court err in admitting this evidence?

If it did err in this matter, then the judgment must be reversed, for, undoubtedly, the jury, in the formation of their verdict, must have been greatly influenced by testimony that the general character or habit of Bowie was to gamble when intoxicated.

All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Bowie to gamble, when drunk, legally tend to prove that he *did* gamble on the day the notes were executed? The general character and habits of Bowie, were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party.* Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted.† If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury that,

* 1 Greenleaf's Ev., § 54.

† 1 Phillips on Evidence, p. 143; The State *v.* Field, 14 Maine, 249.

when drunk, he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases. "There is no difference," says Abbott, Justice,* "as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other."

The uniform habit of a party to loan money at usurious interest, was not considered by the Supreme Court of New York a legal foundation for a verdict establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable, that the case under review was of that description.† The uniform habit of Bowie, when drunk, to gamble is not a legal foundation for this verdict, although it is highly probable that the notes in controversy were executed by him for a gaming consideration.

There are other assignments of error, which it is unnecessary to notice, as the decision of this question disposes of the case.

The judgment of the court below is reversed, and mandate ordered, with instructions to award a

VENIRE DE NOVO.

Mr. Justice GRIER dissenting:

I cannot give my assent to the reversal of this judgment for the reason alleged in the opinion of the court, nor for any other.

The defence to the payment of these notes was that they were obtained by fraud from the defendant when he was drunk, and were without consideration and void.

Now, fraud will not be presumed but must be proved as other facts, either by direct proof or by circumstantial evidence which will convince the mind of a jury that a fraud

* Rex *v.* Watson, 2 Starkie, 155; Regina *v.* Murphy, 8 Carrington and Payne, 306.

† Jackson ex dem Norris *v.* Smith, 7 Cowen, 719.

was committed. It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify directly to their fraudulent contrivances. Circumstantial evidence is often as convincing to the mind as direct testimony, and often more so. A number of concurrent facts, like rays of the sun, all converging to the same centre, may throw not only a clear light but a burning conviction; a conviction of truth more infallible than the testimony even of two witnesses directly to a fact. A cord of sufficient strength to suspend a man may be formed of threads, not one of which, alone, would support the weight of a pound or even of an ounce.

When it becomes necessary for the purpose of justice to have resort to circumstantial evidence, it is the usual course of counsel to object to each thread because it will not support the whole weight of the case. Thus, if the defence be that a note was obtained by a combination of a band of gamblers and swindlers from a drunken man, as but one fact or circumstance can be proved at a time, the learned counsel will object to the offer to prove that the payee kept a gambling-house, and will gravely quote the decision of some learned judge, that a plea of usury cannot be substantiated by proof that the plaintiff had the character of being a usurer; so also that he executed four other notes at the same time to other notorious gamblers, &c. No one of these facts standing by itself would be received as evidence in defence. But the court received evidence of the following facts:

The defendant gave evidence, by several witnesses, tending to prove that Steer kept a gambling-house in Washington City at the time of the date of the said notes, and was not engaged in any other business to the knowledge of the witnesses, and had no property to their knowledge, and that the defendant was at a social entertainment on the night of the 31st of December, 1856, and became grossly intoxicated, so that, in the opinion of said witnesses, he was unfit to transact business, and that he remained in such condition

when he left the place of said entertainment with the other guests who were there, and that he left in such condition between one and two o'clock in the morning of the 1st of January, 1857, and also that the body of said notes was written in the handwriting of J. R. James, who not only frequented the gaming-house of the said Steer, but other gaming-houses; and then gave evidence to prove that said James was a gambler by profession. And the defendant then offered to prove that a note dated on the 1st January, 1857, for $1000, was given by the defendant, payable to Campbell, and indorsed by him, to one Johnson, and that Campbell was a frequenter of the said gaming-house, and assisted in dealing for the said Steer. And the plaintiff objected to the said note to Campbell being admitted in evidence, but the court overruled the objection and admitted the said note to be read in evidence. After the reception of this testimony, of which this court has found no fault, the defendant proposed to add another fact, to wit: "that when the defendant was under the influence of liquor he had a propensity to gamble."

This admission of evidence of a fact, of little consequence in the decision of the case, has been seized upon here and treated as the only fact in the case, and not a circumstance, which, unless connected with others, of itself formed no defence. Now if it was wholly irrelevant, it did no harm to either party. If it was a fact, which might influence the mind of a jury, why should it be withheld from them? In a charge of fraud courts have said, what is evidence to affect the mind of a jury is often difficult to decide or distinguish. But any fact, though in itself of slight importance, will not be withheld. In such cases it is not for the court to treat the jury as persons without discernment, where the issue is one purely of fact. Now there is not a fact stated as having been proved, taken by itself, as *per se* a defence to the action, which counsel might not with equal justice have treated as absurd or ridiculous. But if the court below had selected this fact from all the others as peculiarly liable to objection, their judgment might have been liable to the same charge.

Statement of the case.

THE STATE OF MISSISSIPPI *v.* JOHNSON, PRESIDENT.

1. The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed.
2. It makes no difference whether such incumbent of the Presidential office be described in the bill as President or simply as a citizen of a State.

THIS was a motion made by Messrs. *Sharkey* and *R. J. Walker*, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and *President of the United States*, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two acts of Congress named in the bill, one "An act for the more efficient government of the rebel States," passed March 2d, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an act supplementary to it, passed in the same way March 23d, 1867; acts commonly called the Reconstruction Acts.

The former of these acts, reciting that no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, divided the States named into five military districts, and made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military

commissions, which the act authorized. It provided, further, that on the formation of new constitutions and certain conditions which the act prescribed, the States respectively should be declared entitled to representation in Congress and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede it.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the States in question.

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the Federal government was not in anywise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity."

The bill then went on:

"The acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to exert sovereign power over it—and the utter destruction of the State must be the consequence of their execution. They also violate a well-known salutary principle in governments, the observance of which can alone preserve them, by making the civil power subordinate to the military power, and thus establish a military rule over the States enumerated in the act, and make a precedent by which the government of the United States may be converted into a military despotism, in which every man may be deprived of his goods, lands, liberty, and life, by the breath

of a military commander, or the sentence of the military commission or tribunal, without the benefit of trial by jury, and without the observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen. And the more effectually to accomplish this purpose the said acts divide the ten Southern States into five military districts, and make it the duty of the President to assign an officer to the command of each district, and to place a sufficient force under him, whose will is to be the law and his soldiers the power that executes it. It is declared to be his duty to protect all persons in their rights of person and property; to suppress insurrections, disorder, and violence; and to punish, or cause to be punished, all disturbers of the peace and criminals; and he may organize military commissions and tribunals to try offenders when he may think proper. But, by what rule or law is he to judge of the rights of person or property? By what rule or law is he to arrest, try, and punish criminals? By what rule or law is he to judge whether they have committed crimes? The answer to these questions is plain,—by his own will; for, though he may adopt the State authorities as his instruments if he will, yet he may reject them if he will. A scope of power so broad, so comprehensive, was never before vested in a military commander in any government which guards the rights of its citizens or subjects by law. It embraces necessarily all those subjects over which the States reserved the power to legislate for themselves, as essential to their existence as States, including the domestic relations, all the rights of property, real and personal; the rights of personal security and personal liberty; and assumes the right to control the whole of the domestic concerns of the State. These acts also provide that the governments now existing in the Southern States are but provisional governments, subject to the paramount authority of Congress, which may at any time abolish, modify, control, or supersede them."

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a *mere ministerial duty*, to the execution of said acts, as though they

were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so he performed anything more than a mere ministerial duty; and that with the view to the execution of said acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. Sharkey, of his desire to file this bill, the Attorney-General objected to it *in limine*, as containing matter not fit to be received. The Chief Justice then stated that while as a general thing a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

Messrs. Sharkey, R. J. Walker, and Garland, by briefs filed:

Can the President of the United States be made a party defendant to this bill? There is no precedent directly to the point. Yet it is believed the question has been virtually settled. It is important, in this connection, to mark the distinction between what are called political powers and such as are ministerial. In the exercise of discretionary or political powers, courts will not undertake to control the action of officers; but not so with regard to ministerial duties, in the exercise of which no one is above the law, however exalted his position. Fortunately, we have neither a king nor an emperor, nor a parliament, who are omnipotent or above the Constitution.

Our Constitution declares that "the judicial power shall extend to *all* cases in law and equity arising under this Constitution," &c. And thus the judiciary are made the guardians and protectors of the Constitution.

The President is but the creature of the Constitution, one of the agencies created by it to carry it into practical opera-

tion; and it would be strange if he should be permitted to exert his agency in violating that instrument, and then claim exemption from the process of the court whose duty it is to guard it against abuses, because he is the chief executive officer of the government, and especially when he is exerting a mere ministerial duty; for that is all he does exert in executing an act of Congress; he has no discretion in the matter. The Constitution makes no distinction as to parties. The case is the criterion, no matter who is plaintiff or who defendant; and if the President be exempt from the process of the law, he is above the law. On the trial of Aaron Burr, an application was made for a *subpœnâ duces tecum*, to be directed to the President of the United States; and the application was resisted on the ground that the President was not amenable to the process of the court, and could not be drawn from the discharge of his duties at the seat of government, and made to attend the court sitting at Richmond. But Chief Justice Marshall, who tried the case, drew the distinction between the President and the King of England, and held that all officers in this country were subordinate to the law, and must obey its mandate, and, therefore, sustained the application. There, the *subpœnâ duces tecum* was only a command to the President to do a particular thing. Here, the injunction asked for is but a command to him not to do a particular thing under a void authority. The principle is the same in the two cases, as well as the means of coercing obedience; and the reasoning of Chief Justice Marshall reaches and settles the question now before this court. The Constitution provides, indeed, that all officers may be impeached; but this does not exonerate them from personal liability for acts done under color of office, the President as well as other officers.

If the President be exempt, why not all his cabinet officers? They all constitute but parts of the executive department of the government. Yet in *Marbury* v. *Madison, Secretary of State*,* it was decided that the acts of the Secre-

* 1 Cranch, 137.

tary of State were the acts of the President, and that the secretary might be subjected to the process of *mandamus*. Why would it not just as well lie against the President? It would be strange to hold that the subordinate is liable and may be sued for acts which are the acts of his principal, and yet that the principal is not liable and cannot be subjected to the process of law. Even more recently, in the cases of Mr. Kendall, Postmaster-General, and of Mr. Guthrie, Secretary of the Treasury, this court has decided that officers of the executive department are liable to the process of the court.* The case of *Ellis* v. *Earl Gray*,† is a leading case in England, and has been approved in this court. It was there decided that the Lords of the Treasury, constituting the prominent department of the executive government, might be enjoined by the judicial department. In that country, the King is supposed to be above the law, and is the fountain of justice; yet his immediate subordinate departments are not above it. In this country the President is not above the law; it is above him, and hence he must be subject to its restraints.

In *The State of Ohio ex rel.* v. *Chase, Governor*,‡ the objection was raised, that a *mandamus* would not lie against the governor. But, in delivering the opinion, Chief Justice Bartley said:

"Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests, all paying it homage, the least as feeling its care, and the greatest as not being exempt from its power."

If the chief executive officer of a State is liable to be controlled by the courts of the State in the discharge of ministerial duties, for much stronger reasons is the chief executive officer of the United States liable to be controlled by this court under the provisions of the Federal Constitution. In

* Kendall *v.* The United States, 12 Peters, 524; United States *v.* Guthrie 17 Howard, 284.

† 6 Simons, 214.

‡ 5 Ohio State, 529.

Greene v. *Mumford*,* the Supreme Court of Rhode Island said, in regard to officers:

"If they are departing from the power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under their commission, but treats them as individuals."

By the same principle, the President, when acting in opposition to the Federal Constitution, may be treated as an individual.

II. Does the bill present a case proper for the interposition of this court? [The learned counsel then went fully into this point, enlarging upon and enforcing, by argument and authority, the positions set forth in the bill itself.]

Mr. Stanbery, A. G., contra:

It is manifest here that the case made against Andrew Johnson is not made against him as an individual, as a natural person, for any acts that he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States. The evil complained of, so far as he is concerned, is in the execution of what he considers to be his official duty (as they say, notwithstanding his vetoes), to execute certain acts of Congress by appointing the necessary officers. By his seeing to the execution of those laws the mishief ensues of which they complain; and, therefore, they ask this court to make him a party defendant; they ask this court to submit him, as President, to the process of *subpœna;* to compel his attendance; to bring him, as President, within the power of this court; and to compel him, by the power which a court of equity possesses to enforce its decrees, to do that, in regard to these laws, which this court may deem to be proper.

The opposing counsel admit that this is a case of the first impression; that they have no precedent for such a bill; but

* 5 Rhode Island, 472.

they have certain analogies, they think, under which this court will find power to bring the President here, and make him perform the behests of this court. It will be observed that there is no allegation that the President is about to do anything of his own motion, which, as President, he is not authorized to do. The allegation is, that he is about to execute certain laws passed by Congress; that he considers it his duty to execute those laws; but that this court is a better judge of his duty as President than the President himself; and that when he seeks to execute a law, and to avoid impeachment and denouncement as unfaithful to his duty as Executive, this court is to interfere and tell him what his duty is in the premises, and compel him to perform it.

Now, I beg attention to the cases upon which the counsel rely, not as in point, but as in close analogy; and, first of all, is what was decided in the case of Burr, by Chief Justice Marshall. In the course of the prosecution against Colonel Burr, his counsel deemed it necessary that they should have possession of a certain letter written to the then President, Mr. Jefferson, by General Wilkinson. It did not exactly appear whether it was a private letter or an official letter, but it was said to be a letter in the possession of the President. The counsel of Colonel Burr moved for a subpœna to be issued by the court to the President, commanding him to appear and bring with him that paper. The question was argued by the counsel for the United States, and by the counsel for Colonel Burr; and, although the counsel for the United States did not admit that such process could be issued against the President, they waived the point, and the whole argument was upon the right of the party to have the paper itself. They got upon that side issue, and did not argue, but merely stated the other point, that, according to their idea, a subpœna could not issue against the President. However, when Chief Justice Marshall came to decide the matter, undoubtedly he was of opinion that a subpœna might issue against the President, as President, to produce a paper in his possession as President. Counsel in this case argue from that, if the President is liable to the process of the

court by subpœna to testify, he is liable to the process and the action of the court as a party to abide any order which the court may make. I will go a step or two further with that case, to show how, notwithstanding the opinion that was delivered by the Chief Justice, the court came to a point in which they would not take another step.

When the subpœna was received by the President, Mr. Jefferson, he did not give to it any notice. He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated, that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpœna; that he *would not go;* that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpœna. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpœna, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order. At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite too apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who, on circuit, at *nisi prius*, suddenly, on a motion of this kind, had held that the President of the United States was liable to the subpœna of any court as President.

Is not the proposition subversive of all ideas of what government is and of the purposes for which a President is put in the executive chair, that whenever there are controversies between individuals anywhere in the United States, and the President even in his natural capacity happens to know anything about them, wherever the process of the court can extend to him territorially, he is bound to quit

his office, to leave his place at the head of the government, and to attend to the business of the individual citizen; to remit his duties over the whole and attend to his duties to the individual? I know in that case of Burr an attempt was made to distinguish between the President and a king or queen of Great Britain, for it was acknowledged by every one that there was no authority in England for a suit or a subpœna or any command to the head of the government to appear before any court. But it is said that that depended upon the divinity which hedged a king or crowned head; that with us our President had no such immunity; that he could do wrong, although the King of England could not do wrong; that he was liable to punishment, liable under certain circumstances to process, and they attempted to make a distinction between the two. Undoubtedly so far as the mere individual man is concerned there is a great difference between the President and a king; but so far as the office is concerned—so far as his position as the great executive officer of this government is concerned—I deny that there is a particle less dignity belonging to the office of President than to the office of King of Great Britain or of any other potentate on the face of the earth. He represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world.

It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or *quasi* court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There

he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can he be subjected to the jurisdiction of the courts. Then it is the individual they deal with, not the representative of the people.

But what would be the consequences if the court should issue this subpœna against the President now, and like Mr. Jefferson he should decline to obey it, not out of any disrespect to this court, but out of respect to the high office which he fills? If the court should entertain this case, and direct its subpœna to issue to the President, what will come if, as is inevitable, he will not obey it? No man in the nation entertains a higher respect for this court than he does, but as the custodian of his office, as the person there representing the nation, it is not for Andrew Johnson to speak; it is for the President. He has no particular personal dignity of his own to take care of, but he is bound to take care of the dignity, the rights, and the prerogatives that belong to him as President. The one he may lay down and be as humble as he pleases; the other he cannot lay down. What then will be the consequences? I may suggest them.

If, under such advice and such action as is inevitable if this subpœna is issued, the President declines to obey it, treats the writ issued to him as one which he cannot obey and dare not obey, what next must your honors be called upon to do? Precisely what the Chief Justice was called upon to do in the case of Burr. The gentlemen at once move in this court for an attachment against the President for disobedience of a lawful order of this court that he shall attend and answer this complaint. If the President is liable to the subpœna, as the gentlemen say he is, then he is liable to answer as defendant, and when the subpœna is served upon him, whether he comes or not, if it is a lawful subpœna, he is within the jurisdiction of this court; he is a

party here, and bound therefore by every act and every order which the court makes in this case. What, then, is the order, what is the relief, what is the judgment that the opposite counsel require? It is that he, as President, shall be enjoined from performing and executing two acts of Congress? If, when the President is here by a service of the subpœna, the court proceed in the case, and find it a case in which they are ready to order an injunction to issue to the President to command him not to execute those laws, and notwithstanding, the President goes on to execute them, what follows? That the court must now sustain its own dignity, for the court has a dignity and a power to be observed as well as the President. The next step here, then, is to move for an attachment, or a rule on the President, to show cause why an attachment should not issue against him; for what? For a contempt of this court; that whereas the court ordered him to abstain from proceeding further in the execution of these laws, in defiance of that order the President has gone on to do some acts in execution of the laws. He is therefore brought here by what kind of process? By process *quasi* criminal; by process of attachment to answer for a contempt of the court. Now we have subpœnas no longer; now we have process compelling his attendance, which goes to the marshal, and when we come to the proper point, process that goes to the marshal commanding him to bring the person of the President before this court to answer to this court for a disobedience of its process.

Now let us suppose the case to go so far as it must go in order to give the relief that is claimed; what sort of a spectacle have we? One great department of this government has arraigned another, and the executive department of the government, represented by the President, brought before the judicial department—for what purpose? To be punished criminally; for if he stands out and makes no apology to the court, and does not purge himself of the contempt in failing to obey its orders, the court is bound to put him in jail or to fine him; ordinarily to put him in jail, and, if he still per-

sists, to keep him in jail without any remedy, for in cases of commitment for contempt no *habeas corpus*, as every one knows, can ever reach the prisoner. No other court can release the President from this imprisonment, by *habeas corpus* or otherwise. He is there a close prisoner of this court, and to remain there until he dies, unless he performs the orders of the court.

What then? The President deposed; the President made incapable of performing the duties of his office! Certainly a jail, or a dungeon it may be, is not a fit place to perform the duties and functions of President. You have made the President incapable of performing his duties. What is the effect of that? You have removed the President, for that is one of the conditions in which the President's office becomes vacant, that he is incapable of performing his duties. You have done it more effectually than by impeachment, for an impeachment does not deprive him of liberty; an impeachment sets him at large, and simply takes from him his official character; but the order of this court under these circumstances takes him as President and puts him in jail, and keeps him there until he performs what this court orders him to perform. That vindicates, it is true, the right of the State of Mississippi, or it may vindicate the right of any individual who has some claim to have an injunction against the President; but as to all the rest of us! as to the people, as to the government itself, what becomes of them under these circumstances and the exercise of that power? What becomes of the public safety, the *salus populi*, the supreme law of all laws, that this court, a co-ordinate branch of the government, bound to respect the other branches of the government, not to interfere with their duties or their privileges or their rights—that this court has in effect taken, destroyed, annihilated the President who is put there by the people? You leave the government without a head; you leave the office vacant, and the people must go about to get another President to perform these functions and these duties. In the meantime, until that is done, everything is at large, and there is not a law of the United States that can

be executed, not an officer that can be appointed or an officer that can be removed. There is no one left to proclaim insurrection, if that shall happen. There is no one left to perform all the duties which for the safety of this people as a nation are reposed in the President. To correct a particular evil, to guard a particular individual or a particular State against the acts of the President, there is no way, according to the gentlemen, but to depose that President by a proceeding like this, and, for the correction of this lesser evil, to produce that enormous evil which affects not merely the State of Mississippi, but every other State of the Union and every individual.

Is this the way to treat the head of the government?

Take the common case of an ambassador who comes here from another government, who is not the chief of that government, neither a king nor the president of any republic, but who simply comes here to represent a foreign government. Can you sue him? Can you make him liable? Can you bring him within the jurisdiction of this court, or any other court, unless he chooses to come here voluntarily as a plaintiff? Not at all. His person is sacred. Why? Not on account of any natural dignity that pertains to him, but because he represents a sovereign; he is sent here by the chief executive of some other state—it may be a king, it may be a president—and as representing that foreign sovereign he is no more liable to suit here than the foreign sovereign himself would be, no matter what mischief he may do. I say he is not only not liable to civil suit, but not to criminal proceedings. If the representative of some foreign sovereign, should in a moment of passion kill some one in this District, some one of our own citizens, absolutely murder him—a thing most improbable indeed—but suppose the case—is there a court in the United States that could try that representative for that offence? I am putting the strongest case possible. There is a great mischief, to be sure; the representative has done a great injury; he has taken life; but in that extremest of all cases you cannot correct that great mischief and enormous wrong by com-

mitting the greater wrong of making him, the representative of another government, liable here to suit or prosecution. All you can do is to remand him and send him out of the country, and to require his own government to punish him for the offence he has committed. You have no jurisdiction over him.

The counsel, then, are altogether wrong in their argument that wherever there is a right there must be a remedy—wherever there is a wrong done there must be a means of righting that wrong. Not so; at any rate not in this case.

In support of their right to file this bill, opposite counsel refer to some authorities. They are cases that have been before this court, of proceedings not against the President, but against certain high officers of the government who have been brought in the court or made amenable to the process of the court.

First, let me say that there is a clear diversity between those cases and this. The various heads of departments who have been sued here, such as in the case of Mr. Kendall and Mr. Guthrie, and Mr. Madison while he was Secretary of State, are at last but subordinates. They are agents to carry out the executive power, but they are not the depositaries of the executive power. They have functions to perform, and although they are agents, they are public agents, and we must take care to see our way clearly, when we bring them into court for official action or official misconduct, how it should be done, whether at the instance of a private individual or otherwise. The only cases in which the court has maintained jurisdiction over the heads of departments in order to compel them to execute laws are cases of *mandamus* to compel a Postmaster-General, a Secretary of State, or a Secretary of the Treasury to do something; and the court has always been strict in maintaining that jurisdiction; cautious at every step. That jurisdiction has been exercised again and again, but always with this limitation, that the thing required to be done is a simple *ministerial* act required to be done by the officer in virtue of some specific law. It is a thing as to which he has no discretion

whatever; in which not the President merely but some law requires him to do some one thing. He is commanded by the legislative department to do some one thing in which a citizen is interested and he refuses to do it. The court have said in such a matter as that, being purely ministerial and directed by law, we will require that officer to do that thing. They have never said as to the President that where *he* is directed by law to do some single thing, although ministerial in its character merely, involving no discretion or the performance of any particular duty except the duty to obey that particular statute, that a *mandamus* could go against *him*, in such a case. The counsel can find no such *dictum* even. In the case of a mere subordinate officer the court may very well enforce its authority, even to the point of imprisoning him for contempt; because, taking a Secretary from the head of his department, or an Attorney-General from his office, or a Postmaster-General from his department, does not stop the government, does not interfere with any great branch or department of the government. The President is there to make another Attorney-General, or another Postmaster-General, or another Secretary. That does not interfere with the public interests. The government goes on just as well whether one officer is there or another officer is put in his place. But, notwithstanding that, as I have said, this court have exercised that sort of jurisdiction very carefully. I have not, however, found a case like this, a case in which a suit has been entertained by this court against an executive officer as such officer, or an injunction allowed against him, against the performance of his duty as an executive officer.

The English courts have set their faces against such suits. *Macbeath* v. *Haldimand*,* was an action brought against Haldimand for certain things done by him in his capacity of Governor of Quebec. The case was argued in banc, in 1786, and Lord Mansfield, Mr. Justice Ashurst, Mr. Justice Willes, and Mr. Justice Buller held that he was not personally liable for bills of exchange drawn by him as Governor.

* 1 Durnford and East, 172.

The case of *Gidley* v. *Lord Palmerston** establishes the doctrine that on principles of public policy an action will not lie against persons acting in a public character and situation.

The view I maintain has been expressed in this court, so far as the President is concerned. In *Kendall* v. *United States*,† the court say:

"The executive power is vested in the President. As far as his power is derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution,—through the impeaching power."

There it is. As President, he is beyond the control of any other department, except through the impeaching power. For what is he reached by the impeaching power? The highest crimes and misdemeanors. Therefore, according to this, for the highest crimes and misdemeanors, he is, as President, above the power of any court or any other department of the government. Only in that other chamber can you arraign him for anything done or omitted to be done while he is President.

The State of Ohio, ex rel., v. *Chase, Governor*, is relied on by the other side; but that was a case where the Governor was directed by law to issue a certain proclamation upon the existence of certain facts which were admitted to exist; and it was held that, as the thing to be done did not necessarily appertain to the office of Governor, but was simply a duty imposed by a statute, the court might issue a *mandamus* to compel the performance of the ministerial act prescribed by statute.

So far as this bill seeks to make the President a party, I have said from the first that it was scandalous. I mean, of course, in legal language; that is to say, a suit not fit to be brought, and which no court in the United States can sustain. Therefore it is that as *amicus curiæ*, or as law officer next the President, I have felt bound, at the first motion

* 8 Broderip and Bingham, 275.

† 12 Peters, 610.

made to file this bill, to attempt to keep so scandalous a thing from the records of this court.

It is with the approbation, advice, and instruction of he President that I appear here to make this objection. I should have felt bound to make it on my own motion, as the law officer of the government. But although counsel, in their bill, have said that the President has vetoed these acts of Congress as unconstitutional, I must say, in defen e of the President, this, that when the President did that he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws. He has instructed me to say that in making this objection, it is not for the purpose of escaping from any responsibility either to perform or to refuse to perform.

Mr. R. J. Walker, in reply:

The main question is whether a bill to restrain the President of the United States by injunction issuing from this court from carrying into effect an act of Congress forbidden by the Constitution, and therefore unconstitutional and void, being a proceeding to enjoin the President from the performance of a mere ministerial duty (for by his veto he admits it to be a mere ministerial duty which he is compelled to do), is, in fact, a proceeding against the government of the United States, and whether such a bill can be entertained by this tribunal.

This is not a suit against the President of the United States only, giving the name of no individual, at all, as was the suit of the *Governor of Georgia* v. *Juan Madrazo*, known to the Attorney-General. That case was different, and the court well remarked that no process could issue unless against the State, because there was no individual named against whom any process could issue. But the President of the United States is not the government of the United States. The President, in a suit like this, does not represent all the departments of the government. The distinc-

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tion is drawn in the clearest manner by Chief Justice Marshall, in the great case of Burr.* He there said:

"The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate.

"By the Constitution of the United States, the President, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors.

"By the Constitution of Great Britain the crown is hereditary, and the monarch can never be a subject.

"By that of the United States, the President is elected from the mass of the people, and on the expiration of the time for which he is elected returns to the mass of the people again.

"How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the Executive Chief will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a State, at any rate, under the former Confederation, and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum.*

"If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this court."

In that case the awful consequences, which have been referred to so eloquently by my learned brother, of attaching the President of the United States, and compelling him by process of attachment to obey the subpœna, were all argued

* Trial of Aaron Burr, by Combs, p. 45.

before Chief Justice Marshall gave this opinion. It was owing to entirely extraneous causes that it became unnecessary to carry it out; but this opinion was never recalled, nor changed, nor modified in any respect whatsoever. Of course, if the court had a right to issue a *subpœna duces tecum* to the President of the United States in the same manner as to any other person, it would follow, as a necessary consequence, that the court had a right to follow out a disobedience to that subpœna by the process of attachment for contempt.

The Attorney-General has said that if this court, in the performance of its duty, should proceed under its oath of office to defend the Constitution of the United States from violation, even by the hands of the President, the President could not obey its order, and that there would be brought on a direct and fearful conflict between the President and this great tribunal.

But who has contended more strongly and with more ability than this very President of the United States, in various veto messages, for the final character of the decisions of the Supreme Court of the United States in all cases involving a construction of its Constitution? Who has urged, from time to time, with more ability and force than this President the great doctrine that all the departments of this government are sworn to support the Constitution of the United States, and that this great tribunal, this arbiter, was created by the Constitution to avoid just such a result as the Attorney-General has referred to; was created for the peaceful and final and ultimate decision of all such questions as this? What! The President of the United States not obey the mandate of this court? If he does not, he disobeys the mandate of the Constitution.

It is said that the President merely follows the example of Thomas Jefferson in refusing to obey the subpœna. But the matter in the case of President Jefferson was not carried out. It was not necessary to carry it out. What the court would have done if the necessity had existed may be inferred from the opinion of Chief Justice Marshall. Moreover, I believe that Mr. Jefferson used to boast that he was no law-

yer; we know that he had no very favorable opinion of lawyers, or of judges, and especially no very favorable opinion of the Supreme Court of the United States, or of the great man who presided there—Chief Justice Marshall—during the period when he, Mr. Jefferson, was President of the United States. Upon a judicial question like this I shall not attempt to compare the opinion of President Jefferson with that of Chief Justice Marshall and the Supreme Court of the United States, and of Madison, as shown in the recent publication of the fourth volume of his writings. These carry out the idea set forth by Hamilton, and Madison, and Jay, in the Federalist, at the very time when the Constitution was pending for its ratification before the people, and set forth plainly before them that the Constitution had created one great tribunal, the Supreme Court, for the peaceful decision of all questions of constitutional law. What can be stronger than the language of Mr. Madison, that where two laws conflict with each other, the tribunal which is to expound and interpret the law is to decide which shall prevail? that when you take up an act of Congress on one page, and take up the Constitution on the other, if the act of Congress is in conflict with the prohibitions of the Constitution, that instrument declares it to be utterly null and void? Such was the opinion of Jay, and Madison, and Hamilton. Such was the sense in which the people of all the States understood the Constitution when it was framed, as shown by the debates. Such was the opinion of the first Congress, composed of many of the men who had framed the Constitution, who in the twenty-fifth section of the Judiciary Act gave final jurisdiction to this court in all cases involving the construction of the Constitution, laws, and treaties of the United States, even on appeal from the highest judicial State tribunals.

If there is anything that is definitely settled for three-fourths of a century by repeated and manifest decisions of this court, the opinions of the framers of the Constitution, and the great statesmen of the day, it is that this is the tribunal and the only tribunal created by the Constitution whose decision is final and conclusive upon the interpreta-

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tion of the Constitution. I think that this court will answer the statement in which the Attorney-General has lapsed as to the inevitable disobedience of the President to a writ of this court, as it answered a menace when the Legislature and High Court of Error and Appeals of Virginia declared that *they* would not obey the final mandate of the Supreme Court of the United States. The answer which was given to that menace by the court, through Chief Justice Marshall, its organ, in delivering its opinion, is found in the case of *Cohen* v. *Virginia.**

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts or whatever difficulties a case may be attended we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Such was the answer given by this court, in that day, to the Legislature of Virginia, then all-powerful, and to the unanimous resolve of the High Court of Errors and Appeals of that great State, then composed of distinguished jurists and statesmen; that for this court to refuse to take jurisdiction in a case given them by the fundamental law, whatever the consequences might be, whoever might menace disobedience to the mandate of the court, would be treason to the Constitution. So I say here, that if this court shall issue its mandate, declaring an act of Congress to be unconstitutional, and restraining the President or Secretary of War, or any of the officers of the army or navy, from the execution of that act—whoever shall resist that mandate of the court by force will be guilty of treason.

[Mr. Walker next commented in detail upon the cases which had been cited, arguing from them that no officer is above the law, but that all are amenable and responsible to it.]

* 6 Wheaton, 264.

Opinion of the court.

The Attorney-General has shown a picture of the calamities which would follow, if the President of the United States should disobey the mandate of this court. Let us look at the calamities that might follow, on the other hand, if this court declines to exercise the power which I think is granted by the Constitution, and permits these military laws to go into effect. What then? According to the President's own opinion, as expressed in his veto messages, the Constitution of the United States is, by the Reconstruction Acts, subverted and overthrown, and a military despotism is erected upon its ruins. Ten States are to be expelled from the Union; ten millions of people are to be deprived of all the benefits of the Constitution; deprived of the right of trial by jury. These ten States are cut up into five military districts; people are to be tried outside of their States for offences unknown and undefined, merely at the will of a military officer; deprived of the right of trial by jury; all this in time of profound peace, when Congress itself, speaking, as it has done in several acts, of "States lately in rebellion," admits that there is no rebellion in the land; deprived of their rights and privileges of American citizens. So far as constitutional liberty is concerned, they might as well be living under a Czar or a Sultan, upon the banks of the Bosphorus or the Neva, as in this free country. Life, liberty, and property may be taken from them without due process of law.

The CHIEF JUSTICE delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

The Attorney-General objected to the leave asked for, upon

the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury* v. *Madison, Secretary of State*,* furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

* 1 Cranch, 137.

So, in the case of *Kendall, Postmaster-General*, v. *Stockton & Stokes*,* an act of Congress had directed the Postmaster-General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshal, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

* 12 Peters, 527.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to

observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore,

DENIED.

SAULET *v.* SHEPHERD.

1. Under the practice prevailing in the Circuit Courts of the United States the finding of the facts by the court makes a case in the nature of a special verdict and is conclusive as to those facts; and this although the petition sets forth a different state of facts which are neither confessed nor denied by the answer.
2. The right to alluvion depends upon the fact of contiguity of the estate to the river. Hence where accretion is made before a strip of land bordering on a river, the accretion belongs to *it* and not to the larger parcel behind it and from which the strip when sold was separated.

ERROR to the Circuit Court for the Eastern District of Louisiana.

This was a suit by the heirs of one Saulet for a lot of alluvion (or "batture" as it is called in Louisiana) fronting the city of New Orleans, on the Mississippi. It is marked on the sketch opposite, in shade and as within the letters F G H L.

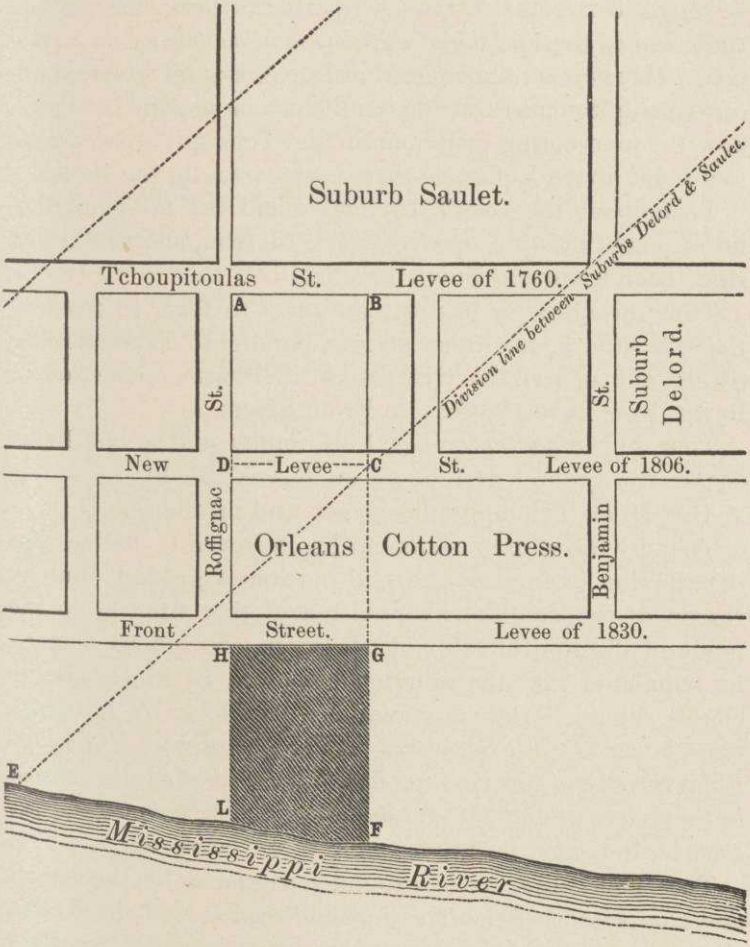
The petition of the heirs set forth:

That their ancestor, Saulet, bought, in 1763, a certain piece of ground (being part of an estate previously known as the Jesuits' Plantation), and that the same was cultivated as a plantation up to the year 1810. [The tract thus purchased is in the region marked on the sketch as "Suburb Saulet."]

That in 1763 the river ran close to and parallel to Tchoupitoulas Street, which was then the public road on the bank of the river, and that there was, outside of the road and close to the river, a dyke or levee running along the whole length of the Jesuits' Plantation, protecting the same from overflow during the annual rise of the Mississippi River.

That outside of the dyke or levee, an alluvial deposit, designated by the name of batture, was afterwards formed, the ownership of which gave rise to much litigation, until the year 1841, when it was finally adjudicated that the said alluvion belonged to the owners of the lands fronting the river.

Sketch showing the lot.



Statement of the case.

That the system according to which the division of such alluvions should be made between contiguous riparian proprietors, was also a matter of considerable doubt until recently, when it was adjudicated that such divisions should be made between contiguous riparian owners according to the *extent of the front line of each owner at the time of the formation of the alluvion;* that the front line of Saulet's plantation, on Tchoupitoulas Street, extended from a point which is now the west corner of Benjamin and Tchoupitoulas Streets, to a point above Roffignac Street, as shown on the sketch.

That about the year 1810, Saulet laid out his plantation into squares and lots, opened streets thereon, and that it had since been known as Suburb Saulet.

That the alluvion having continued to form in front of the said suburb, two other streets, parallel to Tchoupitoulas Street, and nearer the river, were afterwards opened on it, to wit, New Levee Street and Front Street.

That on the 3d September, 1807, Saulet sold to one Bellechasse the ground designated on the sketch by the letters A B C D, on Tchoupitoulas Street, and on the line C D.

That by the same instrument he conveyed to Bellechasse the alluvion in front of the said portion of ground; but by reason of the doubts which existed at that time as to the mode of division of alluvions between contiguous owners, he stipulated that the alluvion conveyed by him to Bellechasse should be taken *between lines parallel to the line of division between Suburb Saulet and Suburb Delord, back of Tchoupitoulas Street, and that the lower line of Bellechasse's batture should be the prolongation of the said line of division between the said two suburbs*, indicated by the letters C E of the sketch.

That hence the whole ground designated by the letters and comprised between the lines C F and C E of the sketch, situated in front of Suburb Saulet, never was sold or alienated by the said Saulet, nor by his legal representatives, and was the property of the petitioners.

That the portion of the said ground indicated on the sketch as that on which the Orleans Cotton Press is built, was now held and possessed under the aforesaid act of sale to Belle-

Statement of the case.

chasse, by one Shepherd, who had probably acquired the same by prescription.

That the portion of the said ground designated by the letters F G H L is now vacant and unoccupied, and under the administration of the city of New Orleans, according to the laws of Louisiana, but that the said Shepherd claims the same, and also the whole ground comprised between the prolongations of Roffignac and Benjamin Streets to the water's edge.

The petitioners prayed, therefore, that Shepherd might be cited; that after due proceedings had, they themselves might be recognized as the owners of the ground between Front Street, the River Mississippi, the prolongation of Roffignac Street, and the line G F of the sketch, and Shepherd be forever enjoined from asserting title to the said alluvial ground.

Shepherd answering the petition, and denying the title of Saulet's heirs, set up among other things, that he had been in uninterrupted and peaceable possession, in good faith and under just titles, for more than thirty years, of the property or estate to which the said property sued for was attached and belonged, and of the said property or batture as long as the same had existed; and that by reason of such possession under the said titles, he pleaded the prescription of ten, twenty, and thirty years.

And further, that he was a *bonâ fide* purchaser of the said property, without notice; and that all those under whom he claims, for a series of more than thirty years, had been *bonâ fide* purchasers of the principal estate to which the batture sued for belongs.

The cause came on to be heard before the court upon the pleadings, and a large body of evidence, and was argued by counsel, and thereupon the court, under a practice usual in Louisiana, found the following, among others, *as facts proved in the cause:*

That the petitioners were the heirs of Saulet.

That, in the year 1763, the Jesuits' Plantation, situated,

Statement of the case.

&c., was sold, and that one lot, as described, became the property of the said Saulet, and of his heirs at his death, except in as far as he legally disposed of it in his life.

That, in the year 1763, the Mississippi River was close to and parallel with Tchoupitoulas Street, which was then a public road on the bank of that river. That, between this road and this river there was a levee to protect the plantation, and extending along its river boundary, and between the river and the levee there was a batture. That this batture continued to exist from that time until 1810, without experiencing much change. But that by the improvement of the country, and from natural causes, it had, since that time, been raised and extended, and had become the subject of profitable ownership, and that the maps produced in evidence [from one of which the sketch given opposite p. 502, is taken], would show, with sufficient certainty, the changes that the *locus* had undergone since 1763.

That, from the year 1763, until a period subsequent to 1809, the proprietor, Saulet, and the successive proprietors of the adjacent lot, now known as the Delord suburb, *acquiesced in and acted upon the opinion, that the division-line between their plantations extended on a right line across the batture, without experiencing any deflection in consequence of the change made by alluvium.* That the claimants under Saulet had acted on the same opinion, and had made improvements in front of their lots, had sustained expensive suits, and borne the charges of such property to the present time, and that this suit was the first legal contestation of that right by the heirs of Saulet.

That the defendant had connected himself with Saulet, and his heirs, by means of deeds which were read in evidence [and which the court specified], and which showed that the defendant was entitled to all the estate, rights, and privileges which were confirmed by the said deeds, or *ensue* from those granted to the parties named in them.

That all the land between the levee, as now possessed by the city of New Orleans and administered for the public use, and the river boundary in 1763 and in 1810, between the

Delord plantation and the farther external line of the lots,—conveyed to Bellechasse, continued to the same,—had been held by the persons claiming under the deeds of Saulet, mentioned before; and that neither Saulet nor his heirs have, at any time before this suit, contested their right.

The court, upon a construction of the deeds above mentioned, declared:

That all the accretions to those lots between the Delord plantation and the external line of the Bellechasse lots had, of right, ceased to be the property of Saulet or his heirs.

That the plea of prescription was available in this case, in the favor of the defendant.

Judgment was therefore given to dismiss the petition.

Mr. Janin, for the plaintiffs in error; Mr. Mason Campbell, contra.

Mr. Justice GRIER delivered the opinion of the court.

The statement of the evidence made by the court below is in the nature of a special verdict, and conclusive as to the facts of the case.

The only question for our consideration is whether the judgment of the court thereon is erroneous.

The plaintiffs claim, as the heirs of Saulet, a parcel of land now forming a part of the batture, in New Orleans, and a part of the levee of the city.

The defendant, in his answer, "claims to have been in uninterrupted and peaceable possession in good faith and under just title for more than twenty years, of the property or estate to which the said land sued for is attached and belongs, as long as the same has existed, and, under the said titles, he pleads the prescription of ten, twenty, and thirty years." The court below finds the facts to be as stated in this plea, and decide the plea of prescription in favor of the defendant.

The civil code of Louisiana declares that the accretions which are formed successively and imperceptibly to any

soil situated on the shores of any creek or run, are called alluvions.

The right to alluvion depends upon the fact of the contiguity of the estate to the river. Before there can be a right to accession or accretion there must be an estate to which the accession can attach. The plaintiffs' claim seems to be founded on the notion that the right to alluvion adhered to the original plantation, and not to the particular portion of it that borders on the river. They assume that it stretches over the lots that have been sold fronting on the river, and debars them from any extension from improvements or natural causes. The case of *Gravier* v. *The City of New Orleans*, quoted in the record, has the following statement of the law on this subject. The court in that case says:

"If Gravier had continued proprietor of the whole tract on which the faubourg has been established, there would have been no difficulty in determining his title to the alluvion. But Gravier has divested himself of all title to that part of his tract on which the faubourg is situated, by the establishment of the faubourg, and by selling the lots fronting and adjoining the highway. It is, therefore, important to inquire what was the situation of the batture or alluvion in question at the time when the faubourg was established, or at least when the front lots were sold, for if no alluvion existed at the time when Gravier ceased to be the owner of the land adjoining the highroad, then it is the opinion of the court that an alluvion subsequently formed would not become the property of Gravier. The reason of this opinion is, that if Gravier could be considered as the proprietor of the road after selling the adjacent land, or of the levee lying between this road and a public river, he would nevertheless, not possess that kind of property which gives the right of alluvion, for the destruction of this property by the encroachments of the river would be a public and not a private loss, since it could not be appropriated to the private use of any individual, and the said road and levee would have become necessarily liable to be kept in repair at the public expense."

Opinion of the court.

The case stated by the court brings this case within the principles established by the court in that.

The matter of fact decided by the court was that the defendant had possessed the property for the full period required by the laws of the State under all the conditions which those laws demand: a possession of thirty years under claim; a possession of ten years under just titles and in good faith. The map will show that the division-line between the De Lord and Saulet suburbs which had been established in 1763, and acquiesced in by the parties, passed through the upper corner of the lands of the Orleans Cotton Press, and did not touch the land in dispute, which is an accession in front of the said lots. The facts as found sustain, therefore, the defendant's plea, and the judgment of the Circuit Court is

AFFIRMED ACCORDINGLY.

BENTLEY *v.* COYNE.

1. Where a vessel has the wind free, or is sailing before or with the wind, she must keep out of the way of the vessel which is closehauled by the wind or sailing by or against it. Those closehauled on the wind, or sailing on the starboard tack, must keep their course.
2. But these established rules of navigation do not apply after a vessel advancing in violation of them is so near another vessel that by such other vessel's adhering to them a collision would be inevitable. A departure from them, under such circumstances, by a vessel otherwise not in fault, will not impair her right to recover for injuries occasioned by the collision.

THESE were appeals from the Circuit Court of the United States for the Eastern District of Michigan, in a libel and cross-libel for collisions of vessels on Lake Michigan; the questions involved being of fact chiefly, and the cases being submitted.

Mr. Hibbard, for the appellants; Mr. Newbury, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Subject-matter of the controversy in this case was a collision between the schooner White Cloud and the bark Newsboy, which occurred on the twelfth day of November, 1862, off Twin River Point, or a little below, on the west shore of Lake Michigan. Owner of the White Cloud filed his libel against the bark Newsboy on the twenty-fifth day of May, 1863, and the owners of the bark filed their cross-libel against the schooner on the twenty-ninth day of September in the same year. Both cases were heard together in the District Court, and the decision was that the bark was in fault. Damages were accordingly awarded to the libellant in the case of the schooner in the sum of five thousand six hundred and seventy-three dollars and sixty-six cents, and the cross-libel was dismissed with costs. Circuit Court on appeal affirmed the respective decrees and the owners of the bark, as respondents in one case and as libellants in the other, appealed to this court.

1. Voyage of the schooner was from Buffalo to Chicago, and that of the bark was from Milwaukie to Buffalo. Capacity of the former was three hundred and eighteen tons, and that of the latter was five hundred and fifty-seven tons, and both were good vessels and had a full complement of officers and seamen. Testimony shows that both vessels were under full headway when the collision occurred, and that it resulted in great damage to the schooner. Among other injuries it broke the rail, stanchions, and bulwarks of the schooner from the fore-rigging to the main-rigging, and cut her outside planks down below the water-line as far as the bilge, and broke the clamps and ceiling down to the bilge-kelson. Damage was also done to the plank-sheer and deck-frame, and the capstan and some of the deck-plank were broken, the forestay-sail split and the butts of the deck-plank were started the whole length of the vessel.

Principal damage was on the starboard side of the schooner, showing conclusively that the blow was between the main and fore-rigging, on that side. She was in ballast, but the bark had a full cargo of wheat. Collision occurred about seven o'clock in the evening, but the proofs

show that it was not very dark, and the witnesses concur that there was no haze on the water and that the lights of vessels could be seen for several miles. Although it was cloudy, still the weather was pleasant and there was a good breeze. Speed of schooner was six or seven miles an hour, and that of the bark was nine miles. Weight of the evidence shows that the wind, though slightly baffling, varying occasionally perhaps a degree to the west, was southwest-by-west, and both vessels were under a full, or nearly full, press of canvas. Course of the schooner was south-half-east, and that of the bark was north-northeast, but she was not kept steady.

Considerable conflict exists in the testimony as to the course of the wind and of the schooner, but the better opinion, in view of the whole case, is, that the testimony of the master is correct. He came on deck twenty minutes before the collision, and he testified that the wind was about southwest-by-west, a little baffling, varying sometimes a point to the westward, and that the vessel was heading by the compass south-half-east, and we adopt those statements as satisfactorily sustained by the weight of the evidence.

Both vessels showed lights, and the proofs are full to the point that each saw the light of the other two or three miles before they came together. Obviously, therefore, it is a case of fault and not of inevitable accident—as the water was smooth and the vessels were sailing in a broad unobstructed thoroughfare. Undisputed fact also is that the schooner was sailing on the starboard tack, closehauled on the wind, and that the bark was on the larboard tack and had the wind free. Rule of navigation is, that where a vessel has the wind free, or is sailing before or with the wind, she must keep out of the way of the vessel which is closehauled by the wind or sailing by or against it, and the vessel on the starboard tack has a right to keep her course and the one on the larboard tack must give way or be answerable for the consequences.*

* St. John *v.* Paine, 10 Howard, 581; The Gazelle, 2 W. Robinson, 517; Woodrop Sims, 2 Dodson, 85; Ann Caroline, 2 Wallace, 544.

Strong effort is made by the respondents to take the case out of the operation of that rule by attempting to show that the schooner changed her course. Persons engaged in navigating vessels upon navigable waters are bound to observe the nautical rules recognized by law in the management of their vessels on approaching a point where there is danger of collision. Undoubtedly the same law which requires vessels having the wind free, or sailing on the larboard tack, to keep out of the way or give way, as the case may be, also imposes the correlative duty upon those closehauled on the wind, or sailing on the starboard tack, to keep their course, in order that the former may know the position of the object to be avoided, and not be baffled or led into error in their endeavors to comply with the requirement.*

Appellants show, beyond doubt, that the schooner changed her course, but they do not show that she changed it at a time or in any sense when or in which the law regards it as a fault. The rules of navigation mentioned do not apply to a vessel required to keep her course after the approach of the advancing vessel is so near that the collision is inevitable. An error committed by those in charge of a vessel under such circumstances, if the vessel is otherwise without fault, will not impair her right to recover for the injuries occasioned by the collision, for the reason that those who put the vessel in that peril are chargeable with the error, and must answer for the consequences which it occasions.

Evidence shows satisfactorily that the schooner kept her course until *the peril was impending and the collision inevitable*, and that the order, hard-a-starboard, was given by the master at the moment it occurred, "to ease off the blow and make it glancing." Such a change of course, at that moment, the District Court held was demanded as a means of self-preservation and was not a fault, and we entirely concur in that conclusion.

Objection is also taken to the decision of the court in confirming the report of the commissioner as to the amount of

* Steamship Co. *v.* Rumball, 21 Howard, 384.

the damages, but the objection is without merit and is hereby overruled. Decision of the District Court in the case of the cross-libel was also correct.

Decree of the Circuit Court

AFFIRMED WITH COSTS IN BOTH CASES.

PURCELL *v.* MINER.

A contract for the exchange of lands is as much within the statute of frauds as a contract for their sale, and a party seeking to enforce a specific execution of a parol contract for that purpose, must bring himself within the same conditions, before he can invoke the aid of a court of equity.

That is to say, he must make full, satisfactory, and indubitable proof—

First. Of the contract, and of its terms; a proof which must show a contract leaving no *jus deliberandi*, or *locus pœnitentiæ;* and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transaction, in chance conversation.

Secona. That the consideration has been paid or tendered. And even the payment of the price in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, if the party have a sufficient remedy at law to recover back the money.

Third. That there has been such a part-performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law.

Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party; a requisition which is not satisfied by proof of a scrambling and litigious possession.

PURCELL filed a bill against Coleman, Miner and wife, and others, in the Supreme Court of the District of Columbia, where the statute of frauds—enacting that all estates in lands made by parol only and not put in writing and signed by the parties making the same shall have the force and effect of estates at will only—is in force. The bill set forth that Coleman having a house in Washington, and he, Purcell, a farm in Virginia, "a trade" had been made between them; and the possession and key of the house delivered to him by Coleman, and full payment admitted by Coleman's

receiving the farm, the title of which he had examined, and "the trade" closed; and that Coleman had requested the complainant to prepare both deeds; that Purcell had done so, and had tendered and was now ready to tender to Coleman a deed for the farm according to the contract.

The bill then went on:

"Your orator further avers that several weeks thereafter, to his great surprise, about the time he had commenced improving the house for the purpose of placing a tenant in it, the said Coleman, in the night-time, entered the back way, by means of a ladder, and took from the back door the key on the inside of said house, and held forcible possession of the same until he was found guilty of the charge by two justices, after hearing all the testimony and having the aid of two counsel. That the said Coleman then delivered the key to your orator, and stated in the presence of several gentlemen that the change of property was fair; that he knew its condition before trading, in relation to its value and title; that it was advantageous to him, but that his wife had a few days previous refused to go with him to the said farm, and that was his only reason for his unlawful conduct, and that he would not do it again, and that he would pay all the costs in the case, which he has failed to do.

"Your orator further avers that notwithstanding the key, possession, and equitable title being with your orator, and that he had actually prepared a bill in equity to compel said Coleman to make him a deed for the house and lot, and was about to file it, that to his great surprise it appeared that on the 9th March, 1861, one Miner had entered into a conditional contract with the said Coleman for the house and lot, and obtained a deed for the same in the name of his wife; the said Miner well knowing at the time he made the conditional contract with the said Coleman that your orator was entitled to the equitable estate in said house and lot, as well as the peaceable and lawful possession of the same; that the said Miner, in order to get possession of the house, in the absence of your orator prepared a false key and entered it, first having torn down the printed advertisement from the door showing the house was for rent by your orator. And that your orator had again to incur the expense, loss of time, and annoyance of prosecuting the writ of

forcible entry, and the said Miner was found guilty as charged, and fined fifty dollars.

"Your orator further avers that the said Miner stated to your orator in the presence of several gentlemen that it was not necessary to make him a party to the suit to compel the legal title; that if your orator succeeded against said Coleman, that said Coleman was to convey back to him or his wife the land in Virginia, which he had conveyed to said Coleman for the house and lot referred to, thereby showing that their pretended exchange was entirely depending on the right of your orator to the said house and lot, which is still in your orator's possession, but owing to the annoyance, by said Coleman and Miner, he has been unable to rent it.

"Your orator further avers that it is impossible to place your orator and the said Coleman in the same situation they were in before they exchanged property, because the said Coleman not having given attention to the farm, a barn has been destroyed, and also much of the fencing, as your orator has been informed and believes, and that he has been at expense in repairing the house and lot, &c."

The bill prayed a specific performance of the contract set up.

The bill was answered by Miner, denying, &c., and set out that Miner also having a farm in Virginia, he and Coleman had agreed on and actually consummated a *bonâ fide* and unconditional exchange of the house for *it*.

The answer then thus went on:

"This defendant further says, that soon after the execution of said deed to his said wife he took possession of the premises (as this defendant was authorized to do as the property of his wife) in a peaceable, quiet, and proper manner, and that he met upon the street a locksmith, who unlocked the front door of said house and sold this defendant a key. Some days subsequently the said complainant demanded of this defendant the possession of said house and lot, which demand this defendant refused to comply with. The next day the complainant came to the premises with a large number of officers and two justices of the peace, and in their presence again demanded possession

of the house and lot, which this defendant again refused to grant, but being requested by said justices, he opened the door and allowed them to enter. The said justices immediately proceeded to try the question of possession, and, to the utter surprise and astonishment of this defendant, imposed a fine for withholding from the said complainant the possession of the said house and lot. This defendant requested the said complainant to show his title to the said house and lot which he claimed, and the said complainant exhibited some papers, but none of them were signed by said Coleman, nor were they of any consequence in reference to the support of his pretended claim of title. This defendant immediately called upon Coleman and related to him the circumstances in reference to the claim upon the house and lot set up by the complainant, and was informed by Coleman that the complainant had no claim upon the said house and lot, but admitted that they had been negotiating for an exchange of properties, and while the negotiations were going on, he, the said Coleman, learned that the farm in Virginia that said complainant had offered him for said house and lot did not belong to the said complainant, and that he could not give him, the said Coleman, a clear title thereto, and consequently that he, the said Coleman, had declined closing any contract with said complainant."

Mrs. Miner did not answer, but made default. A good deal of testimony was taken, many of the interrogatories—the parties managing their own case—being of a most leading character.

The court below dismissed the bill, and the case was now here on appeal.

Messrs. Brent and Merrick, for the appellant, Purcell:

At a moment when the complainant was entitled to a decree *pro confesso* against Mrs. Miner, the recipient of Coleman's title, the court dismissed the bill.

The statute of frauds is not relied on or intimated in the answer of defendants; but if it had been, it would not apply in this case. The giving possession is part performance.*

* Stewart *v.* Dent (N. & S.), 4th July, 1786; Simmons *v.* Hill, 4 Harris & McHenry, 252.

The possession being mutually given and taken by the parties, entitled the appellant to a specific performance of the agreement.* An exchange will be specifically decreed.†

Mr. Miner, pro se, contra.

Mr. Justice GRIER delivered the opinion of the court.

A contract for the exchange of lands is as much within the statute of frauds as a contract for their sale, and a party seeking to enforce a specific execution of a parol contract for that purpose, must bring himself within the same conditions before he can invoke the aid of a court of equity. The statute, which requires such contracts to be in writing, is equally binding on courts of equity as courts of law. Every day's experience more fully demonstrates that this statute was founded in wisdom, and absolutely necessary to preserve the title to real property from the chances, the uncertainty, and the fraud attending the admission of parol testimony. It has been often regretted by judges that courts of equity have not required as rigid an execution of the statute as courts of law.

Nevertheless, courts of equity have, in many instances, relaxed the rigid requirements of the statute; but it has always been done for the purposes of hindering the statute made to prevent frauds from becoming the instrument of fraud.

A mere breach of a parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof—

First. Of the contract, and of its terms. Such proof

* Boon *v.* Chiles, 10 Peters, 177. † McIver *v.* Kyger, 3 Wheaton, 53.

must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi*, or *locus pœnitentiæ*. It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted.

Second. That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money.

Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law.

Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.

The application of these principles to the case before us will show that the plaintiff has wholly failed to establish a case proper for the interference of a court of equity.

We do not think it necessary to a vindication of our judgment to give a history either of the pleadings or evidence disclosed by the record. The case appears to have been carried on by the parties *propriâ personâ*, who are excusable for their ignorance of all the rules of pleading and practice in a court of chancery, or the proper mode of taking testimony. The merits of the case seem to have been tried in a verbal wrangle before two justices, and afterwards converted into a written one for the consideration of the court.

Taking the complainant's bill to be a correct statement of the facts, he has shown no case for the interference of the court. By his statement, the contract was not intended

to be left in parol; but when the parties had each examined the properties proposed to be exchanged, they contemplated to come together and perfect the exchange. If either party had delivered a deed, in execution of the "trade" or bargain, and the other refused to fulfil his part, by making a proper conveyance, or if valuable improvements had been made by the party in possession, there would have been a case for a decree of specific execution. As it was, the defendant declined to go on with the "trade," alleging that the plaintiff's farm was incumbered. He had given the key of the house to the complainant, which was set up as a delivery of possession, while the defendant denied any intention to make such delivery, and took forcible possession of his house. While this contest about the possession was going on, the defendant sold his house, and conveyed it to the wife of his counsel, who carried on the litigation for him before the justices, and here.

The bill must fail—

1. For want of clear, definite, and conclusive proofs of the contract.

2. For want of any delivery of peaceful and uninterrupted possession.

3. Or of valuable improvements made.

We find no part execution on either side, nor anything but a breach of promise, and a consequent quarrel before the contract of exchange was executed.

DECREE AFFIRMED.

NOTE.

SAME *v.* SAME.

AFTER the decision above made, the complainant, Purcell, asked leave of this court to file a petition for a bill of review in the court below. He had already asked in that court, leave to file such a petition; but the leave was not granted.

The petition asked the leave on two grounds.

The first ground consisted in the material evidence which it

was said could be given by Purcell himself, he being rendered competent to testify in his own behalf since the final decree in March, 1864, by the act of Congress of 2d July, 1864, which, for the first time, enabled parties to testify in their own cases. And it being alleged that the new evidence which he would be able to give would establish,—

1st. The clear and definite terms of the contract of exchange.

2d. Part performance of the verbal contract, by each party taking possession of the exchanged property in execution of the contract, and by improvements made.

3d. The tender of a deed of conveyance from the petitioner to Coleman, and his refusal to accept it.

All which facts it was alleged were in the exclusive knowledge of the petitioner.

Besides this new evidence, the petition set forth newly discovered evidence by one Calvert, and others, tending to show distinct and unequivocal acts of possession, by Coleman, of the farm in Virginia, and his improvements thereon under, and in pursuance of the contract of exchange.

Messrs. Brent and Merrick, for the petitioner.

By the new evidence the right of complainant to specific performance would be made out.*

In addition there was error in law,—since the legal title had passed to Mrs. Miner,—in not decreeing against her, *pro confesso*, under the rules of this court adopted by the court below.

Mr. Justice GRIER delivered the opinion of the court.

We have just decided this case and affirmed the judgment below, because by the complainant's own statement in his bill he has shown no sufficient grounds for a court of equity to grant him the relief sought. We will not repeat the points there decided. The case was too plain to leave any possible doubt respecting the correctness of our decision. Moreover, the record showed an application made in the court below, before the appeal to this court, for a bill of review, which was decided by this court to have been properly refused. But it seems that the appellant is not satisfied with the judgment of the court, and

* Story's Eq. Plead., § 412–418; 3 Daniels' Ch. Prac., 1733, side paging.

Opinion of the court.

now makes an application to the court for leave to file *another* bill of review in the court below.

We have no doubt that the complainant honestly believes that he has been greatly wronged by the defendant below, who has taken the liberty of breaking his promise with regard to a parol contract for an exchange of property with the complainant; but we had supposed that in the opinion just delivered, we had shown clearly to the satisfaction of any person who did not suffer under some obliquity of mental vision, that by his own statement of his case, the complainant had mistaken his remedy; and that although he may have suffered a wrong by the defendant's want of good faith, he had not presented a case which required a court of equity to disregard the statute of frauds, because it had been used for the purpose of committing a fraud. As if a party to a contract of exchange had received a deed and kept the land; refusing to give a conveyance for the land given in exchange.

But in this case there was nothing shown but a breach of promise and a scrambling possession, followed by litigation. The present application shows more perseverance and faith in the applicant than discretion or judgment; and presents not a single feature of a case proper for a bill of review.

By Lord Chancellor Bacon's rules, it was declared: "No bill of review shall be admitted except it contain either error in law appearing in the body of the decree without further examination of matters in fact, or some new matter which hath arisen in time after the decree; and not on any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree was made, which could not possibly have been used at the time when the decree passed, a bill of review may be granted by the special license of the court and not otherwise."

We will not put ourselves in the position of seriously noticing the reasons offered for a review of this case. Suffice it to say that the petitioner has not presented a single feature of a case within the rules. He offers no new evidence, but what he might as well have produced before, and which, if it had been produced, would not have justified a decree in his favor.

MOTION DENIED.

COMMISSIONER OF PATENTS *v.* WHITELEY.

1. Where an applicant for reissue of a patent has done all in his power to make his application effectual—has filed his application with the acting commissioner and paid the requisite amount of fees—the application is to be considered as properly before the commissioner.
2. Where a statute directed the commissioner of patents to grant a reissue of patents in certain cases, to "assignees," it is the duty of the commissioner to decide whether the applicant is an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision on the subject; and if he has thoroughly examined and decided that the applicant is not so, a *mandamus* will not lie commanding him to refer the application to "the proper examiner or otherwise examine or cause the same to be examined according to law." The preliminary question was within the scope of his authority. If the *mandamus* had ordered the commissioner to allow an appeal, the order under which it issued would have been held correct.
3. *Mandamus* cannot be made to perform the functions of a writ of error.
4. *Semble* that an applicant for a reissue of a patent under the thirteenth section of the Patent Act of 1836, which allows a reissue in certain cases to a patentee "and in case of his death or any *assignment* by him made of the *original patent*," vests a similar right "in his executors, administrators, or *assignees*," must be an assignee of the whole interest in the patent; and not the assignee of a sectional interest only. At least where the commissioner of patents had thus decided, this court, on the questions being raised in connection with other questions, whose decision rendered a decision on *it* unnecessary, say that "as at present advised they were not prepared to say that the decision of the commissioner was not correct."

ERROR to the Supreme Court of the District of Columbia.

Whiteley, the defendant in error, was the assignee of a sectional interest in a patent granted to Hains, on the 4th of September, 1855, for an improvement in mowing machines. He held, by virtue of several assignments, all the territory embraced in the patent, except the State of Ohio and the northern half of the State of Illinois; and in all the territory, except as just mentioned, was assignee of all the rights of the patentee.

In 1863, he applied to the commissioner of patents for a reissue of the patent, according to the thirteenth section of the Patent Act of 1836; a section which enacts that—

Statement of the case.

"Whenever any patent, &c., shall be inoperative or invalid, by reason of a defective or insufficient description or specification, &c., if the error has or shall have arisen by inadvertency, accident, or mistake, &c., it shall be lawful for the commissioner, upon the surrender to him of such patent, &c., to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification. And in case of his death, or *any assignment* by him made of the original patent, a similar right shall vest in his executors, administrators, or *assignees.*"

The assignees for the State of Ohio, and of the northern half of Illinois, did not join in the application.

The commissioner of patents, after a laborious investigation of the law and comparison of various sections of the patent acts, decided that the applicant, not being the assignee of the whole interest in the patent, was not entitled to the reissue asked for.

Whiteley took no appeal from the commissioner's decision to the "board of examiners," but setting forth that his application for reissue was filed with the acting commissioner, and the refusal, petitioned the Supreme Court of the District of Columbia for a *mandamus* to send the application *to an examiner to be acted upon by him as though made by the patentee.*"

The commissioner, in reply—premising that for the reason that the proposed applicant was not such an assignee as the law contemplates, and that the application, therefore, was not filed, or entered upon the books of the office, and never had been, and that the fees required on such application, which had been paid by the relator to the chief clerk of the office, on the presentation of said application, had not been placed to the credit of the patent fund, but remain in the hands of the chief clerk, personally, and subject to the order of the relator—replied, among other reasons, against the *mandamus:*

1. That the object of it was to carry by appeal a preliminary question solely cognizable by him, to the Supreme Court of the District, and that such a *mandamus* would be nugatory.

2. That he had decided rightly in rejecting the application, the relator not coming within the meaning of the term "assignee," as contemplated in the thirteenth section of the act of 1836. And in support of this view he submitted as part of his answer a full law argument, which now came up in the record.

The Supreme Court of the District granted the *mandamus*, "commanding the commissioner of patents *to refer said application to the proper examiner, or otherwise examine or cause the same to be examined according to law.*" The case was now here on writ of error, brought by the commissioner of patents, to remove the proceeding to this court. Two principal questions were raised:

1. Supposing the decision of the commissioner to have been erroneous, and that the assignee of a sectional interest in a patent was entitled to a reissue, did a *mandamus* such as that above mentioned lie to correct the decision?

2. Did the commissioner, in deciding as he did, that the applicant as owner of but a sectional interest was not entitled to a reissue, decide correctly?

In order to judge of the first question it is necessary to state—

1. That the Patent Act of 1836, by its seventh section, provides that on the filing of any application for a patent, "the *commissioner* shall make or cause to be made an examination of the alleged new invention or discovery," and if on such examination it does not appear that the same had been invented or discovered by any other person, &c., he shall issue the patent. But if, on the contrary, he shall decide that the applicant was not the original and first inventor, &c., and the applicant shall insist on his claim, "such applicant may *on appeal have the decision of a board of examiners* to be composed of three disinterested persons who shall be appointed by the Secretary of State for that purpose," which board shall have power "to reverse the decision of the commissioner, either in whole or in part."

2. That by an act of 1837, in addition to the former act, it is provided that in cases of application to the commis-

sioner for *re*-issue, the applicant, if dissatisfied with the decision of that officer, "shall have the same remedy and be entitled to the same privileges and proceedings as are provided by law in the case of *original* applications."

Mr. Foote, for the plaintiff in error, contended:

On the first point. That if the decision was erroneous it could not be corrected in the manner in which the relator had proceeded. The commissioner had already done just that thing which the writ commanded him to do. He had examined the matter very fully, and the proof of this was in the document found in the record as the chief reply to the application for the *mandamus* granted. The remedy was appeal.

On the second point. The decision of the commissioner was believed by him to be correct; but that officer had no personal interest in the questions. All that he wished was that it should be settled by this court. Similar questions frequently arose in the Patent Office, and it was important to the public interest that the statute should receive an authoritative construction.

He conceded that an extension of the act to assignees of sectional interests would be very convenient to them. That the necessity of a reissue might be as great to them as to the owner of the whole interest. Indeed that their rights might be impaired and even lost for want of such a power.

But there were serious objections to such a construction of the statute.

1st. It might lead to as many different patents for the same invention as the patentee should grant sectional interests in it.

2d. Upon a reissue the original patent must be surrendered.

In *Moffatt* v. *Garr*,* this court held that a surrender of the patent to the commissioner in judgment of law extinguishes the patent. It is a legal cancellation of it; and

* 1 Black, 273.

hence can no more be a foundation for a right after the surrender than could an act of Congress which had been repealed. If the patent be cancelled by one assignee, how could a suit be maintained upon it by another who had not joined in the reissue? Or if the sectional assignee did not happen to possess the patent, how could he surrender it to be cancelled?

3d. The omission in the thirteenth section of the act to mention the grantees of sectional interests, as would be seen on reference to it that the act does in other sections, in connection with the requirement of a surrender of the patent, would seem to imply that it was not the intention of the act to extend its provisions beyond the patentee and the assignee of the whole interest.

Messrs. Coombs and Fisher, contra.

So far as it was possible, Whiteley complied with all the forms and requirements of the law. The case, therefore, presents general questions of right applicable to many cases.

I. Has the Supreme Court of the District of Columbia jurisdiction and power to grant and enforce a "writ of *mandamus*" commanding the commissioner of patents to do an act enjoined by law?

The writ is a remedial writ, issuing out of the King's Bench, or other highest court of original jurisdiction; it commands the party to whom it is directed to do his duty, and summarily enforces its command by attachment; and it is the appropriate remedy where the law has prescribed no specific remedy, and where justice and good government require one. It is based upon the principle, that there should be a remedy to enforce every right. Without such writ, of such general application, and of such power *in terrorem*, the frequent failure of justice would be intolerable. Nowhere in the country is there so great need of the writ of *mandamus* as in the District of Columbia, where all the great departments of the general government have their

offices, and where the rights of the people are so liable to infringement.

In *Griffith* v. *Cochran*,* a rule was granted upon Cochran, Secretary of the Land Office, "commanding him to prepare and deliver patents to Griffith" for certain tracts of land. The court said:

"Where a ministerial act is to be done, and there is no other specific remedy, a *mandamus* will be granted to do the act which is required; but where the complaint is against a person who acts in a judicial or deliberative capacity, he may be ordered by *mandamus* to proceed to do his duty, by deciding according to the best of his judgment, but the court will not direct him in what manner to decide. This was the principle adopted by the Supreme Court of the United States, in the case of *United States* v. *Lawrence*,† and it has been frequently recognized by this court. If the secretary had in this case refused to make any calculation, or take any step whereby the business of the applicant might be despatched, it would certainly have been our duty to compel him by *mandamus*."

In *Kendall* v. *United States*,‡ in this court—the leading authority upon the question,—the court said:

"Congress has entire control over the District for every purpose of government; and it is reasonable to suppose that, in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice. The Circuit Court here is the highest court of original jurisdiction; and if the power to issue a *mandamus* in a case like the present exists anywhere, it is vested in that court."

In *Decatur* v. *Paulding*,§ Taney, C. J., in delivering the opinion of the court, said:

"In the case of *Kendall* v. *United States*, it was decided in this court, that the Circuit Court for Washington County, in the

* 5 Binney, 103–105.
† 3 Dallas, 42.
‡ 12 Peters, 524.
§ 14 Id. 515.

District of Columbia, has the power to issue a *mandamus* to an officer of the Federal government commanding him to do a ministerial act."

The act of Congress of 3d March, 1863,* which established the Supreme Court of the District of Columbia, in section third, says:

"The Supreme Court organized by this act shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia," &c.

II. Is the commissioner of patents commanded by law to examine, or cause to be examined, a proper and lawful application for a reissue, and does the writ of *mandamus* lie to enforce that command?

The relator holds, that when an application for a reissue is made in due form of law, it is the duty of the commissioner to examine it, and take such action upon the case as will enable the applicant to appeal from his decision if it be unfavorable. To this the commissioner objects, that the relator is not entitled to apply for a reissue, because he does not own the entire patent; that the legal question involved is *preliminary*, and determinable by him alone, without appeal; and refuses to put the case upon the files of the Patent Office in such form, that his refusal to grant the reissue, would give the applicant an appeal to a Justice of the Supreme Court of the District of Columbia. And the object in praying for the writ was, that the commissioner might be compelled to "examine" this case. Before the examination can be made, the case must be duly *filed*, and then, if the commissioner refuses the patent, for any reason, we are entitled to an appeal; but as long as the commissioner keeps us completely out of the Patent Office, we are subject to his will, which deprives us of the right of appeal.

The thirteenth section of the act of 1836; the eighth sec-

* 12 Statutes at Large, 762.

tion of the act of 1837, which is supplemental to it, and the seventh section of the act of 1836, are co-active sections of the law and command the commissioner to make, &c., an examination.

This being the case, the writ of *mandamus* lies to enforce that command.

Formerly the received idea was, that a *mandamus* would lie only to command the performance of a ministerial duty; but modern cases have gone much further, and it is now the practice to grant the writ to command the performance by any inferior jurisdiction or officer, of any public duty, for which there is no specific remedy. The duty must be a public one, though the value to the public is not scrupulously weighed.

Adjudged cases* cover the present one, and demonstrate the power of the court below to command and compel the commissioner of patents "to hear the application;" "to exercise his discretion;" "to determine the one way or the other;" "to put himself in motion to do the thing;" "to proceed to do his duty," by examining, or causing to be examined, our application for a reissue, according to law.

III. Has the grantee of an exclusive territorial interest in a patent a legal right to apply for a reissue of that patent?

In *Shaw* v. *Cooper*,† the court say, "That the *holder* of a defective patent may surrender it to the Department of State, and obtain a new one, which shall have relation to the emanation of the first, was decided by this court at the last term, in the case of *Grant and Others* v. *Raymond*."‡

The word "holder" here used, it must be observed, is a general term, and cannot be so restricted as to apply only to one who holds the entire interest in a patent; but is equally applicable to those who hold any exclusively territorial interest.

Moreover, the thirteenth section of the act of 1836, which

* Rex *v.* Bp. of Litchfield, 7 Modern, 218; Rex *v.* JJ. of Kent, 14 East, 220; Rex *v.* JJ. of North Riding, 2 Barnewall and Cresswell, 291; and Griffith *v.* Cochrane, 5 Binney, 103.

† 7 Peters, 292.

‡ 6 Id. 220.

first established the reissue, as now granted, grants unto *any assignee* the same right to a reissue that it grants to the patentee. Had it been the intention of Congress to restrict the remedy of reissue to the assignee of the *whole* interest, it would have been easy to use words of limitation, or to have used the restrictive and definite article "the" instead of the distributive pronoun "any," before the word "assignment."

[The learned counsel followed, and replied to the argument of the commissioner, as set forth in the opinion annexed to his answer, and made part of the argument; contending, also, that Whiteley was not a mere grantee of an exclusive territorial right.]

Mr. Justice SWAYNE delivered the opinion of the court.

This case was brought here by a writ of error to the Supreme Court of the District of Columbia.

On the 4th of September, 1855, a patent was issued to Jonathan Haines for an improvement in mowing machines.

On the 22d of November, 1856, Haines sold and assigned to Ball, Aultman & Co., an exclusive right to the invention and patent, within the limits of the State of Ohio.

On the 13th of April, 1858, upon the surrender of the original patent by Haines, and upon his application, without the assent of Ball, Aultman & Co., a reissue of the patent was granted to him.

On the 15th of January, 1860, Jonathan Haines sold and assigned to his brother, Ansel Haines, one undivided third part of his interest in the patent.

On the 25th of January, 1860, Jonathan and Ansel Haines sold and granted to Isaac and Wm. C. Hawley the exclusive right to the invention and patent in certain counties in the State of Illinois.

On the 10th of April, 1863, Ansel Haines reassigned to Jonathan Haines all his interest in the patent.

On the 17th of April, 1863, Jonathan Haines sold and assigned all his interest in the patent to Andrew Whiteley, the defendant in error. Haines, at the same time, delivered

the patent to Whiteley, in order that he might surrender it and procure another reissue.

Ball, Aultman & Co. were applied to; but declined to concur. It does not appear that the Hawleys were advised upon the subject.

On the 25th of January, 1863, Whiteley filed his application for a reissue in the Patent Office, in conformity with the provisions of the thirteenth section of the act of 1836.

The commissioner of patents declined to entertain the application, upon the ground that the applicant was only the grantee of an exclusive sectional interest, and not of the entire patent. He also declined to allow an appeal to be taken from this decision. An application was thereupon made to the Supreme Court of the District of Columbia for a writ of *mandamus*. That court awarded a peremptory writ, commanding the commissioner "to refer said application to the proper examiner, or otherwise examine or cause the same to be examined according to law." This writ of error is prosecuted to reverse that order. Did the court err in making it?

The thirteenth section of the act of 1836 declares that, under the circumstances therein stated, "it shall be lawful for the commissioner, upon the surrender to him of such patent," . . . . "to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specifications; and in case of his death or any assignment by him made of the original patent, a similar right shall vest in his executors, administrators, or assigns."

The seventh section of this act provides that, on the filing of any application for a patent and the payment of the duty required, "the commissioner shall make, or cause to be made, an examination of the alleged new invention or discovery," &c.

The eighth section of the act of 1837 provides, in regard

to applications for the reissue of patents, and the decisions of the commissioner, that "in all such cases the applicant, if dissatisfied with such decision, shall have the same remedies, and be entitled to the benefit of the same privileges and proceedings as are provided by law in case of original applications for patents."

This renders it necessary to recur to the act of 1836, and to consider carefully its provisons touching the applications to which it relates.

Both acts should be liberally construed to meet the wise and beneficent object of the legislature. Patentees are a meritorious class, and all the aid and protection which the law allows, this court will cheerfully give them.

If the commissioner should hold that a party applying originally for a patent "was not the original and first inventor," and should decide against him upon that ground, the applicant could undoubtedly take an appeal from his decision. The commissioner having reached this conclusion, would be under no obligation to go further and examine any other question arising in the case, and it would not be necessary to the right of appeal that he should do so.

Here an assignee applied for *the reissue* of a patent. It was clearly competent for the commisioner, and it was his duty, to decide whether the applicant was an assignee at all, and, if so, whether he was an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision upon the subject. The latter question is an important one. It is as yet unsettled, and awaits an authoritative determination.

The commissioner says, in his answer to the rule, that he could not examine the application, because none had been filed in the Patent Office.

This position is untenable. It is averred in the petition, and not denied in the answer—and, therefore, as in other like cases of pleading, to be taken as conceded– that the application was filed with the acting commissioner. It is also admitted, in the answer, that the requisite amount of fees had been paid by the relator, but, it is added, that it

had not been placed to the credit of the office, and was in the hands of the chief clerk, subject to the relator's order.

The relator had done all in his power to make his application effectual, and had a right to consider it properly before the commissioner.

It was so. If it was not, a *mandamus* would clearly lie to compel the commissioner to receive it. It was his first duty to receive the application, whatever he might do subsequently. Without this initial step there could be no examination, and, indeed, no rightful knowledge of the subject on his part. Examination and the exercise of judgment, with their proper fruit, were to follow, and they did follow.

The commissioner found the question, whether the assignee was such a one as the law entitled to a reissue, lying at the threshold of his duties? It required an answer before he could proceed further. His decision was against the appellant. His examination of the subject was thorough, and his conclusion is supported by an able and elaborate argument. It was made a part of his reply to the rule, and is found in the record.

From this decision, whether right or wrong, the relator had a right, under the statute, to appeal.

If the *mandamus* had ordered the commissioner to allow the appeal, we should have held the order under which it was issued to be correct. But the order was that he should proceed to examine the application. That he had already done. The preliminary question which he decided was as much within the scope of his authority as any other which could arise. Having resolved it in the negative, there was no necessity for him to look further into the case. Entertaining such views, it would have been idle to do so. *The question* was vital to the application, and its resolution was fatal, so far as he was concerned. Only a reversal by the tribunal of appeal could revive it, and cast upon him the duty of further examination.

The principles of law relating to the remedy by *mandamus* are well settled.

It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.

It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.

It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error.

In *Decatur* v. *Paulding*,* referring to an act of Congress under which the relator in that case claimed a pension which had been refused her by the Secretary of the Navy, this court said: "If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by any head of a department; and if they supposed his decision to be wrong, they would of course so pronounce their judgment. But their construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor reverse his judgment in any case where the law authorizes him to exercise discretion or judgment; nor can it by *mandamus* act directly upon the officer, and guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. . . . The interference of courts with the performance of the ordinary duties of the executive department of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them."

This case, as presented to the court below, was within neither of the categories above mentioned. The court, therefore, erred in making the order to which the commissioner objected.

The main question passed upon by the commissioner, and

* 14 Peters, 515.

which was supposed to underlie this case, is not before us for consideration. If it were, as at present advised, we are not prepared to say that the decision of the commissioner was not correct.

The order of the court below, awarding the *mandamus*, is reversed with costs, and it is ordered by this court that the application of the relator be by that court

OVERRULED AND DISMISSED.

VON HOFFMAN *v.* CITY OF QUINCY.

1. Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied. The State and the corporation in such a case are equally bound.
2. A subsequently passed statute which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity.
3. It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.
4. If it does not perform this duty a *mandamus* will lie to compel it.

THIS case was brought up by a writ of error to the Circuit Court of the United States for the Southern District of Illinois.

The relator filed his petition in that court, alleging, among other things, as follows:

At the June Term, 1863, and before that time, he was the owner and holder of certain coupons on interest notes of the City of Quincy. They were past due and unpaid. When issued and negotiated they were attached to certain bonds made and delivered by that city, in payment for the stock of the Northern Cross Railroad Company, and of the Quincy and Toledo Railroad Company, subscribed for by

the city under and by virtue of certain acts of the legislature of Illinois, of the 17th of October, 1851, and 26th of January, 1853, and the 31st of January, 1857. *By the provisions of these several acts the city was authorized to collect a special annual tax upon the property, real and personal, therein, sufficient to pay the annual interest upon any bonds thereafter issued by the city for railroad purposes, pursuant to law.* It was required that the tax, when collected, should be *set aside*, and held separate from the other portions of the city revenue, as a fund specially pledged for the payment of the annual interest upon the bonds aforesaid. It was to be applied to this purpose, from time to time, as the interest should become due, "*and to no other purpose whatsoever.*"

The city failed to pay the coupons held by the relator for a long time after they became due, and refused to levy the tax necessary for that purpose. The relator sued the city upon them in the court below, and at the June Term, 1863, recovered a judgment for $22,206.69 and costs. An execution was issued and returned unsatisfied. The judgment was unpaid. The city still neglected and refused to levy the requisite tax. He therefore prayed that a writ of *mandamus* be issued, commanding the city and its proper officers to pay over to him any money in their hands otherwise unappropriated, not exceeding the amount of the judgment, interest, and costs; and, for want of such funds, commanding them to levy the special tax as required by the acts of the legislature before referred to, sufficient to satisfy the judgment, interest, and costs, and to pay over to him the proceeds.

The city filed an answer. It alleged that there was no money in its treasury wherewith to satisfy the judgment, and as a reason why a peremptory writ of *mandamus* should not issue, referred to an act of the legislature of Illinois, of the 14th of February, 1863, which contains the following provisions:

Sec. 4. The city council of said city shall have power to levy and collect annually taxes on real and personal property within

Statement of the case.

the limits of said city, as follows: On real and personal property within, or which may hereafter be within, portions of said city lighted with gas, to meet the expenses thereof, not exceeding twenty-eight cents on each one hundred dollars per annum on the annual assessed value thereof. On all real and personal property within the limits of said city, to meet the expenses of obtaining school grounds, and erecting, repairing, and improving school buildings and school grounds, and providing teachers and maintaining public schools in said city, and to be devoted exclusively for such purposes, not exceeding twenty-five cents on each one hundred dollars per annum on the annual assessed value thereof: *Provided, That no more than eighteen cents on each one hundred dollars aforesaid shall be levied in any year for such purposes without the concurrence of a majority of the votes of legal voters of said city*, to be cast at an election to be ordered by said city council, and held to determine the rate per cent. so to be levied. On all real and personal property within the limits of said city, to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof.

Sec. 5. All laws and parts of laws, other than the provisions hereof, touching the levy or collection of taxes on property within said city, except those regulating such collection, and all laws conflicting herewith, are hereby repealed; but this act shall not affect taxes of said city relating to streets or alleys, or to licenses of whatever nature, nor any sources of revenue other than taxes upon real or personal property, and which said act remains in full force and unrepealed.

The answer averred that the full amount of the tax authorized by this act had been assessed, and was in the process of collection; that the power of the city in this respect has been exhausted: "and that the said fifty cents on the one hundred dollars, when collected, will not be sufficient to pay the current expenses of the city for the year 1864, and the debts of the said city." It further alleged that about the year 1851, the city, under the act of November 6th, 1849, issued to the Northern Cross Railroad Company bonds to the amount of $100,000, and about the year 1854, under the act of January 26th, 1853, other bonds to the amount of

Argument for the relator.

$100,000, and that about the year 1856, it made and delivered its other bonds to the amount of $100,000. It alleged that the bonds last issued were wholly unauthorized, but that they were subsequently ratified by the legislature by the act of January 1st, 1857. The relator's judgment, it averred, was founded upon coupons belonging to bonds of these three classes.

The relator demurred to the answer, and judgment was given against him.

The principal question in this court was whether the act of February 14th, impaired the obligation of a contract, and was therefore void within the tenth section of the first article of the Constitution, which prohibits any State from passing such an act.

A second question was whether, if it did so, a *mandamus* would lie against the city to compel it to levy a tax to pay the debt.

Messrs. McKinnon and Merrick, for the relator, plaintiff in error.

I. The general law of November 6th, 1849, and the several supplemental acts of the legislature, under which were issued the coupons, or interest notes, on which the relator obtained judgment, constitute a contract.

"A contract," says Chief Justice Marshall,* "is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. A contract executed is one in which the object of the contract is performed, and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right."

This language was used in reference to a grant of land,

* Fletcher *v.* Peck, 6 Cranch, 137.

Argument for the relator.

by the governor of a State, under a legislative act. It is simple and unambiguous, and determines, in an unequivocal manner, that the grant of a State is a contract within the clause of the Constitution referred to, and implies an agreement not to resume rights granted. The doctrine applies to an act of the legislature granting authority to a city to issue its bonds in consideration of railroad stock, for its private advantage and emolument, and provide for the payment thereof by special taxation.

These acts of the legislature are grants of special powers and privileges to the respondent, for its private advantage and benefit, and not for municipal purposes, and when acted upon, and bonds are issued and negotiated thereunder, the acts fall completely within Judge Marshall's definition of executed contracts.

Do the acts possess, in any less degree, the elements of a good contract than a charter granted by the supreme power of a State, to any given number of persons, or corporators, for religious or educational purposes? They do not; and no one, at this day, would contend that such a charter is not a contract within the meaning of the constitutional provision invoked.

In *Dartmouth College* v. *Woodward*,* which was an action of trover that grew out of an attempt on the part of the legislature of New Hampshire, as revolutionary successor of George III, to revoke a charter of this kind, Judge Marshall, in delivering the opinion of the court, and speaking of the charter, holds the following language:

"This is plainly a contract to which the donors, the trustees, and the crown—to whose right and obligations New Hampshire succeeds—were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also."

* 4 Wheaton, 643.

Argument for the relator.

The language of this case is applicable to the case at bar. Here we have a grant of special powers by legislative enactment, authorizing the respondent, as a private company, to purchase or subscribe for stock in certain railroad companies, and in payment therefor to issue its bonds, and provide for the annual interest on and the ultimate redemption of the bonds so issued, by the levy and collection of a special tax, to be set aside and held separate and distinct, for that and no other purpose whatever. Under these powers and privileges, stock is subscribed for, bonds issued and negotiated, pecuniary rights vested, and third parties, relying upon this legislative grant, pay out their money, and *bonâ fide* become the owners of the bonds and coupons so issued.

But, probably, the most accurate definition of a contract by legislative grant, anywhere to be met with, is that laid down by Mr. Justice Washington, in this same case.

That learned judge, after stating that the question was whether the charter granted to Dartmouth College, on the 13th of December, 1769, was to be considered as a contract, then asks what is a contract? and, in answer, says:

"It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. The ingredients requisite to form a contract, are: parties, consent, and an obligation to be created and dissolved."

Apply this definition to the case at bar.

In the first place, there is a legislative grant of special powers, enabling the respondent, as a private company, to subscribe for stock in certain railroad companies, issue its bonds for the amount of such stock, and to provide for payment of the bonds so issued, with interest thereon, by the levy and collection of a special tax.

Following this grant of powers and privileges is the fact of a transaction in strict pursuance thereof.

Here, then, is every ingredient which, according to the definition, is requisite to form a contract—parties, consent,

and obligation—whereby each party reciprocally acquired a right to what was promised by the other.

"A legislative act, conferring powers and privileges, is a grant which, when accepted, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right; and, therefore, the legislature is estopped by its own grant."*

A State legislature may bind the State by contract in regard to the exercise of the power of taxation.†

The act of February 14th, 1863, attempting as it did to revoke the power vested in the corporate officers to levy a special tax to pay a debt incurred on the faith of the existence of the power, is not distinguishable from a law prohibiting the sheriff from selling on execution, except on certain conditions.‡

It follows as a corollary that the act of February 14th, 1863, so far as the same repeals the several laws and parts of laws under which the coupons, or interest notes, in question were issued, by prohibiting the Common Council of Quincy to levy and collect the special tax which those laws and parts of laws direct to be levied and collected as a means of paying its bonds and interest coupons issued thereunder, as it did, is an act impairing the obligation of contracts.

II. The court below had power by *mandamus* to compel the city to levy and collect a tax to pay the judgment ob-

* Fletcher *v.* Peck, 6 Cranch, 137; State of New Jersey *v.* Wilson, 7 Id. 166; Terret *v.* Taylor, Id. 43; Town of Paulet *v.* Clark, Id. 252; Sturgis *v.* Crowninshield, 4 Wheaton, 122; Mechanics' Bank of Pennsylvania *v.* Smith, 6 Id. 131; Green *v.* Biddle, 8 Id. 1; Bronson *v.* Kinzie, 1 Howard, 311; McCracken *v.* Hayward, 2 Id. 608; Gantly's Lessee *v.* Ewing, 3 Id. 707; Planters' Bank *v.* Ewing, 6 Id. 319; Curran *v.* Arkansas, 15 Id. 304; Commissioners of Knox County *v.* Aspinwall, 21 Id. 239; Curtis *v.* Butler County, 24 Id. 446; Rice *v.* Railroad Company, 1 Black, 373; People *v.* Bond, 10 California, 571.

† McGee *v.* Mathis, *supra*, p. 143; The State of New Jersey *v.* Wilson, 7 Cranch, 164; Billings *v.* The Providence Bank, 4 Peters, 514; Gordon *v.* Appeal Tax Court, 3 Howard, 133; The F. & P. Railroad Co. *v.* The Louisa Railroad Co., 13 Id. 71; Jefferson Branch Bank *v.* Skelly, 1 Black, 349.

‡ McCracken *v.* Hayward, 2 Howard, 71.

tained against it for interest on its bonds issued under the special authority abovementioned.*

Messrs. Cushing and Ewing, Jr., contra, for the City of Quincy, defendant in error:

Mandamus lies only where there is a clear legal right to have a specific thing done by the public officer. And when the legislature has inhibited a city from levying a tax exceeding a certain limit, no court can compel it by *mandamus* to override the legislative limitation.†

The act of 1863, set up in the return, fixes the maximum of taxation by the city, to meet certain municipal expenses, and to pay the debts of the city, at fifty cents on the hundred dollars. This tax has been duly levied, to the limit authorized, and, therefore, the city has failed to execute no power of taxation. This act is clear and explicit, leaving no room for construction. The purposes of taxation are named. The intention of the act is free from question.

Does the act of 1863, set up in the return, "impair the obligation of the contract?" We think that it does not.

Legislative power and control over the public revenue, over the entire subject of taxation, is a fundamental element of sovereignty which must ever remain with the State; a political power to be exercised consistently with the public interests, or necessities, and over which the courts have no jurisdiction. No contract, binding or controlling the legislature as to the collection or appropriation, under revenue laws, of future taxes, can, consistently with the sovereignty of the State, exist. And by virtue of no contract, capable of legal enforcement, can a vested interest be created in any one in such unlevied and uncollected taxes.

As a general rule, any act may be repealed by the author-

* The Board of Commissioners of Knox County *v.* Aspinwall, 24 Howard, 376; Same case, 21 Id. 539; The Commonwealth *v.* Commissioners of Alleghany, 4 Wright's Pennsylvania, 348; The United States ex rel. Learned *v.* Mayor of Burlington, United States Circuit for Iowa, 2 American Law Register, New Series, 394.

† People *v.* Burrows, 27 Barbour, 93; People *v.* Tremain, 29 Id. 98.

ity that created it. There may, indeed, be legislative grants of property, or of franchises, which, becoming vested rights of property, assume the character of contracts; but such rights of property can never arise out of a delegation to municipal corporations of the power to levy taxes; nor out of a pledge of public faith.

The *Dartmouth College* case* states the doctrine as to what are public or political corporations, and concedes plenary power over them in the legislature. This court held the college to be a private eleemosynary corporation, and hence, under the Constitution, protected from legislative control.

In the separate opinions of Washington and Story, JJ., the rule is declared to be, that corporations for the government of communities, such as "towns, cities, and counties," being "public institutions," are always subject to State control, by regulating, enlarging, or limiting their powers according to the will of the legislature.

Now, the City of Quincy was created by the legislature for the purposes of civil government alone—for public, not private ends. The State was the only party to the charter. No acceptance, by any one, of chartered privileges was essential to give it a political being, nor could the default of individuals forfeit the charter. It is but an instrument of government, exercising political power through the agency of public officers only. Individuals may be interested in having certain powers continued in or conferred upon the city, by reason of being its creditors or otherwise; but they are political powers, to be exercised only through public officers, in which the individual can have no more a contract right than he could in the powers of any one of the three departments of the State government, or of any officer thereof. Although the State may empower a municipal corporation to issue bonds, and provide for future taxation of property within the municipality to pay them, and bonds accordingly issue, this, in the sense of the Constitution of the United States, creates no contract between the holder

* 4 Wheaton, 641.

and the State, that the State will not exercise its political authority over the subject of taxation therein.*

To be a contract within the meaning of the Constitution, the right must be such that an action could be founded upon it in a court of justice.

Numerous adjudged cases support our view. In *East Hartford* v. *The Hartford Bridge Company*, in this court,† a municipal corporation had obtained from the legislature ferry privileges, which were afterwards repealed. It was held that there was no violation of a contract; that the State, having the power to even abolish the corporation, could not confer upon it rights which it could not take away; that all powers conferred on it could be controlled or resumed by the legislature in virtue of its sovereignty, and that all grants to such public corporations are made upon condition that they may be defeated or resumed at the will of the legislature.

In *Saterlee* v. *Matthewson*,‡ also, in this court, it was said that a statute which divests a right, even an existing right, of property, may be valid, provided the statute do not operate upon and impair a contract, and that it is only when the statute, by its own force, impairs or destroys the contract, that it is void under the Constitution.

"It is an unsound proposition," the Supreme Court of New York declared in *The People* v. *Morris*,§ "that political power conferred by the legislature can become a vested right, as against the government, in any individual or body of men."

In *Trustees* v. *Rider*,‖ the Supreme Court of Connecticut held that a statute granting money to a private corporation or individual, to be acquired *in futuro*, and through the official action of public agents, may be repealed at any time before the acquisition and application of the money, and the grant defeated before it is fully executed. Such a grant is not a perfect obligation capable of enforcement.

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* Gilman *v.* City of Sheboygan, 2 Black, 510.

† 10 Howard, 533–5.

‡ 2 Peters, 413.

§ 13 Wendell, 331.

‖ 13 Connecticut, 87.

Argument for the City.

In *Brandon* v. *Green*,* a Tennessee case, the Supreme Court of Tennessee decided that a statute giving a new remedy to defeat usurious contracts is constitutional, even as to existing contracts and judgments upon them.

In the *Covington Railroad* v. *Kenton*,† the Court of Appeals of Kentucky say that provisions in a railroad charter, providing for county subscription to stock and the collection of a tax to pay the same, are no contract between the State and the railroad company, and may be repealed at any time before they are complete by full execution. The legislature may take away by statute what by statute is granted, unless by execution of the powers granted, private rights, in some definite thing or property, have become vested.

A legislative act, this court held in *Railroad Co.* v. *Nesbit*,‡ cannot impair the obligation of a contract, unless at the time of its passage, some one not subject to legislative control, "by contract with the State, has been vested with certain, perfect, absolute rights of property," which rights are divested or impaired by such act.

It also held, in *Beers* v. *Bingham*,§ that "the right to imprison (for debt) constitutes no part of the contract; and discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects;" and, in *Mason* v. *Hake*,‖ where A. gave a prison-limits bond, and by an act of the legislature was discharged from arrest and imprisonment, that the act was valid.

The Supreme Court of California has gone as far as we now ask this court to do. In 1855, the legislature of the State passed a law for funding the debts of a county, changing the time and manner of payment, and prohibited payment of any debts not so funded. The court, on the matter coming before it, held,¶ that as the county was a municipal

* 7 Humphrey, 130; and see Wilson *v.* Hardesby, 1 Maryland Chancery, 66.
† 12 B. Munroe, 147, 148; and see People *v.* Livingston, 6 Wendell, 531
‡ 10 Howard, 400, 401.
§ 9 Peters, 359.
‖ 12 Wheaton, 370.
¶ Hunsacker *v.* Borden, 5 California, 288

body, the legislature had full control of its revenues and payment of its debts, and the law did not, therefore, impair the creditor's contract in the sense of the Constitution.

In *Oriental Bank* v. *Frieze*,* the Supreme Court of Maine says:

"When a person by existing laws becomes entitled to a judgment, or to have certain real or personal property applied to the satisfaction of his debt, he is apt to regard the privilege as a vested right, not considering that it has its foundations only in the remedy, which may be changed, and the right thereby destroyed."

It was accordingly held that the legislature may take away rights given by statute, until those rights are perfect, and vested by judgment recovered.

In the *Sunbury Railroad Co.* v. *Cooper*† the Supreme Court of Pennsylvania lay down principles which justify fully the action of the court below in its refusal to grant a *mandamus*. The legislature of Pennsylvania had there pledged the revenues of the State canals to the payment of certain State bonds. Afterwards an act was passed for the sale of these canals, and different appropriation of the proceeds. The diversion of the pledge made by the legislature was held to be without legal redress.

Numerous cases are in effect similar with the principle above generally asserted by us.‡

Reply: The proposition stated on the other side, to wit, that "legislative power and control over the public revenues is a fundamental element of sovereignty which must ever remain with the State," and "that no contract, binding or controlling the legislature, as to the collection or appropriation under revenue laws, of future taxes, can, consistently

* 18 Maine, 109. † 33 Pennsylvania State, 278, 281, 285.

‡ See Mayor *v.* The State, 15 Maryland, 376; Trustees *v.* Tatman, 13 Illinois, 28; Stocking *v.* Hunt, 3 Denio, 274; Fisher *v.* Lackey, 6 Blackford, 373; Evans *v.* Montgomery, 4 Watts & Sergeant, 220; Springfield *v.* Commissioners, 5 Pickering, 508.

Reply for the relator.

with the sovereignty of the State, exist," may be admitted as a general proposition, subject to exception.* But we are at a loss to apply it to the case under consideration. How is the levy and collection of a special annual tax, under and in pursuance of the powers in question, to be deemed an exercise of sovereignty which must ever remain with the State? A specific mode whereby the respondent is empowered to provide the necessary means of discharging debts contracted by it as a private company is no such exercise.

The moneys thus to be raised are in no manner or way connected with "the public revenues." Nor is the levy and collection of this special tax, under the laws, legally speaking, an exercise of sovereign powers belonging to the respondent in its character as a municipal or political corporation. The object and purpose of the tax, as well as the powers authorizing its levy and collection, are private, not public. Therefore, the respondent, in respect to the powers conferred by these laws, is to be regarded as a private corporation, standing on the same footing as would any individual or body of persons upon whom like privileges had been conferred. Or, in the language of the court in *Bailey* v. *The Mayor, &c., of the City of New York*,† a case where this whole matter is fully and learnedly considered, "The argument confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant."

The proposition is based on, and is almost in the identical words of, a suggestion offered by the court in the New Hampshire case of *Brewster* v. *Hough*,‡ to the effect that it is not competent for a legislature, by enactment, to make a contract perpetually exempting from taxation any portion of the

* State of New Jersey *v.* Wilson, 7 Cranch, 166; State Bank of Ohio *v.* Knoop, 16 Howard, 369; Dodge *v.* Woolsey, 18 Id. 331.

† 3 Hill, 539.

‡ 10 New Hampshire, 145.

property lying within the government; that the right to levy and collect taxes, being an element of sovereignty, it is so far inalienable, that no legislature can make a contract by which it shall be surrendered.

This, however, is not law. In *The State of New Jersey* v. *Wilson*,* it is laid down by Chief Justice Marshall, as a settled rule, that a State may do so through its legislature, and that the law is a contract within the meaning and protection of the Constitution of the United States. If an act of the legislature, perpetually exempting from taxation certain portions of the State, or property of its citizens, lying within the government, is a contract, within the meaning and protection of the Constitution, it would seem to follow, as inevitable, that a law authorizing the citizens of a particular municipal locality, or division of the State, to levy and collect a special annual tax on the property, real and personal, lying within that locality, as a means or mode of paying indebtedness contracted by it under the authority and upon the faith of such law, is also a contract, which cannot be repealed to the prejudice of third persons having pecuniary rights or interests depending on the existence thereof, without violating the Constitution of the United States. Numerous cases are to this effect.†

The case, it will be observed, comes here upon the petition, answer, and demurrer.

Mr. Justice SWAYNE delivered the opinion of the court, and after stating the case, proceeded thus:

The demurrer admits what is set forth in the answer. On the other hand, the answer, according to the law of pleading, admits what is alleged in the petition and not denied.

It is then a part of the case before us, that when the bonds were issued and negotiated there were statutes of Illinois in

* 7 Cranch, 164.

† Atwater *v.* Woodbridge, 6 Connecticut, 223; Osborne *v.* Humphrey, 7 Id. 335; Parker *v.* Redfield, 10 Id. 495; Landon *v.* Litchfield, 11 Id. 251; Armington *v.* Barnet, 15 Vermont, 751; Herrick *v.* Randolph, 13 Id. 525.

force which authorized the levying of a sufficient special tax to pay the coupons in question as they became due. Such statutes are so inconsistent with the provisions of the act of 1863, relied upon by the city, and cover the same ground, in such a manner that the act of 1863 unquestionably repeals them, if that act be valid for the purposes it was intended to accomplish.

The validity of the bonds and coupons is not denied. No question is made as to the judgment. The case turns upon the validity of the statute restricting the power of taxation left to the city within the narrow limits which it prescribes.

The answer says expressly that fifty cents on the hundred dollars' worth of property, which is all the statute allows to be levied to meet the debts and current expenses of the city, will not be sufficient for those purposes. The expenses will, of course, be first defrayed out of the fund. What the deficiency will be as to the debts, or whether anything applicable to them will remain, is not stated. So far, it appears that nothing has been paid upon these liabilities. And it was not claimed at the argument that the result under the statute would be different in the future.

The question to be determined is whether the statute, in this respect, is valid, or whether the legislature transcended its power in enacting it.

The duty which the court is called upon to perform is always one of great delicacy, and the power which it brings into activity is only to be exercised in cases entirely free from doubt.

The Constitution of the United States declares (Art. I, § 10), that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

The case of *Fletcher* v. *Peck*,* was the first one in this court in which this important provision came under consideration. It was held that it applied to all contracts, executed and executory, "whoever may be parties to them." In that case the legislature of Georgia had repealed an act

* 6 Cranch, 87.

passed by a former legislature, under which the plaintiff in error had acquired his title by mesne conveyances from the State. The court pronounced the repealing act within the inhibition of the Constitution, and therefore void. Chief Justice Marshall said: "The validity of this rescinding act might well be doubted were Georgia a single sovereign power; but Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire. She is a member of the American Union, and that Union has a Constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States which none claim a right to pass." This case was followed by those of *New Jersey* v. *Willson*,* and *Terret* v. *Taylor*.† The principles which they maintain are now axiomatic in American jurisprudence, and are no longer open to controversy.

It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.‡

In *Green* v. *Biddle*, the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the States of Virginia and Kentucky. It was made in contemplation of the separation of

* 7 Cranch, 164. † 9 Id. 43.

‡ Green *v.* Biddle, 8 Wheaton, 92; Bronson *v.* Kinzie, 1 Howard, 319; McCracken *v.* Hayward, 2 Id. 612; People *v.* Bond, 10 California, 570; Ogden *v.* Saunders, 12 Wheaton, 231.

the territory of the latter from the former, and its erection into a State, and is contained in an act of the legislature of Virginia, passed in 1789, whereby it was provided "that all private rights and interests within" the District of Kentucky "derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." By two acts of the legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of that State. So far as they affected the lands covered by the compact, this court declared them void. It was said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they *overturned* his rights and interests."

In *Bronson* v. *Kinzie*,* the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was therefore void.

In *McCracken* v. *Hayward*,† the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason.

In *Sturges* v. *Crowninshield*,‡ the question related to a law

* 1 Howard, 297. † 2 Id. 608. ‡ 4 Wheaton, 122.

discharging the contract. It was held that a State insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage.

In *Ogden* v. *Saunders*,* the question was as to the effect of such a law upon a subsequent contract. It was adjudged to be valid, and a discharge of the contract according to its provisions was held to be conclusive.

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word *ton* should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a State would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement."† The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. In *Green* v. *Biddle*,‡ it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it.

* 12 Wheaton, 213.

† Sturges *v.* Crowninshield, 12 Id. 257.

‡ 8 Id. 84.

Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage."

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force."*

This has reference to legislation which affects the contract directly, and not incidentally or only by consequence.

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it whenever they think proper.† They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of mod-

* Planters' Bank v. Sharp et al., 6 Howard, 327.

† Beers v. Haughton, 9 Peters, 359; Ogden v. Saunders, 12 Wheaton, 230; Mason v. Haile 12 Id. 373; Sturges v. Crowninshield, 4 Id. 200.

ifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.*

If these doctrines were *res integræ* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might perhaps well be doubted.† But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases.‡ It is equally clear that where a State has authorized a municipal

* Bronson *v.* Kinzie, 1 Howard, 311; McCracken *v.* Hayward, 2 Id. 608.

† 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in Mason *v.* Haile, 12 Wheaton, 379.

‡ New Jersey *v.* Wilson, 7 Cranch, 166; Dodge *v.* Woolsey, 18 Howard, 331; Piqua Branch *v.* Knoop, 16 Id. 331.

corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.*

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a *mandamus*. The judgment of that court is REVERSED, and the cause will be remanded, with instructions to proceed

IN CONFORMITY WITH THIS OPINION.

THE HINE *v.* TREVOR.

1. The doctrine of the case of *The Genesee Chief*, 12 Howard, that the admiralty jurisdiction of the Federal courts, as granted by the Constitution, as not limited to tide-water, but extends wherever vessels float and navigation successfully aids commerce, approved and affirmed.
2. The grant of admiralty powers to the District Courts of the United States, by the ninth section of the act of September 24th, 1789, is coextensive with this grant in the Constitution, as to the character of the waters over which it extends.

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* People *v.* Bell, 10 California, 570; Dominic *v.* Sayre, 3 Sandford, 555.

Statement of the case.

8. The act of February 26th, 1845, is a limitation of the powers granted by the act of 1789, as regards cases arising *upon the lakes and navigable waters connecting said lakes*, in the following particulars:
   1. It limits the jurisdiction to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and which are employed in commerce and navigation, between ports and places in different States.
   2. It grants a jury trial, if either party shall demand it.
   3. The jurisdiction is not exclusive, but is expressly made concurrent with such remedies as may be given by State laws.
4. The grant of original admiralty jurisdiction by the act of 1789, including as it does all cases not covered by the act of 1845, is exclusive, not only of all other Federal courts, but of all State courts.
5. Therefore, State statutes, which attempt to confer upon State courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*, are void; because they are in conflict with that act of Congress, except as to cases arising on the lakes and their connecting waters.
6. These statutes do not come within the saving clause of the ninth section of the act of 1789, concerning a common-law remedy.
7. But this rule does not prevent the seizure and sale, by the State courts, of the interest of any owner, or part owner, in a vessel, by attachment or by general execution, when the proceeding is a personal action against such owner, to recover a debt for which he is personally liable.
8. Nor does it prevent any action which the common law gives for obtaining a judgment *in personam* against a party liable in a marine contract, or a marine tort.

ERROR to the Supreme Court of the State of Iowa; the case, as disclosed by the record, having been in substance this:

A collision occurred between the steamboats Hine and Sunshine, on the *Mississippi River*, at or near St. Louis, in which the latter vessel was injured. Some months afterwards, the owners of the Sunshine caused the Hine to be seized while she was lying at Davenport, Iowa, in a *proceeding under the laws of that State*, to subject her to sale in satisfaction of the damages sustained by their vessel. The code of Iowa, under which this seizure was made, gives a lien against any boat found in the waters of that State, for injury to person or property by said boat, officers or crew, &c.; gives precedence in liens; authorizes the seizure and sale of the boat, without any process against the wrongdoer, whether owner or master, and saves the plaintiff all his

common-law rights, but makes no provision to protect the owner of the vessel.

The owners of the Hine interposed a plea *to the jurisdiction of the State court.* The point being ruled against them, it was carried to the Supreme Court of the State, where the judgment of the lower court was affirmed; and by the present writ of error this court was called upon to reverse that decision.

To comprehend the argument fully, it is here well to state that Congress had, prior to the date of this proceeding, enacted—

1. In 1789, September 24th, by the Judiciary Act, that the District Courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden. . . . *Saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.*"

2. In 1845, by statute of the 26th February of that year, "that the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the same time employed in business of commerce and navigation, between ports and places in different states and territories, upon the *lakes* and *navigable waters connecting said lakes*, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels, employed in navigation and commerce upon the high seas, or tide-waters within the admiralty and maritime jurisdiction of the United States."

The question in the present case was, how far the jurisdiction of the District Courts of the United States, in cases of admiralty arising on our navigable inland waters, is exclusive; and how far the State courts might exercise jurisdiction concurrently.

Argument in favor of State jurisdiction.

Mr. Cook, in favor of the concurrent State jurisdiction:

I. The Judiciary Act of 1789 invests the Federal District Courts with exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, when the common law is competent to give it. This act was amended in 1845, and extended the admiralty jurisdiction of the Federal courts to cases on the lakes and navigable waters connecting the same, but expressly saving to parties the right of a concurrent remedy which may be given by State laws.

In England the jurisdiction of courts of admiralty was confined to the ebb and flow of the tide; and this court, in the cases of *The Thomas Jefferson*,* and *The Steamboat Orleans* v. *Phœbus*,† followed the English decisions, confining the admiralty jurisdiction. But in 1851, in the case of *The Genesee Chief*,‡ it overruled these two cases, and held that the jurisdiction of courts of admiralty extended to the lakes and navigable waters of the United States. But neither in this case nor in any other case decided by this court, that we recall, was it decided that the jurisdiction of the District Courts of the United States in cases of admiralty is exclusive. The judiciary acts of Congress to which we have referred expressly save to suitors, as we have remarked, common-law remedies, and any concurrent remedies provided by State laws.

In the absence, then, of any decision by this court we may look at the action of the State courts. And in a mass of decisions, which may be referred to, we do not find one in which the jurisdiction of the State courts was denied on the ground assumed by plaintiff in this case; but, on the contrary, such jurisdiction of the State courts in this class of cases is admitted all the way through.

In Iowa, from which State the present case comes, there is the case of *Miller* v. *Galland*.§ That case was an attachment against the steamboat Kentucky. A question of jurisdiction, on another point, was raised, and it was held that

* 10 Wheaton, 428.
† 11 Peters, 175.
‡ 12 Howard, 443.
§ 4 Green, 191.

Argument in favor of State jurisdiction.

the court had jurisdiction. Numerous cases in Iowa, cited below,* are to the same effect.

We refer to these cases, not because they explicitly and directly decide anything on the question of jurisdiction, but only to show that if the point made by taking this writ is well taken, the Supreme Court of Iowa has been deciding a great many cases over which it had no jurisdiction.

Authorities, however, in other States support its view.

The case of *Germain* v. *The Indiana*, is in Illinois.† There the court speaks of the difference between the decrees in State courts and in admiralty courts in this class of cases, and clearly upholds the jurisdiction of State courts. Many other cases have been decided in the same State, both before and since the decision in the case last referred to, in which the jurisdiction is recognized and impliedly admitted.

So in New York. *The Richmond Turnpike Co.* v. *Vanderbilt*,‡ in the Superior Court of New York City, was a collision in tide-water. The jurisdiction was maintained. The earlier case of *Percival* v. *Hickey*,§ was to the same effect; and the case is an important and well-considered one. The whole question of jurisdiction of State and admiralty courts was there considered, and the jurisdiction of the State courts upheld.

If we may cite text-writers, we have the respectable authority of Mr. Angell,‖ who, after referring to authorities, says: "We have seen that the remedy in cases of collision lies either in the courts of common law or in the admiralty court."

So in Missouri.¶ So in Ohio.**

* The Kentucky *v.* Brooks, 1 Green, 398; Newcomb *v.* The Clermont, 3 Id. 295; Ham *v.* The Hamburg, 2 Iowa, 460; Steamboat Kentucky v. Hine, 1 Green, 379; Haight & Brother *v.* The Henrietta, 4 Iowa, 472; The War Eagle, 9 Iowa, 374, S. C. 14 Id. 363.

† 11 Illinois, 535.

‡ 1 Hill, 480; and see Barnes *v.* Cole, 21 Wendell, 188.

§ 18 Johnson, 257.

‖ Angell on the Law of Carriers, § 651.

¶ Steamboat United States *v.* Mayor, &c., of St. Louis, 5 Missouri, 230; Steamboat Western Belle *v.* Wagner, 11 Id. 30.

** Steamboat Clipper *v.* Logan, 18 Ohio, 375; Thompson *v.* The J. D. Morton, 2 Ohio State, 26.

Argument in favor of State jurisdiction.

Above any authorities already cited is the case of *Taylor* v. *Carryl*,* in this court. It was three times argued, and the whole question of jurisdiction of State and Federal courts discussed and determined. A vessel had been seized under process of attachment issued from a State court of Pennsylvania, identical with that which issues out of the District Court of the United States sitting in admiralty. A libel was filed in the District Court of the United States for mariners' wages. It was held that where property is levied upon it is not liable to be taken by an officer acting under another jurisdiction. The admiralty jurisdiction of the Federal court, although exclusive in some subjects, is concurrent upon others. The courts of common law deal with ships or vessels as with other personal property. In cases like the one now before the court, courts of common law, we think, have concurrent jurisdiction.

II. Up to the time of *The Genesee Chief*, it was held by this court that courts of admiralty had jurisdiction only within the ebb and flow of the tide. Then, it follows that up to that time, State courts must have had exclusive jurisdiction over this class of cases, or there was no remedy in the law. Now, if they once had jurisdiction, there must be some law, or provision of the Constitution, which took it from them. We find none. But we do find the decision in that case asserting that the courts of admiralty have jurisdiction above such ebb and flow. But this does not oust State courts from their jurisdiction.

III. The Federal courts are of limited jurisdiction. They can only exercise the jurisdiction given by act of Congress. Now when parties go into the Federal courts, they must show by the pleadings certain facts to give the court jurisdiction; such as residence, citizenship of the different parties, or such other fact as may be prescribed by law, to affirmatively show jurisdiction in the court.

Now apply the rule to the pleadings in this case. By the act of 1845—under which alone the plaintiff in error can set

* 20 Howard, 583.

up that the courts of the United States have jurisdiction—these courts have jurisdiction only in matters of contract and tort in, upon, and concerning steamboats of twenty tons burden, enrolled and licensed in the coasting trade, &c. In this case there is no averment that the steamboat was of twenty tons burden; no averment that she was enrolled and licensed for the coasting trade; and no averment that she was engaged in business of commerce and navigation upon the lakes and navigable waters, &c.; no averments, therefore, which affirmatively show jurisdiction in the District Court of the United States at all.

Mr. Grant, contra.

Mr. Justice MILLER delivered the opinion of the court.

The record distinctly raises the question, how far the jurisdiction of the District Courts of the United States in admiralty causes, arising on the navigable inland waters of this country, is exclusive, and to what extent the State courts can exercise a concurrent jurisdiction?

Nearly all the States—perhaps all whose territories are penetrated or bounded by rivers capable of floating a steamboat—have statutes authorizing their courts, by proceedings *in rem*, to enforce contracts or redress torts, which, if they had the same relation to the sea that they have to the waters of those rivers, would be conceded to be the subjects of admiralty jurisdiction. These statutes have been acted upon for many years, and are the sources of powers exercised largely by the State courts at the present time. The question of their conflict with the constitutional legislation of Congress, on the same subject, is now for the first time presented to this court.

We are sensible of the extent of the interests to be affected by our decision, and the importance of the principles upon which that decision must rest, and have held the case under advisement for some time, in order that every consideration which could properly influence the result might be deliberately weighed.

There can, however, be no doubt about the judgment which we must render, unless we are prepared to overrule the entire series of decisions of this court upon the subject of admiralty jurisdiction on Western waters, commencing with the case of *The Genesee Chief*, in 1851, and terminating with that of *The Moses Taylor*, decided at the present term;* for these decisions supply every element necessary to a sound judgment in the case before us.

The history of the adjudications of this court on this subject, which it becomes necessary here to review, is a very interesting one, and shows with what slowness and hesitation the court arrived at the conviction of the full powers which the Constitution and acts of Congress have vested in the Federal judiciary. Yet as each position has been reached, it has been followed by a ready acquiescence on the part of the profession and of the public interested in the navigation of the interior waters of the country, which is strong evidence that the decisions rested on sound principles, and that the jurisdiction exercised was both beneficial and acceptable to the classes affected by it.

From the organization of the government until the era of steamboat navigation, it is not strange that no question of this kind came before this court. The commerce carried on upon the inland waters prior to that time was so small, that cases were not likely to arise requiring the aid of admiralty courts. But with the vast increase of inland navigation consequent upon the use of steamboats, and the development of wealth on the borders of the rivers, which thus became the great water highways of an immense commerce, the necessity for an admiralty court, and the value of admiralty principles in settling controversies growing out of this system of transportation, began to be felt.

Accordingly we find in the case of *The Steamboat Thomas Jefferson*, reported in 10 Wheaton, 428, that an attempt was made to invoke the jurisdiction in the case of a steamboat making a voyage from Shippingport, in Kentucky, to a point

* *Supra*, p. 411.

some distance up the Missouri River, and back again. This court seems not to have been impressed with the importance of the principle it was called upon to decide, as, indeed, no one could then anticipate the immense interests to arise in future, which by the rulings in that case were turned away from the forum of the Federal courts. Apparently without much consideration—certainly without anything like the cogent argument and ample illustration which the subject has since received here—the court declared that no act of Congress had conferred admiralty jurisdiction in cases arising above the ebb and flow of the tide.

In the case of *The Steamboat Orleans*, in 11 Peters, 175, the court again ruled that the District Court had no jurisdiction in admiralty, because the vessel, which was the subject of the libel, was engaged in interior navigation and trade, and not on tide-waters. The opinion on this subject, as in the case of *The Thomas Jefferson*, consisted of a mere announcement of the rule, without any argument or reference to authority to support it.

The case of *Waring* v. *Clark*, 8 Howard, 441, grew out of a collision within the ebb and flow of the tide on the Mississippi River, but also *infra corpus comitatus*. The jurisdiction was maintained on the one side and denied on the other with much confidence. The court gave it a very extended consideration, and three of the judges dissented from the opinion of the court, which held that there was jurisdiction. The question of jurisdiction above tide-water was not raised, but the absence of such jurisdiction seems to be implied by the arguments of the court as well as of the dissenting judges.

The next case in order of time, *The Genesee Chief*, 12 Howard, 457, is by far the most important of the series, for it overrules all the previous decisions limiting the admiralty jurisdiction to tide-water, and asserts the broad doctrine that the principles of that jurisdiction, as conferred on the Federal courts by the Constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external.

That case arose under an act of Congress, approved February 26th, 1845,* which provides that "the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats, or other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in navigation between ports and places, in different states and territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas and tide-waters within the admiralty and maritime jurisdiction of the United States." The Genesee Chief was libelled under this act for damages arising from a collision on Lake Ontario. A decree having been rendered against the vessel, the claimants appealed to this court.

It was urged here that the act under which the proceeding was had was unconstitutional.

1st. Because the act was not a regulation of commerce, and was not therefore within the commercial clause of the Constitution.

2d. Because the constitutional grant of admiralty powers did not extend to cases originating above tide-water, and Congress could not extend it by legislation.

The court concurred in the first of these propositions, that the act could not be supported as a regulation of commerce. The Chief Justice, who delivered the opinion, then entered into a masterly analysis of the argument by which it was maintained that the admiralty power conferred by the Federal Constitution did not extend beyond tide-water in our rivers and lakes.

This argument assumed that in determining the limits of those powers, we were bound by the rule which governed the Admiralty Court of Great Britain on the same subject at the time our Constitution was adopted. And it was said

* 5 Statutes at Large, 726.

that the limit of the court's power in that country was the ebb and flow of the tide.

This was conceded to be true as a matter of fact, but the Chief Justice demonstrated that the reason of this rule was that the limit of the tide in all the waters of England was at the same time the limit of practicable navigation, and that as there could be no use for an admiralty jurisdiction where there could be no navigation, this *test* of the navigability of those waters became substituted as the rule, instead of the navigability itself. Such a rule he showed could have no pertinency to the rivers and lakes of this country, for here no such test existed. Many of our rivers could be navigated as successfully and as profitably for a thousand miles above tide-water as they could below; and he showed the absurdity of adopting as the test of admiralty jurisdiction in this country an artificial rule, which was founded on a reason in England that did not exist here. The true rule in both countries was the navigable capacity of the stream; and as this was ascertained in England by a test which was wholly inapplicable here, we could not be governed by it. The cases of *The Thomas Jefferson* and *The Steamboat Orleans*, already referred to, were then examined and overruled.

This opinion received the assent of all the members of the court except one.

Although the case arose under the act of 1845, already cited, which in its terms is expressly limited to matters arising upon the lakes and the navigable waters connecting said lakes, and which the Chief Justice said was a limitation of the powers conferred previously on the Federal courts, it established principles under which the District Courts of the United States began to exercise admiralty jurisdiction of matters arising upon all the public navigable rivers of the interior of the country.

This court also, at the same term in which the case of *The Genesee Chief* was decided, held in *Fretz* v. *Bull*, in which the point was raised in argument, that the Federal courts had jurisdiction according to the principles of that case in the matter of a collision on the Mississippi River above tide-water

As soon as these decisions became generally known admiralty cases increased rapidly in the District Courts of the United States, both on the lakes and rivers of the West. Many members of the legal profession engaged in these cases, and some of the courts have from this circumstance assumed, without examination, that the jurisdiction in admiralty cases arising on the rivers of the interior of the country is founded on the act of 1845; and such is perhaps the more general impression in the West. The very learned court whose judgment we are reviewing has fallen into this mistake in the opinion which it delivered in the case before us, and it is repeated here by counsel for the defendant in error.

But the slightest examination of the language of that act will show that this cannot be so, as it is confined, as we have already said, to cases arising "on the lakes and navigable waters connecting said lakes." The jurisdiction upon those waters is governed by that statute, but its force extends no further.

The jurisdiction thus conferred is in many respects peculiar, and its exercise is in some important particulars different under that act from the admiralty jurisdiction conferred by the act of September 24th, 1789.

1. It is limited to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade.

2. To vessels employed in commerce and navigation between ports and places in different States.

3. It grants a jury trial if either party shall demand it.

4. The jurisdiction is not exclusive, but is expressly made concurrent, with such remedies as may be given by State laws.

But the true reason why the admiralty powers of the Federal courts began now to be exercised for the first time in the inland waters was this: the decision in the case of *The Genesee Chief*, having removed the imaginary line of tide-water which had been supposed to circumscribe the jurisdiction of the admiralty courts, there existed no longer any reason why the general admiralty powers conferred on

all the District Courts by the ninth section of the Judiciary Act,* should not be exercised wherever there was navigation which could give rise to admiralty and maritime causes. The Congress which framed that act—the first assembled under the Constitution—seemed to recognize this more extended view of the jurisdiction in admiralty, by placing under its control cases of seizure of vessels under the laws of impost, navigation, and trade of the United States, when those seizures were made in waters navigable from the sea by vessels of ten tons burden or upwards.

The case of *The Magnolia*, 20 Howard, 296, is another important case in the line of decisions which we have been considering. It was a case of collision occurring on the Alabama River, far above the ebb and flow of the tide, on a stream whose course was wholly within the limits of the State which bears its name. This was thought to present an occasion when the doctrines announced in the case of *The Genesee Chief* might properly be reconsidered, and modified, if not overruled. Accordingly we find that the argument in favor of the main proposition decided in that case was restated with much force in the opinion of the court, and that a very elaborate opinion was delivered on behalf of three dissenting judges. The principles established by the case of *The Genesee Chief* were thus reaffirmed, after a careful and full reconsideration. It was also further decided (which is pertinent to the case before us), that the jurisdiction in admiralty on the great Western rivers did *not* depend upon the act of February 3d, 1845, but that it was founded on the act of September 24th, 1789. That decision was made ten years ago, and the jurisdiction, thus firmly established, has been largely administered by all the District Courts of the United States ever since, without question.

At the same time, the State courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognizance;

* 1 Statutes at Large, 77.

and they have in these causes administered remedies which differ in no essential respect from the remedies which have heretofore been considered as peculiar to admiralty courts. This authority has been exercised under State statutes, and not under any claim of a general common-law power in these courts to such a jurisdiction.

It is a little singular that, at this term of the court, we should, for the first time, have the question of the right of the State courts to exercise this jurisdiction, raised by two writs of error to State courts, remote from each other, the one relating to a contract to be performed on the Pacific Ocean, and the other to a collision on the Mississippi River. The first of these cases, *The Moses Taylor*, had been decided before the present case was submitted to our consideration.

The main point ruled in that case is, that the jurisdiction conferred by the act of 1789, on the District Courts, in civil causes of admiralty and maritime jurisdiction, is exclusive by its express terms, and that this exclusion extends to the State courts. The language of the ninth section of the act admits of no other interpretation. It says, after describing the criminal jurisdiction conferred on the District Courts, that they "shall also have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden." If the Congress of the United States has the right, in providing for the exercise of the admiralty powers, to which the Constitution declares the authority of the Federal judiciary shall extend, to make that jurisdiction exclusive, then, undoubtedly, it has done so by this act. This branch of the subject has been so fully discussed in the opinion of the court, in the case just referred to, that it is unnecessary to consider it further in this place.

It must be taken, therefore, as the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other

court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

This examination of the case, already decided by this court, establishes clearly the following propositions:

1. The admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States.

2. The original jurisdiction in admiralty exercised by the District Courts, by virtue of the act of 1789, is exclusive, not only of other Federal courts, but of the State courts also.

3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789.

4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 3d, 1845.

If the facts of the case before us in this record constitute a cause of admiralty cognizance, then the remedy, by a direct proceeding against the vessel, belonged to the Federal courts alone, and was excluded from the State tribunals.

It was a case of collision between two steamboats. The case of *The Magnolia*,* to which we have before referred, was a case of this character; and many others have been decided in this court since that time. That they were admiralty causes has never been doubted.

We thus see that every principle which is necessary to a decision of this case has been already established by this court in previous cases. They lead unavoidably to the conclusion, that the State courts of Iowa acted without jurisdiction; that the law of that State attempting to confer this jurisdiction is void, because it is in conflict with the act of Congress of September 24th, 1789, and that this act is well authorized by the Constitution of the United States. Unless

* 20 Howard, 296.

we are prepared to retract the principles established by the entire series of decisions of this court on that subject, from and including the case of *The Genesee Chief*, down to that of *The Moses Taylor*, decided at this term, we cannot escape this conclusion. The succeeding cases are in reality but the necessary complement and result of the principles decided in the case of *The Genesee Chief*. The propositions laid down there, and which were indispensable to sustain the judgment in that case, bring us logically to the judgment which we must render in this case. With the doctrines of that case on the subject of the extent of the admiralty jurisdiction we are satisfied, and should be disposed to affirm them now if they were open to controversy.

It may be well here to advert to one or two considerations to which our attention has been called, but which did not admit of notice in the course of observation which we have been pursuing without breaking the sequence of the argument.

1. It is said there is nothing in the record to show that the Hine was of ten tons burden or upwards, and that, therefore, the case is not brought within the jurisdiction of the Federal courts. The observation is made, in the opinion of the Supreme Court of Iowa, in reference to the provision of the act of 1845, which that court supposed to confer jurisdiction on the Federal courts in the present case, if it had such jurisdiction at all. We have already shown that the jurisdiction is founded on the act of 1789. That act also speaks of vessels of ten tons burden and upwards, but not in the same connection that the act of 1845 does. In the latter act it is made essential to the jurisdiction that the vessel which is the subject of the contract, or the tort, should be enrolled and licensed for the coasting trade, and should be of twenty tons burden, or upwards. In the act of 1789, it is declared that the District Courts shall have jurisdiction in admiralty of seizures for violations of certain laws, where such seizures are made on rivers navigable by vessels of ten tons burden or upwards from the sea. In the latter case, the phrase is used as describing the carrying capacity of the

river where the seizure is made. In the former case, it relates to the capacity of the vessel itself.

2. It is said that the statute of Iowa may be fairly construed as coming within the clause of the ninth section of the act of 1789, which "saves to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it."

But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States.

While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the older States foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the State.

Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act.

But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such

remedies as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly; for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, "any concurrent remedy which may be given by the State laws where such steamer or other vessel is employed."

THE JUDGMENT IS REVERSED, and the case is remanded to the Supreme Court of Iowa, with directions that it be

DISMISSED FOR WANT OF JURISDICTION.

NEWELL v. NIXON.

1. Although no partnership may exist between them, yet where two persons are joint owners of a vessel against which a claim exists for non-delivery of cargo, and one gives a note in the joint name for a balance agreed on as due for such non-delivery—the other party being aware of the making of the note, and of the consideration for which it was given, and making no dissent from the act of his co-owner—such note cannot be repudiated by such other party, he having bought out the share of his co-owner in the vessel and agreed to pay her debts and liabilities.
2. Where a suit is brought against a shipowner for a sum acknowledged by the owners to be due the shipper, for a breach of contract in delivering merchandise, the production of the bill of lading is not essential.
3. The plea of prescription of one year, under the Civil Code of Louisiana, cannot be set up in a case where the suit is brought in April on an acknowledgment made in September previous of a sum due on settlement.
4. A party suing, not on a note but on the consideration for which the note was given—and using the note as evidence rather than as the foundation of the claim—may have lawful interest on the sum due him, although by note given on a settlement the party sued may have promised to pay unlawful interest and such as the law of the State where the note was given visits with a forfeiture of all interest whatever.

Statement of the case.

5. Where usury is not set up in some way as a defence below, it cannot be urged here.

ERROR to the Circuit Court for the Eastern District of Louisiana; the case being thus:

By the Civil Code of Louisiana it is enacted—

1. That actions "for the delivery of merchandise or other effects shipped on board any kind of vessel . . . . are prescribed by one year."

2. That conventional interest shall in no case exceed eight per cent., under pain of forfeiture of the entire interest so contracted.

With these provisions in force, Nixon sued Newell, attaching as his property the steamboat Hill; and setting forth by petition *filed April 20th*, 1857:

1. That Newell was indebted to him $2585, with interest from January 11th, 1855, at the rate of eight per cent., for this, to wit, that on the said day the said Newell and one Hamilton, since deceased, being co-owners of the steamboat Hill, . . . and in such capacity, viz., as owners, made their note in his favor for the above-named sum, which would appear by reference to the note annexed and made part of the petition.

2. That independently of this, Newell was indebted in the same sum for this—that he, Nixon, had shipped, at New Orleans, on the said steamboat, of which Newell and one *Hamilton* were owners, a large quantity of salt, which was never delivered at its destination.

The note, which was annexed to the petition, was for the amount above stated, and was signed "Newell & Hamilton, owners," but was made payable with interest at the rate of *ten per cent. per annum.*

Newell set up as defence that he never was a member of any firm known as Newell & Hamilton; and that no person had authority to bind him under any such signature; and, moreover, that the cause was barred by the "prescription" (or "limitation," as it is called in many States), of one year.

The court found as fact that the note was not signed by

the defendant, Newell, but by Hamilton, now dead; that these two persons had no commercial partnership; that they did not transact the business of the boat under a social name, and were not accustomed to sign notes in this form; but that they were simply part owners in the Hill—Newell owning three-fourths and Hamilton one.

The court found, further (no bill of lading being produced and the evidence being of witnesses who received the salt), that the salt was shipped as alleged but arrived at an intermediate port in bad condition, where it was taken by the agent of the owners of the Hill, who disposed of the same with their consent and for their account, the plaintiff having refused to receive it on account of its bad condition; that the consideration of the note was the sum due by the steamboat and owners for the salt not delivered; that the defendant was aware of the making of the note and of its consideration; that there was no evidence of his dissent from the act. It was shown also that after the death of Hamilton, his administrator made a settlement with Nixon and transferred to him Hamilton's interest in the steamboat, for which Nixon had agreed to pay "the debts and liabilities of the boat." *This settlement took place September 22d*, 1856.

The objections made below to the claim were:

1. That the defendant, Newell, not having been in any sense a partner of Hamilton, the note signed by Hamilton did not bind Newell.

2. That no bill of lading had been produced; and that one was necessary.

3. That the suit was barred by prescription or limitation of one year.

The court (Campbell, J.), as to the first point, admitted that as Newell was not a partner, in any sense, of Hamilton, the note could not bind Newell, unless he was connected with it by testimony other than itself. But it thought that the special facts of the case did so connect and make him liable. The term "boat," in the contract by which Newell assumed to pay "the debts and liabilities of the boat," the learned judge considered as meaning those binding the

owners on account of their interest in the boat. The assumption had been made on an adequate consideration. The note on its face expressed an obligation affecting the boat, and it was given in recognition of such a liability.

In regard to the second point, the learned judge did not consider the production of the bill of lading essential to the support of the action. The suit had not been brought on the contract of shipment, but to collect the sum acknowledged to be due in consequence of the breach of contract.

3. To the argument of prescription the court said nothing.

Judgment having been given accordingly, for the plaintiff, the same points were again presented here on exception; an additional point being made, to wit, that the court erred in allowing eight per cent. interest.

Mr. Reverdy Johnson, who filed a brief of Mr. Marr, for the plaintiff in error:

1. As there was no commercial partnership between the defendant and Hamilton, and as they did not transact the business of the boat under a social name, Newell was not bound by the note, and, if he was liable to plaintiff, that liability must rest solely upon the original consideration, the shipment, consignment, and breach set forth in the petition. The note itself proved nothing against the defendant; and the plaintiff was bound to prove such facts as would constitute legal responsibility on the part of defendant; that is to say, was bound to prove the shipment, the consignment, the breach, and consequent damages, exactly as if no such note had been given. He did not do this.

2. The bill of lading was not produced; an extraordinary fact in the case of any large shipment. Nor does the plaintiff allege that he was the owner of the salt. In the absence of proof to the contrary, the consignee would be presumed to be the owner. The legal title is in him; and the mere shipper has no interest in the contract of affreightment, or in the delivery of the cargo. If the defendant was liable to the plaintiff, it was as a common carrier, for the damages resulting from the breach of the specific contract alleged.

Argument for the plaintiff in error.

The best proof of that contract would have been the bill; and without in some way accounting for the failure to produce it, the plaintiff ought not to have been allowed to introduce secondary and oral proof of the shipment. His character as shipper does not give him such an interest in the property as to enable him, upon that mere allegation, to maintain an action. The consignee might sue and recover upon simply alleging and proving the consignment to him, and failure to deliver; but if the shipper sues, he must allege and prove property in himself. This court may well presume, in the absence of a contrary showing, that every important allegation has been proven to the satisfaction of the triers, when there is a general finding in favor of plaintiff; but it will certainly not presume in favor of plaintiff, that an important fact, essential to his right to recover, which he has not alleged, was proven.

3. As there was no proof of demand having been made of defendant, and no pretence that he ever acknowledged his liability to plaintiff on this claim, there is nothing to take it out of the prescription; and the demand was barred.

4. The court below erred in allowing eight per cent. interest, even if the proof makes out the liability of the defendant.

The suit was upon the note, and one of two things is true in the matter. Either the note is obligatory upon Newell; and in that event it is void, so far as interest is concerned, because it stipulates for ten per cent.; or, it is not obligatory on him; and in that event there is no proof of a written agreement, or of any other agreement to pay conventional interest. Either there is no proof of an agreement to pay interest, or there is proof of an agreement to pay usurious interest, which is prohibited by the law of Louisiana.

In *Reid* v. *Duncan*,* the Louisiana courts say, in reference to the law against usury: "The statute is prohibitory. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.† The

* 1 Annual, 267.

† Civil Code, Art. 12.

agreement to pay usurious interest being in violation of a prohibitory law, we can give it no effect whatever."

This case arose and was decided under Art. 2895 of the Civil Code, which affixed no penalty to the agreement to pay usurious interest. But the law applicable in this case, attaches as a penalty the forfeiture of the entire interest so contracted. So utterly void is such an agreement, under this statute, that the debtor, if he has actually paid the usurious interest, may sue for and recover it within twelve months.*

Without written proof of an agreement to pay it, conventional interest cannot be recovered. An agreement to pay ten per cent. cannot be maintained as a valid contract to pay eight per cent. If the written proof establishes an agreement prohibited by law, the court can give it no effect whatever, but must declare it void *in toto*. In *Reid* v. *Duncan*, already cited, the court say: "We cannot say that we will let the convention stand up to the highest limit permitted by the law, and disregard it for so much as it exceeds the legal limit. The convention is a whole, and the nullity covers the whole."

Will it be said that there was no plea of usury in this case? That is so, and it is so for two reasons: 1st. Newell did not admit that the note was obligatory upon him; consequently he could not have pleaded that he had made an agreement to pay usurious interest. 2d. As the note itself, which is the only agreement touching interest, was exhibited as part of the petition, and offered in evidence, it furnishes proof of a stipulation which the law prohibits, and which the courts must reprobate. If the note were obligatory upon Newell the case would be exactly analogous, so far as the interest is concerned, to one in which a note offered in evidence should state upon its face that it is given for money lost at play. The proof of indebtedness disclosing an agreement which the courts cannot enforce, no special plea of illegality would be necessary.

* See a full comment on this statute in Lalande *v.* Breaux, 5 Annual, 506, *et seq.*

Argument for the defendant in error.

Mr. Janin, contra:

I. It is submitted that under the state of facts found by the court below, a sufficient partnership to bind Newell, even if not a truly commercial partnership did exist between Newell and Hamilton, under the laws of Louisiana. They were partners in the ownership and business of the steamboat. If so, they were bound jointly and severally for this debt, and the settlement of the claim by the note now sued on, by one of the partners, cannot, under the facts of the case, be complained of by the other partner.

But more clear is the fact, that the owners of the boat, Newell and Hamilton, acknowledging their liability, took the salt and disposed of it on their own account, and therefore, not only as carriers, but by appropriating the property to their own use, with the evident intention of indemnifying the owner, became responsible for the value of the property.

Express sanction was not wanting in this case on the part of Newell. The agent of the boat sold this damaged salt, *with the consent of both of the owners of the boat, and for their account;* Newell was aware of the making of the note, and the consideration for which it was given, and never objected to Nixon's claim; and, further, after Hamilton's death, in August, 1855, Hamilton's administrator transferred to him Hamilton's fourth interest in the boat and its benefits, in consequence of which Newell assumed to pay all the debts and liabilities of the boat. This includes, of course, the note sued on, which, on its face, expresses an obligation affecting the boat; and the evidence is that it was given in recognition of such a liability.

By this assumption the plaintiff in error became bound for the debt, even if he had not been originally bound by the note. Article 1884 of the Civil Code of Louisiana is in these words:

"A person may also, in his own name, make some advantage to a third person the condition or consideration of a commutative contract or onerous donation; and if such third person consents to avail himself of this advantage, stipulated in his favor, the contract cannot be revoked."

II. The counsel contend that the defendant in error was a mere shipper, and did not prove the ownership of the salt. This was, however, acknowledged by the settlement of Hamilton with Nixon, treating him as the party in interest.

III. As to the plea of prescription. The owners appropriated the proceeds of our salt. The action is less for a breach of contract to carry than *assumpsit* for money had and received. It is so plain that the prescription of one year for the mere non-delivery of merchandise cannot apply, that the court thought it needless to make any remark about the thing at all. And so it was. After Hamilton's direct acknowledgment of ownership and Newell's tacit assent to the settlement, it was certainly unnecessary to produce the bill of lading.

IV. The allowance of eight per cent. interest on the principal of the note was right. The suit was perhaps less upon the note than on the appropriation and use of our money, the proceeds of the salt sold. We asked eight per cent. interest, and no objection being made, it was given us. This was probably right.

But whether right or not, it must now stand. Objection to it is now first made here. There was no plea of usury, nor was usury set up even by argument in the Circuit Court, from which the case comes.

Mr. Justice CLIFFORD delivered the opinion of the court.

Judgment was rendered for the plaintiff in the court below, and the defendant in that court excepted and sued out this writ of error. Cause of action, as stated by the plaintiff in his original petition, was that the defendant, Thomas H. Newell, was justly indebted to him in the full sum of two thousand five hundred and eighty-seven dollars and eighty-five cents, with interest thereon from the eleventh day of January, 1855, until paid, at the rate of eight per cent. per annum. He also alleged that the defendant, together with one Thomas Hamilton, deceased, as the owners of a certain steamboat engaged in carrying freight and passengers for

hire on the same eleventh day of January, made and executed to him their note for that sum, payable one day after date, with interest thereon at the rate of ten per cent. per annum from the date of the note, which was annexed to and made part of the petition. In his supplemental petition the plaintiff alleged that during the month of June, 1854, he shipped on board the steamer aforesaid, of which the defendant and the said Thomas Hamilton were the owners, four thousand seven hundred and sixteen sacks of salt, to be transported to Nashville, and there to be delivered to certain consignees, and that a large part of the shipment, to wit, two thousand four hundred and six sacks of the salt were never so transported and delivered: and he averred that he was entitled to recover for the value of the deficit, and that the note annexed to the original petition and signed "Newell and Hamilton, owners," was given by them for that consideration.

Service was made by attachment, as the defendant resided permanently out of the State, and the writ of attachment was duly served on the aforesaid steamboat, then lying in the port of New Orleans. Due return having been made by the sheriff, the defendant appeared in the case, and on his motion the property attached was discharged, he having given bond to satisfy such judgment as might be rendered against him in the suit. All these proceedings took place in the Fifth District Court of New Orleans, but the cause was shortly afterwards, on motion of the defendant, removed into the Circuit Court of the United States for that district, under the twelfth section of the Judiciary Act.

Principal defences, as pleaded in the original and supplemental answers of the defendant, were: 1. A general denial of all the allegations of the petition. 2. That the defendant never was a member of a firm or partnership called Newell & Hamilton, and that no person ever had power or authority to bind him by note or otherwise under that name or style. 3. That the supposed cause of action accrued more than one year prior to the institution of the suit, and that the same was barred by the prescription of one year.

Opinion of the court.

1. Testimony was taken, and the cause was submitted to the court without the intervention of a jury. Although there was no jury trial, still the rulings of the court, under the peculiar practice in the Louisiana district, may be examined in this court upon writ of error, and the judgment reversed or affirmed by a bill of exceptions, in the same manner as if there had been a jury trial. They may also be revised here upon a state of facts found by the court, but the question presented in the court below and decided by the court must be clearly stated.*

Applying that rule to the present case, it is clear that no questions are properly before the court in this case except such as are distinctly presented in the bill of exceptions. Recurring to that source, it appears that the court found from the evidence that the steamer which carried the freight was commanded by the defendant, and that he owned three-fourths part of her, and that Thomas Hamilton (since deceased), owned the remaining one-fourth; that they were not partners, and never had any partnership name for transacting the business of their steamboat, and were not accustomed to sign bills or notes for each other, but that each signed for himself whenever it was necessary to give securities concerning the business of the boat, and that the note annexed to the original petition was not in the handwriting of the defendant. Full proof, however, was introduced that the consideration of the note was the balance due by the steamboat and owners for the salt not delivered to the plaintiff, and that the defendant was aware of the making of the note and of the consideration for which it was given.

2. Second objection of the defendant under the general issue was that the plaintiff could not recover upon the consideration stated in the petition, because the bill of lading was not produced; but the court ruled that the suit was not brought on that instrument: that it was a suit to collect the sum acknowledged to be due to the plaintiff in consequence of the breach of the contract. Undoubtedly that ruling was

* Arthurs et al. v. Hart, 17 Howard, 15.

correct, as is obvious from the allegations of both petitions. They allege the consideration of the note as the cause of action, rather than the note itself, and the judgment of the court very properly followed the declaration or petition. Reference is made in the bill of exceptions to the note and the testimony in support of it rather as evidence of the amount due to the plaintiff than as the foundation of the suit.

3. But the plaintiff in error still relies upon the plea of prescription, and insists that the action was barred by that limitation. Nothing is said upon that subject in the opinion of the court, but inasmuch as that defence was set up in the answer, and is mentioned in the bill of exceptions as one of the objections taken by the defendant to the right of the plaintiff to recover, we think the point is properly open to review in this court. Hamilton gave the note in liquidation of the demand of the plaintiff, and the bill of exceptions states that the defendant had notice of it before the death of Hamilton, who died in August, 1855. After the death of Hamilton his administrator made a settlement with the defendant, and transferred to him the one-fourth of the steamboat which belonged to his intestate, and in consideration of that transfer the defendant assumed and agreed to pay all the debts due by the boat. Express statement of the bill of exceptions is that that settlement took place on the twenty-second day of September, 1856, and that the cause of action in this case was included in that settlement. Viewing the matter in that light, the court held that the promise of the defendant to the administrator of the deceased part owner enured to the benefit of the plaintiff, and inasmuch as it was within the year next preceding the commencement of the suit, it was doubtless the conclusion of the court that the plea of prescription was not maintained. Suggestion of the defendant, however, is that there was no satisfactory proof of the acknowledgment of the specific amount stated in the petition, but the statement in the bill of exceptions is substantially otherwise, and we think the statement was fully warranted by the pleadings and evi

dence. Assuming the facts to be so, then it is clear that the plea of prescription is not maintained, as the petition was filed on the twentieth day of April, 1857, less than one year after the settlement was made.

4. Remaining objection of the present plaintiff, the defendant below, is that the court erred in allowing eight per cent. interest. Legal interest in Louisiana is fixed at five per cent., and the legislature has provided that "conventional interest shall in no case exceed eight per cent., under pain of forfeiture of the entire interest so contracted." Theory of the plaintiff in error is that the judgment was rendered upon the note, and that inasmuch as the note stipulated for the payment of ten per cent., the entire interest was forfeited. Present defendant denies that theory, and we think it cannot be sustained for the reasons already given. Judgment was rendered on the cause of action stated in the petition, as before explained, and not on the note, as assumed by the present plaintiff. Conventional interest might be eight per cent., and as the petition claimed no more, and no more was allowed by the court, the presumption, in the absence of proof to the contrary and of any exception to the decision of the court, is that the judgment is correct. Such a question might have been presented in the finding of the court, or it might have been presented in the bill of exceptions on objection to the ruling of the court. But usury was not set up, either in the original or supplemental answers, and it does not appear that any such objection was made in the court below. Parties might lawfully agree that the rate of interest should be eight per cent., and inasmuch as that rate was demanded in the petition and was allowed by the court, and no objection was taken to the ruling of the court, it must be presumed in this court, under the state of the pleadings exhibited in the record, that the court decided correctly.

The decree of the Circuit Court is therefore

AFFIRMED, WITH COSTS.

SPARROW v. STRONG.

1. This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment, in strict language, in the record of such inferior court, is a general judgment.
2. An appeal from an order denying a motion for a new trial does not, under the legislation of Nevada, carry the original judgment and the whole cause before the appellate court, so that the decision upon the appeal operates as a judgment reversing or affirming the judgment below.

SPARROW brought ejectment against Strong in the District Court for the County of Story, in Nevada, for an undivided interest in a mining claim, the proceeding being in the form prevailing in Nevada, of petition, answer, and replication.

On the 21st of May, 1862, a jury, after hearing the evidence and the charge of the court, rendered a general verdict for the defendants.

On the next day afterwards, to wit, on the 22d day of May, 1862, the court pronounced judgment on the verdict.

On the 13th of November, 1862, the District Court in which the cause had been tried heard a *motion for new trial*, and, after argument, overruled the motion and *refused the new trial*, to which the plaintiffs excepted.

Two days afterwards the plaintiffs gave notice to the defendants that they (the plaintiffs) appealed to the Supreme Court of the Territory from *the order* of the District Court, *made on the 13th of November*, 1862, *overruling the motion for a new trial.*

On the same day of this notice the defendants filed a bond —an undertaking—for the damages and costs. In this bond they recite that it is given on an appeal from *the order* of the District Court, made on the *13th of November*, overruling the *motion for a new trial.*

On the 22d of November, 1862, the counsel of both parties agreed upon a *statement;* and it was declared in their agree-

ment that the statement so settled was to be used on the hearing in the Supreme Court of the appeal from the *order* of the District Court refusing a *new trial*, which order is referred to in it as made on the 13th of November, 1862.

The statement comprised:

1. The motion of the plaintiffs for a new trial, and a specification of the grounds on which it was to be sustained; among which are insufficiency of the defendants' evidence, surprise at the trial, and newly-discovered evidence.

2. Certain evidence, oral and documentary, given on the trial. There were no *bills of exception* to evidence embodied in the statement; but in the specification of grounds it was alleged that the evidence was excepted to.

3. The prayers of both parties for instructions to the jury on questions of law, with the answers of the judge.

4. The general charge to the jury.

5. Affidavits of the parties, and of several other persons, taken after trial, to prove surprise and newly-discovered evidence. One of these undertook to detail what a certain witness, who had been rejected, would have sworn if he had been admitted.

On this statement, apparently, the case went into the Supreme Court of the Territory. No writ of error was taken out; nor did bills of exception accompany the evidence; nor was any assignment of error made in the Territorial Supreme Court.

On the 16th of March, 1863, the Supreme Court gave judgment in the case as follows:

"On appeal from the District Court of the first judicial district in and for Story County.

"Now, on this day, this cause being called, and having been argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here *seen* and *fully considered*, the opinion of the court herein is delivered by Turner, C. J. (Mott, J., concurring), to the effect that the *judgment* below be affirmed.

"Wherefore it is now *ordered*, *considered*, and *adjudged* by the court here that the *judgment* and *decree* of the District Court of

the first judicial district in and for Story County, *be and the same is affirmed* with costs."

From this judgment of the Supreme Court of Nevada a writ of error, on the 14th of August, 1863, was taken here.

On the same day the plaintiff in error filed with the clerk of the Supreme Court of the Territory the *assignment of errors* for this court; that is to say, a specification of the grounds on which they relied here for the reversal of the decision of the Territorial Supreme Court.

In those specifications they complained that the Supreme Court of the Territory *refused to reverse the judgment and order of the District Court refusing a new trial.* Then followed the specific objections to the *judgment and order*, some of which were *matters of fact.*

On the same day that the writ of error from this court was taken out and the errors assigned the plaintiffs petitioned for a *citation.* In that citation they described the cause or subject-matter which it was their object to have reviewed in this court. They set forth that, after trial and judgment in the District Court, they moved the same court for a *new trial;* that it was refused on the 13th of November, 1862; that *an appeal from that order* was taken to the Supreme Court of the Territory; that in the latter court, on the 16th of March, 1863, judgment was rendered "*affirming the order of said District Court;*" that the plaintiffs afterwards asked for a rehearing, which was denied them; hence the writ of error.

This court, two terms ago, on the record being brought before them, by a motion to dismiss the case on other grounds assigned, doubted, on looking at the judgment of affirmance above quoted, as given in the Supreme Court of Nevada, whether it was a final judgment or decision reviewable here within the meaning of the act of Congress organizing the Territory, and which gave this court jurisdiction to review "the final decisions" of the Supreme Court of the Territory, and ordered that point to be argued. It was accordingly argued; the argument turning chiefly on the language of the affirmance.

Argument for the defendant in error.

After the argument, this court refused to dismiss the case on the motion. It then said:*

"It is insisted, on this point, that the judgment is merely an affirmance of the order of the District Court overruling the motion for new trial. *If* this be so, the judgment itself is, in substance and effect, nothing more; and it is settled that this court will not review such an order. The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere. The circumstance that the discretion was exercised under a peculiar statute by an appellate court, and on appeal, cannot withdraw the case from the operation of the principles which control this court.

"But the majority of the court does not feel at liberty to disregard the plain import of the terms of the judgment rendered by the Supreme Court of the Territory. It does not purport to be an order or judgment affirming an order overruling a motion for new trial, but a judgment affirming the judgment or decree of the District Court, and the only judgment or decree, which we find in the record, is the judgment for the defendants in the action of ejectment.

"*If* this view be correct, the judgment of the Supreme Court is one to review which a writ of error may be prosecuted."

The case was accordingly retained for a hearing in regular course. It was now reached, and was argued fully on its merits; the true nature of this judgment or decree of affirmance and of every part of the matter of the jurisdiction being, however, again very fully discussed on a minute examination of all parts of the record, with a presentation of the Code of Nevada.

Messrs. W. M. Stewart, and J. S. Black, for the defendant in error, after arguing the case on merits, contended that the discussion of these ought never to arise in this court; that it was manifest from the statement of the case that the counsel of the plaintiff in error expected this court to hear them on the motion for a new trial, and to reverse the de-

* Sparrow *v.* Strong, 3 Wallace, 105.

cision of the Territorial court on that point by granting, here, the new trial which, there, had been refused. The language of the decree of affirmance of itself might be doubtful if read by the distant lights of ancient technical formularies; but it was not doubtful if read by the lights which surrounded it, and which as modern ones are the true ones by which to read it. The clerk has written, the "judgment and decree" of the District Court affirmed. But what does he mean by "decree?" No one will pretend that there is any decree in the technical sense, in this case; that, by any proceeding here taken this court has acquired jurisdiction of a decree in chancery; yet this pretence would be no more unreasonable than the assertion that this court may entertain jurisdiction of a judgment which was not before the Territorial Supreme Court. The whole record shows that the decision of the Territorial Supreme Court was merely one of affirmance of whatever was before that court, to wit, the order overruling the motion for a new trial.

It makes no substantial difference as to the form of the decision, as long as its meaning is obvious. An order overruling a motion for a new trial is, in one sense, a judgment. It is true, it is not technically a common law judgment, but it is, nevertheless, a decision of a court, and in that sense it is a judgment, and the record shows that that was the sense in which the clerk used the words decree and judgment. For his use of the word decree shows that he had little knowledge of the technical use of legal terms. We submit, therefore, that the decision of the Territorial Supreme Court was nothing more nor less than an affirmance of an order overruling a motion for new trial, of which this court has no jurisdiction.

The mode of removing a cause, in Nevada, from an inferior court for review in a court of appellate jurisdiction was prescribed by statute and is exclusive. It may be done, the statute declares, "as presented in this title and not otherwise."* It is worth while to look at these provisions a little.

* See Statute Book, 361.

Argument for the plaintiff in error.

They will make it plain that what was here affirmed, was the action of the inferior court about a *new trial.*

Section 274, provides for appeals generally.

Section 285, shows in what cases and how an appeal may be taken to the Supreme Court from the District Court in Chancery cases.

Section 302, prescribes the mode of removing "*every final judgment, order, or decision of a District Court, except in Chancery cases,*" to the Supreme Court, to be re-examined for error in law, and declares that it shall be done *by writ of error.*

Section 308, requires the errors to be specified.

Section 275, authorizes an appeal from an order of the District Court granting or refusing a new trial.

Section 284, prescribes how the cause shall be taken up *when the appeal is made from an order.*

Section 276, provides that a statement shall be made when an appeal is taken from an order, just as it was made in this case.

There was therefore no jurisdiction. If this court, when the case was last here, intimated anything else, it was on an imperfect view of the record; and now, that on such thorough view and full examination of every part of it, as the argument on the merits gives, it sees the true history of the case, it will dismiss the suit.

Messrs. G. T. Curtis and C. O'Conner, contra:

When this same cause was before the court at a former term, on a motion to dismiss, one of the grounds of the motion was that the judgment of the Territorial Supreme Court, now brought into this court for review and reversal, was an affirmance of an order of an inferior court overruling a motion for a new trial. This court, after hearing this point elaborately argued, held that the judgment of the Supreme Court was not an affirmance of an order of the inferior court overruling a motion for a new trial; that it did not purport at all to be an affirmance of an order overruling a motion for a new trial; but that the plain import of its terms is, that it affirmed a general judgment for the defend-

ants in the action. Hence, it was held by this court that the judgment of the Supreme Court is one which can be reviewed in this court by writ of error, and the motion to dismiss was denied.

The point, then, in relation to the plain import and effect of the judgment of the Territorial Supreme Court, is really *res adjudicata*, and ought not to be argued.

We submit, however,

1. That the proceeding under the Nevada code, called therein a motion for a new trial, is a special method of review, intended to reach the verdict and the judgment rendered in an action, and to bring the latter up for revision in the court in which it was rendered; and that the appeal from an order overruling such an application is intended to carry into the appellate court, for its revision, the merits of the judgment of the inferior court, and to enable the appellate court to act upon that judgment.

Our view of this proceeding is, that it is intended (as a mode of review of a general judgment) for an alternative method, with like efficacy and effect with an appeal from such general judgment or a writ of error, and more convenient and more likely to be embraced, because it unites in the same proceeding relief to be given in respect to the weight of evidence, or newly discovered evidence, and relief to be given, on account purely of erroneous rulings of law. That it unites these two grounds of relief, can constitute no solid objection to the re-examination, in this court, of the pure questions of law contained in a record made under such statute provisions, and brought here by writ of error. That such is the character of this proceeding is shown, we think, by the act of Congress* organizing this Territory, which act committed to the regulation of the Territorial legislature the whole subject of "writs of error, bills of exceptions and *appeals*," from the Territorial District Courts to the Supreme Court of the Territory; and by the Code of Practice, adopted November 29th, 1861, by the Territorial

* Act of Congress, March 2d, 1861, § 9; 12 Stat. at Large, 212.

legislature,* under authority conferred by the act of Congress aforesaid.

It was certainly competent to the Territorial legislature, under the broad authority conferred upon it, to provide any *form* of appeal from the District to the Supreme Court, and to give that form any scope and effect that it saw fit.

The Territorial Code of Practice, in civil cases, does not prescribe or recognize a common-law bill of exceptions; and it does prescribe and recognize a different mode of excepting to the rulings of a court at the trial of an action. It also provides three modes of bringing errors of law under review after a verdict and *judgment;* one of which is called a motion for a new trial. The code recognizes but one *form of civil action*, which it makes the same at law and in equity. It is instituted by complaint.† But the distinction between suits at law and suits in equity is not abolished.

Issues are either of law or of fact. If of fact in an action at law, there may be a trial by jury.

When there is a trial of issues to a jury, the court is required to state to them all matters of law necessary for their information in giving their verdict, and to furnish to the parties a statement in writing of the points of law contained in the charge, or to sign at the time a statement of such points prepared and submitted by the counsel of either party.‡

This is not a *bill* of exceptions according to the statute of Westminster; but something quite different, and obviously intended as a substitute therefor. That it is so intended is apparent from the definition of an exception given in § 188; namely, "an objection taken, at the trial, to a decision upon a matter of law."

It may be taken for the future purpose of a motion for a new trial, or for the future purpose of an appeal (§ 188). It may be delivered in writing to the judge, or written down by the clerk; or it may be noted on the judge's minutes, and

* Laws of Nevada Territory, 314–435

† Code of Practice, title i, p. 314.

‡ Id. § 165, p. 341.

afterwards *settled* in the "statement of the case," provided by the code (§ 189). "No particular *form* of exception shall be required" (§ 190).

After a verdict, "judgment" is to be entered by the clerk in conformity therewith, within twenty-four hours after the verdict (§ 197), and a "judgment is the final determination of the rights of the parties in the action" (§ 144).

"Final judgments" in the *District* Courts may be reviewed on appeal to the *Supreme* Court, by appealing from the "final judgment" rendered in an action commenced in the District Courts, or brought there from another court; and an "order" overruling a motion for a new trial may, also, be appealed from (§ 285). Both are intended to reach the final judgment of the District Court.

An appeal from the "final judgment" of course opens the whole merits of the judgment. An appeal from an "order" overruling a motion for a new trial may do this, and it also has a function beyond; it may open the whole merits of the judgment, and bring under review incidental errors not properly reviewable on direct appeal from the judgment alone. It may open only questions of fact, addressed to the discretion of the court; or it may open questions of law, addressed to the legal obligation of the court to decide rightly on the law, according as the "statement of the case" and the motion for a new trial did or did not include questions of law. This is apparent from various sections.* Hence it appears that it was not true, in the courts of this Territory, that motions for new trials necessarily involve *only* questions addressed to the discretion of the court. They *may* involve matters of discretion—as the weight of evidence, or newly discovered evidence; or they *may* involve rulings of law, or they may involve *both*, according as the "statement" and the "exceptions" are made up.

An appeal, therefore, from an order overruling a motion for a new trial *may* bring into the appellate court a record

* See, on the points, §§ 188, 189, 190, 191; 193, 194, 195; 271, 275, 276, 277, 278, 279, 280, 281, 282, 283; 285; 291.

which shows erroneous rulings of law; and if the order overruling the motion for a new trial is final in its nature, reaffirming, or leaving operative the general judgment previously rendered on the verdict, it is the proper subject of an appeal; and if it be founded, in whole or in part, on rulings of law at the trial, duly excepted to, the appeal from it necessarily opens the merits of the general judgment, in respect to the exceptions so taken.

2. The Supreme Court did act on the general judgment of the District Court, and did affirm that judgment, without authority, and when it only had authority to affirm or reverse an order overruling a motion for a new trial; and for this error, if it was one, we are entitled to a reversal of the judgment entered in the Territorial Supreme Court.

It is impossible to construe the judgment entered by the Supreme Court as a mere affirmance of the order of the District Court overruling the motion for a new trial. Either the Supreme Court rightly supposed—as we conceive—that the appeal from the order brought before it the general judgment of the District Court for reversal or affirmance, or else it committed an error; for it made no order or decree in direct reference to the order overruling the motion for a new trial, but proceeded directly to the general judgment of the District Court, which was the only judgment in the record before it, and *affirmed* it. If the Supreme Court had intended to act only on the order appealed from, it would simply have dismissed that appeal, or have affirmed in terms the order appealed from. It did not act on the mere order, but acted on the judgment brought before it in the record; and if the plaintiffs in error had never prosecuted this writ of error, the defendants must in all time have found their final evidence of title to this property in this record of the Supreme Court of the Territory, affirming the judgment of the District Court, by which the claim of the plaintiffs was negatived.

3. It can constitute no valid objection to the examination by this court of any errors of law disclosed by this record, that it contains no sealed bill of exceptions, or that the pro-

ceeding by which the whole case was, after judgment entered, brought under review, first in the District Court and then in the Supreme Court, was denominated in the practice of those courts a motion for a new trial.

The Nevada code* provides that "no particular *form* of exception shall be required;" just as that of New York does,† that an exception shall "not be sealed or signed." Both codes require the exception to be *taken* at the proper time, and point out how the evidence that it was taken shall be preserved; but under neither code can the judge, either before or after the judgment, be compelled to seal it. The decision in *Pomeroy* v. *The Bank of Indiana*,‡ cannot extend to writs of error to *all* courts, even though their statutory practice excludes the requirement of a sealed bill of exceptions. It applies only to the ruling of those where the Statute of Westminster is of binding force.

[The learned counsel, after arguing all these and some other points with great fulness and minute citations from the code, proceeded to argue the case on its merits.]

The CHIEF JUSTICE delivered the opinion of the court.

This case was before us at the last term, upon motion to dismiss the writ of error.

The suit, originally brought in the District Court for the Territory of Nevada, was an action of ejectment for an undivided interest in a mining claim.

Upon trial, there was a verdict and judgment for the plaintiff. Subsequently, and in accordance with the statute of Nevada, a motion for a new trial was made, which was denied. An appeal was then taken to the Supreme Court of the Territory, which gave judgment affirming the judgment or decree of the District Court.

We were asked to dismiss the writ, upon the ground that this judgment affirmed only the order of the District Court denying the motion for new trial, and was, therefore, not reviewable here.

* §§ 165, 188-91. † § 264. ‡ 1 Wallace, 592.

On opening the record, however, it was apparent that the judgment of the appellate court was, in terms, an affirmance of the judgment or decree of the District Court, and that the only judgment of that court, properly so called, was the judgment for the defendants in the action of ejectment.

A majority of the court declined to look beyond the plain import of the judgment of affirmance, and examine the record farther, in order to ascertain whether there was anything in it which would limit its effect to an affirmance of the order denying the motion for a new trial.

The motion to dismiss was therefore overruled; but we then observed that, if the judgment of the Supreme Court was, in substance and effect, nothing more than such an affirmance, this court could not review it; and after stating the familiar rule, that this court will not revise the exercise of discretion by an inferior court, in granting or refusing new trials, we said further: "The circumstance that the discretion was exercised under a peculiar statute, by an appellate court, and upon appeal, cannot withdraw the case from the operation of the principles which control this court."

The cause has now been regularly heard, and fully argued, and the first question for our consideration is that which was left undecided at the last term: "What is the true nature and effect of the judgment of the Territorial Supreme Court?"

The record shows an action of ejectment by petition, answer, and replication—the form sanctioned by Territorial law—regularly prosecuted in a Territorial District Court, resulting in a verdict and judgment for the defendants.

The record shows, also, a motion for new trial overruled, and a notice by the plaintiffs to the defendants of an appeal, from the order overruling that motion, to the Supreme Court of the Territory, and a bond of the plaintiffs, on appeal, reciting the appeal as made from that order.

Under the laws of Nevada, appeals are allowed from orders granting or refusing new trials; but it was necessary, before an appeal could be perfected, that a statement of the case, showing the grounds of appeal, should be filed. A

statement which had been used on the motion for new trial was accordingly filed, under a stipulation signed by both parties, which recited the notice of appeal as an appeal from the overruling order.

There is no paper in the record which indicates that either party understood that anything was before the appellate court except that order. Nothing else, as it seems, was intended to be brought before it by the appellants, and nothing else was understood to be by the appellees.

If, then, the decision of that court is anything more than an affirmance of the order of the District Court, it is not what was expected by either party. It must not, therefore, be held to be more, unless the principles of legal construction clearly require it.

Its terms, indeed, import an affirmance of the original judgment; but are they incompatible with a more limited sense? The decision is loosely and inaccurately expressed. It purports to affirm a judgment and decree; but there was no decree, in any proper sense of the word, in the District Court. The words "judgment and decree" must, therefore, have been used as equivalents; and "judgment" in such a connection, may well have been regarded as the equivalent of "decision or order."

It is probable, we think, that the court intended that its judgment should be understood as a simple affirmance of the order below. And such seems to have been the understanding of the appellants; for, in their prayer for a citation, on appeal to this court, they describe their "appeal" to the Supreme Court of the Territory as "taken for the reversal of the order," in the District Court, and state that judgment was given "affirming the order." We impose, then, no impossible, or even unnatural sense on the terms of the judgment, especially when considered in connection with the whole record, when we hold it, as we do, to be nothing else than an affirmance of the order overruling the motion for new trial.

But, it was argued at bar, with ingenious ability, that this judgment, if admitted to be merely an affirmance of the

order of the District Court, was, nevertheless, a final judgment, subject to review, on a writ of error, by this court. It was insisted, that under the peculiar legislation of Nevada, an appeal from an order denying a motion for a new trial, carried the original judgment and the whole cause before the appellate court, and that the decision, upon appeal, operated as a judgment, reversing or affirming the judgment below.

But we do not so understand that legislation. The statutes of Nevada directed the judgment to be entered within twenty-four hours after verdict, unless there was a stay of proceeding; and the direction of the statutes was observed in this case. But those statutes also provided for a motion for new trial after judgment; and the effect of granting the motion was to vacate the judgment and verdict, as in the ordinary practice it would vacate the verdict only, and so prevent the entry of judgment. With this exception, the proceeding, on motion for new trial, in the court of original jurisdiction, was not distinguishable, in any important respect, from the like proceeding in the District and Circuit Courts of the United States. There was, however, another peculiarity in respect to the finality of the proceeding. In the latter courts, the decision upon such a motion is without appeal. In the District Court of Nevada, an appeal might be taken to the Supreme Court; and, as we have seen, in case of such appeal, a statement, showing the grounds of it, must be filed, in order to perfect the proceeding.

But there is nothing in the statutes which gives, in terms, any other or different effect to the reversing or affirming order of the appellate court, than would attend the allowance or denial of the motion in the inferior court. Nor is there anything in the statutes which seems intended to give by implication any such other or different effect. On the contrary, the statutes provide for the ordinary mode of reversing the judgments of inferior courts, by appellate tribunals, upon writs of error; which would hardly have been done, if it was intended to give the same effect to appeals from decisions upon motions for new trials.

Decisions on such motions, by the District Courts, were required to be made upon such grounds of law and facts as the case might furnish; and upon like grounds were the decisions of the Supreme Court, upon appeal, required to be made. We cannot doubt that the decision of the District Court, in such a case, was the exercise of a discretion not reviewable in the Territorial Supreme Court, except under an express statute of the Territory. And we are obliged to think that the decision of the appellate court was equally an exercise of discretion upon the law and the facts, and not reviewable here in the absence of any act of Congress authorizing appeals in such cases.

This view of the preliminary question makes it unnecessary to examine the other important points in the case, which have been so ably and exhaustively discussed by counsel. We think the judgment of the Supreme Territorial Court only an order affirming the order of the District Court denying a motion for new trial, and that it is therefore not reviewable here on error.

WRIT DISMISSED.

BELL *v.* RAILROAD COMPANY.

1. Municipal corporations, such as the county boards of police usual in Mississippi, when authorized by statute to do acts which otherwise they would have no power to do—such, for example, as subscribe to a railroad incorporated and beginning in another State and passing through their own State—cannot modify or alter the subscription as authorized by the statute. A compromise by such board with a railroad company which does so modify or alter the subscription is, accordingly, void.
2. A sheriff, *ex officio* collector of taxes, who under the direction properly given of such county police board has collected a tax which such board was authorized by statute, upon certain conditions, to levy for the benefit of another body, a railroad company, has no right to decide whether such municipal body has laid the tax rightly or not, or to settle differences between the tax-payers, the county, and the third body. If the president of the board of police direct him to pay it to the third body his duty is to pay it.

Statement of the case.

3. The fact that the statute made it the duty of such sheriff before entering upon the duty of collecting to give a bond to the president of the board of police, with sureties to be approved by him, and by which he should bind himself to "keep safely and pay over to the order of the president of the board of police all money collected by him," and that the sheriff did not give a bond in such form at all, does not affect this obligation.
4. Where there is a plea to merits, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.

ERROR to the District Court of the United States for the Northern District of Mississippi.

The Mobile and Ohio Railroad Company, a corporation created by the laws of Alabama, was compelled, in order to reach its northern terminus, to pass through Mississippi, and the legislature being desirous that the road should be built, gave to the corporation the necessary powers to extend their line through the State. As the enterprise was one of great public utility, it was deemed important that the counties benefited by the construction of the road should have the privilege of subscribing for and holding stock in it. Provision was accordingly made for the police court of any county through which the road should be located, or of any county contiguous to it, to subscribe for stock, if the sense of the people of the county, obtained through an election, was in favor of it, and authority was given to levy a special tax to pay for the stock, if the vote was for the subscription. The sheriff of the county, who was ex-officio tax collector, was required, before he entered on the discharge of the duties imposed on him by this legislation, to execute a bond, payable to the president of the board of police and his successors in office, conditioned that he would safely keep and *pay over to his order* all moneys collected by virtue of the tax thus levied. The County of Pontotoc voted to subscribe for one hundred thousand dollars of stock in the road, and the board of police of the county, at their August term, 1852, levied a tax to pay for this subscription, and directed the sheriff to collect it, who, in pursuance of his instructions, did collect a certain sum of money.

The police court, for some reason not disclosed by the rec-

ord, failed to make the subscription, and controversy arose with the railroad corporation because this was not done, resulting in a litigation. This litigation was finally compromised; the railroad company agreeing to release all claim against the county on account of any liability for stock heretofore voted for by the people of the county, to be taken by the county, and the condition of the release being that the board of police would pay over as a bonus the sum collected by the sheriff.

The president of the board accordingly, by written draft, directed the sheriff, a certain Bell, to pay to the railroad company the sum of money already collected by him under order of the board of police for the purpose of paying for stock in the said company. Bell, when called on by the agent of the company, specially appointed to settle the dispute, to know if he would accept the order, told his agent "to get up his order and fix it up right, and if things were fixed up right, he, Bell, had the money." When, however, the order was actually presented, Bell would not accept the order nor pay the money, alleging that the stock had been illegally subscribed for.

He had not given a bond in the form prescribed by the statute authorizing the subscription.

The company now brought *assumpsit* against Bell in the Federal court for the Northern District of Mississippi, to recover the sum which he had collected, setting out the order, acceptance, and non-payment; declaring also on an account stated. Evidence of the compromise and agreement was put in evidence and relied on; also the written order of the president of the police board on Bell, to pay the money to the railroad company.

The court below charged, among other things, that the police court had no authority except such as was derived from the acts of the legislature, and as such had no authority to make a compromise, and that their action therein was void. That the money in the hands of Bell vested in the company so soon as an order was made by the president of the police board on him to pay the money to the company

That Bell had no right to judge of the fact whether the stock had or had not been legally subscribed for.

Judgment went accordingly in favor of the railroad company for the sum collected by the sheriff, Bell, defendant in the suit, and he now brought the case here on error on exceptions to the charge.

The record showed that there were pleas in abatement and a demurrer to them in the case; the disposition of which was not very plain. There was also a plea to the merits subsequently put in, on which the suit went to trial, and was tried.

The case was submitted on the record on behalf of the plaintiff in error, Bell, and a printed brief of *Mr. Peck*, *contra*, who contended that, if the compromise between the railroad company and the county was made in good faith, it was binding. The company having a right to sue, and the county a right to defend, the right to settle in any way, including compromise as one way, followed; but that if this was not so, that the error had been to the prejudice of the railroad company and not to that of Bell, and that the charge having been correct on other points, there was no error for which judgment could be reversed. In other respects—the learned counsel argued—the charge was right.

Mr. Justice DAVIS delivered the opinion of the court, and after stating the case proceeded thus:

It is not necessary to consider the terms of the compromise as a basis of recovery; for it is very clear that a municipal corporation like the board of police could not modify or alter the stock subscription voted by the people, in the absence of power from the legislature, and as there is no pretence that this was conferred, it follows that the agreement made with the railroad company was without authority of law, and void. But the company did not rest their right to recover on *this agreement*, and the court expressly charged the jury that no effect could be given to it.

There is, however, aside from this agreement or compromise, a substantial ground—relied on by the court below.

and sustained by the evidence—on which the judgment in this case can be supported. If the County of Pontotoc, according to the requirements of the law, voted a subscription to the stock of the railroad; the board of police levied a tax to pay for it; the tax was collected; and the president of the board instructed Bell, who was the sheriff, and had the money, to pay it to the agent of the company, who also demanded payment, then the liability of Bell is fixed, and he cannot be allowed to interpose collateral matters by way of defence. The money in the hands of Bell vested in the railroad corporation so soon as the president of the board of police drew the order, and, on presentation, *he* was obliged to pay. *His* duty was obedience. It was no part of his business to sit in judgment on the proceedings of the board of police, nor was he at liberty to constitute himself an arbiter to settle the differences that had arisen, or might arise, between the county, the tax-payers, and the company, growing out of the vote to subscribe stock, and the refusal to make the subscription.

So far as Bell was concerned, the board of police had the exclusive power over this subject; and if in the exercise of that power the president of the board directed him to pay the money to the Mobile and Ohio Railroad, he could not question the authority nor review the decision. And the omission to give the bond, as by law required, cannot affect his liability, although it may lessen the security of the company.

There is great confusion in the record in relation to the disposition of the demurrers and pleas in abatement; but, as Bell filed a plea to the merits, and the parties went to trial, all antecedent irregularities were waived.

There is no error in the record, and the judgment below is

AFFIRMED WITH COSTS.

RYAN *v.* THOMAS.

Where a decision of the highest court of law or equity of a State is *in favor* of the validity of a statute of or an authority exercised under the United States, drawn in question in such court, this court, under the twenty-fifth section of the Judiciary Act (by which alone it has jurisdiction of the judgments of State courts), has no revisory power.

THOMAS brought suit against Ryan, in the St. Louis Land Court, an inferior State court of Missouri, for a tract of land in that State. The only question was as to the validity of a patent granted by the United States to a fictitious person. The inferior court held that the patent was valid; but the Supreme Court of the State, in 1857, reversed the judgment, and held that the patent to a fictitious person was a nullity. The case having been tried again in the inferior court, was again, in 1860, before the Supreme Court of the State, and it being proved that the supposed fictitious person was simply a false name assumed by an actual person, that court held that, although a patent issued to a person not in existence was a nullity, yet that a patent to a person under an assumed name was not void; and if such person should, under such assumed name, transfer the land to a purchaser, the title would enure to the latter; and they again reversed the judgment of the Land Court. The case was a third time tried in the inferior court, and, in 1864, a third time reached the Supreme Court, which affirmed the decision of that court, and declared that no new point was presented. Ryan now brought the case by writ of error here, conceiving, apparently, that this court had jurisdiction under the twenty-fifth section of the Judiciary Act, which authorizes a final judgment or decree in any suit in the highest court of law or equity of a State to be brought here on error in point of law, provided the validity of a statute of or an authority exercised under the United States is drawn in question in the State court, and the decision is *against* that validity.

Mr. Coffey, for the defendant in error, moved to dismiss the case for want of jurisdiction, there being, as he argued, no

question which, under the Judiciary Act, could give this court appellate jurisdiction of the case.

Mr. Blair, contra.

The CHIEF JUSTICE delivered the opinion of the court.

We have no jurisdiction of the judgments of State courts except under the twenty-fifth section of the Judiciary Act, and, upon examining the record, we do not find that the case presented is within any clause of it.

The suit in the State court was for the recovery of a tract of land in St. Louis, Missouri. The proofs of the plaintiff consisted of a patent of the United States to one Johnson, dated January 5th, 1843; a certificate of entry by Johnson, issued by the register of the St. Louis Land Office, on the 19th of August, 1829; an assignment of the same date by Johnson and the plaintiff, indorsed upon the certificate, and a decree, upon default, of the St. Louis Land Court, in a suit by the plaintiff against Johnson, adjudging and decreeing the title to be vested in the possessor.

The defence rested upon the ground that Johnson was a fictitious person, but the court held the patent not void, if issued to a real person and transferred by his indorsement to the plaintiff, though such person in making the entry and obtaining the certificate used a fictitious name.

The patent offered by the plaintiffs seems to have been the only authority under the United States drawn in question in the State court, and the decision was in favor of its validity. It is only when, in such a case, the decision is against the authority that this court has revisory jurisdiction.

It is suggested, in the brief for the plaintiff in error, that a subsequent patent was relied on by him when defendant in the State court, and that the decision having been against that patent may be reviewed here. But we find no such patent and no such decision in the record.

The writ of error must therefore be

DISMISSED.

Statement of the case.

PEARSON v. DUANE.

1. Although a common carrier of passengers by sea, as a master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual though violent and revolutionary authorities of a town, under threat of death if he return, and when the bringing back and landing of such passenger would in the opinion of such master tend to promote further difficulty—yet this refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting aboard the vessel, have paid or tendered, himself or through a friend, the passage-money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him aboard it, and send him back to the port of departure. And if he do so, damages will be awarded against him on a proceeding in admiralty.
2. However, where a person who had been thus banished from a place got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the history of the case until after the vessel was at sea—on meeting a return steamer, of a line to which his own vessel belonged—stopped his own and sent the man aboard the returning one, to be taken to the port where he embarked—such captain, not acting in any malice, but acting from a humane motive, and from a belief that the passenger, if landed at the port where his own vessel was going, would be hanged—in such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly, in such a case, this court, on appeal from a decree which had given four thousand dollars damages, modified it by allowing but fifty dollars, with directions, moreover, that each party should pay his own costs on the appeal.
3. In a case such as above described, a passenger is entitled to compensation for the injury done him by being put on board the return vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries that he suffered from obstructions which he afterwards met with in getting to the place from whence he had been expelled and where he wanted to return; and which injuries were not caused by this act, but were owing to the fact that all to whom he afterwards applied for passage to that place knew the power and determination of the authorities there and were afraid to carry him back.

IN the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on

board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary, yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," *upon penalty of death in case of return.* This committee had, in the fore part of June, against his will, placed him on the Golden Age, a steamer in the harbor of San Francisco, destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the Stevens afforded the first opportunity to get back, which he was anxious to embrace, being willing to encounter the risk to which his return might expose him. Duane went openly on the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being aboard until after the ship got to sea, but no directions had been given for his exclusion, and although he was without a ticket, or money to buy one, yet a passenger, who had the means, offered to pay the purser his fare, who declined receiving it.

It was usual for those persons who wished to secure a passage, to procure a ticket at Acapulco, but there was no imperative rule of the ship requiring it, and the customary fare was often paid to the purser after the boat had left the port.

There was no evidence that Duane would have been excluded, had the master been aware that he was on board before he left Acapulco, for it was quite clear that the circumstances of his banishment were unknown at that time.

The master, Pearson, was aware that the Vigilance Committee were in control of San Francisco, and ascertained in some way that Duane had been expelled by them from California, and if he returned, would be in danger of losing his life. Having learned this, he resolved to put Duane aboard the first down ship he met, and send him back to Acapulco. The steamer Sonora, commanded by Captain Whiting, and one of the same line of steamers of which Pearson was master, very soon came in sight, and was stopped. Whiting in-

formed Pearson that he had orders not to carry back any banished person, and that Duane *would certainly be executed if he returned*, and advised that he should be sent to the Sonora, and he would endeavor to persuade him to go on with him.

Thereupon Duane was transferred to the Sonora, and landed at Acapulco. The transfer was effected without any personal indignity to Duane, who at first resisted, but was induced to yield to superior force, by friendly counsels.

Duane did not return to California until the month of February, 1860. The Vigilance Committee no longer existed, and he then filed a libel in admiralty for damages, in the District Court of the Northern District there, setting forth essentially the facts above stated; that having been expelled as he was from the Stevens, all efforts to get aboard vessels going to San Francisco were unavailing; that he went thus to Aspinwall, in the Republic of New Grenada, to try and get passage thence to San Francisco, but that a line of steamers previously existing there and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival. That finally, through charity, he obtained a passage to New York, in which city he was without money or means, his character and reputation blasted, and himself a dependent on charity for subsistence, and was for several months confined in the hospital there, physically unable to attempt the voyage to San Francisco until February, 1860.

By the 12th article of his libel, he assigned as a reason for delay in bringing his action, the state of things in San Francisco, the numerous executions there by the Vigilance Committee, and his own belief that if he returned his life would be put in jeopardy; a belief which, he alleged, "existed up to the time of his departure from New York to California."

The answer, besides a defence from lapse of time, asserted that the libellant was not "a good or law-abiding citizen of San Francisco," and that he had "secretly and without any right or authority so to do, got on board of the Stevens and

Argument for the appellant.

remained secreted on board as a stowaway;" and that the defendant in sending the libellant back on the Sonora, had been influenced by humane motives.

The District Court decreed in favor of Duane, with $4000 damages; a decree affirmed in the Circuit Court. Appeal.

Messrs. Lyon and Alexander Hamilton, Jr., for the appellant:

I. The condition of affairs in San Francisco, in July, 1856, is a matter of public history. It was that of an organized rule of anarchy, irresistible from its force, and unyielding in the execution of its purposes. It was submitted to, if not created by, a body of men otherwise supporters of law, and was formed to correct an evil which the law could not or did not reach. In whatever way it judged, it executed its judgments with inflexible certainty. The defendant could not disregard the existence of this power, nor defy its edicts because they emanated from an unlawful source. His duty, in common with every other citizen, was to abstain from participating in anything which this tribunal had pronounced against until the supremacy of the law should be re-established. To have taken back an obnoxious exile, would have been a direct challenge to the Vigilance Committee, which they would have answered by hanging the victim, under a sentence already pronounced.

To sustain a recovery, under such a state of facts, for the refusal of the defendant to carry this exile to the gallows, would be to disregard the principles on which the law of common carriers is founded.

The first and most general obligation on the part of the public carriers of passengers is, without doubt, to carry persons who apply for passage. The obligation is, nevertheless, subject to several qualifications.

In *Jencks* v. *Coleman*,* a case before Story, J., it was said:

"The right of passengers to a passage is not an unlimited right; but is subject to such reasonable regulations as the proprietor may prescribe for the due accommodation of passengers.

* 2 Sumner, 222.

and for the due arrangement of their business. The proprietors have not only this right, but the further right to *consult and provide for their own interests* in the management of such boats as a common incident to their right of property."

"They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbance on board, or whose characters are doubtful, or dissolute or suspicious, and *a fortiori* whose characters are unequivocally bad; nor are they bound to admit passengers on board, whose object it is to interfere with the interest or patronage of the proprietors so as to make the business less lucrative to them. While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them, if *there be a reasonable objection.*"

The report of this case shows that Mr. Webster, who tried the case for the plaintiff, made no exception to any of the propositions involved in this part of the charge.

In *Cook* v. *Gourdon*,* a South Carolina case, Mr. Justice Bay, in delivering the opinion of the court, speaking of the rights and liabilities of ferrymen, says:

"In fact, the law gives him the right of judging when it is safe and proper for him to cross or not."

In *Bennett* v. *Dutton*, in the Supreme Court of New Hampshire,† Chief Justice Parker says:

"We are of opinion that the proprietors of a stage-coach for the regular transportation of passengers for hire, are bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, *unless there is a sufficient excuse for them for a refusal.*"

Like innkeepers, carriers of passengers are not bound to receive all comers.‡

* 2 Nott and McCord, 22.

† 10 New Hampshire, 486.

‡ Markham *v.* Brown, 8 New Hampshire, 523.

Argument for the appellant.

"*The character of the applicant*, or his condition at the time, may furnish just grounds for his exclusion, and his object at the time may furnish a sufficient excuse for a refusal, as if it be to commit an assault upon another passenger, or to injure the business of the proprietor."

The fact that the libellant was willing and desirous to return to San Francisco, makes no difference as to the defendant's duty. His conduct in acting like a madman did not justify the master of the ship in imitating it. The value or worthlessness of the libellant's life is not involved in the question. The crime of murder or any lesser breach of the peace, is an offence against the body politic; in any measures taken to avoid this, the civil rights of individuals are subordinate to the requirements of a public duty.

An agent of a railway would be justified in refusing to sell a ticket to a pugilist on his way to participate in a prize fight, as would the conductor of a train in putting him off before reaching the place where the fight is to take place. Will it be asserted that a disappointed prize-fighter could recover damages against the carrier for thus averting a flagrant breach of the peace? The case before the court is stronger against a recovery.

If a carrier has reason to suppose that a passenger is engaged in canvassing for another line, the law excuses him for refusing to carry the passenger; or if he is of dissolute habits and not a fit companion for other passengers, he may be excluded; how much more is the carrier justified in excluding a person, who he well knew would meet, at the end of the route, with death at the hands of an armed and organized body of men in open rebellion against the constituted authorities?

Questions affecting the carriage of persons are comparatively of modern date, the first case coming under the notice of the court being in 1791, before Lord Kenyon. The carrier of goods, as will be conceded, is held to wider obligations than the carrier of passengers. Yet, if the goods offered are of a nature which will at the time expose them

to extraordinary danger or popular rage, he need not take them. This was decided in the King's Bench, in *Edwards* v. *Sherrat*,* a case where the plaintiff had a lot of wheat at Wolverhampton to be sent to Birmingham. There was a great disposition to riot manifested in the neighborhood, on account of the prevailing scarcity. The mob had pulled down a corn-mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The defendant was a common carrier, by water, between Birmingham and Wolverhampton, and on to Radford. The plaintiff's agents, finding one of the defendant's boats going by, without any intention of staying at Wolverhampton, or seeking to take in goods there, stopped the boat, and prevailed upon the boatman to take in the corn, which was seized by the rioters at a distance of four or five miles from Wolverhampton. The defendant had a verdict, and opinions were delivered by Lord Kenyon and Barons Gross, Lawrence, and Le Blanc. Lord Kenyon said:

"All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this; for *no man in his senses would, under these circumstances, have taken the corn under a liability as common carrier.*"

That is, there being a disposition to riot in the neighborhood, and a reasonable probability that the corn would be seized by the rioters in case it was taken on board the boat, the boatman would have been justified in acting upon the belief, and in refusing to take the corn.

Baron Gross says, in the same case:

"What are the facts? A boatman, in the night, is induced to take goods on board *under such circumstances as, if the defendant had been apprised of them*, it is clear that he would not have contracted to receive them as a common carrier."

Almost all legal propositions which are true in the abstract

* 1 East, 604.

have their exceptions in applying them. Thus, no feature of the common law is more conspicuous than the tenacity with which it has maintained the sacredness of a man's person. Yet in an indictment for an assault and battery, the defendant may justify laying his hands upon another *to prevent him from fighting or committing a breach of the peace;** or *to prevent him rescuing goods taken in execution;*† or the like.‡ "A man may justify an assault and battery in preventing the commission of a felony, *or a breach of the peace, or the suppression of a riot.*"§

In fact, the mere belief, if sincere, that the danger existed, was enough to justify the captain's conduct.

In the *Commonwealth* v. *Power*, in the Supreme Court of Massachussets,‖ a person named Hall, actually had a ticket, intending to take passage. He had, however, on a former occasion, while on the passage, violated the rules of the company, and Power, the superintendent, now put him out of the car. The Chief Justice, referring to Hall's former conduct, uses this language:

"And if he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, *and if Power believed* that his intention was to violate a subsisting, reasonable regulation, then he and his assistants were justified in forcibly removing him from the depot."

In addition, carrying the libellant to San Francisco was calculated not only to endanger the safety of the ship and passengers, but would have subjected the cargo to risk, for which the owners would have been responsible. It has been held, that the phrase, "king's enemies," does not include the violence of a mob, or riot, or civil commotion of any nature.¶

* Comyn's Digest, tit. Pleadings, 3 M. 16.

† Bridgwater *v.* Bythway, 3 Levinz, 113.

‡ Glever v. Hynde, 1 Modern, 168.

§ Roscoe's Criminal Evidence, 213.

‖ 7 Metcalf, 596.

¶ 1 Parsons' Maritime Law, 181; citing the cases.

II. But if the court should hold that the libellant is entitled to recover, then the damages allowed are excessive. No special damage is averred or proved; no unnecessary violence was used in removing him from the ship; nor did he receive bodily harm. He does not show a pecuniary injury of a dollar resulting from the act.

Mr. Ashton, contra:

I. "A common carrier for passengers," says Professor Parsons, citing *Bennett* v. *Dutton*,* quoted on the other side, "is bound to receive all passengers who offer, to carry them the whole route, to demand no more than the usual and established compensation, *to treat all his passengers alike*, to behave to all with civility and propriety, to provide suitable carriages and means of transportation."†

The libellant went publicly on board the Stevens, at Acapulco, and was not refused his passage, and having been carried from Acapulco, after coming publicly on board, with the knowledge of Pearson, the captain, and having tendered his fare, was as much entitled to his passage as any other person, and his rights were as grossly violated as would have been those of any other, the most respectable and most respected passengers on board, if the captain had taken a freak against them and tendered them back their fare, and then forcibly put them on board the Sonora.

In *Coppin* v. *Braithwaite*,‡ a leading case in England, the plaintiff was reported to be a pickpocket and associate of what was called the "swell mob," and as such, being found on board the vessel, though by consent of the officers, it was determined by the master that he was unfit to be a passenger. He was accordingly disembarked against his will at an intermediate point; the act of expelling him being accompanied with contemptuous and insulting language. At *nisi prius* judgment was for the plaintiff, and a motion in arrest of judgment, on the ground that the declaration was

* 10 New Hampshire, 481. † Treatise on Contracts, vol. i, p. 698.
‡ 8 Jurist, 875.

bad in that it alleged as breach that the defendant, by his agent, had caused the disembarkation to be conducted in a scandalous and improper manner, &c., whereby the plaintiff suffered injury, &c., was emphatically overruled by the court.

It is not pretended that the libellant did anything on the Stevens that was improper. The only argument is that if he arrived at San Francisco he would have been maltreated. But that was a risk which he had a right to take. The matter all rested in uncertainty. He had a right to be the sole judge of it.

II. The damages are a matter which are in the nature of a finding by a jury, and belonged properly to the case below. As on questions of fact, brought up here on appeal, this court, even where it may strictly have a right to reverse, will be slow to exercise its action, so here, it will consider that this matter belonged rather to the court below than to the appellate tribunal. The question of law, that is to say, the question whether, under the circumstances, Pearson had a right to expel Duane, is the only proper question for this tribunal.

Independently, however, of this, the damages cannot be regarded as grossly excessive. The expulsion of Duane was a great and mortifying indignity to him. It was an injury, too. He had been banished from San Francisco on the shortest notice. He was without funds, of course; and was unable to return to his former home for years; suffering the greatest hardships in the mean time over the whole continent.

The act of expulsion by Pearson was, in addition, a great breach of public rights; rights, at least, which every man is interested to maintain. The master of a ship has powers practically despotic. It is of great importance that every such person be taught that his powers must be exercised in subjection to law.

Mr. Justice DAVIS delivered the opinion of the court.

This case is interesting, because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.*

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.† Duane conducted himself properly on the

* Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

† Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But, the sum of four thousand dollars awarded as damages, in this case, is excessive, bearing no proportion to the injury received. Duane is entitled to compensation for the injury done him by being put on board the Sonora, so far as that injury arose from the act of Pearson in putting him there. But the outrages which he suffered at the hands of the Vigilance Committee, his forcible abduction from California and transportation to Acapulco, the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by Pearson. Every one, doubtless, to whom he applied for passage, knew the power of the Vigilance Committee, and were afraid to encounter it, by returning an exile, against whom the sentence of death had been pronounced.

Pearson had no malice or ill-will towards Duane; and, as the evidence clearly shows, excluded him from his boat, in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for Duane to seek to go back there. Common prudence required that he should wait until the violence of the storm blew over, and law and order were restored.

This course he finally pursued, and he did not return to California until February, 1860. If he believed, when expelled from the Stevens, that Pearson had done him a great wrong, he certainly did not when he filed the libel in this case, for the 12th article is as follows:

"That when libellant was so banished from the State of California, as aforesaid, by the said Vigilance Committee, he was threatened with the penalty of death should he ever

return to said State; that libellant was aware that said committee had caused to be executed a number of persons, without color or warrant of law or right, and that the said committee had the power and ability to put in execution their threats, and libellant believed and had reason to believe from the conduct of said R. H. Pearson as aforesaid, and the treatment he received from the hands of said Vigilance Committee, and their threats as aforesaid, which were well known to said Pearson, that should he return to said State, his return, if attempted or if successful, would be impeded and resisted, and his life put in peril and jeopardy, which belief existed up to the time of his departure from New York to California."

This is the sworn statement of Duane, that his life was in peril if he returned to California at an earlier day, for the conduct of Pearson, to which he refers, was predicated on a corresponding belief.

It is true, this article in the libel was introduced, by way of excuse, for not having sooner brought the suit, but the admissions in it are proper evidence for all purposes. If so, it is clear that the legal injury which Duane suffered at the hands of Pearson, can be compensated by a small amount of money. On a review of the whole case, we are of opinion that the damages should be reduced to fifty dollars.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court.

ORDER ACCORDINGLY.

WARE *v.* UNITED STATES.

1 Where—on a suit by the United States against a deputy postmaster for damages in not paying over moneys which came to his hands during the six months next preceding the discontinuance (March 13th, 1862) of the office to which he was appointed—the defendant's rejoinder (demurred to), by its whole context, and by its introductory allegations

Statement of the case.

that the office was never supplied with mails after it was discontinued, shows that it means nothing more than that such defendant was wrongfully prevented from earning commissions—such rejoinder presents a claim for damages merely.

2. To such a claim it is answer—

(1) That postage commissions as ascertained by the quarterly accounts of deputy postmasters and the receipts from boxes, during the term in question in this suit, were the only sources of compensation to those officers allowed by law.

(2) That the claim being for damages and not for commissions or receipts from boxes as ascertained in a quarterly account, it could not be sustained as a credit unless it appeared affirmatively that it had been presented to the auditor of the Post-office Department and had been by him disallowed in whole or in part, or that the defendant had been prevented from so presenting it by some unavoidable accident.

3. By the legislation of Congress the Postmaster-General has the power to "establish *post-offices*" as well where the commissions of the office amount to or exceed one thousand dollars as where they do not.

4. Unless there is some provision in the acts of Congress restraining its exercise, the power to establish post-offices, as interpreted by usage coeval with the creation of the Post-office Department and recognized in Congressional legislation, infers a power to discontinue them. And deputy postmasters occupy their offices subject to the contingency that such offices may be so discontinued.

5. Possessing thus the power to discontinue post-offices, the Postmaster-General may exercise the power, notwithstanding that the deputy postmasters have been appointed by the President, by and with the advice and consent of the Senate, and under a statute which enacts that the appointee shall hold his office for the term of four years unless sooner removed by the President.

6. If he do exercise it, the office of deputy postmaster is, in such cases, gone. There is no longer a deputy postmaster at that place.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to reverse a judgment of that court affirming the judgment of the District Court in an action of debt instituted by the United States on the official bond of one Ware, as deputy postmaster at Kensington, in the county of Philadelphia, for $8000.

The declaration alleged that there was due to the United States from the said postmaster, according to his quarterly accounts of receipts and expenditures for the last quarter of the year 1861 and the first quarter of the year 1862, a balance of $3380.43.

Statement of the case.

The only question in the cause arose upon the defendant's *second* plea, which alleged that the defendant, Ware, being postmaster at Kensington, and still continuing to exercise that office, and *not having been lawfully removed* therefrom, held and retained in his possession the sum of $3450, part of the sum demanded by the United States, as and for his commissions on the postages collected at that office, and for rent of office during the space of eighteen months, commencing April 1st, 1862, and ending September 30th, 1863.

The *replication* of the United States was a *special traverse* of this plea, averring in the *inducement* that on March 13, 1862, the Postmaster-General of the United States discontinued the post-office at Kensington, and that afterwards no letters were deposited in or forwarded by mail from that office; but that all such letters, &c., as had previously been deposited in and mailed at the Kensington office were, after the date aforesaid, deposited in and mailed at the Philadelphia post-office; and that the said Ware, since the 19th of March, 1862, had collected no postages at the said late post-office at Kensington, and, since his quarterly account for the first quarter of the year 1862, had rendered no accounts of receipts and expenditures at the said Kensington post-office; and, concluding: "*Without this*, that the said Samuel Ware, for the space of eighteen months, from the 1st day of April, 1862, to the 30th day of September, 1863, was deputy postmaster at Kensington, in the manner and form," &c.

The defendants, in the rejoinder filed to this replication, averred that, after the said unlawful discontinuance of the post-office at Kensington, the postmaster at Philadelphia received and delivered letters and other mailable matter which, *but for the said discontinuance, would have passed through the Kensington post-office, sufficient in quantity to authorize and justify an allowance of commissions to the said Ware*, over and above expenditures, at the rate of $2000 per annum, which said commissions, so wrongfully withheld from him, exceed in amount the balance claimed by the United States.

To this rejoinder the United States demurred, and the demurrer was sustained by the District Court. A jury having

Statement of the case.

been called to assess the damages found for the plaintiffs in the sum of $2366.22, for which the court entered judgment.

This judgment was affirmed, on writ of error, by the Circuit Court.

To understand the matter more completely it may be well to state the facts, not disputed, of the case, and also to mention certain acts of Congress in reference to the subject of postmasters.

I. *The facts were these:*

Previous to 1854, Kensington was a district adjoining the municipality of Philadelphia proper, possessing a distinct municipal organization. In 1854 it was consolidated with the city of Philadelphia, under an act of Assembly of the State of Pennsylvania. The post-office established at Kensington, before the consolidation of the districts, continued to be maintained there until March, 1862, when it was discontinued by the Postmaster-General in the manner stated in the plaintiff's replication.

At the time of this order the accounts of Ware had not been finally adjusted at the department.

After this, the mails were no longer supplied to or distributed through the Kensington office, but through the Philadelphia office and its sub-offices. No postages were collected or received thereafter by the postmaster of Kensington, and no accounts were rendered by him, after the abolition of his office, to the department at Washington.

II. *As respected the acts of Congress:*

1. The Constitution confers upon Congress power "to establish post-offices and post-roads." An act of March 3d, 1825,* provides that the Postmaster-General "shall *establish post-offices* and appoint postmasters *at all such places as shall appear to him expedient* on the post-roads that are or may be established by law." This act was changed by an act of July 2d, 1836,† which authorized the *President*, by and with the consent of the Senate, to appoint a deputy postmaster at

* § 1; 4 Stat. at Large 102. † § 33; Id. 87.

each office at which the commissions amounted to or exceeded one thousand dollars a year. And this law (*under which Ware had been appointed*) declares that the appointee "*shall hold his office for the term of four years, unless sooner removed by the President.*" But no other repeal of the act of 1825 was made by this act of 1836.

2. By an act of June 22d, 1854,* the compensation authorized or allowed by law, during the period mentioned in the defendant's second plea, to deputy postmasters, was certain *commissions* on the postages collected *at* their respective offices in each quarter of the year.

By an act of March 3d, 1847,† no compensation in addition, excepting the receipts from boxes, could be given to deputy postmasters by the Postmaster-General.

Mr. G. M. Wharton, by brief, for the plaintiff in error, Ware.

I. Ware held his office for the term of four years, and was entitled to its emoluments during that term unless sooner removed by the President.

There is no evidence on the record of any such removal, nor is there any proof of express removal even by the Postmaster-General. There is, therefore, no room for an inference that the defendant was removed by order of the President, as consequent on the act of the Postmaster-General.

The alleged power in the Postmaster-General to discontinue any post-office can hardly be construed to carry with it the removal of the postmaster not appointed by himself, else he might do indirectly what he could not do directly. This power in the Postmaster-General ought, therefore, to be construed to apply only to those offices where he has the power to appoint the postmaster.

The power of removal should be coextensive with the power of appointment. The Postmaster-General neither appointed Ware nor established the Kensington office.

II. If illegally removed, Ware was not removed at all, but still continued postmaster at Kensington, *de jure*, and was

* § 1; 10 Stat. at Large, 298. † § 13; 9 Id. 145.

Argument for the deputy postmaster.

entitled to the emoluments of the office, although wrongfully withheld from him. He was, consequently, further entitled to a credit on the books of the department for those emoluments.

III. In a suit by the United States against him for money alleged to be in his hands, he was entitled to claim credit for the amount in which the government was thus equitably indebted to him, the law being, that any credits may be claimed by the defendant when so sued, which had been previously submitted to the consideration of the accounting officers of the Treasury, and been rejected.

IV. The damages claimed to be set off by the defendant, need not arise out of the same transaction, which is the subject of suit.

V. Any claim within the discretion of the head of a department may be set off. A court and jury may do what the head of the department should have done.

VI. The restrictions on this right of set-off appear to be: *First.* The defendant cannot set off unliquidated damages; nor, *secondly*, any claim which requires legislative sanction. But these exceptions do not apply to the present case.

Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, the verdict being regulated by peculiar circumstances of each particular case; which cannot be ascertained by computation or calculation, as damage for not using a farm in a workmanlike manner, for not building a house in a good and sufficient manner, on warranty in the sale of a horse, for not skilfully amputating a limb, and other cases of like character.*

In our case the measure of compensation to the defendant, Ware, is to be found in the receipts of the office prior to its discontinuance, and in the allowance theretofore made to him at the post-office department, to wit, at the rate of two thousand dollars per annum.

After the discontinuance, the same mailable matter, yielding the same returns to the treasury, passed through the

* Butts *v.* Collins, 13 Wendell, 139

office at Philadelphia, and in the eye of the law, if the discontinuance and removal complained of were illegal, would stand to the credit of the Kensington post-office, and would be the basis of the salary or commissions of the defendant, Ware. The United States cannot contend that, by their own wrongful act, no revenue was received at the Kensington post-office after 13th of March, 1862; the revenue from the mailable matter which ought to have passed through that office, wheresoever received, would be considered in law as received thereat. The Kensington post-office had been established for many years, and yielded an annual return to the treasury, of which an average could be readily taken. Of course the receipts would increase with the increase of population.

Numerous decisions of this court may be cited as authority for the foregoing legal propositions.*

Mr. Ashton, Assistant Attorney-General, contra:

I. The argument of the other side assumes, as a *concessum* of the case, that if the Postmaster-General had no authority, under the acts of Congress, to discontinue the office at Kensington, the defendant, Ware, was unquestionably entitled to receive, and can claim by way of defence in this suit, the compensation, allowance, or emolument that he demands for the period subsequent to the discontinuance of that office.

But under the system established by the act of 1854, which was in full force during the period for which the defendant sets up a claim for compensation, no postmaster received or was entitled to any compensation unless he actually collected postages at his office; and, therefore, if for any reason a postmaster failed to collect postages at his office, he earned no compensation. If no postages were collected,

* United States *v.* Giles, 9 Cranch, 212; Same *v.* McDaniel, 7 Peters, 1; Same *v.* Ripley, Id. 19; Same *v.* Robeson, 9 Id. 319; Gratiot *v.* United States, 15 Id. 336; United States *v.* Bank of Metropolis, Id. 377; Same *v.* Wilkins, 6 Wheaton, 135; Same *v.* Buchanan, 8 Howard, 83.

he was entitled to no commissions; and commissions were the only compensation allowed or payable to the officers.

Certainly after March 31st, 1862, Ware collected no postages at the Kensington Post-Office, *nor were postages collected at that office by any one;* so that, whether the action of the Postmaster-General was lawful or unlawful, the defendant cannot make good the claim as he sets it up, for compensation after the discontinuance of his office.

II. Independently of this, the Postmaster-General had authority to discontinue this post-office.

1. By the act of March 3d, 1825, the entire constitutional power of Congress "to establish post-offices and post-roads," in so far as post-offices are concerned, was given to the Postmaster-General.

The power to discontinue post-offices is incident to the power to establish them. This was established by this court in *Ex parte Hennen.** The Postmaster-General may lawfully do, under the power conferred on him by the act of 1825 to "establish post-offices," whatever Congress might lawfully do under the same power conferred on it by the Constitution.

2. Moreover, the power to discontinue post-offices has been in constant exercise by the Postmaster-General, and it is too late, in a collateral way like this, to call in question the legality of his acts in that particular.

3. In addition, Congress has repeatedly recognized the power as one subsisting in the Postmaster-General. Thus the act of July 2d, 1836, section 11, requires him to cause to be certified to the Auditor of the Post-Office Department, "all establishments and *discontinuances* of post-offices,"† &c. And again, the act of March 3d, 1851, provided that "no post-office now in existence shall be *discontinued* in consequence of any diminution of the revenues that may result from this act."‡

III. The post-office having been discontinued in fact and in law, such discontinuance operated to determine the in-

* 13 Peters, 261. † 5 Stat. at Large, 82. ‡ 9 Id. 590.

cumbency of the defendant in the office of postmaster at Kensington, to which he was appointed by the President.

The existence of the office of deputy postmaster at Kensington depended upon the existence of a post-office *at Kensington.* It could continue not a day after the abolition of the post-office at that place. Now, we have seen that the continuance of a post-office at Kensington was made dependent by Congress upon the will of the Postmaster-General. And when, therefore, he exercised his discretion and discontinued the post-office there, *the office* to which he was appointed ceased. And unless it is possible to entertain the legal conception of an officer without a subsisting office, we must conclude that the defendant ceased to be deputy postmaster at Kensington on the 19th of March, 1862.

Mr. Justice CLIFFORD delivered the opinion of the court.

Deputy postmasters, where the commissions allowed to the office amount to or exceed one thousand dollars, are appointed by the President, by and with the advice and consent of the Senate, and hold their offices for the term of four years, unless sooner removed by the President.*

Principal defendant was, on the sixteenth day of July, 1861, duly appointed in that manner deputy postmaster at Kensington, in the County of Philadelphia; and the record shows that he was in the performance of the duties of that office on the thirteenth day of March, 1862, when the same was decided to be unnecessary by the Postmaster-General, and was discontinued. When appointed, he gave bond with sureties as required by law for the faithful performance of his duties, and that he would render a quarter-yearly account of receipts and expenditures, and pay over to the proper officer the balance of all moneys which should come to his hands for postages, in the manner prescribed by the department.

Substantial charge against the defendant was, that he had neglected and refused to pay over certain moneys received for postages, as exhibited in his quarterly accounts for the

* 5 Stat. at Large, 84.

last two quarters next preceding the discontinuance of the office. Refusing to pay over those sums, the United States sued him in an action of debt, declaring on his official bond against him and his surety.

Defendants appeared and pleaded several pleas; but it is unnecessary to refer particularly to any one of them except the second, as all the others resulted in issues of fact, and present no question for decision in this record. Second plea of the defendants alleged that the postages annually received at that office amounted to a sum which authorized an annual allowance to him of two thousand dollars, and entitled him to retain that sum, as and for commissions, to his own use, besides the rent of his office, from and out of the moneys so collected and received for postages; and they also averred that the principal defendant was never lawfully removed from his office, and that the moneys not paid over, as set forth in the declaration, were properly retained by him for rent of his office and as commissions for postages, from the first day of April, 1862, to the thirtieth day of September in the following year. Replication of the plaintiffs alleged that the office was discontinued by the Postmaster-General as unnecessary, on the thirteenth day of March, 1862; that the incumbent of the office was duly notified of that fact; that proper directions were given that the public property, keys, and books of the office should be transmitted to the Post-office Department; that letters and all other mailable matter then ceased to be delivered through or by that post-office, and that the defendant thereafter never collected any postages or rendered any quarterly accounts.

Rejoinder of the defendants denied that the office was ever lawfully discontinued, and averred that letters and other mailable matter addressed to the office, and which, but for the unlawful discontinuance of the same, would have passed through it, were received and delivered by the postmaster at Philadelphia, sufficient in number and quantity to justify the annual allowance to the defendant as commissions, of two thousand dollars, and that the commissions so wrongfully withheld from the defendant exceeded in amount the alleged

balance due to the plaintiffs, and tendered an issue to the country. Plaintiffs demurred to the rejoinder of the defendants, and the defendants joined in demurrer. Parties were heard, and the court rendered judgment for the plaintiffs for the damages as found by the jury. All of the foregoing proceedings took place in the District Court; but the judgment was affirmed, on writ of error, in the Circuit Court, and the defendants removed the cause into this court.

I. Theory of the defendants is, that the discontinuance of the post-office, even if it was the exercise of a lawful authority, did not carry with it the removal of the postmaster; and inasmuch as he was never removed by the President, they contend that he continued to be the postmaster *de jure* at that office, and that as such he was entitled to the commissions which the office would have earned if it had been regularly supplied with the mails as theretofore, and the defendant had performed all the duties which were devolved upon him prior to its discontinuance. Suppose all that could be admitted, still it is obvious that it would not, without more, establish a valid defence to the action, as it would yet be incumbent upon the defendant to show that he had a right to retain the amount which came to his hands before the office was discontinued, and to set off against that sum the damages he sustained by the subsequent refusal of the Postmaster-General to allow him a credit equal to the commissions for the year and a half next following the time when the order of discontinuance was carried into effect.

Demand of the plaintiffs is for damages for not paying over moneys which came to the hands of the incumbent of the office during the six months next preceding its discontinuance, and they insist that he had no right to retain the amount so received for any purpose, but was bound by law to pay it over under the regulations of the department. On the other hand, the defendants insist, in argument, that he properly retained it, and might lawfully and as matter of right prove his supposed claim for commissions in set-off as an answer to the action of the plaintiffs. Nothing of the

kind was alleged in the rejoinder, and nothing of the kind, therefore, was admitted by the demurrer. All that the rejoinder alleged was, that the commissions of the office, if it had not been unlawfully discontinued, would have been sufficient to justify an allowance to the incumbent of two thousand dollars per annum, and that the commissions were wrongfully withheld from him by the department.

Taken separately from the other averments of the rejoinder, those allegations might afford some countenance to the proposition that the demurrer admitted away the plaintiffs' case; but the whole must be considered together, and when so considered, it is evident that the pleader, when he alleged that the commissions were wrongfully withheld from the incumbent of the office, meant nothing more than that he was wrongfully prevented from earning commissions, as the clear and indisputable inference from the introductory allegations of the rejoinder are that the office was never supplied with the mails after it was discontinued.

II. Commissions are allowed to deputy postmasters, at prescribed rates, on the postage collected at their respective offices in each quarter of the year, or in due proportion for any period less than a quarter, and they are required by law and the regulations of the department to render accounts quarter-yearly of the receipts and expenditures of their offices, which are expected to show the extent of their liability and the amount of the commissions to which they are entitled.* Viewed in the light of these suggestions, it is undeniable that the real claim of the principal defendant, as exhibited in the pleadings, was not for commissions in the sense in which that word is employed in the acts of Congress and the regulations of the department, but was, in truth and fact, a claim for damages, based on the assumption that he had been wrongfully prevented from earning such commissions by the neglect and refusal of the Postmaster-General to supply his office with the mails, and by its unlawful discontinuance. Assuming such to be the char-

* 4 Stat. at Large, 102, 105; 10 Id. 298.

acter of the claim as described in the rejoinder, then it follows, as a necessary consequence, that there are at least two difficulties in the way of the theory of the defendants which cannot be overcome.

1. Where a deputy postmaster collects no postages, there can be no commissions allowed under the acts of Congress in force during the period embraced in this controversy, and as the office was not supplied with the mails there could be no receipts from boxes, as there were no letters or other mail matter to be delivered. Postage commissions, as ascertained by the quarterly accounts of deputy postmasters and the receipts from boxes, during that period, were the only sources of compensation to those officers allowed by law, and those sources having entirely failed in this case—yielding nothing—the department possessed no authority whatever to make any other allowance.*

2. Claim of the principal defendant being for damages, and not for commissions or receipts from boxes, as ascertained in his quarterly accounts, the court below, if the case had been tried on the merits, could not have sustained the claim as a credit unless it had appeared affirmatively that it had been presented to the Auditor of the Post-office Department, and had been by him disallowed in whole or in part, or that he had been prevented from so presenting it by some unavoidable accident. Such has been the rule in respect to credits claimed by individuals at the Treasury Department, almost from the foundation of the government, and the original provision upon that subject is still in full force.†

Same rule, substantially, has been prescribed by Congress in the trial of suits against delinquent postmasters and mail contractors, except that the party claiming the credit is required to present the claim to the Auditor of the Post-office Department. No claim not having been so presented and disallowed in whole or in part can be sustained at the trial, unless it appear that the defendant is then in possession of

* 9 Stat. at Large, 202; 10 Id. 298.

† 1 Id. 515; United States *v.* Giles, 9 Cranch, 212.

vouchers, not before in his power to procure, and that he was prevented from presenting the claim for credit to the auditor by some unavoidable accident.*

Testing the rejoinder by these requirements it is too plain for argument that it is defective in substance, as the facts shown in the allegations are in several respects insufficient to constitute a defence to any part of the plaintiff's claim. Plain inference from the facts, as alleged in the rejoinder, is that the defendant had neither collected any postages nor earned anything as receipts from boxes, and there is no pretence, even in argument, that he ever, during the period embraced in this controversy, rendered any quarterly account. Neglecting to allege those facts, or any of them, he utterly fails to show any claim to commissions, and having omitted to allege that his claim for credit on account of damages sustained was ever presented to the auditor and disallowed, he fails to make a case in which any such credit can be sustained in a Federal court.

III. But suppose it were otherwise, still we are of the opinion that the plaintiffs must prevail, because, in our judgment, the post-office at Kensington was lawfully discontinued. A general post-office was established on the twenty-sixth day of July, 1775, the year before the Declaration of Independence.† By that ordinance it was directed that a line of posts be appointed under the direction of the Postmaster-General, from Falmouth, now Portland, to Savannah, with as many cross-posts as he shall think fit; and he was authorized to appoint as many deputies as to him might seem proper and necessary. Amendments were made to that ordinance from time to time to the twenty-eighth day of October, 1782, when it was repealed, and a supplemental ordinance was adopted in its place, conferring substantially the same powers upon the Postmaster-General. Those powers were continued, with certain alterations and additions, until the Constitution of the United States was

* 5 Stat. at Large, 83.

† 1 Laws of the United States, ed. 1815, p. 649.

adopted. Congress, on the twenty-second day of September, 1789, made provision for the appointment of a Postmaster-General, and enacted that his powers and salary, and the compensation to the assistant or clerk and deputies which he may appoint, and the regulations of the post-office, shall be the same as they last were under the regulations and ordinances of the late Congress.*

Throughout that period post routes were established by Congress, but the deputy postmasters were invariably appointed by the Postmaster-General, and they were required to receive and distribute the mails at the places designated by the appointing power. When the last-named act was passed it was entitled "An act for the temporary establishment of the post-office;" but it was continued in force, from time to time, without any material alteration, until the twentieth day of February, 1792, when the act was passed to establish the post-office and post-roads within the United States.† Authority was conferred upon the Postmaster-General, by the third section of that act, "to appoint an assistant and deputy postmasters where such shall be found necessary."‡ Same authority was continued in the same terms in the act of the eighth of May, 1794, with the further provision that where there was more than one road between the places mentioned in the act, he might direct the route to be considered the post-road.§ Express authority was conferred upon the Postmaster-General, by the act of the second of March, 1799, *to establish post-offices* and appoint postmasters at all such places on the post-roads that are or may be established by law, as shall appear to him expedient.‖ Like power was conferred upon that officer by the first section of the act of the thirtieth of April, 1810, which also enacted that he should provide for the carrying of the mail on all post-roads that are or may be established by law, and as often as he, having regard to the productiveness thereof, and other circumstances, shall think proper. ¶

* 1 Stat. at Large, 70.
† 1 Id. 178–218.
‡ Id. 234.
§ 1 Id. 357.
‖ Id. 733.
¶ 2 Id. 593.

Power to establish post-offices and post-roads is conferred upon Congress, but the policy of the government from the time the General Post-office was established, has been to delegate the power to designate the places where the mails shall be received and delivered to the Postmaster-General. Sufficient evidence of that fact is seen in the references already made to acts of Congress; but if more be needed it will be found in the first section of the act of the third of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the Post-office Department."* Provision is there made that the Postmaster-General "shall establish post-offices and appoint postmasters at all such places as shall appear to him expedient, on the post-roads that are or may be established by law." No part of that provision has been repealed except the clause as to the appointment of postmasters for offices where the commissions amount to or exceed one thousand dollars. Such appointments must be made by the President, by and with the advice and consent of the Senate; but in all other cases the power of appointing postmasters is still vested in the Postmaster-General, and his power *to establish post-offices*, as there conferred, is neither repealed nor modified. We concur with the plaintiffs, that the power to discontinue post-offices is incident to the power to establish them, unless there is some provision in the acts of Congress restraining its exercise.†

Undoubtedly Congress might discontinue a post-office which they had previously established by law, and it is difficult to see why the Postmaster-General may not do the same thing when acting under an act of Congress expressed in the very words of the Constitution from which Congress derives its power. Strong necessity exists that the power of the Postmaster-General in this behalf should be upheld so long as the offices are established by his authority. New facilities for transportation may call for change of location, or it may appear that the location was unadvisedly selected,

* 4 Stat. at Large, 102.

† Ex parte Hennen, 12 Peters, 261.

either from want of proper information or through misrepresentation. Some of these causes must be constantly operating in a sphere of action so vast and diversified as that of the Post-office establishment. Probably it was such reasons and others of a like character that gave rise to the practice which is believed to have been coeval with the creation of the department. Such a practice, which it is understood has been in constant exercise for more than three-fourths of a century, is certainly entitled to weight in the construction of an act of Congress appertaining to the powers of a department of the government. Much support to that view of the subject is also derived from the acts of Congress recognizing the power as one subsisting in the Postmaster-General. Section eleven of the act of the second of July, 1836, requires the Postmaster-General to cause to be certified to the auditor of the department "all establishments and *discontinuances of post-offices*, and all appointments, deaths, resignations, and removals of postmasters," and the second section of the act of the third of March, 1851, provides that no post-office now in existence shall be discontinued . . . . in consequence of any diminution of the revenues that may result from that act.* When weighed in connection with the immemorial usages of the department, those acts of Congress recognizing the existence of the power, may well be regarded as a legislative interpretation of the provision authorizing the Postmaster-General to establish post-offices, and as sanctioning a construction in conformity to that well-known usage.

Possessing that power it was lawful for the Postmaster-General to exercise it, notwithstanding the postmaster had been appointed by the President, by and with the advice and consent of the Senate, because the incumbent accepted the appointment subject to the legal contingency that the post-office might be discontinued. Congress, therefore, by necessary implication, authorized the Postmaster-General to discontinue any such post-office whenever it should appear

* 5 Stat. at Large, 82; 9 Id. 590.

to him to be expedient and proper, and having exercised that discretion it is not possible to hold that the discontinuance was unlawful.

Learned counsel will hardly contend that Congress might not have discontinued that office, and our conclusion is that the same effects flow from the discontinuance in this case as if it had been directly declared by an act of Congress.

Defendant, when the post-office was discontinued, ceased to be postmaster at Kensington, because there was no longer any post-office at that place. He was never entitled to any compensation except commissions and receipts from boxes, and those sources of compensation were extinguished when the post-office was discontinued, and he lost nothing to which he was entitled.

The judgment of the Circuit Court is therefore

AFFIRMED.

THE NASSAU.

1. The jurisdiction of a court of admiralty over a vessel captured *jure belli*, is determined by the fact of capture. The filing of a libel is not necessary to create it.
2. When, under the act of Congress of the 25th March, 1862, for the better administration of the law of prize (12 Stat. at Large, 374), the prize commissioners authorized by the act certify to a District Court that a prize vessel has arrived in their district, and has been delivered into their hands, this is sufficient evidence to the court that the vessel is claimed as a prize of war and in its jurisdiction as a prize court.
3. Demands against property captured as prize of war must be adjusted in a prize court. The property arrested as prize is not attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.
4. Whether a maritime lien for work and materials alleged to have been furnished to a vessel prior to her capture *jure belli* is lost by such capture, is a proper subject for investigation and decision by the prize court before which the captured vessel is brought for adjudication; and which the parties setting up such lien can, on presentation of their claim to that tribunal properly have decided.

Statement of the case.

5. But if such parties do not so present and ask to have it decided, the question is not properly before this court for review, in a case where the District Court has only dismissed the libel as improperly filed on its instance side.

APPEAL from the Circuit Court of the United States for the Southern District of New York; the case being thus:

On the 17th of June, 1862, Harlan, Hollingsworth & Co., a mercantile firm doing business at Wilmington, Delaware, filed a libel in admiralty, on the instance side of the District Court for the Southern District of New York, against the steamship Nassau, then in the port of New York, for repairs done to, and materials furnished for, the said vessel, in June, 1860. On the same day, in obedience to a monition properly issued, the marshal attached the vessel, and made return that she was at the time in the custody of the prize commissioners. Afterwards, on the 27th day of June, the prize commissioners certified that the steamer, an alleged prize of war, arrived at the port of New York on the 2d day of June, and was delivered into their hands, and was then in their custody. These commissioners, it may be here stated, were officers acting under the authority of an act of Congress,* which directs, that when any property captured as prize is brought into any district of the United States for adjudication, it shall be the duty of the prize commissioners to receive and keep it until by proper process of the court it shall be placed in the custody of the marshal.

A motion having been made by the district attorney, intervening for the United States, to dismiss the libel—on the ground that a vessel under arrest as prize of war was within the cognizance of the prize court, and could not be attached in a private action, and that all legal and equitable demands against her must be adjudicated in the prize court—the District Court sustained the motion, and dismissed the libel; and the Circuit Court, on appeal, affirmed the decree. The case was now brought here to review that decision; the libellants insisting that the order of dismissal was without authority of law.

* Act of 25th March, 1862, 12 Stat. at Large, 374.

Mr. J. T. Williams, for the appellants:

It will be readily inferred from the dates in this case—and the fact will doubtless be conceded to be so—that it was in consequence of the Rebellion, and the suspension of the authority of the Federal courts in the Southern ports, the ports between which the Nassau was doubtless plying,—that the libellants were forced to wait from June, 1860, when the repairs, which are the foundation of this suit, were made, till June, 1862, when they filed their libel, before they could pursue their claim. In the beginning of our civil war the vessel, no doubt, sailed from a Southern port, and nothing more seems to have been heard of her by these libellants who had given their labor to her until June, 1862, when she came into the port of New York, and was delivered into the hands of the "prize commissioners." The case shows that thereupon, immediately, on the 17th June, 1862, *and before any prize suit had been commenced*, or the prize commissioners had certified that she was in their hands, the libellants filed their libel in the District Court for New York, setting up *their* claim and maritime lien, and praying the usual process and sale for payment.

For the purposes of the present argument, the claim of the libellants must, of course, be taken to be just and legal, and one that would have been pronounced for, had not the libel been, at the instance of the government, summarily dismissed. The government cannot here argue that the claim was unjust or doubtful, and so *beg* the question upon a hearing of which it has deprived the party asserting the claim.

This being so, is it law—while a vessel is in the hands of prize commissioners, no otherwise than as an *alleged* prize of war—it not being shown how she came into the hands of such commissioners, nor in any respect how, or on what, the government claim is founded—that no private citizen can proceed against her in a civil action, to bring her into the District Court upon a claim confessedly legal and meritorious?

Such a proposition cannot be maintained.

Argument for the material-men.

At the time when the libellants filed their libel for repairs and materials, no libel in prize had been filed. The vessel was not within the jurisdiction of any court. Certainly, *until* a libel in prize had been filed, any one had a right to proceed against the vessel for a meritorious claim. Suppose the government had never filed a libel. How then? This libel of ours was not only filed before the government filed any of theirs, but, for aught that appears, before it had a design of filing one. Even the commissioners had not acted.

Of course, there can be no pretence of a conflict of jurisdiction. The libellants did not seek to take the vessel *out* of the jurisdiction of one court and bring her into the jurisdiction of another. They first brought her within the jurisdiction of a court having general jurisdiction, not only of their claim, but of the claims of their antagonists.

It cannot be questioned that the District Courts of the United States have concurrent jurisdiction in prize as well as in admiralty. The jurisdiction of the prize court in *England*—which is a special jurisdiction, conferred by a special commission from the Crown, and only when the exigencies of war seem to require it—extends, no doubt, *only* to cases of prize. But in this country prize courts and the courts of admiralty are blended—consolidated under one and the same statutory jurisdiction—and although the practice in prize cases varies somewhat, in some particulars, from that which obtains in admiralty cases, the jurisdiction is one and the same.

The Judiciary Act* provides that the District Courts shall "have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction;" and similar provision is made by the act of 1812, "concerning letters of marque, prize, and prize goods,"† which enacts that "the District Courts of the United States shall have exclusive original cognizance of all prizes brought into the United States, as in civil causes of admiralty and maritime jurisdiction."

* § 9.

† § 6, Stat. at Large, 761.

Argument for the material-men.

In *Glass* v. *Sloop Betsy*,* which was a decision prior to the act of 1812, the court say:

"The truth is, Admiralty is the *genus;* Instance and Prize Courts are the *species*, comprehended in the grant of admiralty jurisdiction."

We must beware, then, how we attempt to apply to our courts the dicta, or even the adjudications, of English tribunals. The foundations of the respective jurisdictions being wholly different, nothing but confusion and error can, by such attempts, ensue.

These matters being settled, we may confidently argue that no title, whether it be derived from capture as prize of war or otherwise, can be higher than that which is acquired by purchase. Whatever may be the legal altitude of the claim of the government to the vessel in question, a citizen may ask of a court that it hear him as a citizen suitor, asserting a superior prior claim to the whole, or some portion of it; and his claim, in such a case, ought not to be dismissed without a hearing.

Between a claim from purchase and a lien for repairs made in good faith, in furtherance of the public interest, in full reliance upon a universal principle of law, which has had the sanction of all nations for a thousand years—law which, unlike a contract, bends to no local interpretation, but is alike uniform and universal—there can be no essential difference.

But were it never so well settled that a *valid* prize claim overrides a lien and claim like that of the libellants, no one will pretend that an *invalid* prize claim will have the same effect. And will the court assume that this "prize claim" was valid when no fact appears upon the record to show it, and the government was not able to assert that the vessel was anything more than "an *alleged* prize of war?" Or assume that, had the libellants been permitted to do so, they would not have been able to show that this *alleged* claim was not a

* 3 Dallas, 12.

valid one? If invalid, can the government be heard to dispute the claim of the libellants?

What the libellants did in this case was in accordance with ancient practice. A vessel can be libelled by as many and as various parties and actions as a man can be sued by. Coming in as a claimant or petitioner in the suit of another is permitted only in special cases, and the practice is not favored. It was competent for the government to intervene in the suit of the libellants, and to contest the validity of their claim and lien, on whatever ground they saw fit, and, if successful, they had the field to themselves, so far as the libellants were concerned. They could probably, even in that suit, have asked for a sentence of condemnation of the vessel; or, perhaps more orderly, they should have filed a separate libel for that purpose. But the libellants had no possible way of presenting their claim to the adjudication of the court but by filing an original libel. It cannot be suggested that their situation would have been better if they had waited till after the government had filed its libel. As we have already asked, what if the government had never done so? Or how can it be said that the government had a right to file its libel first; or that, if the libellants had filed theirs after the government had filed its, a motion to dismiss would not have been granted with equal propriety?

The action of the District Court proceeded, of course, on the ground that a prize condemnation had the effect to efface all maritime liens; the court forgetting that a prize condemnation had not taken place, and that there was as yet no evidence upon which the court could pronounce such condemnation.

II. A valid claim to a vessel as prize of war, does not efface or override the claim and lien upon her, given to a material-man by the general maritime law.

The principle that a forfeiture, as prize, has no such effect upon a maritime lien given by the general maritime law, was admitted by Sir William Scott, in the *Vrow Sarah*,*

* Referred to in a note in 1 Dodson's Admiralty, p. 355–6.

also in *The Constantia*,* and claims founded on such liens were allowed, even in an English prize court. In *The Belvidere*, the same learned judge admitted that prize did not override a "positive lien upon the ship."

The Tobago, and some other cases cited upon the brief of the other side, are distinguishable.

[The learned counsel then went into a critical and very learned examination of these cases, endeavoring to distinguish them from the present.]

Mr. Ashton, Assistant Attorney-General, contra:

1. The vessel having been, at the time of the filing of the libel, in the possession of the prize commissioners, was in the custody of the law, and subject only to the orders and decrees of the *prize* court of admiralty.†

2. Whether a mere lien on property captured *jure belli* is or is not an interest sufficient to support a claim in a court of prize—a point that opposing counsel have argued so learnedly—is a question which really does not arise in the case as it now stands here. The District Court—*as an instance court of admiralty*—had no jurisdiction of the libel filed by these libellants in a case where the vessel had been captured and was plainly about to be proceeded in as prize of war. The point made need not, therefore, be replied to.

Yet we apprehend it to be clear, on the authority of American not less than of English cases,‡ that such mere lien is not maintainable on the prize side of the District Courts against the vessel, or the proceeds thereof, and hence that the order of the court below dismissing the one set up in this case, was right.

Mr. Justice DAVIS delivered the opinion of the court.

It is the practice with civilized nations, when a vessel is

* Edwards, 232.

† 1 Kent's Commentaries, 101–103, and cases cited; Act of March 25, 1862.

‡ The Eenrom, 2 Robinson, 5; The Tobago, 5 Id. 222; The Marianna, 6 Id. 24; The Frances (Thompson's Claim), 8 Cranch, 335; Id. (Irvin's Claim), Id. 418; Bolch *v.* Darrell, Bee, 74; The Mary, 9 Cranch, 126.

captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so to settle all intervening claims of property. Until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it.

But it is argued that the libel in this case was sustainable, because no libel in prize had been filed, and until this was done any one had the right to proceed against the vessel for a meritorious claim. If this were so, it would greatly lessen, with captors, the stimulus to activity so necessary in time of war, for they could never tell how many private actions they would have to defend before they could reap the fruits of their enterprise and valor. Sound policy, as well as the law of prize, therefore, requires that all demands against captured property must be adjusted in a prize court, and that the property arrested as prize shall not be attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement.

The fact of capture determines the jurisdiction, and not the filing of a libel. When captured as prize of war the property is in the custody of the law, and remains there to await the decision of a prize court, and, if condemned, all claims to the property are by it adjusted. Any other rule would work great hardship to captors, and tend to cripple the operations of government during time of war. Under the provisions of the act of Congress for the better administration of the law of prize,* it is directed that, whenever any property captured as a prize is brought into any district of the United States for adjudication, it shall be the duty of the prize commissioners to receive it and keep it, until by

* 12 Stat. at Large, 374.

Statement of the case.

the proper process of the court, it shall be placed in the custody of the marshal of the district.

When, therefore, in this case, the prize commissioners certified to the court below that the prize steamer Nassau had arrived in the District of New York, and was delivered into their hands, there was sufficient evidence before the court that the vessel was claimed as prize of war, and in the jurisdiction of a prize court; and the motion to dismiss this libel, filed by private parties, was properly entertained and decided.

Whether a maritime lien, like the one in this case, is lost, when the property is captured *jure belli*, would have been a proper question for investigation and decision by the prize court that condemned the Nassau, and which the libellants, on presentation to that tribunal, could have had decided.

Not having done so, the question is not before this court for review.

The decree of the Circuit Court is

AFFIRMED

UNITED STATES *v.* LE BARON.

1. When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day.
2. If it be proved that a bond bearing date the first day of the month, did not become obligatory until the fifteenth, this is no variance, although the bond is counted on in the pleadings as a contract made on the first day of the month and bearing that date.

ERROR to the Circuit Court for the Southern District of Alabama.

This was an action of debt brought by the United States against Le Baron, surety of Beers, deputy postmaster at Mobile, on an official bond, dated *the first of July*, 1850.

The declaration set out—

"For that whereas, heretofore, to wit, *on the first day of July*, A D. 1850, at Mobile, to wit, in the State aforesaid and within

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the jurisdiction of this court, the said Le Baron, by his certain writing obligatory sealed with his seal, &c., *acknowledged himself* to be held and firmly bound to the United States in the sum of $20,000."

The assignments of the breaches were laid in these words:

"That while the said Beers was deputy postmaster as aforesaid under *said* writing obligatory, and after the making and delivery thereof, to wit, on the 10th day of July aforesaid, and divers other days before the commencement of the suit," &c.

The case had been already before this court at December Term, 1856, and is reported in 19 Howard.* The facts then thus appeared:

Beers was appointed deputy postmaster at Mobile by the President during the recess of the Senate, and received a commission bearing date in April, 1849, to continue in force until the end of the next session of the Senate, that is to say until the 30th of September, 1850.

In April, 1850, before the old term had expired, he was nominated by the President to the Senate for the same office; and the nomination having been confirmed, a commission was made out and signed by President Taylor, but the President dying, it had not been transmitted to him at the date of the bond, July 1st. The condition of the bond was simply that whereas Beers was "deputy postmaster at Mobile," "now, if he should well and truly execute the duties of the said office," the bond should be void. There was nothing therefore in the bond to show to which term of office it meant to apply; whether to the earlier one which underlaid the second, or to the second which overlapped partially the first. The default assigned as a breach of the bond was admitted to have occurred under the second appointment; and the principal question on the writ of error then before this court, was, whether the bond secured the faithful performance of the duties of the office under the first or under the second appointment.

* Page 73.

Argument for the surety.

The third plea of the defendant alleged that from the 1st July until the 30th September, Beers was deputy postmaster, under an Executive appointment, made by the President during the recess of Congress, and that the bond sued on was intended to apply to that appointment and to that term alone, and that during that term no default had occurred. The replication was "that on and after the delivery by the defendant of the bond aforesaid, to wit, on the 1st day of July," and from thenceforward for four years, Beers held under the appointment confirmed by the Senate, and that the bond was made for the faithful discharge of duty under *this* appointment—the last one. The rejoinder was, that "at the time of the execution of the bond," Beers was not postmaster under the appointment set forth in the replication, but under the Executive appointment—and that the bond secured the performance of duty only during the time mentioned in the plea. Issue was joined on this rejoinder of the defendant.

The court held that the bond being an official and statutory bond, spoke, not like ordinary bonds, from its date, but from the time when it reached the Postmaster-General and was accepted by him. The judgment was reversed and *a venire de novo* awarded.

On a subsequent trial it was proved that the bond was accepted July 15th. Thereupon the Circuit Court instructed the jury that if the bond given in evidence was not approved until July 15th, 1850, there was a variance between the allegation and the proof. And a verdict having gone accordingly for the defendant, the instruction just mentioned was the chief matter now assigned as error. A few exceptions to the admission of evidence also appeared upon the record.

Messrs. Reverdy Johnson, E. S. Dargan, and G. N. Stewart, for the defendants in error:

The substance of the issue was, whether Beers was, *on the first day of July*, 1850, deputy postmaster under his appointment confirmed by the Senate. Whether he was or not, depended on the question whether the bond was accepted

on that day, and thus became a perfect obligation on the said first day. The proof showing that the bond was not accepted until the 15th, there could, under the decision in 19th Howard, when the case was here before, be no other instructions given than were given by the court. The declaration *described* one bond and *proved* another.

Suppose that the pleader had in his replication alleged the true day on which the bond was accepted, and the office, to which it was intended to apply, vested, that is to say that he had alleged in his replication that the bond was accepted by the Postmaster-General on the 15th of July, 1850; this replication would have been a clear departure from the declaration, which described a bond operative from the first of that month.

In *Hall* v. *Matthew Denbigh and others*, reported so far back as Croke Elizabeth,* the declaration described a deed as bearing date the first of November (39 Eliz.), but did not aver when it was *delivered.* After judgment, there was a motion in arrest of judgment, because it was not averred when the deed was delivered: after several arguments, the court said the declaration was well enough, because it must be intended that the deed was delivered on the day of its date, and further, if it had been delivered on a subsequent day, and so averred in the replication, this would have been a departure.

The later case of *Williams* v. *Jones*,† is to the same effect and in principle similar to ours. The declaration in our case describes a bond dated the 1st July. By implication, this means delivery on that day. A delivery on another day may be proved, it is true, by parol, because as this court has decided in regard to this particular bond, there is a case of exception to the general rule, and such proof is held not to contradict the instrument;‡ but when it is proved, the bond is varied, and no longer conforms to the bond described nor to the profert, and is therefore fatally variant from both.

* Page 773.

† 5 Barnwell and Cresswell, 108

‡ 19 Howard, 73.

It is true that the replication to the third plea asserts that the bond was made for the proper discharge of the duties of the second office, and the rejoinder says it applied to and covered only the time set forth in the plea, and no other. But these are only the legal conclusions of the pleaders, and not averments of fact. These allegations are not traversable nor issuable, involve questions of law only depending on the facts alleged and proved, which alone can determine the duties involved by the contract. These assertions, then, on both sides, are wholly immaterial.*

The plaintiff undertook, therefore, by his pleadings, to establish before the jury four propositions: 1. That the bond was made and delivered on the 1st of July, 1850, and was operative from that day. 2. That Beers was in office on that day under the second appointment. 3. That the senatorial term of office, or second term, embraced the time as early as the 1st July, 1850. 4. That as a consequence the defendant was liable for moneys received by the postmaster on the 1st and 10th of July, 1850.

But with the admitted fact that the bond was not accepted till July 15th, and the decision when the case was here before, that it operated but from that day, he undertook an impossibility.

Mr. Ashton, Assistant Attorney-General, for the plaintiff in error:

The bond given in evidence sustained the declaration. The time of the making it is laid under a videlicet. It was not, therefore, necessary to prove it as averred.† Though a deed takes effect only from its delivery, yet the delivery need not be stated in pleading.‡ A plaintiff may reply or show in evidence that a deed was really made on a different day from that of its date as stated in the body of it.§

In the plaintiff's replication to the third plea the time of

* Gould on Pleading, 183, § 29.

† McDade *v.* The State, 20 Alabama, 81.

‡ Tompkins *v.* Corwin, 9 Cowen, 255.

§ Serle *v.* Darford, 1 Lord Raymond, 120.

the making and delivery of the bond are laid under a videlicet.

The issue was joined on the rejoinder of the defendant to this replication. The rejoinder was: "That *at the time of the execution*" of the bond "Beers was not postmaster in the manner and for the term of office set forth in the replication, but was postmaster by Presidential appointment."

The *execution* of the bond included its signing, sealing, and delivery.* The *making* of the bond would seem to be the writing of it.† This rejoinder, then, tendered the substantial issue in the case, and upon that the parties went to trial.

The former decision of this court covers the merits of the case now.

Mr. Justice MILLER delivered the opinion of the court.

It was decided, when this case was in this court before, that the bond, which is the foundation of the suit, was obligatory from the time of its acceptance by the Postmaster-General, and not from its date; and also that the term of office of Beers commenced, under his appointment, by and with the advice and consent of the Senate, on the day of that acceptance.

The case having been remitted to the Circuit Court for a new trial, that court directed a verdict for the defendant, on the ground that there was a variance between the bond offered in evidence and the one set out in the pleadings. The variance is supposed to have reference to the time the bond took effect. It is claimed that the bond is described as being dated and taking effect on the 1st day of July, 1850, whereas the evidence showed, that while it bore that date on its face, it was not approved by the Postmaster-General until the fifteenth day of that month, and, therefore, under the decision in 19th Howard, did not become the bond of defendant until the last-mentioned date.

* Burrill's Law Dictionary, tit. "Execution."

† Hall *v.* Cazenave, 4 East, 481.

Upon an examination of the declaration, it will be seen that the plaintiff declares on the bond, according to its legal effect, namely, that on July 1st, 1850, the defendant, by his certain writing obligatory, acknowledged himself indebted to the plaintiff in the sum of $20,000. This manner of declaring gives no date to the bond, and merely gives the time when defendant became bound by it to the plaintiff. The rule that allegations of time, quantity, value, &c., need not be proved with precision, but that a very large departure from the time, quantity, &c., alleged, is allowable, is so well understood, and is so much a matter of every-day practice, that no citation of authority to sustain it is necessary. An indictment charging a prisoner with murder on the first day of July would be sustained by proving a murder committed on the fifteenth of that month. How much more reasonable that a contract alleged to have been made on the first, may be supported by evidence of the same contract made on the fifteenth of the month?

But it is also a rule of evidence that when words used in a declaration are *descriptive* of the instrument declared on, it must, when offered in evidence, conform strictly to that description; and we concede that if it is alleged as part of the description of such an instrument that it bears such a date, or is dated of such a day, that no instrument will be admissible which does not bear that date.

It is said by counsel that this declaration gives such a description of the date of the bond. A careful examination of it, however, shows no attempt at such description, and merely the usual necessary allegation of the time when the contract was made. If, however, counsel are correct in their construction of the declaration, still there is no variance, because the bond read in evidence actually bears the date which it is claimed that the declaration ascribes to it, and it therefore conforms to the supposed description.

It is no variance, however, from the substance of the issue to show that, though dated the first of July, it took effect only on the fifteenth, because, as we have already shown

the precise time when the contract became obligatory need not be proved on trial.

The attempt to show that, by the pleadings subsequent to the declaration, it became necessary to prove that the contract became obligatory on the very day alleged, is equally unsuccessful.

The defendant, by his third plea, alleges that from July 1st to September 30th his principal was deputy postmaster, under an appointment not confirmed by the Senate, and that the bond sued on was applicable to this appointment and to this period alone, and that during that time no default or breach of its condition occurred. The replication is, that on the day of the date of the bond, and from thenceforward for four years, Beers, the deputy postmaster, held under the appointment confirmed by the Senate, and that the bond covered his transactions during that time. To this defendant rejoined that Beers was not postmaster under the appointment set forth in the replication, but under the first—a Presidential appointment—and that the bond covered only the time mentioned in the plea.

As it was proved on the trial that the bond was accepted on the 15th July, 1850, it follows, under the former decision of this court, that from that time forth the bond covered his liability, and that it was under the last appointment. The plea of the defendant fails, therefore, except as to the time between the first and fifteenth of July. It is not perceived how the precise day when the bond took effect is material otherwise than this, and the court, by refusing to permit any breach to be proved within those fifteen days, would have fully protected the defendant.

All these pleas have relation to the legal effect of the bond, and none of them *describe* a bond different from the one offered in evidence. After the day had been fixed by proof at which the contract became binding, it was material that no breach should be proved before that time; but the proof which fixed that date was no variance from any pleading of the plaintiff, nor from the substance of any issue made in the case.

As these principles require a reversal of the case, it is not deemed necessary to notice the other exceptions, which are unimportant, and may not arise on a new trial.

JUDGMENT REVERSED.

RAILROAD COMPANY *v.* LINDSAY.

1. The article 3499 of the Civil Code of Louisiana, which prescribes that "actions for the payment of freight of ships and other vessels are prescribed by one year," does not apply to a case where the plaintiffs were shipbrokers only and not shipowners, and where the contract was not one of affreightment.
2. A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to the time or place of delivery, yet with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties.
3. Where none of the evidence offered by a plaintiff is objected to below, and no exception taken to the findings of the court there, objection cannot be made in this court.
4. An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained.
5. Such case comes within the thirty-second section of the Judiciary Act, curing imperfections, defects, or want of form in the pleadings or course of proceedings, except such are specially demurred to.

LINDSAY & Co., *ship-brokers*, of London, filed their petition in the Circuit Court for the Eastern District of Louisiana, in which—alleging a written contract between themselves and the New Orleans, &c., Railroad Company, the company bound itself to pay them "freights," at the rate of 25*s.* per ton, "in consideration of freightage to be furnished to Algiers, opposite New Orleans, for certain iron rails," &c.—they averred that, in pursuance of the aforesaid contract, they did furnish freightage for several thousand tons of such rails, from Wales to Louisiana, and that the balance of the freight upon the rails due them was $18,000, &c.

Statement of the case.

The defendants denied that the contract had been performed; claimed damages by way of "re-convention," and "pleaded the prescription of one year and three years;" that is to say, set up, in argument, the bar of limitation of one year, under article 3499 of the Civil Code, which prescribes, that actions "for the payment of the freight of ships and other vessels are prescribed by one year;" and the limitation of three years, to which an act of the Louisiana legislature limits actions upon open accounts.

The court found, on a submission of the case to them, in accordance with the Louisiana practice, that a large portion of the rails had not been delivered within the time stipulated for; and that of these a portion had been sent, not to Algiers but to New Orleans, for the cost of removing which to New Orleans the plaintiffs were entitled to re-coup; that the time within which the freightage was to be furnished had been extended and limited by a subsequent agreement to a date fixed; that the railroad company refused to receive any rails delivered after that date; that the manufacturers resumed possession of these; that the company had not proved any special damage as resulting from the delay mentioned, and that this delay had been owing to the acts of Lindsay & Co., who had found, during the Crimean war, a more profitable employment for the ships.

The court declared that the contract was not a contract for the payment of the freight of ships and other vessels, within article 3499 of the Civil Code set up; and overruling also the prescription of three years given by statute for open accounts, gave judgment in favor of the plaintiff below "for the whole amount of freightage, at the rates specified in the contract," allowing certain credits and the cost of transferring to Algiers those rails which had been improperly landed at New Orleans.

The case came here on error, two errors being assigned.

1. That the court allowed the plaintiffs, Lindsay & Co., to recover on an express agreement, when it was found that they had never performed it.

2. That they had overruled the plea of prescription.

Argument for the railroad company.

Messrs. Carlisle and McPherson, for the plaintiff in error:

I. As to the special contract. It is a settled principle of law that a party cannot recover upon a contract without proving performance of all conditions precedent, and their performance within the limited time, when a time is limited.*

It is true, the court found that the defendants had not proved "any special damage" by the delay; but under this issue they were not bound to prove any damage, special or other. To require it was to shift the burden of proof, and relieve the plaintiffs from the exigencies of their own case.

We agree that in the civil, as well as at common law, a recovery may be had, although there be a failure to prove performance of the special contract, if the defendant have derived any benefit in the premises. But such recovery can only be *ex equo ex bono*, and undeniably must be founded on some proof tending to show some service performed and accepted, other than that stipulated in the contract, and what the plaintiff reasonably deserved to have from the defendant therefor. The objection here is, that all such proof is absolutely wanting. The court does not find that the defendant below derived any benefit from the services of the plaintiff, or what was the value of the service rendered, or that it was of any value.

II. As to the statute of limitations, or prescription of one year. The court proceeded, doubtless, on the ground that the special contract was in the nature of a brokerage contract, the plaintiffs below being middle-men between the defendant and the shipowners. But we have seen that the plaintiffs wholly failed to make any case upon the special contract; and if they could recover at all, must do so upon the implied contract arising out of the service performed by them, to wit: the transportation of the goods. In other words, it was an implied contract for the freight of ships merely, which arose directly between the parties to the suit, to the exclusion of all third persons, and, consequently, was within

* Slater *v.* Emerson, 19 Howard, 229.

the letter as well as the spirit of the article of the Civil Code above cited.

Mr. Janin, contra:

I. *As to the basis of the recovery.*

The objection is really an allegation of variance. But it is far too technical to prevail. No objection of this sort was made below. It must be considered as waived.

II. *The plea of the prescription.*

As to the one year, this case is different from that of a ship-owner or captain contracting for the freight of goods shipped by his vessel. The plaintiffs are ship-brokers; they bound themselves to provide vessels to transport a large quantity of iron from Wales to New Orleans, an obligation which the iron-masters probably were not able or willing to assume. It might not have been possible for the iron-masters or the agents of the defendants to find a sufficient number of vessels for this purpose. It may only have been possible for large ship-brokers to influence such a number of vessels to undertake this business. So, no doubt, the defendants thought when they made the contract of 1853. It was, in short, a legitimate commercial undertaking on the part of plaintiffs, who thought that, owing to their position, they could undertake such a duty with advantage, and were willing to run the risk of it.

This is different from the case of a captain of a vessel who agrees to take freight for one trip at a fixed price. A contract for a fixed freight, such as is contemplated by article 3499 of the Civil Code of Louisiana, is evidenced by a bill of lading, and not by an agreement extending over years and involving the employment of many vessels, like that upon which this suit was brought. It is therefore clear that that article is not applicable to the present case.

And it is equally clear that the act of the legislature of Louisiana, which limits actions upon open accounts to three years, is not applicable to this case.* The account was not

* Acts of Louisiana of 1852, p. 90, Revised Statutes, 82

an open account, but an *admitted* account, which it was attempted to extinguish by a counter-claim.

In the case of the *New Orleans Railroad Company* v. *Estlin*,* the defendant was sued for the unpaid balance of his subscription to the stock, and pleaded the prescription of three years, contending that he was sued upon an open account. The court said: "The defendant was not sued upon an open account. The demand is based upon an express and written contract." In *Cooper* v. *Harrison*,† an agent was sued for the price of land sold by him for his principal during a number of years. The prescription of three years of actions upon open accounts having been pleaded under the statute of 1852, the court said: "We are of opinion that the accounts due by an agent for the selling of lands cannot be considered as embraced in the sense of the statute in the words 'open accounts.' And as they are not enumerated in the articles in the Civil Code on the prescription of one, three, and five years, they are consequently subject to that of ten years."

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiffs in error were the defendants in the court below. The plaintiffs in that court filed their petition, setting forth a contract between them and the defendants, whereby the plaintiffs agreed to transport from Wales, and deliver at Algiers, opposite to New Orleans, certain railroad iron for the defendants, and the defendants agreed to pay them a stipulated compensation for such transportation and delivery. The petition averred performance, and sought to recover the specified compensation, less the amount which the plaintiffs had already received. The defendants, by their answer, denied performance, claimed damages by reconvention for non-performance, and pleaded the statute of limitations.

The parties waived the intervention of a jury, and submitted the case to the court. The court found the facts

* 12 Annual Reports, 184.

† Id 631.

specially, and gave judgment for the plaintiffs below. The findings of the court are set forth in the record, and are to be regarded as a special verdict. The court found, among other things, that the iron had not been delivered within the contract time, but that it had been agreed between the parties, in September, 1854, that the plaintiffs should allow the defendants eight hundred pounds, on account of past delays, and that the time for the further deliveries should be extended to the first of December following; that the defendants refused to receive the iron tendered or shipped after the last-mentioned time, and that it was thereupon disposed of, with the assent of all concerned; that the defendants had not shown any damage arising from the delays; that the delivery of the iron at New Orleans was a breach of the contract, and that the defendants were entitled to recoup the cost of removing it to Algiers. Upon these principles, the amount to be recovered was computed, and judgment was rendered accordingly. The court was of opinion that the contract was "not a contract for the payment of the freight of ships and other vessels within the 3449th article of the Civil Code," of the State, and overruled the defence that the action was thereby barred. No bill of exceptions was taken, and but a small part of the evidence appears in the record.

Two errors are relied upon; one of them relates to the statute of limitations. We think the ruling of the court upon this subject was correct. The findings show that the plaintiffs were not ship-owners, and that their contract was wholly different from one of affreightment. The article of the Code relied upon had, therefore, no application to the case. Nor can the demand be regarded as an open account. The contract was the foundation of the claim, and though not fulfilled according to its letter, either as to the time or place of delivery, yet, with the qualifications which the law under such circumstances imposes, it determined the respective liabilities of the parties. The plaintiffs could not recover more than the contract price, and the recoupment

of the defendants was governed by its requirements on the part of the plaintiffs. Its provisions were elements in the case, vital to the rights of both parties. By their light, and the law arising upon the facts as developed in the evidence, the court was to be guided in coming to its conclusions.

The other error insisted upon is, that there is a fatal variance between the facts as found by the court, and by the case made by the plaintiffs' petition.

It does not appear that any of the evidence offered by the plaintiffs in the court below was objected to by the defendants, nor does it appear that any exception was taken when the court announced its findings, or subsequently, when the judgment was entered.

It was in the power of the court to permit the petition to be amended, and the proper amendments would doubtless have been made if the objection had been stated. It is presented for the first time in this court. Under these circumstances, it must be held to have been waived by the plaintiffs in error in the court below, and they are concluded by that waiver in this court.

There is another ground upon which this exception must be overruled. It is not alleged that the findings of the court were unwarranted by the proofs, nor that the judgment does not conform to the law and justice of the case, as the case is thus presented. The objection is purely technical. It lies wholly in the variance between the averments of the petition and the facts as found by the court.

The thirty-second section of the Judiciary Act of 1789, declares that the courts of the United States, "respectively, shall proceed and give judgment according as the right of the cause and the matter in law shall appear unto them, without regarding imperfections, defects, or want of form in such writ, declaration, or other pleading, return process, or judgment, or course of proceeding whatsoever, except those only in case of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof."

Syllabus.

The effect of this provision is decisive. No case more proper than the one before us, for its application, can be presented.

The judgment below is

AFFIRMED, WITH COSTS.

ROBBINS *v.* CHICAGO CITY.

1. Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced.
2. The term "parties," as thus used, includes all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.
3. Express notice to defend is not necessary in order to render a party liable over for the amount of a judgment paid to an injured plaintiff. If the party knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of the damages. *Chicago City* v. *Robbins* (2 Black, 418), affirmed.
4. Absence of objection by municipal officers to a person's building an area in a public sidewalk, may infer a permission to build the area but cannot infer a permission to leave it in a state dangerous to persons passing by.
5. A person building a storehouse on a street, who, in consequence of the city's raising the carriage-way of the street, raises a sidewalk so as to make it conform to the grade of the carriage-way—such person obtaining by his mode of raising the sidewalk, vaults and an area for the benefit of his building—does not do a public work, nor relieve himself from the penalty of making a nuisance if a nuisance is made by what he does.
6. In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "*dug*, opened, and *made*," the area is sustained by proof that he formed it partially by excavation and partially by raising walls.
7. Where work done on a public highway necessarily constitutes an obstruction or defect in the highway which renders it dangerous as a way for travel and transportation unless properly guarded or shut out from public use, in such case a principal for whom the work was done cannot defeat the just claim of a municipal corporation which has had to pay

damages, or of a private party who has suffered injury, by proving that the work which constituted the obstruction or defect was done by an independent contractor. *Chicago City* v. *Robbins* (2 Black, 418), affirmed.

ERROR to the Circuit Court for the Northern District of Illinois.

This was an action on the case brought by the city of Chicago against Robbins. The declaration alleged that the city had by law exclusive control over the public streets and was bound to protect them from encroachment and injury. That Robbins owned a lot on the corner of Wells and Water Streets, and wrongfully "*dug, opened, and made*" an area in the sidewalk adjoining, and left it so unguarded that one Woodbury fell into it and was severely injured; that Woodbury had recovered, for his injuries, $15,000 damages against the city, which sum the city had paid, and which, though the city had been primarily liable for it, Robbins was bound to refund. Plea, the general issue.

The case was this:

Robbins owning an unimproved lot, at the southeast corner of Wells and Water Streets, in Chicago, contracted, in February, 1856, with one Button to build a storehouse on it; Button's principal work being the masonry, and there being seven different contractors on the building in all, on different parts of it. The whole was under charge of an architect appointed by Robbins, the duty of which person was to see that the work was done according to contract.

The city had, in 1855, ordered the grade of Wells Street to be raised about seven feet and the *carriage*-way to be filled with earth. This improvement—as Robbins wished to have vaults to his new store—rendered necessary a curb-wall from the natural surface of the ground to the height of the grade. By its position—about sixteen feet from the building—this wall would give, so far as the space beside it was covered over (an extent of about eleven feet), a vault for storage, and where open—as five feet would be left by another or area-wall—an area immediately adjoining the edifice, by means of which light and air would be given to it. En-

croachments on the street to the width of five feet were apparently allowable by the city ordinance.

In making this area there was some *excavation or digging away* of the natural soil, but the testimony of Button tended to show that what earth was thus removed was replaced by sand and other material used in flooring the space, and that the principal space was procured by the raising of the street and the erection of the wall and the edifice beside it. The depth of the space was seven or eight feet.

By his contract, Button was to be liable for any violation of the city ordinances in obstructing the sidewalks or for accidents arising therefrom; but there was no specific provision that he or any other contractor should provide proper lights or guards. There were lamps at a bridge not very far off, and one at an alley sixty-four feet from the area.

Possession of the ground was given to Button on the 1st of April, 1856, and the excavation and walls making the space were in effect raised some time during the spring; the city about the same time filling the carriage-way with earth.

Button, by the terms of his contract, was to finish his work by the 1st September, 1856, but he did not in fact complete it till February, 1857. However, the sidewalk—eleven feet—which was made by broad flagging stones placed over the two walls, was finished in the autumn; the area, which was intended to be covered with iron grating, and which when so covered would have been thrown, in a manner, into the sidewalk, not being as yet so covered.

In all respects, however, except this protection of grating to passers by, the area, it seemed, was substantially finished and ready to be covered by grating before the 19th of December. With the grating Button had nothing to do; that being a matter, with the rest of the iron-work of the building, contracted for by another person.

From the time that the area was made until the grating was put there, it was covered, as the whole space, before the sidewalk was completed, by laying flagging, had been

more or less by joists, the covering being sometimes very slight, and the area—which ran along the whole side of the building, one hundred and fifty feet—sometimes wholly *un*-covered.

Robbins was in Chicago, and during the summer and early autumn occasionally at the building. Later in the season, when ice was on the sidewalk, the city superintendent spoke to him about the dangerous condition of the area; suggested a mode in which, at a small cost, it could be made safe; telling him, at the same time, that if it happened any time to be sleety, and people should be passing by his building rapidly, and the covering was not attended to, somebody would be hurt—'a neck or a leg broke'—and the city have damages to pay.

To this Robbins replied, that it was "more the contractor's business than his," or was "wholly the contractor's business," but that he would speak to him. Previously to this the chief clerk of the superintendent's office, by direction of the superintendent, had written to Robbins, giving him notice of the dangerous condition of the place; and the clerk and superintendent, who were often in that neighborhood, and were struck with this condition, had, themselves, once or oftener, covered it with plank. The contractor was told about it also, and he spoke several times to his foreman on the subject.

On Sunday evening, December 28th, 1856, the night being stormy, Woodbury, who was passing the place, and in walking had to face the storm, fell down the area, which had been left or had become uncovered from Saturday night, and was severely hurt. He soon after brought suit against the city for damages.

The city attorney, Mr. Marsh, whose duty it was to defend the suit, now applied to Robbins to assist him in procuring testimony. Robbins told him of one Livingston, who had boarded at the same place with Woodbury at the time of the accident, whose idea was that Woodbury's injuries were not so great as he pretended, and who would therefore be a good witness for the city. Robbins promised

Statement of the case.

to write to him, and afterwards informed Marsh that he had done so. The day of the trial or the day before it, Marsh, casually meeting Robbins at the foot of the stairway of the court-house, remarked to him that the suit was about to be tried, or was coming on; but he did not tell him in what court the suit was, nor did he ever give Robbins any notice that the city would look to him for indemnity for what it might have to pay Woodbury; he "never having talked with Robbins in reference to the case with any such idea as that," the only object being to prepare the defence. Marsh did not state to Robbins that he was the city attorney, but the parties were long and intimately acquainted with each other, meeting almost daily, and Marsh presumed as of course, that Robbins knew that fact.

Woodbury recovered in his suit $15,000 damages, which the city paid.

A provision of the city charter in force at the time when Robbins built his area, declared that

"All owners in front of whose premises the common council should direct sidewalks to be constructed, should make such sidewalks at their own cost, and if not so made, that the council might make them and assess the cost against the premises."

The controversy had already been before this tribunal, when a judgment in favor of Robbins had been reversed.*

The court below now charged the jury, in substance, as follows:

"The law is, that although the city is primarily liable for an injury suffered by reason of the dangerous condition of the streets and sidewalks, yet the corporation has a remedy over against the party that is in fault, and has so used the streets and sidewalks as to produce the injury.

"The question, then, is, whether Robbins is answerable to the city for the judgment recovered by Woodbury.

"If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered against the

* Chicago City *v.* Robbins, 2 Black, 418.

city, if he knew that the suit was pending and could have defended it.

"It is not necessary that the city should have given him an express notice to defend the suit, nor is it necessary that the city should have notified him that it would look to him for indemnity. If Marsh, the attorney for the city, told him of the pendency of the suit, what it was for; told him of the day of the trial, and talked to him about the testimony of a witness, he is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

"It is not requisite that Marsh should have *informed* him that he was city attorney. If Robbins knew the fact, he did not need to be informed of it.

"It is urged that Robbins was not informed by Marsh, in what particular court the action was pending. This was not necessary. When Robbins was told that Woodbury had sued the city for falling into an area which he had built, then it was his duty to have ascertained in what particular court the action was to be tried.

"Was it through the fault of Robbins that the accident to Woodbury happened? The building was commenced in the spring of 1856. The grade of Wells Street had been ordered to be raised by the city, but was not actually raised until the summer of 1856. There is testimony tending to show that when Robbins removed the old sidewalk, which was on the natural surface of the ground, he removed very little earth in order to make this area. There is also testimony tending to show that what earth he did remove was replaced by sand and other materials, and it is contended that although he might be liable if there were proper allegations in the declaration, yet he is not liable in this suit, because the declaration says that he wrongfully and unjustly dug a large hole or pit, and the digging, if any was done, did not contribute to produce the injury. But if the declaration charges him with digging a large hole or pit, it also charges him with opening and making one, and in the opinion of the court it is immaterial whether the area was made by *excavating* the earth as stated by some of the witnesses, or in the manner mentioned by Mr. Button, the contractor. Robbins was not in fault in making the area so as to conform to the grade of the city, and the city was not in fault in permitting

Argument for the plaintiff in error.

him to build it. Robbins had the implied license of the city to build the area, but no license can be presumed from the city to leave the area open and unguarded.

"The fact that Robbins was building the area at the same time that the city was grading the street does not excuse him or show that the city was in any degree delinquent. Robbins impliedly agreed with the city that if he were permitted to build the area for his own benefit, he would do it in such a manner as to save the public from danger, and the city from harm. The gravamen of the offence is not that Robbins was engaged in an unlawful work when he made the area, but that he left uncovered and unprotected an area which was dangerous, and which, if left without guards to warn those who passed by, became a nuisance; what was originally lawful thereby became unlawful. The city cannot be held under any obligation to supervise the building of an area like this, under the circumstances detailed in the evidence.

"If the jury believe that this area was built under the direction of Robbins and for his benefit, and that it was left unprotected, and that Woodbury, while passing along the street, fell into it and was injured, then the jury will find the amount Woodbury recovered against the city, with interest."

To so much of the charge as related to the notice to Robbins of the pendency of the suit of Woodbury against the city, and "to so much of the charge as related to the construction of the area," the defendant excepted.

Messrs. Kales and Beckwith, for the plaintiff in error:

I. There was error in the instructions as to the obligation of Robbins to defend. The law on the subject of the conclusiveness on another party of a judgment like that given against the city is this:

Where there is no request, and where the facts are only partially communicated, it depends upon the circumstances under which the communication is made whether the party is charged with attending to the defence. If the circumstances were such that a prudent man might be reasonably expected to act upon them, then the partial communication may be considered as notice. But if from the facts commu-

nicated, and from the circumstances under which they were communicated, a prudent man would not be expected to act upon them, then the communication ought not to be deemed notice; and this is more especially true when neither the party making the communication, nor the party receiving it, had any idea that the latter was in any manner to act by reason of what was said.

Here there was no notice. It should have been submitted to the jury, whether the facts communicated—considering the circumstances under which the communication was made—were such as would have caused a prudent man to act.

II. The charge was erroneous in respect to the construction of the area.

The city had ordered the carriage-way of the street to be raised and filled to the new grade, and paved, and had compelled Robbins to put up his building with reference to the *new grade*. This improvement, as it progressed to completion, left the surface of the old sidewalks at this point far below the rest of the street, thus causing a deep, vacant space or pit around Robbins' building, on both streets. There was really no excavation. The allegation of the declaration that Robbins *dug*, opened, and made an area, is not sustained by the proof.

But, independently of this point of pleading, the city had itself created a *public* necessity for what Robbins did. As the raising of the carriage-way part of the street—an improvement lawfully undertaken by the city—would, if nothing else were done, render the rest of the street occupied by the sidewalks impassable, it became the duty of the city to cause the sidewalks to be rebuilt. To perform this duty it was necessary for the city officers, in the first instance, to order Robbins to build them, and in case he omitted to do so, then to build them themselves, and charge him or his lot with the expense. The erection of a curb wall necessarily preceded the filling and paving of the carriage-ways. Robbins, in planning the improvement of his lot, knew this, and contracted for the erection of a curb wall and sidewalk in connection with the erection of his building. He had the

right to expect the city officers would order him to construct them as soon as the city's duty to the public required the order to be made. The erection of the curb wall was required as part of the sidewalk, and it will be presumed that the city officers gave the proper order to Robbins to proceed with the work. The duty of the city to cause the sidewalk to be built was absolute, though the obligation of the mere act of building it rested upon Robbins.

Under these circumstances—and the public having a right to require the city to cause it to be done at the time it was performed—the work was primarily for the public benefit.

III. When the case was here before, it appeared that Robbins had entered into the street by but an implied license, and the fact was regarded as important in the decision then made; one against Robbins. It appears, now, that he entered by express authority of a statute. The case is therefore a new one.

The question then is, did Robbins perform his whole duty when, under such circumstances, he let out to skilful and independent contractors the execution of this work, to be done in conformity with the plan ordained; especially as *the result*, when the work was completed, conformed to what he was authorized to do? The following cases are decisive, to show that he did: *Gray* v. *Pullen* (Q. B., 1863), Law Journal Reports, N. S., vol. 32, p. 169; *Blake* v. *Ferris* (1 Selden, 48); *Painter* v. *Pittsburgh* (46 Pennsylvania State, 213); *Pack* v. *Mayor* (4 Selden, 222); *Kelley* v. *Mayor* (1 Kernan, 432); *Overton* v. *Freeman* (73 English Common Law, 867); *Allen* v. *Hayward* (7 Adolphus & Ellis, N. S., 960).

In each case above cited the party on whom the right to do the work was conferred let out the execution of it to independent contractors; injury was occasioned to others, who were without fault, by the negligent and improper manner in which the execution of the work was conducted or left during the progress of it, by the contractors' servants; the suits were against the employers, and they were held not to be liable for the negligence of the contractors or their servants.

Argument for the plaintiff in error.

The ground of decision is stated in *Gray* v. *Pullen*, where Cockburn, C. J., announces it as "common doctrine, that if a person in the exercise of his rights as a private individual, *or of those conferred on him by statute*, employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable."

In the construction of a public improvement, pursuant to a statutory right, it is as much a part of the right to intrust the execution of the work to skilful and careful contractors, as it is a part of one's individual right, in making an improvement on his own land, to let the work in that manner. On this subject the court, in *Blake* v. *Ferris*, say with force:

"The impracticability and injustice of holding the express licensees who had let the work to be liable for the contractor's negligence, in leaving the hole in the street uncovered over night, may be further illustrated by the common case of a man about to build a house for himself. He may, if he please, manage the whole, give directions, &c., &c., which his men would be bound to follow; and thus make himself the master in fact of all the persons employed; but, as Baron Parke said about the butcher driving the ox, 'he is not bound to do so, and he may not know how to do it.' He may therefore let out by contract the building of the house to some person who will undertake to do it. Would he thereby become liable for all injuries to third persons for negligence or misconduct in doing an act *tending to the construction of the house?* For instance, by the carpenter's men, in getting out timber in the forest; by the stonecutter's servants, in blasting stone in the quarry; or by the teamsters, in handling materials; such consequences would, indeed, shock the common sense of all men."

Few persons possess the skill to build a house. A particular class of persons must, to a greater or less degree, be intrusted with the execution of such a work. And the more completely the execution of it, and the manner of doing it, are placed by the employer in the hands of skilful and independent contractors, the more fully has he performed his duty to the public. He has thereby substituted

the skilful management and independent control of another over the work, pending its execution, in the place of his own probable want of skill to direct.

Where a person enters under an implied license to do work for his own exclusive benefit, which appeared to be the fact in this controversy when the case was here before, it is a condition of such license that nothing shall be done under it to the injury of the licensor. But when the right springs from an express permission, or from statutory authority, no conditions are attached but those expressed; and the obligation is different.

In this case it was pending the execution of the work, and while the work was in the exclusive control of the contractors and their servants, and while Robbins had no power or authority to remove the contractors' servants from the work, that the accident to Woodbury occurred. The omission to cover the opening properly, on Sunday night, was never directed by Robbins, but was the wrongful act of the contractors' servants.

The court is bound to presume that the plan of the sidewalk, authorized by the common council, could be carefully executed without the necessity of such a negligent omission; and Robbins had the right, as against the city, which had forced the plan upon him, to suppose the same thing.

Under these circumstances, if the contractor, *while invested with the control of the work*, unnecessarily committed a nuisance, Robbins is not liable therefor, or for the consequences.*

Mr. E. Anthony, contra:

I. *The instruction as to Robbins's obligation to defend.* Robbins was a business man, as the case shows; and no notice, whether oral or written, could have given him any more information about the suit, or about his rights and duties in the premises, than he possessed when informed of the com-

* Peachey *v.* Rowland, 76 English Common Law, 181; Overton *v.* Freeman, 73 Id. 867; Allen *v.* Hayward, 53 Id. 960; Reedie *v.* Railway Co. and Hobbit *v.* Railway Co., 4 Exchequer, 255; Saltonstall *v.* Banister, 8 Gray, 195.

mencement of the suit, of its nature, and the claim made by Woodbury, and of the trial of the case. Under *such* circumstances Robbins cannot go back of Woodbury's judgment and try the case all over.

In *Blaisdale* v. *Babcock*,* all the notice that ever was given was simply a notice that a suit had been commenced; and yet, Chancellor Kent, at that time Chief Justice, held the judgment conclusive.†

In the Leading Cases in Equity,‡ *Le Neve* v. *Le Neve*, it is said:

"It is not necessary in any case, to constitute notice, that it should be in the shape of a distinct and formal communication, and it will be implied in all cases, where a party is shown to have had such means of informing himself as to justify the conclusion that he might and ought to have availed himself of them."

Again, in speaking of notice to purchasers of property:

"It should be remembered that a purchaser will have notice whenever he has the means of knowledge, although he may choose not to know; or, in other words, whenever it may fairly be presumed that he either knew or remained wilfully ignorant."

Why does not the rule apply to this case? Is there any peculiar and extenuating circumstances presented to the court why Robbins should not be held to it?

II. The point made below as to the difference between the proofs and the averment of the declaration is scarcely pressed here.

It is argued, however, that Robbins was compelled to relay his sidewalk, and that the plan of doing the work had

* 1 Johnson, 519.

† See also Barney *v.* Dewey, 13 Johnson, 226; Kip *v.* Bingham, 6 Id. 158; Waldo *v.* Long, 7 Id. 173; Bender *v.* Fremberger, 4 Dallas, 436; Leather *v.* Poultney, 4 Binney, 352–376; Winter *v.* Schlatter, 2 Rawle, 359; Bond *v.* Ward, 1 Nott & McCord, 201; Duffield *v.* Scott, 6 Tennessee, 366; Tarleton *v.* Tarleton, 4 Maule & Selwyn, 20.

‡ 2 Leading Cases in Equity, 160; note.

been forced upon him. The argument is that it was a necessary work put on him by the city.

But the city never forced any plan whatever upon him. They never designed his sidewalk, his area, or his vaults. They never told him how or when to build them, and said nothing to him on that subject whatever. He formed his own plans, began when he got ready, used his own materials, and all that can be said about the matter with any aspect of fairness is, that the city permitted him to build up his building, using a portion of the sidewalk as an appurtenant to his building, in order to accommodate him, and nobody else. But this very fact made it his duty to see that he kept his vaults covered up, and his premises safe and secure. This was what he undertook, and what the city warned him, both verbally and in writing, to do.

III. The question in regard to contractors is out of this case, because—

1. The contracts had expired before the accident, and the presumption of law is that Robbins was doing the work himself by employing his own workmen.

2. Robbins had an architect to superintend the work all the time, and to see that the work was done according to contract.

The doctrine pertaining to contractors cannot, for other reasons, apply.

In *Ellis* v. *The Sheffield Gas Consumers*,* when the argument in regard to contractors was addressed to Lord Campbell, he said, "It would be monstrous if the party *causing* another to do the thing were exempted from liability merely because there was a *contract* between him and the person immediately causing the act to be done."

IV. The charge, in view of *the facts* of the case, is perfect and right. It condenses the entire evidence. The only exceptions which were taken to it are, first, to the sufficiency of the notice of the city to Robbins; and second, "to the construction of the area." The particular errors complained

* 12 Ellis & Blackburne (75 English Common Law), 169.

of are not set out, and we ought not to be made to argue in regard to matters *so indefinitely put* that it requires a statement at bar to show what they mean.

V. But none of these questions ought to have been argued by us. Every point raised in this case was adjudged when the case was here before, as will be seen by reference to the report. There is no essential difference between the case as now coming up and as it was then presented. And, after the language of this court, at the last term, in *Minnesota Co.* v. *National Co.*,* every question should be regarded as closed.

Mr. Justice CLIFFORD delivered the opinion of the court.

Municipal corporations having the care and control of the public streets within their limits are obliged by the laws of the State of Illinois to keep the same in good repair "for the passage of persons and property," and in case of neglect any person receiving injury in consequence of any obstruction or defect may have an action on the case to recover compensation for such injuries. Statutes to that effect exist in most of the States, but the principle is now well settled that in all cases where it appears that the obstruction or defect which occasioned the injury was caused, constructed, or created by a third person, the corporation, if it was without their concurrence, may have a remedy over against the party immediately in fault.

Severe injuries were received by one William H. Woodbury, on the twenty-eighth day of December, 1856, while passing over Wells Street, within the limits of the plaintiff corporation. He sued the corporation in the State court to recover compensation for the injuries so received. Declaration alleged that the defendant in this suit was the owner of a building lot fronting on that street; that in making improvements thereon he wrongfully excavated an area in the sidewalk in front of his lot, and adjoining the same, of great length, width, and depth, and wrongfully suffered it to re-

* 3 Wallace, 333.

main uncovered and unguarded, so that the injured party, while passing over the sidewalk during the night of that day, and while in the exercise of reasonable care and prudence, fell into the excavation and was greatly injured. Parties went to trial in that suit at the June Term of the court in 1857, and judgment was rendered for the plaintiff in the sum of fifteen thousand dollars damages and costs of suit, which the corporation was compelled to pay.

Present suit was an action on the case to recover of the defendant, as the party who constructed, caused, or created the obstruction or defect in the street, the amount of that judgment and the expenses of the litigation. Gravamen of the charge in the declaration was that the defendant made the excavation and negligently left it open and unguarded, and that the injury to the plaintiff in the suit against the corporation was caused by that obstruction or defect, and that the defendant by reason of the premises became and was answerable over to the plaintiffs in this suit for the amount of that judgment, and for their reasonable expenses in defending the action. Plea was the general issue, and the verdict and judgment at the first trial were for the defendant. Corporation plaintiffs removed the cause into this court by writ of error, and the judgment of the Circuit Court was reversed and the cause remanded for a new trial. Pursuant to the mandate of this court, a new *venire* was issued, and the verdict and judgment at the second trial were for the plaintiffs, and the defendant excepted and sued out this writ of error.

Errors alleged at the trial, as stated in the bill of exceptions, have respect to so much of the charge of the court as relates to the notice to the defendant of the pendency of the suit in which the injured party recovered judgment against the corporation, and also to so much of the charge of the court as relates to the construction of the area described in the declaration. Exceptions were also proposed to one of the rulings of the court in excluding certain testimony, but the objection appears to have been waived, as it was not made the subject of any consideration in the argument.

Opinion of the court.

I. Charge of the court in respect to the notice to the defendant of the pendency of the suit against the corporation, presents the first question for decision. Preliminary to that part of the charge which is the subject of complaint, the court remarked that although municipal corporations were primarily liable for injuries occasioned by obstructions or defects in their streets or sidewalks, they yet might have a remedy over against the party who was in fault, and who had so used the street or sidewalk as to produce the injury. Instruction was then given to the effect that if the defendant knew that the suit was pending and could have defended it, and it was through his fault that the party was injured, he was concluded by the judgment recovered against the corporation. Express notice, said the presiding justice, was not required, nor was it necessary that the officers of the corporation should have notified him that they would look to him for indemnity. Just exception certainly cannot be taken to those instructions, as they are in precise accordance with what this court decided in this case when it was before the court on the former occasion. Same principle was adopted and applied in the case of *Lovejoy* v. *Murray*,* in which the leading authorities upon the subject were collated and examined. Conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.†

Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect

* 3 Wallace, 18.

† 2 Taylor on Evidence, § 497.

to appear and avail themselves of those rights, are equally concluded by the proceedings.*

Evidence in the record shows that the defendant knew that the party was injured by falling into the excavation, and that the action against the corporation was commenced, that he was informed of the day of trial, that he was requested to assist in procuring testimony, and that he actually wrote to a witness upon the subject. Testimony of the attorney of the corporation shows that he called upon the defendant, soon after the suit was commenced, for the purpose of finding out whether he, the defendant, knew anything about the case which would be for the benefit of the corporation in preparing the defence, and made inquiries of him to that effect. Responsive to those inquiries the defendant mentioned the name of a person who was boarding at the same place with the injured party, and whose testimony he, the defendant, supposed would be of benefit to the corporation. His idea was that the injuries of the party were not as great as he pretended, and for that reason the defendant suggested that the person named would be a good witness for the defence, and he agreed to write and get an exact statement of what he would testify if called and examined.

Inquiry was made of the witness if he told the defendant that he was the attorney of the corporation, and he answered that he was not able to say; but he further testified that he had long known the defendant, and that they were intimate acquaintances. Same witness testified that on the day of the trial of that case, or the day before, he met the defendant in the court-house, at the foot of the stairs, and told him that the case was about to be tried.

Surely it cannot be doubted that the evidence justified the instructions of the court, and, it might be added, if need be, that it fully warranted the finding of the jury. Based on that testimony, the court further instructed the jury that if the attorney of the corporation informed the defendant of the suit and its nature, and of the day of the trial, and con-

* 1 Greenleaf on Evidence, 12th ed., p. 559.

versed with him about the testimony for the defence, he was as much chargeable with notice as if he had been directly told that he could contest the right of the injured party to recover, and that the corporation would look to him for indemnity in case of an adverse result. Argument for the defendant was that the notice was defective, because the attorney did not specify in what court the suit was pending, but the presiding justice instructed the jury that when the defendant was told that the injured party had sued the corporation for the injuries occasioned by his falling into an area which he, the defendant, had built, then it was his duty to have inquired and ascertained in what court the action was to be tried. Knowledge of the pendency of the suit in the most authentic form was brought home to him, and the legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit. Being in the court-house on the day the trial commenced, or the day before, and having been informed by the corporation attorney that the case was about to be heard, the defendant cannot evade the effect of the judgment upon the ground that he did not know in which court the case was pending. Persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn round and evade the consequences which their own conduct and negligence have superinduced.*

Decision of this court in this case, when it was here before, was that express notice to the defendant to defend the prior suit was not necessary in order to render him liable to the corporation for the amount of the judgment paid to the injured party; that if he knew that the suit was pending, and could have defended it, he was concluded by the judg-

* May v. Chapman, 16 Meeson & Welsby, 355.

ment as to the amount of the damages, and we adhere to that rule as the settled law of the court.

II. Second exception is even more general in its terms than the first, and might well be rejected on that account as presenting no definite question for the decision of the court. Statement in the bill of exceptions is that the defendant excepts to so much of the charge of the court as relates to the construction of the area described in the declaration, and the record shows that the part of the charge referred to fills more than a page of the transcript, and for the most part is merely descriptive of the circumstances under which the area was constructed.

Purport of the description is that the defendant was engaged in erecting a large and valuable building on his lot, fronting on the east side of Wells Street, and that he caused an area to be constructed in the sidewalk in front of the building, appurtenant to the same, and for its convenience and accommodation.

Prior to that time the corporation had passed an ordinance requiring the grade of this street to be raised, and the work of raising the grade as ordered was accomplished during the summer preceding the accident. Change of grade in the street made it necessary to raise the sidewalk, so that the defendant, in order to construct the area in front of his building, was not obliged to make much excavation.

Declaration alleged that the place for the area was excavated, and the defendant contended that the proofs did not sustain that allegation, as they showed that the depth of the area was chiefly created by filling and raising the sidewalk on each side of it, and not by excavation, as alleged. Charge of the court was that it was immaterial whether the depth of the area was obtained in the one or the other of these modes, or by both, and we have no doubt the charge was correct.

Material matter alleged and in issue was, that the defendant caused or created the obstruction or defect in the street which occasioned the injury and wrongfully left it open and unguarded, as alleged in the declaration; and if he did so,

it surely was immaterial whether he constructed it by excavation or in the manner described by the contractor. Strong effort was made to show in argument that the defendant, in constructing the area, acted under the express orders of the corporation, and consequently that he is not liable in this action. Theory of his counsel is, that inasmuch as the ordinance of the corporation directed the grade of the street to be raised, he but executed the orders of the corporation in doing the work. Suppose all that be granted, still it is evident that it constitutes no defence to this action. His authority to raise the sidewalk to the new grade is not contested.

Neither the ordinance nor the evidence, however, shows that in excavating, or leaving unfilled, the place for the area, he acted under the directions of the corporation, or that his acts were in any way for their benefit. Absence of objections on the part of the officers of the corporation authorize the presumption that the defendant was not in fault in constructing the area so as to raise the surface to the even grade of the street, and justified the charge of the court, that in constructing it the jury might infer that he acted under their implied license, but no license can be presumed from that fact, or from any other evidence in the case, to leave the area open and unguarded, which was the gravamen of the charge in the declaration.

Instructions of the court were substantially in accordance with those views, and were quite as favorable to the defendant as he had any right to expect.

Remarks already made show that the defendant, in constructing the area, was not constructing a public improvement for the benefit of the corporation, but was constructing a private work exclusively for his own convenience. Attempt is made to give the work a public character, because, in constructing the area, it became necessary to raise the sidewalk to the new grade, but the argument is hardly plausible, and is clearly without any solid foundation. Liability of the defendant, however, was not placed upon the ground that he was not authorized to raise the sidewalk.

On the contrary, the jury were distinctly told that the gravamen of the charge was, not that the defendant was engaged in an unlawful work when he constructed the area, but the court placed his liability upon the ground that he left the area open and without guards to warn those who had occasion to pass in the street, so that the work, which was originally lawful, became a nuisance and was unlawful at the time of the injury. Correctness of that instruction, in view of the evidence as reported in the transcript, is so manifest that it needs no support.

Objection is also taken to the instruction in which the court told the jury that if they believed from the evidence that the area was built under the direction of the defendant, and for his benefit, and that it was left open and without guards, and that the plaintiff in the suit against the corporation, while passing along the street, fell into the area and was injured as alleged, then they would find for the plaintiff. Want of reasonable care on the part of the injured party was not alleged in defence or suggested in argument, and instructions as to notice to the defendant of the pendency of the prior suit had been previously given to the jury.

Argument for the defendant is that the instruction as to the liability of the defendant was erroneous. He contends that the evidence showed that the erection of the building and all the other work, including the construction of the area, was done by an independent contractor, and that the owner of the land, for whose benefit the improvements were made, is not liable in such cases for any such injuries occasioned by an obstruction or defect in the street caused or created by the contractor or his workmen in the construction of such improvements. Two answers may be given to that proposition, either of which is satisfactory—

1. That it assumes a theory of fact which is contradicted by the evidence.

2. That this court, in its former decision, overruled it as applied to a case where the work contracted to be done was itself of a character necessarily to constitute an obstruction or defect in the street or highway requiring precautions,

care, and oversight, to protect the traveller from danger and injury.

1. Theory of fact assumed by the defendant is not sustained by the evidence. Seven contractors were employed in preparing the lot, laying the foundations, erecting and completing the building, raising the sidewalk, constructing the area, laying the flagstones, putting in the gratings, and finishing the improvements. Contractor who constructed the area finished his contract prior to the nineteenth day of December, 1856, when he left and went away, and did not return till after the accident.

Uncontradicted evidence was introduced that the defendant frequently visited the premises during the progress of the work, and that the curb-wall was raised eight or nine inches under his special directions, in the latter part of September of that year. Both the area and curb-wall were ready for the flagstones four months before the accident. When the area was completed it was covered with joists, three by twelve inches, but they were afterwards removed, when the gratings were put down, late in the fall, and were never properly replaced. Attention of the defendant was several times called to the dangerous condition of the sidewalk, and the superintendent of public works gave him notice in writing that the area was not properly covered. He gave no heed to these repeated admonitions, but insisted throughout that it was the sole business of the contractor, with which he had nothing to do. Such wilful negligence the law will never excuse.

2. Import of the decision of this court in reversing the former judgment of the Circuit Court, and remanding the cause for a new trial, was, that the party contracting for the work was liable, in a case like the present, where the work to be done necessarily constituted an obstruction or defect in the street or highway which rendered it dangerous as a way for travel and transportation, unless properly guarded or shut out from public use; that in such cases the principal for whom the work was done could not defeat the just claim of the corporation, or of the injured party, by proving that

the work which constituted the obstruction or defect was done by an independent contractor.

Strictly speaking, that question was not open in this case, but the argument was allowed to proceed; and, lest there should be a doubt upon the subject, it is proper to say that we again affirm the proposition.

Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results *directly* from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party.*

Implied authority was doubtless shown to construct the area, if it was done with proper precautions to prevent accidents to travellers, but no authority to construct it without such precautions is proved or can be presumed; and it is clear that in leaving it open and without guards during the progress of the work, or after its completion, the defendant was guilty of gross negligence, and the structure itself became unlawful. Concede that the defendant might cast the blame on the contractor while the area was being constructed, still it is clear to a demonstration that he cannot successfully make that answer for his own negligence after the work was completed, and the control and oversight of the contractor had ceased.

Looking at the case in any point of view, there is no error in the record.

JUDGMENT AFFIRMED, WITH COSTS.

* Hole *v.* Railway Co., 6 Hurlstone & Norman, 497; Ellis *v.* Gas. Cons. Co., 2 Ellis & Blackburn, 767; Newton *v.* Ellis, 5 Id. 115; Lowell *v.* B. & L. Railroad, 23 Pickering, 24; Storrs *v.* City of Utica, 17 New York 104.

UNITED STATES v. MCMASTERS.

1. It is the duty of a party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. Hence objections of a very general and indefinite nature to testimony taken under a commission, with interrogatories, and which do not point out except in gross the portions of the answers objected to, and which embrace matters clearly competent, will not be sustained. If the exception covers any admissible testimony, it is rightly overruled.
2. A grant in whose language there is some obscurity, and which if open for construction might present some ground for an interpretation in one way, may, on a question of location, be explained in a different sense by an official survey referred to in it, and which was before the party when making the grant.
3. A tract of land, situate in the Parish of St. Bernard, about ten miles below New Orleans, and claimed in this suit against the United States by parties under F. & J. Phillipon, held to have been confirmed by this government, and that grants under the French and Spanish governments were as extensive and the boundaries as well defined and settled as they were under the survey and location confirmed by the United States.

THIS was a writ of error to the Circuit Court for the Eastern District of Louisiana, and involved two questions: one, that of a private boundary to a tract of land, the other a question of the admission of testimony taken under a commission.

The case was submitted on printed briefs of *Mr. Stanbery, A. G., and Mr. Assistant Attorney-General Ashton, for the United States, plaintiff in error, and of Mr. Janin, contra.*

Mr. Justice NELSON delivered the opinion of the court.

This suit was brought, in the court below, by the United States to recover possession of a tract of land situate in the Parish of St. Bernard, about ten miles below the city of New Orleans, on the east side of the River Mississippi, and between that river and Lake Borgne.

The defendants set up two grounds of defence: 1. That the tract of land in controversy had been granted to Madame Le Compte by the Spanish government, November 3d, 1784; and, 2 That the grant was confirmed to F. and J. Phillipon

by act of Congress, March 3d, 1835, from whom the defendants derived their titles.

1. The Spanish grant was produced on the trial from the register's office in New Orleans, where these ancient titles are deposited, and is found in the record.

The Governor, in making the grant, recites:

"Considering the foregoing proceedings, made by the *segundo ayundante* of this place, Louis Andry, who was appointed to make survey and put Dn. Maria Le Compte in possession of the vacant land which lies in rear or at the extremity of the forty arpents in depth of the plantation belonging to Bachemin, Corbin, Voison, and Portugais, and consists of fourteen arpents in front, composing the said plantations, until it reaches Lake Borgne; and, finding that said proceedings are made agreeably to the order of survey, and to the grants of the above-named parties, who are not injured—nay, who have assented thereto, &c.—NOW, THEREFORE, &c., we do, by these presents, "grant to the said Maria Le Compte the above-mentioned fourteen arpents front from the forty arpents in depth owned by the said Bachemin, &c., to the aforesaid lake, following the same directions which the boundary lines of the said Bachemin, &c., run, in order that she may dispose of and enjoy the same, &c."

There is some obscurity in the language of the grant, and, if it was open for construction, there is ground for the interpretation contended for by the government, namely: that the tract granted consisted of an area of fourteen arpents front, and extending back within parallel lines to Lake Borgne. But this obscurity is removed by the official Spanish survey referred to in the grant, and which, as we have seen, was before the government when the grant was made.

Phelps, a United States deputy surveyor, and who has been in the service of the government, under the Surveyor-General, since 1828, surveyed the side lines of this tract in 1831, and, according to his recollection and belief, had before him, at the time, the original Spanish survey of Landry, and followed the side lines of that survey, which were not parallel, but were diverging side lines, corresponding with

those of the front grant to Bachemin and others. That grant fronted on a bend of the river, on the convex side, or shore; and, according to the usage in Spanish locations on such bends, and which is the usage and practice of locations under our system of survey, the side lines run at right angles with the bend of the river, and, as in the instance before us, diverge and widen as the lines extend for the entire depth of the front lot. It was these diverging lines terminating at the rear of the Bachemin lot that were extended in the same direction by the survey and location of the back lot of Madame Le Compte, by Landry, to Lake Borgne, and which were afterwards adopted by Phelps. This Spanish survey and location of the grant removes any obscurity that may exist in the description.

The survey of Landry was not produced, but its existence and loss were sufficiently proved to let in the secondary evidence presented on the trial.

The testimony of Phelps was taken under a commission, and when produced at the trial several objections were taken to its competency and admissibility, on the part of the government, which were overruled. The objections were very general and indefinite, without pointing out the portions of his answers to the interrogatories which were inadmissible, except in gross, embracing matters clearly competent and relevant to the issues. It is the duty of the party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. If the exception covers any admissible evidence, it is rightly overruled.* This principle disposes of all the objections in which any doubt can exist as to the competency of the evidence.

We do not regard, however, the portion of Phelps's testimony objected to as of any particular importance in the case. The only portions of his evidence which are material relate to the Landry survey of Madame Le Compte's grant, and his own survey of the same in 1831. But—

2. The most conclusive defence to this action to recover

* Moore *v.* The Bank of the Metropolis, 13 Peters, 302.

the land in question is the decision of the register and receiver, on the petition of F. and J. A. Phillipon for confirmation, dated December 20th, 1832, the report of these officers in favor of the claim, 5th September, 1833, and confirmation by act of Congress, March 3d, 1835.

The Phillipons owned a large tract of land derived from six French and Spanish grants, all of which are set out on the record, and among them is the grant in question to Madame Le Compte. They state in their petition that the land is situate in the Parish of St. Bernard, on the east bank of the Mississippi River, about ten miles below the city of New Orleans, measuring twenty-one arpents front by an irregular depth extending to Lake Borgne, bounded on one side by the plantation of Mr. Guichard, and on the other side (below) by the plantations of the widow Beauregard; the whole, according to a full and detailed plot thereof, executed by Augustus S. Phelps, United States deputy surveyor, in the month of February, 1831, herewith presented and prayed to be accorded. This map is in the record, and includes the tract of Madame Le Compte, with the diverging lines, as surveyed by Landry, and afterwards by Phelps.

The register and receiver, after hearing the proofs in the case, and referring to the claim, and reciting that it contains twenty-one arpents front by an irregular depth extending to Lake Borgne, and bounded above by land of Mr. Guichard, and below by land of the widow Beauregard; and reciting, also, that the tract is made up of several tracts, all of which are derived from the original grants made, and completed in due form, as follows: enumerating the six French and Spanish grants, with their dates, *report*—"We are therefore of opinion that this claim ought to be confirmed." This claim, thus described by the register and receiver, was specifically confirmed, referring to the date of this report, by the act of Congress of March 3d, 1835.

We do not deem it necessary to pursue the case further. It seems to us that the title, to the extent claimed by the Phillipons, under whom the defendants held, has not only

been confirmed by this government, but that the grants under the French and Spanish governments were as extensive, and the boundaries as well defined and settled, as we are of opinion they now are under the survey and location confirmed by act of Congress.

JUDGMENT AFFIRMED.

INDEX.

ADMIRALTY. See *Evidence*, 2, 3; *Prize Court*, 1–3.

JURISDICTION.

1. A contract for the transportation of passengers by a steamship on the ocean is a maritime contract, and there is no distinction in principle between it and a contract for the like transportation of merchandise. *The Moses Taylor*, 411.
2. The distinguishing and characteristic feature of a suit in admiralty, is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. *Ib.*
3. The provision of the ninth section of the Judiciary Act, which vests in the District Courts of the United States exclusive cognizance of civil causes of admiralty and maritime jurisdiction, is constitutional. *Ib.*
4. The grant of admiralty powers to the District Courts of the United States, by the ninth section of the act of September 24th, 1789, is coextensive with this grant in the Constitution, as to the character of the waters over which it extends. *The Hine* v. *Trevor*, 555.
5. The act of February 26th, 1845, is a limitation of the powers granted by the act of 1789, as regards cases arising *upon the lakes and navigable waters connecting said lakes*, in the following particulars:
   (*a*) It limits the jurisdiction to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and which are employed in commerce and navigation, between ports and places in different States.
   (*b*) It grants a jury trial, if either party shall demand it.
   (*c*) The jurisdiction is not exclusive, but is expressly made concurrent with such remedies as may be given by State laws. *Ib.*
6. The grant of original admiralty jurisdiction by the act of 1789, including as it does all cases not covered by the act of 1845, is exclusive, not only of all other Federal courts, but of all State courts. *Ib.*; see also *The Moses Taylor*, 411.
7. Therefore, State statutes, which attempt to confer upon State courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem* [that is to say, which authorize actions *in rem* against vessels for causes of action cognizable in the admiralty—*The Moses Taylor*, 411], are void; because they are in conflict with that act of Congress, except as to cases arising on the lakes and their connecting waters. *Ib*

ADMIRALTY (*continued*).

8. These statutes do not come within the saving clause of the ninth section of the act of 1789, concerning a common-law remedy. *Ib.*; see also *The Moses Taylor*, 411.
9. But this rule does not prevent the seizure and sale, by the State courts, of the interest of any owner, or part owner, in a vessel, by attachment or by general execution, when the proceeding is a personal action against such owner, to recover a debt for which he is personally liable. *Ib.*
10. Nor does it prevent any action which the common law gives for obtaining a judgment *in personam* against a party liable in a marine contract, or a marine tort. *Ib.*
11. The jurisdiction of a court of admiralty over a vessel captured *jure belli*, is determined by the fact of capture. The filing of a libel is not necessary to create it. *The Nassau*, 634.

ALLUVION.

The right to alluvion depends upon the fact of contiguity of the estate to the river. Hence where accretion is made before a strip of land bordering on a river, the accretion belongs to *it* and not to the larger parcel behind it and from which the strip when sold was separated. *Saulet* v. *Shepherd*, 502.

ATTAINDER, BILLS OF. See *Attorneys and Counsellors*, 1–8; *Constitutional Law*, 1–13.

ATTORNEYS AND COUNSELLORS. See *Constitutional Law*, 1–11; *Pardon*, 1–3.

1. Attorneys and counsellors of the Supreme Court of the United States are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. *Ex parte Garland*, 333.
2. The order of admission is the judgment of the court that the parties possess the requisite qualifications and are entitled to appear as attorneys and counsellors and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court *after opportunity to be heard has been afforded.* Their admission and their exclusion are the exercise of judicial power. *Ib.*
3. The right of an attorney and counsellor, acquired by his admission, to appear for suitors, and to argue causes, is not revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency. *Ib.*
4. The admitted power of Congress to prescribe qualifications for the office

ATTORNEYS AND COUNSELLORS (*continued*).

of attorney and counsellor in the Federal courts cannot be exercised as a means for the infliction of punishment for the past conduct of such officers, against the inhibition of the Constitution, preventing the passage of bills of attainder (under which general designation bills of pains and penalties are included), or that against the passage of an *ex post facto* law. *Ib.*

5. The act of Congress of January 24th, 1865, providing that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after March 4th, 1865, to the bar of any Circuit or District Court of the United States, or Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in the act of July 2d, 1862—which latter act requires the affiant to swear or affirm that he has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; and that he has not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto—operates as a legislative decree excluding from the practice of the law in the courts of the United States all parties who have offended in any of the particulars enumerated. *Ib.*

6. Exclusion from the practice of the law in the Federal courts, or from any of the ordinary avocations of life for *past conduct* is punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate. *Ib.*

7. The act being of this character partakes of the nature of a bill of pains and penalties, and is subject to the constitutional inhibition against the passage of bills of attainder, under which general designation bills of pains and penalties are included. *Ib.*

8. In the exclusion which the act adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it adds a new punishment to that before prescribed, and it is thus within the inhibition of the Constitution against the passage of an *ex post facto* law. *Ib.*

BANKS.

1. A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed. And where a State imposes on the State banks a tax on their *capital* (the *shares* in the hands of the shareholders being exempt from tax), a tax cannot be laid by such State on the *shares* of banks, organized under the act of June 3d, 1864, to provide a national currency; which act, while it allows the State to tax the shares of banks organized under it, does so only on condition that the tax laid shall not exceed the rate imposed upon the

BANKS (*continued*).

shares in any of the banks organized under authority of the State where such association is located. *Van Allen* v. *The Assessors* (3 Wallace, 573), affirmed. *Bradley* v. *The People*, 459.

2. Shares in banks, whether State banks or those organized under the act of June 3d, 1864, "to provide a national currency," &c., are liable to taxation by the State under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared, by statutes creating them, to be exempted from taxation by or under State authority. *Van Allen* v. *The Assessors* (3 Wallace, 573), affirmed. *People* v. *The Commissioners*, 244.

3. If the rate of taxation by the State on such shares is the same as, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." *Ib.*

BILLS OF ATTAINDER. See *Attorneys and Counsellors*, 1–8; *Constitutional Law*, 1–13.

BILLS OF EXCEPTION. See *Practice*, 3–7.

CALIFORNIA. See *Mexican Law*, 1–3.

CAPTURED PROPERTY. See *Prize Court*, 1–3.

Demands against property captured as prize of war must be adjusted in a prize court. The property arrested as prize is not attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement. *The Nassau*, 634.

COLLISION.

Those established rules of navigation that where a vessel has the wind free, or is sailing before or with the wind, she must keep out of the way of the vessel which is closehauled by the wind or sailing by or against it, and that those closehauled on the wind, or sailing on the starboard tack, must keep their course, do not apply after a vessel advancing in violation of them is so near another vessel that by such other vessel's adhering to them a collision would be inevitable. A departure from them, under such circumstances, by a vessel otherwise not in fault, will not impair her right to recover for injuries occasioned by the collision. *Bentley* v. *Coyne*, 509.

COMITY, STATE AND FEDERAL. See *Mexican Law*, 4.

The interpretation within the jurisdiction of a State of a local law, becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different States to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one State from what it is in the other. *Christy* v. *Pridgeon*, 196.

COMMON CARRIERS.

1. Although a common carrier of passengers by sea, as a master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual though violent and revolutionary authorities of a town, under threat of death if he return, and when the bringing back and landing of such passenger would in the opinion of such master tend to promote further difficulty—yet this refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting aboard the vessel, have paid or tendered the passage-money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him aboard it, and send him back to the port of departure. And if he do so, damages will be awarded against him on a proceeding in admiralty. *Pearson* v. *Duane*, 605.
2. However, where a person who had been thus banished from a place got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the history of the case until after the vessel was at sea—on meeting a return steamer, of a line to which his own vessel belonged—stopped his own and sent the man aboard the returning one, to be taken to the port where he embarked—such captain, not acting in any malice, but acting from a humane motive, and from a belief that the passenger, if landed at the port where his own vessel was going, would be hanged—in such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly, in such a case, this court, on appeal from a decree which had given four thousand dollars damages, modified it by allowing but fifty dollars, with directions, moreover, that each party should pay his own costs on the appeal. *Ib.*
3. In a case such as above described, a passenger is entitled to compensation for the injury done him by being put on board the return vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries that he suffered from obstructions which he afterwards met with in getting to the place from whence he had been expelled and where he wanted to return; and which injuries were not caused by this act, but were owing to the fact that all to whom he afterwards applied for passage to that place knew the power and determination of the authorities there and were afraid to carry him back. *Ib.*

CONSTITUTIONAL LAW. See *Attorneys and Counsellors*, 1–8; *Habeas Corpus*, 4; *Pardon*, 1–3; *Trial by Jury*, 1–4.

I. Ex Post Facto Laws.

1. Under the form of creating a qualification or attaching a condition, the States cannot in effect inflict a punishment for a past act which was not punishable at the time it was committed. *Cummings* v. *The State of Missouri*, 277.
2. Deprivation or suspension of any civil rights for past conduct is punishment for such conduct. *Ib.*
3. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. *Ib.*
4. These bills, though generally directed against individuals by name, may be directed against a whole class, and they may inflict punishment absolutely, or may inflict it conditionally. *Ib.*
5. The clauses of the second article of the constitution of Missouri (set forth in the statement of the case of *Cummings* v. *The State of Missouri*, 4 Wallace, pp. 279–281), which require priests and clergymen, in order that they may continue in the exercise of their professions, and be allowed to preach and teach, to take and subscribe an oath that they have not committed certain designated acts, some of which were at the time offences with heavy penalties attached, and some of which were at the time acts innocent in themselves, constitute a bill of attainder within the meaning of the provision in the Federal Constitution prohibiting the States from passing bills of that character. *Ib.*
6. These clauses presume that the priests and clergymen are guilty of the acts specified, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath: they assume the guilt and adjudge the punishment conditionally. *Ib.*
7. There is no practical difference between assuming the guilt and declaring it. The deprivation is effected with equal certainty in the one case as in the other. The legal result is the same on the principle that what cannot be done directly cannot be done indirectly. *Ib.*
8. The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct by legislative enactment, under any form, however disguised. *Ib.*
9. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. *Ib.*
10. The clauses of the second article of the constitution of Missouri, already referred to, in depriving priests and clergymen of the right to preach and teach, impose a penalty for some acts which were innocent at the time they were committed, and increase the penalty prescribed for such of the acts specified as at the time constituted public offences, and

CONSTITUTIONAL LAW (*continued*).

in both particulars violate the provision of the Federal Constitution prohibiting the passage by the States of an *ex post facto* law. They further violate that provision in altering the rules of evidence with respect to the proof of the acts specified—thus, in assuming the guilt instead of the innocence of the parties; in requiring them to establish their innocence, instead of requiring the government to prove their guilt; and in declaring that their innocence can be shown only in one way, by an expurgatory oath. *Ib.*

11. Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal. *Ib.*
12. A statute which simply authorizes the imposition of a tax according to a previous assessment is not retrospective. *Locke* v. *New Orleans*, 172.
13. Retrospective acts embrace such only as impose or affect penalties or forfeitures. *Ib.*

II. Violation of Contract.

14. Where a State, in order to promote the drainage and sale of certain swamp lands belonging to it, and which it was desirous of reclaiming, has passed, by way of encouraging purchasers, a law that such lands "shall be exempt from taxation for the term of ten years," and issued transferable scrip receivable for them, a repeal of the exemption act, so far as it concerns lands paid for either before or after the repeal, with scrip issued before the repeal, impairs a contract of the State with the holders of such scrip. *McGee* v. *Mathis*, 143.
15. Where a statute has authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied. The State and the corporation in such a case are equally bound. *Von Hoffman* v. *City of Quincy*, 535.
16. A subsequently passed statute which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity; and it is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed. *Ib.*
17. Certificates of discharge granted under insolvent laws passed by a State cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. *Baldwin* v. *Hale*, 1 Wallace, 223, and *Baldwin* v. *Bank of Newbury*, Id. 234, affirmed. *Gilman* v. *Lockwood*, 409.

III. The President.

18. The President of the United States cannot be restrained by injuncti[illegible]n

CONSTITUTIONAL LAW (*continued*).
from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed. *The State of Mississippi* v. *Johnson, President*, 475.

19. It makes no difference whether such incumbent of the Presidential office be described in the bill as President or simply as a citizen of a State. *Ib.*

CONTRACT, OBLIGATION OF. See *Constitutional Law*, 14–16.

CONTRACTOR, LIABILITY OF, IN RELATION TO PRINCIPAL. See *Respondeat Superior*.

CORPORATION. See *Mandamus*, 5.

1. Municipal corporations, such as the county boards of police usual in Mississippi, when authorized by statute to do acts which otherwise they would have no power to do—such, for example, as subscribe to a railroad incorporated and beginning in another State and passing through their own State—cannot modify or alter the subscription as authorized by the statute. A compromise by such board with a railroad company which does so modify or alter the subscription is, accordingly, void. *Bell* v. *Railroad Company*, 598.
2. A provision in the charter of a city corporation authorizing it to borrow money for any public purpose, whenever, in the opinion of the City Council, it shall be expedient to exercise it, is a valid power. *Rogers* v. *Burlington* (3 Wallace, 654), affirmed. *Mitchell* v. *Burlington*, 270.
3. Money borrowed by such a corporation to construct a plank-road, if the road leads from, extends to, or passes through the limits of the corporation, is borrowed for a public purpose within the meaning of the provision. *Ib.*
4. *Havemeyer* v. *Iowa County* (3 Wallace, 294), and *Gelpcke* v. *City of Dubuque* (1 Wallace, 175), affirmed, and the doctrine reasserted, that if municipal bonds, when made, were valid by the constitution and laws of a State as then expounded, by the highest judicial authority whose duty it was to interpret them, no subsequent judicial exposition of an opposite kind, will make them invalid. *Ib.*

CUSTOMS. See *Reciprocity Treaty of* 1854.

DAMAGES. See *Common Carrier*, 2, 3.

Where—on a suit by the United States against a deputy postmaster for damages in not paying over moneys which came to his hands during the six months next preceding the discontinuance (March 13th, 1862) of the office to which he was appointed—the defendant's rejoinder (demurred to), by its whole context, and by its introductory allegations that the office was never supplied with mails after it was discontinued, shows that it means nothing more than that such defendant was wrongfully prevented from earning commissions—such rejoinder

DAMAGES (*continued*).
presents a claim for damages merely. Such a claim cannot be maintained as a defence to a suit such as above described. *Ware* v. *United States*, 617.

DEPOSITIONS. See *Evidence*, 2–3.

DISPUTED CLAIM.

1. A collector of taxes, who under the direction properly given of a county police board has collected a tax which such board was authorized by statute, upon certain conditions, to levy for the benefit of another body, a railroad company, has no right to decide whether such municipal body has laid the tax rightly or not, or to settle differences between the tax-payers, the county, and the third body. If the president of the board of police direct him to pay it to the third body his duty is to pay it. *Bell* v. *Railroad Company*, 598.
2. The fact that the statute made it the duty of such collector before entering upon the duty of collecting to give a bond to the president of the board of police, with sureties to be approved by him, and by which he should bind himself to "keep safely and pay over to the order of the president of the board of police all money collected by him," and that the collector did not give a bond in such form at all, does not affect this obligation. *Ib.*

DISTRICT OF COLUMBIA. See *Jurisdiction*, 10–13.

EJECTMENT.

1. A final judgment pronounced in an action of ejectment, where the claim of title in fee simple absolute by the parties respectively was the sole subject of controversy, and where the suit is not in the fictitious form, but in form between litigants with real names, and where the land is accurately described, is, in those States where no provision is made by statute for a subsequent trial, a valid legal bar to a like action subsequently instituted between the same parties for the same lands or premises, involving the same identical title and rights to the possession of such lands or premises and none other. *Sturdy* v. *Jackaway*, 174.
2. Although when statute abolishing its fictitious forms places the action of ejectment on the same footing with other actions as to the conclusiveness of the judgment, the court will give effect to the same; yet where a plaintiff in ejectment is defeated in one suit, where he claimed through a power of attorney rightly ruled out on the trial as void, he will not be held to be concluded in a subsequent action where he claims under a new deed made by the executors themselves. Having acquired a new and distinct title, he has the same right to assert it, without prejudice from the former suit, as a stranger would have, had it passed to him. *Barrows* v. *Kindred*, 399.
3. Where a party claiming land as owner, under the laws of Pennsylva-

EJECTMENT (*continued*).

nia, brings ejectment in the name of the original warrantee, and recovers, against a father; and subsequently producing a deed-poll from the warrantee, made previously to the date of the ejectment and deraigning title to himself, brings another ejectment in his own name against a son, who on his father's death kept possession of the same land: such two suits are an estoppel and within the act of Assembly of Pennsylvania, of the 13th of April, 1807, which declares that "where two verdicts shall, in any suit of ejectment between the same parties, be given in succession, for the plaintiff or defendant, and judgment be rendered thereon, no new ejectment shall be brought." *Evans* v. *Patterson*, 224.

EQUITY. See *Former Judgment; Injunction*, 1, 2.

A court of equity will set aside a patent of the United States obtained by mistake or inadvertence of the officers of the land office, on a bill filed for that purpose by the government when the patent *primâ facie* passes the title. *Hughes* v. *United States*, 232.

ESTOPPEL.

1 Although no partnership may exist between them, yet where two persons are joint owners of a vessel against which a claim exists for non-delivery of cargo, and one gives a note in the joint name for a balance agreed on as due for such non-delivery—the other party being aware of the making of the note, and of the consideration for which it was given, and making no dissent from the act of his co-owner—such note cannot be repudiated by such other party, he having bought out the share of his co-owner in the vessel and agreed to pay her debts and liabilities. *Newell* v. *Nixon*, 572.

2. If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, they cannot, when sued for an injury growing out of their negligence in care of the street, defend themselves by alleging want of authority in establishing the street originally. *Mayor* v. *Sheffield*, 189.

EVIDENCE.

1. On an issue as to whether certain promissory notes, dated on a particular day, were given for money lost at play and therefore void, it is not allowable to prove that the party giving them was intoxicated on the day of the date of the notes in suit, and that when intoxicated he had a propensity to game. *Thompson* v. *Bowie*, 463.

2. Depositions cannot be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject-matter, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to any such party, and had no right to cross-examine the witnesses. *Rutherford* v. *Geddes*, 220.

3. Nor can depositions be read in admiralty any more than at common law, without some sufficient reason being shown why the witness was not produced at the hearing. *Ib.*

EVIDENCE (*continued*).

4. Where a suit is brought against a shipowner for a sum acknowledged by the owners to be due the shipper, for a breach of contract in delivering merchandise, the production of the bill of lading is not essential. *Newell* v. *Nixon*, 572.

5 When, under the act of Congress of the 25th March, 1862, for the better administration of the law of prize (12 Stat. at Large, 374), the prize commissioners authorized by the act certify to a District Court that a prize vessel has arrived in their district, and has been delivered into their hands, this is sufficient evidence to the court that the vessel is claimed as a prize of war and in its jurisdiction as a prize court. *The Nassau*, 634.

EX POST FACTO LAWS. See *Attorneys and Counsellors*, 1–8; *Constitutional Law*, 1–13.

FEDERAL AND STATE JURISDICTION. See *Admiralty Jurisdiction*, 1–10.

FLORIDA.

The established rule—that a writ of *fieri facias*, tested and issued after the death of the party against whom the judgment is recovered, is void, and confers no power on the ministerial officer to execute it—applies where the proceedings are begun by seizing property under a writ of attachment under the laws of Florida, as at the common law. *Mitchell* v. *St. Maxent's Lessee*, 237.

FORMER JUDGMENT. See *Recovery Over*.

A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit. *Hughes* v. *United States*, 232.

FRAUDS. See *Statute of*.

GAMING CONSIDERATION. See *Evidence*, 1.

HABEAS CORPUS. See *Trial by Jury*, 4.

1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus* for the purpose of inquiring into the cause of commitment, and they have jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged. *Ex parte Milligan*, 2.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of *habeas corpus*, to issue the writ, and on its return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged. *Ib.*

HABEAS CORPUS (*continued*).

3 A petition for a writ of *habeas corpus*, duly presented, is the institution of a cause on behalf of the petitioner; and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner, is matter of law and not of discretion. If the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal, under the Judiciary Act of 1802, for final decision. *Ib.*

4. Suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further. *Ib.*

5. A person arrested after the passage of the act of March 3d, 1863, "relating to *habeas corpus* and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district. *Ib.*

6. The omission to furnish a list of the persons arrested, to the judges of the Circuit or District Court as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge. *Ib.*

INDIANA.

The Federal authority having been always unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the trial there, by a Military Commission, of a citizen in civil life, not connected with the military or naval service, for any offence whatever, was unconstitutional. *Ex parte Milligan*, 2.

INJUNCTION.

1. The President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed. *The State of Mississippi* v. *Johnson, President*, 475.

2. It makes no difference whether such incumbent of the Presidential office be described in the bill as President or simply as a citizen of a State. *Ib.*

INSOLVENT LAWS OF STATES. See *Constitutional Law*, 17.

INSTANCE COURT. See *Prize Court*, 1–3.

INTEREST.

A party suing, not on a note, but on the consideration for which the note was given—and using the note as evidence rather than as the foundation of the claim—may have lawful interest on the sum due him.

INTEREST (*continued*).

although by note given on a settlement the party sued may have promised to pay unlawful interest, and such as the law of the State where the note was given visits with a forfeiture of all interest whatever. *Newell* v. *Nixon*, 572.

INTERPRETATION.

I. Of Statutes, See *Statutes*, I.

II. Of Deeds.

A grant in whose language there is some obscurity, and which, if open for construction, might present some ground for an interpretation in one way, may, on a question of location, be explained in a different sense by an official survey referred to in it, and which was before the party when making the grant. *United States* v. *McMasters*, 680.

JUDGMENT. See *Mandamus*, 1, 2; *Principal and Surety; Recovery over*, 1–3.

JUDICIARY ACT OF 1802.

1. A petition for a writ of *habeas corpus*, duly presented, is the institution of a cause on behalf of the petitioner; and if the judges of the Circuit Court, being opposed in opinion, can render no judgment on it, the point upon which the disagreement happens may be certified to the Supreme Court, under the act of 29th April, 1802, for final decision. *Ex parte Milligan*, 2.
2. The Supreme Court cannot take jurisdiction where the question certified is one of fact, and which can be determined only by an examination of the evidence in the record. *Brobst* v. *Brobst*, 2.

JURIDICAL POSSESSION. See *Mexican Law*, 1–3

JURISDICTION.

I. Of the Supreme Court of the United States.

(*a*) *Where the Jurisdiction exists.*

1. A petition for a writ of *habeas corpus* duly presented is the institution of a "cause," within the meaning of the Judiciary Act of 1802, allowing certificates of division in opinion between the judges. And a certificate of division of opinion on such petition is within the jurisdiction of the Supreme Court. *Ex parte Milligan*, 2.

(*b*) *Where the Jurisdiction does not exist.*

2. This court cannot take jurisdiction on a certificate of division, under the Judiciary Act of 1802, in a case where the question certified is one of fact and can only be determined by an examination of the evidence in the record. *Brobst* v. *Brobst*, 2.
3. The jurisdiction of the Supreme Court to re-examine judgments of the Circuit Courts is limited to cases where the matter in dispute *exceeds* $2000. Where it but equals that sum the jurisdiction does not exist. *Walker* v. *United States*, 163.

JURISDICTION (*continued*).

4. In a case brought here from a State court, under the twenty-fifth section of the Judiciary Act, the record must show that some one of the matters mentioned in that section was *necessarily* decided by the court, notwithstanding there may be a certificate from the presiding judge, that such matters were drawn in question. If it appears from the record that the State court might have decided the case on some other ground, this court has no jurisdiction. *Railroad Company* v. *Rock*, 177.
5. This court cannot review the decision of a State court upon the general ground, that such court has declared a contract void, which this court may think to be valid. *Ib.*
6. It must be the Constitution or some statute of the State which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution or laws of the United States; and the decision of the State court must sustain the law of the State in the matter in which this conflict is supposed to exist, or the case for this court does not arise. *Ib.*
7. In cases brought from a State court under the twenty-fifth section of the Judiciary Act, where a decision of the highest court of law or equity of a State is *in favor* of the validity of a statute of or an authority exercised under the United States, drawn in question in such court, this court has no revisory power. *Ryan* v. *Thomas*, 603.
8. The twenty-fifth section of the Judiciary Act does not warrant the review of an adjudication upon a mere question of boundary; nor does the fact that the land to which the boundary relates is held by a title derived from an act of Congress change the result. Location upon the land when the title is admitted, is wholly within the cognizance of the State tribunals, and it is not within the power of the Supreme Court to reverse their action. In such cases its authority is limited to errors relating to the title. *Lanfear* v. *Hunley*, 204.
9. Where two parties held patents for land from the United States, under Mexican grants, both of which included the same lands in part, and one of the parties brought a suit in a State court to vacate the patent of the other, to the extent of the conflict of title, and the State court refused to entertain jurisdiction of the question, and dismissed the complaint, this court has no jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the judgment. *Semple* v. *Hagar*, 431.
10. Under the act of March 3d, 1863, establishing the Supreme Court of the District of Columbia, the action of that court can be examined here in no case in which like action in the Circuit Court of the district, whose place it supplies, could not be re-examined. *Brown* v. *Wiley*, 165.
11. Hence, it can be examined only in those cases where there has been a final judgment, order, or decree. *Ib.*
12. The certificate of the finding of a jury on certain issues involving paternity, marriage, and legitimacy, sent from the Orphans' Court to the Supreme Court of the district, which certificate of finding is

JURISDICTION (*continued*).

transmitted by the Supreme Court to the Orphans' Court, is not such a final judgment, order, or decree as this court can re-examine on error. *Ib.*

13. Nor where the finding of the jury was at special term held by a single judge of the Supreme Court of the District of Columbia, under instructions by such judge, and a motion for new trial on exception to such instructions and other grounds has been heard at general term by all the judges and overruled, is such overruling a final judgment, order, or decree, reviewable on a writ of error by this court. *Ib.*

14. This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment, in strict language, in the record of such inferior court, is a general judgment. *Sparrow* v. *Strong*, 584.

II. Of Circuit Courts of the United States.

Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus* for the purpose of inquiry into the cause of commitment, and they have jurisdiction, unless in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged. *Ex parte Milligan*, 2.

III. Of District Courts of the United States.

See *Admiralty*, 1–11; *Prize Court*, 1–3.

LANFEAR, AMBROSE.

The act of Congress of August 16th, 1856, confirming claims in favor of Ambrose Lanfear, confirmed to him whatever he was entitled to by virtue of the original grant referred to in it, conceding that to have been valid. It neither enlarged nor diminished what the grant gave. It extinguished all claim on the part of the United States to the land covered by the surveys; but as regards adverse claimants, it determined nothing, and concluded no one. *Lanfear* v. *Hunley*, 204.

LIABILITY OVER.

Where work done on a public highway *necessarily* causes an obstruction or defect in it, it is no defence, by a principal, to a claim of a municipal corporation which has had to pay damages for injuries done to a passer by from such obstruction or defect, that the defect was caused by an independent contractor. *Robbins* v. *Chicago City*, 657.

LOUISIANA, CIVIL CODE OF.

The article 3499 of the Civil Code of Louisiana, which prescribes that "actions for the payment of freight of ships and other vessels are prescribed by one year," does not apply to a case where the plaintiffs

LOUISIANA, CIVIL CODE OF (*continued*).
were shipbrokers only and not shipowners, and where the contract was not one of affreightment. *Railroad Company* v. *Lindsay*, 650.

MANDAMUS.

1. On application by a creditor for *mandamus* against county officers to levy a tax to pay a judgment, the defendant cannot impeach the judgment by setting up that interest was improperly given in it. This would be to impeach it collaterally. *Supervisors* v. *United States, Ex relatione*, 435.
2. A statute which enacts that when a judgment is given against a county, the county commissioner shall draw a warrant upon the treasurer for the amount, "*which shall be paid as other county debts*," cannot be taken advantage of on error, in case of an application for a *mandamus* to levy a tax to pay a judgment, where such a warrant was applied for and refused, and where there are no funds in the county treasury with which to pay the judgment. *Ib.*
3. Where a statute directs the commissioner of patents to grant a reissue of patents, in certain cases, to "assignees," it is the duty of the commissioner to decide whether the applicant is an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision on the subject; and if he has thoroughly examined and decided that the applicant is not so, a *mandamus* will not lie commanding him to refer the application to "the proper examiner, or otherwise examine or cause the same to be examined according to law." The preliminary question was within the scope of his authority. If the *mandamus* had ordered the commissioner to allow an appeal, the order under which it issued would have been held correct. *Commissioner of Patents* v. *Whiteley*, 522.
4. *Mandamus* cannot be made to perform the functions of a writ of error. *Ib.*
5. *Mandamus* will lie to compel a municipal corporation to levy and collect taxes which payment of its just debts renders necessary. *Von Hoffman* v. *City of Quincy*, 535.

MARITIME LIEN. See *Prize Court*, 1–3.

MATERIAL-MEN. See *Prize Court*, 1–3.

MEXICAN LAW.

I. LAW OF JURIDICAL POSSESSION.

1. The Mexican law made a formal delivery of possession of real property granted essential, after the execution of the grant, for the investiture of the title. *Graham* v. *United States*, 259.
2. The proceeding had upon such delivery—called, in the language of the country, the delivery of juridical possession—was usually taken by the magistrate of the vicinage, with assisting witnesses, in the presence of the adjoining land proprietors, and involved, when there was any

MEXICAN LAW (*continued*).

uncertainty in the description of the premises, a measurement of the land and the establishment of its boundaries. *Ib.*

3. The record of a proceeding of this nature must control the action of the officers of the United States, in surveying the land granted, when the grant is confirmed. *Ib.*

II. COLONIZATION LAW OF 1824. See *Comity*.

4. The Mexican colonization law of August 18th, 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new State, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the State, must be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be the opinion of the Federal courts of its original soundness. If in courts of other States carved out of territory since acquired from Mexico, a different interpretation has been adopted, the courts of the United States will follow the different ruling, so far as it affects titles in those States. *Christy* v. *Pridgeon*, 196.

MILITARY COMMISSIONS. See *Habeas Corpus*, 4; *Trial by Jury*, 1–4.

MISSOURI. See *Constitutional Law*, 1–11.

NAVIGABLE WATERS OF THE UNITED STATES. See *Admiralty*, 1–10.

NEGOTIABLE PAPER.

1. A bill of exchange drawn in one State upon a party in another, the known and common purpose of both parties being to carry on a business declared unlawful by statute of the first State, is void as to the drawer in the hands of a party to the bill having notice of its true character. *Davidson* v. *Lanier*, 447.

2. As between the parties the delivery of negotiable paper, signed and indorsed in blank, authorizes the receiver to fill it up in conformity with the authority given him; but it does not authorize him to do more, nor give him power to fill it up at pleasure. In a suit by the drawer upon such paper against drawer or indorser, the burden of proof, that an agreement as to filling up had been violated, is on the defendant; but if he can make the proof it will avail him. *Ib.*

NEVADA.

An appeal from an order denying a motion for a new trial does not, under the legislation of Nevada, carry the original judgment and the whole cause before the appellate court, so that the decision upon the appeal operates as a judgment reversing or affirming the judgment below. *Sparrow* v. *Strong*, 584.

NOTICE. See *Recovery Over*.

1. The equity of a preëmption claimant of land under the laws of the United States who has complied with the conditions imposed by those laws, obtained his certificate by the payment of the purchase-money, and retained uninterrupted possession of the property, cannot be defeated by one whose entry was subsequent, although he has fortified his title with a patent; such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the preëmption claimant. *Hughes* v. *United States*, 232.
2. Open, notorious, and exclusive possession of real property by parties claiming it is sufficient to put other persons upon inquiry as to the interests, legal or equitable, held by such parties; and if such other persons neglect to make the inquiry, they are not entitled to any greater consideration than if they had made it and had ascertained the actual facts of the case. *Ib.*

OPEN ACCOUNT.

A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to the time or place of delivery, yet with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties. *Railroad Company* v. *Lindsay*, 650.

PARDON.

1. The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. The power is not subject to legislative control. *Ex parte Garland*, 333.
2. A pardon reaches the punishment prescribed for an offence and the guilt of the offender. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his civil rights. It gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. *Ib.*
3. A person who has received a full pardon for all offences committed by his participation, direct or implied, in the Rebellion, is relieved from all penalties and disabilities attached to the offence of treason, committed by such participation. He cannot, therefore, be excluded by reason of that offence from continuing in the enjoyment of a previously-acquired right to appear as an attorney and counsellor in the Federal courts. *Ib.*

PATENT. See *Equity; Mandamus*, 3.

1. Where an applicant for reissue of a patent has done all in his power to make his application effectual—has filed his application with the acting commissioner and paid the requisite amount of fees—the application is to be considered as properly before the commissioner. *Commissioner of Patents* v. *Whiteley*, 522.
2. *Semble* that an applicant for a reissue of a patent under the thirteenth section of the Patent Act of 1836, which allows a reissue in certain cases to a patentee, "and in case of his death or any *assignment* by him made of the *original patent*," vests a similar right "in his executors, administrators, or *assignees*," must be an assignee of the whole interest in the patent; and not the assignee of a sectional interest only. At least where the commissioner of patents had thus decided, the Supreme Court, on the question's being raised in connection with other questions, whose decision rendered a decision on *it* unnecessary, say that "as at present advised they were not prepared to say that the decision of the commissioner was not correct." *Ib.*

PENNSYLVANIA. See *Ejectment*, 3.

PLEADING. See *Mandamus*, 1.

1. Where there is a plea to merits, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived. *Bell* v. *Railroad Company*, 598.
2. Where a plea in answer is but notice of special matter by way of abatement of the amount claimed and so goes to but part of the cause of action, it cannot be relied on as a plea in bar. *United States* v. *Dashiel*, 182.
3. When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day. *United States* v. *Le Baron*, 642.
4. If it be proved that a bond bearing date the first day of the month, did not become obligatory until the fifteenth, this is no variance, although the bond is counted on in the pleadings as a contract made on the first day of the month and bearing that date. *Ib.*
5. An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case as presented by the findings, will not be sustained in the Supreme Court on review. *Railroad Company* v. *Lindsay*, 650.
6. Such case comes within the thirty-second section of the Judiciary Act, curing imperfections, defects, or want of form in the pleadings or course of proceedings, except such as are specially demurred to. *Ib.*
7. In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "*dug*, opened, and *made*" the area is sustained by proof that he formed it partially by excavation and partially by raising walls. *Robbins* v. *Chicago City*, 657.

POSTMASTER-GENERAL. See *Post-offices*, 1–3.

POST-OFFICES.

1. By the legislation of Congress the Postmaster-General has the power to "establish *post-offices*" as well where the commissions of the office amount to or exceed one thousand dollars as where they do not. *Ware* v. *United States*, 617.
2. Unless there is some provision in the acts of Congress restraining its exercise, the power to establish post-offices, as interpreted by usage coeval with the creation of the Post-office Department and recognized in Congressional legislation, infers a power to discontinue them. And deputy postmasters occupy their offices subject to the contingency that such offices may be so discontinued. *Ib.*
3. Possessing thus the power to discontinue post-offices, the Postmaster-General may exercise the power, notwithstanding that the deputy postmasters have been appointed by the President, by and with the advice and consent of the Senate, and under a statute which enacts that the appointee shall hold his office for the term of four years unless sooner removed by the President. *Ib.*
4. If he do exercise it, the office of deputy postmaster is, in such cases, gone. There is no longer a deputy postmaster at that place. *Ib.*

PRACTICE. See *Jurisdiction*, 1–14; *Mandamus*, 2–4; *Principal and Surety; Pleading*, 5, 6; *Prohibition*, 1–3.

1. It is not required that a writ of error be allowed by a judge. It is enough that it is issued and served by copy lodged with the clerk of the court to which it is directed. *Davidson* v. *Lanier*, 447.
2. A mistake in the date of the writ of error is not important, when it is clear that such mistake is a clerical one merely, and when, from the judgment described and the number given to it, the party cannot be misled. *Ib.*
3. When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, otherwise it will be disregarded. *Leftwitch* v. *Lecanu*, 187.
4. The fact that a copy of a paper is attached to a pleading in the case, which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can this court presume that it is the same paper read in evidence and excepted to. *Ib.*
5. The practice of making bills of exception a sort of abstract or index to the history of the case, and so of obscuring its merits, condemned. *Evans* v. *Patterson*, 224.
6. It is the duty of a party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. Hence objections of a very general and indefinite nature to testimony taken under a commission, with interrogatories, and which do not point out except in gross the portion of the answers objected to and

PRACTICE (*continued*).

which embrace matters clearly competent, will not be sustained. If the exception covers any admissible testimony, it is rightly overruled. *United States* v. *McMasters*, 680.

7. Where none of the evidence offered by a plaintiff is objected to below, and no exception taken to the findings of the court there, objection cannot be made in this court. *Railroad Co.* v. *Lindsay*, 650.
8. A motion for a new trial is not a waiver of exceptions. *United States* v. *Dashiel*, 182.
9. A *certiorari* for diminution of the record allowed under special circumstances, and where the cause had been continued till the next term, although the motion for it was made after more than one term had passed since the entry of the case, and contrary, therefore, to a rule of the court. *Stearns* v. *The United States*, 1.
10. A writ of *fieri facias*, tested and issued after the death of the party against whom the judgment is recovered, is void, and confers no power on the ministerial officer to execute it. *Mitchell* v. *St. Maxent's Lessee*, 237.
11. Under the practice prevailing in the Circuit Courts of the United States, the finding of the facts by the court makes a case in the nature of a special verdict and is conclusive as to those facts; and this although the petition sets forth a different state of facts which are neither confessed nor denied by the answer. *Saulet* v. *Shepherd*, 502.
12. When a want of jurisdiction is patent, or can be readily ascertained by an examination of the record in advance of an examination of the questions on the argument of the merits, this court will entertain and act upon a motion to dismiss for want of jurisdiction. *Semple* v. *Hagar*, 431.
13. On the application of a prisoner for a writ of *habeas corpus*, the usual course of proceeding is for the court to issue the writ, and on the return to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts as presented in the petition, the prisoner, if brought before the court, would be discharged. *Ex parte Milligan*, 2.
14. If parties setting up a maritime lien for work and materials alleged to have been furnished to a vessel prior to her capture *jure belli* do not present and ask to have it decided in the prize court, before which the captured vessel is brought for adjudication, the question is not properly before this court for review, in a case where the District Court has only dismissed the libel as improperly filed on its instance side. *The Nassau*, 634.

PRESCRIPTION. See *Louisiana, Civil Code of.*

PRESIDENT OF THE UNITED STATES. See *Pardon; Trial by Jury*, 4.

The President cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill hav-

PRESIDENT OF THE UNITED STATES (*continued*).

ing such a purpose be allowed to be filed. And it makes no difference whether such occupant of the Presidential office be described in the bill as President or simply as a citizen of a State. *The State of Mississippi* v. *Johnson*, 475.

PRINCIPAL AND SURETY.

If a judgment is obtained against a surety, the amount of it being fixed by a judgment previously obtained against his principal, the former judgment cannot be reversed on error as for an amount too small, though the latter should be afterwards reversed as having so been. *United States* v. *Allsbury*, 186.

PRISONER OF WAR.

A person who was a resident, during the Rebellion, of a loyal State, in which he was then arrested; who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war, within the meaning of the act of March 3d, 1863, authorizing, on certain conditions, the discharge from imprisonment of persons held "otherwise than as prisoners of war." *Ex parte Milligan*, 2.

PRIVATE BANKING. See *Public Policy*.

PRIZE COMMISSIONERS. See *Evidence*, 5.

PRIZE COURT.

1. Demands against property captured as prize of war must be adjusted in a prize court. The property arrested as prize is not attachable at the suit of private parties. If such parties have claims which, in their view, override the rights of captors, they must present them to the prize court for settlement. *The Nassau*, 634.
2. Whether a maritime lien for work and materials alleged to have been furnished to a vessel prior to her capture *jure belli* is lost by such capture, is a proper subject for investigation and decision by the prize court before which the captured vessel is brought for adjudication; and which the parties setting up such lien can, on presentation of their claim to that tribunal, properly have decided. *Ib.*
3. But if such parties do not so present and ask to have it decided, the question is not properly before this court for review, in a case where the District Court has only dismissed the libel as improperly filed on its instance side. *Ib.*

PROHIBITION.

1. The writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed. *United States* v. *Hoffman*, 158.
2. Therefore, where the court to which the writ should be issued, has al-

PROHIBITION (*continued*).

ready disposed of the case, so that nothing remains which that court can do, either by way of executing its judgment or otherwise, no prohibition will be granted. *Ib.*

3 And this is true, though the final disposition of the case was made after service on the judge of a rule to show cause why the writ should not issue, and though other cases of the same character may be pending in the same court. *Ib.*

PUBLIC LANDS. See *Taxes*, 2–4.

PUBLIC MONEYS.

The loss of public money by a receiver and disburser of it, through felonious taking away, though without fault on his part, does not discharge him or his sureties from obligation on his official bond. *United States* v. *Dashiel*, 182.

PUBLIC POLICY.

1. A statute declared by its title to be "an act to suppress private banking," and making it penal to "erect, establish, institute, or put in operation, or to issue any bills or notes for the purpose of erecting, establishing, or putting in operation any banking institution, association, or concern," covers with its prohibition not only the primary steps in establishing and putting into operation the bank, but also the whole range of its transactions, by which illegitimate currency is imposed on a community; and contracts made in furtherance of such transactions are as void as those made to give it original operation. *Davidson* v. *Lanier*, 447.
2. A bill of exchange drawn in one State upon a party in another, the known and common purpose of both parties being to carry on a business declared unlawful by statute of the first State, is void as to the drawer in the hands of a party to the bill having notice of its true character. *Ib.*
3. As between the parties the delivery of negotiable paper, signed and indorsed in blank, authorizes the receiver to fill it up in conformity with the authority given him; but it does not authorize him to do more, nor give him power to fill it up at pleasure. In a suit by the drawee upon such paper against drawer or indorser, the burden of proof, that an agreement as to filling up had been violated, is on the defendant; but if he can make the proof it will avail him. *Ib.*

PUBLIC STREETS. See *Estoppel*, 2.

PUBLIC WORK.

A person building a storehouse on a street, who, in consequence of the city's raising the carriage-way of the street, raises a sidewalk so as to make it conform to the grade of the carriage-way—such person obtaining by his mode of raising the sidewalk, vaults and an area for

PUBLIC WORK (*continued*).

the benefit of his building—does not do a public work, nor relieve himself from the penalty of making a nuisance if a nuisance is made by what he does. *Robbins* v. *Chicago City*, 657.

REBELLION, THE. See *Attorneys and Counsellors*, 4–8; *Constitutional Law*, 1–11; *Habeas Corpus*, 4–6; *Trial by Jury*, 1–4.

1. A person arrested after the passage of the act of March 3d, 1863, "relating to *habeas corpus* and regulating judicial proceedings in certain cases," and under the authority of the said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the district. *Ex parte Milligan*, 2.
2. The omission to furnish a list of the persons arrested, to the judges of the Circuit or District Court, as provided in the said act, did not impair the right of such person, if not indicted or presented, to his discharge. *Ib.*

RECIPROCITY TREATY OF 1854.

1. Staves for pipes, hogsheads, and other casks, the growth and produce of the Province of Canada, imported in November, 1863, from Canada into the United States, were not free from duty under the reciprocity treaty of 1854 between the United States and Great Britain, by which "timbers and lumber of all kinds, round, hewed, and sawed, unmanufactured in whole or in part," were to be admitted free of duty. They were liable to pay 10 per cent. *ad valorem*, imposed by the sixth section of the act of July 14th, 1862. *United States* v. *Hathaway*, 404.
2. Split white-ash timber, chiefly designed to be used in the manufacture of long shovel handles, the growth and product of the Province of Canada, and imported from there into the United States, were not free from duty under the treaty above named, but were chargeable with a duty of 20 per cent. *ad valorem* under the 24th section of the act of March 2d, 1861. *United States* v. *Quimby*, 408.

RECOVERY OVER.

1. Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced. *Robbins* v. *Chicago City*, 657.
2. The term "parties," as thus used, includes all who are directly interested in the subject-matter, and who had a right to make defence, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. *Ib.*
3. Express notice to defend is not necessary in order to render a party liable over for the amount of a judgment paid to an injured plaintiff.

RECOVERY OVER (*continued*).

If the party knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of the damages. *Chicago City* v. *Robbins* (2 Black, 418), affirmed. *Ib.*

RESPONDEAT SUPERIOR.

Where work done on a public highway *necessarily* constitutes an obstruction or defect in the highway which renders it dangerous as a way for travel and transportation unless properly guarded or shut out from public use, in such case a principal for whom the work was done cannot defeat the just claim of a municipal corporation which has had to pay damages, or of a private party who has suffered injury, by proving that the work which constituted the obstruction or defect was done by an independent contractor. *Chicago City* v. *Robbins* (2 Black, 418), affirmed. *Robbins* v. *Chicago City*, 657.

STATE AND FEDERAL JURISDICTION. See *Admiralty*, 1–10.

STATUTES. See *Admiralty*, 7–10; *Post Offices*, 2.

I. General Principles of Interpretation in one Class of.

Where power is given by statute to public officers, in permissive language—as that they "*may*, if deemed advisable," do a certain thing—the language used will be regarded as peremptory where the public interest or individual rights require that it should be. *Supervisors* v. *United States*, 435.

II. Of the United States. See *Admiralty*, 3, 4, 6; *Attorneys and Counsellors*, 5–8; *Banks*, 1–3; *Evidence*, 5; *Habeas Corpus*, 5; *Judiciary Act of* 1802, 1, 2; *Jurisdiction*, 3, 4–11; 7–13; *Lanfear, Ambrose; Notice*, 1; *Patent*, 1, 2; *Pleading*, 5, 6; *Post-office*, 1–4; *Rebellion, The*, 1, 2.

III. Of States. See *Admiralty*, 7; *Constitutional Law*, 14–17; *Florida; Taxes*, 1–3; *Ejectment*, 3; *Louisiana; Nevada.*

STATUTE OF FRAUDS.

A contract for the exchange of lands is as much within the statute of frauds as a contract for their sale, and a party seeking to enforce a specific execution of a parol contract for that purpose, must bring himself within the same conditions, before he can invoke the aid of a court of equity. *Purcell* v. *Miner*, 513.

He must accordingly make full, satisfactory, and indubitable proof—

First. Of the contract, and of its terms; a proof which must show a contract leaving no *jus deliberandi*, or *locus pœnitentiæ;* and which cannot be made out by mere hearsay, or by evidence of the declarations of a party to mere strangers to the transaction, in chance conversation.

Second. That the consideration has been paid or tendered. And even the payment of the price, in part or in whole, will not, of itself, be

STATUTE OF FRAUDS (*continued*).
sufficient for the interference of a court of equity, if the party have a sufficient remedy at law to recover back the money.
Third. That there has been such a part-performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law.
Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party; a requisition which is not satisfied by proof of a scrambling and litigious possession. *Ib.*

STATUTE OF LIMITATION. See *Louisiana, Civil Code of.*

SUPREME COURT OF THE DISTRICT OF COLUMBIA. See *Jurisdiction*, 10–13.

TAXES. See *Banks*, 1–3; *Disputed Claim*, 1–2.

1. The different States, as a general rule, have the right of determining the manner of levying and collecting taxes on private property within their limits; and can declare that a tract of land shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed and advertised; and that an erroneous assessment does not vitiate the sale for taxes. *Witherspoon* v. *Duncan*, 210.
2. Lands originally public are liable to taxation, after they have been entered at the land office, and a certificate of entry has been obtained; and if the taxes remain unpaid, they may be sold like other lands, even though no patent may as yet have issued. *Ib.*
3. The right to tax attaches as well to donation entries as to cash entries; the particular land in either case, when the entry is made and certificate given, being segregated from the mass of public lands, and becoming private property. *Ib.*

TEST OATHS. See *Constitutional Law*, 1–11; *Attorneys and Counsellors*, 1–8.

TEXAS. See *Mexican Law*, 4.

TRIAL BY JURY. See *Habeas Corpus*, 5–6.

1. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power. *Ex parte Milligan*, 2.
2. The guarantee of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people, at all times and under all circumstances *Ib.*

TRIAL BY JURY (*continued*).

3. In States where the Federal authority was unopposed, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could not authorize the trial there of a citizen in civil life, not connected with the military or naval service, by a military tribunal, for any offence whatever. *Ib.*

4. Although cases arising in the land or naval forces, or in the militia, in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury; and the right of trial by jury, in such cases, is subject to the same exceptions,—yet citizens not connected with the military service, and resident in a State where the courts are open and in the proper exercise of their jurisdiction, cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced, otherwise than by the ordinary courts of law. Nor can either the President or Congress disturb this or any other safeguard of civil liberty incorporated into the Constitution, except in so far as the right is given to suspend, in certain cases, the privilege of the writ of *habeas corpus*. *Ib.*

TRUSTEE. See *Disputed Claim.*

VARIANCE. See *Pleading*, 3–6.