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BENJAMIN R. CURTIS.

[Benjamin R. Curtis was born in Watertown, Mass., 1809. He was educated at Harvard College, where he was graduated in 1829. He studied law at Cambridge under Judge Story and Prof. Ashmun, but left, before taking his degree, to practice law in Northfield. In 1834 he moved to Boston. While serving as a member of the state legislature in 1851 he was appointed by President Fillmore, at the solicitation of Daniel Webster and Rufus Choate, an associate justice of the supreme court of the United States. In 1857 he resigned his judicial position, and resumed practice in Boston. He died at Newport, R. I., 1874. His life, by his brother, George Ticknor Curtis, and a selection from his public and professional writings, were published by Little, Brown & Co., Boston, 1879, by whose permission two of the following selections are reproduced.]

It was once remarked of the famous Dr. Chalmers that whatever science he happened to touch was at once transmuted into theology. The same remark may well be applied to Judge Curtis with respect to jurisprudence. Judicial alike in moral and mental temperament, he devoted his entire energies to his high vocation. And the wonderful precision and accuracy of his mental operations were probably due in no small degree to the singular simplicity, rectitude, and force of his character. No stimulus of ambition led him to mar the integrity of his life; and well might the sense of duty which seems to have guided his exertions prompt his biographer to characterize him, in the words of Wotton's hymn, as one

> "Whose armor is his honest thought,
> And simple truth his utmost skill."

The characteristic features of his mind were described with sympathetic appreciation in a memorial address by his friend Sidney Bartlet:

"Whoever will peruse his recorded judgments will find how thoroughly, when the occasion arose, he mastered, and how acutely and comprehensively he applied, those principles; but, if I mistake not, he may also find slight, though not disfiguring, traces of a mind thoroughly imbued with the principles of the common law, and which that common law had

molded. In this, his favorite science, he had among us no superior, and but few equals. But legal scholarship, however wide and thorough, might, without the addition of his other marked qualities, have limited him to the life of an author and a student; furnishing, through his pen, thoughts and principles the weight and value of which in their practical application must be found and wrought out by others. Had he lacked the power of giving weight to his words by the mode of their utterance, he could hardly have attained distinction at the bar; but he added to his other learning a familiar acquaintance with the beauties and strength of the tongue he spoke, and from them he framed for himself a style of surpassing simplicity and power. The clothing he thus gave his thoughts, striking as it was, would, with the thought itself, have failed of its true effect if he had not added to it a clearness of statement and a rigorous logic that I have rarely known to be equaled. Quick in his perceptions, he had also a power of memory which was almost wonderful."

An examination of his work substantiates all the elements of this eulogy. His learning, in the first place, was accurate and extensive. The standard of acquirement which he set for himself at the outset is well illustrated by a letter that he wrote to his uncle, George Ticknor, explaining his reason for leaving Northfield, where, even as a law student, he had been actively employed. He quoted the reply of an eminent jurist who had been asked whether a certain person was a good lawyer: "No; he has always had too much business to become a good lawyer." In the early years of his practice in Boston the magnitude of his labors severely taxed his strength, but he soon acquired a facility in passing from case to case which equaled, if it did not surpass, that of his celebrated English contemporary, Sir William Follett. The work performed by him during the first fifteen years of his practice in Boston illustrates the extent and variety of his professional experience. From his admission as a counselor, in 1836, when, as a youth of twenty-seven, he delivered his able argument in the case of the slave Med, to the year 1851, when he took his seat as associate justice in the supreme court of the United States, he argued one hundred and thirty-eight cases before the supreme court of Massachusetts.[1] During this time he was also actively engaged in the United States circuit and district courts, and participated in an equally large proportion of *nisi prius* trials, besides disposing of a very large chamber practice. After his return to practice, in 1857, he argued forty-six cases in the United States supreme court, eighty cases before the state supreme court, and, besides an extensive practice in the United States circuit and district courts, prepared a series of opinions as counsel which fill

[1] 18 Pick. to 7 Cush.

nearly one thousand closely-written folio pages. His aggregate professional receipts during these seventeen years were $650,000.

His judicial work during his short service as an associate justice of the United States supreme court will be found in Howard's Reports, from the 12th to the 19th volumes, and in the two volumes of his decisions on circuit. The nature of his first judicial service on circuit will indicate the difficult position to which he had been called. The strong conflict between state and federal authorities over the enforcement of the fugitive slave law, and the excitement and controversy which accompanied every exercise of federal jurisdiction, rendered it exceedingly difficult for him to perform his duty in a manner that would satisfy the community of his impartiality. Two months before he took his seat on the supreme bench, Curtis presided, at circuit, at the trial of the so-called "rescue cases," arising out of the forcible rescue from the custody of the United States marshal of the fugitive slave Shadrach. The success with which he discharged this difficult duty is attested by one of the counsel for the defendants, Richard H. Dana, who said, several years afterwards: "I felt then, and have felt ever since, that there was in the conduct of those trials more than passive impartiality. There was on his part an affirmative determination that the trial should be had with absolute fairness." The two published volumes of his work on circuit have always been held in high esteem by the profession. Although he had seldom been engaged in criminal cases at the bar, it is noticeable that his judicial opinions display a profound knowledge of this branch of jurisprudence.

In the supreme court of the United States he at once bore his share of the work. At his first term he delivered the opinion of the court in ten cases; during his brief judicial service he wrote fifty-one opinions. These opinions cover a wide range of subjects, with uniform excellence. Probably the most important is in Cooley v. Board of Wardens of Port of Philadelphia,[2] on the constitutionality of local pilotage requirements. His opinions are brief, well-constructed, and supported by carefully selected authorities. He was usually in accord with the majority; rarely, if ever, did he dissent alone. The evidences of his labors in this tribunal, although meager compared with his work at the bar, are sufficient to justify the expectations which his appointment aroused. Most of Marshall's great opinions were delivered after he had been on the bench many years; and it is safe to say that, if Curtis had spent

[2] 12 How. 299.

the remainder of his life on the bench, he would have attained a reputation in federal jurisprudence second only to that great magistrate.

Nothing illustrates more clearly the legal cast of his mind than his edition of the reports of the supreme court of the United States. The then fifty-seven volumes of decisions had been reported by five different reporters, with varying degrees of care and skill. Curtis edited them in a series of twenty-two volumes. His labors were directed toward a short, but clear, statement of the case disincumbered from useless quotations of pleadings, an abstract of the arguments of counsel which should exhibit the points actually presented to the court, and a syllabus or headnote which should embody the actual decision. This laborious and exacting task was performed with an accuracy and discrimination which have long served as a model.

In form and expression, as well as in weight and cogency, his work closely resembles that of Marshall. He always addressed his lucid and unimpassioned argument to the reason, and, without the least exaggeration or straining for effect, placed his whole reliance upon the solid merits of his cause. And his manner, according to Reverdy Johnson, his frequent associate, was always in accord: "He ever 'suited the action to the word, the word to the action,' and never 'overstepped the modesty of nature.' He was always calm, dignified, and impressive, and therefore persuasive."

The clearness and accuracy of his style was thus described by Dr. Robbins in his memorial address before the Massachusetts Historical Society:

"Vigorous, but not impassioned; massive without ruggedness; devoid of ornament, but distinguished for that purity of taste, and that perfect propriety, which nothing but a familiarity with the classics can impart,—his choice and suggestive words had the force of illustrations, and rendered figures unnecessary. He never overlaid an argument with superfluous words, or stretched it beyond its strength, or weakened it by exaggeration, or made it subservient to the parade of his own learning and ingenuity; but, having clearly and forcibly presented it, was content to leave it to stand on its own merits. Though a lover of poetry, and often in conversation referring to and sometimes repeating a favorite verse or line from the best authors, ancient and modern, he never quoted it in a public speech, and very rarely in any published writings. He kept his object in full view, advancing towards its accomplishment with single aim, a steady step, and by the most direct road. The fairness, calmness, and sober earnestness with which he presented his case gave weight to his arguments, and helped to produce conviction. He never condescended to any small devices; never appealed to the passions or prejudices of the jury; never lost his temper; and never indulged in personalities."

Webster said of him that "his great mental characteristic was clearness"; and in this respect he has probably never been surpassed at the bar. "Whenever I have heard Judge Curtis state his proposition on a subject which I had myself made a matter of study," said Richard Henry Dana, "I listened to it with something of that surprise and delight with which one who has labored through the slow and repetitious process of arithmetic sees his work done before his face by the methods and signs of algebra." To this capacity for perspicuous statement he added a rigorous logic. His sinewy arguments are masterpieces of judicial reasoning. When, by the exercise of rare analytical power, he had stated his premises, his conclusion was a necessary sequence. His propositions followed one another in appropriate order, and enforced a method of reasoning which, while avoiding unnecessary accumulation of ideas, was always ample in furnishing whatever the proper presentation of the case required. With a clear perception of the point at issue, he invariably confined himself rigidly to it. Without imagination, he was never tempted away from the precise issue.

When, therefore, one considers how, in a mind always vigilant, calm, and ready, he combined a comprehensive and exact knowledge of the law with such a marvelous power of legal reasoning, illustration, and expression, there is much to be said for Justice Miller's opinion that Curtis was "the first lawyer of America, of the past or the present time."

The extraordinary judicial sense which characterized Curtis' intellect carried with it certain limitations. Even within the sphere of the law he was thoroughly imbued with the intense conservatism of a mind molded by the common law. While resembling Marshall so closely in character and intellect, it may be doubted whether, in Marshall's position, he would have displayed the originality and breadth of mind necessary to create a new department of jurisprudence. He was deprived of the forecast of the statesman. The momentous political and social problems of the time received very slight impressions from his powerful mind. By the very cast of his mind, it was impossible that he should be a partisan; but his feeble participation in public controversies which foreshadowed the Civil War was sufficient to indicate a singular lack of appreciation of the crisis. His ablest public utterance, a pamphlet on the executive power, published in 1861, advocated, with characteristic conservatism, the total subordination of the instinct and necessity of self-defense on the part of the government in a tremendous and unprecedented emergency to the strict legal

rules of peaceful times. However, a man who has administered the law in judicial position, and applied its principles in advocacy at the bar, in such a manner as to strengthen the foundations of society, and to illustrate the value of absolute justice, has surely earned a title to the gratitude of posterity. And in the elevated and extended professional career of Judge Curtis we find, in the language of the resolutions of his brethren who met to commemorate his services, "the imposing traits and qualities of intellect and character which, in concurrence, make up the true and permanent fame among men of a great lawyer and a great judge."

ARGUMENT IN DEFENSE OF PRESIDENT JOHNSON, IN THE UNITED STATES SENATE, SITTING AS A COURT OF IMPEACHMENT, 1868.

STATEMENT.

The impeachment trial of President Johnson is the most memorable attempt ever made by a great nation to depose a constituted ruler in accordance with the forms of law. The imposing trial of Warren Hastings, with which the occasion is often compared, has been invested with undue significance by the eloquence of Burke; it was simply the arraignment of a subordinate official upon charges of peculation and cruelty, and bore no comparison with the momentous issues involved in the arraignment of the executive of forty millions of people. There had been five impeachment trials under the provision of the federal constitution,—Senator Blount, in 1797, Mr. Justice Chase, in 1803, and District Judges Pickering, Peck, and Humphreys, in 1803, 1830, and 1862, respectively,—in only two of which the charges were sustained.

The facts leading to strife between congress and President Johnson are part of the political history of the time, and need not be repeated here. Suffice it to say that, on February 24, 1868, by the decisive vote of one hundred and twenty-six ayes to forty-seven noes, the house of representatives passed a resolution impeaching the president. On February 29th, George S. Boutwell, chairman of the committee appointed to prepare articles of impeachment, reported the articles on which the impeachment was based. There were eleven articles. The first nine charged the president with the violation of the tenure of office act of 1867 in removing Edwin M. Stanton from the office of secretary of of war, and authorizing or appointing General Lorenzo Thomas to act as secretary of war *ad interim*. The fourth, fifth, sixth, and seventh articles charged him, specifically, with conspiring with Gen. Thomas to violate the act. The eighth article charged him with attempting, through Gen. Emory, in charge of the department of Washington, to issue orders without the intervention of the general of the army, so that he might violate the act. The tenth charged him with speaking of congress in a manner which tended to bring a co-ordinate branch of the government into ridicule and contempt. The eleventh article was a summary charge that he had denied the validity of the legislation of the thirty-ninth congress, and had attempted and contrived to prevent the execution of certain laws.

The managers elected by the house were John A. Bingham, George S. Boutwell, James F. Wilson, Benjamin F. Butler, Thomas Williams, John A. Logan, and Thaddeus Stevens. On March 5th, the managers formally presented their charges against the president at the bar of the senate, sitting as a court of impeachment, under the presidency of the chief justice of the United States. The president was represented by Benjamin R. Curtis, William M. Evarts, Henry Stanberry, William S. Groesbeck, and T. A. R. Nelson. After the reading of the articles of impeachment, the senate adjourned until March 23d, when the answer of the president was submitted. To this the house submitted a replication; and all other preliminaries having been disposed of, on March 30th the case on behalf of the house of representatives was opened by Ben-

jamin F. Butler. The evidence in support of the charges was then presented, and, on April 9th, Benjamin R. Curtis opened for the defense in the following argument. The evidence on both sides having been concluded, on April 22d the closing arguments were begun. The first vote was taken on the eleventh article. Thirty-five senators voted "Guilty;" seventeen, "Not Guilty." As conviction required a two-thirds vote, the impeachment on the eleventh article failed; but the change of a single vote from the minority to the majority would have been fatal to the president. After this vote, the senate adjourned until May 26th, when a vote was taken on the second and third articles, with the same result as on the eleventh. The remaining articles were thereupon abandoned, and the senate, as a court of impeachment, adjourned *sine die.*

The real controversy turned upon the alleged violation of the tenure of office act. The other charges were, for the most part, trivial and unimportant. The examination of the tenure of office act, its alleged violation, and its constitutionality involved an inquiry into the nature of impeachable offenses, and the character of the tribunal provided by the constitution for their adjudication.

The argument of Judge Curtis was without doubt the ablest forensic effort of his career, and contributed largely to the result. As Benjamin F. Butler afterwards said: "After Judge Curtis had presented the case of his client, nothing more was added in his behalf, although in the five or six closing speeches of his other counsel much else was said." In describing the occasion, a correspondent of one of the metropolitan journals said: "It became evident to those who were not already familiar with his style of oratory that Mr. Curtis was not, in the highest sense, an orator. He spoke from voluminous notes, and frequently consulted and read from the books of reference beside him. The clearness of his statements, the accuracy of his logic, and the precision and steadiness with which he advanced from every premise he established to conclusions, needed, in fact, no fiery oratory to enhance the effect. If his tones did not often thrill the heart, they reached the brain. They were earnest, if not eloquent, and there was a certain fascination in their monotony. They bore a heavier burden of matter than the chaff blown from the lips of many windy elocutionists, and that is one reason why their equable, repressed accents were tolerable. Two or three times Mr. Curtis indulged a fervor which gave to his aspect an inspiring majesty and glow. Then his voice had the tremor of a waterfall. Then his form shook like a pine; but as a pine recovers itself after a gust, and stands erect and stately as before, so, in an instant after these noble outbursts, the speaker of to-day was seen composed and motionless, as if every hot impulse of his nature had been thrust back,—beaten into its lair. It is generally regarded that the speech is an original and invincible effort."

ARGUMENT.

Mr. Chief Justice, I am here to speak to the senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the chief justice of the United States, for the trial of the president of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions, outrageous biases can have no fit operation. The constitution requires that here should

be a "trial," and as in that trial the oath which each one of you has taken is to administer "impartial justice according to the constitution and the laws," the only appeal which I can make in behalf of the president is an appeal to the conscience and the reason of each judge who sits before me. Upon the law and the facts, upon the judicial merits of the case, upon the duties incumbent on that high officer by virtue of his office, and his honest endeavor to discharge those duties, the president rests his defense. And I pray each one of you to listen to me with that patience which belongs to a judge for his own sake, which I cannot expect to command by any efforts of mine, while I open to you what that defense is.

The honorable managers, through their associate who has addressed you [Mr. Butler], has informed you that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Upon those subjects I shall have something hereafter to say. The honorable manager did not tell you, in terms at least, that here are no articles before you, because a statement of that fact would be in substance to say that here are no honorable managers before you; inasmuch as the only authority with which the honorable managers are clothed by the house of representatives is an authority to present here at your bar certain articles, and, within their limits, conduct this prosecution; and therefore I shall make no apology, senators, for asking your close attention to these articles, one after the other, in manner and form as they are here presented, to ascertain, in the first place, what are the substantial allegations in each of them, what is the legal operation and effect of those allegations, and what proof is necessary to be adduced in order to sustain them. And I shall begin with the first, not merely because the house of representatives, in arranging these articles, have placed that first in order, but because the subject-matter of that article is of such a character that it forms the foundation of the first eight articles in the series, and enters materially into two of the remaining three.

What, then, is the substance of this first article? What, as the lawyers say, are the *gravamina* contained in it? There is a great deal of verbiage—I do not mean by that, unnecessary verbiage—in the description of the substantive matters set down in this article. Stripped of that verbiage, it amounts exactly to these things: First, that the order set out in the article for the removal of Mr. Stanton, if executed, would be a violation of the tenure-of-office act; second, that it was a violation of the tenure-of-office act; third, that it was an intentional violation of the tenure-of-office

act; fourth, that it was a violation of the constitution of the United States; and, fifth, was by the president intended to be so. Or, to draw all this into one sentence which yet may be intelligible and clear enough, I suppose the substance of this first article is that the order for the removal of Mr. Stanton was, and was intended to be, a violation of the tenure-of-office act, and was intended to be a violation of the constitution of the United States. These are the allegations which it is necessary for the honorable managers to make out in proof to support that article. Now, there is a question involved here which enters deeply, as I have already intimated, into the first eight articles in this series, and materially touches two of the others; and to that question I desire in the first place to invite the attention of the court. That question is whether Mr. Stanton's case comes under the tenure-of-office act. If it does not,—if the true construction and effect of the tenure-of-office act, when applied to the facts of his case, exclude it,—then it will be found by honorable senators, when they come to examine this and the other articles, that a mortal wound has been inflicted upon them by that decision. I must therefore ask your attention to the construction and application of the first section of the tenure-of-office act. It is, as senators know, but dry work. It requires close, careful attention and reflection; no doubt it will receive them. Allow me, in the first place, to read that section:

"That every person holding any civil office to which he has been appointed by and with the advice and consent of the senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in a like manner appointed and duly qualified, except as herein otherwise provided."

Then comes what is "otherwise provided":

"Provided, that the secretaries of state, of the treasury, of war, of the navy, and of the interior, the postmaster general, and the attorney general, shall hold their offices respectively for and during the term of the president by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the senate."

Here is a section, then, the body of which applies to all civil officers, as well to those then in office as to those who should thereafter be appointed. The body of that section contains a declaration that every such officer "is"—that is, if he is now in office—"and shall be"—that is, if he shall hereafter be appointed to office—entitled to hold until a successor is appointed and qualified in his place. That is the body of the section. But out of this body of the section it is explicitly declared that there is to be ex-

cepted a particular class of officers,—"except as herein otherwise provided." There is to be excepted out of this general description of all civil officers a particular class of officers as to whom something is "otherwise provided,"—that is, a different rule is to be announced for them. The senate will perceive that, in the body of the section, all officers, as well those then holding office as those thereafter to be appointed, are included. The language is:

"Every person holding any civil office to which he has been appointed, ... and every person who shall hereafter be appointed, ... is and shall be entitled," etc.

It affects the present; it sweeps over all who are in office, and come within the body of the section; it includes by its terms as well all those now in office as those who may be hereafter appointed. But when you come to the proviso, the first noticeable thing is that this language is changed. It is not that "every secretary who now is, and hereafter may be, in office shall be entitled to hold that office" by a certain rule which is here prescribed; but the proviso, while it fixes a rule for the future only, makes no declaration of the present right of one of this class of officers, and the question whether any particular secretary comes within that rule depends on another question,—whether his case comes within the description contained in the proviso. There is no language which expressly brings him within the proviso; there is no express declaration, as in the body of the section, that "he is, and hereafter shall be, entitled" merely because he holds the office of secretary at the time of the passage of the law. There is nothing to bring him within the proviso, I repeat, unless the description which the proviso contains applies to and includes his case. Now, let us see if it does:

"That the secretaries of state, etc., shall hold their offices respectively for and during the term of the president by whom they may have been appointed."

The first inquiry which arises on this language is as to the meaning of the words "for and during the term of the president." Mr. Stanton, as appears by the commission which has been put into the case by the honorable managers, was appointed in January, 1862, during the first term of President Lincoln. Are these words, "during the term of the president," applicable to Mr. Stanton's case? That depends upon whether an expounder of this law judicially, who finds set down in it as a part of the descriptive words, "during the term of the president," has any right to add, "and any other term for which he may afterwards be elected." By what authority short of legislative power can those words be put

into the statute, so that "during the term of the president" shall be held to mean, "and any other term or terms for which the president may be elected?" I respectfully submit no such judicial interpretation can be put on the words.

Then, if you please, take the next step. "During the term of the president by whom he was appointed." At the time when this order was issued for the removal of Mr. Stanton, was he holding "during the term of the president by whom he was appointed"? The honorable managers say "Yes," because, as they say, Mr. Johnson is merely serving out the residue of Mr. Lincoln's term. But is that so under the provisions of the constitution of the United States? I pray you to allow me to read two clauses which are applicable to this question. The first is the first section of the second article:

"The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows."

There is a declaration that the president and the vice-president is each respectively to hold his office for the term of four years. But that does not stand alone; here is its qualification:

"In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president."

So that, although the president, like the vice-president, is elected for a term of four years, and each is elected for the same term, the president is not to hold his office absolutely during four years. The limit of four years is not an absolute limit. Death is a limit. A "conditional limitation," as the lawyers call it, is imposed on his tenure of office. And when, according to this second passage which I have read, the president dies, his term of four years, for which he was elected, and during which he was to hold, provided he should so long live, terminates, and the office devolves on the vice-president. For what period of time? For the remainder of the term for which the vice-president was elected. And there is no more propriety, under these provisions of the constitution of the United States, in calling the time during which Mr. Johnson holds the office of president after it was devolved upon him a part of Mr. Lincoln's term than there would be propriety in saying that one sovereign who succeeded to another sovereign by death holds a part of his predecessor's term. The term assigned to Mr. Lincoln by the constitution was conditionally assigned to him. It was to last four years, if not sooner ended; but if sooner ended

by his death, then the office was devolved on the vice-president, and the term of the vice-president to hold the office then began.

I submit, then, that upon this language of the act it is apparent that Mr. Stanton's case cannot be considered as within it. This law, however, as senators very well know, had a purpose. There was a practical object in the view of congress; and, however clear it might seem that the language of the law, when applied to Mr. Stanton's case, would exclude that case,—however clear that might seem on the mere words of the law,—if the purpose of the law could be discerned, and that purpose plainly required a different interpretation, that different interpretation should be given. But, on the other hand, if the purpose in view was one requiring that interpretation to which I have been drawing your attention, then it greatly strengthens the argument; because not only the language of the act itself, but the practical object which the legislature had in view in using that language, demands that interpretation.

Now, there can be no dispute concerning what that purpose was, as I suppose. Here is a peculiar class of officers singled out from all others, and brought within this provision. Why is this? It is because the constitution has provided that these principal officers in the several executive departments may be called upon by the president for advice "respecting"—for that is the language of the constitution—"their several duties," not, as I read the constitution, that he may call upon the secretary of war for advice concerning questions arising in the department of war. He may call upon him for advice concerning questions which are a part of the duty of the president, as well as questions which belong only to the department of war. Allow me to read that clause of the constitution, and see if this be not its true interpretation. The language of the constitution is that:

> "He [the president] may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."

—As I read it, relating to the duties of the offices of these principal officers, or relating to the duties of the president himself. At all events, such was the practical interpretation put upon the constitution from the beginning of the government; and every gentleman who listens to me who is familiar, as you all are, with the political history of the country, knows that from an early period of the administration of General Washington, his secretaries were called upon for advice concerning matters not within their respective departments, and so the practice has continued from that time to this. This is one thing which distinguishes this class of officers from any other embraced within the body of the law.

But there is another. The constitution undoubtedly contemplated that there should be executive departments created, the heads of which were to assist the president in the administration of the laws, as well as by their advice. They were to be the hands and the voice of the president; and, accordingly, that has been so practiced from the beginning, and the legislation of congress has been framed on this assumption in the organization of the departments, and emphatically in the act which constituted the department of war. That provides, as senators well remember, in so many words, that the secretary of war is to discharge such duties of a general description there given as shall be assigned to him by the president, and that he is to perform them under the president's instructions and directions. Let me repeat that the secretary of war and the other secretaries, the postmaster general, and the attorney general are deemed to be the assistants of the president in the performance of his great duty to take care that the laws are faithfully executed; that they speak for and act for him. Now, do not these two views furnish the reasons why this class of officers was excepted out of the law? They were to be the advisers of the president. They were to be the immediate confidential assistants of the president, for whom he was to be responsible, but in whom he was expected to repose a great amount of trust and confidence; and therefore it was that this act has connected the tenure of office of these secretaries to which it applies with the president by whom they were appointed. It says, in the description which the act gives of the future tenure of office of secretaries, that a controlling regard is to be had to the fact that the secretary whose tenure is to be regulated was appointed by some particular president, and during the term of that president he shall continue to hold his office; but as for secretaries who are in office, not appointed by the president, we have nothing to say, —we leave them as they heretofore have been. I submit to senators that this is the natural, and, having regard to the character of these officers, the necessary, conclusion, that the tenure of the office of a secretary here described is a tenure during the term of service of the president by whom he was appointed; that it was not the intention of congress to compel a president of the United States to continue in office a secretary not appointed by himself.

We have, however, fortunately, not only the means of interpreting this law which I have alluded to, namely, the language of the act, the evident character and purpose of the act, but we have decisive evidence of what was intended and understood to be the meaning and effect of this law in each branch of congress at the time when

it was passed. In order to make this more apparent, and its just weight more evident, allow me to state what is very familiar, no doubt, to senators, but which I wish to recall to their minds,—the history of this proviso, this exception. The bill, as senators will recollect, originally excluded these officers altogether. It made no attempt—indeed, it rejected all attempts—to prescribe a tenure of office for them as inappropriate to the necessities of the government; so the bill went to the house of representatives. It was there amended by putting the secretaries on the same footing as all other civil officers appointed with the advice and consent of the senate, and, thus amended, came back to this body. This body disagreed to the amendment. Thereupon a committee of conference was appointed, and that committee, on the part of the house, had for its chairman Hon. Mr. Schenck, of Ohio, and, on the part of this body, Hon. Mr. Williams, of Oregon, and Hon. Mr. Sherman, of Ohio. The committee of conference came to an agreement to alter the bill by striking these secretaries out of the body of the bill, and inserting them in the proviso containing the matter now under consideration. Of course, when this report was made to the house of representatives and to this body, it was incumbent on the committee charged with looking after its intentions and estimates of the public necessities in reference to that conference,—it was expected that they would explain what had been agreed to, with a view that the body itself, thus understanding what had been agreed to be done, could proceed to act intelligently on the matter.

Now, I wish to read to the senate the explanation given by Hon. Mr. Schenck, the chairman of this conference on the part of the house, when he made his report to the house concerning this proviso. After the reading of the report Mr. Schenck said:

"I propose to demand the previous question upon the question of agreeing to the report of the committee of conference; but before doing so I will explain to the house the condition of the bill, and the decision of the conference committee upon it. It will be remembered that by the bill as it passed the senate it was provided that the concurrence of the senate should be required in all removals from office, except in the case of the heads of departments. The house amended the bill of the senate so as to extend this requirement to the heads of departments as well as to other officers.

"The committee of conference have agreed that the senate shall accept the amendment of the house. But, inasmuch as this would compel the president to keep around him heads of departments until the end of his term, who would hold over to another term, a compromise was made, by which a further amendment is added to this portion of the bill, so that the term of office of the heads of departments shall expire with the term of the president who appointed them, allowing those heads of departments one month longer, in which, in case of death or other-

wise, other heads of departments can be named. This is the whole effect of the proposition reported by the committee of conference. It is, in fact, an acceptance by the senate of the position taken by the house."[1]

Then a question was asked, whether it would be necessary that the senate should concur in all other appointments, etc., in reply to which Mr. Schenck said:

"That is the case. But their terms of office [that is, the secretaries' terms of office] are limited, as they are not now limited by law, so that they expire with the term of service of the president who appoints them, and one month after, in case of death or other accident, until others can be substituted for them by the incoming president."[2]

Allow me to repeat that sentence:

"They expire with the term of service of the president who appoints them, and one month after, in case of death or other accident."

In this body, on the report being made, the chairman, Hon. Mr. Williams, made an explanation. That explanation was, in substance, the same as that made by Mr. Schenck in the house, and thereupon a considerable debate sprang up, which was not the case in the house, for this explanation of Mr. Schenck was accepted by the house as correct, and unquestionably was acted upon by the house as giving the true sense, meaning, and effect of this bill. In this body, as I have said, a considerable debate sprang up. It would take too much of your time and too much of my strength to undertake to read this debate, and there is not a great deal of it which I can select, so as to present it fairly and intelligibly, without reading the accompanying parts; but I think the whole of it may fairly be summed up in this statement: that it was charged by one of the honorable senators from Wisconsin that it was the intention of those who favored this bill to keep in office Mr. Stanton and certain other secretaries. That was directly met by the honorable senator from Ohio, one of the members of the committee of conference, by this statement:

"I do not understand the logic of the senator from Wisconsin. He first attributes a purpose to the committee of conference which I say is not true. I say that the senate have not legislated with a view to any persons or any president, and therefore he commences by asserting what is not true. We do not legislate in order to keep in the secretary of war, the secretary of the navy, or the secretary of state."[3]

Then a conversation arose between the honorable senator from Ohio and another honorable senator, and the honorable senator from Ohio continued thus:

[1] Congressional Globe, Thirty-Ninth Congress, Second Session, p. 1340.
[2] Id.
[3] Id. p. 1516.

"That the senate had no such purpose is shown by its vote twice to make this exception. That this provision does not apply to the present case is shown by the fact that its language is so framed as not to apply to the present president. The senator shows that himself, and argues truly that it would not prevent the present president from removing the secretary of war, the secretary of the navy, and the secretary of state. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the president of the United States that his services were no longer needed, I certainly, as a senator, would consent to his removal at any time, and so would we all."[4]

I read this, senators, not as expressing the opinion of an individual senator concerning the meaning of a law which was under discussion, and was about to pass into legislation. I read it as the report; for it is that in effect,—the explanation, rather, of the report of the committee of conference appointed by this body to see whether this body could agree with the house of representatives in the frame of this bill, which committee came back here with a report that a certain alteration had been made and agreed upon by the committee of conference, and that its effect was what is above stated. And now I ask the senate, looking at the language of this law, looking at its purpose, looking at the circumstances under which it was passed, the meaning thus attached to it by each of the bodies which consented to it, whether it is possible to hold that Mr. Stanton's case is within the scope of that tenure-of-office act? I submit it is not possible.

I now return to the allegations in this first article; and the first allegation, as senators will remember, is that the issuing of the order which is set out in the article was a violation of the tenure-of-office act. It is perfectly clear that is not true. The tenure-of-office act, in the sixth section, enacts "that every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act," etc., shall be deemed a high misdemeanor. "Every removal contrary to the provisions of this act." In the first place no removal has taken place. They set out an order. If Mr. Stanton had obeyed that order, there would have been a removal; but inasmuch as Mr. Stanton disobeyed that order, there was no removal. So it is quite clear that, looking to this sixth section of the act, they have made out no case of a removal within its terms, and therefore no case of violation of the act by a removal. But it must not only be a removal, it must be "contrary to the provisions of this act"; and therefore, if you could hold the order to be in effect a removal, unless Mr. Stanton's case was within this act, unless this act gave Mr. Stanton a tenure of office,

[4] Id. p. 1516.

and protected it, of course the removal, even if it had been actual, instead of attempted, merely, would not have been "contrary to the provisions of the act," for the act had nothing to do with it. But this article, as senators will perceive on looking at it, does not allege simply that the order for the removal of Mr. Stanton was a violation of the tenure-of-office act. The honorable house of representatives have not, by this article, attempted to erect a mistake into a crime. I have been arguing to you at considerable length, no doubt trying your patience thereby, the construction of that tenure-of-office law. I have a clear idea of what its construction ought to be. Senators, more or less of them who have listened to me, may have a different view of its construction, but I think they will in all candor admit that there is a question of construction. There is a question of what the meaning of this law was; a question whether it was applicable to Mr. Stanton's case; a very honest and solid question, which any man could entertain, and therefore I repeat it is important to observe that the honorable house of representatives have not, by this article, endeavored to charge the president with a high misdemeanor because he had been honestly mistaken in construing that law. They go further, and take the necessary step. They charge him with intentionally misconstruing it. They say: "Which order was unlawfully issued with intention then and there to violate said act." So that, in order to maintain the substance of this article, without which it was not designed by the house of representatives to stand, and cannot stand, it is necessary for them to show that the president willfully misconstrued this law; that, having reason to believe, and actually believing, after the use of due inquiry, that Mr. Stanton's case was within the law, he acted as if it was not within the law. That is the substance of the charge. What of the proof in support of that allegation offered by the honorable managers? Senators must undoubtedly be familiar with the fact that the office of president of the United States, as well as many other executive offices, and, to some extent, legislative offices, call upon those who hold them for the exercise of judgment and skill in the construction and application of laws. It is true that the strictly judicial power of the country, technically speaking, is vested in the supreme court and such inferior courts as congress from time to time have established or may establish. But there is a great mass of work to be performed by executive officers in the discharge of their duties, which is of a judicial character. Take, for instance, all that is done in the auditing of accounts. That is judicial, whether it be done by an auditor or a comptroller, or whether it

be done by a chancellor; and the work has the same character whether done by one or by the other. They must construe and apply the laws; they must investigate and ascertain facts; they must come to some results compounded of the law and of the facts.

Now, this class of duties the president of the United States has to perform. A case is brought before him which, in his judgment, calls for action. His first inquiry must be, what is the law on the subject? He encounters, among other things, this tenure-of-office law in the course of his inquiry. His first duty is to construe that law; to see whether it applies to the case; to use, of course, in doing so, all those means and appliances which the constitution and the laws of the country have put into his hands to enable him to come to a correct decision. But after all he must decide in order either to act or to refrain from action. That process the president in this case was obliged to go through, and did go through; and he came to the conclusion that the case of Mr. Stanton was not within this law. He came to that conclusion, not merely by an examination of this law himself, but by resorting to the advice which the constitution and laws of the country enable him to call for to assist him in coming to a correct conclusion. Having done so, are the senate prepared to say that the conclusion he reached must have been a willful misconstruction,—so willful, so wrong, that it can justly and properly, and for the purpose of this prosecution, effectively be termed a high misdemeanor? How does the law read? What are its purposes and objects? How was it understood here at the time when it was passed? How is it possible for this body to convict the president of the United States of a high misdemeanor for construing a law as those who made it construed it at the time when it was made?

I submit to the senate that thus far no great advance has been made towards the conclusion either that the allegation in this article that this order was a violation of the tenure-of-office act is true, or that there was an intent on the part of the president thus to violate it; and although we have not yet gone over all the allegations in this article, we have met its "head and front," and what remains will be found to be nothing but incidental and circumstantial, and not the principal subject. If Mr. Stanton was not within this act; if he held the office of secretary for the department of war at the pleasure of President Johnson as he held it at the pleasure of President Lincoln; if he was bound by law to obey that order which was given to him, and quit the place, instead of being sustained by law in resisting that order,—I think the honorable managers will find it extremely difficult to construct,

out of the broken fragments of this article, anything which will amount to a high misdemeanor. What are they? They are, in the first place, that the president did violate, and intended to violate, the constitution of the United States, by giving this order. Why? They say, as I understand it, because the order of removal was made during the session of the senate; that for that reason the order was a violation of the constitution of the United States. I desire to be understood on this subject. If I can make my own ideas of it plain, I think nothing is left of this allegation. In the first place, the case, as senators will observe, which is now under consideration, is the case of a secretary of war holding during the pleasure of the president by the terms of his commission; holding under the act of 1789, which created that department, which, although it does not affect to confer on the president the power to remove the secretary, does clearly imply that he has that power by making a provision for what shall happen in case he exercises it. That is the case which is under consideration, and the question is this: whether, under the law of 1789 and the tenure of office created by that law,—designedly created by that law,—after the great debate of 1789, and whether under a commission which conforms to it, holding during the pleasure of the president, the president could remove such a secretary during the session of the senate. Why not? Certainly there is nothing in the constitution of the United States to prohibit it. The constitution has made two distinct provisions for filling offices. One is by nomination to the senate, and confirmation by them, and a commission by the president upon that confirmation. The other is by commissioning an officer when a vacancy happens during the recess of the senate. But the question now before you is not a question how vacancies shall be filled,—that the constitution has thus provided for; it is a question how they may be created, and when they may be created,—a totally distinct question.

Whatever may be thought of the soundness of the conclusion arrived at upon the great debate of 1789 concerning the tenure of office, or concerning the power of removal from office, no one, I suppose, will question that a conclusion was arrived at, and that conclusion was that the constitution had lodged with the president the power of removal from office independently of the senate. This may be a decision proper to be reversed; it may have been now reversed,—of that I say nothing at present. But that it was made, and that the legislation of congress of 1789 and so on down during the whole period of legislation to 1867 proceeded upon the assumption, express or implied, that that decision had been made,

nobody who understands the history of the legislation of the country will deny. Consider, if you please, what this decision was. It was that the constitution had lodged this power in the president; that he alone was to exercise it; that the senate had not and could not have any control whatever over it. If that be so, of what materiality is it whether the senate is in session or not? If the senate is not in session, and the president has this power, a vacancy is created, and the constitution has made provision for filling that vacancy by commission until the end of the next session of the senate. If the senate is in session, then the constitution has made provision for filling a vacancy which is created by a nomination to the senate; and the laws of the country, as I am presently going to show you somewhat in detail, have made provisions for filling it *ad interim* without any nomination, if the president is not prepared to make a nomination at the moment when he finds the public service requires the removal of an officer. So that, if this be a case within the scope of the decision made by congress in 1789, and within the scope of the legislation which followed upon that decision, it is a case where, either by force of the constitution the president had the power of removal without consulting the senate, or else the legislation of congress had given it to him; and, either way, neither the constitution nor the legislation of congress had made it incumbent on him to consult the senate on the subject.

I submit, then, that if you look at this matter of Mr. Stanton's removal just as it stands on the decision in 1789, or on the legislation of congress following upon that decision, and in accordance with which are the terms of the commission under which Mr. Stanton held office, you must come to the conclusion, without any further evidence on the subject, that the senate had nothing whatever to do with the removal of Mr. Stanton, either to advise for it or to advise against it; that it came either under the constitutional power of the president as it had been interpreted in 1789, or it came under the grant made by the legislature to the president in regard to all those secretaries not included within the tenure-of-office bill. This, however, does not rest simply upon this application of the constitution and of the legislation of congress. There has been, and we shall bring it before you, a practice by the government, going back to a very early day, and coming down to a recent period, for the president to make removals from office when the case called for them, without regard to the fact whether the senate was in session or not. The instances, of course, would not be numerous. If the senate was in session, the president would send a nomination to the senate, saying: "A. B., in place of C. D.,

removed." But then there were occasions—not frequent, I agree, but there were occasions, as you will see might naturally happen—when the president, perhaps, had not had time to select a person whom he would nominate, and when he could not trust the officer then in possession of the office to continue in it, when it was necessary for him, by a special order, to remove him from the office wholly independent of any nomination sent in to the senate. Let me bring before your consideration for a moment a very striking case which happened recently enough to be within the knowledge of many of you. We were on the eve of a civil war. The war department was in the hands of a man who was disloyal and unfaithful to his trust. His chief clerk, who, on his removal or resignation, would come into the place, was believed to be in the same category with his master. Under those circumstances, the president of the United States said to Mr. Floyd, "I must have possession of this office," and Mr. Floyd had too much good sense, or good manners, or something else, to do anything but resign, and instantly the president put into the place General Holt, the postmaster general of the United States at the time, without the delay of an hour. It was a time when a delay of twenty-four hours might have been of vast practical consequence to the country. There are classes of cases arising in all the departments of that character followed by that action, and we shall bring before you evidence showing what those cases have been, so that it will appear that, so long as officers held at the pleasure of the president, and wholly independent of the advice which he might receive in regard to their removal from the senate, so long, whenever there was an occasion, the president used the power, whether the senate was in session or not.

I have now gone over, senators, the considerations which seem to me to be applicable to the tenure-of-office bill, and to this allegation which is made that the president knowingly violated the constitution of the United States in the order for the removal of Mr. Stanton from office while the senate was in session; and the counsel for the president feel that it is not essential to his vindication from this charge to go further upon this subject. Nevertheless, there is a broader view upon this matter, which is an actual part of the case,—and it is due to the president it should be brought before you,—that I now propose to open to your consideration. The constitution requires the president to take care that the laws be faithfully executed. It also requires of him, as a qualification for his office, to swear that he will faithfully execute the laws, and that, to the best of his ability, he will preserve, protect, and defend

the constitution of the United States. I suppose every one will agree that, so long as the president of the United States, in good faith, is endeavoring to take care that the laws be faithfully executed, and in good faith, and to the best of his ability, is preserving, protecting, and defending the constitution of the United States, although he may be making mistakes, he is not committing high crimes or misdemeanors. In the execution of these duties, the president found, for reasons which it is not my province at this time to enter upon, but which will be exhibited to you hereafter, that it was impossible to allow Mr. Stanton to continue to hold the office of one of his advisers, and to be responsible for his conduct in the manner he was required by the constitution and laws to be responsible, any longer. This was intimated to Mr. Stanton, and did not produce the effect which, according to the general judgment of well-informed men, such intimations usually produce. Thereupon the president first suspended Mr. Stanton, and reported that to the senate. Certain proceedings took place, which will be adverted to more particularly presently. They resulted in the return of Mr. Stanton to the occupation by him of this office. Then it became necessary for the president to consider, first, whether this tenure-of-office law applied to the case of Mr. Stanton; secondly, if it did apply to the case of Mr. Stanton, whether the law itself was the law of the land, or was merely inoperative because it exceeded the constitutional power of the legislature.

I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty, there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the constitution of the country. Will any man question the patriotism or the propriety of John Hampden's act when he brought the question whether "ship money" was within the constitution of England before the courts of England? Not only is there no such rule incumbent upon private citizens which forbids them to raise such questions, but, let me repeat, there may be, as there not unfrequently have been, instances in which the highest

patriotism and the purest civil and moral duty require it to be done. Let me ask any of you, if you were a trustee for the rights of third persons, and those rights of third persons, which they could not defend themselves by reason, perhaps, of sex or age, should be attacked by an unconstitutional law, should you not deem it to be your sacred duty to resist it, and have the question tried? And if a private trustee may be subject to such a duty, and impelled by it to such action, how is it possible to maintain that he who is a trustee for the people of powers confided to him for their protection, for their security, for their benefit, may not, in that character of trustee, defend what has thus been confided to him?

Do not let me be misunderstood on this subject. I am not intending to advance upon or occupy any extreme ground, because no such extreme ground has been advanced upon or occupied by the president of the United States. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with his assent or without his assent, it is his duty to see that that law is faithfully executed, so long as nothing is required of him but ministerial action. He is not to erect himself into a judicial court, and decide that the law is unconstitutional, and that therefore he will not execute it, for, if that were done, manifestly there never could be a judicial decision. He would not only veto a law, but he would refuse all action under the law after it had been passed, and thus prevent any judicial decision from being made. He asserts no such power. He has no such idea of his duty. His idea of his duty is that, if a law is passed over his veto which he believes to be unconstitutional, and that law affects the interests of third persons, those whose interests are affected must take care of them, vindicate them, raise questions concerning them, if they should be so advised. If such a law affects the general and public interests of the people, the people must take care at the polls that it is remedied in a constitutional way. But when, senators, a question arises whether a particular law has cut off a power confided to him by the people, through the constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the government to say which of them is right, and after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law, it remains to be decided by you whether there is any violation of his duty when he takes the needful steps to raise that question, and have it peacefully decided. Where shall the line be drawn? Suppose a law should provide that the president of the United

States should not make a treaty with England or with any other country. It would be a plain infraction of his constitutional power; and if an occasion arose when such a treaty was, in his judgment, expedient and necessary, it would be his duty to make it, and the fact that it should be declared to be a high misdemeanor if he made it would no more relieve him from the responsibility of acting through the fear of that law than he would be relieved of that responsibility by a bribe not to act. Suppose a law that he shall not be commander in chief in part or in whole,—a plain case, I will suppose, of an infraction of that provision of the constitution which has confided to him that command; the constitution intending that the head of all the military power of the country should be a civil magistrate, to the end that the law may always be superior to arms. Suppose he should resist a statute of that kind in the manner I have spoken of by bringing it to a judicial decision? It may be said these are plain cases of express infractions of the constitution; but what is the difference between a power conferred upon the president by the express words of the constitution and a power conferred upon the president by a clear and sufficient implication in the constitution? Where does the power to make banks come from? Where does the power come from to limit congress in assigning original jurisdiction to the supreme court of the United States,—one of the cases referred to the other day? Where do a multitude of powers upon which congress acts come from in the constitution except by fair implications? Whence do you derive the power, while you are limiting the tenure of office, to confer on the senate the right to prevent removals without their consent? Is that expressly given in the constitution, or is it an implication which is made from some of its provisions? I submit it is impossible to draw any line of duty for the president, simply because a power is derived from an implication in the constitution instead of from an express provision. One thing unquestionably is to be expected of the president on all such occasions,—that is, that he should carefully consider the question; that he should ascertain that it necessarily arises; that he should be of opinion that it is necessary to the public service that it should be decided; that he should take all competent and proper advice on the subject. When he has done all this, if he finds that he cannot allow the law to operate in the particular case without abandoning a power which he believes has been confided to him by the people, it is his solemn conviction that it is his duty to assert the power, and obtain a judicial decision thereon. And although he does not perceive, nor do his counsel perceive, that it is

essential to his defense in this case to maintain this part of the argument, nevertheless, if this tribunal should be of that opinion, then, before this tribunal, before all the people of the United States, and before the civilized world, he asserts the truth of this position.

I am compelled now to ask your attention, quite briefly, however, to some considerations which weighed upon the mind of the president, and led him to the conclusion that this was one of the powers of his office which it was his duty, in the manner I have indicated, to endeavor to preserve. The question whether the constitution has lodged the power of removal with the president alone, with the president and senate, or left it to congress to be determined at its will in fixing the tenure of offices, was, as all senators know, debated in 1789 with surpassing ability and knowledge of the frame and necessities of our government. Now, it is a rule long settled, existing, I suppose, in all civilized countries,—certainly in every system of law that I have any acquaintance with,—that a contemporary exposition of a law made by those who were competent to give it a construction is of very great weight; and that, when such contemporary exposition has been made of a law, and it has been followed by an actual and practical construction in accordance with that contemporary exposition, continued during a long period of time, and applied to great numbers of cases, it is afterwards too late to call in question the correctness of such a construction. The rule is laid down, in the quaint language of Lord Coke, in this form:

"Great regard ought, in construing a law, to be paid to the construction which the sages who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made. *Contemporanea expositio est fortissima in lege.*"

I desire to bring before the senate in this connection, inasmuch as I think the subject has been frequently misunderstood, the form taken by that debate of 1789, and the result which was attained. In order to do so, and at the same time to avoid fatiguing your attention by looking minutely into the debate itself, I beg leave to read a passage from Chief Justice Marshall's Life of Washington, where he has summed up the whole. The writer says, on page 162 of the second volume of the Philadelphia edition:

"After an ardent discussion, which consumed several days, the committee divided, and the amendment was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the house of representatives did not explicitly convey their sense of the constitution. Indeed, the express grant of the power to the president rather implied a right in

the legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson moved in the house, when the report of the committee of the whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the president. He gave notice, that, if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the president might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was by fair construction fixed in the constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the legislature on this important part of the American constitution."

Some allusion has been made to the fact that this law was passed in the senate only by the casting vote of the vice-president; and upon that subject I beg leave to refer to the life of Mr. Adams, by his grandson, volume I of his works, pages 448 to 450. He here gives an account, so far as could be ascertained from the papers of President Adams, of what that debate was, and finally terminates the subject in this way:

"These reasons [that is, the reasons of Vice-President Adams] were not committed to paper, however, and can therefore never be known; but in their soundness it is certain that he never had the shadow of a doubt."

I desire leave, also, to refer on this subject to the first volume of Story's Commentaries on the Constitution, section 408, in support of the rule of interpretation which I have stated to the senate. It will there be found that it is stated by the learned commentator that a contemporaneous construction of the constitution, made under certain circumstances, which he describes, is of very great weight in determining its meaning. He says:

"After all, the most unexceptionable scource of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solid argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet or the retired speculations of ingenious minds, intent on theory or general views, and unused to encounter a practical difficulty at every step!"

On comparing the decision made in 1789 with the tests which are here suggested by the learned commentator, it will be found,

in the first place, that the precise question was under discussion; secondly, that there was a deep sense of its importance, for it was seen that the decision was not to affect a few cases lying here and there in the course of the government, but that it would enter deeply into its practical and daily administration; and in the next place, the determination was, so far as such determination could be entertained, thereby to fix a system for the future; and in the last place, the men who participated in it must be admitted to have been exceedingly well qualified for their work. There is another rule to be added to this which is also one of very frequent application, and it is that a long-continued practical application of a decision of this character by those to whom the execution of a law is confided is of decisive weight. To borrow again from Lord Coke on this subject: *"Optimus legum interpres consuetudo,"*—"practice is the best interpreter of law." Now, what followed this original decision? From 1789 down to 1867, every president and every congress participated in and acted under the construction given in 1789. Not only did the government so conduct, but it was a subject sufficiently discussed among the people to bring to their consideration that such a question had existed, had been started, had been settled in this manner, had been raised again from time to time, and yet, as everybody knows, so far from the people interfering with this decision,—so far from ever expressing in any manner their disapprobation of the practice which had grown up under it,—not one party nor two parties, but all parties, favored and acted upon this system of government. . . .

This is a subject which has been heretofore examined and passed upon judicially in very numerous cases. I do not speak now, of course, of judicial decisions of this particular question which is under consideration, whether the constitution has lodged the power of removal in the president alone, or in the president and senate, or has left it to be a part of the legislative power; but I speak of the judicial exposition of the effect of such a practical construction of the constitution of the United States, originated in the way in which this was originated, continued in the way in which this was continued, and sanctioned in the way in which this has been sanctioned.

There was a very early case that arose soon after the organization of the government, and which is reported under the name of Stuart v. Laird, in 1 Cranch, 299. It was a question concerning the interpretation of the constitution in relation to the power which the congress had to assign to the judges of the supreme court circuit duties. From that time down to the decision in the case of Cooley v. Port Wardens of Philadelphia, reported in

12 Howard, 315,—a period of more than half a century,—there has been a series of decisions upon the effect of such a contemporaneous construction of the constitution, followed by such a practice in accordance with it; and it is now a fixed and settled rule, which I think no lawyer will undertake to controvert, that the effect of such a construction is not merely to give weight to an argument, but to fix an interpretation. And accordingly it will be found, by looking into the books written by those who were conversant with this subject, that they have so considered and received it. I beg leave to refer to the most eminent of all the commentators on American law, and to read a line or two from Chancellor Kent's Lectures, found in the first volume, page 310, marginal paging. After considering this subject, and, it should be noted in reference to this very learned and experienced jurist, considering it in an unfavorable light, because he himself thought that, as an original question, it had better have been settled the other way; that it would have been more logical, more in conformity with his views of what the practical needs of the government were, that the senate should participate with the president in the power of removal,—nevertheless he sums it all up in these words:

"This amounted to a legislative construction of the constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of the government, appointed by the president and senate, whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the senate was an exception to a general principle, and ought to be taken strictly. The president is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it."

This, I believe, will be found to be a fair expression of the opinions of those who have had occasion to examine this subject in their closets as a matter of speculation. In this case, however, the president of the United States had to consider, not merely the general question where this power was lodged;—not merely the effect of this decision made in 1789, and the practice of the government under it since,—but he had to consider a particular law, the provisions of which were before him, and might have an application to the case upon which he felt called upon to act; and it is necessary, in order to do justice to the president in reference to this matter, to see what the theory of that law is, and what its operation is or must be, if any, upon the case which he had before him, namely, the case of Mr. Stanton.

During the debate in 1789 there were three distinct theories held by different persons in the house of representatives. One was that the constitution had lodged the power of removal with the president alone; another was that the constitution had lodged that power with the president acting with the advice and consent of the senate; the third was that the constitution had lodged it nowhere, but had left it to the legislative power, to be acted upon in connection with the prescription of the tenure of office. The last of these theories was at that day held by comparatively few persons. The first two received not only much the greater number of votes, but much the greater weight of reasoning in the course of that debate; so much so that, when this subject came under the consideration of the supreme court of the United States, in the case of *ex parte* Hennan, collaterally only, Mr. Justice Thompson, who delivered the opinion of the court on that occasion, says that it has never been doubted that the constitution had lodged the power either in the president alone or in the president and senate,—certainly an inaccuracy; but then it required a very close scrutiny of the debates, and a careful examination of the few individual opinions expressed in that debate, in that direction, to ascertain that it ever had been doubted that, one way or the other, the constitution settled the question. Nevertheless, as I understand it,—I may be mistaken in this, but as I understand it,—it is the theory of this law, which the president had before him, that both these opinions were wrong; that the constitution has not lodged the power anywhere; that it has left it as an incident to the legislative power, which incident may be controlled, of course, by the legislature itself, according to its own will, because, as Chief Justice Marshall somewhere remarks (and it is one of those profound remarks which will be found to have been carried by him into many of his decisions), when it comes to a question whether a power exists the particular mode in which it may be exercised must be left to the will of the body that possesses it; and therefore, if this be a legislative power, it was very apparent to the president of the United States, as it had been very apparent to Mr. Madison, as was declared by him in the course of his correspondence with Mr. Coles, which is, no doubt, familiar to senators, that, if this be a legislative power, the legislature may lodge it in the senate, may retain it in the whole body of congress, or may give it to the house of representatives. I repeat, the president had to consider this particular law; and that, as I understand it, is the theory of that law. I do not undertake to say it is an unfounded theory, I do not undertake to say that it may not be main-

tained successfully, but I do undertake to say that it is one which was originally rejected by the ablest minds that had this subject under consideration in 1789; that, whenever the question has been started since, it has had, to a recent period, very few advocates, and that no fair and candid mind can deny that it is capable of being doubted and disbelieved after examination. It may be the truth, after all; but it is not a truth which shines with such clear and certain light that a man is guilty of a crime because he does not see it.

The president not only had to consider this particular law, but he had to consider its constitutional application to this particular case, supposing the case of Mr. Stanton to be, what I have endeavored to argue it was not, within its terms. Let us assume, then, that his case was within its terms. Let us assume that this proviso, in describing the cases of secretaries, described the case of Mr. Stanton; that Mr. Stanton, having been appointed by President Lincoln in January, 1862, and commissioned to hold during the pleasure of the president, by force of this law acquired a right to hold this office against the will of the president down to April, 1869. Now, there is one thing which has never been doubted under the constitution,—is incapable of being doubted, allow me to say,—and that is, that the president is to make the choice of officers. Whether, having made the choice, and they being inducted into office, they can be removed by him alone, is another question. But to the president alone is confided the power of choice. In the first place, he alone can nominate. When the senate has advised the nomination, consented to the nomination, he is not bound to commission the officer. He has a second opportunity for consideration, and acceptance or rejection of the choice he had originally made. On this subject allow me to read from the opinion of Chief Justice Marshall in the case of Marbury v. Madison, where it is expressed more clearly than I can express it. After enumerating the different clauses of the constitution which bear upon this subject, he says:

"These are the clauses of the constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations: (1) The nomination. This is the sole act of the president, and is completely voluntary. (2) The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. (3) The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.' "[5]

[5] 1 Cranch, 155.

He then goes into various considerations to show that it is not a duty enjoined by the constitution; that it is optional with him whether he will commission even after an appointment has been confirmed, and he says:

"The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed."[6]

The choice, then, is with the president. The action of the senate upon that choice is an advisory action only at a particular stage after the nomination, before the appointment or the commission. Now, as I have said before, Mr. Stanton was appointed under the law of 1789, constituting the war department, and in accordance with that law he was commissioned to hold during the pleasure of the president. President Lincoln had said to the senate: "I nominate Mr. Stanton to hold the office of secretary for the department of war during the pleasure of the president." The senate had said: "We assent to Mr. Stanton's holding the office of secretary for the department of war during the pleasure of the president." What does this tenure-of-office law say, if it operates on the case of Mr. Stanton? It says Mr. Stanton shall hold office against the will of the president, contrary to the terms of his commission, contrary to the law under which he was appointed, down to the 4th of April, 1869. For this new, fixed, and extended term, where is Mr. Stanton's commission? Who has made the appointment? Who has assented to it? It is a legislative commission; it is a legislative appointment; it is assented to by congress acting in its legislative capacity. The president has had no voice in the matter. The senate, as the advisers of the president, have had no voice in the matter. If he holds at all, he holds by force of legislation, and not by any choice made by the president, or assented to by the senate. And this was the case, and the only case, which the president had before him, and on which he was called to act.

Now, I ask senators to consider whether, for having formed an opinion that the constitution of the United States had lodged this power with the president,—an opinion which he shares with every president who has preceded him, with every congress which has preceded the last; an opinion formed on the grounds which I have imperfectly indicated; an opinion which, when applied to this particular case, raises the difficulties which I have indicated here, aris-

[6] 1 Cranch, 156.

ing out of the fact that this law does not pursue either of the opinions which were originally held in this government, and have occasionally been started and maintained by those who are restless under its administration; an opinion thus supported by the practice of the government from its origin down to his own day,—is he to be impeached for holding that opinion? If not, if he might honestly and properly form such an opinion under the lights which he had, and with the aid of the advice which we shall show you he received, then is he to be impeached for acting upon it to the extent of obtaining a judicial decision whether the executive department of the government was right in its opinion, or the legislative department was right in its opinion? Strangely enough, as it struck me, the honorable managers themselves say: "No; he is not to be impeached for that." I beg leave to read a passage from the argument of the honorable manager by whom the prosecution was opened:

"If the president had really desired solely to test the constitutionality of the law, or his legal right to remove Mr. Stanton, instead of his defiant message to the senate of the 21st of February, informing them of the removal, but not suggesting this purpose, which is thus shown to be an afterthought, he would have said, in substance: 'Gentlemen of the senate, in order to test the constitutionality of the law entitled, "An act regulating the tenure of certain civil offices," which I verily believe to be unconstitutional and void, I have issued an order of removal of E. M. Stanton from the office of secretary of the department of war. I felt myself constrained to make this removal lest Mr. Stanton should answer the information in the nature of a *quo warranto*, which I intend the attorney general shall file at an early day, by saying that he holds the office of secretary of war by the appointment and authority of Mr. Lincoln, which has never been revoked. Anxious that there shall be no collision or disagreement between the several departments of the government and the executive, I lay before the senate this message, that the reasons for my action, as well as the action itself, for the purpose indicated, may meet your concurrence.'"

Thus far are marks of quotation showing the communication which the president should have obtained from the honorable manager and sent to the senate in order to make this matter exactly right. Then follows this:

"Had the senate received such a message, the representatives of the people might never have deemed it necessary to impeach the president for such an act to insure the safety of the country, even if they had denied the accuracy of his legal position."

So that it seems that it is, after all, not the removal of Mr. Stanton, but the manner in which the president communicated the fact of that removal to the senate after it was made. That manner is here called the "defiant message" of the 21st of February. That

is a question of taste. I have read the message, as you all have read it. If you can find anything in it but what is decorous and respectful to this body and to all concerned your taste will differ from mine. But whether it be a point of manners well or ill taken, one thing seems to be quite clear: that the president is not impeached here because he entertained an opinion that this law was unconstitutional; he is not impeached here because he acted on that opinion, and removed Mr. Stanton; but he is impeached here because the house of representatives considers that this honorable body was addressed by a "defiant message," when they should have been addressed in the terms which the honorable manager has dictated.

I now come, Mr. Chief Justice and senators, to another topic connected with this matter of the removal of Mr. Stanton, and the action of the president under this law. The honorable managers take the ground, among others, that whether, upon a true construction of this tenure-of-office act, Mr. Stanton be within it, or, even if you should believe that the president thought the law unconstitutional, and had a right, if not trammelled in some way, to try that question, still by his own conduct and declarations the president, as they phrase it, is estopped. He is not to be permitted here to assert the true interpretation of this law; he is not to be permitted to allege that his purpose was to raise a question concerning its constitutionality, and the reason is that he has done and said certain things. All of us who have read law books know that there is in the common law a doctrine called "rules of estoppel," founded, undoubtedly, on good reason, although, as they are called from the time of Lord Coke, or even earlier, down to the present day, odious, because they shut out the truth. Nevertheless, there are circumstances when it is proper that the truth should be shut out. What are the circumstances? They are where a question of private right is involved, where on a matter of fact that private right depends, and where one of the parties to the controversy has so conducted himself that he ought not, in good conscience, to be allowed either to assert or deny that matter of fact. But did any one ever hear of an estoppel on a matter of law? Did any one ever hear that a party had put himself into such a condition that, when he came into a court of justice, even to claim a private right, he could not ask the judge correctly to construe a statute, and insist on the construction when it was arrived at in his favor? Did anybody ever hear, last of all, that a man was convicted of crime by reason of an estoppel under any system of law that ever prevailed in any civilized state? That the president of the United

States should be impeached and removed from office, not by reason of the truth of his case, but because he is estopped from telling it, would be a spectacle for gods and men. Undoubtedly it would have a place in history which it is not necessary for me to attempt to foreshadow. There is no matter of fact here. They have themselves put in Mr. Stanton's commission, which shows the date of the commission and the terms of the commission, and that is the whole matter of fact which is involved. The rest is the construction of the tenure-of-office act, and the application of it to the case, which they have thus made themselves; and also the construction of the constitution of the United States, and the abstract public question whether that has lodged the power of removal with the president alone, or with the president and senate, or left it to congress.

I respectfully submit, therefore, that the ground is untenable that there can be an estoppel by any conduct of the president, who comes here to assert, not a private right, but a great public right, confided to the office by the people, in which, if anybody is estopped, the people will be estopped. The president never could do or say anything which would put this great public right into that extraordinary predicament. But what has he done? What are the facts upon which they rely, out of which to work this estoppel, as they call it? In the first place, he sent a message to the senate on the 12th of December, 1867, in which he informed the senate that he had suspended Mr. Stanton by a certain order, a copy of which he gave; that he had appointed General Grant to exercise the duties of the office *ad interim* by a certain other order, a copy of which he gave; and then he entered into a discussion, in which he showed the existence of this question, whether Mr. Stanton was within the tenure-of-office bill; the existence of the other question, whether this was or was not a constitutional law; and then he invoked the action of the senate. There was nothing misrepresented. There was nothing concealed which he was bound to state. It is complained of by the honorable managers that he did not tell the senate that, if their action should be such as to restore Mr. Stanton practically to the possession of the office, he should go to law about it. That is the complaint,—that he did not tell that to the senate. It may have been a possible omission, though I rather think not. I rather think that that good taste which is so prevalent among the managers, and which they so insist upon here, would hardly dictate that the president should have held out to the senate something which might possibly have been

construed into a threat upon that subject. He laid the case before the senate for their action; and now, forsooth, they say he was too deferential to this law, both by reason of this conduct of his, and also what he did upon other occasions, to which I shall presently advert.

Senators, there is no inconsistency in the president's position or conduct in reference to this matter. Suppose this case: A party who has a private right in question submits to the same tribunal in the same proceeding these questions: First, I deny the constitutionality of the law under which the right is claimed against me; second, I assert that the true interpretation of that law will not affect this right which is claimed against me; third, I insist that, even if it is within the law, I make a case within the law,—is there any inconsistency in that? Is not that done every day, or something analogous to it, in courts of justice? And where was the inconsistency on this occasion? Suppose the president had summed up the message which he sent to the senate in this way: "Gentlemen of the senate, I insist, in the first place, that this law is unconstitutional. I insist, in the second place, that Mr. Stanton is not within it. I respectfully submit for your consideration whether, if it be a constitutional law, and Mr. Stanton's case be within it, the facts which I present to you do not make such a case that you will not advise me to receive him back into office." Suppose he had summed up in that way, would there have been any inconsistency then? And why is not the substance of that found in this message? Here it is pointed out that the question existed whether the law was unconstitutional; here it is pointed out that the question existed whether Mr. Stanton was within the law; and then the president goes on to submit for the consideration of the senate, whom he had reason to believe, and did believe, thought the law was constitutional, though he had no reason to believe that they thought Mr. Stanton was within the law, the facts to be acted upon within the law, if the case was there.

It seems the president has not only been thus anxious to avoid a collision with this law; he has not only, on this occasion, taken this means to avoid it, but it seems that he has actually, in some particulars, obeyed the law; he has made changes in the commissions, or, rather, they have been made in the departments, and, as he has signed the commissions, I suppose they must be taken, although his attention does not appear to have been called to the subject at all, to have been made with his sanction, just so far, and because he sanctions that which is done by his secretaries, if he does not

interfere actively to prevent it. He has done not merely this, but he has also in several cases—four cases, three collectors and one consul, I think they are—sent into the senate notice of suspension,—notice that he had acted under this law, and suspended these officers. This objection proceeds upon an entire misapprehension of the position of the president, and of the views which he has of his own duty. It assumes that because, when the emergency comes, as it did come in the case of Mr. Stanton, when he must act or else abandon a power which he finds in the particular instance it is necessary for him to insist upon in order to carry on the government,—that, because he holds that opinion, he must run amuck against the law, and take every possible opportunity to give it a blow, if he can. He holds no such opinion. So long as it is a question of administrative duty merely, he holds that he is bound to obey the law. It is only when the emergency arises; when the question is put to him so that he must answer it: "Can you carry on this department of the government any longer in this way? No. Have you power to carry it on as the public service demands? I believe I have." Then comes the question how he shall act. But whether a consul is to be suspended or removed, whether a defaulting collector is to be suspended or removed, does not involve the execution of the great powers of the government. It may be carried on; he may be of opinion with less advantage, he may be of opinion not in accordance with the requirements of the constitution, but it may be carried on without serious embarrassment or difficulty. Until that question is settled, he does not find it necessary to make it,—settled in some way, by some person who has an interest to raise and have it settled.

I wish to observe, also (the correctness of which observation I think the senate will agree with), that these changes which have been made in the forms of the commissions really have nothing to do with this subject. For instance, the change is made in the department of state, "subject to the conditions prescribed by law." That is the tenure on which I think all commissions should originally have run, and ought to continue to run. It is general enough to embrace all. If it is a condition prescribed by law that the senate must consent to the removal of the incumbent before he is rightfully out of office, it covers that case. If the tenure-of-office bill be not a law of the land because it is not in accordance with the constitution, it covers that case. It covers every case necessarily from its terms, for every officer does and should and must hold subject to the conditions prescribed by law,—not necessarily a law of congress, but a law of the land, the constitution being supreme in that particular.

There is another observation, also, and that is, that the change that was made in the department of the treasury—"until a successor be appointed and qualified"—has manifestly nothing whatever to do with the subject of removal. Whether the power of removal be vested in the president alone, or vested in the president by and with the advice and consent of the senate, this clause does not touch it. It is just as inconsistent with removal by the president with the consent of the senate as it is inconsistent with the removal by the president alone. In other words, it is the general tenure of the office which is described, according to which the officer is to continue to hold; but he and all other officers hold subject to some power of removal vested somewhere, and this change which has been made in the commission does not declare where it is vested, nor has it any influence on the question in whom it is vested. I wish to add to this that there is nothing, so far as I see, on this subject of estoppel, growing out of the action of the president, either in sending the message to the senate of the 12th of December, or in the changes in the commissions, or in his sending to the senate notices of suspensions of different officers, which has any bearing whatever upon the tenure-of-office act as affecting the case of Mr. Stanton. That is a case that stands by itself. The law may be a constitutional law. It may not only be a law under which the president has acted in this instance, but under which he is bound to act, and is willing to act, if you please, in every instance. Still, if Mr. Stanton is not within that law, the case remains as it was originally presented, and that case is that, not being within that law, the first article is entirely without foundation.

. . . .

Mr. Chief Justice and senators, among the points which I accidentally omitted to notice yesterday was one which seems to me of sufficient importance to return, and for a few moments to ask the attention of the senate, to it. It will best be exhibited by reading from Saturday's proceedings a short passage. In the course of those proceedings Mr. Manager Butler said:

"It will be seen, therefore, Mr. President and senators, that the president of the United States says in his answer that he suspended Mr. Stanton, under the constitution, indefinitely, and at his pleasure. I propose, now, unless it be objected to, to show that that is false under his own hand, and I have his letter to that effect, which, if there is no objection, I will read, the signature of which was identified by C. E. Creecy."

Then followed the reading of the letter, which was this:

"Executive Mansion,
"Washington, D. C., August 14, 1867.

"Sir: In compliance with the requirements of the eighth section of the act of congress of March 2, 1867, entitled, 'An act regulating the tenure of certain civil offices,' you are hereby notified that, on the 12th instant, Hon. Edwin M. Stanton was suspended from office as secretary of war, and General Ulysses S. Grant authorized and empowered to act as secretary of war *ad interim*.

"I am, sir, very respectfully yours, Andrew Johnson."

This is the letter which was to show, under the hand of the president, that, when he said in his answer he did not suspend Mr. Stanton by virtue of the tenure-of-office act, that statement was a falsehood. Allow me now to read the eighth section of that act:

"That whenever the president shall, without the advice and consent of the senate, designate, authorize, or employ any person to perform the duties of any office, he shall forthwith notify the secretary of the treasury thereof; and it shall be the duty of the secretary of the treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his department."

The senate will perceive that this section has nothing to do with the suspension of an officer, and no description of what suspensions are to take place; but the purpose of the section is that if, in any case, the president, without the advice and consent of the senate, shall, under any circumstances, designate a third person to perform temporarily the duties of an office, he is to make a report of that designation to the secretary of the treasury, and that officer is to give the necessary information of the event to his subordinate officers. The section applies in terms to and includes all cases. It applies to and includes cases of designation on account of sickness or absence or resignation, or any cause of vacancy, whether temporary or permanent, and whether occurring by reason of a suspension or of a removal from office; and therefore, when the president says to the secretary of the treasury, "I give you notice that I have designated General Grant to perform the duties *ad interim* of secretary of war," he makes no allusion, by force of that letter, to the manner in which that vacancy has occurred, or the authority by which it has been created; and hence, instead of this letter showing, under the president's own hand, that he had stated a falsehood, it has no reference to the subject-matter of the power or the occasion of Mr. Stanton's removal.

MR. MANAGER BUTLER: Read the second section, please,—the first clause of it.

MR. CURTIS: What did the manager call for?

MR. MANAGER BUTLER: Read the first clause of the second section of the act, which says that in no other case except when he suspends shall he appoint.

MR. CURTIS: The second section provides:

"That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the senate, be shown by satisfactory evidence," etc.

The president is allowed to suspend such an officer. Now, the president states in his answer that he did not act under that section.

MR. MANAGER BUTLER: That is not reading the section; that is not what I desired.

MR. CURTIS: I am aware that is not reading the section, Mr. Manager. You need not point that out. It is a very long section, and I do not propose to read it.

MR. MANAGER BUTLER: The first half a dozen lines.

MR. CURTIS: This second section authorizes the president to suspend in cases of crime and other cases which are described in this section. By force of it the president may suspend an officer. This eighth section applies to all cases of temporary designations and appointments, whether resulting from suspensions under the second section, or whether arising from temporary absence, or sickness, or death, or resignation. No matter what the cause may be, if, for any reason, there is a temporary designation of a person to supply an office *ad interim,* notice is to be given to the secretary of the treasury; and therefore I repeat, senators, that the subject-matter of this eighth section, and the letter which the president wrote in consequence of it, have no reference to the question under what authority he suspended Mr. Stanton.

I now ask the attention of the senate to the second article in the series; and I will begin, as I began before, by stating what the substance of this article is, what allegations it makes, so as to be the subjects of proof, and then the senate will be prepared to see how far each one of these allegations is supported by what is already in the case, and I shall be enabled to state what we propose to offer by way of proof in respect to each of them. The substantive allegations of this second article are that the delivery of the letter of authority to General Thomas was without authority of law; that it was an intentional violation of the tenure-of-office act; that it was an intentional violation of the constitution of the United States; that the delivery of this order to General Thomas was

made with intent to violate both the act and the constitution of the United States. That is the substance of the second article. The senate will at once perceive that, if the suspension of Mr. Stanton was not a violation of the tenure-of-office act in point of fact, or, to state it in other terms, if the case of Mr. Stanton is not within the act, then his removal, if he had been removed, could not be a violation of the act. If his case is not within the act at all,—if the act does not apply to the case of Mr. Stanton,—of course his removal is not a violation of that act. If Mr. Stanton continued to hold under the commission which he received from President Lincoln, and his tenure continued to be under the act of 1789, and under his only commission, which was at the pleasure of the president, it was no violation of the tenure-of-office act for Mr. Johnson to remove, or attempt to remove, Mr. Stanton; and therefore the senate will perceive that it is necessary to come back again—to recur under this article, as it will be necessary to recur under the whole of the first eight articles—to the inquiries, first, whether Mr. Stanton's case was within the tenure-of-office act; and, secondly, whether it was so clearly and plainly within that act that it can be attributed to the president as a high misdemeanor that he construed it not to include his case. But suppose the case of Mr. Stanton is within the tenure-of-office act, still the inquiry arises whether what was done in delivering this letter of authority to General Thomas was a violation of that act; and that renders it necessary that I should ask your careful attention to the general subject-matter of this act, and the particular provisions which are inserted in it in reference to each of those subjects.

Senators will recollect, undoubtedly, that this law, as it was finally passed, differs from the bill as it was originally introduced. The law relates to two distinct subjects. One is removal from office; the other subject is appointments of a certain character, made under certain circumstances, to fill offices. It seems that a practice had grown up under the government that, where a person was nominated to the senate to fill an office, and the senate either did not act on his nomination during their session, or rejected the nomination, after the adjournment of the senate, and in the recess, it was considered competent for the president, by a temporary commission, to appoint that same person to that same office, and that was deemed by many senators—unquestionably by a majority, and I should judge, from reading the debates, by a large majority, of the senate—to be an abuse of power,—not an intentional abuse. But it was a practice which had prevailed under the government to a very considerable

extent. It was not limited to very recent times. It had been supported by the opinions of different attorneys general given to different presidents. But still it was considered by many senators to be a departure from the spirit of the constitution, and a substantial derogation from the just power of the senate in respect to nominations for office. That being so, it will be found, on an examination of this law, that the first and second sections of the act relate exclusively to removals from office and temporary suspensions in the recess of the senate; while the third section and several of the following sections, to which I shall ask your particular attention, relate exclusively to this other subject of appointments made to office after the senate had refused to concur in the nomination of the person appointed. Allow me now to read from the third section:

"That the president shall have power to fill all vacancies which may happen during the recess of the senate, by reason of death or resignation"—

I pause here to remark that this does not include all cases. It does not include any case of the expiration of a commission. It includes simply death and resignation; not cases of the expiration of a commission during the recess of the senate. Why these were thus omitted I do not know; but it is manifest that the law does not affect to, and in point of fact does not, cover all cases which might arise belonging to this general class to which this section was designed to refer. The law goes on to say:

"That the president shall have power to fill all vacancies which may happen during the recess of the senate by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter; and if no appointment, by and with the advice and consent of the senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the senate, and, during such time, all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

Here all the described vacancies in office occurring during the recess of the senate, and the failure to fill those vacancies in accordance with the advice of the senate, are treated as occasioning an abeyance of such offices. That applies, as I have said, to two classes of cases,—vacancies happening by reason of death or resignation. It does not apply to any other vacancies.

The next section of this law does not relate to this subject of filling offices, but to the subject of removals:

"That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law."

The fifth section is:

"That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by a fine not exceeding $10,000, or by imprisonment," etc.

Any person who shall, "contrary to the provisions of this act," accept any appointment. What are the "provisions of this act" in respect to accepting any appointment? They are found in the third section of the act, putting certain offices in abeyance under the circumstances which are described in that section. If any person does accept an office which is thus put into abeyance, or any employment or authority in respect to such office, he comes within the penal provisions of the fifth section; but outside of that there is no such thing as accepting an office contrary to the provisions of the act, because the provisions of the act in respect to filling offices extend no further than to these cases. And so, in the next section it is declared:

"That every removal, appointment, or employment made, had, or exercised, contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors," etc.

Here, again, the making of a letter of authority contrary to the provisions of the act can refer only to those cases which the act itself has described, which the act itself has prohibited, and any other cases which are outside of such prohibition, as this case manifestly is, do not come within its provisions. The stress of this article, however, does not seem to me to depend at all upon this question of the construction of this law, but upon a totally different matter, which I agree should be fairly and carefully considered. The important allegation of the article is that this letter of authority was given to General Thomas, enabling him to perform the duties of secretary of war *ad interim* without authority of law. That I conceive to be the main inquiry which arises under this article, provided the case of Mr. Stanton and his removal are within the tenure-of-office bill at all.

I wish first to bring to the attention of the senate the act of 1795, which is found in 1 Statutes at Large, page 415. It is a short act, and I will read the whole of it:

"That, in case of vacancy in the office of secretary of state, secretary of the treasury, or of the secretary of the department of war, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the president of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancies be filled: provided, that no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months."

This act, it has been suggested, may have been repealed by the act of February 20, 1863, which is found in 12 Statutes at Large, page 656. This also is a short act, and I will trespass on the patience of the senate by reading it:

"That, in case of the death, resignation, absence from the seat of government, or sickness of the head of any executive department of the government, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the president of the United States, in case he shall think it necessary, to authorize the head of any other executive department, or other officer in either of said departments whose appointment is vested in the president, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease: provided, that no one vacancy shall be supplied in manner aforesaid for a longer term than six months."

These acts, as the senate will perceive, although they may be said in some sense to relate to the same general subject-matter, contain very different provisions, and the later law contains no express repeal of the other. If, therefore, the later law operates as a repeal, it is only as a repeal by implication. It says in terms that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." That a general principle of law would say if the statute did not speak those words. The addition of those words adds nothing to its repealing power. The same inquiry arises under them that would arise if they did not exist, namely, how far is this later law inconsistent with the provisions of the earlier law?

There are certain rules which I shall not fatigue the senate by citing cases to prove, because every lawyer will recognize them as settled rules upon this subject. In the first place there is a rule that repeals by implication are not favored by the courts. This is, I understand it, because the courts act on the assumption or the principle that if the legislature really intended to repeal the law,

they would have said so. Not that they necessarily must say so, because there are repeals by implication; but the presumption is that, if the legislature entertained a clear and fixed purpose to repeal a former law, they would be likely at least to have said so, and therefore the rule is a settled one that repeals by implication are not favored by the courts. Another rule is that the repugnancy between the two statutes must be clear. It is not enough that, under some circumstances, one may possibly be repugnant to the other. The repugnancy, as the language of the books is, between the two must be clear, and, if the two laws can stand together, the latter does not impliedly repeal the former. If senators have any desire to recur to the authorities on this subject, they will find a sufficient number of them collected in Sedwick on Statute Law, page 126.

Now, there is no repugnancy whatsoever between these two laws that I can perceive. The act of 1795 applies to all vacancies, however created. The act of 1863 applies only to vacancies, temporary or otherwise, occasioned by death and resignation. Removals from office, expiration of commissions, are not included. The act of 1795 applies only to vacancies; the act of 1863 to temporary absences or sickness. The subject-matter, therefore, of the laws, is different. There is no inconsistency between them. Each may stand together and operate upon the cases to which each applies; and therefore I submit that, in the strictest view which may ultimately be taken of this subject, it is not practicable to maintain that the later law repealed altogether the act of 1795. But whether it did or not, I state again what I have had so often occasion to repeat before: Is it not a fair question? Is it a crime to be on one side of that question, and not on the other? Is it a high misdemeanor to believe that a certain view taken of the repeal of this earlier law by the later one is a sound view? I submit that that would be altogether too stringent a rule, even for the honorable managers themselves to contend for; and they do not, and the house of representatives does not, contend for any such rule. Their article alleges, as matter of fact, that there was a willful intention on the part of the president to issue this letter to General Thomas without authority of law; not on mistaken judgment, not upon an opinion which, after due consideration, lawyers might differ about, but by reason of a willful intention to act without authority, and that, I submit, from the nature of the case, cannot be made out.

The next allegation in this article to which I desire to invite the attention of the senate is that the giving of this letter to General

Thomas during the session of the senate was a violation of the constitution of the United States. That will require your attentive consideration. The constitution, as you are well aware, has provided for two modes of filling offices. The one is by temporary commissions, during the recess of the senate, when the vacancy happens in the recess. The other is by appointment with the advice and consent of the senate, followed by a commission from the president. But it very early became apparent to those who administered the government that cases must occur to which neither of those modes dictated by the constitution would be applicable, but which must be provided for,—cases of temporary absence of the head of a department, the business of which, especially during the session of congress, must, for the public interest, continue to be administered; cases of sickness; cases of resignation or removal, for the power of removal, at any rate in that day, was held to be in the president; cases of resignation or removal in reference to which the president was not, owing to the suddenness of the occurrence, in a condition immediately to make a nomination to fill the office, or even to issue a commission to fill the office, if such vacancy occurred in vacation. And therefore it became necessary by legislation to supply these administrative defects which existed and were not provided for by the constitution; and accordingly, beginning in 1792, there will be found to be a series of acts on this subject of filling vacancies by temporary or *ad interim* authority; not appointments, not filling vacancies in offices by a commission in the recess of the senate, nor by a commission signed by the president in consequence of the advice and consent of the senate, but a mode of designating a particular person to perform temporarily the duties of some particular office, which otherwise, before the office can be filled in accordance with the constitution, would remain unperformed. These acts are one of May 8, 1792, § 8,[7] February 13, 1795,[8] and, last, in February 20, 1863.[9]

The senate will observe what particular difficulty these laws were designed to meet. This difficulty was the occurrence of some sudden vacancy in office, or some sudden inability to perform the duties of an office; and the intention of each of these laws was, each being applied to some particular class of cases, to make provision that, notwithstanding there was a vacancy in the office, or notwithstanding there was a temporary disability in the officer without a vacancy, still the duties of the office should be tempo-

[7] 1 Stat. p. 281.
[8] 1 Stat. p. 415.
[9] 12 Stat. p. 656.

rarily discharged. That was the purpose of these laws. It is entirely evident that these temporary vacancies are just as liable to occur during the session of the senate as during the recess of the senate; that it is just as necessary to have a set of legislative provisions to enable the president to carry on the public service in case of these vacancies and inabilities during the session of the senate as during the recess of the senate; and, accordingly, it will be found, by looking into these laws, that they make no distinction between the sessions of the senate and the recesses of the senate in reference to these temporary authorities. "Whenever a vacancy shall occur" is the language of the law,—"whenever there shall be a death or a resignation or an absence or a sickness." The law applies when the event occurs that the law contemplates as an emergency; and the particular time when it occurs is of no consequence in itself, and is deemed by the law of no consequence. In accordance with this view, senators, has been the uniform and settled and frequent practice of the government from its very earliest date, as I am instructed we shall prove, not in any one or two or few instances, but in great numbers of instances. That has been the practical construction put upon these laws from the time when the earliest law was passed in 1792, and it has continued down to this day.

The honorable managers themselves read a list a few days since of temporary appointments during the session of the senate of heads of departments, which amounted in number, if I counted them accurately, to upwards of thirty, and, if you add to these the cases of officers below the heads of departments, the number will be found, of course, to be much increased; and, in the course of exhibiting this evidence, it will be found that, although the instances are not numerous, for they are not very likely to occur in practice, yet instances have occurred on all-fours with the one which is now before the senate, where there has been a removal or a suspension of an officer, sometimes one and sometimes the other, and the designation of a person has been made at the same time temporarily to discharge the duties of that office. The senate will see that, in practice, such things must naturally occur. Take the case, for instance, of Mr. Floyd, which I alluded to yesterday. Mr. Floyd went out of office. His chief clerk was a person believed to be in sympathy with him, and under his control. If the third section of the act of 1789 was allowed to operate, the control of the office went into the hands of that clerk. The senate was in session. The public safety did not permit the war department to be left in that predicament for one hour,

if it could be avoided, and President Buchanan sent down to the post-office department, and brought the postmaster general to the war department, and put it in his charge. There was then in this body a sufficient number of persons to look after that matter. They felt an interest in it, and consequently they passed a resolve inquiring of President Buchanan by what authority he had made an appointment of a person to take charge of the war department without their consent, without a nomination to them, and their advising and consenting to it; to which a message was sent in answer containing the facts on this subject, and showing to the senate of that day the propriety, the necessity, and the long-continued practice under which this authority was exercised by him, and giving a schedule running through the time of General Jackson and his two immediate successors, I think, showing great numbers of *ad interim* appointments of this character, and to those, as I have said, we shall add a very considerable number of others. I submit, then, that there can be no ground whatever for the allegation that this *ad interim* appointment was a violation of the constitution of the United States. The legislation of congress is a sufficient answer to that charge.

I pass, therefore, to the next article which I wish to consider, and that is not the next in number, but the eighth; and I take it in this order because the eighth article, as I have analyzed it, differs from the second only in one particular, and therefore, taking that in connection with the second, of which I have just been speaking, it will be necessary for me to say but a very few words concerning it. It charges an attempt unlawfully to control the appropriations made by congress for the military service, and that is all there is in it except what there is in the second article. Upon that, certainly, at this stage of the case, I do not deem it necessary to make any observations. The senate will remember the offer of proof on the part of the managers designed, as was stated, to connect the president of the United States, through his private secretary, with the treasury, and thus enable him to use unlawfully appropriations made for the military service. The senate will recollect the fate of that offer, and that the evidence was not received; and therefore it seems to me quite unnecessary for me to pause to comment any further upon this eighth article.

I advance to the third article, and here the allegations are that the president appointed General Thomas; second, that he did this without the advice and consent of the senate; third, that he did it when no vacancy had happened in the recess of the senate;

fourth, that he did it when there was no vacancy at the time of the appointment; and, fifth, that he committed a high misdemeanor by thus intentionally violating the constitution of the United States. I desire to say a word or two upon each of these points. And first we deny that he ever appointed General Thomas to an office. An appointment can be made to an office only by the advice and consent of the senate, and through a commission signed by the president, and bearing the great seal of the government. That is the only mode in which an appointment can be made. The president, as I have said, may temporarily commission officers when vacancies occur during the recess of the senate. That is not an appointment. It is not so termed in the constitution. A clear distinction is drawn between the two. The president also may, under the acts of 1795 and 1863, designate persons who shall temporarily exercise the authority and perform the duties of a certain office when there is a vacancy; but that is not an appointment. The office is not filled by such a designation. Now, all which the president did was to issue a letter of authority to General Thomas, authorizing him *ad interim* to perform the duties of secretary of war. In no sense was this an appointment. It is said it was made without the advice and consent of the senate. Certainly it was. How can the advice and consent of the senate be obtained to an *ad interim* authority of this kind under any of these acts of congress? It is not an appointment that is in view. It is to supply temporarily a defect in the administrative machinery of the government. If he had gone to the senate for their advice and consent, he must have gone on a nomination made by him of General Thomas to this office, a thing he never intended to do, and never made any attempt to carry into effect. It is said no vacancy happened in the recess. That I have already considered. Temporary appointments are not limited to the temporary supply of vacancies happening in the recess of the senate, as I have already endeavored to show. It is said there was no vacancy at the time the act was done. That is begging the question. If Mr. Stanton's case was not within the tenure-of-office act,—if, as I have so often repeated, he held under the act of 1789, and at the pleasure of the president,—the moment he received that order which General Thomas carried to him there was a vacancy in point of law, however he may have refused to perform his duty, and prevented a vacancy from occurring in point of fact.

But the senate will perceive these two letters were to be delivered to General Thomas at the same time. One of them is an

order to Mr. Stanton to vacate the office; the other is a direction to General Thomas to take possession when Mr. Stanton obeys the order thus given. Now, may not the president of the United States issue a letter of authority in contemplation that a vacancy is about to occur? Is he bound to take a technical view of this subject, and have the order creating the vacancy first sent and delivered, and then sit down at his table and sign the letter of authority afterwards? If he expects a vacancy, if he has done an act which, in his judgment, is sufficient to create a vacancy, may he not, in contemplation that that vacancy is to happen, sign the necessary paper to give the temporary authority to carry on the duties of the office? Last of all, it is said he committed a high misdemeanor by intentionally violating the constitution of the United States when he gave General Thomas this letter of authority. If I have been successful in the argument I have already addressed to you, you will be of opinion that, in point of fact, there was no violation of the constitution of the United States by delivering this letter of authority, because the constitution of the United States makes no provision on the subject of these temporary authorities, and the law of congress has made provision equally applicable to the recess of the senate and to its session. Here, also, I beg leave to remind the senate that, if Mr. Stanton's case does not fall within the tenure-of-office act, if the order which the president gave to him to vacate the office was a lawful order, and one which he was bound to obey, everything which is contained in this article, as well as in the preceding articles, fails. It is impossible, I submit, for the honorable managers to construct a case of an intention on the part of the president to violate the constitution of the United States out of anything which he did in reference to the appointment of General Thomas, provided the order to Mr. Stanton was a lawful order, and Mr. Stanton was bound to obey it.

I advance, now, senators, to a different class of articles, and they may properly enough, I suppose, be called the "conspiracy articles," because they rest upon charges of conspiracy between the president and General Thomas. There are four of them,—the fourth, fifth, sixth, and seventh in number as they stand. The fourth and the sixth are framed under the act of July 31, 1861, which is found in 12 Statutes at Large, page 284. The fifth and seventh are framed under no act of congress. They allege an unlawful conspiracy, but they refer to no law by which the acts charged are made unlawful. The acts charged are called unlawful, but there is no law referred to and no case made by

the articles within any law of the United States that is known to the president's counsel. I shall treat these articles, therefore, the fourth and sixth together, and the fifth and seventh together, because I think they belong in that order. In the first place, let me consider the fourth and sixth, which charge a conspiracy within this act which I have just mentioned. It is necessary for me to read the substance of this law in order that you may see whether it can have any possible application to this case. It was passed on the 31st of July, 1861, as a war measure, and is entitled "An act to define and punish certain conspiracies." It provides:

"That, if two or more persons within any state or territory of the United States shall conspire together to overthrow or to put down or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States, or by force or intimidation or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States."

These are the descriptions of the offenses. The fourth and sixth articles contain allegations that the president and General Thomas conspired together, by force, intimidation, and threats, to prevent Mr. Stanton from continuing to hold the office of secretary for the department of war, and also that they conspired together by force to obtain possession of property belonging to the United States. These are the two articles which I suppose are designed to be drawn under this act, and these are the allegations which are intended to bring the articles within it. Now, it does seem to me that the attempt to wrest this law to any bearing whatsoever upon this prosecution is one of the extraordinary things which the case contains. In the first place, so far from having been designed to apply to the president of the United States, or to any act he might do in the course of the execution of what he believed to be his duty, it does not apply to any man or any thing within the District of Columbia at all. "If two or more persons within any state or territory of the United States." Not within the District of Columbia. This is a highly penal law, and an indictment found in the very words of this act charging things to have been done in the District of Columbia, and returned into the proper court of this District, I will undertake to say, would not bear a general demurrer because there is locality given to those things made penal by this act of congress. It is

made applicable to certain portions of the country, but not made applicable to the District of Columbia.

But not to dwell upon that technical view of the matter, and on which we should not choose to stand, let us see what is this case. The president of the United States is of opinion that Mr. Stanton holds the office of secretary for the department of war at his pleasure. He thinks so, first, because he believes the case of Mr. Stanton is not provided for in the tenure-of-office act, and no tenure of office is secured to him. He thinks so, secondly, because he believes that it would be judicially decided, if the question could be raised, that a law depriving the president of the power of removing such an officer at his pleasure is not a constitutional law. He is of opinion that in this case he cannot allow this officer to continue to act as his adviser and as his agent to execute the laws if he has lawful power to remove him, and under these circumstances he gives this order to General Thomas. I do not view this letter of authority to General Thomas as a purely military order. The service which General Thomas was invoked for is a civil service, but, at the same time, senators will perceive that the person who gave the order is the commander in chief of the army; that the person to whom it was given is the adjutant general of the army; that the subject-matter to which the order relates is the performance of services essential to carry on the military service; and, therefore, when such an order was given by the commander in chief to the adjutant general respecting a subject of this kind, is it too much to say that there was invoked that spirit of military obedience which constitutes the strength of the service? Not that it was a purely military order; not that General Thomas would have been subject to a court-martial for disobeying it; but that, as a faithful adjutant general of the army of the United States, interested personally and professionally and patriotically to have the duties of the office of secretary for the department of war performed in a temporary vacancy, was it not his duty to accept the appointment unless he saw and knew that it was unlawful to accept it? I do not know how, in fact, he personally considered it,—there has been no proof given on the subject; but I have always assumed—I think senators will assume—that, when the distinguished general of the army of the United States, on a previous occasion, accepted a similar appointment, it was under views of propriety and duty such as those which I have now been speaking of; and how and why is there to be attributed to General Thomas, as a co-conspirator, the guilty intent of designing to

overthrow the laws of his country, when a fair and just view of his conduct would leave him entirely without reproach?

And when you come, senators, to the other co-conspirator, the president of the United States, is not the case still clearer? Make it a case of private right, if you please; put it as strongly as possible against the president in order to test the question. One of you has a claim to property. It may be a disputed claim. It is a claim which he believes may prove, when judicially examined, to be sound and good. He says to A. B.: "Go to C. D., who is in possession of that property. I give you this order to him to give it up to you, and, if he gives it up, take possession." Did anybody ever imagine that that was a conspiracy? Does not every lawyer know that, the moment you introduce into any transaction of this kind the element of a claim of right, all criminal elements are purged at once; and that this is always true between man and man where it is a simple assertion of private right, the parties to which are at liberty either to assert them or forego them, as they please? But this was not such a case. This was a case of public right, of public duty,—of public right claimed upon constitutional grounds, and upon the interpretation of the law which had been given to it by the lawmakers themselves. How can the president of the United States, under such circumstances, be looked upon by anybody, whether he may or may not be guilty or not guilty of other things, as a co-conspirator under this act? These articles say that the conspiracy between the president and General Thomas was to employ force, threats, intimidation. What they have proved against the president is that he issued these orders, and that alone. Now, on the face of these orders, there is no apology for the assertion that it was the design of the president that anybody, at any time, should use force, threats, or intimidation. The order is to Mr. Stanton to deliver up possession. The order to General Thomas is to receive possession from Mr. Stanton when he delivers it up. No force is assigned to him; no authority is given to him to apply for or use any force, threats, or intimidation. There is not only no express authority, but there is no implication of any authority, to apply for or obtain or use anything but the order which was given him to hand to Mr. Stanton; and we shall offer proof, senators, which we think cannot fail to be satisfactory in point of fact, that the president, from the first, had in view simply and solely to test this question by the law; that, if this was a conspiracy, it was a conspiracy to go to law, and that was the whole of it. We shall show you what advice the

president received on this subject, what views in concert with his advisers he entertained, which, of course, it is not my province now to comment upon,—the evidence must first be adduced, then it will be time to consider it.

The other two conspiracy articles will require very little observation from me, because they contain no new allegations of fact which are not in the fourth and sixth articles, which I have already adverted to; and the only distinction between them and the others is that they are not founded upon this conspiracy act of 1861,—they simply allege an unlawful conspiracy, and leave the matter there. They do not allege sufficient facts to bring the case within the act of 1861. In other words, they do not allege force, threats, or intimidation. I shall have occasion to remark upon these articles when I come to speak of the tenth article, because these articles, as you perceive, come within that category which the honorable manager announced here at an early period of the trial,—articles which require no law to support them; and when I come to speak of the tenth article, as I shall have occasion to discuss this subject, I wish that my remarks, so far as they may be deemed applicable, should be applied to these fifth and seventh articles which I have thus passed over.

I shall detain the senate but a moment upon the ninth article, which is the one relating to the conversation with General Emory. The meaning of this article, as I read it, is that the president brought General Emory before himself as commander in chief of the army for the purpose of instructing him to disobey the law, with an intent to induce General Emory to disobey it, and with intent to enable himself unlawfully, and by the use of military force through General Emory, to prevent Mr. Stanton from continuing to hold office. Now, I submit that not only does this article fail of proof in its substance as thus detailed, but that it is disproved by the witness whom they have introduced to support it. In the first place, it appears clearly from General Emory's statement that the president did not bring him there for any purpose connected with this appropriation bill affecting the command of the army, or the orders given to the army. This subject General Emory introduced himself, and, when the conversation was broken off, it was again recurred to by himself asking the president's permission to bring it to his attention. Whatsoever was said upon that subject was said not because the president of the United States had brought the commander of the department of Washington before him for that purpose,

but because, having brought him there for another purpose, to which I shall allude in a moment, the commanding general chose himself to introduce that subject, and converse upon it, and obtain the president's views upon it. In the next place, having his attention called to the act of congress and to the order under it, the president expressed precisely the same opinion to General Emory that he had previously publicly expressed to congress itself at the time when the act was sent to him for his signature, and there is found set out in his answer, on page 32 of the official report of these proceedings, what that opinion was; that he considered that this provision interfered with his constitutional right as the commander in chief of the army; and that is what he said to General Emory. There is not even probable cause to believe that he said it for any other than the natural reason that General Emory had introduced the subject, had asked leave to call his attention to it, and evidently expected and desired that the president should say something on the subject; and, if he said anything, was he not to tell the truth? That is exactly what he did say,—I mean the truth as he apprehended it. It will appear in proof, as I am instructed, that the reason why the president sent for General Emory was not that he might endeavor to seduce that distinguished officer from his allegiance to the laws and the constitution of his country, but because he wished to obtain information about military movements, which he was informed, upon authority which he had a right to and was bound to respect, might require his personal attention.

I pass, then, from this article, as being one upon which I ought not to detain the senate, and I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is all of and concerning the speeches of the president. In the front of this inquiry the question presents itself: What are impeachable offenses under the constitution of the United States? Upon this question learned dissertations have been written and printed. One of them is annexed to the argument of the honorable manager who opened the cause for the prosecution. Another one on the other side of the question, written by one of the honorable managers themselves, may be found annexed to the proceedings in the house of representatives upon the occasion of the first attempt to impeach the president. And there have been others written and published by learned jurists touching this subject. I do not propose to vex the ear of the senate with any of the precedents drawn from the middle ages. The framers of our constitution were quite as familiar with them as

the learned authors of these treatises; and the framers of our constitution, as I conceive, have drawn from them the lesson which I desire the senate to receive,—that these precedents are not fit to govern their conduct on this trial. In my apprehension, the teachings, the requirements, the prohibitions of the constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home, and see what provisions of the constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere.

My first position is that, when the constitution speaks of "treason, bribery, and other high crimes and misdemeanors," it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the constitution on the subject of impeachment. "Treason" and "bribery." Nobody will doubt that these are here designated high crimes and misdemeanors against the United States, made such by the laws of the United States, which the framers of the constitution knew must be passed, in the nature of the government they were about to create, because these are offenses which strike at the existence of that government. "Other high crimes and misdemeanors." *Noscitur a sociis.* High crimes and misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the constitution, —in the very first step it takes on the subject of impeachment. "High crimes and misdemeanors" against what law? There can be no crime, there can be no misdemeanor, without a law, written or unwritten, express or implied. There must be some law; otherwise there is no crime. My interpretation of it is that the language "high crimes and misdemeanors" means "offenses against the laws of the United States." Let us see if the constitution has not said so. The first clause of the second section of the second article of the constitution reads thus:

"The president of the United States shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

"Offenses against the United States" would include "cases of impeachment," and they might be pardoned by the president if

they were not excepted. Then cases of impeachment are, according to the express declaration of the constitution itself, cases of offenses against the United States. Still, the learned manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Very different was the understanding of the fathers of the constitution on this subject.

MR. MANAGER BUTLER: Will you state where it was I said it was bound by no law?

MR. STANBERY: "A law unto itself."

MR. MANAGER BUTLER: "No common or statute law" was my language.

MR. CURTIS: I desire to refer to the sixty-fourth number of the Federalist, which is found in Dawson's edition, on page 453:

"The remaining powers which the plan of the convention allots to the senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments, as in the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the senate."

And then it is discussed. The next position to which I desire the attention of the senate is that there is enough written in the constitution to prove that this is a court in which a judicial trial is now being carried on. "The senate of the United States shall have the sole power to try all impeachments." "When the president is tried, the chief justice shall preside." "The trial of all crimes, except in case of impeachment, shall be by jury." This, then, is the trial of a crime. You are triors, presided over by the chief justice of the United States in this particular case, and that on the express words of the constitution. There is also, according to its express words, to be an acquittal or a conviction on this trial for a crime. "No person shall be convicted without the concurrence of two-thirds of the members present." There is also to be a judgment in case there shall be a conviction.

"Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States."

Here, then, there is the trial of a crime, a trial by a tribunal designated by the constitution in place of court and jury; a conviction, if guilt is proved; a judgment on that conviction; a punishment inflicted by the judgment for a crime,—and this on the express terms of the constitution itself. And yet, say the

honorable managers, there is no court to try the crime, and no law by which the act is to be judged. The honorable manager interrupted me to say that he qualified that expression of no law. His expression was: "No common or statute law." Well, when you get out of that field you are in a limbo, a vacuum, so far as law is concerned, to the best of my knowledge and belief. I say, then, that it is impossible not to come to the conclusion that the constitution of the United States has designated impeachable offenses as offenses against the United States; that it has provided for the trial of those offenses; that it has established a tribunal for the purpose of trying them; that it has directed the tribunal, in case of conviction, to pronounce a judgment upon the conviction, and inflict a punishment. All this being provided for, can it be maintained that this is not a court, or that it is bound by no law? But the argument does not rest mainly, I think, upon the provisions of the constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibition of the constitution. "Congress shall pass no bill of attainder or *ex post facto* law." According to that prohibition of the constitution, if every member of this body, sitting in its legislative capacity, and every member of the other body, sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of members of this body? As a congress, you cannot create a law to punish these acts if no law existed at the time they were done; but sitting here as judges, not only after the fact, but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case. According to this assumption, the same constitution which has made it a bill of rights of the American citizen, not only as against congress, but as against the legislature of every state in the Union, that no *ex post facto* law shall be passed,—this same constitution has erected you into a body, and empowered every one of you to say, *Aut inveniam aut faciam,*—"If I cannot find a law I will make one." Nay, it has clothed every one of you with imperial power; it has enabled you to say, *Sic volo, sic jubeo, stat pro ratione voluntas,*—"I am a law unto myself, by which law I shall govern this case." And, more than that, when each one of you, before he took his place here, called God to witness that he would administer impartial justice in this case according to the constitution and the laws, he meant such laws as he might make as he went along. The constitution, which had prohibited any body from making

such laws, he swore to observe; but he also swore to be governed by his own will,—his own individual will was the law which he thus swore to observe; and this special provision of the constitution, that when the senate sits in this capacity to try an impeachment the senators shall be on oath, means merely that they shall swear to follow their own individual wills! I respectfully submit this view cannot consistently and properly be taken of the character of this body or of the duties and powers incumbent upon it.

Look for a moment, if you please, to the other provision. The same search into the English precedents, so far from having made our ancestors who framed and adopted the constitution in love with them, led them to put into the constitution a positive and absolute prohibition against any bill of attainder. What is a bill of attainder? It is a case before the parliament where the parliament make the law for the facts they find. Each legislator —for it is in their legislative capacity they act, not in a judicial one—is, to use the phrase of the honorable managers, "a law unto himself," and, according to his discretion,—his views of what is politic or proper under the circumstances,—he frames a law to meet the case, and enacts it or votes in its enactment. According to the doctrine now advanced, bills of attainder are not prohibited by this constitution; they are only slightly modified. It is only necessary for the house of representatives, by a majority, to vote an impeachment, and send up certain articles, and have two-thirds of this body vote in favor of conviction, and there is an attainder; and it is done by the same process, and depends on identically the same principles, as a bill of attainder in the English parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result. I submit, then, senators, that this view of the honorable managers of the duties and powers of this body cannot be maintained. But the attempt made by the honorable managers to obtain a conviction upon this tenth article is attended with some peculiarities which I think it is the duty of the counsel to the president to advert to. So far as regards the preceding articles, the first eight articles are framed upon allegations that the president broke a law. I suppose the honorable managers do not intend to carry their doctrine so far as to say that, unless you find the president did intentionally break a law, those articles are supported. As to those articles there is some law, unquestionably; the very gist of the charge being that he broke a law. You must find that the law existed; you must

construe it and apply it to the case; you must find his criminal intent willfully to break the law,—before the articles can be supported.

But we come now to this tenth article, which depends upon no law at all, but, as I have said, is attended with some extraordinary peculiarities. The complaint is that the president made speeches against congress. The true statement here would be much more restricted than that; for although in those speeches the president used the word "congress," undoubtedly he did not mean the entire constitutional body organized under the constitution of the United States,—he meant the dominant majority in congress. Everybody so understood it; everybody must so understand it. But the complaint is that he made speeches against those who governed in congress. Well, who are the grand jury in this case? One of the parties spoken against. And who are the triors? The other party spoken against. One would think there was some incongruity in this; some reason for giving pause before taking any very great stride in that direction. The honorable house of representatives sends its managers here to take notice of what? That the house of representatives has erected itself into a school of manners, selecting from its ranks those gentlemen whom it deems most competent, by precept and example, to teach decorum of speech; and they desire the judgment of this body whether the president has not been guilty of indecorum,—whether he has spoken properly, to use the phrase of the honorable manager. Now, there used to be an old-fashioned notion that, although there might be a difference of taste about oral speeches, and, no doubt, always has been and always will be many such differences, there was one very important test in reference to them, and that is whether they are true or false; but it seems that in this case that is no test at all. The honorable manager, in opening the case, finding, I suppose, that it was necessary, in some manner, to advert to that subject, has done it in terms which I will read to you:

"The words are not alleged to be either false or defamatory, because it is not within the power of any man, however high his official position, in effect to "slander" the congress of the United States, in the ordinary sense of that word, so as to call on congress to answer as to the truth of the accusation."

Considering the nature of our government,—considering the experience which we have gone through on this subject,—that is a pretty lofty claim. Why, if the senate please, if you go back to the time of the Plantagenets, and seek for precedents

there, you will not find so lofty a claim as that. I beg leave to read from two statutes—the first being 3 Edward I. c. 34, and the second, 2 Richard II. c. 1—a short passage. The statute 3 Edward I. c. 34, after the preamble, enacts:

"That from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the realm; and he that doeth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

The statute 2 Richard II. Stat. 1, c. 5, enacted, with some alterations, the previous statute. It commenced thus:

"Of devisors of false news and of horrible and false lies of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm."

The great men of the realm in the time of Richard II. were protected only against "horrible and false lies"; and when we arrive, in the course of our national experience during the war with France and the administration of Mr. Adams, to that attempt to check, not free speech, but free writing, senators will find that, although it applied only to written libels, it contained an express section that the truth might be given in evidence. That was a law, as senators know, making it penal, by written libels, to excite the hatred or contempt of the people against congress, among other offenses; but the estimate of the elevation of congress above the people was not so high but that it was thought proper to allow a defense of the truth to be given in evidence. I beg leave to read from this sedition act a part of one section, and make a reference to another, to support the correctness of what I have said. It is found in 1 Statutes at Large, page 596:

"That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing, any false, scandalous, and malicious writing or writings against the government ot the United States, or either house of the congress of the United States, or the president of the United States, with intent to defame the said government, or either house of the said congress, or the said president, or to bring them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein," etc.

Section 3 provides:

"That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense the truth of

the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

In contrast with the views expressed here, I desire now to read from the fourth volume of Mr. Madison's works, pages 542 and 547, passages which, in my judgment, are as masterly as anything Mr. Madison ever wrote upon the relations of the congress of the United States to the people of the United States in contrast with the relations of the government of Great Britain to the people of that island, and the necessity which the nature of our government lays us under to preserve freedom of the press and freedom of speech:

"The essential difference between the British government and the American constitution will place this subject in the clearest light. In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the parliament is unlimited in its power, or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their bill of rights, etc.—are not reared against the parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a government as this, an exemption of the press from previous restraint, by licensers appointed by the king, is all the freedom that can be secured to it. In the United States the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of laws."

One other passage, on page 547, which has an extraordinary application to the subject now before you:

"(1) The constitution supposes that the president, the congress, and each of its houses may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents at the returning periods of election; and the president, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

"(2) Should it happen, as the constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper that, according to the cause and

degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

"(3) Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people can only be determined by a free examination thereof, and a free communication among the people thereon.

"(4) Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the government, it is the duty, as well as right, of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party."

These observations of Mr. Madison were made in respect to the freedom of the press. There were two views entertained at the time when the sedition law was passed concerning the power of congress over this subject. The one view was that, when the constitution spoke of freedom of the press, it referred to the common-law definition of that freedom. That was the view which Mr. Madison was controverting in one of the passages which I have read to you. The other view was that the common-law definition could not be deemed applicable, and that the freedom provided for by the constitution, so far as the action of congress was concerned, was an absolute freedom of the press. But no one ever imagined that freedom of speech, in contradistinction from written libel, could be restrained by a law of congress; for whether you treat the prohibition in the constitution as absolute in itself, or whether you refer to the common law for a definition of its limits and meaning, the result will be the same. Under the common law, no man was ever punished criminally for spoken words. If he slandered his neighbor and injured him, he must make good in damages to his neighbor the injury he had done; but there was no such thing, at the common law, as an indictment for spoken words. So that this prohibition in the constitution against any legislation by congress in restraint of the freedom of speech is necessarily an absolute prohibition; and therefore this is a case not only where there is no law made prior to the act to punish the act, but a case where congress is expressly prohibited from making any law to operate even on subsequent acts. What is the law to be? Suppose it is, as the honorable managers seem to think it should be, the sense of propriety of each senator appealed to. What is it to be? The only rule I have heard—the only rule which can be announced—is that you may require the speaker to speak properly. Who are

to be the judges whether he speaks properly? In this case the senate of the United States, on the presentation of the house of representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the constitution. That is the same freedom of speech, senators, in consequence of which thousands of men went to the scaffold under the Tudors and the Stuarts. That is the same freedom of speech which caused thousands of heads of men and of women to roll from the guillotine in France. That is the same freedom of speech which has caused in our day, more than once, "order to reign in Warsaw." The persons did not speak properly in the apprehension of the judges before whom they were brought. Is that the freedom of speech intended to be secured by our constitution?

Mr. Chief Justice and senators, I have to detain you but a very short time longer, and that is by a few observations concerning the eleventh article, and they will be very few, for the reason that the eleventh article, as I understand it, contains nothing new which needs any notice from me. It appears by the official copy of the articles which is before us—the printed copy—that this article was adopted at a later period than the preceding nine articles; and I suppose—it has that appearance—that the honorable managers, looking over the work they had already performed, perhaps not feeling perfectly satisfied to leave it in the shape in which it then stood, came to the conclusion to add this eleventh article, and they have compounded it out of the materials which they had previously worked up into the others. In the first place, they said, here are the speeches, we will have something about them; and accordingly they begin by the allegation that the president, at the executive mansion, on a certain occasion, made a speech, and without giving his words, but it is attributed to him that he had an intention to declare that this was not a congress, within the meaning of the constitution; all of which is denied in his answer, and there is no proof to support it. The president, by his whole course of conduct, has shown that he could have entertained no such intention as that. He has explained that fully in his answer, and I do not think it necessary to repeat the explanation. Then they come to the old matter of the removal of Mr. Stanton. They say he made this speech denying the competency of congress to legislate, and, following up its intent, he endeavored to remove Mr. Stanton. I have sufficiently discussed that, and I shall not weary the patience of the senate by doing so any further. Then they say

that he made this speech, and followed up its intent by endeavoring to get possession of the money appropriated for the military service of the United States. I have said all I desire to say upon that. Then they say that he made it with the intent to obstruct what is called the law "for the better government of the rebel states," passed in March, 1867, and in support of that they have offered a telegram to him from Governor Parsons, and an answer to that telegram from the president, upon the subject of an amendment of the constitution, sent in January before the March when the law came into existence; and, so far as I know, that is the only evidence which they have offered upon that subject. I leave, therefore, with these remarks, that article for the consideration of the senate.

It must be unnecessary for me to say anything concerning the importance of this case, not only now, but in the future. It must be apparent to every one in any way connected with or concerned in this trial that this is and will be the most conspicuous instance which ever has been or can ever be expected to be found of American justice or American injustice,—of that justice which Mr. Burke says is the great standing policy of all civilized states, or of that injustice which is sure to be discovered, and which makes even the wise man mad, and which, in the fixed and immutable order of God's providence, is certain to return to plague its inventors.

ARGUMENT BY BENJAMIN R. CURTIS IN FARRINGTON AGAINST SAUNDERS, IN THE SUPREME COURT OF THE UNITED STATES, 1870.

STATEMENT.

This action was brought to contest the constitutionality of the tax on cotton imposed by the first eight sections of the act of congress of 1866, entitled, "An act to reduce internal taxation, and to amend an act entitled, 'An act to provide internal revenue to support the government, and to pay interest on the public debt, and for other purposes.'"[1] The facts are fully stated in the following argument. From an adverse decision by the lower court, Mr. Curtis, on behalf of the contestant, appealed to the supreme court of the United States, where the judgment of the lower court was affirmed, by a divided court, February 20, 1871. As no opinion was filed, the case was not reported. In subsequent decisions the supreme court has held that a tax is uniform, within the meaning of the constitution, whenever it bears equally upon all things, lands, or persons on which it is imposed, wherever they are found. If these conditions are fulfilled, it is immaterial that there are various localities where the tax is ineffectual for want of subject-matter on which to operate.[2] While, therefore, the constitutional requirement of uniformity has been thus placed at the discretion of congress, subsequent events have served to enforce, rather than to impair, the grounds of this powerful argument.

ARGUMENT.

May it Please Your Honors: This case draws in question the validity of an act of congress, and for that reason, as well as on account of the subject-matter of the law, the question raised is necessarily a grave one. The court is required to compare a law enacted by the people with a law enacted by congress. On that comparison, if it be found both laws can stand, and each have its appropriate operation, of course both are to stand; but, on the other hand, if it is ascertained, to the satisfaction of the judicial mind, that there are some requirements in the constitution, or some prohibitions contained therein, which cannot have their full and appropriate effect if this law is to stand, then this law cannot stand. I do not, may it please your honors, add any adjective. I suppose that this fact must appear to the judicial mind: that there is a necessary conflict between the two laws. I suppose that this fact must be guessed at, or supposed, or conjectured. It must be seen that there is such a necessary con-

[1] 14 Stat. pp. 98-100.
[2] State Railroad Tax Cases, 92 U. S. 612; Head-Money Cases, 112 U. S. 595.

flict. But I do not agree that there is to be any particular tremulousness of judgment in passing on such a question, induced either by a mistaken apprehension of popular jealousy, or any other cause. Nor do I admit that this act of congress comes before the court with any great weight of authority. The remarks made by the attorney general upon that subject seem to me to require much qualification An act of congress may have been passed under such circumstances, and may have so long stood on the statute book, and been so acted on, as to carry with it very great weight as authority; but it depends upon its circumstances whether this be so or not. That act, passed by the first congress which settled the tenure of office of the secretary of war and the other secretaries, and made it dependent upon the pleasure of the president; which was passed by men, a very large part of whom had participated in the formation and adoption of the constitution; which was passed after the most exhaustive debate reported in the proceedings of congress; which was passed under no party heat or feeling whatsoever, and which stood on the statute book from 1789,—nearly three-quarters of a century,—and was practiced upon almost daily by all branches of the government,—an act of congress of that character unquestionably comes before a judicial tribunal, or presents itself anywhere with great weight of authority. But an act of congress, may it please your honors, like this, passed in the heat of war, directed against that product of the enemy's country which was justly looked upon as one of the main causes of the war, continued on the statute book a few years, modified twice, and then repealed with general acquiescence, the men who voted for it giving, as an apology for their votes, that they were acting under the light of the flames of a civil war when they voted for it, and that it was of questionable constitutionality,—such an act of congress does not present itself with any great weight as authority.

I proceed, then, may it please your honors, to examine and compare this act with those provisions of the constitution on which we rely.

And, in the first place, assuming that this is an excise tax, has it that uniformity which the constitution requires? Before proceeding directly to the discussion of this question, it is necessary for me to ask the attention of the court to a few particulars of this law, and some principles connected with it which have a strong and direct bearing upon the main question. The first of these particulars is that this law took effect on the 1st of August,

1866; that the cotton crop of that year was not then gathered; that all existing cotton of former crops had been taxed under other laws, and this law excepts it out in terms.[1] The law says that there shall be a tax "upon all cotton produced within the United States, and upon which no tax has been levied, paid, or collected," etc. Now, all cotton existing at the time when this law took effect had been taxed under former laws; so that this law took effect upon cotton which was then growing in the fields, and was afterwards to be gathered.

The next particular is that this law requires payment or security for the tax before the removal of the product from the place of its growth. In other words, it requires payment or security for the tax while the crop is yet on the land which produced it. It was stated yesterday by the assistant attorney general that the tax was required to be paid before the cotton should be taken out of the collection district where it was produced. But the law is more narrow than that. It is required to be paid before it is taken out of the collection district; but here is a prohibition contained in the law which shows that the law ties the crop to the land which produced it until the tax is paid. It is in the fifth section of the act, as follows: "That it shall be unlawful from and after the first day of September, eighteen hundred and sixty-six, for the owner, master, supercargo, agent, or other person having charge of any vessel, or for any railroad company, or other transportation company, or for any common carrier, or other person, to convey or attempt to convey or transport any cotton, the growth or produce of the United States, from any point in the district in which it shall have been produced," etc.,—not from the district itself, but from any point in the district in which it shall have been produced.

The next particular to which I desire to draw the attention of the court is that the laws of climate and of vegetable growth restrict this product within fixed geographical limits, which limits include about one-third of the states in number, and very much less than half of the territory of the United States. Now, this fact is dependent upon natural causes. It is part of the history of the country. It is drawn from sources of information open to all the world; and ignorance of it, for any practical purpose, I submit, would be simply inexcusable. And it seems to be perfectly well settled, as a matter of technical law, that this court will take judicial notice that this product is regulated by the laws

[1] See 14 Stat. p. 98.

of climate and of vegetable growth in such a manner as to be restricted as I have mentioned. But, inasmuch as this point is one of very great importance in my view of the case, I beg leave to refer your honors to a few authorities upon the subject. The earliest case bearing on this question is found in 9 Wheat. 374. Other cases to which I refer may be found in the following: 7 Pet. 342; 13 Pet. 590; 8 East, 207; 1 Greenleaf, Evidence, p. 7; Starkie, Evidence (8th Am. Ed.) p. 735.

There is reason, in addition to what I have now submitted, why this court should attribute to congress knowledge of this fact, and why the court, in its present action on this subject, should assume that congress knew this fact, legislated in reference to it, and intended that this tax should have the restricted and geographical operation which, from the nature of the case, it must have. And the reason is, or the reasons are, that the legislation of congress has designedly furnished to itself, as well as to this court, and to the whole country and the world, precise and detailed information upon this subject, first, in every census which has been taken; secondly, in special acts which congress has passed bearing more or less directly on this subject, and, among others, those that require returns of exports; thirdly, because congress in 1862, four years before this act was passed, established a bureau of agriculture, and made it the duty of the head of that bureau to make annual reports to congress, which reports cover this subject. I submit, then, that your honors will take judicial notice of this fact, and will also attribute to congress knowledge of it, and an intention to legislate in reference to it.

This, then, is a case where the subject of this tax is certain to be found within known geographical limits, and is certain not to be found outside of them; and the question is whether a tax whose subject can exist and be found for taxation only in a part of the states is a tax "uniform throughout the United States," within the meaning of those words in the constitution. That calls upon the court to decide what is the scope and effect of those words of the constitution, "uniform throughout the United States." And in deciding this question the court will, of course, apply that rule which has so often been announced and applied, —that they will look to the words of the constitution, and construe them with reference to the object known to have been in view.

Well, now, in the first place, laying aside the object known to have been in view, and looking only to the apparent literal

meaning of those words, "uniform throughout the United States," does this law meet that requirement? The learned attorney general says it contains the words, "all cotton," and it does contain them,—"a tax of three cents per pound," etc., "upon all cotton produced within the United States." Undoubtedly it contains those words. But these are not the only territorial words, so to speak, which the act contains. When the act comes to describe the place where the tax is to be paid, and the place where this subject-matter is to be found, and consequently the place where this law is to operate, it describes those collection districts in which cotton is raised. These are the places where this law is to operate territorially,—those collection districts of the United States in which cotton is produced. And these special words, showing the design and operation of the law, necessarily qualify the general words which are first used,—"throughout the United States." They show what congress contemplated when it laid this tax,—that it was to be a tax that was to operate, not "throughout the United States," but in those collection districts of the United States where cotton could be raised, and there alone.

Now, suppose, may it please your honors, that this law, instead of using the words, "throughout the United States," had said, "in eleven enumerated states,"—"a tax is imposed of three cents per pound upon all cotton raised in eleven enumerated states." Would anybody undertake to say that that was a tax law which was "uniform throughout the United States"? Why, on its face it would impose on the inhabitants of those eleven states a grievous burden, no part of which was to be borne, or could possibly be borne, under the law, by any inhabitant of any other state. I submit that that question would not stand a moment's inquiry. If, instead of these general words, allow me to repeat, congress had enumerated eleven states, and said, "A tax of three cents per pound shall be paid on the cotton raised in those eleven states," I do not think the man could be found who would undertake to say that that was a law "uniform throughout the United States." But I respectfully submit that, although the eleven states are not enumerated in the manner I have supposed, they are effectually enumerated by this law. The legal effect of this law —the known legal effect of it; the legal effect which this court contemplates as belonging to it; the legal effect which congress intended it should have—is exactly the same as if the eleven states in which cotton grows had been enumerated in the law. And, that being so,—that being certain which is thus made certain,—how does the law differ from what it would have been if

the states in which it grows had been actually enumerated? The law says that the tax is to be levied and paid in those collection districts where cotton grows. This court knows judicially that those districts are in but eleven states of the Union; and this court knows that congress knew it at the time when it passed the law, and that congress intended the law should so operate. How, then, if we look only to the clear legal effect of the words of this law,—how is it possible to hold that it is conformable to the requirement of the constitution that there shall be no excise law which is not uniform throughout the United States?

But I apprehend, may it please your honors, that this is by no means the strength of the argument. According to the rule which I have alluded to just now, it is not enough to look to the words of the constitution,—there must be kept in view the purpose which those words were designed to accomplish. And, on the one hand, a construction is not to be given to the language of the constitution which would prevent the full exercise of a power granted by the constitution; nor, on the other hand, shall such a construction be given to its language as would arrest the full operation of a prohibition or restriction which it contains. And in ascertaining what is the effectual operation of a power, or of a prohibition or restriction upon it, it is necessary to look to the objects known and acknowledged to be accomplished by the grant of power, or by the insertion of the restriction.

Now, what were the objects of this restriction requiring uniformity throughout the United States? It is known to your honors that, in the convention which formed the constitution, there was the gravest apprehension felt and expressed lest the possession of the power of taxation by the general government might be used by one part of the country for the oppression of another part. It was, so to speak, geographical discrimination which was feared, and this fear made itself manifest to such a degree, and with such effect, as to cause the different restrictions upon the power of taxation and regulation of commerce which appear in the constitution. One and all of them have reference to geographical discrimination. This one requiring uniformity throughout the territory of the United States; that requiring that no tax or duty should be imposed on any export from any state; that no privilege should be given to the ports of one state over the ports of another state; that no vessel bound to or from one state should be obliged to enter, clear, or pay any duties in another,—all have reference to the restriction of this power of taxation, so that it could not be used to discriminate in favor of the

inhabitants of one part of the country, and against the inhabitants of another part.

Now, when this constitution came before the people in public discussion, and before the conventions whom the people of the several states selected to represent them in its adoption or rejection, this same jealousy, these same apprehensions, were felt and expressed. They were quieted by assurances given, and repeated over and over again, by the friends of the constitution, that no such power of oppression was left in the constitution; that the securities against it were sufficient; and last, but not least, was employed the persuasive argument—and the sound argument, if their other views were right—that they who would vote the taxes must be the representatives of those who are to pay them, and that this must be so on account of these restrictions imposed by the constitution. But, may it please your honors, if this tax is uniform throughout the United States, within the meaning of the constitution, all were acting under a profound and fatal mistake. Geographical discrimination was not prevented. It could be practiced up to the extent of confiscation, or anything short of it which can be called taxation. The representatives who vote the taxes—the representatives who voted this tax—need not be the representatives of the people who have to pay any part of it. On the contrary, in voting such a tax, they may impose a burden on people whom they did not represent,—a grievous burden,—and just to that extent may relieve from taxation the people whom they do represent. So that, I repeat, if this be a valid tax, uniform, within the meaning of the constitution, the constitution made but faint and unsuccessful attempts to accomplish what those who framed it and those who adopted it believed it had accomplished,—protection against geographical discrimination in taxation.

But it is said by the attorney general—and this seems to be the answer which he mainly relies upon in this part of the case—that the uniformity spoken of by the constitution does not require that the same amount of money should be drawn in taxes from one part of the country as is drawn from another part. I agree to the position. He said truly that probably there was no article which could be selected as a subject of taxation, the practical result of which selection would be that a proportional sum would be drawn from every part of the territory of the United States. If, for instance, congress were to impose a tax on wheat (and wheat is raised in all the states), nevertheless this tax would from some states draw a very much larger sum than from others.

And so of almost all subjects of taxation which could be mentioned. I agree that this kind of uniformity in the results and products of a tax law is not what the constitution contemplated when it demands uniformity. But there would be this striking difference—this tangible, and, as I conceive, controlling difference—between a law which should tax wheat, or tax any article of manufacture, and this law, and that difference is that the law taxing wheat can operate anywhere, and it depends upon the contingent action of individuals, under the law, to what extent it will operate in a particular place, whereas this law is one which cannot operate outside of certain fixed geographical limits. Its operation does not depend upon the contingent action of individuals under the law. It depends on natural laws of climate and vegetable growth, which draw a line around certain geographical territory, and render it just as impossible for cotton to be raised as an agricultural product, and a subject of taxation, outside of that line, as it would be to perform any other natural impossibility, and just as impossible by the laws of nature as it would have been by the law of congress if congress had prohibited cotton from being raised outside of the eleven states. I submit this is a sound, practical distinction between the two. The one law may operate throughout the United States, the degree of its operation depending upon the contingent action of individuals, and, as a judicial question, it would be impossible for the court to say that the operation of such a law is not uniform. The other law can by no possibility operate outside of a restricted territory, and this is as judicially certain as if the words of the law had restricted its effect to certain enumerated states.

I proceed, now, to the next inquiry I desire to submit to the court; that is, whether this tax is invalid by reason of that provision of the constitution which prohibits a tax on exports. It is extremely important, as I conceive, to understand precisely the requirements of this law before considering this question, for these requirements are very peculiar. This has been spoken of as a tax upon cotton, but, properly speaking, it is not a tax on the production of cotton, nor is it a tax on the cotton itself after it is produced. When and for what, under this law, is this tax to be paid? It is required to be paid for two things. One is the consumption of cotton by a manufacturer within the district where it shall have been raised. That is a tax on consumption. The manufacturer is required to keep an account of cotton consumed within the collection district where cotton is raised, and render monthly his statement of the quantity which he has used

in his business. Well, that is a tax on consumption. The residue of the law is taken up with a set of provisions, the substance of which I can shortly state to be that, so long as the planter, or the purchaser from the planter, keeps the cotton where it was raised, no tax can be collected upon it; but if he desires to remove it to a market, he must pay the tax. To answer the question, when and for what is this tax paid? it is paid when the transit to market is to be begun. That is the "when," and the "for what" is for the privilege of making the transit. There is no authority in this law to lay a tax upon any cotton until it is in the predicament of being moved from its place of production to a market. The provisions of the law are that the producer, owner, or holder of the cotton may go to the collector, carrying his cotton with him to places within the district appointed for that purpose, and have it weighed, stamped, and pay the duties upon it, and then it may be moved to a market, or he may apply to the collector to send an officer to his plantation, and there have the cotton weighed and stamped, and the duties paid, he adding to these duties the traveling expenses of the officer, and then he can put his cotton in motion towards a market. So that this is in form and in effect, not a tax upon the production of cotton, but a tax paid when the owner desires to send his cotton to market, and to enable him to obtain the privilege of doing so.

It requires no argument to show that, if congress had power to lay a tax of that kind, that provision of the constitution which prohibits any tax or duty upon exports is a dead letter. Take this case, of which thousands may be imagined: A planter has made a crop of cotton on one of the sea islands, if you please, on the coast of Carolina, or on the bank of one of the great rivers of the southwest. He has made an arrangement with his factor that he will send the cotton to Liverpool. The factor is to make him an advance on it, and ship it to Liverpool. He has his steamboat alongside the bank at his plantation, putting his cotton on board. The tax collector appears and says: "Are you going to remove this from the district? "Yes." "You must pay me the tax to obtain the privilege of doing so." Now, is not that a tax upon exports? Is it any the less a tax on exports because congress, not waiting until the thing can and does present itself as an export,—not waiting for that,—interposes and prevents the owner of the thing from presenting it as an export? If congress cannot lay a tax on cotton presented to the custom house for entry for export, can it prevent the cotton from being presented there for export by a tax? If it may, the constitutional

prohibition is a nullity. The greater necessarily includes the less; and in this law it includes it in so many words. Here is one of its provisions: Any person who shall convey or attempt to convey from any state in which cotton is produced to any port or place without the United States any cotton upon which the tax has not been paid shall be liable to a penalty of one hundred dollars for each bale, the forfeiture of his vehicle, and the cotton, also, to the government.[2] The law has therefore, in just so many words, interposed this tax between the owner of the cotton and the export of the cotton, and has inflicted a penalty for an attempt to export if the tax be not paid.

It was asked yesterday, and certainly the question was a striking one, whether it is a tax on exports necessarily because the subject of a tax, or some part of it, may be exported. And then a further inquiry was made: The state of Louisiana being prevented from taxing exports, cannot the state of Louisiana tax the cotton which its citizens raise? Well, I understand from those who have great experience on the subject, that no such tax ever has been laid. No such case has ever arisen. I am not aware how it is in all the states, but certainly in some of the states—I think I might venture to say in all of the states—there is no tax upon the raw products of agriculture while in the hands of the producer. I understand there is no such tax in any of the southern states, or ever has been.

But, may it please your honors, the question is one which does not apply to this case. When the state of Louisiana insists on levying a tax, not on cotton, but on its transit to the market,—when the state of Louisiana does that,—then the question will arise whether it must not be accompanied by a drawback on exportation. That is what this law does. This law is a tax upon the privilege of removing the article from the place where it was produced towards a market; and if that market is a foreign country, there is the penalty which I have read interposing the tax between the privilege and the enjoyment of the constitutional right of export. When the constitution provided that no tax should be laid on exports, did it not confer the privilege upon everybody who had something which he desired to export of exporting it without the payment of tax? Was it not intended that this privilege should be thus conferred, and that it should be respected and not interfered with? And is it enough to say that, although the tax which is laid is interposed between the market and the arti-

[2] Section 5.

cle, although that is done in words by the law, nevertheless, so long as the law does not call it a tax on exports, it is not a tax on exports? I think your honors will take into consideration the purpose which the framers of the constitution had in view in inserting those words,—the purpose which they had in view in making this prohibition; and if your honors see that this law conflicts with that purpose, and that it does substantially what was intended to be prohibited, the particular name by which it is designated, or the particular mode of arriving at the result, as this court has more than once declared, is immaterial.

I come now to the only remaining question upon which I desire to address the court, and that is, whether this be or be not a direct tax. I admit this tax cannot be apportioned. I admit that congress can lay no direct tax which cannot be apportioned. But I desire to pause a moment here, and say that I am not thereby questioning the power of congress to tax cotton by a direct tax. If the product of land while still on the land,—the last crop,—if that is to be considered the subject of direct tax, what is to prevent congress from taxing cotton? There is certainly reason enough to prevent them from taxing cotton directly, if they tax nothing else. But what is to prevent congress, when it taxes the land, from taxing the agricultural product of the land? Congress cannot apportion a tax on land used for production of cotton, any more than it can apportion a tax on cotton. And yet, will anybody undertake to say that a tax laid on land used for the production of cotton is not a direct tax? It cannot be apportioned, and therefore it cannot be laid. That is the consequence. Not that it becomes an indirect tax; it is a direct tax, but it is one which, because it cannot be apportioned, cannot be laid. This power to lay direct taxes is a limited power. It is limited by the qualification that it must be such a direct tax as can be apportioned. But there is nothing in that clause of the constitution which declares or implies that every direct tax can be apportioned. And it is manifest that it is not true that every direct tax can be apportioned. As I have said, a tax on land used for the production of cotton, or used for the production of wheat, cannot be apportioned. But a tax on all land can be apportioned, and a tax on all agricultural products, including cotton, can be apportioned; and therefore it does not seem to me that, on this basis of apportionment, there is any difference between the product of the land and the land itself.

Looking at this thing, not in a theoretical light, not according to the views of political economists, but according to the exact

and known fact, as every man of common sense must perceive and appreciate it, can a tax upon the land be distinguished from a tax upon the product of that land,—the last crop before it has been removed from the land? Suppose a tax upon the land. What pays it? A part of the crop. This necessarily is appropriated to pay the tax,—directly or indirectly, it matters not which. Suppose the tax is laid on the crop. What pays it then? Why, part of the crop. So that, if the same tax is laid, first on the land, and secondly on the crop, precisely the same thing goes from the producer into the treasury. Now, this is fact, not speculation. And is it possible, upon any ground sanctioned by good sense and right reason, to make a distinction, or suppose that the constitution designedly made a distinction, between a tax on land and a tax on the year's product of the land, before it is removed from the land? They who framed and adopted the constitution included among their number men who had much theoretical knowledge of the subjects which came before them; and I might add that the opponents of the constitution—they who were unfriendly to the constitution—oftentimes indulged themselves in some abstruse, and, as it has proved, even fanciful, theories. But, as a general thing, the men who framed and adopted the constitution were practical statesmen,—not schoolmen, not speculators in abstruse subjects, but practical statesmen,—and they looked as straight as they could at the realities with which they were dealing. Now, if the question had been proposed in any convention which acted on this subject,—if it had been brought before any convention in this form: "The constitution prohibits a tax on land, unless it is apportioned among the states; but the constitution allows congress to tax the product of that land before it is removed from the land, without apportionment,"—would they not have said this is a senseless verbal distinction,—in substance and effect, this is the same tax in both cases? The crop is to pay the tax in each case, and if, before that crop has been severed from the land, so as to put it into a market, and make it the property of a different owner, you undertake to tax it, you cannot make a distinction between that and taxing the land. What would have been the effect, if anybody had been bold enough to present such a scheme, it is not difficult to imagine.

It has been said that the term "direct taxes" is a vague term, and I agree it is. It has been said that, when the question was asked in the convention by Mr. King, "What is a direct tax?" he got no answer. It would seem pretty certain that it was not the general opinion of that convention that the single word "land"

would have made him an answer. That they must have looked beyond that, not in the way of definition, for they have given none,—perhaps not with any very great precision of meaning,—but sufficiently beyond it not to make that a test which has been set up by the learned attorney general, *viz.*, the possibility of apportioning the tax; because I think the court must see that is not a decisive test. We may have direct taxes which cannot be apportioned, as well as indirect taxes.

There is only one other subject as to which I wish to say a few words before I relieve the patience of the court. In this case it appears that the plaintiff in error was the holder or owner of this cotton, and that he was about to remove it from the district. It does not appear that he was about to export it to a foreign country. Now, if your honors should come to the conclusion that, so far as this law operates to prevent persons desiring to export their cotton from exporting it, it is unconstitutional and inoperative, but that, so far as it operates on persons who have no such intention, it is constitutional and operative, then there would be two classes of cases, and it would not appear by the statement of facts to which class this case belonged. But then there comes in another principle, which is equally efficacious for this plaintiff in error, and that is that, when a public officer exacts a tax from a citizen, that public officer must be in a condition to show that he has executed it under law and facts which gave him the authority. The burden is on him; and it is not enough for him to show that there are two classes of cases,—one in which he might exact the tax lawfully, and the other in which he could not exact it lawfully,—and that this case belonged to one or the other. Well, if it belonged to one or the other, he either had or had not the authority, and therefore he did not have it. I do not know whether this case was designedly left in that condition, but it seems to me that it cannot, under the just operations of law, have any practical effect in the decision, and that this case must stand as if it appeared that the endeavor to remove this cotton from the collection district was an endeavor to do that with it which is done with four-fifths or five-sixths of the whole,—send it to a foreign country.

JUDICIAL OPINION IN THE CASE OF DRED SCOTT AGAINST SANDFORD, IN THE SUPREME COURT OF THE UNITED STATES, 1856.

STATEMENT.

During the first half century or more following the adoption of the federal constitution, both the legislative and executive departments of the government made various attempts to compromise the slavery question. In the Dred Scott case the judiciary gratuitously entered upon the hopeless task, and attempted to solve this great political controversy by a legal decision. Of all the various temporary expedients, the Missouri Compromise of 1820 was best calculated to postpone the inevitable settlement. The further compromise of 1850 was, for the most part, simply a further application of the prior agreement to recognize and protect slavery where it already existed, and to restrict it within such limits. But the provisions of the law relating to the return of fugitive slaves were a source of constant irritation to the North, and served as a nucleus for the rapidly increasing anti-slavery sentiment. How long the inevitable conflict could have been postponed by adherence to the doctrine of the Missouri Compromise is a matter of conjecture. But when the South repudiated that settlement by the enactment of the Kansas-Nebraska bill of 1854, and sought to carry slavery into territory from which it had so long been excluded, it at once became apparent that the crisis was imminent. It was at this juncture that the majority of the judges of the supreme court of the United States conceived the plan of settling the controversy by judicial enactment. It may well be believed that these judges were actuated by patriotic motives; they were doubtless persuaded that their determination would quiet the rising storm. These expectations were not realized. Their gratuitous expression of opinion simply hastened the crisis, while it sadly impaired the dignity and authority of the tribunal. The war amendments to the constitution have deprived the actual determination of practical importance, but the significance of this lesson of the futility of judicial interference in political affairs remains unimpaired.

The facts and issues involved in this great case may be briefly stated: A negro named Dred Scott brought an action in the circuit court of the United States in the district of Missouri to establish his freedom. To give the required jurisdiction, he described himself as a citizen of Missouri, and the defendant, the administrator of his reputed master, as a citizen of the state of New York. The defendant interposed a plea to the jurisdiction of the court, claiming that the plaintiff was not a citizen of Missouri, but a negro whose ancestors had been brought to this country from Africa, and sold as slaves. To this plea the court sustained a general demurrer. The defendant then pleaded, in bar of the action, that the plaintiff was a negro slave, and the property of the defendant. This issue was tried upon an agreed statement of facts, from which it appeared that in 1834 Scott was a negro slave belonging to Dr. Emerson, a surgeon in the United States army. In that year, Dr. Emerson took the plaintiff from Missouri to a military post at Rock Island, in the state of Illinois. In 1836 he was again moved by his master to a military post at Fort Snelling, in the territory of the

United States north of 36 deg. 30 min., and north of the state of Missouri. Two years later, Dr. Emerson took the plaintiff back to Missouri, where, before the commencement of his suit, the plaintiff was sold to the defendant as a slave. Scott had brought an action for his freedom in the Missouri courts, and obtained a judgment in his favor; but this judgment was afterwards reversed by the supreme court of Missouri, and remanded to the court below, where it had been continued to await the decision of this case in the United States circuit court. At the trial in the latter court, the jury, acting under instructions from the court, returned a verdict that the plaintiff, his wife and children, were negro slaves, and the lawful property of the defendant. Judgment having been entered upon this verdict, the case was taken to the supreme court of the United States by a writ of error.

The first question before the court naturally arose under the plea to the jurisdiction of the circuit court. If the court decided that Scott, by reason of his African descent, was not a citizen, the usual procedure would have been to direct the circuit court to dismiss the case for want of jurisdiction. If, on the other hand, the court decided that he was a citizen, notwithstanding his African descent, then the question raised by the plea to the merits, relating to his personal *status* as affected by his residence in a free territory, and his return to Missouri, would have to be acted upon. This question involved the constitutional power of congress to prohibit slavery in that part of the Louisiana territory purchased by the United States from France, and the question as to the effect to be given to a residence in the free state of Illinois, and a subsequent return to Missouri. After the consideration of the first argument at the December term, 1855, the judges concluded that it was not necessary to decide the question of citizenship, but that the case should be disposed of on the merits.[1] Justice Nelson prepared an opinion, which was designed to be delivered as the opinion of the majority, in which, after stating that it was unnecessary to pass upon the question of citizenship, he stated that the question upon the merits was whether the removal of the plaintiff with his master from the state of Missouri to the state of Illinois, with a view to a temporary residence, and his subsequent return to the slave state, worked an emancipation. He then decided this question on the ground that the highest court in the state of Missouri had decided that Scott was still a slave, and that, on this question, the supreme court must follow the law as laid down by the highest state tribunal. The conclusion was, therefore, that the judgment of the circuit court, which held Scott to be still a slave, should be affirmed. Before this opinion was announced, however, a motion was made by Justice Wayne, in a conference of the court, for a reargument of the case, and two questions, involving both the jurisdiction and the merits, were framed by the chief justice, to be argued anew. The case was accordingly reargued by Montgomery Blair and George Ticknor Curtis for the plaintiff in error, and by Reverdy Johnson and Senator Geyer, of Missouri, for the slave owner. Justice Wayne, who appears to have taken the initiative, apparently persuaded Chief Justice Taney and Justices Grier and Catron of the expediency of attempting to quiet the agitation of the question of slavery in the territories by affirming that congress had no constitutional power to prohibit its introduction. The opinion of the court to this effect was accordingly pronounced by the chief justice, in which Justice Wayne fully con-

[1] From this conclusion Justices McLean and Curtis dissented.

curred. Justice Nelson read the opinion which he had previously prepared for the court. Justice Grier concurred in Nelson's opinion, and was of the opinion, also, that the act of March 6, 1820, known as the "Missouri Compromise," was unconstitutional, as stated by the chief justice. Justices Daniel and Campbell concurred generally with the chief justice, while Justice Catron thought that the judgment upon the plea in abatement was not open to their examination, but concurred generally with the chief justice upon other points. Justices McLean and Curtis alone dissented, the former believing that the judgment given by the circuit court on the plea in abatement was final. He was also of opinion that a free negro was a citizen, that the constitution justified the act of congress in prohibiting slavery, and that the judgment of the supreme court of Missouri pronouncing Scott to be a slave was illegal.

Mr. Justice Curtis controverted the right of the majority of the judges to decide, under a plea to the jurisdiction of the court, that the court had no jurisdiction, and then to proceed to decide the case on the merits. He dissented from that part of the opinion of the majority of the court in which it was held that a person of African descent cannot be a citizen of the United States, and also from their assumption of authority to examine the constitutionality of the act of congress commonly called the "Missouri Compromise Act," as well as the grounds and conclusions announced in their opinion. "Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the circuit court, and having decided that this plea showed that the circuit court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court. . . . . I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri, save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court, or any court, binding when expressed on a question not legitimately before it. The judgment of this court is that the case is to be dismissed for want of jurisdiction because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."

Since, however, Justice Curtis was of the opinion that the circuit court had jurisdiction, it became necessary for him to consider the question whether its judgment on the merits of the case should stand. After examining the general question whether the plaintiff's *status* as a slave was so changed by his residence within the territory lying north of latitude 36 deg. 30 min. that he was not a slave in the state of Missouri at the time this action was brought, he came to the conclusion that the laws of the United States, in operation in the territory of Wisconsin at the time of the plaintiff's residence there, did act directly upon the *status* of the plaintiff, and changed his *status* to that of a free man. He then proceeded, in the last place, to consider the constitutionality of the legislative act designed to exclude slavery from the territories.

The following selection from Justice Curtis' opinion is confined to his demonstration of the capacity of free persons of color to be citizens, within the meaning of the judiciary act, and of the constitutional authority of congress to exclude slavery from the territories.

OPINION.

I dissent from the opinion pronounced by the chief justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration that he was a citizen of the state of Missouri, and that the defendant was a citizen of the state of New York. It is not doubted that it was necessary to make each of these allegations to sustain the jurisdiction of the circuit court. The defendant denied, by a plea to the jurisdiction, either sufficient or insufficient, that the plaintiff was a citizen of the state of Missouri. The plaintiff demurred to that plea. The circuit court adjudged the plea insufficient; and the first question for our consideration is whether the sufficiency of that plea is before this court for judgment upon this writ of error. The part of the judicial power of the United States conferred by congress on the circuit courts being limited to certain described cases and controversies, the question whether a particular case is within the cognizance of a circuit court may be raised by a plea to the jurisdiction of such court. When that question has been raised, the circuit court must, in the first instance, pass upon and determine it. Whether its determination be final, or subject to review by this appellate court, must depend upon the will of congress; upon which body the constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the judiciary act of 1789, which allows a writ of error from final judgments of circuit courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court. Accordingly it has been held, from the origin of the court to the present day, that circuit courts have not been made by congress the final judges of their own jurisdiction in civil cases; and that, when a record comes here upon a writ of error or appeal, and on its inspection it appears to this court that the circuit court had not jurisdiction, its judgment must be reversed, and the cause remanded, to be dismissed for want of jurisdiction.

It is alleged by the defendant in error in this case that the plea to the jurisdiction was a sufficient plea; that it shows on inspection

of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the state of Missouri; that, upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the constitution, because it was not a suit by a citizen of one state against a citizen of another state. To this it is answered, first, that the defendant, by pleading over, after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea. When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the circuit court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here there was no consent. And, if the benefit of the plea was finally lost, it must be, not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the circuit court on such a plea, when that decision is against the defendant. This is not the law. Whether the decision of the circuit court on a plea to the jurisdiction be against the plaintiff or against the defendant, the losing party may have any alleged error in law, in ruling such a plea, examined in this court on a writ of error, when the matter in controversy exceeds the sum or value of two thousand dollars. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error.[1] If the decision be against the defendant, though he must answer over, and wait for a final judgment in the cause, he may then have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record touching the jurisdiction. The fact that he pleaded over to the merits under compulsion can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For, if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error, and have the ruling reviewed here; while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the cir-

[1] Mollan v. Torrance, 9 Wheat. 537.

cuit court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected that, as the judgment of the circuit court was in favor of the defendant, and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the circuit court had jurisdiction. The practice of this court does not require a technical assignment of errors. Upon a writ of error, the whole record is open for inspection, and, if any error be found in it, the judgment is reversed.[2] It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment which was for his advantage. In this we follow an ancient rule of the common law; but so careful was that law of the preservation of the course of its courts, that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage, if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac. Abr. "Error," H, 4. And this court followed this practice in Capron v. Van Noorden,[3] where the plaintiff below procured the reversal of a judgment for the defendant, on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction. But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the circuit court on the merits, when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not extend. The course of the court is, where no motion is made by either party on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear affirmatively that it does exist.[4] It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted.[5] I con-

[2] Bank of United States v. Smith, 11 Wheat. 171.
[3] 2 Cranch, 126.
[4] Piquignot v. Pennsylvania R. Co., 16 How. 104.
[5] Cutler v. Rae, 7 How. 729.

sider, therefore, that, when there was a plea to the jurisdiction of the circuit court in a case brought here by a writ of error, the first duty of this court is *sua sponte,* if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the circuit court nor this court shall use the judicial power of the United States in a case to which the constitution and laws of the United States have not extended that power.

[Justice Curtis then proceeded to examine the plea to the jurisdiction. When the plaintiff has alleged on the record the necessary citizenship, the defendant must interpose a plea in abatement, the allegations whereof show that the court has not jurisdiction, and it is incumbent on him to show the truth of his plea. The defendant's plea was a special traverse of the plaintiff's allegation of citizenship, and the facts set out in the plea as the ground of the traverse must of themselves constitute, in point of law, a negative of the allegation thus traversed. Upon a demurrer to this plea, the question arose whether the fact that the plaintiff was a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, might be true, and yet the plaintiff be a citizen of the state of Missouri, within the meaning of the constitution and laws of the United States, which confer on citizens of one state the right to sue citizens of another state in the circuit courts.]

Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of states other than Missouri in the courts of the United States. So that, under the allegations contained in this plea and admitted by the demurrer, the question is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the constitution uses the language: "A citizen of the United States at the time of the adoption of this constitution." One mode of approaching this question is to inquire who were citizens of the United States at the time of the adoption of the constitution. Citizens of the United States at the time of the adoption of the constitution can have been no other than citizens of the United States under the confederation. By the articles of confederation, a government was organized, the style whereof was, "The United States of America."

This government was in existence when the constitution was framed and proposed for adoption, and was to be superseded by the new government of the United State of America, organized under the constitution. When, therefore, the constitution speaks of the citizenship of the United States existing at the time of the adoption of the constitution, it must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption. Without going into any question concerning the powers of the confederation to govern the territory of the United States out of the limits of the states, and consequently to sustain the relation of government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several states were citizens of the United States under the confederation. That government was simply a confederacy of the several states, possessing a few defined powers over subjects of general concern, each state retaining every power, jurisdiction, and right not expressly delegated to the United States in congress assembled. And no power was thus delegated to the government of the confederation to act on any question of citizenship, or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several states, and to the natural consequence of such action, that the citizens of each state should be citizens of that confederacy into which that state had entered, the style whereof was, "The United States of America."

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the confederation, and consequently at the time of the adoption of the constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the states under the confederation at the time of the adoption of the constitution. Of this there can be no doubt. At the time of the ratification of the articles of confederation, all free native-born inhabitants of the states of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those states, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. The supreme court of North Carolina, in the case of State v. Manuel,[6] has declared the law of that state on this subject in terms which I believe to be as sound law in the other states I have enumerated as it was in North Carolina.

[6] 4 Dev. & B. 20.

"According to the laws of this state [says Judge Gaston, in delivering the opinion of the court] all human beings within it who are not slaves fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British king. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European king to a free and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the state, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina; and all free persons born within the state are born citizens of the state. The constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety that, under it, free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color a few years since by our amended constitution."

In State v. Newsom,[7] decided in 1844, the same court referred to this case of State v. Manuel, and said: "That case underwent a very laborious investigation, both by the bar and the bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which gave it a controlling influence and authority on all questions of a similar character." An argument from speculative premises, however well chosen, that the then state of opinion in the commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the constitution of 1780 of that state, admitted to the condition of citizens, would be received with surprise by the people of that state who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, were by that constitution made citizens of the state; and such of them as have had the necessary qualifications have held and exercised the elective franchise as citizens from that time to the present.[8] The constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the state having the necessary qualifications," of which color or descent was not one. The constitution

[7] 5 Ired. 253.

[8] See Com. v. Aves, 18 Pick. 210.

of New York gave the right to vote to "every male citizen * * * who shall have been an inhabitant," etc., making no discrimination between free colored persons and others.[9] That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £50 proclamation money, clear estate." New York, by its constitution of 1820, required colored persons to have some qualifications as prerequisites for voting which white persons need not possess. And New Jersey, by its present condition, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry except to show that, before they were made, no such restrictions existed; and colored, in common with white, persons, were not only citizens of those states, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted in the Declaration of Independence that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is that a calm comparison of these assertions of universal abstract truths, and of their own individual opinions and acts, would not leave these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them, nor true in itself, to allege that they intended to say that the Creator of all men had endowed the white race exclusively with the great natural rights which the Declaration of Independence asserts. But this is not the place to vindicate their memory. As I conceive, we should deal here, not with such disputes,—if there can be a dispute concerning this subject,—but with those substantial facts evinced by the written constitutions of states, and by the notorious practice under them. And they show, in a manner which no argument can obscure, that, in some of the original thirteen states, free colored persons, before and at the time of the formation of the constitution, were citizens of those states.

The fourth of the fundamental articles of the confederation was as follows: "The free inhabitants of each of these states—paupers, vagabonds, and fugitives from justice excepted—shall be

[9] See Const. N. Y. art. 2; 1 Rev. St. N. Y. p. 126.

entitled to all the privileges and immunities of free citizens in the several states." The fact that free persons of color were citizens of some of the several states, and the consequence that this fourth article of the confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected. On the 25th of June, 1778, the articles of confederation being under consideration by the congress, the delegates from South Carolina moved to amend this fourth article by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two states voted for the amendment, eight states against it, and the vote of one state was divided. The language of the article stood unchanged; and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear that under the confederation, and at the time of the adoption of the constitution, free colored persons of African descent might be, and by reason of their citizenship in certain states were, entitled to the privileges and immunities of general citizenship of the United States.

Did the constitution of the United States deprive them or their descendants of citizenship? That constitution was ordained and established by the people of the United States, through the action in each state of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of that state. In some of the states, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of "the people of the United States," by whom the constitution was ordained and established, but in at least five of the states they had the power to act, and doubtless did act, by their suffrages upon the question of its adoption. It would be strange if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established. I can find nothing in the constitution which *proprio vigore* deprives of their citizenship any class of persons who were citizens of the United States at the time of its

adoption, or who should be native-born citizens of any state after its adoption; nor any power enabling congress to disfranchise persons born on the soil of any state, and entitled to citizenship of such state by its constitution and laws. And my opinion is that, under the constitution of the United States, every free person born on the soil of a state, who is a citizen of that state by force of its constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion. The first section of the second article of the constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been in conformity with the common law that free persons born within either of the colonies were subjects of the king; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several states, all such persons ceased to be subjects and became citizens of the several states, except so far as some of them were disfranchised by the legislative power of the states, or availed themselves seasonably of the right to adhere to the British crown in the civil contest, and thus to continue British subjects.[10] The constitution having recognized the rule that persons born within the several states are citizens of the United States, one of four things must be true: First, that the constitution itself has described what native-born persons shall or shall not be citizens of the United States; or, second, that it has empowered congress to do so; or, third, that all free persons, born within the several states, are citizens of the United States; or, fourth, that it is left to each state to determine what free persons, born within its limits, shall be citizens of such state, and thereby be citizens of the United States. If there be such a thing as citizenship of the United States acquired by birth within the states, which the constitution expressly recognizes, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the constitution itself has defined citizenship of the United States by declaring what persons, born within the several states, shall or shall not be citizens of the United States, will not be pre-

[10] McIlvaine v. Coxe's Lessee, 4 Cranch, 209; Inglis v. Sailor's Snug Harbour, 3 Peters, 99; Shanks v. Dupont, 3 Peters, 242.

tended. It contains no such declaration. We may dismiss the first alternative as without doubt unfounded.

Has it empowered congress to enact what free persons, born within the several states, shall or shall not be citizens of the United States? Before examining the various provisions of the constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the constitution has empowered congress to create privileged classes within the states, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the constitution has enabled congress to declare what free persons, born within the several states, shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the control of congress, it must depend wholly on its discretion. For certainly no limits of that discretion can be found in the constitution, which is wholly silent concerning it; and the necessary consequence is that the federal government may select classes of persons within the several states who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the states may be president or vice-president of the United States, or members of either house of congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of congress. By virtue of it, though congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the federal government. It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the states to the general government, but of controlling the political condition of the people of the United States. Certainly, we ought to find this power granted by the constitution, at least by some necessary inference, before we can say it does not remain to the states or the people. I proceed, therefore, to examine all the provisions of the constitution which may have some bearing on this subject.

Among the powers expressly granted to congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this would do violence to the meaning of the term "natu-

ralization," fixed in the common law,[11] and in the minds of those who concurred in the framing and adopting of the constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen that it was employed in the Declaration of Independence. It was in this sense it was expounded in the "Federalist,"[12] has been understood by congress, by the judiciary,[13] and by commentators on the constitution.[14] It appears, then, that the only power expressly granted to congress to legislate concerning citizenship is confined to the removal of the disabilities of foreign birth. Whether there be anything in the constitution from which a broader power may be implied will best be seen when we come to examine the two other alternatives, which are whether all free persons born on the soil of the several states, or only such of them as may be citizens of each state respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth. Undoubtedly, as has already been said, it is a principle of public law, recognized by the constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that, though the constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign states whose people were then citizens were not only to continue in existence, but with powers unimpaired except so far as they were granted by the people to the national government.

Among the powers unquestionably possessed by the several states was that of determining what persons should, and what persons should not, be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First, the power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization, to be administered and applied by the courts; second, determining what persons should enjoy the privileges of citizenship in respect to the internal affairs of the several states; third, what native-born persons should be citizens of the United States. The first-named power, that of es-

[11] Co. Litt. 8a, 129a; 2 Ves. Sr. 286; 2 Bl. Comm. 293.
[12] No. 42.
[13] 2 Wheat. 259, 269; 3 Wash. 313, 322; 12 Wheat. 277.
[14] 3 Story, Com. Const. 1-3; 1 Rawle, Const. 84-88; 1 Tucker, Bl. Comm. App. 255-259.

tablishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it we find a particular part of this entire power separated from the residue, and conferred on the general government, there arises a strong presumption that this is all which is granted, and that the residue is left to the states and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the constitution as touch this subject.

I will examine each which can have any possible bearing on this question. The first clause of the second section of the third article of the constitution is: "The judicial power shall extend to controversies 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." I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill-will between different states, or a particular state and a foreign nation. At the same time, I would remark, in passing, that it has never been held—I do not know that it has ever been supposed—that any citizen of a state could bring himself under this clause, and the eleventh and twelfth sections of the judiciary act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause only because it is one of the places where citizenship is mentioned by the constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several states. It recognizes that, but it does not recognize citizenship of the United States as something distinct therefrom. As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several states, in the

contemplation of the constitution. This cannot be said of other clauses of the constitution, which I now proceed to refer to.

"The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." Nowhere else in the constitution is there anything concerning a general citizenship; but here privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each state. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the constitution or laws of the United States. They are to be citizens of the several states, and, as such, the privileges and immunities of general citizenship, derived from and guarantied by the constitution, are to be enjoyed by them. It would seem that, if it had been intended to constitute a class of native-born persons within the states, who should derive their citizenship of the United States from the action of the federal government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the states upon persons not citizens of the United States. And, if it was intended to secure these rights only to citizens of the United States, how has the constitution here described such persons? Simply as citizens of each state. But, further, though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American constitution; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that constitution, and as being decisive to this extent: that all such persons as are allowed by the constitution to exercise the elective franchise, and thus to participate in the government of the United States, must be deemed citizens of the United States. Here, again, the consideration presses itself upon us that, if there was designed to be a particular class of native-born persons within the states, deriving their citizenship from the constitution and laws of the United States, they should at least have been referred to as those by whom the president and house of representatives were to be elected, and to whom they should be responsible. Instead of that, we again find this subject referred to the laws of

the several states. The electors of president are to be appointed in such manner as the legislature of each state may direct, and the qualifications of electors of members of the house of representatives shall be the same as for electors of the most numerous branch of the state legislature.

Laying aside, then, the case of aliens, concerning which the constitution of the United States has provided, and confining our view to free persons born within the several states, we find that the constitution has recognized the general principle of public law that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that, when we turn to the constitution for an answer to the question, what free persons, born within the several states, are citizens of the United States? the only answer we can receive from any of its express provisions is, the citizens of the several states are to enjoy the privileges and immunities of citizens in every state, and their franchise as electors under the constitution depends on their citizenship in the several states. Add to this that the constitution was ordained by the citizens of the several states; that they were "the people of the United States," for whom and whose posterity the government was declared in the preamble of the constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the constitution," within the meaning of those words in that instrument; that, by them, the government was to be and was in fact organized; and that no power is conferred on the government of the Union to discriminate between them or to disfranchise any of them,—the necessary conclusion is that those persons born within the several states who, by force of their respective constitutions and laws, are citizens of the state, are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject. It has been often asserted that the constitution was made exclusively by and for the white race. It has already been shown that in five of the thirteen original states colored persons then possessed the elective franchise, and were among those by whom the constitution was ordained and established. If so, it is not true in point of fact that the constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the constitution, but contradicted by its opening declaration that it was ordained and established by the

people of the United States for themselves and their posterity; and, as free colored persons were then citizens of at least five states, and so in every sense part of the people of the United States, they were among those for whom, and whose posterity, the constitution was ordained and established. Again, it has been objected that, if the constitution has left to the several states the rightful power to determine who of their inhabitants shall be citizens of the United States, the states may make aliens citizens. The answer is obvious. The constitution has left to the states the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States. It has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in congress. It has been further objected that, if free colored persons, born within a particular state, and made citizens of that state by its constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the constitution, such persons would be entitled to all the privileges and immunities of citizens in the several states; and, if so, then colored persons could vote and be eligible to not only federal offices, but offices even in those states whose constitutions and laws disqualify colored persons from voting or being elected to office. But this position rests upon an assumption which I deem untenable. Its basis is that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen.[15] That this is not true under the constitution of the United States seems to me clear. A naturalized citizen cannot be president of the United States, nor a senator till after the lapse of nine years, nor a representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia or of either of the territories eligible to the office of senator or representative in congress, though he may be a citizen of the United States. So, in all the states, numerous persons, though citizens, cannot vote or cannot hold office, either on account of their age or sex, or the want of the necessary legal qualifications.

The truth is that citizenship under the constitution of the United States is not dependent on the possession of any particular political, or even of all civil, rights, and any attempt so to define it must lead to error. To what citizens the elective

[15] See 1 Litt. 326.

franchise shall be confided is a question to be determined by each state in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way. One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females. One may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the constitution does not confer on the citizens of one state in all other states specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a state by reason of the operation of causes other than mere citizenship are not conferred. Thus, if the laws of a state require, in addition to citizenship of the state, some qualification for office, or the exercise of the elective franchise, citizens of all other states coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the state in which they reside, but because they, in common with the native-born citizens of that state, must have the qualifications prescribed by law for the enjoyment of such privileges under its constitution and laws. It rests with the states themselves so to frame their constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the states will not deny to any of its own citizens a particular privilege or immunity, —if it confer it on all of them by reason of mere naked citizenship, —then it may be claimed by every citizen of each state by force of the constitution; and it must be borne in mind that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each state may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each state. The language of the constitution is: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." If each state may make such persons its citizens,

they become, as such, entitled to the benefits of this article, if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several states.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the fourth of the articles of confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice,—probably because these cases could be dealt with under the police powers of the states, and a special provision therefor was not necessary. It has been suggested that, in adopting it into the constitution, the words "free inhabitants" were changed for the word "citizens." An examination of the forms of expression commonly used in the state papers of that day, and an attention to the substance of this article of the confederation, will show that the words "free inhabitants," as then used, were synonymous with "citizens." When the articles of confederation were adopted, we were in the midst of the war of the Revolution; and there were very few persons then embraced in the words "free inhabitants" who were not born on our soil. It was not a time when many, save the children of the soil, were willing to embark their fortunes in our cause; and, though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical, rather than a substantial, difference. If we look into the constitutions and state papers of that period, we find "the inhabitants or people of these colonies," or "the inhabitants of this state or commonwealth," employed to designate those whom we should now denominate "citizens." The substance and purpose of the article prove it was in this sense it used these words: it secures to the free inhabitants of each state the privileges and immunities of free citizens in every state. It is not conceivable that the states should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the states where they dwelt; that, under this article, there was a class of persons in some of the states, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other states; and the just conclusion is that, though the constitution cured an inaccuracy of language, it left the substance of this article in the national constitution the same as it was in the articles of confederation.

The history of this fourth article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known

to those who framed and adopted the constitution. That, under this fourth article of the confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was in substance placed in and made part of the constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong that the practical effect which it was designed to have and did have under the former government, it was designed to have and should have under the new government. It may be further objected that, if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave, and thereby make him a citizen. Not so. The master is subject to the will of the state. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political *status* of the freed man, —depend, not on the will of the master, but on the will of the state, upon which the political *status* of all its native-born inhabitants depends. Under the constitution of the United States, each state has retained this power of determining the political *status* of its native-born inhabitants, and no exception thereto can be found in the constitution. And if a master in a slaveholding state should carry his slave into a free state, and there emancipate him, he would not thereby make him a native-born citizen of that state, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers the states may exercise to confer privileges of citizenship on persons not born on their soil, the constitution of the United States does not recognize such citizens. As has already been said, it recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the states the application of that principle to individual cases. It secured to the citizens of each state the privileges and immunities of citizens in every other state. But it does not allow to the states the power to make aliens citizens, or permit one state to take persons born on the soil of another state, and, contrary to the laws and policy of the state where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the constitution; and, when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying

that all the free native-born inhabitants of a state, who are its citizens under its constitution and laws, are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is to show that congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The constitution has not excluded them; and, since that has conferred the power on congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the constitution of the United States. It may be added that the power to make colored persons citizens of the United States under the constitution has been actually exercised in repeated and important instances.[16]

I do not deem it necessary to review at length the legislation of congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the government that no such persons are citizens of the United States. Undoubtedly, they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus, the act of May 17, 1792, for the organization of the militia, directs the enrollment of "every free, able-bodied, white male citizen." An assumption that none but white persons are citizens would be as inconsistent with the just import of this language as that all citizens are able-bodied or males. So the act of February 28, 1803,[17] to prevent the importation of certain persons into states, where, by the laws thereof, their admission is prohibited, in its first section forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States," etc. The acts of March 3, 1813, § 1,[18] and March 1, 1817, § 3,[19] concerning seamen, certainly imply there may be

[16] See the Treaties with the Choctaws, of September 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadalupe Hidalgo, February 2, 1848, art. 8.

[17] 2 Stat. 205.

[18] 2 Stat. 809.

[19] 3 Stat. 351.

persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the states, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the states, nor with their being citizens of the United States. Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange if laws were found on our statute book to that effect, when, by solemn treaties, large bodies of Mexican and North American Indians, as well as free colored inhabitants of Louisiana, have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the state of Missouri into the Union, this question was agitated. Its result is found in the resolution of congress of March 5, 1821, for the admission of that state into the Union. The constitution of Missouri, under which that state applied for admission into the Union, provided that it should be the duty of the legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the state under any pretext whatever." One ground of objection to the admission of the state under this constitution was that it would require the legislature to exclude free persons of color, who would be entitled, under the second section of the fourth article of the constitution, not only to come within the state, but to enjoy there the privileges and immunities of citizens. The resolution of congress admitting the state was upon the fundamental condition "that the constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the states of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the constitution of the United States." It is true that neither this legislative declaration, nor anything in the constitution or laws of Missouri, could confer or take away any privilege or immunity granted by the constitution; but it is also true that it expresses the then conviction of the legislative power of the United States that free negroes, as citizens of some of the states, might be entitled to the privileges and immunities of citizens in all the states.

The conclusions at which I have arrived on this part of the case are, first, that the free native-born citizens of each state are citizens of the United States; second, that, as free colored persons born within some of the states are citizens of those states, such persons are also citizens of the United States; third, that every such citizen, residing in any state, has the right to sue and is liable to be sued in the federal courts, as a citizen of that state in which he resides; fourth, that, as the plea to the jurisdiction in this case shows no facts except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States and his residence in the state of Missouri, the plea to the jurisdiction was bad, and the judgment of the circuit court overruling it was correct. I dissent, therefore, from that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of congress commonly called the "Missouri Compromise Act," and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the circuit court, and having decided that this plea showed that the circuit court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the court. In the course of that opinion it became necessary to comment on the case of LeGrand v. Darnall.[20] In that case, a bill was filed by one alleged to be a citizen of Maryland against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves, and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer; and upon these and other facts the court made its decree, founded on the principle that a

[20] Reported in 3 Peters, 664.

devise of land by a master to a slave was by implication also a bequest of his freedom. The facts that the defendant was of African descent, and was born a slave, were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of Le Grand v. Darnall by saying, among other things, that, as the fact that the defendant was born a slave only came before this court on the bill and answer, it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case. In this I concur. Since the decision of this court in Livingston v. Story,[21] the law has been settled that, when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record to see whether those averments are true, except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs with reference to the personal disability of the plaintiff. This is the settled law of the court, affirmed so lately as Sheppard v. Graves[22] and Wickliffe v. Owings.[23] But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri save that raised by the plea to the jurisdiction; and I do not hold any opinion of this court or any court binding when expressed on a question not legitimately before it.[24] The judgment of this court is that the case is to be dismissed for want of jurisdiction, because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

[21] 11 Pet. 351.
[22] 14 How. 5120.
[23] 17 How. 51. See, also, De Wolf v. Rabaud, 1 Pet. 476.
[24] Carroll v. Carroll, 16 How. 275.

But as, in my opinion, the circuit court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

[After an exhaustive examination of the question of the plaintiff's *status*, Justice Curtis reached the following conclusions:

"First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another state or country upon the *status* of the slave, while resident in such foreign state or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that state.

"Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the territory of Wisconsin with his master, who went thither to reside for an indefinite length of time in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave, and it is in conformity with the rules of international law that this change of *status* should be recognized everywhere.

"Third. The laws of the United States, in operation in the territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the *status* of the plaintiff, and change his *status* to that of a free man.

"Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract, a marriage in that territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that state, or of some right derived from them, which cannot be shown in this case, because the master consented to it.

"Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery."

With respect to the contention that the decision of the supreme court of Missouri had settled the controversy by its decision in Scott v. Emerson[25] he said: "To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding states, and with fundamental principles of private international law. . . . But, it is further insisted, we are bound to follow that decision. I do not think so. . . . Upon such a question, not depending upon any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of state courts, however great respect might be felt for their learning, ability, and impartiality. . . Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires to the authority of the decision in 15 Missouri Reports."]

I have thus far assumed, merely for the purpose of the argument, that the laws of the United States respecting slavery in

[25] 15 Mo. 576.

this territory were constitutionally enacted by congress. It remains to inquire whether they are constitutional and binding laws. In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of congress over the territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side, it was maintained that the constitution contains no express grant of power to organize and govern what is now known to the laws of the United States as a territory; that whatever power of this kind exists is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any state, and the necessity for its having some government. On the other side, it was insisted that the constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth article of the constitution. To determine which of these is the correct view, it is needful to advert to some facts respecting this subject which existed when the constitution was framed and adopted. It will be found that these facts not only shed much light on the question whether the framers of the constitution omitted to make a provision concerning the power of congress to organize and govern territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the states insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States by the war carried on by them under a common government, and for the common interest. This dispute was further complicated by unsettled questions of boundary among several states. It not only delayed the accession of Maryland to the confederation, but at one time seriously threatened its existence.[26] Under the pressure of these circumstances, congress earnestly recommended to the several states a cession of their claims and rights to the United States;[27] and before the constitution was framed, it had been begun. That by New York had been made on the first day of March, 1781; that of Virginia, on the first day of March, 1784; that of Massachusetts, on the nineteenth day of April, 1785; that

[26] 5 Jour. Cong. 208, 442.

[27] 5 Jour. Cong. 442.

of Connecticut, on the fourteenth day of September, 1786; that of South Carolina, on the eighth day of August, 1787, while the convention for framing the constitution was in session. It is very material to observe, in this connection, that each of these acts cedes, in terms, to the United States, as well the jurisdiction as the soil. It is also equally important to note that, when the constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several states, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made by North Carolina on the twenty-fifth day of February, 1790, and by Georgia on the twenty-fourth day of April, 1802. The terms of these last-mentioned cessions will hereafter be noticed in another connection; but I observe here that each of them distinctly shows upon its face that they were not only in execution of the general plan proposed by the congress of the confederation, but of a formed purpose of each of these states existing when the assent of their respective people was given to the constitution of the United States.

It appears, then, that, when the federal constitution was framed and presented to the people of the several states for their consideration, the unsettled territory was viewed as justly applicable to the common benefit, so far as it then had or might attain thereafter a pecuniary value, and so far as it might become the seat of new states to be admitted into the Union upon an equal footing with the original states; and also that the relations of the United States to that unsettled territory were of different kinds. The titles of the states of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers; but a confident expectation, founded on their appreciation of the justice of the general claim, and fully justified by the results, was entertained that these cessions would be made. The ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay northwest of the river Ohio. But it must have been apparent, both to the framers of the constitution and the people of the several states who were to act upon it, that the government thus provided for could not continue unless the constitution should confer on the United States the necessary powers to continue it. That temporary government, under the

ordinance, was to consist of certain officers, to be appointed by and responsible to the congress of the confederation. Their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the territory, it was an ordinary act of legislation, deriving its force from the legislative power of congress, and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the constitution, must necessarily be officers of the United States, and not of the congress of the confederation, appointed and commissioned by the president, and exercising powers derived from the United States under the constitution. Such was the relation between the United States and the Northwestern Territory, which all reflecting men must have foreseen would exist when the government created by the constitution should supersede that of the confederation. That if the new government should be without power to govern this territory, it could not appoint and commission officers and send them into the territory, to exercise there legislative, judicial, and executive power; and that this territory, which was even then foreseen to be so important, both politically and financially, to all the existing states, must be left not only without the control of the general government in respect to its future political relations to the rest of the states, but absolutely without any government save what its inhabitants, acting in their primary capacity, might from time to time create for themselves. But this Northwestern Territory was not the only territory the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of "all the territory included within the river Mississippi and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river to the said mountains, and thence to run a due west course to the river Mississippi." It is true that by subsequent explorations it was ascertained that the source of the Tugaloo river, upon which the title of South Carolina depended, was so far to the northward that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from

the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession; and there can be no doubt that the state of South Carolina, in making the cession, and the congress in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the crown of Great Britain by the treaty of peace, though its quantity or extent then remained to be ascertained.[28] It must be remembered also, as has been already stated, that not only was there a confident expectation entertained by the other states that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent that the just title to this "back country," as it was termed, had vested in the United States by the treaty of peace, and could not rightfully be claimed by any individual state.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight. The congress of the confederation had assumed the power not only to dispose of the lands ceded, but to institute governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The convention for framing the constitution was then in session at Philadelphia. The proof is direct and decisive that it was known to the convention.[29] It is equally clear that it was admitted and understood not to be within the legitimate powers of the confederation to pass this ordinance.[30] The importance of conferring on the new government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived is clearly shown by the Federalist,[31] where this very argument is made use of in commendation of the con-

[28] This statement that some territory did actually pass by this cession is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of Howard v. Ingersoll, reported in 13 Howard, 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession, but, as the fact is not important to the argument, I have not thought it necessary further to investigate it.

[29] It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to General Washington on the 15th of July. See Cor. of Am. Rev., vol. 4, p. 261, and Writings of Washington, vol. 9, p. 174.

[30] Jefferson's Works, vol. 9, pp. 251, 276; Federalist, Nos. 38, 43.

[31] No. 38.

stitution. Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory ceded and expected to be ceded could not have escaped the attention of those who framed or adopted the constitution, and that, if it did not escape their attention, it could not fail to be adequately provided for. Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small states felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the confederation, and as to which all the states had deep pecuniary and political interests, and which had been so recently and constantly agitated, was nevertheless overlooked; or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern which belonged to the care of the general government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new states to be framed out of the ceded territory early attracted the attention of the convention. Among the resolutions introduced by Mr. Randolph on the 29th of May was one on this subject,[32] which, having been affirmed in committee of the whole on the 5th of June,[33] and reported to the convention on the 13th of June,[34] was referred to the committee of detail, to prepare the constitution, on the 26th of July.[35] This committee reported an article for the admission of new states "lawfully constituted or established." Nothing was said concerning the power of congress to prepare or form such states. This omission struck Mr. Madison, who, on the 18th of August,[36] moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary governments for new states arising therein. On the 29th of August,[37] the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small states, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the constitution. This met with general appro-

[32] Res. No. 10, 5 Elliot, 128.
[33] 5 Elliot, 156.
[34] 5 Elliot, 190.
[35] 5 Elliot, 376.
[36] 5 Elliot, 439.
[37] 5 Elliot, 492.

bation, and was at once adopted. The whole section is as follows:

"New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of congress.

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or any particular state."

That congress has some power to institute temporary governments over the territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the territory of the United States could not and did not escape the attention of the convention and the people, and that the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory, and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the constitution manifestly intended to relate to the territory, and to convey to congress some authority concerning it. It would seem, also, that when we find the subject-matter of the growth and formation and admission of new states, and the disposal of the territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision, and that an indispensably necessary power to institute temporary governments, and to legislate for the inhabitants of the territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word "territory." Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus, Chief Justice Marshall, in United States v. Bevans,[88] says: "What, then, is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is coextensive with its territory." Examples might easily be multiplied of this use of the word, but they are unneces-

[88] 3 Wheat. 386.

sary, because it is familiar. But the word "territory" is not used in this broad and general sense in this clause of the constitution. At the time of the adoption of the constitution, the United States held a great tract of country northwest of the Ohio; another tract, then of unknown extent, ceded by South Carolina; and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States, and out of the limits of any particular state, and the cessions embraced the civil and political jurisdiction, and so much of the soil as had not previously been granted to individuals.

These words, "territory belonging to the United States," were not used in the constitution to describe an abstraction, but to identify and apply to these actual subjects matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired, and, this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described. I say, the essential qualities and incidents. But, in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration, not only all the particular facts which were immediately before them, but the great consideration ever present to the minds of those who framed and adopted the constitution,—that they were making a frame of government for the people of the United States and their posterity, under which they hoped the United States might be, what they have now become, a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory.[89] With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those states. No doubt has been suggested that the first clause of this same article, which enabled congress to admit new states, refers to and includes new states to be formed out

[89] See Sere v. Pitot, 6 Cranch, 336; American Ins. Co. v. Canter, 1 Peters, 542.

of this territory, expected to be thereafter ceded by North Carolina and Georgia, as well as new states to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded. No reason has been suggested why any reluctance should have been felt by the framers of the constitution to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions,—a circumstance in no way material as respects the necessity for rules and regulations, or the propriety of conferring on the congress power to make them; and if we look at the course of the debates in the convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance. Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those states and by the United States. Their respective claims are purposely left unsettled by the express words of this clause, and, when cessions were made by those states, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims, so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States, and consequently to know whether it was within or without the authority, conferred by this clause, to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur. There is not, in my judgment, anything in the language, the history, or the subject-matter of this article which restricts its operation to territory owned by the United States when the constitution was adopted.

But it is also insisted that provisions of the constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the constitution did not

authorize the federal government to acquire foreign territory, and consequently has made no provision for its government when acquired; or that, though the acquisition of foreign territory was contemplated by the constitution, its provisions concerning the admission of new states, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations. It is undoubtedly true that at the date of the treaty of 1803, between the United States and France, for the cession of Louisiana, it was made a question whether the constitution had conferred on the executive department of the government of the United States power to acquire foreign territory by a treaty. There is evidence that very grave doubts were then entertained concerning the existence of this power; but that there was then a settled opinion in the executive and legislative branches of the government that this power did not exist cannot be admitted without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the constitution, and, whatever doubts may then have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different administrations. Six states formed on such territory are now in the Union. Every branch of this government, during a period of more than fifty years, has participated in these transactions. To question their validity now is vain. As was said by Mr. Chief Justice Marshall, in American Ins. Co. v. Canter:[40] "The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[41] And I add, it also possesses the power of governing it, when acquired, not by resorting to supposititious powers, nowhere found described in the constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the government, and embrace all

[40] 1 Peters, 542.

[41] See Sere v. Pitot, 6 Cranch, 336.

territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the constitution was framed, while at the same time it is admitted that the constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument as it is with its language, and I can have no hesitation in rejecting it. I construe this clause, therefore, as if it had read: "Congress shall have power to make all needful rules and regulations respecting those tracts of country out of the limits of the several states which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession at the time of making it."

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory. But it must be remembered that this is a grant of power to the congress,—that it is therefore necessarily a grant of power to legislate; and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the territory is a power to pass all needful laws respecting it. The word "regulate," or "regulation," is several times used in the constitution. It is used in the fourth section of the first article to describe those laws of the states which prescribe the times, places, and manner of choosing senators and representatives; in the second section of the fourth article, to designate the legislative action of a state on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the second section of the third article, to empower congress to fix the extent of the appellate jurisdiction of this court; and, finally, in the eighth section of the first article are the words, "Congress shall have power to regulate commerce." It is unnecessary to describe the body of legislation which has been enacted under this grant of power,—its variety and extent are well known; but it may be mentioned, in passing, that, under this power to regulate commerce, congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States

on the high seas and in foreign ports, and even over citizens of the United States resident in China, and has established judicatures, with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer that, in common with all the other legislative powers of congress, it finds limits in the express prohibitions on congress not to do certain things; that, in the exercise of the legislative power, congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the constitution. Besides this, the rules and regulations must be needful. But, undoubtedly, the question whether a particular rule or regulation be needful must be finally determined by congress itself. Whether a law be needful is a legislative or political, not a judicial, question. Whatever congress deems needful is so under the grant of power. Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful, not only to prepare them for admission to the Union as states, but even to enable the United States to dispose of the lands. Without government and social order, there can be no property; for, without law, its ownership, its use, and the power of disposing of it cease to exist, in the sense in which those words are used and understood in all civilized states. Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as states, when, in the judgment of congress, they should be fitted therefor; since these were the needs provided for; since it is confessed that government is indispensable to provide for those needs, and the power is to make all needful rules and regulations respecting the territory,—I cannot doubt that this is a power to govern the inhabitants of the territory by such laws as congress deems needful until they obtain admission as states. Whether they should be thus governed solely by laws enacted by congress, or partly by laws enacted by legislative power conferred by congress, is one of those questions which depend on the judgment of congress,—a question which of these is needful.

But it is insisted that, whatever other powers congress may have respecting the territory of the United States, the subject of negro slavery forms an exception. The constitution declares that congress shall have power to make "all needful rules and

regulations" respecting the territory belonging to the United States. The assertion is, though the constitution says all, it does not mean all,—though it says all, without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument to exhibit some solid and satisfactory reason, drawn from the subject-matter or the purposes and objects of the clause, the context, or from other provisions of the constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification. The subject-matter is the territory of the United States out of the limits of every state, and consequently under the exclusive power of the people of the United States. Their will respecting it, manifested in the constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon until new states should be formed. It will not be questioned that, when the constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognized subjects of municipal legislation. Every state had in some measure acted thereon; and the only legislative act concerning the territory—the ordinance of 1787, which had then so recently been passed—contained a prohibition of slavery. The purpose and object of the clause being to enable congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognized scope of that purpose and object. There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the territory." An enactment that slavery may or may not exist there is a regulation respecting the territory. Regulations must be needful; but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of

the interpretation of the constitution.[42] In this view, I proceed briefly to examine the practical construction placed on the clause now in question, so far as it respects the inclusion therein of power to permit or prohibit slavery in the territories.

It has already been stated that, after the government of the United States was organized under the constitution, the temporary government of the territory northwest of the river Ohio could no longer exist, save under the powers conferred on congress by the constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the constitution; and, accordingly, an act was passed on the seventh day of August, 1789,[43] which recites: "Whereas, in order that the ordinance of the United States in congress assembled, for the government of the territory northwest of the river Ohio, may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present constitution of the United States." It then provides for the appointment, by the president, of all officers who, by force of the ordinance, were to have been appointed by the congress of the confederation, and their commission in the manner required by the constitution, and empowers the secretary of the territory to exercise the powers of the governor in case of the death or necessary absence of the latter. Here is an explicit declaration of the will of the first congress, of which fourteen members, including Mr. Madison, had been members of the convention which framed the constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." General Washington, who signed this bill as president, was the president of that convention.

It does not appear to me to be important, in this connection, that that clause in the ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The congress of the confederation had no power to make such a compact, nor to act at all on the subject; and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the "Federalist," I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the ordinance a compact between "the original states and the people and states in the new territory";

[42] Stuart v. Laird, 1 Cranch, 299; Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Wheat. 264; Prigg v. Pennsylvania, 16 Pet. 621; Cooley v. Port Wardens, 12 How. 315.

[43] 1 Stat. 50.

there being no new states then in existence in the territory with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty, even if the congress of the confederation had had power to make one touching the government of that territory. I consider the passage of this law to have been an assertion by the first congress of the power of the United States to prohibit slavery within this part of the territory of the United States, for it clearly shows that slavery was thereafter to be prohibited there; and it could be prohibited only by an exertion of the power of the United States, under the constitution, no other power being capable of operating within that territory after the constitution took effect.

On the 2d of April, 1790,[44] the first congress passed an act accepting a deed of cession, by North Carolina, of that territory afterwards erected into the state of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "Provided, always, that no regulations made or to be made by congress shall tend to emancipate slaves." This provision shows that it was then understood congress might make a regulation prohibiting slavery, and that congress might also allow it to continue to exist in the territory; and accordingly when, a few days later, congress passed the act of May 26, 1790,[45] for the government of the territory south of the river Ohio, it provided: "And the government of the said territory south of the Ohio shall be similar to that which is now exercised in the territory northwest of the Ohio, except so far as is otherwise provided in the conditions expressed in an act of congress of the present session, entitled, 'An act to accept a cession of the claims of the state of North Carolina to a certain district of western territory.'" Under the government thus established, slavery existed until the territory became the state of Tennessee.

On the 7th of April, 1798,[46] an act was passed to establish a government in the Mississippi territory in all respects like that exercised in the territory northwest of the Ohio, "excepting and excluding the last article of the ordinance made for the government thereof by the late congress on the thirteenth day of July, 1787." When the limits of this territory had been amicably set-

[44] 1 Stat. 106.
[45] 1 Stat. 123.
[46] 1 Stat. 549.

tled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession that the ordinance of July 13, 1787, "shall, in all its parts, extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The government of this territory was subsequently established and organized under the act of May 10, 1800, but so much of the ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of acts, in one of which congress has extended the ordinance of 1787, including the article prohibiting slavery over different territories, and thus exerted its power to prohibit it. In the other, congress has erected governments over territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the government under the ordinance which excluded slavery. Of the first class are the act of May 7, 1800,[47] for the government of the Indiana territory; the act of January 11, 1805,[48] for the government of Michigan territory; the act of February 3, 1809,[49] for the government of the Illinois territory; the act of April 20, 1836,[50] for the government of the territory of Wisconsin; the act of June 12, 1838, for the government of the territory of Iowa; the act of August 14, 1848, for the government of the territory of Oregon. To these instances should be added the act of March 6, 1820,[51] prohibiting slavery in the territory acquired from France, being northwest of Missouri, and north of thirty-six degrees thirty minutes north latitude. Of the second class, in which congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established governments by which slavery was recognized and allowed, are: The act of March 26, 1804,[52] for the government of Louisiana; the act of March 2, 1805,[53] for the government of the territory of Orleans; the act of June 4, 1812,[54] for the government of the Missouri territory; the act of March 30, 1822,[55] for the government of the territory of Florida. Here are eight distinct instances, beginning with the first congress, and coming down to the year 1848, in which congress has excluded slavery from the territory of the United States; and six distinct instances in which congress organized governments of territories by which slavery was recog-

[47] 2 Stat. 58.
[48] 2 Stat. 309.
[49] 2 Stat. 514.
[50] 5 Stat. 10.
[51] 3 Stat. 548.
[52] 2 Stat. 283.
[53] 2 Stat. 322.
[54] 2 Stat. 743.
[55] 3 Stat. 654.

nized and continued, beginning also with the first congress, and coming down to the year 1822. These acts were severally signed by seven presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the constitution was adopted.

If the practical construction of the constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to. It appears, however, from what has taken place at the bar, that, notwithstanding the language of the constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of congress respecting slavery in the territories. One is that, though congress can make a regulation prohibiting slavery in a territory, they cannot make a regulation allowing it; another is that it can neither be established nor prohibited by congress, but that the people of a territory, when organized by congress, can establish or prohibit slavery; while the third is that the constitution itself secures to every citizen who holds slaves, under the laws of any state, the indefeasible right to carry them into any territory, and there hold them as property. No particular clause of the constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican governments, its inconsistency with the Declaration of Independence and with natural right. The second is drawn from considerations, equally general, concerning the right of self-government and the nature of the political institutions which have been established by the people of the United States. While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some, and exclude the property of other citizens; and inasmuch as slaves are chiefly held by citizens of those particular states where slavery is established, it is insisted that a regulation excluding slavery from a territory operates practically to make an unjust discrimination between citizens of different states in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is whether they are sufficient to authorize this court to insert into this clause of the constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it must be admitted to be a matter attended with great difficulty; and the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the constitution, upon reasons purely political, renders its judicial interpretation impossible, because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a constitution,—we are under the government of individual men, who, for the time being, have power to declare what the constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the constitution obtains in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown, by anything in the constitution itself, that, when it confers on congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted; or if anything in the history of this provision tends to show that such an exception was intended, by those who framed and adopted the constitution, to be introduced into it,—I hold it to be my duty carefully to consider, and to allow just weight to, such considerations, in interpreting the positive text of the constitution. But where the constitution has said all needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court, closely analogous to this one, in which such an attempt to introduce an exception, not found in the constitution itself, has failed of success. By the eighth section of the first article, congress has the power of exclusive legislation in all cases whatsoever within this district. In the case of Loughborough v. Blake,[56] the question arose whether congress has power to impose direct taxes on persons and property in this district. It was insisted that, though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle that taxation and representation are inseparable. It would not be easy to fix on any political truth better established or more fully admitted in our country than that taxation and representation must exist together. We went into the war of the Revolution to assert it, and it is incorporated as fundamental into all American governments. But, however true and important this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the constitution, to decide whether it should or should not be permitted to operate within this district. Their decision was embodied in the words of the constitution, and, as that contained no such exception as would permit the maxim to operate in this district, this court, interpreting that language, held that the exception did not exist.

Again, the constitution confers on congress power to regulate commerce with foreign nations. Under this, congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular states. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said,[57] "a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this," I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few states, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on,—that the power to regulate commerce did not include the power to annihilate commerce.

[56] 5 Wheat. (U. S.) 324.

[57] 9 Wheat. (U. S.) 192.

But the decision was that, under the power to regulate commerce, the power of congress over the subject was restricted only by those exceptions and limitations contained in the constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the constitution, imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of United States v. Marigold,[58] says: "Congress are, by the constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,' such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions these statutes have received, it can scarcely, at this day, be open to doubt that every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or by the important interests of the entire nation. . . . The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it." If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several states, and may operate without exception upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein? While the regulation is one "respecting the territory"; while it is, in the judgment of congress, "a needful regulation," and is thus completely within the words of the grant; while no other clause of the constitution can be shown which requires the insertion of an exception respecting slavery; and while the practical construction for a period of upwards of fifty years forbids such an exception,—it would, in my opinion, violate every sound rule of interpretation to force that exception into the constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of congress, because what they have said contains no such limitation.

[58] 9 How. 560.

Before I proceed further to notice some other grounds of supposed objection to this power of congress, I desire to say that, if it were not for my anxiety to insist upon what I deem a correct exposition of the constitution, if I looked only to the purposes of the argument, the source of the power of congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that congress has power to organize and govern the territories until they arrive at a suitable condition for admission to the Union. They admit, also, that the kind of government which shall thus exist should be regulated by the condition and wants of each territory, and that it is necessarily committed to the discretion of congress to enact such laws for that purpose as that discretion may dictate; and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate which are found in the constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of congress over the territories as of the extent just described, what positive prohibition exists in the constitution which restrained congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude? The only one suggested is that clause in the fifth article of the amendments of the constitution which declares that no person shall be deprived of his life, liberty, or property without due process of law. I will now proceed to examine the question whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question. Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the constitution, and has been explicitly declared by this court. The constitution refers to slaves as "persons held to service in one state under the laws thereof." Nothing can more clearly describe a *status* created by municipal law. In Prigg v. Pennsylvania,[59] this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In Rankin v. I ydia,[60]

[59] 16 Peters, 611.

[60] 2 A. K. Marsh. 470.

the supreme court of appeals of Kentucky said: "Slavery is sanctioned by the laws of this state, and the right to hold them under our municipal regulations is unquestionable; but we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten and common law." I am not acquainted with any case or writer questioning the correctness of this doctrine.[61]

The *status* of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the state, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one state, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while, in others, the law may recognize a right of the slave to be protected from cruel treatment. In other words, the *status* of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery must depend on the municipal law which creates and upholds it. And not only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that *status* must be defined, protected, and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit or to be a witness, with such police regulations as have existed in all civilized states where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery? Is it not more rational to conclude that they who framed and adopted the con-

[61] See, also, 1 Burge, Col. & For. Laws, 738-741, where the authorities are collected.

stitution were aware that persons held to service under the laws of a state are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel congress to legislate in any particular manner on the subject, and having empowered congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a territory, and hold them there as slaves, without regard to the laws of the territory, I suppose this right is not to be restricted to the citizens of slaveholding states. A citizen of a state which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the territory? If it be said to be those laws respecting slavery which existed in the particular state from which each slave last came, what an anomaly is this! Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law for holding persons in slavery? I say, not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject; and when any slave is sold, or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the *status* of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their

benefit as an organized political society, subsisting as "the people of the United States," under the constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the congress, to whose power, as the legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances or sectional differences of condition cannot, in my opinion, be recognized in this court without arrogating to the judicial branch of the government powers not committed to it, and which, with all the unaffected respect I feel for it when acting in its proper sphere, I do not think it fitted to wield. Nor, in my judgment, will the position that a prohibition to bring slaves into a territory deprives any one of his property without due process of law bear examination. It must be remembered that this restriction on the legislative power is not peculiar to the constitution of the United States. It was borrowed from *Magna Charta,* was brought to America by our ancestors as part of their inherited liberties, and has existed in all the states, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed. And, if a prohibition of slavery in a territory in 1820 violated this principle of *Magna Charta,* the ordinance of 1787 also violated it; and what power had, I do not say the congress of the confederation alone, but the legislature of Virginia, or the legislature of any or all the states of the confederacy, to consent to such a violation? The people of the states had conferred no such power. I think I may at least say, if the congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons—citizens as well as others—to bring slaves into a territory, and a declaration that, if brought, they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding states which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia that thereafter no slave should be imported into that commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it, as may

be seen in Wilson v. Isbell,[62] and a similar law has been recognized as valid in Maryland, in Stewart v. Oakes.[63] I am not aware that such laws, though they exist in many states, were ever supposed to be in conflict with the principle of *Magna Charta* incorporated into the state constitutions. It was certainly understood by the convention which framed the constitution, and has been so understood ever since, that, under the power to regulate commerce, congress could prohibit the importation of slaves, and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a territory violate the fifth amendment of the constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this territory was in the words, "that slavery," etc., "shall be and is hereby forever prohibited." But the insertion of the word "forever" can have no legal effect. Every enactment not expressly limited in its duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is that congress cannot so legislate as to bind the future states formed out of the territory, and that, in this instance, it has attempted to do so. Of the political reasons which may have induced the congress to use these words, and which caused them to expect that subsequent legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance. However fit such considerations are to control the action of congress, and however reluctant a statesman may be to disturb what has been settled, every law made by congress may be repealed, and, saving private rights, and public rights gained by states, its repeal is subject to the absolute will of the same power which enacted it. If congress had enacted that the crime of murder committed in this Indian territory, north of thirty-six degrees thirty minutes, by or on any white man, should forever be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a territory, that at some future day states might exist there, and so the law was invalid, because by its terms it was to continue in force forever.

[62] 5 Call, 425. See, also, Hunter v. Fulcher, 1 Leigh, 172.
[63] 5 Har. & J. 107, note.

Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the legislature.

If the constitution prescribe one rule and the law another and different rule, it is the duty of courts to declare that the constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the constitution has furnished a different rule, or no case which the legislature has the power to govern, then the law can have no operation. If it includes cases which the legislature has power to govern, and concerning which the constitution does not prescribe a different rule, the law governs those cases, though it may in its terms attempt to include others on which it cannot operate. In other words, this court cannot declare void an act of congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of congress, or beyond the reach of that particular law. If, therefore, congress had power to make a law excluding slavery from this territory, while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law, so long as congress has the exclusive legislative power in the territory.

But it is further insisted that the treaty of 1803, between the United States and France, by which this territory was acquired, has so restrained the constitutional powers of congress that it cannot by law prohibit the introduction of slavery into that part of this territory north and west of Missouri, and north of thirty-six degrees thirty minutes north latitude. By a treaty with a foreign nation, the United States may rightfully stipulate that the congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the constitution to do, I more than doubt. The powers of the government do and must remain unimpaired. The responsibility of the government to a foreign nation for the exercise of those powers is quite another matter. That responsibility is to be met and justified to the foreign nation, according to the requirements of the rules of public law, but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The second clause of the sixth article is: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of congress. That they are not perpetual, and must be in some way repealable, all will agree. If the president and the senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the government of the United States could not act at all to that effect without the consent of some foreign government. I do not consider—I am not aware it has ever been considered—that the constitution has placed our country in this helpless condition. The action of congress in repealing the treaties with France by the act of July 7, 1798,[64] was in conformity with these views. In the case of Taylor v. Morton,[65] I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of congress excluding it was void by force of the treaty. Whether or not a case existed sufficient to justify a refusal to execute such a stipulation would not be a judicial, but a political and legislative, question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty to legislate or not to legislate in a particular way has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound.[66] But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States respecting the territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded territory lying north of thirty-six degrees thirty minutes, and west and north of the present state of

[64] 1 Stat. 578.
[65] 2 Curt. 454, Fed. Cas. No. 13,799.
[66] Foster v. Neilson, 2 Peters, 314; Garcia v. Lee, 12 Peters, 519.

Missouri, was then a wilderness, uninhabited save by savages whose possessory title had not then been extinguished. It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this territory which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights; and the United States, as a just government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory, which, in the language of the treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."[66a] There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the congress from excluding slavery from that part of the ceded territory then uninhabited. The first is that, manifestly, its sole object was to protect individual rights of the then inhabitants of the territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish governments while they held the country, as well as the United States when they acquired it, always

[66a] 8 Stat. 202.

exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation that the then inhabitants of Louisiana should be protected in their property can have no reference to their use of that property where they had no right, under the treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty had afterwards taken property then owned by him, consisting of firearms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the act of congress of March 30, 1802,[67] adopted and extended to this territory by the act of March 26, 1804.[68] Besides, whatever rights were secured were individual rights. If congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of congress under the constitution, that individual could complain, and the act of congress, as to such rights of his, would be inoperative; but it would be valid and operative as to all other persons whose individual rights did not come under the protection of the treaty. And inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by treaty, had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed, and, second, that, if any did exist, the entire law was void, not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate. But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the cases of New Orleans v. De Armas,[69] the question was whether a title to property, which existed at the date of the treaty, continued to be protected by the treaty after the state of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects: One, that Louisiana shall be

[67] 2 Stat. 139.
[68] 2 Stat. 283.
[69] 9 Peters, 223.

admitted into the Union as soon as possible, upon an equal footing with the other states; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were 'admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.' " The cases of Choteau v. Marguerite,[70] and Permoli v. Municipality No. 1 of New Orleans,[71] are in conformity with this view of the treaty. To convert this temporary stipulation of the treaty, in behalf of French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of congress to regulate territory then uninhabited, and to assert that it not only restrains congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the ceded territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject-matter and the evident design of the parties, that I cannot assent to it. In my opinion, this treaty has no bearing on the present question. For these reasons, I am of opinion that so much of the several acts of congress as prohibited slavery and involuntary servitude within that part of the territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon to ascertain whether the judgment of the circuit court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less would have been inconsistent with my views of my duty. In my opinion, the judgment of the circuit court should be reversed, and the cause remanded for a new trial.

[70] 12 Peters, 507. [71] 3 Howard, 589.

CHARGE TO THE JURY IN THE CASE OF THE UNITED STATES AGAINST JAMES McGLUE, IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1851.

STATEMENT.

This was an indictment against James McGlue, the second officer of the bark Lewis, of Salem, for the murder of Charles Johnson, the first officer of the bark. The facts are stated in the charge to the jury. The prisoner, who was defended by Rufus Choate, was acquitted.[1]

CHARGE.

Gentlemen of the Jury: The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove, beyond reasonable doubt, the truth of every fact in the indictment necessary, in point of law, to constitute the offense. These facts need not be proved beyond all possible doubt; but a moral conviction must be produced in your minds, so as to enable you to say that, on your consciences, you do verily believe their truth. These facts are in part controverted, and in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound, immediately producing death, was inflicted by the prisoner at the bar; that this wound was given, and the death took place, on board the bark Lewis, a registered vessel of the United States, belonging to citizens of the United States; that Johnson was the first, and the prisoner the second, officer of that vessel, at the time of the occurrence; that the vessel, at that time, was either on the high seas, as is charged in one count, or upon waters within the dominion of the Sultan of Muscat, a foreign sovereign, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offense,—do not appear to be denied, and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all the witnesses. It is not upon a denial of either of these facts that the defense is rested, but upon the allegation by the defendant that, at the time the act was done, he was so far insane as to be criminally irresponsible for his act. And this brings you to consider the remaining allegation in the indictment which involves the defense. It is essen-

[1] 1 Curt. 1.

tial to the crime of murder that the killing should be from what the law denominates "malice aforethought," and the government must prove this allegation; but it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill. These things, if proved, would be evidence of malice, and proof of this kind is one of the means of sustaining the allegation of malice. But, besides this direct evidence of what is called in the law "express malice," malice may be also inferred or implied from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce, and actually producing, death, the law deems the act malicious, and the offense is murder. The law considers that the party meant to effect what was the natural consequence of his act; that, if the natural consequence of his act was death, he meant to kill, and, if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and from that feeling the act was done. In other words, the intention to kill unlawfully, without sufficient provocation, is a malicious intention, and, if the intent is executed, the killing is, in law, from malice aforethought, and is murder.

Keeping these principles in view, you will proceed to inquire what the evidence is of a premeditated design to kill; and, secondly, whether the act of killing, and the circumstances attending it, were such that malice is to be inferred therefrom. The only evidence at all tending to show premeditated design is given by the master of the vessel, and by Saunders, the cabin boy. The master states that, in a previous part of the voyage, four or five weeks before the time in question, while the vessel was in port, and he himself was absent on shore, some difficulty occurred between the first and second officer, in consequence of which the latter applied to him for his discharge. The witness does not know anything of the nature or extent of the difficulty, nor of the feeling to which it gave rise in the breast of either party to it, saving that it produced, in the prisoner, a reluctance to continue under the command of the first officer. His discharge was refused, and there is no evidence of any further quarrel between them. It is also sworn by the master and the cabin boy that, when Mr. Johnson fell, after being stabbed by the prisoner, some of the crew raised him up, and the prisoner

said: "It is of no use. I meant to kill him, and I have done it." These expressions are not testified to by any of the crew. In such a scene, it is in accordance with experience that some witnesses may observe and remember what other witnesses either do not hear or attend to, or have forgotten; and therefore, when these two witnesses swear to this expression, if you consider they are fair witnesses, and intend to tell the truth, they should be believed in this particular, although others present do not confirm their statement. But at the same time, upon this question of malice, it does not seem to me the expressions, if used, are important, because they only declare in words what the act of the defendant, in its nature and circumstances, evinces with equal clearness. It is testified by all the witnesses present at the time, that, the vessel being at anchor about three miles from the shore of the island of Zanzibar, orders were given by the master to get under way; that the first officer was forward, on the house over the forecastle, attending to his duty; that the crew were variously employed in preparations to make sail; and that the prisoner, being aft, ran forward, jumped onto the house, seized Mr. Johnson by the collar with his left hand, and with his sheath knife, which he held in his right hand, stabbed him in the breast, and he dropped dead. When the prisoner seized him, Mr. Johnson said, "What do you mean?" and the prisoner, at the instant he struck the blow, replied, "I mean what I am doing."

Now, gentlemen, if you believe this statement,—and there is certainly no evidence in the case to contradict or vary it, every witness concurring with the rest in the substance of it,—there can be no question that the killing was malicious, provided the prisoner was, at the time, in such a condition as to be capable, in law, of malice. If you are satisfied the prisoner designedly stabbed Mr. Johnson with a knife, in such a manner as was likely to cause, and did cause, death, no provocation whatsoever being given at the time, then, in point of law, the killing was from malice aforethought, unless you should also find that the prisoner, when he did the act, was so far insane as to be incapable in law of entertaining malice; for the rules of law concerning malice are all based upon the assumption that the person who struck the blow was at the time in such a state of mind as to be responsible, criminally, for his act. If he was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice, and therefore no malice is, in that case, to be inferred from his act, however atrocious it may have been. And,

undoubtedly, one main inquiry in this case is whether the prisoner, when he struck the blow, was so far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made by the counsel on each side respecting the character of this defense. On the one side, it is urged upon you that the defense of insanity has become of alarming frequency, and that there is reason to believe it is resorted to by great criminals to shield them from the just consequences of their crimes, when all other defenses are found desperate; that there exist in the community certain theories concerning what is called "moral insanity," held by ingenious and zealous persons, and brought forward on trials of this kind, tending to subvert the criminal law, and render crimes likely not to be punished, somewhat in proportion to their atrocity. On the other hand, the inhumanity and the intrinsic injustice of holding him guilty of murder who was not, at the time of the act, a reasonable being, have been brought before you in the most striking forms. These observations of the counsel on both sides are worthy of your attention, and their just effect should be to cause you to follow, steadily and carefully and exactly, the rules of law upon this subject. The general question, whether the prisoner's state of mind, when he struck the blow, was such as to exempt him from legal responsibility, is a question of fact for your decision, the responsibility of deciding which rightly rests upon you alone. But there are certain rules of law which you are bound to apply, and the court, upon its responsibility, is to lay down; and these rules, when applied, will conduct you to the only safe decision, because these rules will enable you to do what you have sworn to do,—that is, to render a verdict according to the law and the evidence given you. You will observe, then, that this defense of insanity is to be tested and governed by principles of law, and is to be made out in accordance with legal rules. No defendant can be rightly acquitted of a crime by reason of insanity upon any loose, general notions which may be afloat in the community, or even upon the speculation of men of science. In a court of justice, these must all yield to the known and fixed rules which the law prescribes. And I now proceed to state to you such of them as are applicable to this case.

The first is that this defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their criminal acts. To be irresponsible because of insanity is an exception to that general rule; and before

any man can claim the benefit of such an exception, he must prove that he is within it. You will therefore take it to be the law that the prisoner is not to be acquitted upon the ground of insanity unless, upon the whole evidence, you are satisfied that he was insane when he struck the blow.

The next inquiry is, what is meant by insanity? What is it which exempts from punishment because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There have been, and probably always are, in the world, instances of men of general ability, filling, with credit and usefulness, eminent positions, and sustaining through life, with high honor, the most important civil and social relations, who were, upon some one topic or subject, unquestionably insane. There have been, and undoubtedly always are, in the world, many men whose minds are such that the conclusions of their reason and the results of their judgment, tested by those of men in general, would be very far astray from right. There are many more whose passions are so strong, and whose conscience and reason and judgment are so weak, or so perverted, that not only particular acts, but the whole course of their lives, may, in some sense, be denominated insane. And there are combinations of these, or some of these, deficiencies or disorders or perversions or weaknesses or diseases. They are an important, as well as a deeply interesting, study; and they find their place in that science which ministers to diseases of the mind, and which, in recent times, has done so much to alleviate and remove some of the deepest distresses of humanity. But the law is not a medical or a metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime; and therefore it inquires, not into the peculiar constitution of mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong as to the particular act with which the accused is charged. If he understands the nature of his act,—if he knows his act is criminal, and that, if he does it, he will do wrong and deserve punishment,—then, in the judgment of the law, he has a criminal intent, and is not so far insane as to

be exempt from responsibility. On the other hand, if he be under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal, and deserving punishment, then he is not responsible. This is the test which the law prescribes, and these are the inquiries which you are to make on this part of the case: Did the prisoner understand the nature of his act when he stabbed Mr. Johnson? Did he know he was doing wrong, and deserve punishment? Or, to apply them more nearly to this case: Did the prisoner know that he was killing Mr. Johnson? That so to do was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of the crime of murder, and he cannot be acquitted on the ground of insanity. It is not necessary here to consider a case of a person killing another under a delusive idea, which, if true, would either mitigate or excuse the offense, for there is no evidence pointing to any such delusion.

It is asserted by the prisoner that, when he struck the blow, he was suffering under a disease know as "delirium tremens." He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not, as you observed, allowed to give their opinions upon the case, because the case, in point of fact, on which any one might give his opinion, might not be the case which you, upon the evidence, would find, and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and therefore the counsel on each side have put to the physicians such states of fact as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, to be weighed by you; otherwise, their opinions are not applicable to this case. And here I may remark, gentlemen, that although, in general, witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies or occupa-

tions are supposed to have rendered them peculiarly skillful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion, upon a subject within the scope of their studies and practice, than men in general, and therefore better than those who compose your panel; but these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right, not forgetting that on you alone rests the responsibility of a correct verdict. Besides these opinions, upon cases assumed by the counsel, which you may find to correspond more or less nearly with the actual case on trial, the physicians have also described to you the symptoms of the disease of delirium tremens. They all agree that it is a disease of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. All the physicians have described it in substantially the same way. I will read from my notes that given by Dr. Bell. He says the symptoms are: "(1) Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something,—fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others, as well as injure himself; but he is much more apprehensive of receiving injury than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled. (2) Sleeplessness. I believe delirium tremens cannot exist without this. (3) Tremulousness, especially of the hands, but showing itself in the limbs and the tongue. (4) After a time sleep occurs, and reason thus returns. I do not recall any instance where sleep came on in less than three days, dating from the last sleep. At first it is rather broken, not giving full relief; and this is followed by a very profound sleep, lasting six or eight hours, from which the patient awakes sane." Dr. Stedman, who, from his care of the marine hospital at Chelsea, and of the city hospital at South Boston, has had great experience in the treatment of this disease, after describing its symptoms substantially as Dr. Bell did, says

its access may be very sudden, and he has often known it first to manifest itself by the patient's attacking those about him, regarding them as enemies; that it is in accordance with his experience that a case may terminate within two days of the time when the delirium first manifests itself, and that it rarely lasts more than four days; that he has arrested the disease in forty-eight hours by the use of sulphuric ether.

Taking along with you these accounts of the symptoms and course and termination of this disease, you will inquire whether the evidence proves these symptoms existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs, are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of delirium tremens, as described by the physicians. In respect to the previous intemperance of the prisoner, and the symptoms, course, and termination of the disease, you are to look to the accounts of the conduct and acts of the prisoner, given by his shipmates. Their testimony will be fresh in your recollection, and it is not necessary for me to detail it. How recently before the homicide had he slept? Was his demeanor, for two or three days previous, natural, or was he restless? Was any tremor of the hands or limbs visible, and, if so, was it very marked or not? Did he utter any exclamations manifesting apprehensiveness before or immediately after the act? When, and under what circumstances, did he recover his reason, if he was delirious, and especially did he recover it without sleep? These are all important inquiries to be made by you, and answered as a careful consideration of the evidence may convince you they should be answered.

It is not denied, on the part of the government, that the prisoner had drank intemperately of the ardent spirits of the country during some days before the occurrence. But the district attorney insists that he had continued so to drink down to a short time before the homicide, and that, when he struck the blow, it was in a fit of drunken madness; and this renders it necessary for me to instruct you concerning the law upon the state of facts which the prosecutor asserts existed. Although delirium tremens is the product of intemperance, and therefore, in some sense, is voluntarily brought on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness. If a person suffering under delirium tremens is so far insane as I have described to be necessary

to render him irresponsible, the law does not punish him for any crime he may commit; but if a person commits crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation, of his offense, that he first deprived himself of his reason before he did the act. You would easily see that there would be no security for life or property if men were allowed to commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And therefore it is an inquiry of great importance in this case, and, in the actual state of the evidence, I think one of no small difficulty, whether this homicide was committed while the prisoner was suffering under that marked and settled disease of delirium tremens, or in a fit of drunken madness. My instruction to you is that, if the prisoner, while sane and responsible, made himself intoxicated, and, while intoxicated, committed a murder by reason of insanity, which was one of the consequences of that intoxication, and one of the attendants on that state, then he is responsible in point of law, and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under delirium tremens. It may sometimes be difficult to determine under which rule, in point of fact, the accused comes. Perhaps you will think it not easy to determine it in this case. But it is the duty of the jury to ascertain from the evidence on which side of the line this case falls, and to decide accordingly. It may be very material for you to know on which party is the burden of proof in this part of the case. I have already told you that it is incumbent on the prisoner to satisfy you he was insane when he struck the blow, for the reason that, as men in general are sane, the law presumes each man to be so till the contrary is proved; but if the contrary has been proved,—if you are satisfied the prisoner was insane,—the law does not presume his insanity arose from any particular cause, and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty by law because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it; for the charge then assumes this form: that the prisoner committed a murder for which, though insane, he is responsible, because his insanity was produced by and accompanied a state of intoxication. In my judgment, the government must satisfy you of these facts, which are necessary to the guilt of the pris-

oner in point of law, provided you are convinced he was insane. You will look carefully at all the evidence bearing on this question, and, if you are convinced that the prisoner was insane to that extent which I have described as necessary to render him irresponsible, you will acquit him, unless you are also convinced his insanity was produced by intoxication, and accompanied that state, in which case you will find him guilty.

ARGUMENT IN THE CASE OF GARNETT AGAINST THE UNITED STATES, IN THE SUPREME COURT OF THE UNITED STATES, 1870.

STATEMENT.

The case of Garnett against the United States, and three other cases, arising under the acts of congress passed in 1861 and 1862, popularly known as the "confiscation acts," were first argued separately at a term of the supreme court of the United States, and afterwards heard together on reargument. The following selection from Curtis' argument relates exclusively to the constitutionality of the acts. The opinions of the judges in deciding these cases are reported in 11 Wallace, from page 256 to page 356. In Garnett's case the constitutional question was not reached, the case going off on a point of jurisdiction; but in the cases of Miller v. United States and Tyler v. Defrees the constitutionality of the acts was affirmed, Justices Field and Clifford dissenting. The court held that, with the exception of the first four sections of the act of 1862, the acts were an exercise of the war powers of the government, and not an exercise of its sovereignty or municipal power. The right of confiscation exists as fully in case of a civil war as it does when war is foreign. Rebels in arms against the lawful government or persons inhabiting territory exclusively within the control of the rebel belligerent may be treated as public enemies. So, also, may adherents or abettors of such belligerent, though not resident in such enemy's territory.

ARGUMENT.

These three cases, may it please the court,—the two of Garnett and the other of McVeigh,—are to be heard together by arrangement between the counsel, which we suppose to have received the sanction of the court. Two of these cases were instituted in the district court for the District of Columbia in behalf of the United States against Dr. Garnett, the present plaintiff in error. They were founded upon what has been called the confiscation act of July 17, 1862. One of them is a proceeding for the forfeiture of real estate; the other, of personal property. The district court pronounced for the forfeiture in both cases. Dr. Garnett prosecuted a writ of error to the supreme court of the District, and, these writs of error having been returned, the district attorney moved to dismiss them. He assigned different reasons; but the one cause material now, I believe, is that the supreme court of the District was the same court as the district court, and that therefore a writ of error would not lie from the supreme court to the district court. This cause for dismissal was held by the supreme court to be sufficient, and the writ of error was therefore dismissed. An exception was duly taken. A bill of ex-

ceptions was allowed and signed, and it is in the record founded on this ruling of the supreme court of the District dismissing the writ of error, which exception alleged that dismissal to be erroneous. In that state of the record, the writ of error in each of these cases was sued out, and is now here prosecuted. . . .

I propose to discuss together the two cases of Dr. Garnett, and also McVeigh's case, so far as they involve the same principles, and then to take up each of these cases, and speak to those questions which arise in each, and not in the others.

The first question common to all three of these cases lies at the foundation of all proceedings had under the act of July 17, 1862. That question is whether the legislation upon which all these proceedings have been founded is in conformity with the constitution of the United States when viewed simply as a proceeding against property. This, as the court will at once perceive, is a question of extreme gravity and importance; not simply because upon its solution depends a great amount of property which has been proceeded against under this legislation, but because it involves principles inserted in the constitution for the protection of the liberty and property of the citizen; and an inquiry whether these principles are applicable to this legislation is necessarily an inquiry of great gravity and importance.

The fifth and sixth amendments of the constitution of the United States contain restrictions upon legislative power. So far as they are material to this case they are, in the fifth amendment, that no person shall be held to answer for a capital or otherwise infamous offense save on indictment or presentment of a grand jury; that no person shall be deprived of his property save by due process of law; and, in the sixth amendment, that, in all criminal prosecutions, the accused shall be entitled to a speedy and public trial by an impartial jury in the neighborhood or district where the offense was committed. The proceedings now before you had for their object, in point of fact, to deprive a citizen of his property, and to deprive him of it by virtue of an offense defined and punished by death, fine, or imprisonment, by force of this same act of July 17, 1862. This cannot be disputed in point of fact. These libels had for their purpose and object to deprive the defendant in the libel of his property by reason of his commission of one of the offenses described and punished in that act by death, fine, or imprisonment. I admit, however, may it please your honors, that this is necessarily true only in point of fact; and that it may also be true that, although these proceedings have this for their object, they may not come within the restrictions contained

in these amendments of the constitution. It may be that this legislation was founded on other provisions of the constitution sufficient to warrant it, and within which it may safely and properly stand without conflicting with either of the provisions or principles laid down in these amendments; and therefore it is necessary to look further, and to see what other powers the constitution contains under which this legislation might be had, and then to consider under what powers conferred by the constitution this legislation was had. The powers contained in the constitution which I suppose will be relied upon here as the source of authority for this legislation are the powers "to declare" and to prosecute "war," to "subdue insurrection," and to "make rules concerning captures on land and water." They are what have been termed the "war powers" of the government; and undoubtedly it is necessary to examine here whether this legislation was enacted by virtue of these powers, or whether it must necessarily come under the municipal power of the United States to legislate for the punishment of offenses against its sovereignty.

In order to institute this comparison, I must begin by stating what I understand to be the settled doctrines of this court concerning the war powers granted by the constitution, so far as they can apply to this inquiry, and especially the application of those powers to the late Rebellion. I understand this court to have determined that the late Rebellion assumed the proportions of a territorial civil war; that, consequently, all the inhabitants of the Confederate states, and all the inhabitants of the loyal states, became reciprocally enemies to each other, and, this being so, as I agree it has been settled to be so, then I am bound in candor to concede that whatever powers of legislation arise out of this state of things, congress possessed; and if this act of July 17, 1862, comes under those powers, the constitutional objection to it is not tenable. What, then, are the legislative powers of congress in reference to prosecuting war, suppressing rebellion, or making rules concerning captures on land and water? Probably the court would be of opinion, as it seems to me, that this last grant of power or authority to make rules concerning captures on land as well as on water covers all that is necessary to be considered in this inquiry; because this inquiry is concerning the validity of the legislation of congress on the subject of the seizure and confiscation of property of enemies, and therefore this provision of the constitution that congress shall have the power to make rules concerning captures on land and water, there being no limit expressed, would cover all of the subject that any part of its war

powers would touch on or relate to. But I do not know whether it is material whether it be so considered or not. These war powers—the power to declare and prosecute war; the power to suppress insurrection, and to make rules concerning captures on land and water—are by the constitution itself not expressly restricted; but I submit for the consideration of your honors that they are restricted from the very designation and nature of the powers themselves which are granted. The power to prosecute war granted in that great instrument is a power to prosecute it according to the laws of nations, not in violation of the laws of nations. The power to make rules concerning captures on land or water is a power to make such rules concerning them as congress, in its wisdom, during the existence of the war, may think fit, subject, however, to the restriction that they are to be within the laws of nations; and that for the plain reason that, when this authority was granted, it must have been supposed to have been within the contemplation of the people who adopted the constitution that war was to be prosecuted in conformity with the laws of nations and not in violation of them, and that the rules concerning captures on land or water were also to be in substantial conformity with those laws. Details might be changed, modes of proceeding might be changed, subjects of confiscation might be enlarged or diminished, but always within the limits of those international laws which form the very substratum or groundwork of the entire subject with which the constitution was in these particulars concerned. What the laws of nations allow in war, and within their utmost limits, the constitution allows to congress among its powers of legislation; and this court has decided that, so far as respects capture on sea (perhaps on land), these powers of legislation might be fully exercised. It is most material to observe here, and afterwards in the progress of the argument, that this power of congress to legislate for the prosecution of a foreign or domestic war has always for its limits the laws of nations, which form at the same time the field and the boundaries of the grant made by the constitution.

Now, what are the laws of nations, and what are the subjects of legislation under those laws, in respect to captures by land or by water, or the confiscation of property which may be made by a belligerent power? Speaking generally, it was laid down by this court in the case of Brown v. United States, in 8 Cranch, 110, that it is competent for congress to capture or confiscate the whole or any part of the property of enemies under the laws of nations. That is the subject of legislation within these powers of con-

gress,—the confiscation of the whole or any part of the property of enemies in the war; but, as your honors perceive, this has nothing to do with criminals. The laws of nations ascertain who are enemies. They are permanent inhabitants of the enemy's country. They are enemies. It is their property which is the subject of these laws of nations, and of any legislation of congress had under or in reference to the laws of nations,—the property of territorial enemies, so to speak, not of criminals. Their property is to be reached as belonging to persons who, under the laws of nations, being inhabitants of the enemy's country, are liable to have their property taken, not on account of their hostile disposition to the United States; still less on account of any hostile acts done towards the United States; still less on account of their having broken any laws of the United States. That alone is the subject of legislation under the laws of nations, and these grants of power in the constitution. It touches the property of territorial enemies, to be proceeded against in conformity with the laws of nations, and in substantial conformity with their requirements as to process and procedure, as well as to the principles on which condemnation is had.

Let us turn to another inquiry: What is the subject of legislation under the municipal power of the government,—criminal legislation? It is to define and prescribe the punishment for offenses against the United States; not depending on inhabitancy in the enemy's country; not depending on any category which brings property within the reach of the laws of nations, so far as the belligerent chooses to apply them; depending not even on the hostile disposition of persons,—but upon overt criminal acts which are defined by legislation, and punished according to the law of the legislative power. That is the subject of the other and wholly distinct kind of legislation.

Now, may it please your honors, the inquiry comes whether the legislation now in question was had under one or the other or both of these powers. But I have to submit, in the first place, that it could not be had under both these powers, because these powers, in their nature, in their subject-matter, and in the restrictions which belong to them under the constitution, are not only entirely separate, but are incapable of being jointly exercised. The one is a power to apply the laws of nations to enemy's property in a state of war, and to legislate concerning modes of proceeding in applying the principles of the laws of nations to enemy's property. That is the subject of legislation under the power to legislate concerning enemy's property. It has nothing to do

with criminals. It is simply the application of the law of nations to property of the enemy by virtue of such proceedings as congress may devise and direct to have applied; and it is subject to no restrictions whatsoever except those which grow out of the necessary implication that these powers must be exercised under and in general conformity to the laws of nations. On the other hand, when congress comes to penal legislation, it is not dealing with the inhabitants of the enemy's country as such, or their property because they are such inhabitants. It is dealing, as I have said, with certain overt acts which have been done against the sovereignty of the United States, amounting to offenses defined and punished in the laws of the United States. Then congress does legislate under the restrictions which are contained in these fifth and sixth amendments. Then congress cannot require that any person should answer for a capital or otherwise infamous offense without an indictment, or that he can be prosecuted criminally except before an impartial jury in the state and district where the offense was committed, or that he can be deprived of his property without due process of law. Here, then, are these two powers conferred by the constitution on congress, distinct in their subject-matter, distinct in respect to the kind of legislation which congress may adopt, and entirely distinct as regards the restrictions under which congress may legislate; and I respectfully submit that it is not possible for congress, at the same time, to legislate in the exercise of the power to make rules concerning confiscation of enemy's property, and to legislate in regard to criminal offenses against its own sovereignty, committed by its own citizens.

I am quite aware, may it please your honors, and have not overlooked the fact, which has been put prominently forward in the late Civil War, that congress possessed not merely the belligerent right,—the right to prosecute war, and to devise rules for its prosecution and rules for captures on land or water,—but that it also had its own municipal rights. That is all perfectly true; and it is not only true that these two distinct rights—the right of war and the municipal right to legislate penally—existed in the same government, but it is also perfectly true that they could be brought into exercise and applied to the same individual, because, as was said by one of the learned judges in delivering the opinion of this court, a man is none the less an enemy because he is a traitor, and therefore you may forfeit his property, and at the same time you may proceed against him for a crime. But while legislating there must be the necessary regard to the powers un-

der which congress is legislating; and it must consider whether it is legislating in its sovereign capacity to make rules concerning captures on land or water, and the confiscation of the property of enemies, or whether it is legislating in its municipal capacity to define and punish crimes against the United States. If the former, it is subject to no restrictions except those growing out of the laws of nations. If the latter, it is subject to the restrictions contained in the amendments of the constitution. I do not ask of this great court anything which citizens may not fairly expect of it, when I ask them fully to appreciate and apply these distinctions between the powers of legislation conferred on congress by those parts of the constitution which enable congress to act on enemy's property, and those parts which enable congress to enact penal laws.

I now ask your honors to go with me into an examination of this act of July 17, 1862, and to see under which of these powers of congress it was enacted; and I will begin, with your honors' leave, with the title of the act. It is, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The other purposes we have nothing to do with here. It is so much of this act as undertakes "to punish treason and rebellion," "to seize and confiscate the property of rebels," that the court has to do with in the cases now before it. The first section of this act it is not necessary to read. It defines and punishes the crime of treason. It punishes it with death, or, at the discretion of the court, imprisonment for not less than five years, and a fine of not less than ten thousand dollars.

The second section of this act creates offenses which were unknown to the law of the United States at its date, and which President Lincoln, in the message to which I shall presently call your honors' attention, happily characterized as founded on some of the ingredients of treason. It is the offense of "giving aid or comfort to the existing rebellion."[1] It makes that an offense, and provides for its punishment by imprisonment. I suppose that no one will hesitate to say that thus far congress has been legislating, by virtue of its municipal authority, to create penal laws. Then follow the provisions which carry into effect that part of the title of the act which I have read,—"to seize and confiscate the property of rebels,"—not, I pray your honors to observe, to seize and confiscate the property of enemies, but to seize

[1] 12 Stat. 590.

and confiscate the property of rebels; and then the act, following up this declaration in the title, proceeds to define what is meant by "rebels," namely, they who have committed treason; they who have given aid and comfort to the rebellion; they who, being, according to the seventh section, engaged in the rebellion at a certain date, shall not return to their allegiance within sixty days after the proclamation to be issued by the president. They are the rebels against whom this act is directed.

Now the first observation I have to make on this part of the act for seizing and confiscating the property of rebels is that it is not confined to enemies. It is applicable to those persons, and to all those persons, who have done certain overt acts which are described and made punishable by the law. Be he an enemy, within the law of nations, or not, the act is applicable to him; and it is just as applicable to him if he be not, as if he were, an enemy within the laws of nations. The act, therefore, is not directed exclusively against those who, under the laws of nations, can be deemed enemies, but, as I repeat, it is directed against all persons, whether they are within that designation or not, who commit certain overt acts described in the act, and made penal by it.

And the next observation which I desire to make is that, although a person is an enemy, he is not liable to confiscation under this law. So that, in point of fact, while there were millions of enemies not within the law, there were any number of persons not enemies who were within it; and whether within the law or without the law depended, not on their being enemies, but on certain overt criminal acts described and defined by law. So that, I respectfully submit, this cannot be considered to be an act making rules concerning captures on land or water, or for the confiscation of the property of enemies, because the act is not directed against the property of enemies. Confiscation is not to follow from the fact that the property belongs to enemies. On the other hand, confiscation is to follow, although the property does not belong to enemies, provided these described penal acts have been done. I am using the word "enemies," may it please your honors, in the sense in which I understand it to have been used by this court, and in which it is employed by the laws of nations, the only proper sense,—permanent inhabitants of the enemy's country. Now, when your honors come to examine this law, you will see that the fifth clause of the sixth section, under which these libels against Dr. Garnett are framed, and also the

seventh section, are not directed against enemies and their property, but are directed against all who do certain overt acts. Allow me to read the sixth clause of the fifth section: "The property . . . or any person who, owning property in any loyal state or territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion,"—that is to be forfeited. This is not directed against inhabitants of the enemy's country. Dr. Garnett himself, as I understand the fact, was not an inhabitant of one of the rebel states. He was an inhabitant of the District of Columbia; his property was here; his dwelling house and his furniture, which were forfeited in these cases, were here. It does not appear by the record where he was an inhabitant, but it appears by the record that his house and furniture here were sold, and it is not necessary for my argument that it should appear where he was an inhabitant. I will suppose that Dr. Garnett was an inhabitant of the District of Columbia. Could he not give aid and comfort to the rebellion without losing his habitancy and becoming a permanent inhabitant of the rebel states? Might he not contribute money, personal service, information; might he not connect himself directly with the rebellion, so as to give aid and comfort to it, within the meaning of this statute, without ever going off the soil of the loyal states, still less without becoming a permanent inhabitant of one of the rebel states, and so an "enemy," within the constitutional meaning of that word? May it please your honors, it is understood as a matter of fact—I dare say your honors, as a matter of history or *quasi* history, may be acquainted with it—that Capt. Semmes, who preyed upon the commerce of the United States, and committed treason enough, we all know, and piracy enough, in view of the acts of congress, was an inhabitant of Maryland, and never ceased to be so. He was never an "enemy," within the meaning of the laws of nations, as this court has applied that word, for he was never an inhabitant of the rebel states. He was a traitor and a pirate, under the statute law of the United States, but not an enemy.

Let me suppose, for illustration, that a vessel belonging to a citizen of the state of New York, engaged in a lawful voyage during the Rebellion, had been captured as prize, and brought in and libeled, and that the libel had alleged that the owner of that vessel was a citizen of the state of New York, but had committed treason. Could it be condemned as enemy's property? Would not the plain answer be: if he has committed treason, try him for his treason, and forfeit his property? But the laws of nations and the proceedings of prize courts, and whatever is done under them,

are directed, not against criminals,—those who have committed offenses against the United States,—but against enemies of the United States,—territorial enemies, if you please so to apply the word; enemies who are such, not by reason of any crimes they have committed, any wishes they have entertained, any hostility they have felt, but simply from the fact of residence; and as this man is not a resident of the belligerent territory, he is not an enemy, in the sense of the laws of nations.

Now to recur to this law. Here is this section, which forfeits the property of any person, no matter where he resides, who owns property in the District of Columbia, or in one of the loyal states, on the ground that he has committed a crime defined and punished by this law. Well, is such a forfeiture as that a forfeiture under the laws of nations? Is such a forfeiture as that one which has been inflicted under rules made by congress to regulate captures on land or water under the laws of nations? I respectfully submit that it is a forfeiture under this municipal law, and under this only.

Now look, if your honors please, at the sixth section: "That if any person within any state or territory of the United States other than those named as aforesaid [that is, other than the loyal states], after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the president of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States," all his estate shall be forfeited. This, as I have said of the other provision, is directed against all persons, of whatever state they may be inhabitants, and without any regard whatever to the question whether they are enemies, within the laws of nations and the decisions of this court, or not.

This, then, may it please your honors, is a law which begins by punishing treason, which advances to the definition of a new offense, namely, giving aid and comfort to the rebellion, which punishes that by fine or imprisonment, or both, at the discretion of the court, and then it proceeds further and inflicts the forfeiture of all the property of all persons who give aid or comfort to the rebellion. And why is not this last just as much a punishment as the fine which is mentioned in the second section that defines the offense? Suppose that, in addition to this section defining the offense and punishing it by fine or imprisonment, the act had continued: "And he shall forfeit all his property; and this for-

feiture shall be enforced by proceedings in conformity with the subsequent provisions of this act,"—then it would be plain that the forfeiture was intended to be a part of the punishment for the offense. Why is it not just as plain now? He forfeits it for the offense; he forfeits it for this new offense described in this statute, and not otherwise; he forfeits it for that cause, and not for any other cause,—not because he is an enemy, but because he has committed the offense which is described in the act as subjecting him to fine and imprisonment. Your honors are not, of course, to be told that this is not a punishment, because it is simply a forfeiture of property. The punishment prescribed in the very section that creates the offense is a fine of not exceeding five thousand dollars; and that may be the whole punishment that is inflicted under that section. If that is a punishment, the forfeiture of all a man's property may be properly said to be a punishment; and if the forfeiture is inflicted for the offense described in the law on all who commit it, and on no one who does not commit it, how can it be said that it is not a punishment for the offense? This argument, as I humbly conceive, is greatly strengthened by what followed the enactment of this law by congress. The act was passed by the two houses of congress, and sent to the president. Members of the house of representatives, where the bill originated, made known to the house that the president entertained such opinions concerning the constitutionality of the law that he must veto it. That was subsequently made known to the house to induce them to act, and, accordingly, a joint resolution was introduced, which will be found in this same volume of the Statutes at Large, page 627. I shall comment on that presently, after stating its history.

This joint resolution was passed by the house, and sent to the senate; the same opinions of the president concerning the law which had been sent to him for his signature were made known to the senate; they concurred in this joint resolution. It was sent to the president, and was received by him before the expiration of ten days after the passage of the bill. He returned this joint resolution and bill together to the house of representatives, where they had originated, with a message. I will read the message which was sent to the house of representatives, and your honors will see that it refers to another which accompanied it:

"Considering the bill for 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' and the joint resolution explanatory of said act, as being substantially one, I have approved and signed both. Before I had

been informed of the resolution, I had prepared the draft of a message stating objections to the bill becoming a law, a copy of which draft is herewith submitted."

And then comes the message which he had prepared, stating his objection to the bill becoming a law. The message is of considerable length. I will not occupy the time allotted to me by reading it. Your honors will unquestionably read it. The objections of the president were that this is penal legislation, and that the restrictions in the constitution concerning *ex post facto* laws, and concerning forfeiture not extending beyond the life of the offender, have not been observed. Now, the only provision in this act for the forfeiture of the real estate of the offender is in these confiscation proceedings. It is under these confiscation proceedings only that forfeiture of the real estate of the offender can be enforced. With this explanation, I desire to read this joint resolution explanatory of this act which caused the signature of the president to be placed to it.

"Joint resolution explanatory of 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.'"

Resolved, etc., "That the provisions of the third clause of the fifth section of 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," shall be so construed as not to apply to any act or acts done prior to the passage thereof, nor to include any member of a state legislature, or judge of any state court, who has not, in accepting or entering upon his office, taken an oath to support the constitution of the so-called 'Confederate States of America.'"

Then follows this clause:

"Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

A "forfeiture" of the estate of the "offender." What have these terms to do with the appropriation of enemy's property under the laws of nations? They are strictly and exclusively applicable to punishment for crime. And let it be remembered, in reading the message of the president and this joint resolution passed to obtain his signature to this law, that, under the constitution, he is a part of the legislative power.

Now, when your honors bear in mind that, in legislating by virtue of the sovereign belligerent authority of the United States against the property of enemies, there is no restriction whatever as to the duration of the estate to be taken, and that, when congress is legislating concerning the punishment of crimes, there is a restriction, and that the president said, "I cannot sign this

law unless that restriction is placed upon this part of the act which forfeits real estate," you have his declaration, acting in conjunction with the residue of the legislative power, that this is a penal law,—that it is a forfeiture of the property of the offender against the law; and I respectfully submit that this is in entire accordance with the results which every legal mind must come to in looking at the nature and the provisions and the consequences of the law itself, and that the president was not acting under any mistake when he took this view of the proposed act.

There has been before this court at a former term the case of Armstrong's Foundry, reported in 6 Wallace. That was a proceeding against a particular property, which had been placed in an illegal predicament with the consent of the owner. That particular property had been used to aid the rebellion; and under a former law, not under this one, the forfeiture of that property was sought, and, before the final judgment of forfeiture was rendered in this court, Armstrong was pardoned. That being a proceeding, so to speak, against the offending thing, the case was certainly open to the argument that the pardon of the owner of the property did not put an end to the right of the United States to forfeit the property; and that argument was used, and seems to have been entertained by some members of the court, but, on the whole, it was rejected as inadmissible. On the whole it was declared by this court that, even in that case, the intention of congress was to forfeit the property as a punishment for an offense committed by the owner in devoting his property to such a use, and that, therefore, a pardon which condoned all offenses, and this among others, relieved the property from the claim of the government. How much stronger is the case now before the court, where the proceeding is not against an offending thing, but against all the property of a person because he has committed a crime,—a case clearly distinguishable (as I shall have occasion presently more fully to suggest to the court) from one where the proceeding is against some particular thing, on account of some particular legal predicament into which it has been brought, either with or without the consent of the owner.

I beg leave to refer your honors, also, in this connection, to some remarks made by Judge Sprague, of the district court for Massachusetts, in the case of The Amy Warwick, which is cited upon the brief. It is found in 2 Sprague's Decisions, 150, where it will be seen that that learned and able judge has characterized legislation of this kind as penal legislation, and that, of course, under the constitution of the United States, the owner of property can-

not have a forfeiture inflicted upon him until he has been duly convicted, according to the constitution of the United States, of the offense which causes the forfeiture.

I proceed, next, to the inquiry whether this legislation is within the prohibitions contained in the different amendments of the constitution, on the assumption made by the government that the proceedings of confiscation it authorizes may be had without any previous conviction of the offense alleged in the libel, and on this part of the argument I shall find it necessary to say but few words. That this offense of giving aid and comfort to the rebellion is punished by this law by a fine of five thousand dollars, imprisonment for five years, inability or disqualification to hold any office of honor or trust under the United States, and forfeiture of all property,—that this is an "infamous" offense, within the meaning of the constitution, I suppose will hardly be denied. That this is a criminal prosecution, within the meaning of the constitution, if it be not legislation exclusively directed against enemy's property, within the scope of the war power of the government, as I have endeavored to explain it, I suppose, also, cannot be denied. Here is a charge of crime, and here is a forfeiture of all property by reason of his guilt of that crime, to be enforced by this proceeding. I suppose it to be equally clear that this is not "due process of law," within the meaning of the constitution. I am quite aware that property may be proceeded against for offenses against the revenue laws of the country, and for some other offenses, where the property proceeded against is the offending thing, without the owner having been convicted of any offense, and in many cases without its being necessary that he should even be alleged to have been guilty of any offense personally; but those cases are clearly distinguishable, as I have said, from this case. There the offense inheres in the thing, and the thing is forfeited by reason of the unlawful use that has been made of the property, or the unlawful condition into which it has been put; but here is a proceeding against, so to speak, innocent property, that has broken no law, has been used as an instrument for breaking no law, and it is a proceeding against it because of the guilt of its owner.

Now, when the constitution uses the words "process of law" without defining what they mean, it has been said by this court that they must be held to mean such process as was customary under the common law of England, shown by its use in this country, after the emigration of our ancestors, to be suited to our condition. But is there any instance under the common law of Eng-

land, since *Magna Charta,* in which the property of a subject was forfeited by a proceeding like this? Is there any instance in which a subject could lose his property by a direct proceeding against the property itself, because he had committed an offense, without allowing an opportunity for a trial by a jury of his personal guilt? I venture to say there is no such instance known to the common law of England, or which was known to our ancestors as having been brought by them from England.

I am quite aware that, in the heat of the Revolutionary war, acts of confiscation were passed, *ex post facto* laws were passed, bills of attainder were passed, all kinds of violent proceedings were resorted to against those who were deemed to be the enemies of their country. But, may it please your honors, it was these very excesses into which our ancestors had run during that heated time which caused the framers of the constitution of the United States to insert restrictions in it that no *ex post facto* law should be passed; that no bill of attainder should be passed; that no man should be deprived of his property save by due process of law. The citation of the enormities which were committed in those times of revolution, which caused these restrictions to be inserted in the constitution, certainly cannot afford any reason why the restrictions themselves should not be observed.

WENDELL PHILLIPS.

[Wendell Phillips was born in Boston, 1811. His father was a judge of the court of common pleas, and the first mayor of Boston. He was educated at Harvard College, where he was graduated in 1831. He studied law at the Harvard Law School, and was admitted to the bar in 1834. He opened an office in Boston, but soon threw himself heart and soul into the anti-slavery agitation. At a meeting of Abolitionists in Faneuil Hall, in 1837, to denounce the murder of Lovejoy, Phillips made his first speech, and thereafter he was indefatigable with voice and pen in his efforts for the freedom of the slaves. In 1840 he was a delegate to the World's Anti-Slavery Convention in London. After the close of the Civil War he advocated woman's suffrage, labor reforms, and temperance. In 1870 he was the nominee of the Labor and Prohibition parties for governor of Massachusetts. As a lyceum lecturer and commemorative orator, he won great distinction. Among his most celebrated efforts may be mentioned "The Lost Arts," "Toussaint l'Ouverture," "Daniel O'Connell," "William Lloyd Garrison," "Idols," and "The Scholar in a Republic." He died at his home in Boston, February 2, 1884. His speeches, lectures, and letters have been published in two volumes by Lee & Shepard, Boston, from which, by permission, the following argument is taken.]

Mr. Justice Story once remarked that he would like to live long enough to see what distinction three of his pupils in the Harvard Law School would attain. These three pupils were Benjamin R. Curtis, Wendell Phillips, and Charles Sumner. Although all three lived up to the expectations which had been formed by their distinguished instructor, their courses were widely divergent. Phillips, like Sumner, seems to have had no real liking for the law, and his circumstances were such that he was not compelled to abide by his choice. The year following his admission to the bar, in comparing progress with a classmate, he said: "I will wait six months more, and then, if clients do not come, I will not wait for them longer, but will throw myself heart and soul into some good cause, and devote my life to it, if necessary." The cause was near at hand. Within a few months the mobbing of Garrison in the streets of Boston directed his mind to the slavery question. Two years later the briefless lawyer of twenty-six launched himself on

his real career with his spirited speech on the murder of Lovejoy. Time showed what the profession lost in him, for, whatever difference of opinion may exist with respect to his subsequent public conduct as an agitator, no one ever denied that he possessed in a most remarkable degree the power of persuasive speech. Constantly before the public for nearly half a century as a social agitator, or at the head of a little band of lyceum lecturers, he set a new style of public speaking, which still colors the best oratory of our time. "In the measured cadence of his quiet voice," as George William Curtis said, "there was intense feeling, but no declamation, no passionate appeal, no superficial and feigned emotion. It was simple colloquy,—a gentleman conversing." Only once did he display these high powers in a legal argument; but this "outrageously able speech," as Rufus Choate termed it, gives Wendell Phillips an honorable place in forensic annals. For simplicity and force of style, combined with all the elements of rhetorical power, the following argument is indeed a masterpiece of persuasive speech.

ARGUMENT IN SUPPORT OF A PETITION FOR THE REMOVAL OF EDWARD G. LORING FROM THE OFFICE OF JUDGE OF PROBATE, BEFORE A COMMITTEE OF THE MASSACHUSETTS LEGISLATURE, 1855.

STATEMENT.

This controversy arose out of the attempt to enforce the fugitive slave act of 1850 in the city of Boston. The negro Shadrach, the first person arrested under the act, was forcibly rescued in the early part of 1851. In April of that year, Simms was sent back to slavery. In May, 1854, Anthony Burns, the last slave seized in Boston, was brought before the commissioner under the act,—Edward G. Loring,—who was also a probate judge of Boston. By this time the anti-slavery sentiment had reached a high point; Webster was dead, and Sumner represented Massachusetts in the United States senate. Burns was remanded by Commissioner Loring, but it required the assistance of the state militia to place him on board a south-bound vessel in Boston harbor. An agitation at once arose for the removal of Judge Loring from the office of probate judge in consequence of his having acted as a slave commissioner. In the following year, numerous petitions were presented to the legislature asking for his removal by joint address. At the hearing the following argument was delivered by Wendell Phillips on behalf of the petitioners. Richard Henry Dana, who had defended Burns, but who disapproved of the proposed action, appeared in behalf of certain remonstrants. The address finally passed the legislature, but Gov. Gardner declined to accede to it. When, in 1857, Nathaniel P. Banks became governor, the agitation was renewed, and Judge Loring was removed from office. He was immediately appointed by President Buchanan a judge of the United States court of claims.

Mr. Chairman and Gentlemen: The petitions offered you on any one topic are usually all in the same words. On the present occasion I observe on your table twelve or fourteen different forms. This is very significant. It shows they do not proceed from a central committee, which has been organized to rouse the commonwealth. They speak the instinctive, irrepressible wish of all parts of the state. It is the action of persons of different parties, sects, and sections, moving independently of each other, but seeking the same object. Some persons have sneered at these petitions because women are found among the signers. Neither you, gentlemen, nor the legislature, will maintain that women—that is, just one-half of the commonwealth—have no right to petition. A civil right, which no one denies even to foreigners, will not certainly be denied to the women of Massachusetts; and is there any one thoughtless enough to affirm that this is not a proper occasion for women to exercise their rights? These petitions ask the removal of a judge of probate. Probate judges are

the guardians of widows and orphans. Women have a peculiar interest in the character of such judges. He chooses an exceedingly bad occasion to laugh who laughs when the women of the commonwealth ask you to remove a judge of probate, who has shown that he is neither a humane man nor a good lawyer. In the whole of my remarks, gentlemen, I beg you to bear in mind that we, the petitioners, are asking you to remove, not a judge merely, but a judge of probate,—a magistrate who is, in a peculiar sense, the counselor of the widow and the fatherless. The family, in the moment of terrible bereavement and distress, must first stand before him. To his discretion and knowledge are committed most delicate questions,—large amounts of property, and very dear and vastly important family relations. Surely, that should not be a rude hand which is thrust among chords that have just been sorely wrung. Surely, he should be a wise and most trustworthy man who is to settle questions on many of which, from the nature of the case, there can, practically, be no appeal. His court is not watched by a jury. It is silent and private, and has little publicity in its proceedings. He should be, therefore, most emphatically a magistrate able to stand alone; whose rigid independence cannot be overawed or swayed by cunning or able individuals about him; one skillful in the law, and who, while he holds the scales of justice most exactly even, has a tender and humane heart; one whose generous instincts need no prompting from without.

Some object that this petition asks you to do an act fatal, they say, to the independence of the judiciary. The petitioners are asked whether they do not know the value and importance of an independent judiciary. Mr. Chairman, we are fully aware of its importance. We know, as well as our fellow citizens, the unspeakable value of a high-minded, enlightened, humane, independent, and just judge; one whom neither "fear, favor, affection, nor hope of reward" can turn from his course. It is because we are so fully impressed with this that we appear before you. Taking our history as a whole, we are proud of the bench of Massachusetts. You have given no higher title than that of a Massachusetts judge to Sewall, to Sedgwick, to Parsons. Take it away, then, from one who volunteers—hastens—to execute a statute which the law, as well as the humanity of the nineteenth century, regards as infamous and an outrage. We come before you, not to attack the bench, but to strengthen it, by securing it the only support it can have under a government like ours,—the confidence of the people. You cannot legislate judges into the confidence of

the people. You cannot preach them into it. Confidence must be earned. To make the name of "judge" respected, it must be worthy of respect,—must never be borne by unworthy men. It never will be either respected or respectable while this man bears it. I might surely ask his removal in the names of the judges of Massachusetts, who must feel that this man is no fit fellow for them. The special reasons why we deem him an unfit judge I shall take occasion to state by and by. At present I will only add that it is not, as report says, merely because he differs from us on the question of slavery that we ask his removal. It is not for an honest or for any other difference of opinion that we ask it, but, as we shall presently take occasion to state, for far other and very grave reasons.

I do not know, gentlemen, what course of remark the remonstrant or his counsel may adopt; but I have thought it necessary to say so much in order that they may understand our position, and thus avoid any needless enlargement upon our want of respect for the function, or appreciation of the value, of an independent, high-minded judiciary. You will see, in the course of my remarks, that it is because this incumbent has sinned in that very respect that we appear here.

Gentlemen, these petitions, though variously worded, all ask you to "take proper steps for the removal of Edward Greely Loring from office,"—"proper steps." It is for the legislature to decide what the "proper steps" are. In offering some remarks on the proper method of procedure in this case, you will bear in mind that I necessarily, perhaps, go over more ground than the progress of this discussion may show to have been necessary, because, of course, I must be entirely ignorant what ground the remonstrant or his counsel will take. I must therefore cover all the ground. You are of course aware, gentlemen, that, originally, all judges were appointed by the king, and held their offices as long and on such conditions as he pleased to prescribe. Some held as long as they behaved well,—during good behavior, as our constitution translates the old law Latin, *quamdiu se bene gesserint;* others held during the pleasure of the king,—*durante bene placito,* as the phrase is. This, of course, made the judges entirely the creatures of the king. To prevent this, and secure the independence of the judges after the English revolution of 1689, it was fixed by the "Act of Settlement," as it was called, that the king should not have the power to remove judges, but that they should hold their offices "during good behavior." They were still, however, removable by the king, on address from both houses of parlia-

ment. Hallam, in his Constitutional History, states very tersely the exact state of the English law, and it is precisely the law of this commonwealth also, in these words: "No judge can be dismissed from office except in consequence of a conviction for some offense, or the address of both houses of parliament, which is tantamout to an act of legislature."[1]

To come now to our commonwealth. There are, as I just intimated, two ways of removing a judge known to the constitution,—one is by impeachment, and the other is by address of the legislature to the governor. A judge who commits a crime, whether in his official capacity or not, may be punished by indictment, precisely as any other man may,—this principle may be left out of the question. A judge, who, sitting on the bench, transgresses the laws in his official capacity, may be impeached by the house of representatives before the senate, as a court of impeachment, and removed.[2] The petitioners do not ask you to impeach Judge Loring. Why? Because they do not come here to say that he has been guilty of official misconduct. To render a judge liable to impeachment, he must be proved to have misconducted in his official capacity. I shall not go into the niceties of the law of impeachment. One would suppose, from the arguments of the press at the present time, and their comments on Mr. Loring's remonstrance, that a judge could not be impeached unless he had violated some express law. This is not so. It has been always held that a judge may be guilty of official misconduct, and liable to impeachment, who had not violated any positive statute. It is enough that the act violates the principles of the common law. All authorities agree in this, and some would seem to lay down the rule still more broadly.[3] As the constitution confines the process of impeachment to cases of official misconduct, and as we do not pretend that Mr. Loring, sitting as a judge of probate, has been guilty of any such, I pass from this point.

But the constitution provides another form, which is that a judge may be removed from office by address of both houses to his excellency the governor. In the first place, gentlemen, let me read to you the source of this power: "All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is

[1] Const. Hist. (Am. Ed.) p. 597. [2] Const. Mass. c. 1, § 2, art. 8.
[3] See Story, Const. bk. 3, c. 10, §§ 796-798, and Shaw's argument when counsel against Prescott, Prescott's Trial, p. 180.

different provision made in this constitution: Provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature."[4] Now, gentlemen, looking on the face of this, it would be naturally inferred that, notwithstanding his "good behavior," and without alleging any violation of it, a judge could, nevertheless, be removed by address; that an "address" need not be based on a charge of official misconduct,—that an "address" need not be based on a charge of illegal conduct in any capacity. This seems so clear that I should have left this point without further remark if Mr. Loring had not placed upon your files a remonstrance against the prayer of these petitioners, which remonstrance (I shall not occupy your time by reading it) is based upon the principle that it would be a hard and unjust procedure if either house should address the governor against him, seeing that he has not violated any state law, or done anything that was illegal, or that was prohibited by the laws of Massachusetts, and alleging that he has only acted in conformity with the official oath of all officers of the state to support the constitution of the United States. The defense of the remonstrant, as far as we are informed of it, is that he ought not to be removed because he has violated no law of Massachusetts. To that plea, gentlemen, I shall simply reply: The method of removing a judge by "address" does not require that the house or senate should be convinced that he has violated any law whatever. Grant all Mr. Loring states in his remonstrance,—that he has broken no law, that he stands legally impeccable before you, which, in other words, is simply to say that he cannot be indicted. If he had violated a law, he could be indicted. He comes to this house and says, in effect, "Gentlemen, I cannot be indicted; therefore I ought not to be removed." The reply of the petitioners is: "A man may be unfit for a judge long before he becomes fit for the state prison." Their reply is (leaving for the time all question of impeachment): "It is not necessary that a judge should render himself liable to indictment, in order to be subject to be removed by 'address.'" He can be removed (as my brother who preceded me [Seth Webb, Jr., Esq.] has well said) for any cause which the legislature, in its discretion, thinks a fitting cause for his removal. Even if he has not violated any law of the commonwealth, written or unwritten, still he may be removed if the legislature thinks the pub-

[4] Const. Mass. c. 3, art. 1.

lic interest demands it. The matter is entirely within your discretion.

My proof of this is, first, the language of the constitution. The constitution says: "The senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives against any officer or officers of the commonwealth for misconduct and maladministration in their offices."[5] Now, suppose it true, as some claim, that such misconduct must amount to a violation of positive law,—that nothing short of that will justify impeachment,—the mere fact that the constitution provides another way would be *prima facie* evidence that it meant to lay a broader foundation for removal, else why two methods? If, in his office, he had outraged the laws of the state, he could be impeached. Is not one remedy sufficient? Why does the constitution provide another? Because the people, through their constitution, meant to say: "We will not have judges that cannot be removed unless they have violated a statute. We will provide that, in case of any misconduct, any unfitting character, any incapacity or loss of confidence, the supreme power of the legislature may intervene and remove them." If impeachment applies only to official misconduct, expressly prohibited by statute, as seems to be claimed, then, from the existence of another additional method in the constitution, one would naturally infer that this other power referred to misconduct not official, and not expressly prohibited by statute. In addition to the mere letter of the constitution, and the inference from the fact of two powers being granted, we have the action of the commonwealth in times past. I have not time for historical details, but the power of address, whenever it has been used in this commonwealth, has been used to remove judges who had not violated any law. Judge Bradbury was removed, I think, for mental incapacity, resulting from advancing age. Of course, intellectual inefficiency is not impeachable,—it is not such "misconduct or maladministration" as renders a man liable to impeachment; but the constitution, in order to cover the whole ground, has left with the legislature the power to remove an inefficient judge,—a judge who has grown too old to perform his duties. But it happens that this clause of the constitution has been passed upon,—not, indeed, by the supreme court, but I may say by equally high authority. It has been expounded by some of the ablest men the commonwealth ever knew, and in circumstances which preclude

[5] Chapter 1, § 2, art. 8.

the idea of prejudice or passion. It is fortunate for these petitioners, in regard to this claim of the power of the legislature (which it is said Mr. Loring's friends intend to deny, and which his remonstrance does practically deny),—it is fortunate for them that, in the constitutional convention of Massachusetts, in 1820, this clause of the constitution was deliberately discussed. It was discussed, gentlemen, not when there was a case before the commonwealth, when men were divided into parties, when personal sympathy or antipathy might bias men's judgments, but when the debaters were in the most unimpassioned state of mind,—statesmen, endeavoring to found the laws of the commonwealth on the best basis. The discussion was long and able. I shall read you the sentiments of different gentlemen who took part in that discussion for this purpose: to show you that this legislature has an unlimited power of removal for any cause, whether the law has been violated or not; whether acts were done by a judge in his official capacity or any other.

Allow me to remind you, gentlemen, that there are two questions you are bound to ask. The first is, can we remove a judge who is not guilty of any official misconduct, of any violation of statute law, in any capacity? The second is, if we have the power, ought we to exercise it in the present case? (1) Have we this power? (2) Ought we to exercise it?

I propose to read you extracts from the speeches in the Massachusetts convention of 1820, to show that the legislature has, in the judgment of our ablest lawyers and statesmen, an unlimited authority to ask the removal of judges whenever it sees fit, and for any cause the legislature thinks sufficient; that the people, the original source of all power, have not parted with their sovereignty in this respect,—did not intend to part with it, and did not part with it. When I have convinced you, if I shall succeed in convincing you, that you have this authority, I shall, with your permission, say a few words to enforce the other point, that you ought to exercise it according to the prayer of the petitioners. In the first place, I read the clause of the constitution: "The governor, with the consent of the council, may remove them [judicial officers] upon the address of both houses of the legislature." The constitutional convention, which met in 1820, appointed a committee to take this clause into consideration. That committee consisted of Messrs. Story, of Salem (Judge Story, of the supreme court of the United States), John Phillips, of Boston (judge of the common pleas court of Massachusetts, and presi-

dent of the senate), Martin, of Dorchester, Cummings, of Salem (judge of the common pleas), Levi Lincoln, of Worcester (afterwards judge of our supreme court and governor of the commonwealth), Andrews, of Newburyport, Holmes, of Rochester, Hills, of Pittsfield, Austin, of Charlestown (high sheriff of Middlesex county), Leland, of Roxbury (afterwards judge of probate for Norfolk county), Kent, of West Springfield, Shaw, of Boston (present chief justice of the commonwealth), Marston, of Barnstable, Austin, of Boston (since attorney general of the commonwealth), and Bartlett, of Medford,—a committee highly respectable for the ability and position of its members. Permit me to read a section of their report (page 136):

"By the first article of the constitution, any judge may be removed from his office by the governor, with the advice of the council, upon the address of a bare majority of both houses of the legislature. The committee are of opinion that this provision has a tendency materially to impair the independence of the judges, and to destroy the efficacy of the clause which declares they shall hold their offices during good behavior. The tenure of good behavior seems to the committee indispensable to guard judges, on the one hand, from the effects of sudden resentments and temporary prejudices entertained by the people, and, on the other hand, from the influence which ambitious and powerful men naturally exert over those who are dependent upon their good will. A provision which should at once secure to the people a power of removal in cases of palpable misconduct or incapacity, and at the same time secure to the judges a reasonable permanency in their offices, seems of the greatest utility; and such a provision will, in the opinion of the committee, be obtained by requiring that the removal, instead of being upon the address of a majority, shall be upon the address of two-thirds of the members present of each house of the legislature."

The committee, you see, gentlemen, acknowledged that there is unlimited power. They think that power dangerous; they advise that it should be limited—how? Observe, even this committee, although they say they think it dangerous, do not advise it should be stricken out; but they advise it should be limited by requiring a two-thirds vote, and this is all.

Remember, gentlemen, that I read the following extracts, not to show the opinion of this convention as to the value or the danger of this power. I merely wish to show you that, in the opinion of the ablest lawyers of the state, the constitution, as it then stood (and it stands now precisely as it stood then) gave to this legislature unlimited authority to remove judges for any cause they saw fit; and that, while all the speakers were fully aware of its liability to abuse, no speaker denied its unlimited extent, or proposed to strike the power from the constitution. After that report had been put in, the convention proceeded to take it up for discussion. The first gentleman who joins, to any purpose,

in the debate, is Samuel Hubbard, Esq., perhaps, beyond all comparison, the fairest-minded, as well as one of the ablest, lawyers of the Suffolk bar; and let me add that, after a life passed in the most responsible practice of his profession, he finished it on the bench of the supreme court. His testimony is the more valuable because Mr. Hubbard thought this provision eminently dangerous. But he says:

"The constitution was defective in not sufficiently securing the independence of judges. He asked if a judge was free when the legislature might have him removed when it pleased. . . . The tenure of office of judges was said to be during good behavior. Was this the case when the legislature might deprive them of their office, although they had committed no crime? . . . No justice of the peace was allowed to be deprived of his office without a hearing, but here the judges of the highest court might be dismissed without an opportunity of saying a word in their defense."

Then comes Chief Justice Lemuel Shaw:

"The general principle was that they should be independent of the other persons during good behavior. What is meant by good behavior? The faithful discharge of the duties of the office. If not faithful, they were liable to trial by impeachments. But cases might arise when it might be desirable to remove a judge from office for other causes. He may become incapable of performing the duties of the office without fault. He may lose his reason, or be otherwise incapacitated. It is the theory of our government that no man shall receive the emoluments of office without performing the services, though he is incapacitated by the providence of God. It is necessary, therefore, that there should be provision for this case. But in cases when it applies, the reason will be so manifest as to command a general assent. It must be known so as to admit of no doubt, if a judge has lost his reason, or become incapable of performing his duties. As it does not imply misbehavior, if the reason cannot be made manifest so as to command the assent of a great majority of the legislature,—of two-thirds at least,—there can be no necessity for the removal. By the constitution as it stands, the judges hold their offices at the will of the majority of the legislature. He confessed with pride and pleasure that the power had not been abused; but it was capable of being abused. If so, it ought to be guarded against. That could be done by requiring the voice of two-thirds of each branch of the legislature."

Then comes William Prescott, a name well known here and the world over. He was a man of English make; taciturn, of few words,—no diffuse American talker. He spoke little, but each word was worth gold. His rare civil virtues, great ability, and eminently judicial mind added luster to a name that was heard in the van of Bunker Hill fight.

"What security have they [judges] by the constitution? They hold their offices as long as they behave well, and no longer. They are impeached when guilty of misconduct. It is the duty of the house of representatives, constituting the grand inquest of the commonwealth, to make inquiry; for the senate to try, and, if guilty, to remove them from office. There may be other cases in which they ought to be removed,

when not guilty of misconduct in office, but for infirmity. Provision is made for these cases, that the two branches of the legislature, concurring with the governor and council, may remove judges from office. He did not object to this provision, if it was restrained so as to preserve the independence of the judges. They should be independent of the legislature and of the governor and council. But now there is no security. The two other departments may remove them without inquiry,—without putting any reason on record. It is in their power to say that the judges shall no longer hold their offices, and that others more agreeable shall be put in their places. He asked, was this independence?"

There may be "other cases" in which they ought to be removed when not guilty of misconduct in office, but from infirmity. Is not that exactly what the petitioners claim? There being no misconduct in office,—no violation of the precise statutes of the commonwealth,—comes the case described by Mr. Prescott, where a judge ought to be dismissed for "infirmity"; for we maintain that there was here a cruel "infirmity." "He did not object to this provision" if properly restrained (that was the old Federalist; the man who never was inclined to trust the people too far; the man who was in favor of a strong government!)—"he did not object to this provision"; all he asked was a two-thirds vote.

Then comes Mr. Daniel Davis, of Boston. You may not have known him, gentlemen; but those of us who are older remember him as the solicitor general for the commonwealth of Massachusetts. He says:

"If the resolutions were before the committee in a form which admitted of amendment, he would propose to alter it in such manner that the officer to be removed should have a right to be heard. No reason need now be given for the removal of a judge, but that the legislature do not like him."

He did not deny the power; did not question its utility. All he wanted was that the officer should be heard. "No reason need be given, but that the legislature do not like him." Is not this unlimited power? The claim of Mr. Loring is substantially that you abuse your power unless you charge and prove that he has offended against a statute "in such case made and provided." Mr. Daniel Davis says: "No reason need be given for the removal of a judge, but that the legislature do not like him." That is his idea of the power of this legislature.

Then comes Mr. Henry H. Childs, of Pittsfield. I do not know his history. He did not want the constitution changed at all. He did not ask even the two-thirds vote. Mr. Childs says:

"It was in violation of an important principle of the government that the majority of the legislature, together with the governor, should not have the power of removal from office. This power was in accordance with the principle of the bill of rights. It was imperative in the advocates of this resolution to show that it was necessary to intrench this

department of the government for its security. They had not shown it; on the contrary, we were in the full tide of successful experiment. The founders of the constitution intended to put the judiciary on the footing of the fullest independence consistent with their responsibility."

"This power was in accordance with the provisions of the bill of rights." What are these? Section 5 of the bill of rights reads thus:

"All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."

Mr. Loring knew under what condition he was taking office. He knew this provision in the declaration of rights: that the people retain all power, and that all magistrates "vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them," in office and out of it. Section 8 says, further:

"In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life, and to fill up vacant places by certain and regular elections and appointments."

No man has a right to criticise here the manner in which the removal is effected. Let them go elsewhere than to this tribunal if they say it is a bad power. The people retain the right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life. This is the principle of our declaration of rights. Mr. Childs says: "The founders of the constitution intended to put the judiciary on the footing of the fullest independence consistent with their responsibility." Mr. Chairman, I beseech you, in the progress of this discussion, if the remonstrant shall ring changes on the necessity of maintaining the independence of the judiciary, to remember this remark: that "the founders of the constitution intended to put the judiciary on the footing of the fullest independence consistent with their responsibility,"—no more.

Then Mr. Cummings, of Salem, afterwards judge, rose. He says:

"In this state they cannot be removed on address of the legislature, but with the consent of the council. Was not this a sufficient guard? Another part of the constitution protects them when accused of crimes. This provision is not intended to embrace cases of crime,—it is only for cases when they become incompetent to discharge their duties. May not the people, by a majority, determine whether judges are incompetent?"

Mr. Loring says: "Show me my crime!" Mr. Cummings says: "This provision is not intended to embrace cases of crime."

Levi Lincoln, of Worcester, comes next. He was then a Democrat,—since governor and judge.

"He was entirely satisfied with the constitution as it was. He had never heard till now, and was now surprised to hear, that there was any want of independence in the judiciary. He had heard it spoken of in charges, sermons, and discourses in the streets as one of the most valuable features of the constitution that it established an independent judiciary. He inquired, was it dependent on the legislature? It was not on the legislature nor on the executive. No judge could be removed but by the concurrent act of four co-ordinate branches of the government,—the house of representatives, the senate, with a different organization from the house, the governor, and the council. Was it to be supposed that all these should conspire together to remove a useful judge? But it was argued that future legislatures might be corrupt. This was a monstrous supposition. He would rather suppose that a judge might be corrupt. It was more natural that a single person should be corrupt than a numerous body. The proposed amendment was said to be similar to provisions of other governments. There was no analogy, because other governments are not constituted like ours. It was said that judges have estates in their offices,—he did not agree to this doctrine. The office was not made for the judge, nor the judge for the office, but both for the people. There was another tenure, —the confidence of the people. It was that which had hitherto occurred here. Have we, then, less reason to confide in posterity than our ancestors had to confide in us?"

Then follows Mr. Daniel Webster. He had recently come to the state. Joining in the debate, he says:

"As the constitution now stands, all judges are liable to be removed from office by the governor, with the consent of the council, on the address of the two houses of the legislature. It is not made necessary that the two houses should give any reasons for their address, or that the judge should have an opportunity to be heard. I look upon this as against common right, as well as repugnant to the general principles of the government. . . . .

"If the legislature may remove judges at pleasure, assigning no cause for such removal, of course it is not to be expected that they would often find decisions against the constitutionality of their own acts."

These are Webster's words; and you will remember, Mr. Chairman, that the constitution stands, in 1855, just as it stood when Webster was speaking. I cite the language to show what Mr. Webster understood to be the constitution of Massachusetts,—that you could remove a judge without giving any reason, "at your pleasure," without hearing him. Now, what does he propose to do? Does he propose to strike out that provision? No, sir! He does not even propose a two-thirds vote.

"In Pennsylvania, the judges may be removed 'for any reasonable cause,' on the address of two-thirds of the two houses. In some of the states, three-fourths of each house is required. The new constitution of Maine has a provision with which I should be content; which is that

no judge shall be liable to be removed by the legislature till the matter of his accusation has been made known to him, and he has had an opportunity of being heard in his defense."

He says that the constitution gives you the power to remove, and all he asks is that, before doing it, you should allow the judge an opportunity to be heard. The fact is, gentlemen, you have, according to Mr. Webster, the power to shut that door, and, without assigning any reason whatever, vote a judge out of office, and send him word that he is out,—the constitution does not guaranty him anything else than that. Webster wanted it amended. The convention submitted a proposition for amendment; but the people declined to accept it. This absolute sovereignty of Massachusetts, which, ever since the Colonies, had been held on to by the people,—of that they were unwilling to yield a whit.

The debate continues, and Mr. Childs again joins in it:

"The object in giving the power to the legislature was that judges might be removed when it was the universal sentiment of the community that they were disqualified for the office, although they could not be convicted on impeachment."

Can you ask anything more definite than that? Nobody denied it. "The object in giving this power to the legislature was that judges might be removed when it was the universal sentiment of the community that they were disqualified for the office, although they could not be convicted on impeachment."

Gentlemen, I would not weary your patience with long extracts. I am giving you only the general current of the discussion. The next speaker is James Trecothick Austin,—the name of one who will not be suspected of being too favorable to the rights of the people. It is not often that I have an opportunity to quote him on my side. "Nobody objects to this provision," said Mr. Austin. There sat Prescott, Shaw, Webster, Story, Lincoln,—the men whom you look up to as the lights of this commonwealth; but—"nobody objects to this provision!"

"Nobody objects to this provision. The house of representatives is the grand inquest; they are tried by the senate, and have the right of being heard. But the constitution admits that there may be cases in which judges may be removed without supposing a crime. But how is it to be done by this resolution? There are to be two trials, when for the greater charge of a high crime, he has only one. It so obstructs the course of proceeding that it will never be used. He would suppose the case, not of mental disability, but the loss of public confidence. He knew that such cases were not to be anticipated. But he would look to times when the principle might be brought into operation, when the judge, by indulging strong party feelings, or from any other cause, should so far have lost the confidence of the community that his usefulness should be destroyed. He ought, in such cases, to be removed, but, if witnesses were to be summoned to prove specific charges, it

would be impossible to remove him. A man may do a vast deal of mischief, and yet evade the penalty of the law,—a judge may act in such a manner that an intelligent community may think their rights in danger, and yet commit no offense against any written or unwritten law. Men are more likely to act in such manner as to render themselves unworthy to be trusted than so as to subject themselves to trial. The great argument for the amendment is that it is necessary to secure the independence of the judiciary. He was in favor of the principle, but it had its limitations. While we secure the independence of the judges, we should remember that they are but men, and sometimes mere partisans."

The remonstrant here says: "I have not touched a statute." Mr. Austin says: "No matter whether you have or not; a man may do a vast deal of mischief, and yet evade the penalty of the law." Then he says he has heard a great deal of the weakness of the judiciary. He says the judiciary is not weak. Should you chance to see the remonstrant appear here, attended by eminent legal relatives and friends, you will remember this:

"The court were, besides, attended by a splendid and powerful retinue, —the bar. They have great influence from their talents, learning, and *esprit de corps*, and, as an appendage to the court, they give them a great and able support. He did not admit that the judiciary was a weak branch of the government, but, on the contrary, it was a strong branch."

Then comes Judge Story. If anybody ever was, I may say, a little crazy on the subject of the independence of the judges, it was the late able and learned Judge Story,—at least during the last half of his life. What does he say? He says:

"The governor and council might remove them [judges] on the address of a majority of the legislature, not for crimes and misdemeanors, for that was provided for in another manner, but for no cause whatever, —no reason was to be given. A powerful individual, who has a cause in court which he is unwilling to trust to an upright judge, may, if he has influence enough to excite a momentary prejudice, and command a majority of the legislature, obtain his removal. He does not hold the office by the tenure of good behavior, but at the will of a majority of the legislature, and they are not bound to assign any reason for the exercise of their power. *Sic volo, sic jubeo, stet pro ratione voluntas,*— 'Thus I wish it; thus I order. Let my will stand for a reason.' This is the provision of the constitution, and it is only guarded by the good sense of the people. He had no fear of the voice of the people when he could get their deliberate voice, but he did fear from the legislature, if the judge has no right to be heard."

That is the opinion of the learned Judge Story as to the power of the legislature. "I have no fear of the voice of the people," says Judge Story. All he proposed was that the judge should have an opportunity to be heard.

What was the result of this discussion? The convention proposed to the people—what? That no judge should ever be re-

moved without notice. The people voted on that amendment, voted "nay," and declined to insert it in the constitution.

Now, gentlemen, what is my argument? Here is a debate on this clause, not by men heated with passion, not by men with party purposes to serve, but by men acting as statesmen, in the coolest, most deliberate, and temperate mood,—men of various parties, Whig and Democratic,—and every one of them asserts, without a dissenting voice, that this provision is inserted for the purpose of giving the legislature the power to remove a judge when he has not violated any law of the commonwealth. In addition to this, gentlemen, I will read the remark of Chief Justice Shaw when he was counsel for the house against Judge Prescott, of Groton, who was removed on impeachment, you will recollect, in 1821. On that occasion, Judge Shaw was counsel for the house of representatives, and made some comments on this provision, which, as his opinion has a deserved weight in matters of constitutional law, it is well to read here. He says:

"It is true that, by another course of proceeding, warranted by a different provision of the constitution, any officer may be removed by the executive, at the will and pleasure of a bare majority of the legislature, —a will which the executive in most cases would have little power and inclination to resist. The legislature, without either allegation or proof, has but to pronounce the *sic volo, sic jubeo,* and the officer is at once deprived of his place, and of all the rank, the powers, and emoluments belonging to it. And yet, perhaps, this provision (whether wise or not I will not now stop to consider) is hardly sufficient to justify the extraordinary alarm which has been so eloquently expressed for the liberty and security of the people, or to affix upon the constitution the charge of containing features more odious and oppressive than those of Turkish despotism. The truth is that the security of our rights depends rather upon the general tenor and character, than upon particular provisions, of our constitution. The love of freedom and of justice, so deeply engraven upon the hearts of the people, and interwoven in the whole texture of our social institutions, a thorough and intelligent acquaintance with their rights, and a firm determination to maintain them,—in short, those moral and intellectual qualities without which social liberty cannot exist, and over which despotism can obtain no control,—these stamp the character and give security to the rights of the free people of this commonwealth. So long as such a character is maintained, no danger, perhaps, need be apprehended from the arbitrary course of proceeding, under the provision of the constitution, to which I have alluded. But, sir, we have never for a moment imagined that the proceedings on this impeachment could be influenced or affected by that provision. The two modes of proceeding are altogether distinct, and, in my humble apprehension, were designed to effect totally distinct objects. No, sir! Had the house of representatives expected to attain their object by any means short of the allegation, proof, and conviction of criminal misconduct, an address, and not an impeachment, would have been the course of proceedings adopted by them."

These well-considered and weighty sentences of Chief Justice Shaw show his idea of the extent of your power, and will relieve

your minds of any undue apprehension as to the danger of its exercise. The people of Massachusetts have always chosen to keep their judges, in some measure, dependent on the popular will. It is a colonial trait, and the sovereign state has preserved it. Under the king, though he appointed the judges, the people jealously preserved their hold on the bench by keeping the salaries year by year dependent on the vote of the popular branch of the legislature. This control was often exercised. When Judge Oliver took pay of the king, they impeached him.[6] When the constitution was framed, the people chose to keep the same sovereignty in their own hands. Independence of judges, therefore, in Massachusetts, gentlemen, means, in the words of Mr. Childs, "the fullest independence consistent with their responsibility."

The opinions I have read you derive additional weight from the fact that all the speakers were aware of the grave nature of this power, and some painted in glowing colors how liable to abuse it was. Still not one proposed to take it from you. The most anxious only asked to check it by requiring a two-thirds vote. This proposition the convention refused to accept. The utmost the convention would recommend to the people was that the judge should have notice and liberty to defend himself. Even this limitation on your power the people refused to adopt. They were fully warned, and deliberately, on mature reflection, decided that it was safe and wise to intrust you with unlimited discretion in this respect. With such a page in our history it is not competent for the press or the friends of Judge Loring to argue that no such power ought to have been given you, and that it is too dangerous to be used. The people alone have the right to decide that question, and they have decided it. When, after full deliberation, they gave you the power, they said, in effect, that occasions might arise requiring its exercise, and on such fitting occasions they wished it exercised. Doubtless, gentlemen, this is a grave power, and one to be used only on important occasions. We are bound to show you, not light and trifling reasons for the removal of Judge Loring, but such grave and serious reasons—such weighty cause—as will justify your interference, and make this use of your authority strengthen, rather than weaken, the proper independence of the bench. Indeed, the power is in itself a wise, good, and necessary one, and should be lodged somewhere in every government. The Boston papers, in all their arguments on this point, take it for granted that the people are to be always

[6] See Washburn's Judicial History of Massachusetts, 139, 160.

under guardianship; that government is a grand probate court to prevent the people—the insane and always underage people —from wasting their own property and cutting their own throat. Not such is the theory of republican institutions. The true theory is that the people came of age on the fourth day of July, 1776, and can be trusted to manage their own affairs. The people, with their practical common sense, instinctive feeling of right and wrong, and manly love of fair play, are the true conservative element in a just government. It is true, the people are not always right; but it is true, also, that the people are not often wrong,—less often, surely, than their leaders. The theory of our government is that the purity of the bench is a matter which concerns every individual. Whenever, therefore, guilt, recklessness, or incapacity shield themselves on the bench, by technical shifts and evasions, against direct collision with the law, it is meant that the reserved power of the people shall intervene, and save the state from harm. It is easy to conceive many occasions for the exercise of such a power. How many men among us, by gross misconduct in railroad or banking companies, have incurred the gravest disapprobation, and yet avoided legal conviction? Suppose such men had been at the same time judges, will any one say they should have been continued on the bench? Yet, on the remonstrant's theory, it would be an "abuse of power" to impeach or "address" them off the bench! Suppose a judge, by great private immorality, incurs utter contempt,—is drunk every day in the week except probate court day,—shall he, because he is cunning enough to evade statutes, still hide himself under the ermine? Suppose a judge of probate should open his court on the days prescribed by the statute, and close it in half an hour, as your Judge Loring did when he shut up the probate court of Suffolk on Monday, the 29th day of May, to hurry forward the kidnapping of Anthony Burns. Suppose some judge should thus keep his court open only five minutes each probate day the whole year through. He violates no statute, though he puts a stop to all business; yet, according to the arguments of the press and the remonstrant, it would be a gross abuse of power to impeach him, or address the governor for his removal, since he has violated no law! Not such was the good old doctrine. In the Prescott case, Judge Shaw went so far as to contend that a judge might not only be removed by address, but impeached "for misconduct and maladministration in office, ... of such a nature that the ordinary tribunals would not take notice of or punish them, in their usual course of proceedings, and according to the laws of the

land, and for which, therefore, the offender would not be indictable."[7]

You may think, gentlemen, that I have occupied too much time in proving the unlimited extent of your power. But it seemed necessary, since the press which defends the remonstrant, and he also, though they do not in words deny your unlimited authority, do so in effect. They claim that you destroy the independence of the bench and abuse your power if you exercise it in any case but a clear violation of law. This is a practical annihilation of the power. This claim loses sight of the very nature and intent of the power, which is well stated by Mr. Austin when he says that a judge who has lost the confidence of the community ought to be removed, though you can prove no specific charges against him,—though he may have violated no law, written or unwritten. Or, in words said to have been used by Mr. Rufus Choate in a recent case: "A judicial officer may be removed if found intellectually incapable, or if he has been left to commit some great enormity, so as to show himself morally deranged." This unlimited power, then, gentlemen, is one that you undoubtedly possess. It is one that the people deliberately planned and intended that you should possess. It is one which the nature of the government makes it necessary you should possess, and that, on fitting occasion, you should have the courage to use. True, it is a grave power. But what is all government but the exercise of grave powers? "When the sea is calm, all boats alike show mastership in floating." The merit of a government is that it helps us in critical times. All the checks and ingenuity of our institutions are arranged to secure for us in these halls men wise and able enough to be trusted with grave powers, and bold enough to use them when the times require. Let not, then, this bugbear of the liability of this power to abuse deter you from using it at all. Lancets and knives are dangerous instruments. The usefulness of surgeons is that, when lancets are needed, somebody may know how to use them and save life. Has, then, a proper case occurred for the exercise of this power? In other words, ought you now to exercise it? The petitioners think you ought, and for the following reasons:

First. When Judge Loring issued his warrant in the Burns case, he acted in defiance of the solemn convictions and settled purpose of Massachusetts,—convictions and purpose officially made known to him with all the solemnity of a statute. In or-

[7] Prescott's Case, p. 180.

der to do him the fullest justice on this point, allow me to read a sentence from his remonstrance:

"And I respectfully submit that, when (while acting as a commissioner) I received my commission as judge of probate, no objection was made by the executive of the commonwealth, or by any other branch of the government, to my further discharge of the duties of a commissioner; nor at the passage of the act of 1850, when the jurisdiction aforesaid was given to the commissioners of the circuit courts of the United States, nor at any time since, was I notified that the government of Massachusetts, or either the executive or legislative branch thereof, regarded the two offices as incompatible, or were of opinion that the same qualities and experience which were employed for the rights and interests of our own citizens should not be employed for the protection of all legal rights of alleged fugitives from service or labor under the United States act of 1850.

"I make these latter remarks only for the purpose of bringing respectfully to the notice and clear apprehension of your honorable bodies the extreme injustice and want of equity that would be involved in the removal of a judge from office for the past discharge of other official duties, not by law made incompatible with his duties as judge, against his exercise of which no official objection had ever been raised, and which were created and imposed on him by that law of the land which is the supreme law of Massachusetts."

Gentlemen, this is a mere evasion. He was made judge of probate in 1847. He then knew, as well as you and I do, that Massachusetts did regard the conduct of any one of her magistrates in aiding in the return of a fugitive slave as something disgraceful and infamous. He had solemn and official intimation of this. My proof is the statute of March 24, 1843, entitled "An act further to protect personal liberty":

"Section 1. No judge of any court of record of this commonwealth, and no justice of the peace, shall hereafter take cognizance or grant a certificate in cases that may arise under the third section of an act of congress, passed February twelfth, seventeen hundred and ninety-three, and entitled 'An act respecting fugitives from justice, and persons escaping from the service of their masters,' to any person who claims any other person as a fugitive slave within the jurisdiction of the commonwealth.

"Sec. 2. No sheriff, deputy sheriff, coroner, constable, jailer, or other officer of this commonwealth shall hereafter arrest or detain, or aid in the arrest or detention or imprisonment, in any jail or other building belonging to this commonwealth, or to any county, city, or town thereof, of any person, for the reason that he is claimed as a fugitive slave.

"Sec. 3. Any justice of the peace, sheriff, deputy sheriff, coroner, constable, or jailer, who shall offend against the provisions of this law by in any way acting, directly or indirectly, under the power conferred by the third section of the act of congress aforementioned, shall forfeit a sum not exceeding one thousand dollars for every such offense, to the use of the county where said offense is committed, or shall be subject to imprisonment not exceeding one year in the county jail." (Approved March 24, 1843.)

The intent of that statute is clear and unmistakable. It expresses the determined will of the commonwealth that no magistrate of hers shall accept from the United States any authority, or take any part, directly or indirectly, in returning fugitive slaves to their masters. It means to set a stigma on slave catching in this commonwealth. It thunders forth its command that no officer shall hold the broad seal of the state in one hand, and reach forth the other for a slave-catcher's fee. This is the heart and gist of the statute. He that runneth may read. Technically construed, it may be said only to forbid that a judge, acting as a judge, should issue a slave warrant; and it may be claimed that Mr. Loring did not transgress it, since he issued his warrant, not as a judge, but as a slave commissioner. Technically speaking, this may be so, and an inferior court of justice would be bound so to regard it. But you are not sitting as *nisi prius* lawyers, bound by quiddling technicalities. You are statesmen, looking with plain, manly sense at the essence of things. Have you any doubt what Massachusetts intended when she enacted that statute? Have you any doubt that Mr. Loring knew what Massachusetts meant? Why does the constitution give you this power of removing judges by address? To meet just such cases as this; when some individual has violated the spirit and essence of a law, but cannot be technically held by impeachments. Remember what Mr. Austin says, describing just this case in the extract I have twice quoted from his speech in the convention. If you allow yourselves to be diverted from the exercise of the power by such technicalities, you forget the very purpose for which it was given, and practically annihilate it.

It is not true, then, as Mr. Loring claims, that, when he received his commission, "no objection was made by the executive of the commonwealth, or of any other branch of the government, to his further discharge of the duties of a commissioner,"—meaning the duty of catching slaves. The statute of 1843, then in full force and effect, was clear and official notice to him what "objection" the commonwealth had to the returning of slaves. But it is said the statute was passed in 1843, and only prohibited officers from acting under the slave act of 1793. It cannot have any reference to the slave act of 1850, since this was not in existence in 1843, and Mr. Loring's action in the Burns case was under the act of 1850. This is another technical evasion, but not as good even as the first; because, in the Sims case,[8] which Mr. Loring

[8] 7 Cush. 285.

cites, Judge Shaw holds the act of 1850 constitutional, because it is so precisely like the act of 1793; and Mr. Loring, in his Burns judgment, takes the same view. Now, if the two acts are so precisely alike that the constitutionality of one proves the constitutionality of the other, then they are such twins as to be both within the meaning and intent of our statute of 1843. When the counsel of Sims and Burns wished to argue the constitutionality of the act of 1850, on the ground that it went far beyond anything judicially recognized in the act of 1793, then Judges Shaw and Loring find the two acts so much alike that the argument is unnecessary. When Mr. Loring's friends would defend him, then these two acts are so different that our law of 1843 can apply only to the first! To plunge an innocent and free man like Burns into slavery, against law and evidence, these statutes are just alike; to save Judge Loring from the act of 1843, they are different as white and black! But even this technicality is of no avail. The official action of the state has forever closed this door of escape.

While congress was discussing the fugitive slave bill which was finally passed September 18, 1850, our legislature passed the following resolutions, which the governor approved May 1, 1850:

"Resolved, that the sentiments of the people of Massachusetts, as expressed in their legal enactments, in relation to the delivering up of fugitive slaves, remain unchanged; and inasmuch as the legislation necessary to give effect to the clause of the constitution relative to this subject is within the exclusive jurisdiction of congress, we hold it to be the duty of that body to pass such laws only in regard thereto as will be sustained by the public sentiment of the free states, where such laws are to be enforced, and which shall especially secure to all persons whose surrender may be claimed as having escaped from labor and service in other states the right of having the validity of such claim determined by a jury in the state where such claim is made.

"Resolved, that the people of Massachusetts, in the maintenance of these their well-known and invincible principles, expect that all their officers and representatives will adhere to them at all times, on all occasions, and under all circumstances." (Approved May 1, 1850.)

Observe, the commonwealth reaffirms the principle of her former legal enactments,—that is, the act of 1843,—and expects all her "officers to adhere to them at all times, on all occasions, and under all circumstances." What shall we say now to Mr. Loring's claim that neither when he received the commission as judge of probate, nor at any time since, was he notified "by the government of Massachusetts, or by the executive or legislative branch thereof," that slave catching and bearing office under Massachusetts were incompatible! Are not these resolutions substantially a re-enactment of the statute of 1843, distinctly applying to the fugitive slave bill of 1850, and officially warning all officers that

the state expected them to abstain from taking part in the execution of that act, as much as of the act of 1793?

Look at the case, gentlemen. A sovereign state issues her mandate that no magistrate of hers shall aid in catching slaves. Seven years later she solemnly reiterates the order, and directs her officers to remember it on all occasions. In open, contemptuous defiance of all this, one of her judges adjourns his own court to hold one that dooms a man to bondage. The legislature meet and talk of removing him; but the judge, in a tone of indignant innocence, exclaims: "What! turn me out for a mere difference of opinion! Have I not evaded the law? If you remove such an innocent and law-abiding judge as I am, you will destroy the independence of the bench!" Yes, truly; that sort of independence which consists in defying the state in order to serve a party, or minister to the ambition of friends. Some men allege that the same reasoning would condemn Judge Shaw for refusing to set Sims free, by *habeas corpus,* from the grasp of the claimant. But surely he must be stone blind who sees no difference between a judge like Shaw, who, thinking he has no power to arrest the slave act, when once set in motion, refuses to interfere, and a judge like Loring, who actually sets the slave act in motion, and personally executes it! The statute of 1843 only orders our officers not to aid in catching slaves. It does not order them to prevent everybody else from catching slaves. Loring actually hunted a slave, and sent him to Virginia. Shaw only declared himself unauthorized to prevent George T. Curtis from hunting fugitive slaves. Surely, there is some slight difference here.

In consenting, then, to act as a slave commissioner while holding the office of a probate judge, Mr. Loring defied the well-known, settled, religious convictions of the state, officially made known to him. The question was one of vital, practical morality of the gravest importance; one where justice was on one side and infamy on the other. He cannot complain if you consider this heedless or heartless choice of the infamous side—this open defiance—on so momentous a matter sufficient cause for his removal.

My second reason is that the very method of the trial of Anthony Burns shows Mr. Loring unfit to be continued longer on the bench. I am not now dealing with the point that he did act. I have said that his mere acting in the case was a defiance of the commonwealth; but I now say that the manner of his acting is another ground for which he ought to be removed, and shows him to be unfit for the office of a judge. Anthony Burns was arrested at eight o'clock on Wednesday evening. He was hurried to the

court house, and concealed there within four walls. He was not allowed to see anybody but the slave claimant, the marshal, and the police. At nine o'clock on Thursday morning, our judge of probate, Mr. Edward G. Loring, the slave commissioner, appeared in his court room, with the slave claimant and his witnesses, the alleged fugitive, the marshal, and the police. He proceeded to trial. Trembling, ignorant, confused, astounded, friendless, not knowing what to say or where to look, that unhappy man, Burns, sat, handcuffed, with a policeman on each side. The commissioner proceeded to try him. By accident, Mr. Richard H. Dana, Jr., had heard that such a trial was to be held, and had reached the court room. By accident, another learned counsel, who sits by my side (Charles M. Ellis, Esq.), heard that such a scene was enacting, and hurried to the court house. I heard of it in the street. Mr. Theodore Parker was notified, and we went to the court room. We found Robert Morris, Esq., already there. Mr. Morris, a member of the bar, had attempted to speak to Burns,—the policeman forbade him. The melancholy farce had proceeded for about half an hour. In two hours more, so far as any one could then see, the judgment would have been given, the certificate signed, the victim beyond our reach. There sat the judge of probate, clothed with the ermine of Massachusetts; before him cowered the helpless object of cruel legislation,—the crushed victim of an inhuman system. Mr. Dana had moved the court before to defer the trial, but the commissioner proceeded to examine the witness. After a short time Mr. Dana rose (he had no right to rise, technically speaking,—he rose as a citizen merely, not as counsel), and I read you what he said:

"May it please your honor, I rise to address the court as *amicus curiae*, for I cannot say that I am regularly of counsel for the person at the bar. Indeed, from the few words I have been enabled to hold with him, and from what I can learn from others who have talked with him, I am satisfied that he is not in a condition to determine whether he will have counsel or not, or whether or not and how he shall appear for his defense. He declines to say whether any one shall appear for him, or whether he will defend or not.

"Under these circumstances, I submit to your honor's judgment that time should be allowed to the prisoner to recover himself from the stupefaction of his sudden arrest, and his novel and distressing situation, and have opportunity to consult with friends and members of the bar, and determine what course he will pursue. . . . .

"He does not know what he is saying. I say to your honor, as a member of the bar, on my personal responsibility, that from what I have seen of the man, and what I have learned from others who have seen him, that he is not in a fit state to decide for himself what he will do. He has just been arrested and brought into this scene, with this

immense stake of freedom or slavery for life at issue, surrounded by strangers; and even if he should plead guilty to the claim, the court ought not to receive the plea under such circumstances.

"It is but yesterday that the court at the other end of the building refused to receive a plea of guilty from a prisoner. The court never will receive this plea in a capital case without the fullest proof that the prisoner makes it deliberately, and understands its meaning and his own situation, and has consulted with his friends. In a case involving freedom or slavery for life, this court will not do less. . . . .

"I know enough of this tribunal to know that it will not lend itself to the hurrying off a man into slavery, to accommodate any man's personal convenience, before he has even time to recover his stupefied faculties, and say whether he has a defense or not. Even without a suggestion from an *amicus curiae*, the court would, of its own motion, see to it that no such advantage was taken.

"The counsel for the claimant says that, if the man were out of his mind, he would not object. Out of his mind! Please your honor, if you had ever reason to fear that a prisoner was not in full possession of his mind, you would fear it in such a case as this. But I have said enough. I am confident your honor will not decide so momentous an issue against a man without counsel, and without opportunity."

Again, in his argument, alluding to the same scene, Mr. Dana says:

"Burns was arrested suddenly, on a false pretense, coming home at nightfall from his day's work, and hurried into custody, among strange men, in a strange place, and suddenly, whether claimed rightfully or claimed wrongfully, he saw he was claimed as a slave, and his condition burst upon him in a flood of terror. This was at night. You saw him, sir, the next day, and you remember the state he was then in. You remember his stupefied and terrified condition. You remember his hesitation, his timid glance about the room, even when looking in the mild face of justice. How little your kind words reassured him. Sir, the day after the arrest you felt obliged to put off his trial two days, because he was not in a condition to know or decide what he would do."

Mr. Ellis rose also, and protested against the trial. Gentlemen, what a scene! A man clothed in the ermine of Massachusetts has before him a helpless man,—in the words of Mr. Dana, "terrified, stupefied, intimidated,"—and begins to try him. If the chief justice of the commonwealth should find the veriest vagrant from the streets indicted for murder by twenty-three jurors, and solemnly and legally set before him, he would not take upon himself to proceed to trial without the man had counsel,—every lawyer knows this. And yet this man, who ought to have shown the discretion and humanity of a judge, was proceeding in a trial so enormous and fearful that counsel coming in by accident felt urged to rise in their places and interrupt him, protesting, as citizens of Massachusetts, that this mockery of justice should not go on. You have a judge of probate who needs to have accident fill his court room with honest men to call him back to his duty. The petitioners say that such a man is not fit to sit upon the bench of Massachu-

setts. Do we exaggerate the importance of the occasion? Let me read a single sentence from Dr. Channing:

"This constitution was not established to send back slaves to chains. The article requiring this act of the free states was forced on them by the circumstances of the times, and submitted to as a hard necessity. It did not enter into the essence of the instrument, whilst the security of freedom was its great, living, all-pervading idea. We see the tendency of slavery to warp the constitution to its purposes, in the law for restoring the flying bondman. Under this, not a few, having not only the same natural, but legal, rights with ourselves, have been subjected to the lash of the overseer.

"But a higher law than the constitution protests against the act of congress on this point. According to the law of nature, no greater crime against a human being can be committed than to make him a slave. . . . .

"To condemn a man to perpetual slavery is as solemn a sentence as to condemn him to death. Before being thus doomed, he has a right to all the means of defense which are granted to a man who is tried for his life. All the rules, forms, solemnities, by which innocence is secured from being confounded with guilt, he has a right to demand. In the present case, the principle is eminently applicable that many guilty should escape, rather than that one innocent man should suffer; because the guilt of running away from an 'owner' is of too faint a color to be seen by some of the best eyes, whilst that of enslaving the free is of the darkest hue."

Dr. Channing would have all the forms and solemnities of justice usual in cases where life hangs on the issue rigidly observed when a slave case is to be determined. Your judge of probate arrests a man at night. No one knows of it. At the earliest hour in the morning that a court ever sits, he opens his court. This poor, trembling, friendless victim, who hardly dared to look up and meet his eye, is brought before him, and he proceeds to try him. Strangers come in and say he is too stupefied to be tried. Still the judge goes on, and they sit awhile, their blood boiling within them, till they feel compelled to rise, and solemnly protest against this insult to all the forms of justice; and the court, after the repeated protests of two members of the bar, at length consents to put off that trial, allows the unhappy man to recover himself, consult with friends, and decide what course to pursue. Why, gentlemen, if a man has committed murder, and has been indicted by a jury, the statute provides that he shall have time allowed him to prepare for his defense, have a copy of his indictment, and a list of the witnesses against him, and when it is all done, the supreme court would not touch the case until they had assigned him counsel. They would fear to draggle their ermine in blood. But here is a Massachusetts judge of probate with whom it is but the accident of an accident—but the impudence of counsel, so to speak—that prevents such an outrage as Mr. Dana's

protest describes. Now, your petitioners ask, in the name of Massachusetts, for a judge who can be safely trusted in a private chamber with an innocent man. I recall the scene in that court room, while our hope that the judge would postpone that case hung trembling in the balance. We were none of us sure that even the indignant, unintermitted protests of these members of the bar would secure the postponement of that trial. Think of the difference in this case! You are trying Mr. Loring for continuance in his office. He comes here with all the advantages of education, wealth, social position, professional discipline, everything, on his side, and can choose when he will be tried. Around him are troops of friends. Influential journals defend his rights. But that poor victim,—what a contrast! According to Dr. Channing, it was as much as life that hung in the balance. The old English law says that the judge is counsel for the prisoners. There were no such promptings here as led the judge to say: "I shall not try that man unless he has counsel, and all the safeguards and checks of a judicial examination." The hapless victim, too ignorant, at the best, to know his own rights or how to defend them, was then stunned by the overwhelming blow,—by the arrest, and the sight of the horrible pit into which he was to be plunged. Over his prostrate body this Massachusetts judge of the fatherless and widow opens his court, and begins to hold the mockery of a trial! If you continue him in office, you should appoint some one,—some "flapper," as Dean Swift says,—some humane man, to wait upon his court, and for the honor of the state remind him when it will be but decent to remember justice and mercy, for he is not fit to go alone.

Do you ask us what course Mr. Loring should have adopted? We answer, the same course that any merely decent judge would adopt in such a case. Here was a man arrested some twelve hours before on a false pretense, and kept shut up from all his friends. All this Mr. Loring knew, or was bound to know, since such has been the constant practice in all slave cases, here and elsewhere. The first duty of a just judge was to tell the man, truly and plainly, what he was arrested for, see that his friends had free access to him, and fix some future day to commence his trial, leaving time sufficient to consult and prepare a defense. This is what the statutes of every civilized state ordain in cases where even ten dollars are in dispute. The first word that William Brent, the witness, was allowed to speak on the stand in such circumstances was the death knell to any claim Mr. Loring might have to be thought a humane man, a good lawyer, or a just judge. A statute which

the whole civilized world regards as the most infamous on record is executed by men who claim to be lawyers, judges, and Christians, with a violence and haste which doubles its mischief. These slave commissioners, while constantly prating of the "painful duty" their allegiance to law entails on them, contrive to add, by their haste, to the brutality and cruelty even of the slave act. Knowing the cruel nature of the statute he was executing, and the routine of lies and close confinement always found in slave cases, Mr. Loring's first duty, after his court was open, was to adjourn it for three days, at least. taking measures that Burns should meantime see friends and counsel, to consult on his defense. All Mr. Loring's friends can say for him is that he was only acting as all other slave commissioners act, and that no harm was done, since the Abolitionists came in and secured Burns a trial! As if the infamous slave prisons of Curtis and Ingraham were precedents for any court to follow! As if any man was proved fit to be judge by alleging that strangers prevented his doing all the mischief he intended! The case was adjourned to Saturday.

Where do we next meet this specimen of Massachusetts humanity and judicial decorum? It was necessary some one should see Burns to arrange for his having counsel. The United States marshal refused us admission to the cell. On Friday I went to Mr. Loring at Cambridge, where he was law lecturer in Harvard College, and asked him for an order directing the marshal to allow me to see the prisoner. He sits down and writes a letter authorizing me to cross that barrier and see Burns; and as he hands it to me he says: "Mr. Phillips, the case is so clear that I do not think you will be justified in placing any obstacles in the way of this man's going back, as he probably will!" What right had he to think Burns would go back? He had heard only one witness; yet he says, "The case is so clear that I do not think you will be justified in placing any obstacles in the way of this man's going back, as he probably will!" Suppose, Mr. Chairman, that in the case of Dr. Webster, after he had been indicted, but before he had been put on trial, the chief justice of the commonwealth had said to Mr. Sohier, or any other of the counsel: "Sir, I do not think you will be justified in placing any obstacles in the way of this man's being hung, as he probably will!" What would be thought of the judge who should proceed to try a man for his life after expressing such an opinion on the case to be brought before him? Yet such was the mood of mind of this judge of probate, that without hearing argument or testimony, only the disjointed story of a single witness, interrupted by the protests of Messrs. Dana and

Ellis,—the mere *disjecta membra* of a trial; nothing,—he had so far made up his mind that he could warn me from attempting to do anything to save the man from the doom to which he was devoted, on the ground of the probability of his being given up! "A judge who proceeds on half evidence will not do quarter justice," says an old English essayist. What proportion, then, of justice may we expect from a judge who decides on no evidence at all? I ask (I was going to say) the judges of the commonwealth of Massachusetts—men of fair fame and judicial reputation—whether a person of that temper of mind is fit to sit by their side? I ask any man who loves the honor of the bench—who desires to see none but high-minded, conscientious, humane, just judges—whether the petitioners who ask for the removal of such an individual are attacking or supporting the honor of the bench of Massachusetts,—its real strength and independence. It seems to me that we are cutting off a corrupt member, and securing for the rest the only source of strength,—the confidence of the commonwealth. The bench is not weakened when we remove a bad judge, but when we retain him.

Gentlemen, it is not in the power of this legislature,—respectfully be it said,—it is not in the power of this legislature to command the respect of this commonwealth for a bench on which sits Edward Greely Loring. You may refuse to remove him, but you cannot make the people respect a bench upon which he sits. If any man here loves the judiciary, and wishes to secure its independence and its influence with the people, let him aid us to cut off the offending member.

Thirdly. Gentlemen, where is your judge next heard of? He is next heard of at midnight on Saturday, the 27th of May, drawing up a bill of sale of Anthony Burns, which now exists in his own handwriting! Before the trial was begun, he sits down and writes a bill of sale:

"Know all men by these presents that I, Charles F. Suttle, of Alexandria, in Virginia, in consideration of twelve hundred dollars, to me paid, do hereby release and discharge, quitclaim and convey, to Antony Byrnes, his liberty; and I hereby manumit and release him from all claims and services to me forever, hereby giving him his liberty, to all intents and effects, forever.

"In testimony whereof I have hereto set my hand and seal this twenty-seventh day of May, in the year of our Lord eighteen hundred and fifty-four."

Gentlemen, suppose, while Dr. Webster sat in the dock, before the trial commenced, Chief Justice Shaw had summoned Mrs. Webster to his side, and said: "I advise you to get a petition to

the governor to have your husband pardoned. I think he will be found guilty!" Why, he would have been scouted from one end of the commonwealth to the other. Suppose a deed of land was in dispute, and, before the case began, the judge should call one of the claimants before him and say: "I advise you to compromise this matter, for I think your deed is not worth a straw!" Who would trust his case to such a judge? But here is a man put before a judge to be tried on an issue which Dr. Channing says is as solemn as that of life or death, and the judge is found at midnight, with the pregnant intimation that that man must be bought, or he is not safe! What right had he to say that? Mr. Chairman, the case may have been so clear even then, before it was half begun, that every man in the commonwealth, save one, would have been obliged to say that Burns was a fugitive; but there was one pair of lips that honor and official propriety ought to have sealed, and those were the lips of the judge who was trying the case. Yet he is the very man who is found babbling! He seemed to be utterly lost to all the proprieties of his position. Colonel Suttle selling Burns on the 27th of May! What even legal right in Burns had Colonel Suttle then to convey? None. No law knew of any. Yet the very judge trying the case volunteers to suppose a title based on his own decision, which ought then to have been unknown, even to himself. Suffolk court house is turned into a slave-auction block, and the slave commissioner, the trial hardly commenced, jumps upon the stand,—not needing to lay aside whatever judicial robes a slave commissioner may be supposed to wear!

Fourthly. The commissioner knew how general was the opinion among lawyers that a writ of replevin might be served after his judgment, and before the affidavit of the claimant was made. He knew the anxiety of the friends of Burns to test the possibility of thus legally securing his release by Massachusetts law. But in the commissioner's hot haste and obstinate determination to have every law except those of this commonwealth obeyed to the letter, he arranged and conspired with Colonel Suttle and the United States marshal to have all the papers executed in such secrecy, and so exactly at the same moment, as to deprive Burns of all chance from this measure. How eminently worthy such plotting as this of a Massachusetts judge! Of one who assures you that he scrupulously obeyed the laws of Massachusetts!

Well, gentlemen, it is said—I cannot state it on anything but rumor—that, as the crowning act of his unjudicial conduct, he communicated his decision to one party twenty hours before he

communicated it to the other, so that Messrs. Smith, Hallett, Thomas, Suttle & Co. had time to send down into Dock square, and have bullets cast for the soldiers who were to be employed to assist the slave hunter,—had time to inform the newspapers in the city what they intended to do; while Messrs. Dana and Ellis, counsel for the prisoner, were allowed to go to their homes in utter ignorance whether that decision would be one way or another. Where can you find, in the whole catalogue of judicial enormities, an instance when a judge revealed his decision to one party, and concealed it from the other? If he thought it necessary, on any grounds of public security, or from private reasons of propriety, to inform them what his decision was to be, he should have said: "Gentlemen, I can meet you only in open court, in the presence of counsel on both sides. I cannot speak to you, Mr. Thomas, unless Mr. Dana or Mr. Ellis is here. Call them, and then I will tell you what my decision is to be." At four o'clock on Thursday the commissioner made known his decision to the slave-claimant's counsel; on Friday, at nine o'clock, to Messrs. Dana and Ellis, and the world! What a picture! Put aside that it was a slave case. Forget, if you will, for a moment, that he was committing an act which the commonwealth says is *ipso facto* infamous, and declares that no man shall do it and hold office. The old law of Scotland declared that a butcher should not sit upon a jury,—he was incapacitated by his profession. The commonwealth of Massachusetts, by the statute of 1843, says that any slave commissioner is unfit to sit upon the bench. Mr. Loring cannot see it, although it was written and signed, re-enacted and signed again; although he was doing an act which the butchers of our city, to their honor be it said, would not sanction, two days afterwards. He puts this man into a room, bewildered, terrified, unfriended,—so unfit for trial that strangers deem it their duty repeatedly to protest against the proceedings of the court. Having gone through that mockery of half an hour's trial, he takes occasion to express his deliberate opinion of what the result is to be to counsel. Having done that, he makes his conduct still more flagrant by drawing up a bill of sale of the man who was still on trial before him. There was but one man in the state of Massachusetts who could not have drawn that bill of sale, as I before said; yet he was the man to draw it! After that he proceeds to collogue, to conspire, with one party, and tell them his decision twenty hours before he informs the other. Gentlemen, I submit to you, as a citizen of Massachusetts, that this is conduct unfitting for the bench; that

there is, not to speak of inhumanity, an utter unfitness to try questions of any kind,—an utter recklessness of judicial character and regard for propriety in such conduct which might cause the very stones in the street to rise and plead for the majesty of the laws against such a judge. The petitioners say to you that such a man is not fit to wear the ermine of the commonwealth of Massachusetts. Do they say too much? I am to die in this city. Many of the petitioners are to die here. Our wills are to go into his hands. Our children and widows are to go before him. We cannot trust him; and we ask you to remove him, under that provision of the constitution which gives you unlimited power to remove a judge who is unfit for the duties of his office.

It is not necessary, Mr. Chairman, that I detain you long on the charge that Mr. Loring "wrested the law to the support of injustice, tortured evidence to help the strong against the weak, and administered a merciless statute in a merciless manner." You have in your hands the able arguments of Messrs. Ellis and Dana, as well as that remarkable "decision which Judge Loring might have given," originally published in the Boston Atlas. These make it needless for me to enlarge on the law points. Allow me, however, a few brief remarks.

(1) To use my own statement prepared for another occasion: "The fugitive slave act leaves the party claimant his choice between two processes,—one under its sixth section; the other under the tenth. The sixth section obliges the claimant to prove three points: (1) That the person claimed owes service; (2) that he has escaped; and (3) that the party before the court is the identical one alleged to be a slave. The tenth section makes the claimant's certificate conclusive as to the first two points, and only leaves the identity to be proved. In this case the claimant, by offering proof of service and escape, made his election of the sixth section. Here he failed,—failed to prove service; failed to prove escape. Then the commissioner allowed him to swing round and take refuge in the tenth, leaving identity only to be proved; and this he proved by the prisoner's confession, made in terror, if at all, wholly denied by him, and proved only by the testimony of a witness of whom we know nothing, but that he was contradicted by several witnesses as to the only point to which he affirmed, capable of being tested."

(2) As to the point of identity. Colonel Suttle proved that the person at the bar was his Anthony Burns by the testimony of one witness. Of this witness, it may be emphatically said, we knew

nothing. He was never in the state before, and we hope he never will be again. He swore that Burns escaped from Richmond March 24, 1854. To contradict him, six witnesses volunteered their testimony. They were not sought out; they came accidentally or otherwise into court, and offered, unsolicited, their testimony that they had seen the man at the bar in Boston for three or four weeks before the day of alleged escape. These were witnesses of whose daily life and unimpeached character ample evidence existed. Everybody knew them. Six to one! They were Boston mechanics and bookkeepers; one a city policeman, one an officer in the regiment, and member of the common council. Surely it was evident either that the record was wrong, that the Virginia witness was wrong, or that this prisoner was not the man Colonel Suttle claimed as his slave.[9] Out of either door there was chance for the judge to find his way to release Burns. At any rate, there was reasonable doubt, and the person claimed was therefore entitled to his release. But no! Mr. Loring lets one unknown slave hunter outweigh six well-known and honest men, tramples on the rule that, in such cases, all doubts are to be held in favor of the prisoner, and surrenders his victim to bondage.

Observe, gentlemen, in this connection, the exceeding importance of granting time to prepare for trial, the omission of which, on the part of Mr. Loring, I have commented on. If this case had been finished on Thursday, as it would have been but for the interference of others, these witnesses would not have been heard of till after Burns was out of the state. But after the two efforts of his counsel had succeeded in getting delay till Monday, the facts of the case became known through the city, and, having heard them, these witnesses volunteered their testimony. Now, if the ascertaining of pertinent facts be the purpose of a trial, which it surely is in all courts except those of slave commissioners, the consideration I have stated is a very important one. Though Mr. Loring chose to disregard this evidence, it was due to the law and to the satisfaction of the community that, even in his court, it should be heard.

(3) But as to the sole point to be proved under the tenth section,—identity,—the evidence Mr. Loring relies on is the confession of the poor victim when first arrested. No confession is admissible when made in terror. This confession was made at

[9] After the surrender of Burns, it was discovered that the statements of these six witnesses were exactly correct. Burns came to Boston early in February, and Suttle's witness made a mistake of a month in the date of Burns' exit from Virginia.

night; and, even twelve hours after, Mr. Loring was forced himself to admit that the prisoner was so stupefied and terrified he was in no fit state to be tried. Yet he admitted his confessions made in a still more terrified hour! The only witness, also, to this alleged confession, was this same unknown slave hunter, unless we count one of the ruffians who guarded Burns. But if the confession be taken at all, the whole must be taken. Now, in this confession, sworn to by Colonel Suttle's own witness, Burns said he did not run away, but fell asleep on board a ship, where he was at work with his master's permission, and was brought away. This statement, being brought in by Colonel Suttle's own witness, must be taken by this claimant as true. He cannot be allowed to doubt or contradict it. If it be true, then Burns was not a fugitive slave, and so not within the fugitive slave law provisions. Our own supreme court has decided[10] that a slave on board a national vessel with his master, by express permission of the navy secretary, who had been landed in Boston in consequence of navy orders, against the wish of the master, and of course by no action of the slave, could not be reclaimed. To be brought from a slave state is no escape, within the meaning of the law. If taken at all, the whole confession must be taken. If the whole be taken, then the claimant himself has proved that his alleged slave did not escape. If not taken in the whole, then it cannot be taken at all, not even under the tenth section, and then there is no evidence as to identity, and the whole case falls to the ground. Surely somewhere among all these wide gaping chasms in the claimant's case this poor judge, who pleads he was obliged to do infamous work and accept the case, might have found chance of escape if he were a learned and humane man! Mr. Loring contends that he was obliged to issue the warrant in consequence of the oath he took when appointed judge of probate,—to support the constitution of the United States. He says:

"When I was appointed judge of probate I was, by the authority of the people of Massachusetts, bound by an official oath to support the constitution of the United States; this is to be done only by fulfilling the provisions of the constitution, and of those laws of the United States which are constitutionally made to carry the constitution into effect. And on the authority of the supreme judicial court of Massachusetts I confidently claim that, in my action under the United States act of 1850, I exactly complied with the official oath imposed on me by the authority of the people of Massachusetts."

A simple illustration will show the absurdity of this claim. If the "official oath" to the constitution of the United States, which

[10] See 7 Cush. 298.

he says Massachusetts required him, as judge of probate, to take, really binds him to execute all the laws of the Union, in every capacity, then such execution becomes a part of his official duty, since it was as a judge of probate, and only as such, that he took the "official oath." It follows, then, that, if Marshal Freeman should direct Judge Loring to aid in catching a slave, and he should refuse, the house of representatives could impeach him for official misconduct. I think no one but a slave commissioner will maintain that this is law. Mr. Loring contends that he was bound to issue the warrant, holding as he did the office of commissioner! Who obliged him to hold the office? Could he not have resigned, as many—young Kane, of Philadelphia, and others —did, when first the infamous act made it possible that he should be insulted by an application for such a warrant? There was a time when all of us would have deemed such an application an insult to Edward G. Loring. Could he not have resigned when the application was made, as Captain Hayes, of our police, did when called on to aid in doing the very act which Mr. Loring had brought like a plague on the city? Could he not have declined to issue the warrant or take part in the case, as B. F. Hallett was reported to have done in the case of William and Ellen Crafts? But whether he could or not matters not to you, gentlemen. Massachusetts has a right to say what sort of men she will have on her bench. She does not complain if vile men will catch slaves. She only claims that they shall not, at the same time, be officers of hers. Mr. Loring had his choice,—to resign his judgeship or his commissionership. He chose to act as commissioner, and, of course, took the risk of losing the other office whenever the state should rise to assert her laws. Nobody can complain that he is not allowed to hold a probate court one hour and a slave court the next. Certainly it is not too much to claim for Massachusetts the poor right to say that, when the "legalized robber," "the felonious slave trader" (these are Channing's words), comes here, he shall not be able to select agents for his merciless work from those sitting on our bench, and clothed in our ermine.

One single line of this remonstrance goes far to show the hollowness of all the rest: "In this conviction, the commissioners, refusing all pecuniary compensation, have performed their duties to the constitution and the law." If the "pieces of silver" are clean, and have no spot of blood, why do all our commissioners refuse to touch them? And why, when accused of executing this merciless statute (all men seem to think it an accusation), does

each one uniformly plead in extenuation or atonement that he refused the fee? Is it any real excuse for doing an infamous act that one did it for nothing? There is something strange in this. Ah, gentlemen, not all the special pleading in the world, not "all the perfumes of Arabia, can sweeten" that accurse! gold.

There is one paragraph in this remonstrance which deserves notice, as showing either great ignorance or great heedlessness in one who claims to sit on a judicial bench. Mr. Loring says:

"In the year 1851, the act of congress of 1850 was declared, by the unanimous opinion of the justices of the supreme judicial court of the commonwealth of Massachusetts, to be a constitutional law of the United States, passed by congress in execution of the fourth article of the constitution of the United States, and, as such, the supreme law of Massachusetts;[11] and in exposition of the subject, after reference to the nature of the constitution of the United States, as a compromise of mutual rights, creating mutual obligations and duties, it was declared:[12] 'In this spirit, and with these views steadily in prospect, it seems to be the duty of all judges and magistrates to expound and apply these provisions in the constitution and laws of the United States, and in this spirit it behooves all persons bound to obey the laws of the United States to consider and regard them.' And this authoritative direction as to the duties of the magistrates and people of Massachusetts was given in direct reference to the fourth article of the constitution of the United States, the United States act of 1850, and the laws of Massachusetts, as they then were and have ever since been."

Observe the language: "It was declared," by the court, of course, and it is an "authoritative direction as to the duties of magistrates." You conclude, gentlemen, as every reader would, and would have a right to conclude, that this sentence, quoted from the 319th page of Cushing's Reports, is part of a decision of our supreme court. Not at all, gentlemen; it is only a note to a decision, written, to be sure, by Judge Shaw, but on his private responsibility, and no more an "authoritative direction" to magistrates and people than any casual remark of Judge Shaw to his next-door neighbor as they stand together on the sidewalk. In his decision in the Burns case, Mr. Loring refers to the Sims case, above cited,[13] "as the unanimous opinion of the judges of the supreme court of Massachusetts," and then quotes this same sentence as part of the opinion, terming it "the wise words of our revered Chief Justice in that case." Could this important mistake, twice made, on solemn occasions, be mere inadvertence? If he knew no better, he seems hardly fit for a judge. If any of his friends should claim he did know better, then surely he must have intended to deceive, and that does not much increase his fitness for the bench.

[11] 7 Cush. 285.
[12] 7 Cush. 319.
[13] 7 Cush. 285.

Mr. Chairman, there is one view of the Burns case which has not, I believe, been suggested. It is this: Massachusetts declares that the fugitive slave is constitutionally entitled to a jury trial. It is the general conviction of the North. Mr. Webster had once prepared an amendment to the fugitive slave act, securing jury trial. A commissioner of humane and just instincts would be careful, therefore, to remember that the present act, on the contrary, made him both judge and jury. Now does any man in the commonwealth believe that a jury would have ever sent Burns into slavery with six witnesses against one as to his identity, and his confession as much in his favor as against him? Mr. Loring knows, this day, that he sent into slavery a man whom no jury that could be impaneled in Massachusetts would have condemned, —I might add, whom no judge but himself, now on our bench, would have condemned on the same evidence. The friends of Mr. Loring, in the streets, tell us it is hard to hold him accountable for this decision: that all the world knows he did not make it,—powerful relatives and friends dictated it to him. Gentlemen, the apology seems worse even than our accusation. A man whose own heart does not lead him to be a slave catcher allow himself to be made the tool of others for such business! Besides, does this excuse prove him so very fit, after all, to sit on the probate bench? What if he should allow able relatives to dictate his decisions there also?

Gentlemen, I have not enlarged, as I might have done, on the general principle that, without alleging special misconduct, the mere fact of Mr. Loring's consenting to act at all as a slave commissioner is sufficient cause for his removal from the office of a Massachusetts judge. To consent actively to aid in hunting slaves here and now shows a hardness of heart, a merciless spirit, a moral blindness, an utter spiritual death, which totally unfit a man for the judicial office. No such man ought or can expect to preserve the confidence of the community, which is essential to his usefulness as a judge. Neither can Mr. Loring claim that he had not full warning such would be the case. To our shame we must confess that the state has submitted to the execution of the slave act within her limits. But, thank God! we are justified in claiming that she submitted in sad, reluctant, sullen silence; that, while she offered no resistance to the law, as such, she proclaimed, in the face of the world, her loathing and detestation of a slave hunter. In the words of Channing:

"The great difficulty in the way of the arrangement now proposed is

the article of the constitution requiring the surrender and return of fugitive slaves. A state, obeying this, seems to me to contract as great guilt as if it were to bring slaves from Africa. No man who regards slavery as among the greatest wrongs can in any way reduce his fellow creatures to it. The flying slave asserts the first right of a man, and should meet aid, rather than obstruction. . . . . No man among us who values his character would aid the slave hunter. The slave hunter here would be looked on with as little favor as the felonious slave trader. Those among us who dread to touch slavery in its own region, lest insurrection and tumults should follow change, still feel that the fugitive who has sought shelter so far can breed no tumult in the land which he has left, and that, of consequence, no motive but the unhallowed love of gain can prompt to his pursuit; and when they think of slavery as perpetuated, not for public order, but for gain, they abhor it, and would not lift a finger to replace the flying bondsman beneath the yoke."

The legislature, the press, the pulpit, the voice of private life, every breeze that swept from Berkshire to Barnstable, spoke contempt for the hound who joined that merciless pack. Every man who touched the fugitive slave act was shrunk from as a leper. Every one who denounced it was pressed to our hearts. Political sins were almost forgotten if a man would but echo the deep religious conviction of the state on this point. When Charles Sumner, himself a commissioner, proclaimed beforehand his determination not to execute the fugitive slave act, exclaiming, in Faneuil Hall, "I was a man before I was a commissioner!" all Massachusetts rose up to bless him, and say "Amen!" The other slave commissioner who burdens the city with his presence cannot be said to have lost the respect and confidence of the community, seeing he never had either. But slave hunting was able to sink even him into a lower depth than he had before reached. The hunting of slaves is, then, a sufficient cause for removal from a Massachusetts bench. Indeed, I should blush for the state if it were not so. I am willing this case should stand forever as a precedent. Let it be considered as settled that, when a judge violates the well-known, mature, religious conviction of the state on a grave and vital question of practical morality, having had full warning, such violation shall be held sufficient cause for his removal. This principle will do no shadow of harm to the independence of the bench. Mr. Chairman, as I have before remarked, the bench is weakened when we retain a bad judge, not when we remove him. I am glad that the facts of this case are such that we can remove Mr. Loring without violating in the least tittle the proper independence of the judiciary; that Massachusetts can fix the seal of her detestation on the slave act by so solemn a deed, without danger to her civil polity. But, Mr. Chairman, I

frankly confess that, if the case had been otherwise,—if it had been necessary to choose between two alternatives (while I value as highly as any man can an independent judge),—better, far better, in my opinion, to have for judges dependent honest men than independent slave catchers.

Dr. Channing, sitting in his study, says that "no man among us who values his character would aid the slave hunter." We ask you to remove from judicial office the man who has done it,—done it unnecessarily; done it in hot haste; done it against law. We ask you not to have slave hunters on the bench of our old commonwealth. Read Channing's last, dying words:

"There is something worse than to be a slave. It is to make other men slaves. Better be trampled in the dust than trample on a fellow creature. Much as I shrink from the evils inflicted by bondage on the millions who bear it, I would sooner endure them than inflict them on a brother. Freemen of the mountains! as far as you have power, remove from yourselves, from our dear and venerable mother, the commonwealth of Massachusetts, and from all the free states, the baseness and guilt of ministering to slavery, of acting as the slaveholder's police, of lending him arms and strength to secure his victim. . . . . Should a slave hunter ever profane these mountainous retreats by seeking here a flying bondman, regard him as a legalized robber. Oppose no force to him. You need not do it. Your contempt and indignation will be enough to disarm the 'man stealer' of the unholy power conferred on him by unrighteous laws."

This is the picture of a slave hunter which a dispassionate man leaves as his legacy to his fellow citizens. Gentlemen, we assert that such a man is not fit to sit upon the bench. We have a right to claim that you shall give us honorable, just, high-minded, conscientious judges,—men worthy the respect and confidence of the community. You cannot have such if you have men who consent to act as United States slave commissioners. You never can enact a United States commissioner into respect. You may pile your statutes as high as Wachusett,—they will suffice to disgrace the state; they cannot make a slave commissioner a respectable man. We have, it seems to us, a right to ask of Massachusetts this act —it being clearly within her just authority—as a necessary and righteous expression of the feeling of the state. The times are critical. South Carolina records her opinion of slavery in a thousand ways. She violates the United States constitution to do it; expelling Mr. Hoar from her borders, and barring him out with fine and imprisonment. Young Wisconsin makes the first page of her state history glorious by throwing down her gauntlet against this slave-hunting Union, in defense of justice and humanity. Some of us had hoped that our beloved commonwealth would have

placed that crown of oak on her own brow. Her youngest daughter has earned it first. God speed her on her bright pathway to success and immortal honor! Shall Massachusetts alone be mute when the world gathers to this great protest against a giant sin, to this holy crusade of humanity?

Say not we claim something extreme and fanatical. We say only what the state enacted in 1843, and reiterated in 1850,—that to be a Massachusetts magistrate and a slave hunter are incompatible offices. Surely public opinion has not gone back since 1850. Surely the Nebraska outrage has not reconciled you to the slave power. We dare be as much opposed to slavery and slave hunting now as we were before that insult. Tell the nation that Massachusetts throws no sanction around the slave law by allowing her officers to join in executing it. She marks her sense of its merciless nature by refusing her broad seal to any one who upholds it. Judge Loring says: "I only obeyed the United States law in returning the fugitive." Let Massachusetts say to him: "Do it! do it freely! do it as often as you please! Return a fugitive slave every day! But, when you do, remember you shall skulk through the streets like a leper, from whose side every man shrinks. Remember, you shall hold no commission of mine! No, the humblest work that the lowliest official performs, since it is honest, is too holy to be polluted by you. We do not deny your right. It is, unfortunately, your right, as a citizen of the United States, to take your part in slave hunts; but the commonwealth has also, we thank God, still the right to say that her judges shall be decent men, at least. Make your choice! You wish to be United States commissioner? Be it; but no longer be officer of mine!" What! shall our judges be men whose names it makes one involuntarily shudder to meet in our public journals? Whose hand many an honest man would blush to be seen to touch in the streets?

Indeed, Mr. Chairman, I do not exaggerate. Grant that Burns was Colonel Suttle's slave, and what are the facts? A brave, noble man, born, unhappily, in a slave state, has shown his fitness for freedom better than most of us have done. At great risk and by great effort obtained he this freedom; but we were only free born. He hides himself in Boston. By hard work he earns his daily bread. With patient assiduity he sits at the feet of humble teachers, in school and pulpit, and tries to become really a man. The heavens smile over him. He feels that all

good men must wish him success in his blameless efforts to make himself more worthy to stand at their side. Weeks roll on, and the heart which stood still with terror at every lifting of the door latch begins to grow more calm. He has finished his day's work, and, under the free stars, wearied, but full of joyful hope that words could never express, he seeks his home,—happy, however humble, as it is his, and it is free. In a moment the cup is dashed from his lips. He is in fetters, and a slave. The dear hope of knowledge, manhood, and worthy Christian life seems gone. To read is a crime now, marriage a mockery, and virtue a miracle. Who shall describe the horrible despair of that moment? How the world must have seemed to shut down over him as a living tomb! What hand dealt that terrible blow? This poor man, against mountain obstacles, is struggling to climb up to be more worthy of his immortality. What hand is it that, in this Christian land, starts from the cloud and thrusts him back? It is the hand of one whom your schools have nurtured with their best culture, sitting at ease, surrounded with wealth; one whom your commission appoints to protect the fatherless, and mete out justice between man and man. Men! Christians! is there one of you who would, for worlds, take upon his conscience the guilt of thus crushing a hapless, struggling soul? Is the man who could, in obedience to any human law, be guilty of such an act, fit to be judge over Christian people?

Gentlemen, the petitioners have no feeling of revenge toward Mr. Edward G. Loring. Let the general government reward him with thousands, if it will. To us he is only an object of pity. There was an hour when one man trembled before him,—when one hapless victim, with more than life at stake, trembled before this man's want of humanity and ignorance of law. That hour has passed away. To-day he is but a weed on the great ocean of humanity. To us he is nothing; but we, with you, are the commonwealth of Massachusetts, and, for the honor of the state, for the sake of justice, in the name of humanity, we claim his removal. We have a right to a judiciary worthy of the respect of the community. We cannot respect him. Do not give us a man whose judicial character is made up of party bias, personal predilection, bad law, and a reckless disregard of human rights, and whose heart was too hard to melt before the mute eloquence of a hapless and terrified man,—do not commit to such a one the widows and orphans of the commonwealth! Do not place such a man on a bench which only able and humane and Chris-

tian men have occupied before! Do not let him escape the deserved indignation of the community by the technical construction of a statute! The constitution has left you, as the representatives of the original sovereignty of the people, the power to remove a judge when you think he has lost the confidence and respect of his constituents. Exercise it! Say to the United States: "The constitution allows the return of fugitive slaves. Find your agents where you will; you shall not find them on the supreme or any inferior bench of Massachusetts. You shall never gather round that infamous procedure any respectability derived from the magistracy of the commonwealth. If it is to be done, let it be done by men whom it does not harm the honor or the interest of Massachusetts to have dishonored and made infamous!"

Mr. Chairman, give free channel to the natural instincts of the commonwealth, and let us—let us be at liberty to despise the slave hunter without feeling that our children's hopes and lives are prejudiced thereby! When you have done it,—when you have pronounced on this hasty, reckless, inhuman court its proper judgment, the verdict of official reprobation,—you will secure another thing. The next slave commissioner who opens his court will remember that he opens it in Massachusetts, where a man is not to be robbed of his rights as a human being merely because he is black. You will throw around the unfortunate victim of a cruel law, which you say you cannot annul, all the protection that Massachusetts incidentally can; and, doing this, you will do something to prevent seeing another such sad week as that of last May or June, in the capital of the commonwealth. Although you cannot blot out this wicked clause in the constitution, you will render it impossible that any but reckless, unprincipled, and shameless men shall aid in its enforcement. Such men cannot long uphold a law in this commonwealth. The petitioners ask both these things; claiming especially to have proved that you can do this work, and that, if you love justice or mercy, you ought to do it.

CHARLES O'CONOR.

[Charles O'Conor was born in the city of New York, 1804. His early educational advantages consisted of two months in a public school, after which he was apprenticed to a turpentine manufacturer. One year later he was placed in a law office as clerk, and there, at the age of fifteen, he began to study law. In 1824, after many privations, he was admitted to the bar, and from that time until within a few years of his death he devoted himself assiduously to his profession. In 1848 he was the Democratic candidate for lieutenant governor of New York. Throughout the Civil War he sympathized with the southern states, and at its conclusion became counsel for Jefferson Davis when the latter was indicted for treason. From 1871 he was associated with Mr. Evarts for several years in the prosecution of the Tweed ring in the city of New York. He steadily declined compensation for such labors. In 1872 he was nominated for president, in the face of his absolute refusal, by the section of the Democratic party opposed to Horace Greeley. In 1881 he took up his residence on the island of Nantucket, where he died in 1884.]

Among the many self-made men who have risen to eminence at the bar, Charles O'Conor was one of the most remarkable. With scarcely any education, without any extraordinary mental gifts, with an austerity of manner which precluded popularity, he nevertheless forced his way into the front rank of the profession. When asked to what he attributed his success, he replied in one word,—"Study." He did not consider that he had any particular aptitude for the law, and often said he had no doubt that, with the same industry, he would have met with the same measure of success in any walk of life. At all events, industry was the keynote of his career. In the preparation of a case, as he said in the Forrest divorce case, he never left "a stone unturned under which there crept a living thing." His arguments are the embodiment of thorough-going and genuine legal acumen and logic. No loophole is left for evasion; no room for escape. He goes directly at a point with straightforward, persistent force. His mind was solid, rather than brilliant; active, rather than imaginative. He was a close, but not a rapid, thinker; an exact, but not an ardent, reasoner.

Some idea of the extent of his professional labors may be gathered from the fact that the seventy-nine octavo volumes of briefs and arguments, and seven volumes of opinions, which he bequeathed to the New York Law Institute, are the records of little more than half his career,—from 1849. The reports of his cases in New York state alone are distributed through more than two hundred and fifty volumes of reports.

O'Conor was certainly a very learned lawyer. "He was, in my judgment and to my perception," Mr. Evarts once said, "the most accomplished lawyer in the learning of the profession of our bar. Indeed, I cannot be mistaken in saying that he was entitled to pre-eminence in this department of learning among his contemporaries in this country." And Mr. Carter, once his professional associate, says of him that "he could have stepped into Westminster Hall and argued a special demurrer with success against Sergeant Williams." Moreover, his learning was ever ready for the occasion. While his forte was undoubtedly the argument of appeals, he won some notable triumphs before juries. Benjamin R. Curtis considered his management of the Forrest divorce case one of the masterpieces of forensic strategy. His close attention to the smallest details, and the foresight and acuteness with which he anticipated the most remote possibilities, may be observed to advantage in his great will cases, and again in the Lemmon slave case.[1] He was counsel in the Parish, Mason, Jumel, and all the great will cases of his time. In corporation law he enjoyed an immense practice. He was active in the North American Trust & Banking Company litigation, and in the later stages of the long litigation over the Schuyler forgeries of New York & New Haven railroad bonds he persuaded the New York court of appeals to withdraw somewhat from their former decision. At Washington he was counsel for Tilden before the electoral commission in 1876; in the court of claims he argued the case of the owners of the brig Armstrong; and one of his celebrated cases in the supreme court of the United States was the great Almaden mine case, in which his fee was $50,000. His pro-slavery convictions were enlisted in the case of the slave Jack.[2] Two of his cases, which occupied a large measure of public attention, were the Forrest divorce case and the Tweed case,[3] both of which involved him in unfortunate and unnecessary controversies.

O'Conor was successful among contemporaries with far greater

[1] 20 N. Y.
[2] 12 and 14 Wend.
[3] 60 N. Y.

special endowments, because he was a better all-around lawyer than any of them. Without the eloquence of Hoffman, or the wit and humor of Brady, he had, in place of those special qualities, a power of withering sarcasm. Although he was never a reading man, he habitually employed a lucid and forcible style. His statement of a case was always a model of precision. "The great lawyer," he said, "is not the one who knows the most law, but who understands what the point involved is." He was highly gratified with the reply made by one of the judges of the court of appeals when asked what he thought of O'Conor's arguments: "O'Conor does not argue his cases; he states them." His great arguments have a value apart from the occasion because of his habit of explaining the reason of legal and equitable rules by reference to their history and the foundations upon which they rest.

Outside the domain of law, his judgment was not so sure, and the harsh traits of his character led to some unpleasant incidents. However, we know that in his private life he was generous to a fault; and in the practice of his profession, to which he devoted his intellect and tireless industry for nearly sixty years, he won the respect of all by his professional integrity.

ARGUMENT IN THE CASE OF THE BRIG OF WAR GENERAL ARMSTRONG, IN THE UNITED STATES COURT OF CLAIMS, 1855.

On September 26, 1814, during the war between the United States and Great Britain, the American brig General Armstrong, commanded by Capt. Reid, and legally provided with letters of marque, and armed for privateering purposes, cast anchor in the port of Fayal, one of the Azores Islands, within the dominion of Portugal. On the evening of the same day, an English squadron, commanded by Commodore Lloyd, entered the same port. The General Armstrong was soon approached by some English longboats, which were hailed, and commanded to be off, and then fired upon. It was claimed that the English seamen were unarmed. The American brig then came to anchor under the guns of the castle, and applied to the Portuguese governor for protection. On the following day, Capt. Reid, overcome by superior force, abandoned and destroyed his vessel. In consequence of the failure of Portugal to prevent this violation of the neutrality of her territory, the United States presented a claim against that government for indemnity for the loss of the American brig. After long diplomatic correspondence, it was agreed in 1851 to submit the matter to arbitration. The president of the French republic (afterwards Napoleon III.) was selected as arbitrator. He rendered a decision adverse to the United States. Capt. Reid then presented a claim against the United States for $131,600, on behalf of himself and the owners, officers, and crew of the privateer. The claimants were represented by Charles O'Conor, Sam C. Reid, Jr., and Philip Phillips. Hon. Montgomery Blair, United States solicitor, represented the government. The claim was sustained.[1]

ARGUMENT.

May it Please the Court: The claim now presented for adjudication may be placed upon several distinct grounds. In the first place, we contend that the General Armstrong was employed by her officers and crew in the service of the United States, and against the public enemy, under such circumstances that, on being advised of the facts and of the great benefits which resulted therefrom to the country, it became the government, as a matter of equity, to adopt the act, and to indemnify the parties against the expense incurred. Our second general head embraces the following elements: The General Armstrong, while lying in the port of Fayal, was entitled to absolute protection from the Portuguese government. That protection was not afforded. In violation of the neutrality of that port, she was destroyed by the forces of a British squadron, and, for this delinquency on the part of Portugal her owners had a perfect right, by the law of nations,

[1] Dev. Ct. Cl. 22.

to be fully indemnified. The owners had themselves no legal capacity to prosecute this claim directly, but, on establishing its validity, they were entitled to redress through the action of their own government against that of Portugal. The United States, accordingly, investigated the claim, decided in favor of its justice, assumed the control of it, and entered upon the duty of enforcing it. Instead, however, of prosecuting it to an issue by legitimate means, the government receded from its duty in that respect, and actually extinguished the claim, whereby a right has accrued to the owners to demand compensation from the public treasury. Each step in the argument by which these conclusions are arrived at seems to us quite clear and intelligible; but the learned solicitor for the government has advanced a great variety of objections, and it is principally in answering these that we shall engage the time and attention of your honors.

The absence of precedents has been urged against us, and we have been called upon to produce from the books of the common law some instance of an action brought, a trial had, and a judgment rendered for the plaintiff upon a claim like the present. We cannot comply with this unreasonable demand; but neither can we admit that our claim should suffer on that account. The nation itself is here a defendant, responding to the claim of a private suitor for reparation of injuries sustained,—a thing unparalleled in jurisprudence. The court itself is the first-born of a new judicial era. Consequently, we cannot hope to find, among the narrow rules and practical formulæ which ordinarily govern in determining mere questions of property between citizen and citizen, the lights which are to guide its judgment. As a judicial tribunal, it is not merely new in the instance; it is also new in principle. So far as concerns the power of courts to afford redress, it has heretofore been fundamental that the sovereign can do no wrong. This court was erected as a practical negative upon that vicious maxim. Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be.

Whence is such a tribunal to extract the principles by which its action is to be governed,—by which it shall test and allow or disallow the claims which may come before it? In ordinary cases of specific rights declared by some particular statute or regulation, its path may be easy; but in those extraordinary cases which are dependent upon principles not hitherto falling within the

judicial authority, which has never been enforced against the state, and which, consequently, courts have never declared in their judgments or illustrated in their opinions, difficulties may be encountered at the outset. To meet and surmount these, if they exist, is one of the high and responsible duties devolved upon your honors, as pioneers in this newly-opened chapter of juridical science. Though without exact precedents, you are not wholly without chart or compass. A reference to the origin and growth of jurisprudence, in instance the most analogous, will furnish a sufficient guide.

Rights and their correlative duties are divided into two classes; that is to say, the perfect and the imperfect. The only difference between these classes is in external circumstances; intrinsically or morally there is none. Perfect rights are those which may be enforced by established remedies; perfect duties are those the performance of which may be coerced; a right of imperfect obligation is one for the enforcement of which no remedy is provided. Jurisprudence, as administered by human tribunals, deals only with the means of enforcing rights which are recognized as perfect, but, like all moral sciences, it is capable of improvement. As the general mind of a nation advances in that freedom which is the result of increased knowledge, the legislative authority will constantly enlarge the sphere of action assigned to jurisprudence, and increase its power of establishing justice. Jurisprudence is only the means; justice is the end. Jurisprudence is of human origin; justice is an attribute of divinity, pre-existent of all created things, eternal and immutable. Its authority is not derived from any human code, either of positive institution or of customary reception; its decrees are found in the voice of God speaking to the heart which faith has purified to receive, and reason enlightened with capacity to understand. When thus aided by the legislature, jurisprudence is enabled to enlarge the circle of perfect rights by furnishing, from time to time, new instrumentalities for enforcing justice. *Est boni judicis ampliare jurisdictionem* is a sound and unexceptionable maxim; for the exercise of jurisdiction is but giving to men in a practical form the behests of divine justice, and enforcing their observance. This is well illustrated by the rise and progress of the English law. In the lofty growth of equity, by the side of its stunted rival, the common law, we see by what means rights founded in justice and conscience, but not yet recognized by positive law, may rise in grade, acquire recognition, and become enforceable by adequate

remedies. In that example this court will find the best lights for its government. In our early law books we find it urged and admitted that "every right must have a remedy." But Lord Chief Justice Vaughan stripped this commonplace of all its force by replying: "Where there is no remedy, there can be no right." The common-law judges of England always acted upon the principle embodied in this remark. From their rigid adherence to it arose the necessity of a distinct jurisdiction,—the power of equity to compel an observance of those duties which conscience enjoined, but which positive law had provided no means of enforcing.

The ordinary courts of law are not created to declare or enforce justice in the abstract, or justice in general.[1] Their function is to effectuate such human rights only as, in the existing stage of its progress, jurisprudence is enabled to bring within the sphere of its remedial forms, leaving all others to be sought by entreaty, and yielded by free will. The judge is obliged to dismiss every claim, however just, for enforcing which he cannot find an appropriate writ in the register; and, consequently, the regret of the bench and a deep censure upon the defendant is often expressed in the same breath with a judgment denying the remedy sought. This was strikingly exemplified in the case of Bartholomew v. Jackson.[2] An honest farmer, seeing his neighbor's wheat stack on the verge of being consumed by fire in the owner's absence, voluntarily assumed the task of saving it, and did so at a slight cost. Reimbursement being churlishly refused, he brought an action in a justice's court, and the rustic magistrate, not learned enough to know that legal policy sometimes stifles the voice of conscience, decided in favor of the plaintiff. The defendant appealed; and when reversing the decision on the ground that for a service, however beneficial, rendered without a previous request, no action lay, the supreme court of New York denounced the defendant's conduct as "most unworthy." In this censure all honest men must concur. No one could doubt that, had the owner of the wheat been present at the moment of peril, he would have requested aid and promised compensation. An honest man would have conceded this, ratified his neighbor's kind intervention, and promptly repaid his expenditure; but selfishness saw that this was a duty of imperfect obligation, and a callous conscience dishonorably refused to perform it.

[1] See note (a) to De Bode v. Regina, 13 Q. B. 387.
[2] 20 Johns. (N. Y.) p. 28.

The equity jurisdiction of Great Britain has been considered as an anomaly in legal science. Continental jurists seem never to have comprehended it, though it could easily be shown that no civil society ever existed in which there were not some remediable forms of injustice which *lex non exacte definit sed arbitrio boni viri permittit.*[8] Institutions which are novel in form will always excite criticism and opposition, however harmonious they may be, in principle, with what has gone before. But the difficulties which may beset the path of this court at the outset of its high career cannot be greater than those which surrounded the early English chancellors in their efforts to mitigate the rigor and supply the imperfections of positive law. They had no judicial precedents to guide them in stilling the waves of contention; the great unwritten law of natural justice alone governed. They claimed to deal with matters binding in conscience only, and the power to enforce its dictates. At every step they had to contend with the argument now urged against us, that there was no legal remedy, and consequently the law left it optional with the defendant how to demean himself in the premises. As in the present case, the law—the law was dinned into the ears of the court by the advocates of wrong, with loudness and pertinacity; but the clamor was unavailing. Without aid from precedents, but guided by principles, the courts grappled with and mastered the devices of iniquity. Justice! Equity! Conscience! Words without definition, and incapable of being defined, alone prescribed their jurisdiction, and neither legal nor political science had any further connection with the new cases arising before them than to aid in solving the question how far state policy would admit of right being done to the injured suitor. To the precise extent which a due regard to public policy would admit, the masters of equity encroached upon the territory of imperfect duties, making firm land wheresoever they trod. Thus they gradually redeemed from the outlawry to which ignorance or inexpertness had consigned them a large class of imperfect rights, and enforced a large class of duties before deemed imperfect,—because not enforceable,—but which were always obligatory in the eyes of God, and were always voluntarily performed by honest men.

Prior to the institution of this court, all rights, as against the nation, were "imperfect," in the legal sense of the term; every duty of the nation was a duty of imperfect obligation. There

[8]Story, Eq. Jur. §§ 8, 9.

was no judicial power capable of declaring either. No private person possessed the means of enforcing the one or coercing the other. These rights may be deemed still to remain, in one sense, imperfect, for the decrees of this court cannot be carried into execution by authority of the court itself. But effectual progress has been made toward giving form and method to the administration of justice between the nation and the individual. This court enables the latter to obtain an authoritative recognition of his right. No more is needed; for in no case can a state, after such a recognition, withhold payment, and yet retain its place in the great family of civilized nations. The ordinary jurisdiction of the court bears a strong resemblance to the narrow cognizance at common law; but its extraordinary jurisdiction over "all claims which may be referred to it by either house of congress" extends its power to the utmost limits attainable by juridical science in its fullest development. In this aspect, its dignity and importance as a governmental institution cannot be too highly appreciated. As a means by which rightful claims against the government may be readily established, and those not founded in justice promptly driven from the portals of congress, it must exercise a most healthful influence. But we are authorized to look higher than the mere convenience of suitors and the dispatch of public business. Enlightened patriotism will contemplate other and more important consequences. Caprice can no longer control. Here equity, morality, honor, and good conscience must be practically applied to the determination of claims, and the actual authority of these principles over governmental action ascertained, declared, and illustrated in permanent and abiding forms. As, step by step, in successive decisions, you shall have ascertained the duties of government towards the citizen, fixed their precise limits upon sound principles, and armed the claimant with means of securing their enforcement, a code will grow up, giving effect to many rights not heretofore practically acknowledged. In it will be found enshrined, for the admiration of succeeding ages, an honorable portraiture of our national morality, and a full vindication of the eulogium recently pronounced upon our people by the highest authority in the parent state. "Jurisprudence," says Lord Campbell, in Reg. v. Millis,[4] "is the department of human knowledge to which our brethren in the United States of America have chiefly devoted themselves, and in which they have chiefly excelled."

[4] 10 Clarke & F. 777.

Whilst we assert that this court does not stand *super antiquas vias* in anything which concerns mere procedure, and, consequently, that the call for judicial precedents is idle and unreasonable, we admit that cases arising here must be determined in conformity with established principles. It has been truly said that "you have no power to invent rights"; but it must be conceded that you have express power to invent remedies. The seventh section of the act creating the court provides that you shall prepare, to be laid before congress for enactment, the requisite bill or bills in those cases which shall have received your "favorable decision, in such form as, if enacted, will carry such decision into effect." This, according to Mr. Justice Ashhurst, in Pasley v. Freeman,[5] is the precise mode of dealing with cases which are without precedent in the known practice of judicial tribunals.

We agree that you have jurisdiction only over that class of cases which are "claims," properly so called. The applicant for bounty must go elsewhere. Grace and favor, if it is ever proper to bestow them, must be bestowed, as heretofore, by congress, without your interference. But claims—claims which would be entitled, as between individuals, to recognition and enforcement according to known principles of law, or upon known principles of equity—are to be vindicated and established by this court. We assert no more than this, except so far as the nature of things may warrant a practical distinction between a sovereign state and an individual. In this way the sphere of equity may, as against the government, admit of some expansion. In a case like that of the wheat stack, cited from Johnson's Reports, a court constituted as this is could find no difficulty in enforcing the claim against the government. If a large quantity of public property, or any other great public interest, were, at this moment, in danger of being sacrificed, under circumstances rendering it impossible to apply to the executive for instructions, or for the means of saving it, we insist that a reference of the voluntary salvor's claim would enable this court, as keeper of the nation's conscience, to award remuneration. We say that government could not, any more than the owner of the wheat stack, conscientiously withhold compensation in such a case, and that, if the claim should be sent here, this court would be bound to enforce it. State policy may forbid that equity should go so far in a case between individuals as to compel a man to make a request, as it were, *nunc pro tunc*. But why may not government ascertain, through a proper judicial investi-

[5] 3 Term R. 63.

gation, the existing and binding force in equity of a claim upon it, which, in a private case, no honest man would hesitate to acknowledge, which no gentleman could repudiate without dishonor?

When war was declared in 1812, this republic was yet in the infancy of her power. We could scarcely be said to possess either an army or a navy. Though, in the achievement of our independence, we had won high renown, yet physical strength, the only attribute which can enforce respect for the rights of a nation, was not ours to any great extent, and was not imputed to us by any. Our commercial marine had often been plundered with impunity. Even our ships of war had not been exempt from search and impressment. War with France, our early friend, had failed to protect us from insult, and it was in an absolutely necessary defense of our existence as an independent state that we were compelled to venture upon hostilities with the greatest power of ancient or modern times. The invasion of our neutral rights in navigating the ocean induced the measure; the vindication of them was its immediate aim and object.[6] Our naval reputation at that time may be judged by the romantic temerity with which the Alert, a pitiful little English gunboat, in the first month of the war, bore down upon the Essex, a 32-gun frigate.

Perhaps we seized upon an opportune moment, for Britain was engaged in a European war which tasked her utmost energies. Even with this advantage on our side, the contest was very unequal; but when, at length, the gigantic power of Napoleon was prostrated, what was our condition? The patroness of France under her restored dynasty, the foremost of a holy alliance of all monarchical Christendom, with her thousand ships and her victorious legions relieved from every other occupation, Britain stood prepared to "crush us at a blow." Such, all will remember, was the language of the times; and naught seemed to interpose between her resolve and its execution but a brief time,—as much as might be needed to conquer intervening space. Her force was soon felt. The sacred capitol of our Union, the spot consecrated to liberty by the immortal Washington, fell into the hands of her mercenaries. The thunder of her vauntings was heard along our coasts, and at what vital point her apparently resistless force was next to fall upon us none could tell.

At that critical juncture (September 9, 1814), the General

[6] Annals of Thirteenth Congress, pp. 1419-1427, 1431.

Armstrong set sail from New York upon a cruise designed to harass our powerful antagonist. On the seventeenth day out she cast anchor in the neutral port of Fayal for the purpose of taking in a supply of water. Soon after, on the same day, a British squadron, under the command of Captain Lloyd, consisting of a 74-gun ship, a frigate of 38 guns, and a sloop of war carrying 18 guns, entered that port for the same purpose. Two conflicts took place between the American privateer and a body of armed men sent in boats from the British fleet to assail her, which terminated in the destruction of the privateer. This violation of neutrality, and the consequent loss of our property, entitled us to demand compensation as claimants upon the justice of Portugal. Questions of law have been raised as to this asserted liability of Portugal. These we must dispose of in the first place.

It is said that Captain Reid, having himself resorted to violence and struck the first blow, must be deemed the aggressor, however apparent it may have been that such resort was necessary to save his vessel from capture. It is also said that the obligation of a neutral to make compensation in such cases is not absolute; that if a neutral, at the time and place of the aggression, employs all the means in his power to prevent it, this is all that can be required. Of course, in this connection, it is conceded that, if there be negligence in providing, at such time and place, the amount of defensive force which might, under all circumstances, be reasonably required, or if there was a failure in the due and effectual employment of such force, from pusillanimity, gross ignorance, or want of skill on the part of the neutral, responsibility might ensue. What singular questions for discussion between nations would arise in the investigation of these points! In following out its consequences—this idea of limiting national responsibility within the compass of national power—it is said that property unlawfully seized by a third power within the territory of a neutral must be restored by the courts of the latter in case it should come within their reach; but that, when the property is destroyed, or for any other reason cannot be thus subjected to legal process, the neutral is only bound to use his best exertions to procure compensation. To illustrate what is meant by this employment of his best exertions, it is argued that a neutral is not bound to go to war in such a case; that it would be unreasonable, and, consequently, unjust, to require a feeble state to involve itself in hostilities with a powerful aggressor merely for the sake

of obtaining justice for the stranger; that friendly negotiation and urgent entreaty for compensation constitute the whole duty of a weak neutral state, whose territory has been unlawfully converted into a theater of war by a powerful belligerent. Notwithstanding their palpable absurdity, these doctrines are gravely insisted on. From a perusal of the correspondence between the two governments, it might be thought that some of the able and patriotic negotiators who, from time to time, sought the enforcement of the claim against Portugal, conceded these doctrines; for they condescended, in arguing against them, to discuss the evidence, relying, as they well might, upon its insufficiency to excuse Portugal, even if the rule of law was as contended for. We shall adopt the same line of argument; but we protest, at the outset, against any such inference as against us. We do not acquiesce in any of these doctrines. They are founded in the grossest misconception of public law, and a singular blindness to the plainest dictates of common sense. We proceed to prove this, seeking thereby to establish that, in point of law, our claim was perfectly valid against Portugal until that government was released by the acquiescence of the United States in Louis Napoleon's award.

England could in no event be held responsible to the United States or to the aggrieved parties. As between belligerents themselves, it is the right of each to make war upon the other, his subjects and property, wheresoever he can find them. "A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful. It is only by the neutral sovereign that its legal validity can be called in question. The enemy has no rights whatever; and if the neutral omits or declines to interpose a claim, the property [so captured] is condemnable, *jure belli*, to the captor." "This," says the supreme court in The Anne,[7] "is the clear result of the authorities, and the doctrine rests on well-established principles of public law." True it is that Great Britain was responsible over to Portugal for any sum which she might be obliged to pay, and hence, no doubt, the British influence in procuring Louis Napoleon's award; but that was a question altogether between Portugal and Great Britain,—we had no claim whatever against the latter.

It is affirmed, on all hands, that belligerents are bound to abstain from hostilities within neutral territory, and that any violence, except in self-defense, committed by them within such territory, is unlawful. It is unlawful as between the neutral and

[7] 3 Wheat. (U. S.) 435.

each of the belligerents. The injured belligerent may claim indemnity from the neutral; the neutral may demand reimbursement from the aggressor. We refer to the case last cited, and also to 1 Wheat. (U. S.) 405, and 4 Wheat. (U. S.) 52, 298.

The rule requiring a total abstinence from hostilities within neutral territory has, of course, the same limitation which is imposed by reason and necessity in every other case where violence is prohibited. The right of self-defense is rightly called the first law of nature. The arm of the civil magistrate cannot always be extended to prevent injury to the citizen, and, when it is not present for his defense, he is not bound to submit unresistingly to death or wounds. When the danger is imminent, and safety cannot otherwise be purchased, the assailed party may always defend himself, repelling force by force. The same authorities which assert that a belligerent forfeits all claim to protection from a neutral sovereign by commencing hostilities within his territory admit this right of self-defense; and this, let it be noted, is not the privilege of returning a blow,—that, indeed, is revenge or retribution, not self-defense. Self-defense must foresee, anticipate, and defeat the unlawful design whilst only threatened or meditated. Nothing else is defense. Mr. Justice Story says, in The Anne,[8] that, "whilst lying in neutral waters," a ship is "bound to abstain from all hostilities, except in self-defense." Again he says that no vessel in such waters "is bound to submit to search, or to account [to the belligerent] for her conduct or character." In a case somewhat analogous to the present,—The Marianna Flora,[9]—Mr. Justice Story says, in reference to defensive force used by the commander of a ship menaced by another: "He acted, in our opinion, with entire legal propriety. He was not bound to fly or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate." It will be seen, therefore, that Captain Reid's acts in defense of his vessel were lawful, that they involved no breach of duty on his part towards Portugal, and that they in no degree lessened the duty of Portugal to protect him.

What is sometimes called "local and temporary allegiance," but is more properly termed "obedience," is due to every government from aliens and strangers sojourning within its jurisdiction. The neutral state forbids hostilities within its territories between the

[8] 3 Wheat. (U. S.) 435.
[9] 11 Wheat. (U. S.) 1.

armies or navies of belligerents, precisely as the civil magistrate forbids violence between individual enemies. By his laws and regulations, he absolutely supersedes the law of nature, and promises absolute protection in return for obedience. We may admit the truism that neither men nor nations can go further in the performance of their obligations than the employment of their utmost ability; but an obligation like that under consideration is never, in itself, theoretically, nor for any practical purpose, subject to any such limitation. A private man's obligations are no longer enforceable in fact when his whole means of payment are exhausted; but after that event he remains charged with the residue of his indebtedness precisely in the same degree as before. Until relieved by death or released by bankruptcy, he is still bound to his creditor. Poverty and weakness may plead for indulgence, but neither can rightfully demand a release. The obligation remains. So it is with nations; they must perform their duties or cease to exist. There is no bankrupt act for them. Political extinction is their only refuge from the penalties of unredeemed responsibility.

Although some crude remarks of publicists may be found affording a slight pretext for the argument, it cannot be maintained that the duty of a sovereign to afford full protection to the stranger within his gates, whose presence he permits, is anything less than absolute, or that the duty, in this respect, of a weak nation, is any less than that of a strong and powerful one. When a private individual breaks the peace and does an injury to another, the sovereign power subjects him, by due process of law, to mulcts and penalties. His whole estate, if necessary, is sequestered for the remuneration of the injured party. Precisely the same measure of retribution is to be meted out for the like offense when committed against persons or property by a foreign nation.

Belligerents are not permitted to fit out ships of war or augment their force in the ports of a neutral; but all nations allow their ports to be visited by the vessels of those with whom they are in amity, for the purpose of obtaining those necessaries of life which are equally useful in peace or war. Therefore it was entirely proper for the American privateer and the British squadron to enter the friendly port of Fayal, as they did, to supply themselves with water. But it was the duty of both to preserve the peace while there, and that duty was enforced to the utmost against the privateer by the Portuguese authorities. After the first attack upon the General Armstrong, and in anticipation of the

second, Captain Reid sought the governor's permission for thirty of his countrymen, then on shore at Fayal, to come on board and assist in the defense of his vessel. The application was peremptorily refused; and Louis Napoleon, in his award, commends as worthy of all praise the act of the governor in thus effectually preventing an augmentation of the American force. We agree that this was performing precisely, and to the letter, the duty of Portugal towards England; but we insist, however excusable the governor may have been from want of power, that the supreme government of Portugal was bound effectively to have prevented hostilities against those who were restrained by its laws from employing their own means of self-defense. The learned solicitor asserted that the Portuguese government was not bound to protect strangers, any more than it was bound to protect its own people. Perhaps it was not. It is the duty of every government to protect its own people, and, when violence has been committed upon them, to enforce redress from the wrongdoer to the whole extent of such wrongdoer's ability. The same duty exists to preserve the peace within neutral territory between belligerent nations. The reason is obvious,—the local authority compels the belligerent parties to keep the peace, and it is therefore bound to protect them. This seems to us so plain, so obvious, that no argument is necessary to enforce it. Indeed, the general proposition is not denied. We have only to combat an attempt to fritter it away in practice by subtle distinctions.

The extent of the liability upon the part of the neutral power to furnish compensation from its own treasury for the losses incurred in consequence of its failure to keep the peace within its territories is alone disputed. If full reparation is not due to the stranger, what is he entitled to? The attempts to answer this question are ludicrous! It is said that, if a vessel is captured in neutral territory, and afterwards comes within the same territory, it should be restored to the original owner; but if it is carried off, and does not return within the neutral territory, then the neutral is not liable. If this is true, then the total destruction of property involves no liability at all, for the neutral cannot deliver up that which has ceased to exist. As violence cannot always be prevented, what is the duty of the neutral in those cases where destruction ensues? The learned solicitor says the nation whose territory has been invaded is to remonstrate with the aggressor. It is to appeal to him, in the name of justice, reason, and friendship, to make amends to the injured party; and it is said, if these

means fail, the injured party can claim no further redress. Can this be law? The sovereign to whom the application is made is the unrighteous transgressor. He knows that the reparation sought is for his enemy. He knows also that he has only to refuse, and the obligation of his neutral friend will be satisfied. By a simple refusal he can close the transaction and settle the account forever. If this were really the extent of the neutral liability, the whole notion of a right to indemnity would be the merest farce. We insist that the obligation of the neutral power is to prevent hostilities, if practicable, and, if that be impracticable, then to make compensation for the injury sustained.

The notion of limiting the duty to prevention or to the employment of such force as may happen to be at the spot for that purpose is extremely absurd. It can rarely be in the power even of the greatest states to maintain at every point of their territories a force adequate to prevent violations of their neutrality. Indeed, when the force exists, the local officer is not always justifiable in employing it. If the commander of a dozen British 74-gun ships, lying in one of our ports, where they had touched for provisions, should seize a Russian ship, refuse to surrender her to the marshal, and, as Lloyd did at Fayal, threaten, in case of interference with his capture, to bombard the town and slaughter its inhabitants, would the local authorities be bound to plunge at once into the horrors of irregular war? In most cases the force on the spot would be wholly inadequate to effective resistance. But when it happens otherwise, we doubt the expediency of such a resort. Vastly less mischief would result, in ordinary cases, from leaving the wrong to be redressed by the supreme power. Then, if war should come, it would be met with fitting preparation. The armed warrior, not the women and children of a peaceful town, would encounter its brunt. We deny that the governor of the Azores could properly have employed his military force in open war upon the fleet of a powerful nation, which was not only the friend and ally, but, it may be said, the protector, of his sovereign. Even if his force had been adequate, the act would have been rash and injudicious. It is quite clear that, in such cases, the local authorities should most generally submit to the violence, leaving it to the supreme government to apply the proper remedy. And it is equally clear that indemnity is the only remedial justice which can ordinarily be had. If the neutral state has any duty to perform, it is the procurement of such indemnity.

In the obligations which thus rest upon neutrals, there is no

difference between strong and weak nations. We commonly say that, in the eye of the law, all men are equal. So, in international law, all sovereigns are on a perfect equality. Consequently a state, however feeble, cannot maintain its rank and position in the family of nations without performing its public duties. When it fails in this respect, it must necessarily fall exactly into the same condition as an individual engaged in trade, who, failing to pay his debts and to perform the duties of his station, loses all credit and position among his fellow men. This doctrine is reasonable; no other would be tolerable. A feeble state has at its command a suitable remedy for every such case. When wronged by a powerful nation, it may invoke the reprobation of mankind by a proper exposition of the act. The force of opinion is great, and nations have been constrained to respect it in the worst of times. If this resort should fail, it may form an equal alliance with other states of its own class, or it may seek the protection of one more powerful. If it can be supposed that none of those means would enable it to redeem its obligations, nothing can be clearer that that it should declare itself bankrupt, and relinquish its pretensions to sovereignty.

To prove that, for injuries to property sustained by a belligerent, within the territory of a neutral, from hostilities there unlawfully prosecuted against him by his enemy, the neutral sovereign is only bound to afford the measure of redress which may be within his ability, your honors are referred to the text of certain treaties between the United States, England, France, Russia, and Holland. We there find stipulations to the effect that each nation engages to "use its utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken," or to "protect and defend by all means in its power the vessels, etc., and restore the same to the right owner." These treaties are relied upon as full evidence of the sense entertained by the great maritime states as to the extent of the obligations of neutrals in the particular now under consideration. It is claimed that they are not merely strong, but decisive, evidence of the *jus gentium.* We admit the proposition in its broadest extent. It only remains, then, to inquire what is meant by the "utmost endeavors" of a nation, or by the employment of "all means in its power." Our government is one party to these treaties. Do we, when promising to use our utmost endeavors and all means in our power, intend to say that we will humbly pray for justice, and earnestly expostulate against injustice?

Does this involve a complete exhaustion of all the means in our power? And if, indeed, we are so weak and so degraded as this, is Great Britain, is powerful and martial France, with more than forty millions of warlike subjects, equally so? The small kingdom of Holland is also a party to these treaties. Surely these same words, in the same treaty, do not mean one thing as applied to one party, and a different thing as applied to the other party. We respectfully insist that the rule, as expressed in the text of our writers on international law, and in these treaties, means nothing less than that the neutral state is bound to obtain or to make restitution for every outrage committed upon friendly nations within its limits,—peaceably if it can, forcibly if it must.

A few words in Mr. Wheaton's comment upon these treaties are thought to favor the doctrine of limited liability now contended for. In Mr. Lawrence's edition of the Elements of International Law (page 497) the author says: "They were not bound to make compensation, if all the means in their power were used, and failed in their effect." But he does not, by example or otherwise, give the least clue to his notions concerning the means which must be used by the "high contracting parties" in order to fulfill the obligation created by these words. Observing upon the jurisdiction over captures in neutral territory exercised by the admiralty courts of the neutral, he says it is "exercised only for the purpose of restoring the specific property, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries." This sentence is the learned solicitor's leading authority for the position that, when the specific property is destroyed, the neutral has no duty to perform. An important distinction, however, exists between the obligations of a sovereign power, which are to be recognized and performed through its executive, and the much more limited field of admiralty jurisdiction. Of course, a court of admiralty could neither draw upon the public treasury nor levy war upon a foreign power. But we can find in Mr. Wheaton's work no evidence that he ever intended to sanction the doctrine that sovereign power can excuse itself from performing the duties of sovereignty on the plea of weakness.

We have been asked whether we mean to insist that Portugal was bound to go to war? We answer, certainly not. Portugal owed us no such obligation. The question, so far as war is concerned, was whether she owed that measure to herself? Her obligation was to yield us protection, and, having failed in that, to indemnify us. Whether she would prosecute a claim against

Great Britain, by the sword or otherwise, for reimbursement, was altogether her own affair. If she was so weak or so pusillanimous as to waive her rights in this respect, we certainly could not complain. We only say that her high state among the powers of earth required her to protect or indemnify us, and forbid her to plead weakness or poverty as a ground of exemption. The unlimited liability of the neutral in such cases is asserted by the highest authorities on international law. It is asserted in the published speeches of nearly every legislator who has spoken upon this claim. All our administrations, without exception, have maintained it. Portugal herself conceded it in 1814, and even Louis Napoleon admits it. He says, in his award, that, if Captain Reid had not released her by his own conduct, Portugal was under an obligation "to afford him protection by other means than peaceful intervention." The original liability of Portugal is therefore manifest, unless Captain Reid, by some misconduct on his own part, forfeited the protection which she owed him. Whether he so misbehaved is a question of fact which we will discuss hereafter.

The next question of law is whether the enforcement of this claim against Portugal devolved upon the United States as a public duty. In return for the allegiance claimed by the sovereign, says Mr. Justice Blackstone, the sovereign "is always under an obligation to protect his subjects at all times and in all countries"; and that this right of the subject "can never be forfeited by any distance of place or time, but only by misconduct."[10] The lord chancellor of England, on the argument of Baron de Bode's case,[11] says: "It is admitted law that, if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress . . . . through the means of his own government; but if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country." These are the maxims of monarchy at his day. It was the pride of her who, in ancient times, gave law to men and nations, that, in the most distant climes, and among the most barbarous people, "I am a Roman citizen" was a certain passport to safety. Shall it be said that our republic yields a less perfect protection to her citizens? We trust not. Mr. Justice Parker, one of the most eminent of American jurists, recognizes the rule that in such cases there rests an "obligation on the government of the United States to procure re-

[10] Wendell's Blackstone, pp. 370, 371, and notes.
[11] 16 Eng. Law & Eq. Rep. 23.

dress for its citizens, or themselves to reimburse them."[12] On this head there is no lack of precedents. Half the diplomacy of nations has been devoted to obtaining securities for their merchants when subjected in person or property to the jurisdiction of other states; half the treaties on record contain provisions for ascertaining dues and making compensation on account of past failures in this respect, and all of them abound with mutual pledges of protection for the future. From the father of his country to our present chief magistrate, no executive has sent to congress an annual message unmarked with recognitions of this duty. We defy reference to a single instance in which the president has failed annually to apprise congress of his progress in pending efforts to obtain for our citizens redress of grievances suffered by the acts or omissions of other nations. The duty of our government in this respect cannot be denied. It is not denied. The questions are, how far did that duty extend? was there any failure in performing it? and, if so, is the government responsible for the consequences?

Responsibility is denied on many grounds. In the first place, we are told, the government of the United States, in prosecuting claims against foreign powers for redress of grievances suffered by our citizens, is merely the agent of the injured individual; and, assuming as applicable the same rules which obtain in the common law concerning the private relation of principal and agent, or, more exactly speaking, master and servant, it is said that the claimants did not object to the treaty with Portugal before it was made, or afterwards so protest against it, or against the action had under it, as to screen themselves from the imputation of having ratified the act of their servant by implied consent or acquiescence. It is said the subsequent action of the claimant amounts to acquiescence. Acquiescence is assent, assent is ratification, and then comes in this common maxim of servile law, "a subsequent assent is equivalent to an original command." On the other hand, and with equal confidence, it is asserted that the government is the sole judge what claim of the citizen it will enforce; in what manner, at what time, by what means, and to what extent it will enforce them. It may, says our learned opponent, relinquish them, submit them to arbitration, and to any kind of arbitrament it judges to be expedient in reference to the general interests of the republic. It may accept a compromise, or it may release them without compensation, or for a consideration of

[12] Farnam v. Brooks, 9 Pick. (Mass.) 239.

benefit or convenience to the public. In fine, its power over the whole subject is claimed to be "absolute" in the most comprehensive sense of the word, no responsibility attaching to its action, whatever that action may be. It is true that, when laying down this latter proposition, the government solicitor became appalled by the enormity of his own doctrine. First relieving his conscience by an empty admission that it would be wrong—nay, iniquitous—to sacrifice a private right to the public convenience, he endeavored to close this part of the discussion by asserting that nothing of the kind had ever been done in the whole practice of the government. But feeling, as he reached it, that this assertion begged the very question before the court, he returned, like a stout-hearted champion, to his starting point, and insisted that the power was vested in our government thus to deal with, traffic in, and for its own benefit dispose of, the private right of the citizen, without any responsibility whatever. The two heads of exemption from liability thus advanced for the government are manifestly inconsistent. It must be admitted that they cannot stand together. We hope to show that neither of them is well founded.

How can the government be an agent or mere servant, liable to be restrained by the master's prohibition, or affected by his subsequent censure, and, at the same time, possess absolute discretionary power over the whole subject, free from control, restraint, or responsibility? The inconsistency is too glaring. An individual despoiled by the rapacity, or aggrieved by the negligence, of a foreign power, cannot lawfully wage war, or in any other form prosecute directly a claim for indemnity. His only remedy is to invoke the aid of his own government. By a fundamental rule of the social compact, sanctioned by immemorial practice, every community is bound to afford this kind of protection to its members. And when a sovereign state, in the performance of this duty, appears as a prosecutor for redress of injuries, the claimant and respondent are equal in power and dignity. The individual wrongdoer and the individual sufferer are alike lost sight of. The responding state cannot avoid liability by delivering up for sacrifice its agent or subject; neither is the claiming state to be deemed a mere agent of the aggrieved person. It does not act in the name or by the authority of the injured individual, but in its own name and right, as ultimate and paramount lord proprietor of all things, and sovereign of all persons, within its jurisdiction. Between these "high contracting" or high contending parties is the suit

and the trial; between them must be the judgment, whether obtained by negotiation, awarded by arbitrament, or won by the sword.[13] As the respective nations are the parties, and the only known or recognized parties, to the controversy, it necessarily follows that any act of the claiming power which bars its right of further prosecuting the claim works an extinguishment of the claim itself,—is, in substance and effect, a release to the respondent. The methods of pursuing such a claim are negotiation, and, failing that, war, or, if the respondent will consent, arbitration. In all cases which admit of its application, the latter is a resort favored by wisdom and humanity. When a claim is mutually submitted to arbitrament, and determined by the arbiter, that law of honor and good faith which nations must obey[14] declares the award to be final, unless a just and defensible cause can be assigned for disregarding it. If, upon its publication, neither party protest against it, the award becomes conclusive, whatever may be its moral or legal vices.

In the present case, a perfectly valid claim against Portugal has been destroyed by the action of the government. We will prove this by the evidence before your honors. The award of Louis Napoleon stands in our way, and is relied upon as an estoppel. In connection with our review of the merits, we hope to show that the award is void as against us, first, for want of jurisdiction; secondly, because the government did not place before the arbiter, but expressly withheld from his view, important evidence, which afforded him an opportunity to decide upon facts from his own notions or *ex parte* stories, and sanctioned his availing himself thereof; thirdly, because it refused us permission to be heard before the arbiter, or to present an argument to him; and, lastly, because, even upon the imperfect proofs presented to him, the award is manifestly partial and unjust.

Pursuant to the treaty with Portugal, by which this claim was to be submitted to the arbitrament of a third power, the secretary of state, on the 20th of March, 1851, "in accordance," as he states, "with suggestions made by M. de Figaniere" (the minister of Portugal), instructed Mr. Hadduck, our representative at Lisbon, to prepare a protocol, with certain documents annexed, to be authenticated by the respective governments, and laid before the arbiter. The president of the French republic was first named, and, in case he should decline the office, King Oscar, of Sweden, was to be chosen in his place. This letter of instruc-

[13] 5 How. (U. S.) 397. [14] 8 Paige (N. Y.) 534.

tions contains a very singular passage. It is in these words: "You will understand, of course, that these copies (*i. e.*, the papers to be annexed to the protocol) are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation in Washington." The historical fact that at the time of the occurrence, and when the proofs in support of the claim were first made up and presented, the Portuguese government was seated, not at Lisbon, but at Rio Janeiro, renders it easy to perceive why the Portuguese minister suggested this singular limitation of the proofs to be laid before the arbiter. His suggestion was craftily made, and unwarily adopted. Its effect was to carry into the record to be submitted to the arbiter only so much and such parts of the evidence as happened to be incorporated with a renewed correspondence on the subject, which was commenced in 1834, about twenty years subsequently to the occurrence of the outrage for which redress was sought. We will presently show that this instruction caused to be suppressed at least one piece of evidence which was of great force, and, as we conceive, perfectly conclusive upon the very point of Louis Napoleon's judgment. By the 12th July, 1851, the department of state was apprised of its mistake, and, in a dispatch of that date to Mr. Hadduck, after calling his attention to the restrictive phraseology used in his previous instructions, Mr. Webster says: "To provide, however, against the omission of any important part of the earlier portion of the correspondence,—I mean that which passed in 1814 and 1815 in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude,—I transmit you herewith" copies, etc. The latter instructions were issued from the department of state, at Washington, on the 12th July, 1851; but on the 9th day of the same month, three days previously, the protocol had been completed at Lisbon, signed and sealed by the respective agents of Portugal and of the United States, and forwarded to the arbiter. This is expressly stated in Mr. Hadduck's letter to the state department, dated 17th July, 1851. If any important part of the evidence was left out by this misadventure in preparing the documents, it must be confessed that the case was not properly prepared. The solicitor has felt the pressure of this circumstance. He could not help feeling it; for we have read from the dispatch of July 12, 1851, an express admission by the department of its own error. The answer now given to this objection is that ev-

erything material in the prior correspondence was, in some form, repeated in that which was annexed to the protocol; but the fact is otherwise.

Louis Napoleon's award admits, expressly or impliedly, every proposition of law for which we contend. So far as the law is concerned, it asserts but a single position against us, to wit, that a belligerent who commences hostilities within the territory of a neutral thereby forfeits all claim to protection; and this we have never denied. The supreme court of the United States has often so decided, and we have never set up any pretense to the contrary.[15] The point of the award is that Captain Reid and his gallant companions were the first aggressors. It goes upon a mere naked question of fact. How manifestly important, then, was it that the contemporaneous correspondence, and all the testimony taken at the time, and bearing on this point, should have been laid before the arbiter. It seems that Commodore Lloyd, the commander of the British squadron, soon after the transaction, caused to be prepared and verified by Lieutenant Fausset an affidavit giving the British view of the facts. No full copy of this affidavit was furnished to the arbiter. A portion of it is found in the letter of Mr. James B. Clay, our minister at Lisbon, to Count Tojal, Portuguese minister of foreign affairs, dated November 2, 1849. That part is manifestly false; but great aid in developing its falsehood would almost necessarily have resulted from a review of its whole contents. Here was a serious failure on the part of our government in its obligation to properly collect and present the proofs.

Immediately after the occurrence at Fayal, the Marquis D'Aguiar, the Portuguese minister of foreign affairs, addressed a letter to Lord Strangford, the minister plenipotentiary of Great Britain, resident at the court of Rio Janeiro, in which he denounced the outrage upon the General Armstrong as an "audacious" and an "unprovoked attack." He also called upon the British government to make "satisfaction and indemnity, not only to the subjects of Portugal, but for the American privateer, whose security was guarantied by the safeguard of a neutral port." In the same letter the Portuguese minister "nails to the counter," as a base falsehood, the pretense of Captain Lloyd, embodied in Lieutenant Fausset's affidavit, and which Louis Napoleon has sought to consecrate as truth, thereby, as far as in him lay, falsifying American history and dishonoring the American name. Thus speaks the

[15] The Anne, 3 Wheat. 435.

Marquis D'Aguiar: "His excellency (Lord Strangford) will likewise observe the base attempt of the British commander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking of the neutrality on the part of the American in the first instance, by repelling the armed barges that were sent for the purpose of reconnoitering that vessel, advocating, with the most manifest duplicity, that they (the Americans) were consequently the aggressors; but what appears still more surprising is the arrogance with which the British commander threatened to consider the territory of his royal highness (the prince regent of Portugal) as enemies, should the governor adopt any measures to prevent them from taking possession of the American privateer, which they subsequently plundered and set on fire." Some allusions to this letter were, indeed, contained in the correspondence submitted to the arbiter, but no copy of it, or of these important parts of it, was laid before him. This, the learned solicitor tells us, was an important omission, because the Portuguese minister of state could only judge from the evidence; that his view of it, if erroneous, was not conclusive upon his government; and that Louis Napoleon was bound to exercise an independent judgment on the evidence itself. Admitting, for the sake of the argument, that all the facts were laid before Louis Napoleon (which was not the case), it cannot be maintained that this letter did not contain important matter for his consideration. He had assumed to decide a contested fact of considerable antiquity. The witnesses were not personally produced before him. No truth-eliciting cross-examination could be had; no oral dissection or discussion of the proofs was allowed. Was it an unimportant fact that the defendant in the cause—Portugal herself—had, through her highest authorities, solemnly, and at the very moment of the transaction, acknowledged the truth of Captain Reid's statement, and stamped as base duplicity and falsehood the story of Captain Lloyd and his lieutenant? Contemporaneous opinion is strong evidence as to ancient facts. When it is considered that this opinion came from our opponent in the cause under arbitrament, and that, at the time of pronouncing it, Portugal was not only the friend and the ally, but, it may be said, a dependent, of Great Britain, its force as evidence cannot be too highly appreciated. If not technically conclusive, who will say that it was not very persuasive? Here was another grievous failure in the duty of duly presenting the proofs in support of the claim on Portugal.

There was another, and, as we regard it, still a greater, failure.

It is a very fair presumption that Captain Lloyd conceived the design of seizing the Armstrong for a special purpose. To facilitate aggressions upon our coast and in our rivers, small vessels were greatly needed. The desire to supply this need has always seemed the most probable solution of Lloyd's flagitiously illegal conduct. It so happens that one document included in the Rio Janeiro correspondence, and wholly omitted in the protocol, distinctly proves this motive. Immediately after the principal or midnight combat, William Greaves, the British consul at Fayal, addressed to the Portuguese governor of the Azores a letter in which is found this statement: "The [British] commander will send a brig from his squadron to fire on the American schooner, and if the said brig should encounter any hostilities from the castle, or your excellency should allow the masts to be taken from that schooner (the General Armstrong), he will regard this island as an enemy of his Britannic majesty, and will treat the town and castle accordingly." Lloyd threatened to bombard the town and castle of a friend and ally of his sovereign in case the authorities should permit the Americans to dismantle or destroy their own vessel so as to unfit her for service. Anxiety to save an enemy from suicide proves some other motive than revenge. The desire to reduce him to captivity and servitude can alone account for it.

All these important proofs having been suppressed, it cannot be said that the claimant's case was fairly tried before Louis Napoleon. According to the recorded admission of that great jurist and statesman, Daniel Webster, contained in his official letter of July 12, 1851, it was submitted in an imperfect and improper manner. The failure to arrange the proofs, properly so called, separately from the mere arguments contained in the correspondence, seems to have misled Louis Napoleon as to the nature of the submission, or to have furnished him with a pretense for assuming a power which our government could not have intended to confer. The whole frame of his award implies that, in respect to the facts, he did not consider himself bound by the documentary proofs annexed to the protocol, and that he assumed the power of ascertaining them *aliunde*. For this purpose we may fairly presume that he rambled whithersoever he pleased,—into British history or into British table talk. He recites that he proceeded to judgment "after having caused himself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having minutely examined the documents, duly signed in the names of the two parties, which have been submitted to our inspection by the representatives of both powers."

These words certainly imply that he sought proof of the facts elsewhere, and afterwards examined the protocol with its attached documents as an additional or supplemental act. He did not obtain what he calls his correct and circumstantial information solely and exclusively by a perusal of these papers. Thus it appears that, after having submitted the claim to an arbiter, the government failed in its first duty as *promovent*. It not only omitted to produce the evidence in its power, but expressly withheld it at the instigation of the adverse party. It also furnished the partial umpire with an excuse for assuming powers not granted to him, and not intended to be conferred upon him.

To cap the climax of injustice in the measures by which this claim was sacrificed, the claimants were refused a hearing before the arbiter, or even the liberty of presenting to him a written argument in support of their claim. This was one of those flagitious violations of justice against which every honest mind must revolt. To reject without a hearing may be well enough as between a despot and his bond slave,—it is not within the capacity of a judge. Precedent, authority, reason, and sentiment unite in condemning it.

The supreme court of Pennsylvania, in Falconer v. Montgomery,[16] says: "The plainest dictates of natural justice must prescribe to every tribunal the law that 'no man shall be condemned unheard.' It is not merely an abstract rule or positive right, but it is the result of long experience, and of a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning, ... will sometimes have a wonderful effect upon a sound and generous mind,—an effect which the cold and minute details of a reporter can neither produce nor supplant. Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction. . . . . To exclude the party, therefore, from the opportunity of interposing in any of these modes (which the most candid and the most intelligent but a disinterested person may easily overlook), is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition." The case of Sharpe v. Bickerdyke[17] arose upon an award made in Scotland. The award was not impeached for any other fault than the neglect of the arbitrator to hear the party, under a mistaken belief that he had consented to waive that right. The positive law of Scotland was that

[16] 4 Dall. 233.
[17] 3 Dow's Parliamentary Reports, p. 102.

no award should be set aside, at the instance of either party, for any cause or reason whatever, unless it was for bribery, falsehood, or corruption in the arbitrator. Lord Eldon, delivering the judgment of the house of lords, said that, by the great principle of eternal justice, which was prior to all these acts, etc., it was impossible that the award could stand. He added: "Even if he had decided rightly, he had not decided justly." In these cases, and in Elmendorf v. Harris, decided by the court of *dernier ressort* in New York,[18] the awards in question were unanimously set aside upon this principle. Following this line of precedent, the court of queen's bench, in the very recent case of Oswald v. Grey,[19] annulled an award for this cause, saying: "A more glaring departure from the rules that ought to regulate the proceedings of persons sitting in the character of judges it is impossible to conceive."

Another and conclusive objection to this award appears. As has been before observed, it goes upon a mere question of fact,—that is to say, the question whether the Americans, on the occasion in question, resorted to force before they were assailed, or subjected to any indignity or peril. It never could have been the intent of the executive or the senate, in framing the treaty with Portugal, to submit that question to arbitrament. A total insensibility to national honor would have been manifested in adopting such a course. The correspondence between Portugal and the United States shows that the former denied its liability on legal grounds. It was affirmed, on the part of Portugal, that the duty of a state to afford protection to foreigners within its territory was not absolute; that, if such state employed the means of protection in its power, it was not responsible for the inefficacy of such means. The absurdity of this position, as applicable to the case in hand, has been already shown; but suffice it to say, in this connection, that Portugal gravely insisted on it. The treaty (article 2) recites, as the cause of the arbitrament, that "the high contracting parties had not been able to come to an agreement upon the question of public law involved in the case of the American privateer, brig General Armstrong, destroyed by British vessels in the waters of the island of Fayal, in September, 1814."

This recital proves that the intent was to refer a question of law only, not to refer a question of fact. Only two questions of law can be imagined as arising in the case,—first, the silly pretense of immunity from the duties of sovereignty, on the ground of

[18] 23 Wend. 633. [19] 29 Eng. Law & Eq. 88.

weakness, set up by Portugal; and, secondly, whether, if the General Armstrong was the first assailant, she had thereby forfeited her claim to protection. The latter point, as we have shown, was well settled in the affirmative by our own courts, and was never disputed by us; consequently it is plain that but one question of law was in dispute. This question it might have been the part of wisdom to refer, for no third power could ever have decided it against us. Louis Napoleon himself was obliged to determine it in our favor. Did the department of state, when preparing the protocol, intend to submit the question of fact to Louis Napoleon? We have shown that the treaty gave it no authority so to do; but we ask whether, through misapprehension of his powers, temporary inadvertence, or from any other cause, Daniel Webster, in the exercise of his high functions as representative of the honor and interests of his country, did really intend to submit to the arbitrament of a third power the question of fact whether the British or the Americans were the aggressors in the memorable combat of September, 1814, at Fayal. We cannot believe that such an intention existed. We could not admit it without abandoning forever our deep and unfeigned admiration of that illustrious jurist and statesman. Such an act would have been the extreme of folly. It involved, by an inevitable necessity, the loss of the claim, and, what was far worse, a lasting reproach upon our country.

In that midnight conflict, a little American privateer of two hundred and forty tons burthen, carrying seven guns and ninety men, defeated the force of a whole British fleet, killing of her assailants, according to the English historians themselves, within one-sixth as many men as Britain lost in the great naval victory off Cape St. Vincent. The strength of this comparison will be best exhibited by the facts. In that action there were fifty ships of war engaged, and Britain's immortal Nelson captured the Santissima Trinidada, of one hundred and thirty-six guns, and three other three-deckers. Making due allowance for the disparity of the forces engaged, looking with severely exact justice to precise facts, and judging by results, there is not a transaction in the whole history of naval warfare which reflects such signal luster upon the gallantry of the actors as the defense of the General Armstrong. True, the heroes who perished in the fight had moldered into dust, and no monument honored their resting places. Those who survived it had nearly all passed from earth, and the very few yet alive were near the close of their earthly pilgrimage, and were pining in want and penury,—were memorials of that

neglect which is proverbially the recompense of public benefactors. But the glory of their achievements was not forgotten. It belonged to the American name. It had irradiated our naval diadem for forty years, and had become a matter of history. Was an American senate likely to forget its duty towards these recollections? Was Daniel Webster the man to deliver over this bright page in our annals, to be obliterated by the dictum of a European prince? Honor cannot attend or result from unlawful violence. Unable to deny the physical results, Britain had sought to stigmatize the conduct of Captain Reid as an unprovoked aggression in breach of Portuguese neutrality contrary to the law of nations and deserving only the contempt and abhorrence of mankind. Desperate as may seem the folly of imputing to this little cockboat aggressiveness against a whole fleet, any resort was preferable to a confession of the facts. Accordingly, this pitifully absurd tale was placed upon the records of the British admiralty, and thence transferred to the annals of the royal navy. Britain had sat in judgment on the fact, in her national capacity, and sanctioned this story with her high approval. On the other hand, the government of the United States, in all its departments, and under several successive administrations, had testified its full belief in the statement of Captain Reid. From these sources, the literature of the respective nations had taken opposing opinions. The respective historians of Britain and of the United States stood before the world in direct conflict as to the fact, and were, of course, to descend to future times as rival claimants of credibility on this question. Its solution involved no matter of mere pecuniary interest, territorial aggrandizement, or other worldly profit of any kind; it was a question of national honor or shame. Did any nation ever submit such a question to the arbitrament of an umpire? To admit it to be a question for trial was to embrace infamy. As well might a high-toned gentlemen charged with some scandalous act by a known and avowed enemy refer the slander to a mutual friend, with authority to decide, upon proofs, whether or not he was a scoundrel. Honor decides such questions for itself, reposes on its own known rectitude for a protection, or vindicates itself by more active means. It never reposes in a trustee, an agent, or an umpire the power of consigning it to infamy.

One of our reasons for denying that Mr. Webster could ever have intended to refer to Louis Napoleon the question of fact whether the Armstrong was the aggressor is that the result must necessarily have been against his country and his fellow citizens. It is a principle of universal law that the affirmative must be proven by a preponderance of evidence. Equal colliding forces

produce a state of rest, as equal weights in the scales produce an equipoise. It follows that, whenever the opposing proofs as to a disputed fact are equal, the party who asserts the fact must fail. This, however true in theory, is rarely, if ever, applied in practice. Some circumstance affecting the credit of a witness or of a document produced on the one side or the other almost always turns the scale, and the verdict or decision goes, accordingly, upon the theory of full credence being given to one side, and denied to the other. Thus, a judicial forum decides between parties, and resolves the doubtful point upon a nice scrutiny of the proofs, responding according to its view of the right, notwithstanding that its decree may possibly wound the honor of one party and his witnesses by impliedly imputing to them intentional misrepresentation. Now, it so happens, as any one can in a moment see, that, if the question of fact as to who was the first aggressor was to be submitted in this case, the United States would hold the affirmative, and the witnesses would be in direct conflict. Consequently, a judgment could not be formed in our favor without thus implicating the witnesses of our adversary, while, on the other hand, the arbiter could decide against us upon the mere philosophical principle that, a perfect balance being produced, it did not become him, as a friend and ally of each, to disbelieve either.

The treaty provided that the submission should be made "to a sovereign potentate or chief of some nation in amity with both the high contracting parties." It was well known that the true party for whom Portugal appeared in the case was Great Britain. Whatever Portugal might be compelled to pay to us, Great Britain would, of course, be held to reimburse. But, besides all this,—and hence this bitter, long-continued, unyielding opposition to this claim by Portugal, her ally,—the honor of Great Britain was deeply involved in the issue. Great Britain, for a wonder, was then "in amity" with the whole civilized world. She was on terms of the closest amity with both the chrysalis royalty of France, and with Oscar, of Sweden,—the only potentates contemplated by the protocol of submission. The witnesses on our side were private citizens. They had not even an official recognition to connect them with our government, in the technical consideration of a European sovereign, so that discrediting them might be deemed a direct offense to the nation. On the other hand, the opposing witnesses were public officers, servants and agents of Great Britain. Without taking into view, as additional reasons, or make-weights, towards the same conclusion, the intimate relations for mutual support and protection which exist between the sovereigns

of Europe, is it not manifest to the most simple-minded observer that no one of them, consistently with a prudent regard for his own high interests, could ever assume the office of arbiter upon a matter of fact between two independent sovereign powers, and pronounce a decree stigmatizing the public agents of either as perjured?

It was never denied that Captain Reid fired the first gun. *Prima facie,* then, he was the aggressor. To justify this, and fix upon the British forces the inception of hostilities, it was necessary to prove affirmatively the menacing approach of an armed enemy. This was an affirmative of the class which it is most difficult to establish by proof. Captain Reid and his men could do no more than swear to it, as they did, and, by way of confirmation, affirm the distinct fact that the fire was returned from the British boats. But the defeated commandant of the assailing force could easily deny this, and he had denied it. Nor was this a case in which, from the nature of the thing, affirmative testimony has a superiority over negative. There was no room for mistake or oversight on the British side. Lieutenant Faussett knew whether his men were armed or not, and he swore they had no arms. Of course, if they had no arms, they could not have returned the American fire. In addition to the rule that the affirmative must be proved by a preponderance of testimony, there was a principle in close affinity to it, which any one could see led inevitably to our defeat in the umpirage. As to the hostile intent of the approaching British flotilla, Captain Reid could only act upon circumstances affording a presumption of such intent. Had he abstained from firing any longer than he did, it is probable that his deck would have been covered with an overwhelming armed force before a blow was struck. Perhaps no wound would ever have been given on either side. Perhaps every privateersman would have been suddenly seized and pinioned by superior numbers, and the gallant little Armstrong, instead of perishing gloriously amid her vanquished enemies, might have been employed to carry rapine and desolation to our defenseless homes and firesides. As it was always admitted that, in the first combat, Captain Reid repelled the assailing force while it yet held no more commanding position than that of a menace, proof of an aggressive intent by those in the British boats was indispensable to our success, and the proof on that head could only be circumstantial. On the other hand, Lieutenant Faussett could swear positively that no such intention existed. He could say Captain Reid was mistaken, and thus, in the most polite style imaginable, entitle his side to the imperial award.

How hopelessly desperate, then, was the case, treated as a question of fact, considering who was the arbiter, and the consequences to result from the decision! In this connection, we do not question the equal fitness of Louis Napoleon as an arbiter with any other European potentate. It was not to be expected that any sovereign of Europe would convict the British officers of perjury. He could not otherwise conform to the known policy of his class than by finding, as he did, that the fact was not proved. Consequently it would have been a gross error to submit a fact of this kind to the determination of such an arbiter. He could not afford to act judicially, to scrutinize the evidence fairly, or to determine the fact justly. It would have been not only a grievous error in national policy, but a palpable failure in duty to the country and to the claimants. No American who regards the honor of his country will ever admit that the senate of the United States intended to submit to any earthly arbitrament the question of national honor which Louis Napoleon has assumed to decide. No friend or honest admirer of Daniel Webster will ever admit that he could have so far mistaken the import of the treaty as to suppose that he had power to submit it, or that he could have been so blind to the dictates of reason and common sense, or so ignorant of the motives of state policy which govern European potentates, as not to have seen that such submission was equivalent to what lawyers call a *retraxit*. He never could have intended thus to sacrifice at a blow the private interests committed to his charge, and the national honor he so deeply cherished.

If we are right in this, it will be seen that Louis Napoleon's assumed jurisdiction over the facts was a usurpation of power not granted. Upon this ground alone his award was wholly void, in every legal and moral sense, and should have been rejected by our government immediately after its publication. The tendency to usurpation was pretty strong in the mind of the arbiter at the time, as may be perceived by reference to contemporaneous events; but in reference to this case, he not only assumed powers not granted, but undertook to overrule and negative the very facts agreed upon by the high contracting parties, and which, of course, he was expressly forbidden to adjudge.

In the second article of the treaty it is stated in so many words that the General Armstrong was "destroyed by British vessels in the waters of the island of Fayal."[20] Yet the award, in reciting this part of the submission, studiously omits the words "by British

[20] Article 2.

vessels," and, in its finding upon the facts, it states that the act of destruction was by Captain Reid, in consequence of the hostile demonstration made. Even if it was within his judicial province to set aside a fact agreed by the parties, he could not justify this finding. The proofs are clear that Captain Reid merely fired a shot through the vessel's bottom in order to sink her in the harbor, thus placing her for the time beyond the enemy's reach, and reserving the chance of raising her at a future period. But the British, being thus balked in their original design, set fire to her, and thereby effected her complete destruction.

Thus it will be seen that, independently of the deeper moral objection to it, Louis Napoleon's award was not entitled to any respect whatever, and was wholly void, because he based it upon a question of fact not submitted to him. It may be well, therefore, to state here the legal grounds on which we insist that its acceptance wrought an extinguishment of our claim against Portugal, and gave rise to a claim in its place against the treasury of the United States. We had, originally, a just claim for indemnity upon Portugal, which, under the circumstances, it was the imperative duty of our government to enforce, and which, as against us, the government had no right to surrender or annul. The power of prosecuting that claim was vested in the government alone, and consequently the award of Louis Napoleon thereon,—whether just and lawful or not,—on being accepted by the department to which is intrusted our foreign affairs, worked a complete extinguishment of the claim as against Portugal.[21] That acceptance deprived us of all recourse except upon the public treasury. We claim that the award of Louis Napoleon was partial and unjust; we have shown that it was void for want of jurisdiction, because not warranted by the submission, and that it was void as against us, because important evidence was withheld from him, and because the right to be heard in support of our claim before himself or his council was denied to us.

The withholding of evidence, the denial of a hearing, and the unwarrantable acceptance of the award, are relied upon as involving a liability of the government, because they are not acts of a subordinate official who might be personally responsible at law to the citizen for the injury produced by his malversation, but are acts of state, performed by the supreme executive in the exercise of a high discretionary authority, which no court could control or correct at the suit of an individual. Hence the liability of the

[21] See Secretary Marcy's Letter, dated Dec. 10th, 1854.

nation. An opinion of Mr. Attorney General Cushing has been cited, showing that the government is not responsible for the acts of marshals, collectors, pilots, and other subordinate officers who are appointed to facilitate the business operations of the citizens. We acquiesce unhesitatingly in this opinion. But it has no application to the president, the heads of departments, or other high public functionaries, who are themselves the government. These officers are intrusted with the power of representing the nation and acting for it. They cannot be arraigned in a court of law, or elsewhere made responsible to the private citizen who may be injured by acts of state, performed through their agency. For these the nation itself must answer, in its collective and sovereign capacity. Indeed, the departments constantly recognize this rule. Collectors of the customs are in the daily habit of seizing goods and performing other acts of direct interference with the property of individuals, in conformity with instructions from the treasury founded upon a construction of the law which is subsequently condemned by the courts as erroneous, and, as a necessary result, they are frequently made liable for damages and expenses. On all such occasions it is the established practice to indemnify the subordinate out of the public treasury. Though selected with especial reference to their fitness for high station, the heads of departments are mortal, and must sometimes err through haste, inadvertence, or misconception. When such errors occur, there being no other remedy, it is altogether just that the government should make the reparation. Though the act directed to be done is unlawful,—though the direction itself is, of course, a violation of law,—still it is impossible to conduct public affairs at all times with absolute accuracy, and there must be somewhere a discretionary power to act for the public upon emergencies and in doubtful cases. When that discretion is rightly exercised, the nation takes the benefit; when erroneously exercised, it should sustain the resulting loss.

These same principles apply here. Our claim is against the public treasury, because the injury complained of resulted from acts of the government itself, performed through its highest functionaries, in the exercise of an irresponsible discretion. The maxim *respondeat superior* is eminently applicable to such cases. For acts of state, the state itself must answer. The government of the United States did not protest against the award of Louis Napoleon, but, on the contrary, expressly declared its acquiescence through the department of state, and thus released Portugal from all further responsibility. Had the award been rejected, we should now stand in the same attitude which we had occupied for forty

years. We would still hold a valid and subsisting claim against Portugal, neither abandoned nor released by our government, and still in due course of prosecution by the proper authority. Although, in such a condition of things, we might well murmur at the delay, perhaps mere delay, even amounting to neglect, would not entitle us to maintain, here or elsewhere, a pecuniary demand against the United States.

The right to reject the award of a mutual friend has been exercised by our government, and is fully recognized in the law of nations. Vattel says that, where there is flagrant partiality, or where the arbitrator exceeds his power by determining a matter not submitted to him, it will not bind. "If, by a sentence manifestly unjust and contrary to reason, the arbitrator has stripped himself of his quality, his judgment deserves no attention."[22] In the same section that writer illustrates his views by very apposite instances. He says: "In case of a vague and unlimited submission, in which the parties have neither precisely determined what constitutes the subject of the quarrel, nor marked out the limits of their opposite pretensions, it may often happen that the arbitrator may exceed his power and pass judgment on what has not really been submitted for his decision." In this case the submission was framed without the requisite precision as to the point submitted, or Louis Napoleon, without that apology, transcended the authority granted. In either case, the award should have been rejected.

We will now consider the evidence with a view to the question whether Captain Reid was the aggressor. James' Naval History of Great Britain[23] states that "Captain Lloyd sent Lieutenant Robert Faussett, in the Plantagenet's pinnace, into the port, to ascertain the force of the schooner (the Armstrong), and to what nation she belonged. Owing to the strength of the tide, and the circumstance of the schooner getting under weigh, and dropping fast astern, the boat drifted nearer to her than had been intended. The American privateer hailed and desired the boat to keep off, but this was impracticable, owing to the quantity of sternway on the schooner. The General Armstrong then opened her fire before the boat could get out of gunshot, killed two and wounded seven of her men. As the captain of the American privateer had now broken the neutrality, Captain Lloyd determined to send in and cut out his schooner," etc. This, though not rightfully before Louis Napoleon, if before him at all, may be regarded as the Brit-

[22] Book II, c. 18, § 239.

[23] Volume 6, p. 349.

ish version. The historical conflict between us and that nation may be seen by reference to Ingersoll's History of the Second War, volume 1, pp. 44, 45.

The proof before Louis Napoleon, and now before the court, is found in the affidavit of Faussett, on the British side, and that of Captain Reid and his officers, on the American side. Lieutenant Faussett's affidavit tells substantially the same story as that contained in James' work. He says he went to inquire "what armed vessel" it was. He swears that his men were without arms, and that he was in the act of backing his boat astern with a boat hook when he was fired into. Captain Reid, in his protest, verified by himself and nine of his officers, at Fayal, September 27, 1814, swears that the first approach to his vessel was made by "four boats filled with armed men; that he repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, killing and wounding several men." He further says: "The boats returned the fire, killing one man, and wounding the first lieutenant. They then fled to their ships, and prepared for a second and more formidable attack." This is the direct evidence of the immediate actors in the drama. The absurdity of the English story is very striking. In the first place, where was the necessity—what was the right—of the British, then in a state of war, to approach an armed cruiser in a neutral port for the purpose of a search as to her nation or her force? If necessary, could not the first of these particulars have been ascertained with great ease from any officer of the port? No man will contend for the right to make the latter search; and, though stated in James' Naval History, the court will perceive that the vague terms employed in Faussett's affidavit leave it doubtful whether he intends to avow any such design. The testimony of Captain Reid and his gallant associates conflicts with Faussett's in every point. First, they say the approach was made with four boats, instead of one. In the next place, they contradict most explicitly the pretense that the British were unarmed by proving a return fire, effecting the death of one man, and wounding their first lieutenant. About this latter fact there could be no mistake, and here the collision of testimony is so express that no decision could possibly be made against the American party except by convicting them of willful and deliberate perjury, or applying the cold philosophy to which we have before adverted,—that is to say, deeming a fact not proven whenever the affirming and denying witnesses have equal means of knowledge. And, indeed, it will be observed that Louis Napoleon must have gone upon this latter

doctrine; for his finding in the award is simply this: "It is not certain that the men who manned the boats aforesaid were provided with arms and ammunition."

Many circumstances tend to discredit this English story. Not only the ministry of Portugal, but all Fayal at the time, pronounced the English the assailants. The affidavit of Faussett did not see the light for many years subsequently to the occurrence. In this encounter the Armstrong lost one killed and one wounded, while in her final conflict with twelve or fourteen boats filled with armed men, in which such terrible havoc occurred among the enemy, she lost only one additional man killed, and six more wounded. Faussett was obliged, of course, to deny that he approached the first time with more than one boat. Four boatloads of men would be rather a large body to detail on such a service as merely to ask a question; nor was it probable that a British fleet would send out so large a body of men without any arms whatever to overhaul an unknown armed vessel. He was conscious, also, that the General Armstrong had been fired into with results destructive and fatal. This was witnessed by thousands, and could not be denied. But perverse ingenuity could invent a fable to account for it; so he appended to his narrative the apparently irrelevant circumstance that "several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed." To be sure, nothing could be less plausible than the conjecture—rather hinted at than hazarded—that these Portuguese boatmen fired into the Armstrong. With that halting indirection which marks his whole narrative, Faussett merely gives this *on dit,* without venturing to assert, even upon report or hearsay, that there was any firing by the Portuguese. He left it to the venal apologist and the partial umpire to deem it "not certain" whether the fire came from the British or the Portuguese. Surely it is not necessary to dwell further upon this comparison. Faussett is manifestly unworthy of credit, and it appears by the award itself that Louis Napoleon did not believe him.

The primary fact in dispute was this: Did Faussett approach the Armstrong peacefully and unarmed, in a single small boat, to ask a question, or did he approach, with several large boats, thereby displaying and employing such a force as to justify apprehensions of a hostile attack? Louis Napoleon concedes it to be "clear" that this first approach to the General Armstrong was by "some English longboats, commanded by Lieutenant Robert Faussett, of the British navy." Disbelieving him as to the main and primary fact, what honest court, sitting to determine this case be-

tween man and man, could have found, upon his evidence, that his crews were not armed, in opposition to the unimpeached oath of Captain Reid and his officers, confirmed by the voice of all indifferent spectators? The whole story is a palpable falsehood. The case is eminently one for the application of the rule, *Falsus in uno, falsus in omnibus.* Any impartial and competent arbitrator would have applied it. Nothing but Louis Napoleon's total incapacity to sit in judgment on the case, in consequence of his political relations with Great Britain,—the party most deeply implicated in the transaction,—can account for the award. Upon reason and authority, the claim against Portugal appears to have been well founded in fact and valid in law. We had, by the law of nations and the principles of justice, an absolute right to full indemnity from that country. That right has been sacrificed, and the remaining question is this: Are we remediless?

While we deny the authority or force of this award, and question the whole course of the government in respect to the reference, we wish to be understood as standing not in the least behind the learned solicitor in our admiration for the character of Daniel Webster. That great man had been just called into the state department upon the sudden and wholly unexpected advent of a new administration. General Taylor's warlike spirit, as it was supposed, had brought the country to the verge of a war with Portugal. The civilian who succeeded him preferred peace, and, of course, his judgment controlled. Acting in harmony with the policy of the new executive, and perhaps without having given to the subject that careful examination which it required, Mr. Webster assented to the reference for the sake of peace. In this way the rights of the claimants were sacrificed for what was deemed the public weal.

But it is contended that the United States, in prosecuting these claims against foreign powers, acts only as agent for the individuals aggrieved, and that, as principals, we have ratified the act of submission to Louis Napoleon. We have already denied *in toto* the applicability of this doctrine. There can be no implied ratification, because the case is not one of principal and agent. The nation has the whole power; it is the principal, not the agent. In defending the rights of the citizen, it is no more an agent than a father is in avenging an insult offered to his child. It acts in vindication of its own honor and sovereignty. But we need not have denied the doctrine, for there is no evidence of ratification. On the first rumor that an arbitrament was in contemplation, Mr. Sam. C. Reid, Jr., the counsel for the claimants, addressed to

the secretary of state a letter inquiring of its truth, and praying to be heard on the subject before any such action should be had. The gallant old sailor himself, who had never known fear of personal danger, shrank with a wisely instinctive horror from the bare thought of submitting his own and his country's honor to the arbitrament of a European despot. The keenness with which he felt upon this subject is but thinly veiled by the modest courtesy of his respectful remonstrance. Let it be read; it deserves a place in the annals of his country. Let the personal characteristics of the hero, as exhibited in peaceful action, adorn the same page which bears to future times his illustrious deeds. They will alike challenge admiration and reflect honor upon all who may be so happy as to imitate.

"New York, August 26, 1850.

"Hon. Daniel Webster—Sir: By the recent daily journals, rumors are rife that the claims of the General Armstrong are about to be referred to some power for arbitration. This mode, at best, being considered somewhat problematical, we, the claimants, would respectfully suggest whether or not a settlement by treaty or convention may not, in your opinion, be preferable, as being most likely to enable us to obtain our demands without the risk of a failure.

"Feeling, as we do, that we are in very safe and very able hands, we have no great fears for the future if we be allowed to compare what you have already done for us with what is to be expected on future occasions.

"After so much negotiation, controversy, and anxiety for a long series of years, we now look to you, sir, with every confidence for a final and favorable termination of this affair. And should you be pleased to honor us with your views, we shall esteem ourselves under additional obligations.

"With great respect, etc.,

"S. C. Reid,
"Late Commander of the G. A.,
"In Behalf of the Claimants."

Before either of these letters reached the department of state, the negotiations had been brought to a close, and consequently our government could not recede. This had been done without notice to the claimants, without either knowledge or assent on their part, and it was contrary to their wishes. As it was too late to prevent the arbitrament, the claimants did all that remained in their power. They solicited permission, first, that young Mr. Reid, their counsel, might proceed to France with competent authority to obtain a due advocacy of the case. This was not granted. They next had prepared a written argument, and prayed that it might be laid before the arbiter. This request was also denied. It seems to have been understood that it was beneath the dignity of a monarch to hear the party. As an act of state, this refusal may have been according to established forms but, if it was, how manifest

becomes our position that the case never should have been referred! Royal grants usually run *ex certa scientia et mero motu.* This royal arbitrament seems to have been in like manner understood by all parties, except the unsubmitting claimants, as an appeal to absolute, irresponsible monarchical volition! These rejected solicitations for common justice, and these disregarded remonstrances, constitute the whole evidence relied upon to prove a ratification. If they have that effect, we ask, in the name of conscience and reason, what could the claimants have done in the premises which would not have been a ratification? Was it necessary to levy war against the government? Was it necessary to appear at the state department, and rail at the secretary like a common scold? Ought we to have hired penny-a-liners, and filled the journals of the day with invective? Surely none of these things will be pretended. We objected to the policy pursued. When overruled, and no other source was left to us, we resolved, in humble submission to the omnipotence of the state department, to make the most of a bad position, and to devote every means in our power to the attainment of success.

It may be presumed that our objections to the submission are not relied upon as acts of ratification. Perhaps that point is mainly founded on our prayer to be heard before Louis Napoleon. What else could we have done at that stage of the affair? Silence would have been deemed assent. Any omission on our part to do and suggest whatever was in our power, and which could possibly conduce to success, would have been disrespectful toward our government, and might justly have been condemned. Desperate as the case may have seemed to us, it did not appear so to the government, and surely we were right in straining every nerve to secure success. The spirit which animated our gallant tars in the midnight combat at Fayal secured neither safety nor entire success, but it inflicted upon the enemy an irreparable wound. It reflected luster upon our country. The same wise, gallant, persevering, and indomitable spirit presided over this last effort to sustain a righteous cause sinking under the combined influence of artifice in the enemy, partiality in the judge, and oversight in the prosecutors. It did not succeed; but this court will not permit it to prejudice the man who made it. On the contrary, it was, on his part, a performance of duty. Instead of justifying his condemnation to perpetual silence as a willing participator in this unwise submission, it is precisely the act which secures him still a standing in court as a claimant, and entitles him this day to ask a judicial

sentence against the unjust arbiter. *Judex damnatur cum nocens absolvitur.*

There is something most irrational in the pretense that this prayer for leave to be heard, although rejected, was a ratification by us of all that had been done. A gladiator cast naked and weaponless into the arena would instinctively call for a sword as the lion approached him. According to our learned adversary's notions of justice, this last prayer of the predestined victim, although cruelly denied, would be an approval of his sentence to the unequal conflict. We dismiss, without further comment, this idlest of all idle pretenses.

It has been urged that Captain Reid ought to have surrendered; that he would have suffered no dishonor in yielding without a blow. Suppose it to be so, was there neither merit nor honor in the opposite course? But we cannot agree with the learned solicitor in this. An act of congress passed at the commencement of the war directed the president to prepare instructions, and to cause a copy to be delivered to the captain of every private armed cruiser.[24] Our copy was lost in the Armstrong. Knowing that a line of conduct very different from tame and unresisting submission was commanded, we have sought for the original among the archives of the department, but without success. The same remorseless enemy who destroyed the copy at Fayal, at about the same moment destroyed the original record at this capitol. We cannot, therefore, produce it, but we submit that this court should infer the fact. The instructions undoubtedly were to use the utmost exertions to defeat the military and naval forces of the enemy, whenever and wherever encountered. The ninth section of the same act gave a bounty to each person on board when any privateer burned, sunk, or destroyed an armed vessel of the enemy of equal force. Pensions are also allowed by the acts of congress to every officer, seaman, and marine, belonging to a privateer, disabled in any engagement with the armed vessels of the enemy.[25] This point ought not to have been urged by the counsel for the government. Indeed the fact that it is here urged with a hope of success, considering the ground of the arbiter's decision against us, gives great, and, we conceive, conclusive, force to a distinct equity entitling us to compensation from the public treasury. The facts and circumstances in proof show clearly that Captain Lloyd's object was to possess himself of the General Armstrong for the purpose of employing her against the unprotected villages and

[24] 2 Stat. p. 761, § 8.

[25] 2 Stat. p. 799, § 2.

hamlets upon our seaboard. We have shown that the first approach was by many boats, and that the men in them must have been armed. Louis Napoleon admits the former fact; indubitable results make manifest the latter. The letter of Consul Graves proves Lloyd's desire to capture the vessel in an uninjured state, and the first approach, as proved by Faussett himself, shows a design to carry her by surprise. His pinnace, as he calls it, when fired into, was immediately alongside of the Armstrong, so near that he employed a boat hook to direct her motions. These circumstances are, we say, entirely satisfactory proof of the design imputed. How great, then, was the merit of Captain Reid; how deep were our obligations to him and his gallant companions for having defeated it!

Independently of the right to reimbursement from Portugal, they have a direct claim upon the equity and justice of their country. When the boats first approached, symptoms of this design, in the judgment of Captain Reid, were manifest. If Captain Reid had preserved a pusillanimous or selfishly pacific demeanor, submitted to capture, and allowed his vessel to become a weapon of offense against his country, the validity of his claim against Portugal never could have been effectually questioned. But he acted on appearances, defeated the design, crippled a whole British fleet, and conducted his operations in a manner at once so judicious and so gallant that, while considering the forces employed, they excel in martial glory and fearful consequences to the enemy any event of the whole war. Every spectator, including even the Portuguese allies of our enemy, many of whom were injured in person and property during the conflict, justified them as acts of imperiously necessary self-defense, warranted by the great principles of natural and international law, notwithstanding that they were conducted within a neutral territory. His motive could only have been to defeat this pernicious design; his acts could not have been dictated by rashness and temerity, or by any selfish purpose. All the circumstances repel the imputation of rashness. Selfishness would have counseled submission to the enemy. He acted on a belief which we can now see was amply justified. He defeated the hostile intent. No mortal can set limits to the benefits which may probably have resulted to these United States from that defeat. Yet the very nature of the case rendered proof that that intent actually existed extremely difficult. Counter evidence must, of course, be very accessible to the unprincipled assailant. The intent itself was fraudulent and dishonorable. Those engaged in it could not be very conscientious. Falsehood, decep-

tion, and prevarication are the invariable allies of fraud. In submitting himself to the government of his well-founded opinion on this point, Captain Reid performed an act of disinterested devotion to the defense of his country. It was a departure from what the solicitor now calls "the private business speculation in which he was engaged." It was a voluntary act of national defense. By entering upon it, he threw away his certain claim of reimbursement from the Portugese government, for it exposed him to that very judicial condemnation by which the claim has been sacrificed. Upon any proofs which could ever be produced, it might be to a partial arbitrator, nay, to any tribunal, quite "uncertain" that the hostile and aggressive intent which he anticipated and repelled had any existence except in his own imagination. In thus judging and acting, Captain Reid performed a great public benefit. He carried on war against the enemy at his own expense; and it was only necessary to satisfy the constituted authorities of his country that the act was a proper one to be ratified and adopted in order to give him a perfect claim in equity for reimbursement of the cost from the public treasury. A government at war always contemplates carrying on hostilities at the public cost by the employment of force against the enemy at such points as may seem most likely to prove effectual. And, although it is true that no citizen is authorized to assume the direction of war measures, yet whenever a private individual, with no motive but the public good, voluntarily avails himself of a favorable opportunity, and bears the brunt of a contest which government would gladly have assumed, could it have foreseen the occasion, we conceive that there arises in his favor an equitable claim to reimbursement. The principles of enlarged equity and good conscience illustrated by the voluntary service in rescuing the stack of wheat from impending peril mentioned in 20 Johns. apply to such cases, and require the government to indemnify the patriotic actors.

There is still another distinct head under which our claim should be allowed. It is asserted by the learned solicitor, and cannot be denied, that the government has entire and absolute control over such claims as that which existed in this case against Portugal, and is alone competent to prosecute them. Of course we admit this proposition. But while we concede the power, we deny that the government has the right deliberately and intentionally to work an inevitable shipwreck, or an express extinction of the private citizen's claim, for its own ease in the administration of public affairs, to secure the favor or appease the resentment of a foreign power, or to attain any object or purpose beneficial only to

the public at large, except upon full compensation to the person whose right is thus devoted to the use of the nation. This denial is sustained by the eternal principles of justice. And these principles, so far as they touch this question, do not rest merely upon the authority of reason, or even of precedent. They are consecrated as law by the fifth amendment to the constitution. It provides that "private property shall not be taken for public use without just compensation." No one will pretend that a right to reimbursement for an injury is not property, or that the extinguishment of all remedy for the enforcement of such a right is not taking away the right from him who possessed it. This fundamental rule has been violated by the government of the United States in respect to the claim now before your honors; and we insist that, whenever the heel of power tramples in this way upon the interests of a private citizen, a reference of his claim to this court vests it with the means, and charges upon it the duty, of vindicating the right, and exacting justice from the conscience of the republic.

Some further general observations relative to the powers and duty of government in prosecuting against foreign powers claims for redress of grievances suffered by its citizens may here be proper. Though its action is representative, and bears a certain analogy to that of an agent, yet, unlike any other agency, its power over the subject is supreme. Whatever the government could do in its legislative capacity, it could properly have done in reference to this claim. Undoubtedly, in pursuing demands against foreign states, the government must be the sole judge of the measures to be adopted. It is the judge whether war shall be made, and how long the negotiations shall be permitted to progress before resort shall be had to extreme measures. The interests of particular individuals are not to be preferred to the interests of the whole; nor are the horrors of war to be rashly invoked. It is also the sole and the competent judge whether the claim actually exists. It has the right to take adequate measures for investigating the facts, and ascertaining not only the existence of the claim, but whether it is of such a nature as to be properly enforceable by governmental agency. This may be done in any tribunal, or by any officer or instrumentality, the government may think fit to select. This is manifestly so, because, in the nature of things, the government cannot otherwise act intelligently. As a consequence, we must concede that, when the official inquiry thus instituted results adversely to the claim, the suitor is obliged to submit. Even though his claim be just, he must relinquish its prosecution. In such a case he is in no worse plight than the owner

of any other righteous demand, who, from want of evidence or other accident, has failed to persuade a court and jury of its justice or legality. Even when a claim has been found, upon due examination, to be just, we concede that the suitor must submit to such delay in the prosecution of it as the exigencies of public affairs may occasion; nor is there any greater right to complain of delays than belong to suitors in our ordinary courts of justice. Much time is often required to carry their cases through, and consequently mere delay cannot be considered a neglect of duty. Questions of more difficulty may arise in respect to the powers of government to compromise a claim which it has pronounced to be just; for instance, whether, in consideration of some special circumstances, government would be authorized, in a class of cases, to accept as in full a portion of the sum due. Perhaps there are grounds which might justify the exercise of such a discretion. We do not mean to deny or dispute it, because the inquiry is altogether irrelevant to this case. It has been contended that, when prosecuting claims against a foreign state, government has a right to discriminate between those equally meritorious,—to prosecute some, and abandon others. Perhaps this may be so; but there is a universally received notion of justice which forbids such a course. The learned solicitor may, if he pleases, pronounce it a vulgar prejudice; certainly its condemnation is usually expressed in a somewhat vulgar form of speech. It is called "making fish of one, and flesh of another." Even in matters of gift or courtesy it is disapproved. Equality is approved by the universal sense of mankind,—in the distribution of alms, the bestowal of complimentary gifts, and the tender of courtesy, as well as in the administration of justice. When a parent's testament discriminates between his children, it often leaves a "plague spot" upon the testator's memory, and lights the baleful fires of hatred among his posterity. How far a simple discrimination between claims of precisely equal merit might be competent need not be determined. No such case is before the court. This claim was never thus simply discriminated against and abandoned. We will consider hereafter what may be the just result of that which did take place; that is to say, an abandonment of it by the government for a valuable consideration received by the public.

The right of the government, as prosecutor of claims for the spoliation of its citizens, to discriminate, to a certain extent, between classes of claims, might safely be conceded, and perhaps could not be denied. For instance, in negotiating with a foreign

state, all claims existing prior to a certain date, or to some public event, might, perhaps, be deferred; all claims constituting a class, and, as such, falling within certain principles apparently detracting from their merit, might, perhaps, be relinquished. This line of action would not always involve a manifest violation of the rule that government should afford equal protection and extend equal benefits to all beneath its sway. In imposing taxes and other burdens, the legislative power often selects certain classes. Particular trades or occupations hitherto lawful may, by an exercise of legislative discretion, be adjudged to be prejudicial to the public interest, and henceforth prohibited or restrained within new and more confined limits. The legislative power decrees that only males between certain ages shall be sent to bare their bosoms to the enemy and ward off his assaults, thus exempting all others from military duty. Inequalities in administration like these which go upon some reason, wisely or not, assumed to be just, have not the impress of unfairness and favoritism. We need not, in this case, deny their lawfulness. But while we concede to the government, in its legislative action and in its executive administration, this right of discriminating between large classes of cases or persons in the imposition of burdens, and the granting or withholding of privileges, we deny its right to single out for sacrifice a single individual or one particular claim. Such an act is repugnant to the general sense of mankind, and, if it be designed for the public interest, is forbidden by the constitution, unless upon full compensation made from the public treasury.

In the first place, the government investigated the merits of this claim, and determined that it was valid. It was in the power of the government, on obtaining new lights, to have revoked this decision; but it never has done so. It never can do so; the facts forbid. As *parens patriae,* it assumed the duty of enforcing against Portugal this claim, together with several others of equal, but not of greater, validity. Negotiations were commenced accordingly, and after many years they reached a conclusion. The ultimatum of Portugal was that, although she denied the justice of all the claims, yet, for the sake of peace, she would recede from her opposition to all the others, and would pay them in full, provided our government would refer this one to arbitration. Whether she could be driven from this position by anything less than actual compulsion was to some extent tested by General Taylor's administration. The United States could not separate the several parts of the offer; they were obliged to accept it or

reject it *in toto*.[26] Mr. Clay, our minister, by authority of his government, rejected it, demanded his passports, and sailed from the Tagus. At this critical moment in the history of our claim, the heroic head of our government was summoned from mortal to immortal life. His more cool successor, armed with a higher degree of prudence, shrank from the responsibilities of a war with that nation which had been pleading her own weakness and incapacity for half a century. He at once relinquished the high ground taken by his predecessor, and accepted the offer of Portugal. The treaty thereupon made singled out the case of the General Armstrong for umpirage, and the other claims were paid accordingly.

We do not deny that our government might fairly have submitted any mere question of law involved in the case even to a third power, since, on that part of the case, error seems to have been impossible. Perhaps we could not complain of an investigation of the facts by a jury or by any responsible and impartial individual. But inasmuch as, from the outset, it was plainly manifest to the commonest understanding that a reference of the claim, as a question of fact, or as a mixed question of law and fact, to any potentate of Europe, necessarily involved its rejection, we insist that this treaty, taken in connection with the subsequent unwarrantable acquiescence of our government in Louis Napoleon's award, was a sacrifice of the claim for the sake of accomplishing ends deemed to be important to the public,—that is to say, the recovery of other claims and the restoration of amity with Portugal. If we are mistaken in the views which have been expressed to the contrary, and the treaty did, indeed, contemplate a submission of the facts, our point is only made the more brief and direct. Then the treaty itself was a substantial surrender of our claim. All that followed was "leather or prunella,"—the mere ceremonial of the release. Louis Napoleon was the scrivener, chosen by the high contracting parties, to select the phrase and apply the forms required for a solemn authentication of their preconceived design. We do not mean that, in a common and vulgar sense, our government designed this relinquishment; but it is sound law, and conformable to reason, that parties are always held to intend the necessary result of their acts. Portugal saw that "arbitration" and "release" were practical synonyms; the claimants saw it and remonstrated against the measure; our government ought to have seen it, was bound to have seen it, and

[26] 2 Sandf. Ch. (N. Y.) 244.

must, therefore, be adjudged to have seen it. Thus we establish our point that this claim, being private property, was devoted to destruction for purposes of state, which fact, by the constitution and by the elementary principles of general justice, entitles the owners to compensation from the public treasury.

The great antiquity of this claim has been urged against it. That is certainly not the fault of the claimants. They presented it in their protest on the very day the General Armstrong was destroyed. They have patiently, but respectfully, pressed it by every means in their power from that day to the present. If it has been neglected by the government, which alone had the means of enforcing it, that fact, so far from being an objection to the claim as now presented to this court, is the very basis on which it rests. The learned solicitor, however, thinks he has produced something in the shape of authority against us. He says the claim has been thrice rejected. He has not pointed to the evidence of these rejections, nor to the place in the history of the case where we may find them recorded; consequently we are left to conjecture what are the acts which he calls "rejections," and we can only invite attention to the circumstances upon which he may be supposed to rely.

The first of these rejections took place in 1817. It is found in the report of a senate committee upon the memorial of the owners of the General Armstrong. Perhaps that report was right in saying that the owners were not, at that time, or upon the grounds set forth by them, entitled to payment from the public treasury. But that very report declared "that indemnity from Portugal ought to be insisted on as an affair of state." This is rejection the first! Is it not an express recognition of all that we now assert?

In 1846 the claim was again presented to congress, in consequence of its not having been followed up against Portugal by Mr. Upshur, or perhaps, as has been suggested, by Mr. Upshur's clerk, and in consequence of its having been treated in like manner by Mr. Calhoun, who, it is said, acted through the very same irresponsible agency. It was then referred to the committee of the senate on foreign affairs, who, in their report, after reviewing the circumstances of the case, advised a polite reference of the case to the state department, to be proceeded with against Portugal, according to the recommendations of the report made in 1817. This report was adopted by the senate. For some undiscoverable reason, however, the department failed to act until 1849, when Mr. Secretary Clayton took the matter up, and prose-

cuted it with vigor, and to the very verge, it has been said, of a war with Portugal. This is rejection the second!

We now proceed to the third rejection. After the delivery of Louis Napoleon's award, two distinct petitions were presented, one to each house of congress, for the allowance of the claim in its present form. And what were the results? In the house of representatives a report of the most favorable kind was made. It says that "a stronger case for relief in equity could scarcely have been presented." The house, not having sufficient time to take up the claim, referred it to this court. Surely that was not a rejection. In the senate an equally favorable report was unanimously presented by the committee on foreign affairs. That committee was composed of men not unknown to fame, most of whom have borne a conspicuous part in the legislation of the country, and all of whom may be supposed to have understood pretty well the principles of justice, and also what was due to the honor of their country. A bill was accordingly brought into the senate for the relief of the claimants. The fate of that bill is the only thing bearing any resemblance to a rejection which has ever occurred in the history of this claim; and therefore it may be proper to state somewhat in detail the action of the senate. It is appealed to as evidence against the justice of our claim, and therefore it is certainly proper to scrutinize it somewhat carefully in order to ascertain whether it amounts to a rejection. The bill was presented, and, without much examination, was lost by a vote of 12 to 21. A reconsideration took place, and by a vote of 22 to 17 it was ordered to its third reading. This is generally regarded as a test vote; but scruples were indulged in, another reconsideration took place, and finally, at the close of the session, after a very animated debate, a full report of which is presented to your honors, the bill was laid upon the table by a single vote. This is not a rejection; it is something like the put-off of a polite but evasive debtor: "Call again to-morrow." The whole technical force of such a vote is to postpone the consideration of a measure for the session. Its moral weight, in this instance, deserves a passing notice. It was 25 to 24; consequently this lean majority—one single legislator—constitutes the whole length, the whole breadth, and the whole strength of the three alleged rejections.

The claim was once allowed by a strong vote, and the utmost that can be alleged against it is that it was once indefinitely postponed by a majority consisting of one single vote. It is true, the claimants have been delayed and postponed. They have been

turned over to Portugal for redress, and sent muzzled and fettered to the footstool of Louis Napoleon for justice; but their merit has never been denied. Every congressional report upon the subject, and they amount to four in number, covering a period of nearly forty years, is in their favor.

Captain Reid has been reproached with sordid motives in mingling with the glorious history of his achievement the acceptance of a pecuniary recompense. Is it dishonorable in the war-worn veteran to accept from the overflowing treasury of his happy and prosperous country the means of subsistence in his old age, and of decent sepulture when his hour of parting shall arrive? Surely not. The learned solicitor accompanied his lecture on this head with a reference to the example of him whose deeds and memory are deemed the best illustrations of all that is heroic in patriotism, and exalted in honor and moral rectitude. Though Captain Reid presumes not to challenge a comparison, we must say that this allusion of the learned solicitor was most unfortunate. Though there be no comparison, neither is there in this particular any contrast. Though Washington never descended to the grade of a hireling, and persisted to the last in refusing compensation, though he did not even accept reimbursement of his personal expenses from our impoverished treasury during the conflict, yet it is one of the recorded proofs of his practical wisdom, of his freedom from mere sentimentality, and of his precision and exactitude in the details of duty, that, when his country had achieved her independence and was able and willing to do justice, he rendered, in his own handwriting, a minute statement of his expenses in the public service, and received from congress a full pecuniary indemnity. This parallel, which, but for the learned solicitor's introduction of it, we would not have ventured to exhibit, refutes another of his arguments. He says that all claims allowed by government ought to be founded in some prescribed rule of law. Washington declined that very payment for his time and services which the law allowed, and accepted the indemnity which no known law directly sanctioned, but which, being due on principles of natural justice, was conceded by the enlightened equity of congress and the gratitude of his country. Captain Reid asks no gratuity; he asks neither pay nor reward for his personal toil, sufferings, or achievements. Simple indemnity for the actual pecuniary losses of himself and his brave companions is all that he seeks for himself or them. Here and elsewhere, it has been again and again urged that the allowance of this claim would be bad policy and "a dangerous precedent." Paying a just in-

demnity for such losses, it is said, would lead to numerous claims of the kind. When claims are not founded on meritorious services, they can be rejected; but we cannot see that any mischief will result to our country or its interests from allowing indemnity for the cost of achievements in war, so signal in themselves, and so beneficial in their consequences, as that now under review. May such "precedents" never be wanting. They must ever redound to the profit and honor of our country, and can never prove dangerous, except to our enemies.

It is said, if we repudiate the award of Louis Napoleon, it will disturb our amicable relations with France and prevent European potentates from ever acting as umpires for us. France cannot easily make a national quarrel out of our awarding compensation to our gallant tars for doing their duty. And if the effect of your decision should be to deter, for all future time, American statesmen from submitting to the arbitrary determination of a European potentate, without evidence and without argument, questions of fact involving our national honor, so much the better. If it shall also deter European rulers from ever again assuming the decision of such questions, it will render them an important service. He who, by position and circumstances, is disqualified from exercising an impartial judgment, sins against his best interests and his own honor in assuming the office of judge. The award is founded in error. It seeks to falsify American history, to fix a stigma upon our national character, and, at our expense, to rescue our enemy from merited opprobrium. Unless by some competent authority repudiated upon our part, we must be deemed, through all future time, as having subscribed to its truth and our own dishonor. Instead of allowing it to seem thus acquiesced in, this court, as it may do consistently with truth and justice, ought to stamp upon the page of history its indignant reprobation of both the reference and the award. Let it not be said that posterity will prefer to the judgment of this court the award of the impartial referee. In what degree he was impartial may be gathered from the facts. He assumed powers not granted. He gave credit to the denial of a witness whose positive assertion he discredited and solemnly found to be untrue. At the very time of forming his award he was secretly progressing in negotiations for an alliance with Great Britain, the nation chiefly interested against us in the controversy. The importance of that alliance, and the necessity of securing it, may be judged by the stupendous objects it had in view, and is now struggling to accomplish. Neither will it be overlooked that he was chosen to

arbitrate as president of the republic of France, and that, when preparing the award, he was actively engaged in undermining the foundations of that government, which, as chief magistrate, he was pledged to maintain. Though the reference was to a president, the award came from a king. With the hand which signed it, he had just stricken down the liberties of his country; that hand was yet reeking with the life blood of a republican constitution. It may not seem strange if, to gratify a monarchical ally, he sacrificed the rights of a republic.

You have been asked to avoid scrutinizing too nicely the justice of this award, from considerations of deference to the chief of a sovereign state now in amity with us. We ask you to scrutinize it closely, to judge it fearlessly, and, as becomes an American tribunal, to discard considerations of policy when justice and national renown are involved. If the arbiter were all that his most obsequious admirers would venture to assert, his merits have been sufficiently acknowledged and amply rewarded. The liberties of one republic have been sacrificed to his ambition; let us not immolate the fame of another upon the same unholy altar.

ARGUMENT IN THE CASE OF ORMSBY AGAINST DOUGLASS, IN THE SUPERIOR COURT OF NEW YORK, 1858.

STATEMENT.

The mercantile agency has become one of the recognized accessories of the modern business world. Like all innovations, it encountered vigorous opposition, and the rational view of its functions and value taken by the courts was largely due to the efforts of Charles O'Conor, who was interested in much of this early litigation. One of the first cases of this class was Tappan v. Beardsley, in the circuit court for the Southern district of New York. The plaintiff recovered a verdict of ten thousand dollars, but the case dragged along for several years before going to judgment. On appeal to the supreme court of the United States, the judgment was reversed on technical grounds, without any discussion of the application of the law of libel.[1] In the meantime, another suit had been brought by one Ormsby against Douglass and others, the successors of Tappan in the same mercantile agency. It appeared that the clerks or representatives of the agency, in a report to a subscriber of the agency, had stated that the plaintiff, whose standing was under investigation, was a counterfeiter, or allied with a counterfeiter. This statement was false, and Ormsby brought an action of libel. The case was tried before Judge Pierrpont, sitting at *nisi prius* in the superior court of the city of New York, 1858. At the conclusion of the plaintiff's evidence, Mr. O'Conor made the following argument in support of a motion for nonsuit. The motion was granted, and this ruling was subsequently sustained on appeal.[2] The selection is confined to that part of the argument which deals with the foundations of the principle of privileged communications.

ARGUMENT.

The case as it is presented by the plaintiff brings up for consideration a question of no intrinsic difficulty, but which, in this precise form, is somewhat novel in the courts of this state. It is therefore of some interest, and may properly have a very full and deliberate consideration. The novel form in which it arises does not necessarily render it difficult to deal with, for it was well said by a learned and able judge, whose remarks are often cited, that, when questions present themselves to a court which are merely new in instance, it is as easy to decide them and to apply principles to them now as it was two centuries ago, and will be as easy two centuries hence as it is now. It is only when, in the common law or in the existing statute law, there can be found no guiding principles, that courts are embarrassed and constrained to await legislative enactments adapted to the case. It

[1] 10 Wall. 427. [2] 37 N. Y. 377.

has sometimes been said that, in disposing of a case new in instance, courts legislate. They do not. They only administer the known law, and apply its established principles to the new case in the particular phase of human action which it represents. [Mr. O'Conor then stated the facts of the case.]

Now let us see how the matter stands in relation to the communication which is the basis of this action. The inquiry is, was that a privileged communication, within the principles which govern in actions of slander and libel? I have for a considerable length of time had occasion to consider the objections which a fertile imagination might suggest against this business. One readily recurs to a certain set of objections; they have all been suggested by the learned counsel in his highly-colored opening of this case.

First, that it is an unworthy thing to become an habitual searcher after the faults, weaknesses, errors, and deficiencies of other men, and particularly if done for a pecuniary reward. Again, that the business necessarily involves the employment of subordinate agents, and that the agent who hunts up the information and gives it to the principal must be a person subject to these same objections. As it is an unworthy kind of business to pry into the faults and deficiencies of others, such subordinate agent, from the very nature of his occupation, must be or become a degraded person, and that, by such a person, false statements may often be made from the worst motives. All these things may be very easily said. They may be said in a form well calculated to excite the imagination, to inflame the passions, and, by their play, to seduce the judgment. But it is done by borrowing illustrations from a field or theater of action entirely different from that in which this business, as well on the part of the principal as of the agents, employs itself. Nobody will deny that the busybody or tattler who, to gratify his private malice against an individual, or to indulge his evil habit of dwelling on the faults and blemishes of others, employs himself either as a principal or as an agent in picking up foibles for the purpose of retailing them to the world at large, or even of privily retailing them to those who take pleasure in hearing evil of their neighbors, is an unworthy and despicable character. The tattler who goes about fomenting disputes, and circulating, to other men's discredit, the tales which he may have picked up, is an odious and contemptible character, whether his narrative be true or false. And why? Because he does it for no good purpose. He does it to gratify an unworthy habit of mind. He can intend nothing but mischief by it. All illustra-

tions drawn from the habits and conduct of persons engaged in an occupation of that kind must be such as to excite contempt and abhorrence.

But let us see whether these observations of the plaintiff's counsel have any relevancy or application to the case before the court. What is the nature of the mercantile agency? What are its objects? Why was it established? What is its utility? We are constantly advancing in civilization and in its accompaniments, one of which may be called "luxury,"—that is, the enjoyment of all those physical and intellectual pleasures which man's condition in this life enables him to enjoy under favorable conditions. I use the word "luxury," not in the sense which confines it to describing those kinds of enjoyment which are only allotted to the wealthy; I apply it to the enjoyments shared by the humblest members of society. I apply it to the mechanic; nay, to the mere laborer who works for a dollar a day, and whose wife, perhaps, goes out scrubbing for a smaller pittance. When they return to their homes in the evening, they enjoy their cup of tea, brought to them across ten thousand miles of ocean; they sweeten it with sugar coming from a far distant clime. We have made such progress that even the fare of the humblest is made up of a variety, for which "earth, air, and ocean are plundered of their sweets." Such is the variety of enjoyments which, as we improve in civilization and means of enjoyment, are, in greatly increasing extent, brought within reach of our people, to be at last participated in by the whole nation, the highest and the lowest.

Mankind have been and are constantly progressing. Knowledge is constantly increasing. But yesterday chemistry was literally unknown. To-day that science furnishes to us, and to men of every grade and class, a great variety of enjoyments, corporeal and mental. It leads to the production of a greater amount of fruits from the earth, and of a better kind. It leads, in every department of human industry, to consequences highly beneficial, and conducing to the enjoyment of life by all classes. If we look back but a brief period, we find that civilization was confined within a very narrow space. We find that it was inferior in quality to that which exists at this day as far as the general public are concerned. It has been greatly improving and expanding. The discovery of America opened this vast territory to cultivation by mankind, and we have here a garden producing means of enjoyment to the human family which promises to present, in times not far distant, a most extraordinary picture,—an amount of actual enjoyment by millions, which so far exceeds the former state of things that the

mind is utterly unable to keep pace with the glowing probabilities of the future. This progress has not been merely a progress in abstract science; it has been especially a progress of knowledge in arts and manufactures. We appear to be approaching a period when man may cross the ocean, not only without appreciable danger, but without being subject to the temporary evil of an hour's sea sickness. We yesterday had a ship launched which cannot be burned; which it is said cannot be sunk; and, as to her going ashore, those connected with her say that, if such an event should happen, let the shore take care of itself, for it will be more likely to suffer than the ship. Again, it seems that we are shortly to have extended communication with earth's remotest regions by the electric telegraph, thus bringing all mankind into immediate contact, and rendering us one great undivided society. The perils of the sea and its inconveniences are removed, and time and space are no longer barriers to the exercise of will. We hold them in the palms of our hands. And what is to be the effect of these great improvements? The effect must be that trade and commerce will expand with a rapidity and in a degree altogether beyond anything in the former history of mankind. New arrangements, devices, and contrivances have been in our recent progress, and must still be constantly coming into practice in order to make available, in their most perfect and effectual forms, these new and additional facilities afforded us for the enjoyment of life.

What a vast field of discovery must lie open to ingenuity in relation to the transmission of messages over the telegraphic wires! What a wonderful field for the exercise of ingenuity has been opened by the constitution of the leviathan steamship! How much must yet be contrived and done in respect to those messages that are to be suddenly transmitted from one end of the earth to the other! In many cases, secrecy is indispensable, and must be practiced. The manipulator working upon the telegraph must be kept as much in ignorance of the import of the message as the wire itself upon which the message travels. A method must be adopted to avoid mistakes, and checks and counter checks must be devised and adopted to prevent fraud. This your honor will perceive, and that, from time to time, new and hitherto unknown contrivances must be adopted to keep pace with the newly-developed facilities in the management and conduct of even those things which, in their general nature, were not known before. Among these we may reckon the mercantile agencies. As trade is so generally expanded and population so thinly distributed over the vast surface of these states, it has been found necessary that New York and other great

marts for supplying the interior should have better means of acquiring information as to the means of applicants for credit than any which formerly existed, either in the little island of Britain, or even in this country, when her settlements were comparatively few, and lying within short distance of the sea coast.

Under the old system of doing business, what was the practice? When a merchant in New York was applied to for credit, the applicant, if coming from a distance, might bring with him such certificates as he could get from his neighbors. But who were his neighbors? Perhaps there was not one person among his neighbors as well known as himself. He might bring a certificate from his minister, or, if he could get it, one from his rival in business. With these vouchers he might come to New York, make his application, give the party from whom he desired to buy, a fortnight or so to make inquiries, to write letters, or otherwise to search for the requisite information. This was the only known course, and it was found to be exceedingly inconvenient. It has been found in this, as in other things, that the people of this country have occasion to move rapidly. When a man applies for credit, he desires to get it at once, or at once to meet with a refusal, so that he may turn his efforts to another direction. In order to meet this exigency it is necessary that the merchant should have some means of ascertaining promptly the character of the proposed customer. Without further illustrating by details, it may be asserted that the means of obtaining information as to the credit of a newcomer from St. Louis, or any other distant point, proposing to purchase here, was formerly involved in much embarrassment, and, if that embarrassment could not be overcome, our progress in trade must be greatly retarded. But American ingenuity is equal to every emergency, and the invention, if it may be so called, of these mercantile agencies, was the result of that ingenuity. Its origin was imputed to Mr. Douglass by the plaintiff's counsel as a matter of reproach. I do not disclaim for him under the idea that it would be a matter of reproach; but the fact is otherwise. It is well known that it originated with a well-known mercantile law firm in this city. A junior member of that firm, who was the most active in principally developing the idea, subsequently occupied, for many years, as a judge of this court, the position which is now filled by your honor. The project was supposed to be entirely upright and honorable by him and by his associates. And why? Because, as your honor will perceive, the New York merchant did not seek for false stories, scandal, tattling, or evil information. On the contrary, the New York merchant desired a good report if he could

possibly get it consistently with the truth of the case. His object was to sell, and he could only be prevented from selling when prudence enjoined it upon him to forbear. When a New York merchant applied at a mercantile agency as to the credit of a proposed customer, and learned that he was unworthy of credit, he would, of course, watch the effect of that advice. If he found that the rejected customer patronized others, and justified their confidence, he would naturally conclude that the advice of the mercantile agency was unreliable, and discontinue his communication with it. It is therefore undoubtedly the interest of the persons conducting the agency—and there is no tie stronger than that—to procure for the New York merchants the most truthful information in regard to their country customers that can be procured. Merchants losing customers through information to the customer's discredit would, of course, communicate the fact to each other, and this would inevitably destroy the credit, standing, and consequently the business, of the agency from which the business came. Its evil reports, instead of producing extensive mischief to others, would involve itself in bankruptcy. Your honor must perceive, therefore, that the principal in the establishment is bound by the strongest influences to get and give the most favorable reports that he can consistently with the truth. If he does not pursue that course, his business must certainly go to the wall. How is it with the subordinate agents? These subordinate agents are not selected from among tattlers, and those engaged in similar occupations, but from among men of good habits and character. The learned counsel has suggested that persons of good character would not undertake the employment. If this business is base, unjust, unworthy, discreditable, and pernicious in itself, I grant that good men would not be employed in it. But if it is not so,—if we can say that it is just, that it conduces to beneficial results, that it facilitates business,—I should like to know why the worthy, honorable, and upright man should decline to support it, or hesitate to obtain and transmit information to his principal in a prudent form for the purpose of being used in this way. There is but one consideration to restrain a fair man of fair character from undertaking this employment. It is the danger of resentments to which it might expose him where he may happen to give an unfavorable account of a dealer. That consideration is also calculated to induce him to be cautious, and to give the most favorable account that can be given with propriety. In judging of the moral tendency of the business, this distinction is always to be borne in mind: it is not the tattler who, for no purpose other than a love of slander, speaks, but it is a man whose

business it is made to hunt out the truth, and discriminate, as well as he may, between what malice may suggest and what fair and honorable men of good character may give in the form of information. That is his duty; that is his interest. All the promptings of honor, duty, and even of selfishness are towards the adoption of favorable reports. If the sub-agent makes a good report, and the truth warrants it, he does what is agreeable to his employer and to the person for whose use the report is communicated in New York; if he sends a bad report, all the evils and dangers that I have spoken of are present to his mind as possible results. His employer or principal is dissatisfied, and of course dismisses him. There is danger, too, of its coming out that he has spoken to the prejudice of his neighbor, and he may encounter the hostility of that neighbor. By general, abstract reasoning, the learned counsel has endeavored to make out that the subordinate agent must be a vicious person, and of an unworthy disposition; that he must be a person who enters into these operations to gratify his malice. The answer to which is that the person so employed does not go into it wantonly. He does it because it is his interest, and because he is rewarded according to the nature of his labors in the employment by some suitable compensation. He does it for business purposes. He does it, not that his discoveries may be talked about, but that they may be used confidentially, under special provisions securing privacy, only when some business operation calls for it. It is in its whole nature and bearing a different thing from the practices of the wanton tattler.

Well, sir, has the practice tended to show that these suggestions of the plaintiff's counsel have any foundation in fact? How many suits of this description have ever been brought? Have the courts been troubled with them? The business has been in existence certainly much more than twenty years. I remember myself happening to be informed of its existence during a journey to Charleston in 1835. That is twenty-three years ago. How many suits of this description have been brought in the interim? They are amazingly few in number. I believe there are but two verdicts recorded as having been rendered for the plaintiff in such actions. Against the whole circuit of mercantile agencies,—those well conducted, and those not so judiciously managed,—there have been but two verdicts. There is but one verdict against any company conducted as this one is, and that verdict has not yet passed into judgment. Probably it never will. Therefore your honor may see that this general reasoning as to the probable result of such a business, however plausible in theory, is very ill sustained by prac-

tical tests. If men had been slandered,—if this were a mere shield for the gratification of malice or revenge,—how happens it that more have not complained and brought their complaints before a court of justice? The fact that hardly any suits have been brought furnishes the most conclusive evidence that, in their practical operation, these agencies have been conducted in such a way as to give universal satisfaction. Confidence has been almost invariably well kept. The imputations, whether strictly accurate or not, which have prevented credit from being given, have been preserved within the sphere of that confidence by which they were intended to be shielded from general observation, and where, as we maintain, the law shields it from responsibility. Of course I am obliged to stop here in relation to this kind of illustration. I am not permitted to mention to your honor the names of those persons who, in small towns and villages throughout the country, have consented to act and have acted as subordinate agents; but, relying for the proof of what I say on the manner in which the enterprise is worked, giving general satisfaction, and not leading to lawsuits, I feel justified in the assertion that the persons who have acted as subordinate agents, and have given information to the principal agencies, have ever been men of prudence and discretion, and observers of the truth. If names were given, many would be found who, in our courts of justice, and in legislative and executive stations, have attained high eminence.

Let us look a little further into this question. Is the benefit of these mercantile agencies confined merely to the wholesale merchant at the seaboard, and protecting him against undue confidence in the unworthy,—against the error of selling his goods to persons who do not intend to pay for them? Is it narrowed down to that? Is its sole effect to prevent loss by the great wholesale vendors, or even by the small jobbers in New York? Not at all, sir. The effect is as beneficial to the small dealer and the humble village shopkeeper in the interior as it is to the merchant in New York. In the first place, your honor will perceive a certain facility that it affords to the small dealer residing in the interior. He comes to New York, transported as if on the wings of the wind, by railroad. He makes his application at ten o'clock in the morning for a purchase on credit, and by four o'clock in the afternoon his goods are on board the freight cars, bound for his country home. He loses no time in dealing here. He brings no budget of certificates. All that is necessary is to tell who he is, where he comes from, what is

his business, and what he wants. I mean, of course, if he is worthy of credit. There is, in this way, a prodigious saving of time to him and to the New York merchant. Coming from a remote point, it might be exceedingly difficult, were there no mercantile agencies, for a man of limited means, and needing credit, to furnish satisfactory evidence that he was worthy of credit. He would present, perhaps, a certificate from his minister; but the New York merchant might not happen to respect that particular minister much, or might perhaps have a prejudice against ministers of that denomination, or the cloth generally. Besides, the merchant might not think the village minister, the village lawyer, or the village justice of the peace very good judges of pecuniary credit. Every effort to establish his reputation resorted to by the stranger in town might be ineffectual. Under the mercantile agency system, no effort is necessary on the part of the proposed buyer to bring with him a character. The character which exists among his neighbors travels with him. He comes to New York, and that character, attested by methods upon which the New York merchant is willing to rely, is here before him. It awaits him here; or if, perchance, it happens not to be registered in the agency, that institution, aided by the magnetic telegraph, is enabled to ascertain and report upon it without delay.

What evil can result from this system to anybody? Why this, and this only: persons who may have a bad reputation among their neighbors, and are yet innocent of all the things that are said against them, may sometimes fail to get credit, though deserving of it. Innocent though they be, their neighbors not being satisfied of their innocence, they do not get greater credit here than they can obtain at home. Instances may occur when this would be actually unjust,—that is to say, a person may be innocent of the things generally considered to be true, and urged against him by his neighbors. Yet how are all the transactions of life governed? If the New York merchant could be in this man's little village, and hear the people generally say that he was unworthy of credit, would he not refuse him credit? Would he seek out, sift, and inquire? No; he would condemn him on his general reputation. The same things occur in courts of justice. If a man is examined to prove a fact, and twenty or thirty witnesses are then produced who say that, from his general reputation, they would not believe him, his evidence is set aside. That may often be unjust, but still it is the practice. Institutions or arrangements of business which, upon the whole, operate beneficially to the parties concerned, which

are not in themselves inherently unjust or immoral, and have no necessary tendency to mischief, are not, I apprehend, to be condemned or censured because it is possible that they may sometimes mislead and do injustice by being the vehicles of unjust imputation.

With these general observations upon the nature of these establishments, I proceed to inquire whether they are not fairly within the rule concerning privileged communications, and, when fairly conducted, exempt from responsibility by force of that rule. I find the law thus laid down in Greenleaf's Evidence:[1] "If a person having information materially affecting the interest of another honestly communicates it privately to such other party, in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the subject-matter, . . . and though the danger to the other party is not imminent." I refer to the class of cases cited in the note to the sixth edition. This doctrine is very distinctly formulated in Howard v. Thompson[2] and in White v. Nicholls.[3] Mr. Greenleaf, at the place before cited, adds many pertinent remarks in support of the general doctrine. He shows that this is a rule very much favored in law. It is said that the transactions of life cannot be carried on unless, when a man is applied to by another in reference to a transaction involving his interest, he may give to his neighbor or employ an agent to seek information, and receive it confidentially, without the neighbor who gives it being thereby exposed to any action. Again, it is said to be one of the duties of good neighbors, when they know that a person is likely to have dealings with one who is unworthy of credit, to go to that person and voluntarily communicate the supposed facts to him for the purpose of enabling him to be on his guard, and to avoid the evil consequences which might result. This principle is general; it is universal. It applies as well to an individual who is employed and paid to hunt up information, and to communicate it, as to any other person, and for the plain reason that, if a man has the right himself to search for information, he has the right confidentially to employ another to search for it; and the right to employ an agent to search for it would indeed be vain and nugatory if it did not include, upon the part of the person who seeks and obtains it, the right to communicate it to his employer.

So the case before your honor is not distinguishable from the common, every-day instance of a confidential communication by one agent to another, or to his employer, unless it be in the circum-

[1] Volume 2, § 421.
[2] 21 Wend. 335.
[3] 3 How. 287.

stance that the agent here is employed to render, and paid for rendering, this particular service. It may be proper for me to show that that circumstance has not been considered as having any weight whatever. For this purpose I refer your honor to the case of Washburn v. Cooke.* In that case, "a sheriff, having levied upon certain cattle, which were subsequently driven away, employed the defendant, a student at law, to ascertain the facts, and advise him what to do." This young man was hired for the purpose of following the person who had driven the cattle away, and searching into all the facts and circumstances in relation to the conduct and motive of that party, in order to advise the sheriff concerning the anticipated controversy. He did advise him of many facts prejudicial to the plaintiff in a letter containing the most severe language that could well be used. After stating the unfavorable reports, he added: "I think so too." This letter, by no intentional breach of confidence, came before the public. It would seem that, at a subsequent period, it was found in an outhouse, where it had been accidentally thrown. The finder published it, and an action was brought against Cook, the young law student, for the libel contained in it. The plaintiff obtained a verdict. In setting aside this unrighteous and illegal verdict, the court, by Chief Justice Bronson, spoke as follows:

"If the letter was not a privileged communication,—if there was nothing in the occasion of writing it to distinguish this from the ordinary case of making a slanderous charge against another,—the judge was clearly right in his charge to the jury. In the common case of a libelous publication, or the use of slanderous words, the charge of malice in the declaration calls for no proof on the part of the plaintiff beyond what may be inferred from the injurious nature of the accusation. The principle is a broad one. In all cases where a man intentionally does a wrongful act without just cause or excuse, the law implies a malicious intent towards the party who may be injured; and that is so, even though the wrongdoer may not have known at the time on whom the blow would fall. But in actions for defamation, if it appear that the defendant had some just occasion for speaking of the plaintiff, malice is not a necessary inference from what, under other circumstances, would be a slanderous charge; and it will often be necessary for the plaintiff to give other evidence of a malicious intent. There may be many of these privileged communications, . . . as in a regular course of discipline between members of the same church; in answering an inquiry concerning the solvency of a tradesman or banker; or where the communication was confidential between persons having a common interest in the subject, to which it relates. In these and other cases of the same nature, the general rule is that malice is not to be inferred from the publication alone. The plaintiff must go further, and show that the defendant was governed by bad motives; that he did not act in good faith, but took advantage of the occasion to injure the plaintiff in his character or standing."

* 3 Denio, 110.

. . . . The case of Beardsley v. Tappan, tried in the circuit court of the United States for this district, before Judge Betts, in November, 1851, was an action, like the present, against the proprietor of a mercantile agency for publishing an unfavorable report concerning the plaintiff. That eminent and experienced judge charged the jury on the general question as follows:

"The business of the mercantile agency established and conducted by the defendant is, in its general purpose and features, as disclosed in the evidence, both lawful and useful. Information, however defamatory, communicated by the defendant in good faith to merchants applying to him for the information, to guide them in their business, is in law a privileged communication, for which no action could be maintained by the party defamed, except on proof of express mailce."[5]

[5] The remainder of the argument related to procedure.

ARGUMENTS ON BEHALF OF THE DEMOCRATIC CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT, BEFORE THE ELECTORAL COMMISSION, 1877.

STATEMENT.

The result of the presidential election of 1876 was a subject of acrimonious dispute. On the face of the returns the Republicans claimed the election of Rutherford B. Hayes by a majority of one vote in the electoral college. But the Democrats asserted that, in three states claimed by their opponents,—Florida, Louisiana, and South Carolina,—the Democratic electors had received a majority of the votes actually cast, and that the Republican returning boards in these states were preparing to count them out. The Republicans, on the other hand, were equally vociferous in charging fraud upon their opponents, asserting that citizens, especially colored men, throughout the South, had been deprived of their votes by intimidation and force, and that ballot boxes had been foully dealt with. The count of the votes was complicated by the existence of dual governments in the three contested states. In South Carolina and Louisiana there were two governors and two legislatures, each claiming to have been elected, and to constitute the only legitimate government of the state. Each set of electors received their certificates of election, one from the Republican governor, in possession of the office, the other from the Democratic governor, demanding possession of the office. In Florida the Republican majority of the returning board declared the Republican electors chosen; the attorney general of the state, the sole Democratic member of the board, gave certificates of election to the Democratic electors. In Oregon, also, there was a complication. The Republican electors had secured a majority, but, as one of them was thought to be disqualified from serving, the governor gave a certificate of election to the Democratic elector who had received the largest number of votes; but the secretary of state, the official canvassing officer, gave certificates of election to all three of the Republican electors. To solve the problem presented by these disputed returns, congress finally passed an act constituting an electoral commission. By the terms of this act the commission was to be composed of five members of the senate, five members of the house of representatives, and five justices of the supreme court. It provided that when more than one return had been received from any state, the commission should decide which return should be received, and this return should be counted unless both houses should reject the decision. Any right, existing under the constitution and laws, to question in the courts the titles of the persons who should be declared elected, was expressly reserved. The commission, as selected, was composed of Senators Edmunds, Frelinghuysen, Morton, Bayard, and Thurman; Representatives Garfield, Hoar, Abbott, Hunton, and Payne; and Justices Clifford, Strong, Miller, Field, and Bradley. Messrs. William M. Evarts, Stanley Mathews, E. W. Stoughton, and Samuel Shellabarger appeared before the commission as counsel for the Republicans. The Democrats were represented by Messrs. Charles O'Conor, Jeremiah S. Black, Mathew H. Carpenter, J. A. Campbell, Lyman Trumbull, Ashbel Green, Montgomery Blair, George Hoadley, William C. Whitney, R. T. Merrick, and A. P. Morse. The counsel for the Republicans staked their case on the principle that congress could not go behind the returns of

the canvassing board or officer in counting the electoral vote from any state. They contended that, in the election of president and vice-president, the constitution had separated the procedure into two distinct parts, assigning the first part to the control of the states exclusively, and the second part to the control of congress exclusively; that, up to the completion of the election of the electors, the exclusive control of the states extended, but that all control after that point had been reached was in congress; that the report of the vote for the electors by the state canvassing officer or board to the governor was the final act under state control, and that congress had no power, under the constitution, to revise, interfere with, or examine into that final act in the election of directors. It was in reply to this contention, with reference to the count of the electoral vote of Florida, that the following argument was made. The view of the counsel for the Republican candidates prevailed by a majority of a single vote,—the commissioners voting upon party lines,—and the electoral votes of the four states from which double returns had been received were counted for Rutherford B. Hayes and William A. Wheeler.

ARGUMENT.

Mr. President and Gentlemen of the Commission: I will not say probably, because it may be said certainly, that the most important case that has ever been presented to any official authority within these United States is now brought before this honorable commission for its investigation and decision. It is brought here under circumstances that give absolute assurance, as far as absolute assurance can exist in human things, of a sound, upright, intelligible decision that will receive the approval of all just and reasonable men. The great occasion which has given rise to the construction of this tribunal has attracted the attention of every enlightened and observing individual in the civilized world. This commission acts under that observation. The conclusion at which it may arrive must necessarily pass into history, and, from the deeply interesting character, in all their aspects, of the proceedings had and the judgment to be pronounced, that history will attract the attention of students and men of culture and intelligence as long as our country shall be remembered; for it cannot be supposed that a question will ever arise and be determined in a similar manner which, by its superior magnitude, importance, delicacy, and interest, will obscure this one, or cause it to be overlooked.

The selection of members to this commission was made by a choice of five individuals, equal, assumed to be equal, pronounced to be equal, if not superior, to any others to be found in the house of representatives, and a similar choice of similar individuals taken from the senate, thus placing the entire legislative representation of our whole country under the observation of present and future times in respect to whatever shall here be done. To that

has been added a selection of five other members from the highest judicial tribunal known under our constitution and laws, and certainly a tribunal equal in official majesty and dignity, as well as in intellectual power, to any that has ever existed. Evidently, from the whole frame of the procedure, these appointments were made with an earnest intent, and indeed a fixed resolution, to have here represented in this tribunal whatever of perfect impartiality and fairness, whatever of purity and integrity, whatever of learning and dignity of position, our country could afford. This, too, is a public act of the highest authority that could be invoked to express the sovereign will of the whole people. The questions to be considered are of a public character and of a judicial nature. Every member of the commission has been a jurist by profession during his life, and has devoted his time and his study to the apprehension and comprehension of legal questions. It was said by a great English judge, and an eminent writer and historian, in the highest court of that country, in a conspicuous case, that "jurisprudence is the department of human knowledge to which our brethren of the United States of America have chiefly devoted themselves, and in which they have chiefly excelled."

With all these elements affording guaranties in respect to the result, I think it may be confidently asserted that such result cannot be other than the intelligent judgment of mankind in present and future times will approve. With that assurance, and with a deep sense of my own incapacity to fulfill the part assigned me in arguing the great question presented, but a conviction that all deficiencies of this kind will be supplemented by the learning and ability of the tribunal, I proceed to lay before your honors what may seem proper to be now said on our part in relation to the issues that have been raised for consideration by the commission's resolve, adopted on Saturday.

The questions, in short, without repeating details, are expressed by the inquiry, what powers have been vested in this commission for the purpose of enabling its members to guide, through its determination, the action of the political authorities as to the election of president and vice-president? And here let me observe on a mistake which the other side has made in relation to a paper presented to the court on our part on Saturday. It has been construed as in some sense prescribing limits, or giving our view of some limit, proper to be assigned to the power and authority of this commission. This is a mistake. That paper was designed for no such purpose, and expresses no such idea. With a view to facilitate the action of the court, we presented in that

paper a statement which we believe to be correct and true in point of fact, showing the very narrow range of inquiry into matters of fact that would actually become necessary. In reference to the question what elements of inquiry are within the competency of this court, we stand in direct conflict with the other side, and the issue formed between us is this: We maintain, as representing what are called the "Tilden electors," that this tribunal has full authority to investigate, by all just and legitimate means of proof, the very fact, and thereby to ascertain what was the electoral vote of Florida. On the other hand, it is claimed that this learned commission is greatly trammeled by technical impediments, and has no power except merely to determine what may be the just inferences from the documents returned to the president of the senate from the state of Florida. While thus contending, however, the Hayes electors mainly repose themselves on the proposition that they are officers *de facto*. Admitting, for the sake of argument, that their claim to be electors is without right, and is simply clothed with a false and fabricated color of title, the Hayes electors claim through their counsel that, inasmuch as they cast their vote while possessed of some documents which gave to them the mere color of a right to perform that duty, the fact that they acted upon this color, and did, of their own motion, of their own personal will, through their own right of selection, cast the votes for Mr. Hayes that are sent here as the vote of Florida, completely precludes all inquiry, and that it is impossible for any earthly tribunal or any individual to investigate or to declare the invalidity of their claim. This issue, thus, I trust, not too narrowly stated, raises the question, what are the powers of this commission? I proceed to state our views on the subject.

Those powers are distinctly and briefly expressed in the electoral bill under which you are acting,—that admirable act of legislation, destined, to the immortal honor of those concerned in its preparation, to pass into history with your action. The language defining your powers declares that you shall possess "the same powers, if any, now possessed," for the purpose in hand, "by the two houses, acting separately or together." You have then (and this is the test) all the powers of those two houses which they could possibly exercise under the constitution and by the pre-existing statutes, for the purpose of enabling you to determine the inquiries submitted to you. Let us see, then, what powers are possessed by the two houses, separately or together, in deciding as to the electoral vote upon the facts that exist, or that might exist, and may be proven. And this calls upon us to say what those

powers are, and requires us to answer whether, in relation to the action which has here been called "counting," any powers under the laws existing when this electoral bill was passed, and which were needed to a proper ascertainment of the vote, were vested in the president of the senate.

Now, that no power of any description deserving the name of a power to investigate and decide resided in the president of the senate is most plain from the very words of the constitution. He is authorized to receive certain packets, and he has no authority whatever by the constitution, save and except only to present himself to the two houses of congress, and, in their presence, to open these packets. The phrase is "open certificates," but this evidently means open the packets. He has no right to open them at any previous time. He has no power whatever to investigate what is contained in the packets before thus opening them. He has no means of taking testimony, he has no right to judge of anything, and he is positively precluded, not only by the constitution itself, but by the physical laws of nature, from knowing what may be within any packet thus received by him until the moment at which he opens that packet in the presence of the two houses. Of course the packets which he is thus authorized to open are to present the basis of subsequent action. Nothing further is prescribed to him, and I humbly submit that it is most manifest that he has none but the merest of clerical powers, nor any ability to do anything except to open the packets at that time, and at that place, and in that presence. He cannot even know what is in the packets until he opens the packets. But it is manifest that the packets which he thus opens may require a decision by some authority of a preliminary question,—that is to say, what are the votes in respect to which a count may take place? No person or functionary or body is specially pointed out as having power to make that count. Now, a great deal has been said, which I consider not very applicable or very instructive, in reference to this word "count," as if it were the operative and principal word here, and were used to determine the faculty and point out the power of those who have authority to count. Now, I humbly insist that the count itself is so purely a simple arithmetical process that, in reference to it, there never could be a possible difference of opinion anywhere or among any persons.

I apprehend that there is a word in this constitutional provision that ought not to be overlooked. The president of the senate is to receive these packets. They are not required to have any note or ear-mark of any description to indicate to him what they are,

and he can only learn by external inquiry or report that they are sent to him by persons pretending to be electors of president and vice-president; and the constitution, proceeding to declare his duty, says that he shall "open all the certificates." The word "all" would perform no function, and it would be entirely useless, if it were to be confined to indicating the certificates before spoken of. The simple phrase, "shall open the certificates," would suffice. But he is to "open all the certificates"; and this provision of the constitution, not granting powers of investigation, but dealing with visible facts, declares that he shall "open all certificates." This, I apprehend, means all packets that may have come to him under color of being such packets as the constitution refers to,—that is, packets containing electoral votes, or appearing to be of that character. He is bound to open all such packets in the presence of the houses, and there ends his duty. But when we come to the prescription that there shall be a count, we are not told that there shall be a count of all certificates presented, or of all certificates, or of anything in the certificates, but that there shall be a count of "the votes." This, I humbly submit, introduces a necessary implication that somehow and by some authority there shall be made, if necessary, a selection of the actual votes from the mass of papers produced and physically present before the houses. Any investigation that the nature of the case may happen to require in order to determine what are "the votes" must be made by some functionaries having competency to make it. This is a preliminary inquiry, and whether you denominate it judicial, or ministerial, or executive, it is to be an inquiry, and the power to institute or carry it on is neither granted in terms, nor are there any possible means of its exercise, so far as the president of the senate is concerned. This is left to an implication that it is to be exercised by those who may have occasion to act officially on the result of the electoral vote.

Who are they that are to act officially, by the terms of the constitution, in performance of duty resulting from the count of the votes? The constitution is plain. The votes—meaning, of course, the legal votes—are to be counted. The count is the merest ceremony in itself; but the ascertainment of what are legal votes presented necessarily devolves upon that body, or those bodies, that must act on that which is produced as a result by the count. The authorities compelled by duty to see that the count is justly and truly made, and to act on the result, are the two houses. Unquestionably the first and primary duty of the houses, if there is a count showing the election of a person to the presi-

dency, and another to the vice-presidency, is to recognize them as constituting that co-ordinate department of the government called the "executive." As to a mere count, all the world may make it,—no mortal man can doubt about the effect of a count; but I presume the general world is not called upon to act in reference to the count until that count has been officially recognized by some lawful authority. But what is more certain is this: It is the duty of the house of representatives, at that point in the process, to determine whether an exigency has arisen which renders it their duty to recognize that a person has been elected as president by a majority of the votes,—of the legal votes,—or whether there has been a failure to elect by reason of a tie; and in that event, if it should occur, that house is bound to act upon the result, and, in this exigency, itself is to elect a president. The same observations apply to the senate with reference to the vice-president. That body is bound in like manner to recognize the fact of an election, to allow it, admit it, and accept it as a fact, or to deny it, and say that it is not so, and themselves to proceed in the election of a vice-president. I attach no importance to the word "count"; but I claim, from the very nature of the thing, from the laws inwrought into the constitution of human beings, and governing human transactions, that those who have thus to act officially on the count are the persons who must do whatever may be needful for the purpose of enabling a count to be made. Those who are bound to act in the one direction or in the other, as the case may require, must possess the power of making any preliminary investigation that may become necessary.

The result of this construction is that that officer who has no power but to open them is set aside from the moment he opens the packets, and the duty of exercising the higher function, preliminarily, of inquiring what are the votes, prior to this formal act,—"counting,"—must devolve upon those who must take notice what are the legal votes, and act upon the count of them. This no one is authorized to make or to declare unless it be themselves. This implied power is not introduced by any forced construction, but from the absolute necessity of the case; and, consequently, we claim that the needful powers of preliminary investigation were in the houses. It cannot fairly be disputed that congress, by united action, might have constituted some public body to conduct the investigation; and how far they might have gone towards making the result absolutely obligatory on the houses themselves, respectively, we need not inquire. They did not exercise such a power prior to the election of 1876, and they have not otherwise

exercised it subsequently, except by the constitution of this tribunal, and they have reserved to themselves the privilege of establishing a different determination by a concurrent vote. The competency of each house to ascertain the truth is unquestionable. Each has complete powers of investigation; they can take proof through their committees, or otherwise, as to any matter on which they may be obliged to decide, and, either before or after the opening of all the votes, they can thus investigate, though not, it must be admitted, with the aid of a jury, nor in the precise forms of a judicial proceeding. They can investigate, as political and legislative bodies may, touching all the facts and circumstances that are necessary to be known in order to enlighten their judgment and guide them to a just and righteous decision.

Our construction thus recognizes in those two bodies, on such a contingency as is here presented, full power to do whatever may be needful to the accomplishment of justice. What is the objection to this construction? The whole argument against it resolves itself simply into the argument *ab inconvenienti.* Those who would seek to grasp a high office by illegal, irregular, and fraudulent means claim that it would be inconvenient to take so much trouble as might become necessary in order to investigate rightly, and rightly to determine, on proofs, the question of their delinquency and the falsehood of their claim. This is a common plea among persons who set up a falsely and fraudulently contrived title. When an effort is made to strip them of their pretended authority by demonstrating before a court or other appropriate tribunal the fallacy of their claims, and the necessity, to the ends of justice, of having that fallacy declared, and their pretensions set aside, they point out the trouble involved in the task. But let us see how stands that argument. Let us test it by ordinary and familiar principles.

It is suggested that it might lead, and, if entered upon, must necessarily lead, if the parties think fit, to an investigation of the personal qualifications of every one among millions of electors, and that, if you lay down the rule or adopt the principle that you have a right to investigate at all, you open the door to that inconvenient and boundless sea of litigation. The mischief of this, they say, would be so great that it is better to let injustice triumph, and permit a usurper to enter the executive office by the most unholy of avenues,—that which is paved with falsehood, fraud, and corruption. They say it is better to submit to all that, or any other more enormous evil, if a more enormous one can be imagined, than to submit to the shocking and monstrous in-

convenience that is thus to result from any attempt to inquire into the validity of the election! There is really nothing in this broadly presented picture of overwhelming inconvenience. They say, no matter how we should limit our inquiries to a very narrow range, if you allow any investigation you will establish the doctrine,—you will open the door to intolerably protracted litigation. This suggestion is not warranted by law or the practice of courts in such investigations. True it is that, in a writ of *quo warranto* to inquire into the title of an individual to an office, it is competent to investigate all the particulars, down to the qualifications of each individual voter, and, on a point of identity similar to that which occurred in the Tichborne case, one trial might take many years. This is presenting a "raw head and bloody bones" to frighten this commission and the whole country from its propriety.

The answer to all that is as simple as can possibly be imagined. The objection, you perceive, applies as much to ordinary writs of *quo warranto* in reference to ordinary offices as it does to this inquiry, if it should take place before congress. For this argument *ab inconvenienti* is as fatal to the general procedure of courts of justice in actions of *quo warranto* as it is to the proceeding here suggested. But, if the learned commission please, the investigation which might be allowed to take place before either house of congress, or any commission appointed by them, would be governed by the same principles of general jurisprudence which apply to the determination of proceedings by *quo warranto;* and one of those principles is that no man has a right to the writ of *quo warranto* as of course, or merely because he makes out an apparent title. It has always been a matter of discretion. Numerous cases are cited here for that purpose on the other side. It has always been treated as a matter of discretion in the power of the supreme tribunal, acting in the name and majesty of the sovereign power, when applied to for a writ of *quo warranto,* to allow it or not, as, under all the circumstances, may be thought most consistent with the public interest and the ends of justice and the convenience of society, and, by consequence, this expanded inquiry could never take place in the writ of *quo warranto.* It never would be allowed. No court would ever permit the writ to issue without a statement of the points intended to be made; and, if it were necessary in allowing the writ, the court would lay their restraint on the party as to what points or questions he might make. So it appears that in all investigations, judicial or otherwise, as to the right of a particular individual to hold and

exercise a public office, it is in the discretion of the tribunals how far they will go, and it is in your discretion, as it would be in the discretion of either house of congress investigating, for its own advice and direction, as to the election of president or vice-president, to determine whether they would permit any of these intolerably prolix investigations. So much for the argument *ab inconvenienti.* It has no application. Standing upon the ancient practices of the law, the authority that might be called upon to institute an investigation would look at the difficulty presented, and say, under the influence of a due regard to the argument *ab inconvenienti,* "thus far you may go; no farther shall you go."

Now, in reference to the legal question presented, as to what powers each house of congress has under existing laws, and what powers, consequently, you can exercise, we say, as the learned manager from the house said in opening this case, that there is no technical legal limit or barrier, but that you exercise the same high power of the government which has always been exercised in such questions, even in the courts of the common law, to which application must be made to obtain the writ of *quo warranto.* You exercise the same discretion, but you can limit the inquiry, when the point arises, within those limits that are prescribed by necessity and convenience. Now, this is our view, stated as fully as it is in my power to state it in the brief time I am permitted to occupy the attention of your honors. We say that there is no limit to the power of investigation for the purpose of reaching the ends of justice, except such as a due regard for public convenience and the interests of public justice and society at large may impose in the exercise of this discretionary authority.

Well, what is our condition and the condition of all cases of this kind? There is no judicial court of the United States clothed with authority to deal with the premises. We assert that, without stopping to cite books, and to prove it to you negatively. It seems to be conceded that, if such a power might have been created, it has remained dormant, and has not been exercised. And consequently we are told that here we stand, in the second century of this republic's existence, in such a condition that there is no possible remedy against the most palpable fraud and forgery that could be perpetrated, or against any outrageous acts in violation of the rights of the people of the respective states and of the whole nation; that congress must sit by blind and silent, and permit an alien to be counted into office as president of the United States; they must sit by and permit a set of votes plainly and palpably

fraudulent,—votes given by individuals not only disqualified for want of having been chosen by the states, but being themselves absolutely disqualified by the constitution from acting in the office or casting the vote,—and must permit the usurpation contemplated to take place, merely because our wise fathers—one would think that the compliment was intended as a sarcasm—had so chosen to constitute the government they created that injustice, however flagitious, might be perpetrated in open day without the possibility of having any remedy, or even uttering decorously a complaint. This, we humbly submit, cannot be the constitution and the law. Reason forbids. All acts, however solemn, however sacred, from whatever quarter coming, by whatever body perpetrated, are liable to review in some manner, in some judicial or other tribunal, so that fraud and falsehood many shrink abashed and defeated, and may fail in the attempt to trample upon the right.

It seems to be virtually conceded here that the governor's certificate is not conclusive. I have not time to say much about that. It is not required by the constitution. It is only required by an act of congress. The governor could not have been compelled to give it. Many circumstances might prevent his giving it, and he might have given it under circumstances of plainly flagitious falsehood, without any election,—without any proceeding had to sanction it. He might have given his certificate to his own four little boys, and constituted them an electoral college, and the vote which they gave pursuant to his bidding, by force of his certificate, would be absolutely conclusive, forsooth, and binding upon all the authorities of the United States that had any power to act in the premises! I submit to your honors that this is not so, and I beg you to turn, when you come to consider this matter, to the citations in the Amistad case in Mr. Green's brief,[1] where the supreme court, speaking by the voice of Justice Story, pronounced all decisions of every description, however solemn, impeachable for fraud, and capable of being reversed. In the case of State of Michigan v. Phoenix Bank, in 33 New York, p. 27, your honors will find that the most solemn judgments of any court may be overhauled and reviewed, and be shown to have been procured by a trick, a deception, or a falsehood, and may be completely reversed and defeated.

The inquiry, then, is, how far are we to go in this case? The Florida laws to which you have been referred show that it may not be necessary to go further, and we have not asserted that it

[1] 15 Pet. 594.

will be necessary to go further, than to make a correction of the unlawful, extrajudicial acts of the canvassing board. When you come to look at the law which is contained in the little document placed before you, at page 55, you will find that there is no such sanctity attending the action of this state board as is supposed. They have but little power in the matter. "If any such returns" —that is, the county returns to them—"shall be shown or shall appear to be so irregular, false, or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration; and the secretary of state shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said board of canvassers,"—one of which must be the certificate of their action rejecting these returns. The law itself provides for and contemplates an investigation of the action of the board of state canvassers; and turning back to the laws in relation to the county board of canvassers, and to the inspectors of elections, you find that neither of those bodies has any power whatever except simply to compute and return the vote as received. Such is the case as to the primary board of canvassers and the second board of canvassers; and the last and ultimate board of canvassers have these very limited powers, which they seem to have exercised only in respect to one single county, if you are to take our assertions as an evidence of the probable line of proof before you, because they rejected some little fragments of three other counties, but did not exercise the power rejecting the whole of these returns, which was the only power that they possessed. In one single county they seem, by some human possibility, to have acted within the limits of their power and authority. I say it may be supposed, rather, that by some human possibility they did act within them. We propose to show that they did not. We show it by their own certificate, which the law compelled them to file and place along with the canvass which they made, and which very short, brief, and simple proof will demonstrate the monstrosity of the deed that we seek to set aside.

We claim that the *quo warranto* is admissible. You will perceive, by looking at the same statute to which we have referred, that, unless the electors are state officers, this canvassing board had no authority whatever to deal with the subject, and you would be called upon to disregard the canvass which they made, and

to look at the county returns, which the law does authorize to be made in reference to presidential electors, as well as state officers, in terms. If they are state officers, surely they are subject to correction by the state if there were any possible means or contrivance by which they could be corrected at all; and the familiar, ordinary, regular course of proceeding by *quo warranto* was commenced in due season, before they had actually cast their vote, and their authority was determined to be utterly void,—it was annulled,—and that, too, long before their vote had reached the seat of government, or could possibly have been subjected to count. If they are not state officers, then we have done with the canvass of the state board, and have only to look, in case you pass by the governor's certificate, to the next element of proof, and that is the whole set of county returns, which, being footed up, would show the result to be as we claim, and that the governor's certificate was utterly false. Subsequent legislation has been placed before your honors, and a subsequent investigation for the purpose of a recanvass,—or will be before your honors if necessary; indeed, it is before your honors already in the original documents opened by the president of the senate, which, at least, are here.

We claim that, on these principles and on these proofs, and such full proofs as may be offered to you, subject only to the restraints to which I have referred, that you may exercise in your discretion, you have a right to go on to investigate this matter, and to determine two things—First, whether the Hayes electoral vote is valid; and, secondly, whether the Tilden electoral vote is valid. The final decision at which you may arrive might reject either, or might reject both. They are not involved in precisely the same question necessarily. Different questions might possibly apply, and the vote for Mr. Hayes might be pronounced invalid, and the vote for Mr. Tilden equally so. I have not time to discuss more fully the question as to the right of setting up the Tilden vote in case the Hayes vote should be rejected.

Perhaps, in the little time that is left to me, I have hardly an opportunity of saying one word in reference to that which is the main reliance of these parties, and that is the doctrine of officer *de facto*. What is this doctrine of officer *de facto?* The best definition of an officer *de facto* that I have fallen in with is given by Lord Ellenborough, in Rex v. Corporation of Bedford Level:[2] "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer, in point of law." One who somehow has clothed himself with a

[2] 6 East, 367.

reputation of being the officer; and, in relation to that person, the law, with its wise conservatism, has declared that during the period that the person pretending title to the office was in apparent possession of all its powers and functions, and exercised the duties of it, his acts, as it respects persons who, in the ordinary course of things, were obliged to recognize him, and to act under him and in conformity with his directions and his power, shall be esteemed valid, that individuals may not be deceived by this species of disorder or temporary insurrection that has broken in upon the functions of government. It is the duty of individuals, and they are under a necessity, also, for their own business purposes, of bowing to the existing authorities who have thus color of right, and are the only authorities to which they can refer; and in that action, as a reward for their humble obedience and respect for order, regularity, and the apparent law, they are held to be entitled to protection, and in all forms, ways, and places that may be needed they are protected. The officer himself, however, is never protected. That this is the precise rule in relation to that class of officers, I would take leave to prove by referring your honors to Green v. Burke,[8] where a very able opinion was written by one of the most elaborate investigators of legal authorities that I have known or ever heard of,—Judge Cowen, formerly of the state of New York. The cases, to be sure, have gone pretty far. He examined all the authorities, and what he says is: "I know the cases have gone a great way; but they have stopped with preventing mischief to such as confide in officers who are acting without right,"—a summing up of the authorities and of the principle.

Now, what is the proposition here contended for? That these officers, having acted under color of right, and having completely exercised and perfected the function with which they appeared, it is said, to be charged, and with which, if they were duly elected, they were charged, any subsequent attempt to set it aside would be contrary to that principle, contrary to convenience, and mischievous to society. Is this so? Is not that principle of necessity confined to acts affecting private persons? Is not that necessity confined to cases where the act of the officer *de facto* is consummated and perfected and has taken effect in some manner before it is ascertained that he is not entitled to his office, and he is ousted? Are the banknotes of a bank not having authority to issue them, though signed, perfected, and finished, and put in the hands of an agent, valid and effectual under this principle until some per-

[8] 23 Wend. 502.

son has confided in them, has received them, and thus been misled by the appearance of right with which the bank had improperly clothed itself? We maintain that neither the public good, nor the protection of men from deception, nor any rule of convenience or policy, requires the allowance of pretended electors, whose title, on an investigation by competent authority before the votes have been opened and counted, has been ascertained to be groundless.

Referring to the facts of the case, what do we find? These four gentlemen sat down with a false governor's certificate, or a sham certificate from a board of state canvassers, and they, of their own authority, certifying their acts themselves, cast four votes in a given direction, put them in a packet, and sent it to an officer who cannot look at it until the time of its presentation for the purpose of being considered and counted. Before the time arrived at which that act of theirs could deceive anybody, could have any operation, could take any effect, could get into such a condition that its operation could take any effect, could get into such a condition that its preservation and maintenance was necessary to the cause of public justice or private right, their lack of title was ascertained, by a solemn writ of *quo warranto,* to be groundless. It was determined that they were usurpers, had no right to the office, and that their acts were void. Is there any such principle as that the inchoate, partial action of an officer *de facto* shall be carried onward, carried forward, and given its perfection by the acceptance of the act as a due and valid act after the invalidity of that officer's claim has been established? Here we repose upon the *quo warranto* under your honors' allowance, or repose upon the proofs which may be here offered, admitted, and passed upon by your honors, for the purpose of showing the utter invalidity of these gentlemen's claim to the office of electors. In whichever shape this matter is presented or carried forward, that the act of these officers *de facto* fails to have reached the point where it could have or take any effect, or mislead or deceive anybody, is shown and established, by competent means, to be an act of those who had no authority to perform it.

And the position of the thing is very striking in this singular attitude which the other side has assumed,—the attitude of an undoubted, undisputed, convicted usurper. They claim to be received, and that their act shall have an effect which, as yet, it never has had, although, since the time they performed the initiatory and preliminary step, they have been shown to be utterly without right to their pretended offices. It may be said that this sharpened arrow aimed at the heart of the nation, aimed for the

purpose of establishing falsehood, seating a usurper, and trampling down the right of the state and of the Union. It may be said that this arrow was placed in the bow of the false elector; that adequate force and strength were imparted to it to carry it to the bosom that was to be wounded and stung to death by it. But it cannot be denied, if the *quo warranto* is effectual, or if we have a right now to prove the facts of the case, that a shield is interposed between the wrongdoer's arrow and the bosom he designed to pierce, by which that arrow, steeped in guilt and fraud, designed for the perpetuation of injustice and the consummation of an atrocious wrong, has been arrested in its flight, and deprived of its poison and its force.

In this connection, under this strange head of a claim to have a *de facto* president by force of a set of *de facto* electors, I would call your honors' attention to a single view of which this case is susceptible. Although there may be an officer *de facto*, it seems to be in the nature of things that there cannot be an unlawful, unauthorized tribunal or body *de facto* acting without right. These persons could not act except by constituting what has been well enough called an "electoral college," of which they were to be members. They undertook to constitute it. It was an electoral college of their own. They filled it up with their own wrongful claims and intrusive persons, and thus sought to create by wrong, and without a single element of right but this mere color or reputation resting in these individuals, a lawful electoral college. I would ask your honors, for the purpose of showing that that distinction is entitled to considerable weight, to refer to the case of Hildreth's Heirs v. McIntire's Devisee,[4] where certain persons, being no doubt *de facto* officers, claimed that there could not be a *de facto* court, although there might be a *de facto* judge or a *de facto* officer. And we say, by the same reasoning, there cannot be an unlawful *de facto* electoral college composed of mere pretenders to that office, who have no right. In this connection you have exactly the case that was before the court there, and which, perhaps, exists in other states of this Union about this time. You have the case of two distinct bodies existing at the same time,—one rightful and the other wrongful; I mean formal bodies, attempted to be created. The Tilden electors who, though they had no documentary evidence to establish their title, had actually been elected, if our evidence is to be believed, convened their electoral college, performed every ceremony that the constitution of the United States enjoined upon them, performed every

[4] 1 J. J. Marsh. 206.

ceremony that the laws of the United States enjoined upon them, and that it was possible to perform, failing only in this: that they did not obtain the certificate of the governor. They met; they constituted a college; they acted; and they sent forward their votes. Thus you have two rival bodies acting at, to be sure, the right time and in the right place, as prescribed by all laws bearing upon this subject; two rival colleges, one of which was composed of persons truly elected, and the other of which was composed of persons who had no right, but only the mere color of pretense of right,—who were usurpers, as has been ascertained in one form, and will be ascertained in any other that will be satisfactory to you, if you will permit us to present the evidence.

This, then, is the actual condition of this case. The constitution prescribes no forms save such as have been complied with by the Tilden electors. The laws of congress prescribe no forms that were not complied with by the Tilden electors, save and except only that they could not obtain the governor's certificate; and it is pretty much conceded, I think, that the governor's certificate is not absolutely indispensable, and might be gainsaid and contradicted, even if it had been given. So, then, in this case of rivalry between these two sets of electors, it appears to me that we present the best legal title. That we have the moral right is the common sentiment of all mankind. It will be the judgment of posterity. There lives not a man, so far as I know, upon the face of this earth, who, having the faculty of blushing, could look an honest man in the face and assert that the Hayes electors were truly elected. The whole question, therefore, is whether, in what has taken place, there has been such an observance of form as is totally fatal to justice, and beyond the reach of any curative process of any description.

RICHARD HENRY DANA.

[Richard Henry Dana was born in Cambridge, Mass., 1815. He was educated at Harvard College, where he was graduated in 1837. As a remedy for an affection of the eyes, which compelled him to suspend study, he shipped before the mast as a seaman on board the brig "Pilgrim," of Boston, for a voyage around Cape Horn. Upon his return he published his experiences in the well-known "Two Years before the Mast," which is generally recognized as the best narrative of the sailor's life ever published. It has been adopted by the English board of admiralty for distribution among seamen, and has been translated into several foreign languages. Dana studied law with Judge Story, and was admitted to the bar in 1840. He soon took high rank, and conducted a large practice. In 1841 he published "The Seaman's Friend," an elementary work on sea usages and laws. This, also, has been reprinted in England. In 1859 he published "To Cuba and Back." In 1859-60 he made a trip around the world. In 1866 he published his scholarly edition of Wheaton's International Law, and in the following year lectured on that subject in the Harvard law school. He ran for congress in 1868, but was defeated by Benjamin F. Butler. In 1876 he was nominated by President Grant as minister to England, but, through partisan intrigues, the nomination was rejected by the senate. In 1878 he went abroad for the purpose of pursuing his studies on international law, with a view to writing a treatise on that subject, but his health gave way, and he died at Rome, January 7, 1882. His life has been written by Mr. Charles Francis Adams.]

In the world of letters it is well known that the author of "Two Years Before the Mast" possessed literary powers of a high order. By a smaller circle, Dana was recognized as a learned and successful lawyer. As was natural under the circumstances, his classic story of life at sea brought him, at an early day, an extensive practice in maritime law. The reports of the United States court for the first judicial circuit during his time display abundant evidence of his learning and assiduous application. In the case of The Orkney, for instance, the court, adopting his argument, developed for the first time, on philosophical principles, the respective courses of steam and sail vessels meeting at sea. Again, at the height of the Civil War, when the momentous issues involved in the Prize Cases were carried before the supreme court of the United States, Dana was called upon by the government to represent its interests, and it was largely to his profound

argument that a result favorable to the government was due. When the strain of intense application to his extensive practice had made such inroads upon his health that he was compelled, at a comparatively early age, to retire from active labors, his thoughts turned again towards the sea, and his final legacy to the profession was his learned edition of Wheaton's International Law. His comprehensive and discriminating notes to that work, which have been universally recognized as one of the most valuable commentaries ever written on the subject, were designed to be merely preliminary to a complete treatise; but his labors at the bar had ruined his health beyond recovery, and he was never able to carry out his plan.

In many respects Dana was admirably qualified for forensic advocacy. Not well fitted to deal with clients, somewhat contemptuous of details, incapable of popularity, he was not particularly fitted to succeed as an attorney; but, as Judge Lowell said of him, when a great cause demanded lofty powers and unusual exertions, he rose to the occasion, and commanded the admiration of friends and opponents alike by the largeness of his views, the acuteness of his suggestions, and his brilliant eloquence. It was neither in his grasp of principles, nor in his command of technical learning (though deficient in neither), that his strength lay, but in the activity and alertness of his mind. In imaginative faculty and power of copious illustration he was highly endowed. He had emphatically the power of seeing things clearly himself, and then making others see them in the same light. His courage and tenacity and resources were displayed on many a hard-fought field; notably in the Dalton divorce case, in which, single handed, he contended against Rufus Choate and H. F. Durant, then accounted the strongest combination at the Boston bar, and won ten of the twelve jurors to his side. His mental characteristics rendered it impossible for him to be terse. He required scope and play for his imagination. The business-like methods now prevailing in the courts would not have been to his taste, nor sufficient for him. According to his theory, no case could be presented to a jury too clearly or too elaborately. An argument or illustration might convince eleven men, but fail to impress the twelfth. He believed, therefore, that a case should be turned over and over, and presented in all the different aspects that imagination could suggest. In respect to method, a greater contrast could not be found than Dana and Curtis; and in a letter to his wife, written in 1872, Dana relates an exchange of compliments between Curtis and himself in the supreme court of the United

* * * * * States which is a curious proof of the natural tendency to admire in others what one lacks. "Judge Curtis," he said, "made a beautifully condensed argument of not over twenty-five minutes. I told him I would give a great deal if I had the courage and ability to make such an argument. He said he could not make any other, and that he had often wished sincerely that he could make such an argument as I made yesterday. I replied that I was glad to know that there was ever a tribunal before which my one and one-half hours could be more effective than his twenty-five minutes."

Dana's high professional character is illustrated by his participation in the anti-slavery agitation. In 1851 he and Robert Rantoul appeared for the slave Simms, arrested under the fugitive slave law. During the next two years he and John P. Hale successfully defended the rescuers of the slave Shadrach. In 1854 he appeared in opposition to the rendition of Anthony Burns, the last slave arrested in Boston under the act. For his arduous services in the fugitive slave cases, undertaken at the risk of social and political standing, and even of personal safety, he refused compensation. In returning a check sent to him by some anti-slavery advocates he said: "Besides my own feeling in the matter, which would be conclusive with me, I would not have the force of the precedent which has been set in the trials for freedom in Massachusetts thus far impaired in the least, for the honor of my profession and the welfare of those in peril." When, in the following year, it was sought to remove Judge Loring from his state office for having acted as a slave commissioner, Dana voluntarily appeared in opposition to the petition, and delivered a powerful address. In explanation of this course to his anti-slavery friends, he said:

"If they [the petitions] are founded upon the notion that, in discharging the duty of commissioner in the Burns case, he acted from any corrupt or willful motive, or was wanting in kindness or fairness in his treatment of Burns or his counsel, it is a mistake. If founded on the opinion that, in acting at all as commissioner, he violates any law or the spirit of any law of Massachusetts, it is a mistake. If founded on the opinion that, without either of these reasons, he ought to be removed because of his acting as magistrate in a slave case, my own opinion is that it is far better for Massachusetts first to put herself right upon the record, to pass a law prohibiting such an act, and then to punish all who transgress it. This is more dignified in the state, and safer as a precedent as regards the independence of the judges. It seemed to me that no man in the state was in a situation to act with as much effect as I, seeing that I was counsel for Burns, known to be an opponent to the fugitive slave law and hostile to Judge Loring and his set. It seemed to me that it was my duty to come forward, not in his defense, but in defense of the principle, and to save the anti-slavery cause from doing something it might regret."

BRIEF IN THE CASE OF THE AMY WARWICK, IN THE SUPREME COURT OF THE UNITED STATES, 1862.

STATEMENT.

Soon after the outbreak of hostilities in 1861, several vessels—blockade runners, illicit traders in contraband goods or the property of persons residing in the rebel states—were captured and condemned in the United States courts as prizes of war. Appeals were at once taken to the supreme court, where the several cases were consolidated and heard as one case at the December term, 1862. Among these cases was that of the brig "Amy Warwick," which had been condemned at Boston on the ground that her owners were residents of a state in rebellion. Richard Henry Dana, who had conducted the case for the government in the court below, was retained by the attorney general to argue the case in the supreme court. Associated with him were William M. Evarts and Theodore Sedgwick. Messrs. Lord, Bangs, Carlisle, and others appeared for the various claimants. The issue, in brief, was the legality of the blockade imposed by President Lincoln's proclamations of April 19 and 27, 1861. Dana thus described the situation in a letter to Mr. Charles Francis Adams:

"These causes present our constitution in a new light. In all states but ours, now existing or that have ever existed, the function of the judiciary is to interpret the acts of the government. In ours it is to decide upon their legality. The government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the government to exercise war powers,—deny that this can be, in point of law, a war. So the judiciary is actually, after a war of twenty-three months' duration, to decide whether the government has the legal capacity to exert these powers. This is the result of a written constitution as a supreme law, under which there is no sovereign power, but only co-ordinate departments. Contemplate, my dear sir, the possibility of a supreme court deciding that this blockade is illegal! What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers it is fearful to contemplate."

The difficulty of the situation was that, on one hand, the government, in its relation with foreign powers, had treated the matter as a mere rebellion, and insisted that those governments should not accord the Confederacy belligerent rights. On the other hand, the government had claimed for itself, in its efforts to put down the rebellion, belligerent rights and powers, not merely against the Confederacy itself, but against the whole world, and insisted on its right to blockade the Southern ports, and condemn as prize all vessels violating the blockade. But the right to blockade and condemn as prize—a strictly belligerent right—necessarily implied a state of war. The question therefore was, can the same events constitute, at one and the same time, a war and a rebellion?

The court decided the case in accordance with the views presented by

Dana and his associates; Chief Justice Taney and Justices Nelson, Catron, and Clifford dissenting. In the course of his opinion Justice Grier said: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The president was bound to meet it in the shape it presented itself, without waiting for congress to baptize it with a name, and no name given to it by him or them could change the fact. It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. . . . . As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding states, assuming to act as belligerents, could become known in Europe, to-wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, 'recognizing hostilities as existing between the government of the United States of America and certain states, styling themselves the "Confederate States of America."' This was immediately followed by similar declarations or silent acquiescence by other nations. After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war, with all its consequences as regards neutrals. They cannot ask a court to affect technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government, and paralyze its power by subtle definitions and ingenious sophisms. The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense, of the world. It contains no such anomalous doctrine as that which this court is now for the first time desired to pronounce, to-wit: that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors in order to dismember and destroy it is not a war, because it is an insurrection." (2 Black, 635.)

A distinguished lawyer who heard Dana's argument has described the effect of that luminous presentation of the status which armed the executive with power to use the methods and processes of war to suppress the rebellion: "Dry legal questions were lifted into the higher region of international discussion, and the philosophy of the barbaric right of capture of private property at sea was, for the first time in the hearing of most of the judges then on the bench, applied to the pending situation with a power of reasoning and a wealth of illustration and a grace and felicity of style that swept all before them. After Mr. Dana had closed his argument, I happened to encounter Judge Grier, who had retired for a moment to the corridor in the rear of the bench, and whose clear, judicial mind and finely cultivated literary taste had keenly enjoyed the speech, and in a burst of unjudicial enthusiasm he said to me: 'Well, your little "Two Years Before the Mast" has settled that question; there is nothing more to say about it.'"

In default of the oral argument, which was not reported, Dana's brief is given.

Facts Established.

The brig Amy Warwick was captured July 10, 1861, on the high seas, bound for Hampton Roads, by the United States gun-

boat Quaker City, and sent with her cargo into the district of Massachusetts for condemnation. The brig was claimed by Messrs. David Currie and others, and the cargo, which was coffee, was claimed, 400 bags by Messrs. Edmond, Davenport & Co., and 4,700 bags by Messrs. Dunlop, Moncure & Co. The title in the claimants, as respectively claimed, is conceded. All the claimants were permanently residing and were doing business in Richmond, Va., at the time of the capture, and long before, and there is no suggestion that they are not so still. There is no evidence as to whether they were or are citizens of the United States, by birth or naturalization, and no evidence as to the relations they have maintained towards the United States, or towards the so-called Confederate government, established at Richmond, beyond the presumptions from the facts of their continued residence, and their silence in court.

The brig sailed for Hampton Roads April 2, 1861, bound to Rio Janeiro, and sailed thence with her cargo of coffee May 29, 1861, destined to Hampton Roads, for orders. By her charter party she was obliged to go thence, either to Richmond, New York, Philadelphia, or Baltimore, as the charterers, Messrs. Dunlop, Moncure & Co., should direct. The claim of Messrs. Phipps & Co. for their advance has been allowed, and not appealed from. No question arises in the case but of enemy's property.

General Principles.

"Capture," in the judicial sense of a prize court, is the taking of a property by a power engaged in war. When that power submits the capture to the adjudication of its own courts, the question is whether the property was the subject of such capture. This is solved by considering the nature and objects of war. The term "war," in the scientific sense of modern times, is confined to the acts of public bodies or powers for some public purpose. This purpose is to be secured by a coercion of the power against which you act. The customs and opinions of modern civilization have recognized certain modes of coercing the power you are acting against as justifiable. Injury to private persons or their property is avoided as far as it reasonably can be done. Wherever private property is taken or destroyed, it is because it is of such a character, or so situated, as to make its capture a justifiable means of coercing the power with which you are at war. For war is not upon the theory of punishing individuals for offenses;

on the contrary (except for violations of rules of war), it ignores jurisdiction, penalties, and crimes, and is only a system of coercion of the power you are acting against.

If, then, the hostile power has title or direct interest in the property, as if it is public property, it is, of course, liable to capture. If the property is of a character ordinarily used in war, and in the possession of that power, or on its way to his possession, it is liable to capture. In such case it is immaterial in whom is the title. The hostile power has an interest in the private property of all persons living within its limits or control; and such property is a subject of taxation, contribution, confiscation of use, with or without compensation. But the humanity of modern times has abstained from the taking of private property not liable to use in war, when on land. Some of the reasons for this are the infinite varieties of its character, the difficulty of discriminating among these varieties, the need of much of it to support the life of noncombatant persons and animals, and, above all, the moral dangers attending searches and captures in households. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Merchandise sent to sea is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risk, is in the custody of men trained and paid for the business, and its value is usually capable of compensation in money. The sea is *res omnium*. It is the common field of war, as well as of commerce. The object of maritime commerce is the enriching of the owner by the transit over the common field, and it is the most usual object of revenue to the power under whose government the owner resides. For these and other reasons, the rule of coercion by capture is applied to private property at sea. If the power with which you are at war has such an interest in its transit, arrival, or existence as to make its capture one of the fair modes of coercion, you may take it. This I apprehend to be the test.

But international jurisprudence has settled several classes as coming or not coming fairly under this rule. Neutrals have vindicated their general right to trade with your enemy, although it is for his benefit. That is a case of conflict of rights. But the neutral yields to the rule founded on your right of coercion, in case of articles used in war, and in case of effective blockade. These are somewhat artificial limits, but they are such as are usually settled upon in cases of conflict of rights. It is often said that, in such cases, the goods are condemned because the owner has violated the rule of contraband or blockade, but that is only

the proximate reason. He has a personal right to violate those rules, and cannot be punished by the belligerent for so doing, or even treated as a prisoner of war. The time and ultimate reason is that on which the rule of contraband and the right of blockade themselves rest,—that the property itself, irrespective of its ownership, is liable to capture as one of the justifiable modes of coercing your enemy. In the case of contraband, it is so from its character, coupled with its destination to your enemy's control. In the case of blockade, it is so because, being destined to the control and benefit of your enemies, it has gone beyond the limits of neutral protection. In like manner, in case of commerce in certain articles, the growth of countries under the control of your enemy, you may coerce him by preventing maritime commerce in the exportation of those articles from such countries. Here, again, the question in whom is the title, is immaterial. International jurisprudence has recognized another class of cases as subjects of capture on the same principle of coercing the power with which you are at war. That power has an interest that persons residing under his jurisdiction and control should be able to carry on commerce. It adds to their property, to his revenues and resources and means. It makes little difference, in the state of communication and exchange in modern times, whether this property is bound directly to his ports, and thus to become at once directly subject to his control, for revenue or seizure, or is to be placed at the disposal of the owner, in the shape of funds in foreign ports. For these reasons it is recognized as coming under the rule of capture. The reason why you may capture it is that it is a justifiable mode of coercing the power with which you are at war. The fact which makes it a justifiable mode of coercing that power is that the owner is residing under his jurisdiction and control.

It is therefore evident, from this course of reasoning, that the capture in this last case does not rest at all on any actual or constructive criminality or hostility of the owner. Suppose him to be a neutral; he has a right to reside with your enemy, and trade to and from thence, as against all your laws and the laws of war. If he is a loyal subject of your own, and is accidentally or forcibly is liable to capture on this general principle. It is for the political power alone to say whether it will forego the condemnation. cal power alone to say whether it will forego the condemnation. The courts must adjudicate it to be a lawful prize. If he be a born and willing subject of your enemy, your right to capture

is none the greater; nor is the legal reason for the capture different, though the reason may be more gratifying to the moral sense, and the capture more satisfactory. If the trader residing there is suspected of disaffection to that power, and of affection for you, his property is all the more likely to be subjected to contributions, if not actual confiscation. He is not his own master; still less the master of his property. He and it are under your enemy's jurisdiction and control. You may capture it, and refuse to restore it to the claimant while he so resides and the war lasts, even if you compensate or remunerate him afterwards. But that is a political question. The courts can only condemn it, if the political power asks for its condemnation. Under these general principles, the following points are made:

I.

First. Property found on the high seas, subject to the ownership and control of persons who themselves reside in the territory of the enemy, and are thus subject to the jurisdiction and control of the enemy, is liable to capture as prize of war.

Wheaton, Int. Law, 400, 429; 1 Kent's Comm. 56-60, 74-77; 3 Phillimore, Int. Law, §§ 85, 483, 484; Halleck, Int. Law, 470-472, 701; The Amy Warwick, 24 Law Rep. 335, 494; The Venus, 8 Cranch, 280; The Sally, 8 Cranch, 384; The Frances, 8 Cranch, 363; The Chester, 2 Dall. 41; Thirty Hogsheads Sugar v. Boyle, 9 Cranch, 191; Murray v. Charming Betsy, 2 Cranch, 64; Maley v. Shattuck, 3 Cranch, 488; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.) 506; The Escott, 1 Rob. 203, note; The Lady Jane, 1 Rob. 202; The Hoop, 1 Rob. 198; The Bella Guidita, 1 Rob. 207; The Gerasimo, 11 Moore, P. C. 88; The Ania, 38 Eng. Law & Eq. 600; The Abo, 29 Eng. Law & Eq. 594; The Industrie, 33 Eng. Law & Eq. 572; The Ida, Spinke, Prize Cas. 33; The Baltica, 11 Moore, P. C. 141; Brown v. United States, 8 Cranch, 110; The Indian Chief, 3 Rob. 12; The Danous, 4 Rob. 225, note; The Anna Catharina, 4 Rob. 107; The President, 5 Rob. 277; The Mearo, Grier, J.; The Marathon, Grier, J.; The Amelia, Grier, J.; The Hallis Jackson, Betts, J.; The North Carolina, Betts, J.; The Pioneer, Betts, J.; The Crenshaw, Betts, J.; The Gen. Green, Betts, J.; The Edw. Barnard, Betts, J.; The Independence, Sprague, J.; The Victoria, Sprague, J.; The Charlotte, Sprague, J.; The Gen. Parkhill, Cadwallader, J.

The above cases will be found to sustain the following positions, which I suppose will not be controverted, as applicable to cases of war with a recognized and foreign power, and therefore are not elaborated:

I. It is immaterial, in such case, whether the owner of the property has or has not taken part in the war, or given aid or comfort to the enemy, under whose power he resides.

II. It is immaterial whether he be or be not, by birth or naturalization, a citizen or subject of the enemy, and, if he be, whether

he is loyal to his sovereign, or is in sympathy with and actually aiding the capturing power.

III. He may be a subject of a neutral sovereign. He may even be a special and privileged resident, as consul of a neutral power. Still, if property subject to his ownership and control, while he so resides, is found at sea, engaged in commerce, though it be lawful commerce, with neutrals, it comes under the rule. Its capture is one of the justifiable modes of coercing the enemy with whom he resides.

IV. The owner may be even a citizen of the country making the capture, and there may be no evidence that he is disloyal to his own country, or that his residence with the enemy is not accidental or forcible. These are immaterial inquiries. The loss to him is immaterial, in the judicial point of view. The recognized right to coerce the enemy's power affects the property as it was situated when captured. The court can look no farther. It is a political question whether the exercise of the right shall be insisted on.

V. It is not necessary to show that the property in the particular case, if not captured, or if restored, would in fact benefit the enemy, and that its capture would tend to the injury of the enemy. The laws of war go by general rules. Property in a certain predicament is condemned; the general rule being founded on the experience and concession that the property so situated is or may be useful to the enemy in the war, and that the rights of neutrals and the dictates of humanity do not forbid its capture.

VI. It is not necessary that the property should be at the time on a voyage to or from the enemy's country. But the reason for the rule ordinarily seems stronger where the voyage is directly to the enemy's country, so that, but for the capture, it would have been actually subject to his control. Such was the case here. The vessel was bound to Hampton Roads, there to be under the control of the enemy; but the rule is the same, wherever the vessel is bound. We have a right to prevent commerce and its gains on the part of persons residing in the territory of the enemy; and if the owner is friendly to the power under which he lives, the proceeds, subject to order in a foreign port, may be especially useful to that power.

II.

Second. Where the right to condemn property is placed solely on the ground that the person to whose ownership and control it is subject is resident under the jurisdiction or control of the enemy, the question arises, what must be the nature and extent of the jurisdiction or control of the enemy over the place where

the owner resides? To that question I submit the following suggestions:

It is not necessary that the residence should be within the regular dominions of the enemy, as they were when the war began, or as they shall have since been established by treaty or public law. It is sufficient if the territory is in the permanent occupation of the enemy, who has established himself there, not avowedly for temporary purposes, but to hold as long as war shall enable him to hold it. If the enemy has established a civil and military government over it, and claims and exacts allegiance from all inhabitants, levies taxes, etc., the case admits of no doubt.

The Gerasimo, 11 Moore, P. C. 101, and cases there cited; United States v. Rice, 4 Wheat. 246; The Mearo, Grier, J.; The Amy Warwick (Sprague, J.) 24 Law Rep. 335; Thirty Hogsheads Sugar v. Boyle, 9 Cranch, 191.

The principles will be found fully discussed in the case of The Gerasimo, supra. In that case, in the war between Russia and England, an English cruiser sought to make prize of a vessel, solely on the ground that the owner was a citizen and resident in Wallachia, a Danubian province, for the reason that Russia had taken possession of Wallachia, and, for a time, held forcible dominion over it. On full examination, the court held that the occupation was not only forcible and against the will of the local powers and inhabitants, but was avowedly temporary, and for a special purpose. If the province had, by its local authorities, voluntarily joined with Russia, and made common cause in the war against England, and Russian jurisdiction had been established there avowedly to hold as long as it could, under a claim of right, and even in a less case than that, the law, as clearly developed in that cause, would have subjected the property of any resident there to capture.

The reason of the rule is this: The property must either be condemned or restored to the claimant. If restored, it goes under his legal control. He is a resident of the enemy's country, and this property, so restored, would go into the control of the enemy, and add to his resources. The object of maritime capture is to straiten and reduce the enemy's means and resources; *e. g.*, if this ship had been permitted to go to Richmond, she and her cargo would have paid duties to the rebel government. They could have taken the vessel for military purposes. They could have taken the cargo for military necessities, with or without compensation, as they should see fit. If they regarded the owner as

an enemy, they could take it as a prize of war, or by way of confiscation. The law of prize of war, which condemns property that, even by misfortune of a friendly owner, is impressed with a hostile character, or is going, when captured, into enemy's control, or will so go if restored, must not be confounded with municipal forfeiture or confiscation, which is usually penal or punitive for some offense of the owner.

It is not necessary to draw a fast line as to what is to be deemed enemy's territory, for the purpose of deciding this case, if the above principles are applicable to civil war. I suppose it will be conceded that, if these principles are applicable to civil war, the nature and the character of the occupation of Richmond, Va., was more than sufficient to constitute it enemy's territory, within the meaning of the rule. That Richmond, Va., was enemy's country at the time of the capture is shown by the public acts of the president of the United States, of the state of Virginia, of the Confederate congress and executive, and by those facts of public notoriety of which a court of prize always takes cognizance. A government *de facto* engaged in war with the United States was fully established there, with an intent of permanency, claiming sovereignty *de jure* over it, and exercising all the powers of a government, civil and military, legislative, executive, and judicial, with the apparent assent of the people of that region.

The capture was July 10, 1861.

1860. Dec. 20. South Carolina passed a secession ordinance.

1861. Jan. 11. Alabama passed a secession ordinance.

March 2. Louisiana, Florida, and Texas passed secession ordinances.

Feb. 8. Montgomery convention. Constitution of Confederate States adopted. Acceded to by South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas. Jefferson Davis inaugurated president.

April 12. Fort Sumter bombarded by authority of Confederate government.

April 15. President Lincoln's proclamation, calling out militia.

April 17. Virginia passed an ordinance of secession, taking effect at once, with right to secede from the Confederacy, if so voted on election of 23d May.

April 17. Confederate States issue letters of marque.

April 17. President Lincoln's proclamation of blockade.
April 21. Norfolk navy yard taken by the Confederates.
April 24. Proclamation of Governor Letcher, recognizing war between Virginia and United States.
April 24. Virginia forms an alliance offensive and defensive with the Confederacy, and surrenders the control of its military operations to the Confederacy.
April 27. President Lincoln's proclamation, extending the blockade to Virginia and North Carolina.
April 30. Commodore Pendergast's notice of blockade of ports of Virginia.
May 3. Virginia calls out volunteers.
May 3. Proclamation for 40,000 men.
May 3. Proclamation of Governor Letcher, of Virginia, calling on "every citizen" to take arms and give aid.
May 6. The Confederate congress acknowledge the existence of a war between them and the United States.
May 13. Queen's proclamation of neutrality between the two belligerents.
May 20. North Carolina joins the Confederacy.
May 21. The Confederate congress at Montgomery adjourned to meet at Richmond, July 20th.
May 23. Virginia adopts the secession ordinance by popular vote.
June 17. Before this, the battles of Acquia Creek, Fairfax Court House, Philippa, Vienna, and Big Bethel had taken place, and the rebel army was within a few miles of Washington.

III.

Third. The claimants being residents in enemy's territory, the *onus* is on them to show why their property should not be condemned.

The Primus, Spink's Prize Cas. 48; The Magnus, 1 Rob. 31; The Countess of Lauderdale, 4 Rob. 283; The Walsingham, 2 Rob. 77, 1 Wheat. 506, Appendix.

I am now brought to what I suppose to be the only difficult question,—perhaps the only disputed question in the cause,—whether the principles above established are applicable to wars called civil, domestic, or internal.

I propose to consider this question in two parts,—first, whether, in such war, the sovereign power of the state can exert these powers; and, secondly, if so, whether there is anything in the distribution of functions under our constitution which renders the exercise of these powers as they were exercised illegal.

IV.

Fourth. In civil or domestic war, it is competent for the sovereign to exercise belligerent powers. War is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion. The means and modes of doing this are called "belligerent powers."

The present case does not require an extreme definition of what may constitute war. Suppose the following state of facts in a sovereignty:

(1) Millions of the sovereign's subjects unite in the establishment of a new government over a portion of the territory. They are sufficient in numbers, intelligence, and wealth to be recognized as one of the family of nations.

(2) They inhabit territory large enough to constitute an independent sovereignty capable of self-support, with ports, rivers, agriculture, manufactures, and commerce.

(3) They organize a sovereign state over all this territory, not as a temporary expedient, but for a permanency, and claim jurisdiction of right over all the inhabitants of the territory. Their government has all the functions of a state, judicial, executive, and legislative, and they claim recognition as a sovereign by other powers.

(4) They establish this government *de facto,* over the territory, and claim it *de jure.* They treat all resistance to it by inhabitants as treason.

(5) They treat all attempts by force of arms to put down this government, and re-establish the old sovereignty, as acts of war. They declare that war exists between them as one sovereignty and the parent state as another. They raise armies and navies, establish a conscription over all inhabitants, issue letters of marque, and establish prize courts. Their courts condemn, as enemy's property, property of persons residing in the parent state, on the established principles of war.

(6) They attack the forts, troops, and ships of the sovereign, by sea and land, and fighting on the scale of a large war is going on.

(7) Foreign nations recognize this state of things as war, and concede to each power engaged in it the rights of belligerents.

In this state of things, the question is not what the sovereignty may choose to do, or ought to do, but what is competent for him to do. Is he prevented from meeting war by war; belligerent power by belligerent power?

That it is competent for him to exercise belligerent powers:

Rose v. Himely, 4 Cranch, 272; Cheriot v. Foussat, 3 Binn. 253; D'obree v. Napier, 3 Scott, 225; The Santissima Trinidad, 7 Wheat. 306; United States v. Palmer, 3 Wheat. 635; Wheaton, Int. Law, pp. 363, 365; Grotius de Jure Belli, Prol. § 25; Burlamaqui (N. & P. L.) 263; 2 Rutherford Inst. 503; Hay & Marriot, 23, 47, 78, 83, 94, 197, 216; Bynk. Law Nat., 3 Hall Law J. p. 11; The Admiral (Grier, J.) Law Int. Sept. 19, 1862; The Marathon, Grier, J.; The Maero, Grier, J.; The Amelia, Grier, J.; The Amy Warwick, 24 Law Rep. 335, 494; The Gen. Parkhill, Cadwallader, J.; The Tropic Wind, Dunlop, J.; The Hiawatha, Hallis Jackson, Crenshaw, North Carolina, etc., Betts, J.

The capture of what is technically called "enemy's property" forms no exception. None of the above authorities make any distinction among belligerent powers as competent or not competent in civil war. No case has ever been decided to the contrary under our own or any other government.

To determine whether this power is inconsistent with the notion of this kind of war, we must recur to the nature of war, and the reasons for the exercise of this power. The reasoning heretofore employed will elucidate this point.

(1) The object of war is coercion of the power you are engaged with.

(2) If that power has title in any property, or has an interest, for the purposes of the war, in its transit, arrival, or existence, you may capture it, as a mode of coercion, unless the rights of neutrals or the rules of humanity and policy sanctioned by nations exempt it from capture.

(3) As to merchandise found on the sea, the fact that the person to whose ownership and control it is subjected resides within the dominion and under the control of the enemy brings it within the reason of the rule founded on coercion of the enemy, as we have seen, and it is not exempt by any law of nations.

(4) The right to capture it is not derived from or affected by any actual or implied or constructive hostility of the owner. It is immaterial whether he be a citizen or an alien or a friend; whether he has aided in the war or not, or on which side; whether he is considered as faithful to the power under which he resides, or is suspected or even imprisoned by it as a traitor. The test is the predicament of the property. The fact that he is under

the jurisdiction and control of the enemy gives the enemy an interest in the preservation and transfer of the merchandise, whether as a source of wealth, taxation and revenue, or of contribution or confiscation.

These considerations show that the doctrine of "enemy property" is applicable to domestic or civil wars. The reasons are the same.

(1) The object of the sovereign is to coerce the power which is organized against him, and making war upon him.

(2) This power exercises jurisdiction and control *de facto,* and claims it *de jure* over the territory. It compels obedience and exacts allegiance from all inhabitants of the territory, without respect to their wishes. It compels each inhabitant to pay taxes and imposts upon his property, to aid in the war, and makes the property liable to contribution or confiscation. This power, therefore, has the same interest in the merchandise of an inhabitant of the territory at sea, for the purposes of the war, as if it were an acknowledged sovereign; and the parent state has the same interest in the capture of the property, for the purpose of coercing the rebel power.

(3) The right of the sovereign to capture it *jure belli* is not derived from any actual or presumed disloyalty or criminality of the owner. It is equally immaterial as in a foreign war whether the owner is an alien or a friend; whether, in other respects, he has taken part in the war, or on which side; whether the rebel power considers him faithful to them, or suspects him, or has him in prison as a traitor. The test and the reason is the predicament of the property.

(4) If the owner was hostile to the *de facto* government under which he lives, and they had actually declared the property in question to be confiscated before its capture, it would not be doubted that it was subject to capture. But their laws and rules respecting allegiance, obedience, contribution, confiscation, and taxation govern and affect this property in fact (although the sovereign will not admit *de jure*), so long as it is out of the actual custody and control of the parent sovereign.

(5) It does not follow that the owner of the property in civil wars owes allegiance to the sovereign. He may be an alien, or even a mercenary soldier, or a political agent of some power that has recognized the rebels as a nation.

(6) Suppose a part of the sovereign's dominions are wrested from him in public war, and his enemy establishes a civil as well as military government over it, and claims it as his own, and the

local authorities and a majority of the inhabitants acquiesce in the new dynasty, and it is established *de facto*. Can it be doubted that it is competent for the sovereign to capture property of its inhabitants, at sea, as a means of coercion of the power possessing it? It is still a political question with the sovereign whether he will capture such property, and, if condemned, whether, after a peace, he will compensate the owner, on proof of merit.

I will now consider certain objections made to the application to internal wars of the doctrine of enemy's property.

I. It is objected that the exercise of this power is inconsistent with the claim to civil jurisdiction over the owner. Not more so than in foreign war. There the property of a subject is liable to capture if it is in a certain predicament, *e. g.*, if it is the peculiar product of enemy territory, and exported thence, or if the owner resides, however unwillingly, in the enemy's territory, and under his jurisdiction.

II. It is objected that so the property of a loyal citizen may be condemned. Not more so than in foreign war. The property in the given predicament may belong to a loyal friend and subject, or an indifferent neutral. It is a political question whether the right shall be exerted over all such property, on reasons of general policy, or whether exceptions shall be made in case the owner so resident is loyal to us, or sympathizes with us.

It is worthy of remark that the sovereign can exercise these belligerent powers at first, if ever. The lapse of time gives him no new rights of war. The recognition of the rebel state as belligerent by foreign powers confers no right on the sovereign. It only recognizes an existing right. The recognition of rebel states as sovereign by foreign powers confers on the sovereign no new war power. The moment he ceases to claim jurisdiction over the rebel territory the war ceases to be a civil war, and becomes an international war.

The objections really amount to this: that war powers can never be exercised in civil wars, at any stage, except by the rebels. According to this theory, if the civil war is one in which each party claims to be the state, neither can exercise belligerent powers. If neither makes that claim, both may exercise them. If one claims to be the state, and the other does not (as in this case), the latter only can exercise them.

III. It is contended that, if the owner is a traitor, his property is exempt from confiscation by the constitution (article 3, § 3) and the act of 1790 (chapter 9, § 24). But there is no allegation or evidence that the claimants of this property are trai-

tors. The government has never treated or proceeded against them as such; and if they be traitors, they cannot compel the government to proceed against them by indictment as traitors, nor bring them within the clause of the constitution. It cannot be admitted that the clause of the constitution would exempt their personal property from confiscation by proof, on their part, of the commission of treason by them, if they were not proceeded against as traitors.

IV. If it be objected that a traitor cannot personally be treated as a belligerent, or as levying war, I answer that the constitution not only contemplates that treason may take the form of war, but confines treason, under our laws, to acts of such character and magnitude as amount to "levying war against the United States," or aiding those who are so levying war.

Const. art. 3, § 3.

V.

Fifth. There is nothing in the distribution of powers under our constitution which makes the exercise of this war power illegal, by reason of the authority under which the capture was made.

I. It is not necessary to the exercise of war powers by the president, in case of a foreign war, that there should be a preceding act of congress declaring war. The constitution gives to congress the power to declare war. But there are two parties to a war. It is a state of things, and not an act of legislative will. If a foreign power springs a war upon us by sea and land, during a recess of congress, exercising all belligerent rights of capture, the question is whether the president can repel war with war, and make prisoners and prizes by the army, navy, and militia which he has called into service and employed to repel the invasion, in pursuance of general acts of congress, before congress can meet; or whether that would be illegal. It is enough to state the proposition. If it be not so, there is no protection to the state. The question is not what would be the result of a conflict between the executive and legislature during an actual invasion by a foreign enemy, the legislature refusing to declare war; but it is as to the power of the president before congress shall have acted, in case of a war actually existing. It is not to the right to initiate a war as a voluntary act of sovereignty. That is vested only in congress.

II. In case of a civil or domestic war, actually existing, it is not necessary, before any belligerent power can be exercised, that congress shall declare war. The same overwhelming reasons, *ab*

inconvenienti, exist here as in case of foreign war, and even with greater force.

Also, a declaration of war by congress is not appropriate to civil wars. A civil war is always regarded by the sovereign as the act of the rebel, and not his own. He refuses to be compelled to recognize it as in war, in all respects, carrying with it to the rebels all the rights and immunities of war. A formal "declaration of war" is applicable to independent powers. It might well be argued that a formal "declaration of war" against a rebel power, by name or designation, would be a recognition, possibly of its independence, probably of its full belligerent privileges. But in civil wars the sovereign always reserves to himself the right, from day to day, and in each case, to determine whether to meet the rebellion by a civil or a military act, and whether or not to grant to a given rebel the privileges of a belligerent. Each rebel is "at the king's mercy." The sovereign may treat him as a belligerent or a traitor, if he be a citizen, or a criminal, if he be a foreign mercenary. The sovereign also reserves to himself to determine, as to each case, whether to meet it by the exercise of a belligerent act, or an act of civil authority. Therefore, a sovereign never in form declares war against a rebellion.

Yet it is suggested that, although a formal declaration of war by congress against a rebellion is not to be expected, still, under our constitution, in case of a rebellion or civil war, it is a legislative question—a question for congress alone to determine—whether the state of things is such as to call for the exertion of the belligerent rights of maritime capture, and that it is not competent for the president to exert them until congress shall so determine. In the present case it might be admitted that congress has full power over that question, as against the president, at all times, for no act of congress had, when the capture was made, or has since, conflicted with the acts of the president. The present case needs no more than the following point:

III. In case of civil war, the president may, in the absence of any act of congress on the subject, meet the war by the exercise of belligerent maritime capture. The same overwhelming reasons of necessity govern this position as the preceding. This position has been recognized by every court into which the prize causes have been brought in this country,—by Judge Betts, in New York, Judge Sprague, in Massachusetts, Judge Cadwallader, in Pennsylvania, Judge Dunlop, in District of Columbia, Judge Giles, in Maryland, Judge Marvin, in Florida.

It is also understood that Mr. Justice Grier, in Pennsylvania,

and Mr. Justice Clifford, in Massachusetts, were so far satisfied of the right as to confirm the decision, not *pro forma,* but on their own considered opinions, only leaving their minds open for argument here. No adverse decision has ever been given. There are general acts of congress clothing the president with power to use the army and navy to suppress insurrections.

Act 1795, c. 36, § 2; Act 1807, c. 39.

And it must be admitted that the function of using the army and navy for that purpose is an executive function. But it is contended that, before they are used as belligerent powers, before captures can be made, on ground of blockade and enemy property, congress must pass upon the case, and determine whether the powers shall be exerted. Now, if congress must so adjudge in the first instance, why not throughout the war? Civil wars change their character from day to day and place to place. Congress should be a council of war in perpetual session to determine when and how long and how far this or that belligerent right shall be exerted.

The function to use the army and navy being in the president, the mode of using them, within the rules of civilized warfare, and subject to established laws of congress, must be subject to his discretion as a necessary incident to the use, in the absence of any act of congress controlling him.

IV. There were no acts of congress at the time of this capture (July 10, 1861) in any way controlling this discretion of the president.

V. Since the capture, congress has recognized the validity of these acts of the president. Act Aug. 6, 1861, c. 63, § 3, legalizes, among other things, the proclamations, acts, and orders of the president respecting the navy. This includes the blockades, and the orders respecting captures. Act March 25, 1862, c. 50, regulating prize proceedings in section 5, recognizes prize causes as "now pending" in the courts. The proclamations made the blockades belligerent acts, and not municipal surveillance. They are declared to be "in pursuance of the law of nations," and guarantied to be made effective and actual, and provision is made for warning. They had been always treated as blockades, under the laws of war, by the executive, by the courts, and by neutral powers before the passage of this act. Act July 17, 1862, c. 204, § 12, recognizes prize causes as now pending, and regulates them, and recognizes decrees of condemnation in pending cases. The resolution of July 17, 1862 (No. 65), regulates the custody of prize money now in the registry of the courts.

When these acts were passed, congress knew that great numbers of captures had been made solely on the ground of "enemy property"; that the president had, through the several United States attorneys, asked for their condemnation; that they had been condemned solely on that ground in all the chief districts; that condemnation on that ground had been refused in none; and that the proceeds of prizes condemned as enemy property were in the treasury awaiting distribution.

VI. It has been suggested that Act July 31, 1861, c. 28, assumes that there may be loyal citizens in the rebel territory who must not only be protected, but assisted. But the act leaves all to the judgment of the president. It adds to his means, but in no degree detracts from his previous authority to treat persons and property as he shall deem best. Besides, this is irrelevant to the question of enemy property. That doctrine depends, as we have seen, on the status or predicament of the property, as admitting our exercise, through it, of coercion over the power we are at war with. We may at the same time have sympathizers, and even active friends, residing in his territory.

VI.

Sixth. It is contended that Act of July, 1861, c. 3, §§ 5, 6, is an action by congress on the subject, inconsistent with condemnation of this property.

I. The capture, in this case, was before the passage of the act. The statute does not retroact. It is an established rule to interpret statutory law as taking effect from its passage, not as varying the law or its administration by retroactive operation.

Matthews v. Zane, 7 Wheat. 211; 1 Kent, Comm. 455, notes.

The statute does not, in its terms, contemplate a retroactive effect, but rather the reverse. Congress, at the time of passing it, knew that the president had exercised, as of right, full belligerent power to capture at sea on all the recognized grounds of war,—contraband, breach of blockade, and enemy property,—and the courts were entertaining prize jurisdiction on those grounds.

Under such circumstances, if congress intended to make void all those acts, it should be expressed in terms, unless it were necessarily and unavoidably the result of the statute, construed with all the established presumptions against retroaction. All the courts of the United States which have acted on prize causes since the passage of the act have construed it as not retroactive.

II. There is no inconsistency in congress declining to act on the

exercise of war powers by the president in the past, and at the same time making new and special provisions, qualifying or altering the mode of exercising those powers after a future event.

III. To give it a retroactive effect would render this statute inconsistent with Act Aug. 6, 1861, c. 63, § 3.

IV. The Act of July 13, 1861, does not relate to belligerent captures and prizes. It provides for civil forfeitures and confiscations in the exercise of civil jurisdiction.

(1) The terms "capture" and "prize" are not used. The terms are "seizure," "forfeiture," and "confiscation." The former are terms of war; the latter, of civil proceedings.

Park, Ins. c. 4, p. 73; 2 Arnould, Ins. § 303; Richardson v. Maine F. & M. Ins. Co., 6 Mass. 108; Const. U. S. art. 1, § 8; Halleck, Int. Gov. c. 30; Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch, 42-44; Carrington v. Merchants' Ins. Co., 8 Pet. 518, 519; Bradstreet v. Neptune Ins. Co., 3 Sumn. 605-616; Davison v. Seal Skins, 2 Paine, 324; Higginson v. Pomeroy, 11 Mass. 110; Black v. Marine Ins. Co., 11 Johns. 292; Thompson v. Read, 12 Serg. & R. 443; Halleck, Int. Law, c. 12, § 14. 14.

(2) The secretary of the treasury has full powers of remission of the "forfeitures," as in revenue cases, under Act 1797, vol. 1, c. 13, p. 506. This he may do by general regulations of the treasury department. This is unknown to prize or belligerent proceedings, and inapplicable to them.

(3) Section 9 gives jurisdiction over the "forfeitures" to certain courts, which would be unnecessary if these were cases of prize.

(4) The prize laws give an interest to the captors. Under this statute, the title rests in the United States by "forfeiture."

(5) Section 6 introduces a principle unknown to prize law, to-wit: That the whole vessel is condemned on the sole ground that the owner of a part resided in enemy's territory. Congress can hardly have intended that. That such is the true construction of the section appears from the debates at the time of its passage. This construction has been put upon it by the courts, and the treasury has adopted it, and authorized a remission of the forfeiture of the shares owned by residents in loyal states, under certain circumstances.

The true construction of the act I respectfully submit to be this: It is not an act specially providing for the present rebellion, or in terms alluding to it. It is a general act, applicable to all times, and to rebellious or civil wars of every possible character. The president might or might not, at his option, apply it to the present rebellion by issuing or not issuing his proclamation. The

act is applicable, at the option of any president, to a rebellion which is carried on under state authority, and it is applicable to no other.

If such a rebellion exists, and the president sets the act in force by his proclamation, certain results follow: (1) Commercial intercourse between the designated states and other states becomes unlawful. Irrespective of the question of how far it might be prohibited under war power, it is made unlawful by statute. (2) All property passing between the designated states and the other states is forfeited to the United States. Irrespective of the question whether it could be taken for military necessity, or by a levying of contribution, or as trading with an enemy, it is forfeited by force of a statute. The United States takes a statute title in it. (3) If any part of a vessel is owned by a person who continues to reside in the designated states after the time fixed, the entire vessel is forfeited to the United States. The United States acquires a statute title by the facts constituting the forfeiture. Seizure is necessary, as in all cases of forfeitures for breach of revenue laws. (4) All these forfeitures and confiscations are subjected to the treasury department, and the power of remission in revenue causes is extended to these forfeitures. Property may often be so situated as to become the subject both of capture and condemnation as prize of war, and seizure and forfeiture by civil law. In that case the prize law has the precedence.

It is entirely competent, and quite natural and proper, that congress should enact a system of penalties, forfeitures, and confiscation, in the exercise of its civil jurisdiction over the whole country, applicable to rebellions now or hereafter existing, without passing upon or intending to touch the question of the right to exercise the powers and rights of war in any given stage or phase of a rebellion. If the act affects property which the laws of war would not touch, it adds a civil process to the powers of war; both may be set in motion, and the civil forfeiture yields precedence, or the executive may elect which to resort to.

In further proof that this statute was not intended to establish or regulate, or modify or affect, the law of prize, it is observable that it touches small portions of entire matters over which the president has been exercising the right of belligerent capture, and has exercised them still without objection of congress. Section 6 does not forfeit vessels of persons residing in the rebel states, if found in the ports of those states. A rebel man-of-war could not be forfeited under that act if found in their own ports, nor if found elsewhere, if the title was in a neutral or a citizen of a

loyal state. (Nor could it be condemned under the act of August 6, 1861, unless the owner of the vessel knowingly allowed it to be used in the war.) Section 5 forfeits no property unless passing between the designated states and the other states. If found in the rebel states, or passing between rebel states, it is not forfeited, even if it be contraband of war. (Nor would it be forfeited if found there, under the act of August 6, 1861, unless the owner had knowingly allowed it to be used in the war.) If found at sea, passing between two rebel states, or between a rebel state and a neutral port, it would escape. Under this statute, no property could be seized for breach of blockade unless passing between a rebel and a loyal state. No vessel could be seized for breach of blockade unless it was not only passing between a rebel and a loyal state, but carrying cargo; and the fact that the property was contraband would not forfeit it, or the vessel carrying it, if it was bound from a neutral port.

VII.

Seventh. That the rebellion had come to a state requiring the exercise by us of the war power of blockade and capture has been passed upon by the political department of the government, by both the executive and legislative branches. That is conclusive on the courts.

President's Proclamation of April 15 and April 19, 1861, and April 27 and May 3, 1861; Acts Cong. Aug. 6, 1861, c. 63, § 3, March 25, 1862, c. 50, and July 17, 1862, c. 234, § 12. *Vide, supra*, pp. 10, 11, tit. "Second."

VIII.

Eighth. Whether a particular place which the owner of the vessel inhabits is enemy territory is for the court to decide.

The Gerasimo, 11 Moore, P. C. 101.

If the political department of the government has decided that question, that is, of course, conclusive on the courts. If it has not been passed upon by the political department, the court must decide it as a question of fact.

In this case the political department decided that Richmond was in enemy territory on the 10th July, 1861.

Proclamations of April 27, 1861, and August 16, 1861; Acts Cong. Aug. 6, 1861, c. 63, § 3.

In addition to these facts of the executive and legislative departments, the court has the following facts:

1861. Feb. 8. A constitution of a sovereign power, called the "Confederate States," was adopted by the

states of South Carolina, Georgia, Alabama, Mississippi, Florida, Louisiana, and Texas, and a president was inaugurated, and the government set in motion.

April 12. Fort Sumter was bombarded by authority of the Confederate government.

April 15. President Lincoln's proclamation, calling out the militia.

April 17. Virginia passed an ordinance of secession, taking effect at once, with the right to secede from the Confederacy, if so voted on election of 23d May.

April 17. Confederate States issue letters of marque.

April 17. President Lincoln's proclamation of blockade.

April 21. Proclamation of Governor Letcher, of Virginia, recognizing war between Virginia and United States.

April 24. Virginia forms an alliance offensive and defensive with the Confederacy, and surrenders the control of its military operations to the Confederacy.

April 27. President's proclamation, extending the blockade to Virginia and North Carolina.

April 30. Commodore Pendergast's notice of blockade of the ports of Virginia.

May 3. Virginia calls out volunteers.

May 3. Proclamation for 40,000 men.

May 3. Proclamation of Governor Letcher, of Virginia, calling on "every citizen" to take up arms and give aid.

May 6. The Confederate congress acknowledge the existence of a war between them and the United States.

May 13. Queen's proclamation of neutrality between the two belligerents.

May 20. North Carolina joins the Confederacy.

May 21. The Confederate congress, in session at Montgomery, Ala., adjourn to meet at Richmond, Va., July 20th.

May 23. Virginia adopts the secession ordinance by popular vote.

Before June 17 the battles of Aquia Creek, Fairfax Court House, Philippa, Vienna, and Big Bethel had taken place, and the

rebel army was in lines within a few miles of Washington. Richmond was the center of military operations of the rebel armies. It has not yet been reached by our armies. The Confederacy, on the 10th July, 1861, was, and ever since April 17, 1861, had been, in full *de facto* control, military and civil, all over that part of Virginia. This *de facto* government claimed to be a sovereignty, exclusive of all authority of the United States over its territory. It claimed all Virginia, and possessed all of eastern Virginia. It had all the powers and functions, legislative, executive, and judicial, of a state, with its armies, navy, and courts of prize. It was at war with the United States, and was recognized as a belligerent by foreign powers. Its armies were far to the northward and eastward and westward of Richmond, and it held all to the southward. It claimed allegiance of all inhabitants, and treated as traitors all inhabitants who resisted. As a *de facto* power engaged in war, and occupying on claim of right, for a permanency, this territory, it was as complete as if recognized by us as a *de jure* sovereignty.

That the United States government has since recognized the legislature at Wheeling as having been, at a certain stage, the true legislature of Virginia, is immaterial. A question of "enemy property" in war is a question of fact, not of right. A usurpation, if its holding is sufficient in degree and character, gives the other power the right to treat the territory as territory of an enemy. It is for that power to determine whether it will do so as a question of policy.

We are brought, then, to three propositions:

(I) The right to capture, on the high seas, the property of persons residing in the enemy's territory may be exercised in civil or domestic war.

(II) In the present war, that right has been exercised by an authority which this court must deem competent.

(III) Richmond, Va., was enemy's territory, within the meaning of the law of prize, *jure belli*, at the time of its capture.

JEREMIAH S. BLACK.

[Jeremiah Sullivan Black was born in Somerset county, Pa., 1810. His early education was obtained at a country school. At an early age he began to study law, and in 1831 was admitted to the bar. In 1842 he was made president judge of his district, and held this position until he was elected to the supreme court of Pennsylvania in 1851. In 1854 he was re-elected for a full term of fifteen years. In 1857 he was appointed attorney general in President Buchanan's cabinet, and rendered great service to the government in unmasking fraudulent land-grant claims. In 1860 he succeeded General Cass as secretary of state. Throughout the secession controversy he was a strong defender of the authority of the national government. After the accession of President Lincoln he became reporter of the United States supreme court, but, after publishing two volumes of decisions, resigned, and resumed the practice of law at York, Pa. He was a member of the constitutional convention of Pennsylvania, in 1872. He died August 19, 1883. A selection from his essays and speeches was published by D. Appleton & Co., New York, 1886, from which the following argument is taken by permission of the publishers.]

Ten volumes of reports of the supreme court of Pennsylvania (from 5 Harris to 4 Casey) attest Jeremiah S. Black's learning and judicial capacity; but his temperament was forensic, rather than judicial. No subject which he undertook to discuss suffered in its presentation from neglect of details or authorities, but the source of his power was his sturdy, original, and persuasive eloquence. Simplicity, directness, and force characterized alike the man and his style. As a specimen of pure English, his eulogy of Chief Justice Gibson will bear comparison with the best models. By long years of attentive reading, he acquired an extensive acquaintance with history and literature, from the resources of which a powerful memory enabled him to draw a wealth of illustration. And his illustrations are never forced; they grow naturally out of his method of viewing the subject. Every metaphor, figure, and comparison is not only potential for illustration, but strikes with the force of argument.

Black's fearless and aggressive personalty pervades all his work.

The energy and feeling which characterize his dissenting opinion in Hole v. Rittenhouse, 2 Phila. 411, for instance, are seldom met with in the law reports.

"When a principle of law is established by a long series of decisions, without a single case on the other side, to carry it out in plain good faith is as sacred a duty as any judge has to perform. His notion that it ought to be otherwise is not entitled to a moment's consideration. It is no part of our office to tinker at the law, and patch it up with new materials of our own making. Suitors are entitled to it just as it is. Bad laws can be borne; but the *jus vagum aut incertum*—the law that shifts and changes every time it passes through the courts—is as sore an evil and as heavy a curse as any people can suffer, and no people who are fit for self-government will suffer it long. Even a legislator, if he is wise and thoughtful, will make no change which is not absolutely necessary. Legislative changes, however, are prospective, and disturb nothing that is past. But judge-made law sweeps away all the rights which may have been acquired on the faith of previous rules. For such wrongs even the legislature can furnish no redress. When the scales of justice are shaken by the hands that hold them here, there is no power elsewhere to adjust them. The judgment now about to be given is one of 'death's doings.' No one can doubt that, if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed,—of losing the homes they have labored and paid for. But they are dead, and the law which should have protected those sacred rights has died with them. It is a melancholy reflection that the property of a citizen should be held by a tenure so frail. But 'new lords, new laws,' is the order of the day. Hereafter, if any man be offered a title which the supreme court has decided to be good, let him not buy if the judges who made the decision are dead. If they are living, let him get an insurance on their lives; 'for ye know not what an hour may bring forth.' The majority of this court changes, on the average, once in every nine years, without counting the chances of death and resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain, and vicious that the world ever saw. A French constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property, which ought to be as steadfast as the hills, will become as unstable as water. To avoid this great calamity I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority; but I would stand by their decisions because they have passed into the law and become part of it, have been relied and acted on, and rights have grown up under them which it is unjust and cruel to take away.

Political controversies enlisted his strongest feelings. For withering sarcasm and bitter invective his argument before the Electoral Commission could hardly be surpassed. In the Pennsylvania constitutional convention of 1873, speaking on the subject of the legislative oath, he said:

"My friend from Dauphin [Mr. MacVeagh] spoke of legislation under the figure of a stream, which, he said, ought always to flow with crystal

water. It is true that the legislature is the fountain from which the current of our social and political life must run, or we must bear no life; but, as it now is, we keep it merely as 'a cistern for foul toads to knat and gender in.' He has described the tree of liberty, as his poetic fancy sees it, in the good time coming, when weary men shall rest under its shade, and singing birds shall inhabit its branches, and make most agreeable music. But what is the condition of that tree now? Weary men do, indeed, rest under it, but they rest in their unrest, and the longer they remain there the more weary they become, and the birds—It is not the wood lark, nor the thrush, nor the nightingale, nor any of the musical tribe that inhabit the branches of our tree. The foulest birds that wing the air have made it their roosting place, and their obscene droppings cover all the plain about them,—the kite, with his beak always sharpened for some cruel repast; the vulture, ever ready to swoop upon his prey; the buzzard, digesting his filthy meal, and watching for the moment when he can gorge himself again upon the prostrate carcass of the commonwealth. And the raven is hoarse that sits there croaking despair to all who approach for any clean or honest purpose."

Jealousy of all power, political or corporate, which threatened to abridge the freedom of man, was the motive force in Judge Black's professional and political career,—"protection to the man against the ill-used or ill-gotten power of government, corporations, and associations; protection to the states against federal encroachment." The cases of Milligan, McCardle, and Blyew, involving fundamental questions of civil rights, enlisted his highest powers, and, as long as trial by jury shall endure, his fame will be secure.

ARGUMENT IN BEHALF OF LAMBDIN P. MILLIGAN, IN THE SUPREME COURT OF THE UNITED STATES, 1866.

STATEMENT.

In October, 1864, Lambdin P. Milligan and two others were arrested by order of Gen. Alvin P. Hovey, commanding the military district of Indiana, on the charge of being members and supporters of a secret organization, known as the "Order of American Knights," or "Sons of Liberty," having for its object the destruction of the government of the United States. Milligan and his associates were tried by a military commission convened at Indianapolis, found guilty, and sentenced to be hanged. Thereupon Milligan applied to the United States circuit court for his discharge, on the ground that his detention was illegal. The court was divided in opinion, and certified the case to the supreme court of the United States for the purpose of ascertaining whether a writ of *habeas corpus* should issue, whether Milligan should be discharged as prayed for, and whether the military commission had jurisdiction to try the prisoner. The supreme court decided in favor of the prisoner on all three points, and he was therefore discharged from custody.[1] David Dudley Field, Jeremiah S. Black, Joseph E. McDonald, and James A. Garfield appeared for Milligan. The government was represented by Attorney General Speed, Henry Stanberry, and Benjamin F. Butler. The position taken by the government is indicated in the following peroration of Gen. Butler's argument:

"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 the 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 so prevail, so that the civil law may again live, to the end that this may be a 'government of laws, and not of men.'"

ARGUMENT.

May it Please Your Honors: I am not afraid that you will underrate the importance of this case. It concerns the rights of the whole people. Such questions have generally been settled by arms; but since the beginning of the world no battle has ever been

[1] 4 Wall. (U. S.) 2.

lost or won upon which the liberties of a nation were so distinctly staked as they are on the result of this argument. The pen that writes the judgment of the court will be mightier for good or for evil than any sword that ever was wielded by mortal arm. As might be expected from the nature of the subject, it has been a good deal discussed elsewhere, in legislative bodies, in public assemblies, and in the newspaper press of the country; but there it has been mingled with interests and feelings not very friendly to a correct conclusion. Here we are in a higher atmosphere, where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself when I say that we have no thought to suggest which we do not suppose to be a fair element in the strictly legal judgment which you are required to make up. In performing the duty assigned to me in the case, I shall necessarily refer to the mere rudiments of constitutional law, to the most commonplace topics of history, and to those plain rules of justice and right which pervade all our institutions. I beg your honors to believe that this is not done because I think that the court, or any member of it, is less familiar with these things than I am, or less sensible of their value, but simply and only because, according to my view of the subject, there is absolutely no other way of dealing with it. If the fundamental principles of American liberty are attacked, and we are driven behind the inner walls of the constitution to defend them, we can repel the assault only with those same old weapons which our ancestors used a hundred years ago. You must not think the worse of our armor because it happens to be old-fashioned, and looks a little rusty from long disuse.

The case before you presents but a single point, and that an exceedingly plain one. It is not incumbered with any of those vexed questions that might be expected to arise out of a great war. You are not called upon to decide what kind of rule a military commander may impose upon the inhabitants of a hostile country which he occupies as a conqueror, or what punishment he may inflict upon the soldiers of his own army, or the followers of his camp; or yet how he may deal with civilians in a beleaguered city or other place in a state of actual siege, which he is required to defend against a public enemy. This contest covers no such ground as that. The men whose acts we complain of erected themselves 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 full exercise of their functions. My clients were dragged before this strange tribunal, and, after a proceeding, which it would be mere mockery to call a trial, they were ordered to be hung. The charge against them was put into writing, and is found on this record, but you will not be able to decipher its meaning. The relators were not accused of treason, for no act is imputed to them which, if true, would come within the definition of that crime. It was not conspiracy, under the act of 1861, for all concerned in this business must have known that conspiracy was not a capital offense. If the commissioners were able to read English, they could not help but see that it was made punishable, even by fine and imprisonment, only upon condition that the parties should first be convicted before a circuit or district court of the United States. The judge advocate must have meant to charge them with some offense unknown to the laws which he chose to make capital by legislation of his own, and the commissioners were so profoundly ignorant as to think that the legal innocence of the parties made no difference in the case. I do not say, what Sir James Mackintosh said of a similar proceeding, that the trial was a mere conspiracy to commit willful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with the first principles of natural justice, and quite unable to comprehend either the law or the facts of a criminal cause.

Keeping the character of the charges in mind, let us come at once to the simple question upon which the court below divided in opinion: Had the commissioners jurisdiction? Were they invested with legal authority to try the relators and put them to death for the offense of which they were accused? We answer, no; and therefore the whole proceeding, from beginning to end, was utterly null and void. On the other hand, it is absolutely 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 parties, so that their judgment upon the law and facts is absolutely conclusive and binding, not subject to correction, nor open to inquiry in any court whatever. Of these two opposite views you must adopt one or the other, for there is no middle ground on which you can possibly stand. I need not

say (for it is the law of the hornbooks) that, where a court (whatever may be its power in other respects) presumes to try a man for an offense of which it has no right to take judicial cognizance, all its proceedings in that case are null and void. If the party is acquitted, he cannot plead the acquittal afterwards in bar of another prosecution. If he is found guilty and sentenced, he is entitled to be relieved from the punishment. If a circuit court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the state courts, the judgment could have no effect. If a county court in the interior of a state should arrest an officer of the federal navy, try him, and order him to be hung for some offense against the law of nations committed upon the high seas or in a foreign port, nobody would treat such a judgment otherwise than with mere derision. The federal courts have jurisdiction to try offenses against the laws of the United States, and the authority of the state courts is confined to the punishment of acts which are made penal by state laws. It follows that, where the accusation does not amount to an offense against the law of either the state or federal government, no court can have jurisdiction to try it. Suppose, for example, that the judges of this court should organize themselves into a tribunal to try a man for witchcraft, or heresy, or treason against the Confederate States of America, would anybody say that your judgment had the least validity? I care not, therefore, whether the relators were intended to be charged with treason or conspiracy, or with some offense of which the law takes no notice. Either or any way, the men who undertook to try them had no jurisdiction of the subject-matter. Nor had they jurisdiction of the parties. It is not pretended that this was a case of impeachment, or a case arising in the land or naval forces. It 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 offenses 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 3, 1863, which was passed with express reference to persons precisely in the situation of these men, 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 parties, you are bound to relieve the petitioners. It is as much the duty of a judge to protect the innocent as it is to punish the guilty. Suppose that the secretary of some department should take it into his head to establish an

ecclesiastical tribunal here in the city of Washington, composed of clergymen "organized to convict" everybody who prays after a fashion inconsistent with the supposed safety of the state. If he would select the members with a proper regard to the *odium theologicum,* I think I could insure him a commission that would hang every man and woman who might be brought before it. But would you, the judges of the land, stand by and see their sentences executed? No; you would interpose your writ of prohibition, your *habeas corpus,* or any other process that might be at your command, between them and their victims; and you would do that for precisely the reason which requires your intervention here,—because religious errors, like political errors, are not crimes which anybody in this country has jurisdiction to punish, and because ecclesiastical commissions, like military commissions, are not among the judicial institutions of this people. Our fathers long ago cast them both aside among the rubbish of the Dark Ages; and they intended that we, their children, should know them only that we might blush and shudder at the shameless injustice and the brutal cruelties which they were allowed to perpetrate in other times and other countries.

But our friends on the other side are not at all impressed with these views. Their brief corresponds exactly with the doctrines propounded by the attorney general, in a very elaborate official paper, which he published last July, upon this same subject. He then avowed it to be his settled and deliberate opinion that the military might "take and kill, try and execute" (I use his own words), persons who had no sort of connection with the army or navy; and, though this be done in the face of the open courts, the judicial authority, according to him, are utterly powerless to prevent the slaughter which may thus be carried on. That is the thesis which the attorney general and his assistant counselors are to maintain this day, if they can maintain it, with all the power of their artful eloquence. We, on the other hand, 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 offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other. 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, this is not, what we have always supposed it to be, a free country.

Nevertheless, I take upon myself 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 utterly impossible to detach it without destroying the whole political structure under which we live. By removing it you destroy the life of this nation as completely as you would destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

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. That was the compact made with the general government at the time it was created. The states and the people agreed to bestow upon that government a certain portion of the judicial power, which otherwise would have remained in their own hands, but 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 treacherously tramples upon the most important part of that sacred covenant which holds these states together.

May it please your honors, you know, and I know, and everybody else knows, 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 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 willful 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 offenses, 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 toward actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of hireling spies and common 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. Let me say here that nothing has occurred 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, composed of men whose gross ignorance and supple subservience could always be relied on for those base uses to which no judge would ever lend himself. 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 brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his government. To that end they could think of no better provision than a public trial before an impartial jury.

I do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. I 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 covered themselves all over with infamy as with a garment, for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. 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 offenses had been the great engine of despotism in all ages and all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave consists only in this: that the master holds the lash in his hands, and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it. But our fathers were not absurd enough to put unlimited power in the hands of the ruler, and take away the protection 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 rights, 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 for a moment 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 Sidney.

(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 defense.

(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 offense. It cannot be doubted for a moment that, if a person convicted of an offense 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, tuck 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 offense. 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. The party in power never fails, when it can, to stretch the law on that subject by construction, so as to cover its honest and conscientious opponents. 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 the basest minions that skulk about under the pay of the 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 persecutors, 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. I say they are in force, and they will remain in force. We have not surrendered them, and we never will. If the worst comes to the worst, we will look to the living God for his help, and defend our rights and the rights of our children to the last extremity. Those men who think we can be subjected and abjected to the condition of mere slaves are wholly mistaken. The great race to which we belong has not degenerated so fatally. 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 dog-eared 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, copy-holder and villein, would have risen in one mass, and burned 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. When impeached for it, 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 offense 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 Templar 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.

If it were worth the time, I might detain you by showing how this subject was treated by the French court of cassation, in Geoffroy's case, under the constitution of 1830, when a military judgment was unhesitatingly pronounced to be void, though ordered by the king, after a proclamation declaring Paris in a state of siege. *Fas est ab hoste doceri,*—we may lawfully learn something from our enemies; at all events, we should blush at the thought of not being equal on such a subject to the courts of Virginia, Georgia, Mississippi, and Texas, whose decisions my colleague, General Garfield, has read and commented on. 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 from Coke to Wharton 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 disgrace the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. It is true, also, that 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 among such servile creatures. Those butchers' dogs, that feed upon garbage and fatten upon the offal of the shambles, are always ready to bark at whatever interferes with the trade of their master. 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 by the sacred name of George Washington, and by 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 this 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 Gospel of God and solemnly 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 and 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 offense, 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 defense." 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 offenses as those for which Sidney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burned 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 ten-fold 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 offenses 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 are 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, I trust, we have nothing to do here. I decline to discuss it. 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. If the sanitary regulations which defend the health of a city are ever to be relaxed, it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel, and creeps lazily along the bottom, the inhabitants of the adjoining shore have no need of a dike to save them from inundation; but when the booming flood comes down from above, and swells into a volume which rises high above the plain on either side, then a crevasse in the levee becomes a most serious thing. So in peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of arbitrary 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. But this is a question which properly belongs to the jurisdiction of the stump and the newspaper.

There is 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 per-

nicious in policy and false in morals. See how it applies to this case. Here were three men whom it was desirable to remove out of this world, but there was no proof on which any court would take their lives; therefore it was necessary, and, being necessary, it was right and proper, to create an illegal tribunal which would put them to death without proof. By the same mode of reasoning, you can prove it equally right to poison them in their food, or stab them in their sleep. Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering as this pretense of state necessity. A great authority calls it "the tyrant's devilish plea," and the common honesty of all mankind has branded it with everlasting infamy. Of course, it is mere absurdity to say that these relators were necessarily deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the very time, and in the same town, where justice would have been done without sale, denial, or delay. 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 willful. But we are now considering the legal effect of their decision, and that depends on their legal authority 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 relators, had attempted to deprive them of their 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?

Let me illustrate still further. Suppose you, the judges of this

court, to be surrounded in the hall where you are sitting by a body of armed insurgents, and compelled, by main force, to pronounce sentence of death upon the president of the United States for some act of his upon which you have no legal authority to adjudicate. There would be a valid sentence if necessity alone could create jurisdiction. But could the president be legally executed under it? No; the compulsion under which you acted would be a good defense for you against an impeachment or an indictment for murder, but it would add nothing to the validity of a judgment which the law forbade you to give. 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 of common sense is to stand up and dispute it. But there is decisive authority upon the point. 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 "booty and beauty" 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 by the same judge who had declared it to be necessary, and he paid the penalty without a murmur. The supreme court of Louisiana, in Johnson v. Duncan, decided that everything done during the siege in pursuance of martial rule, but in conflict with the law of the land, was void and of no effect, without reference to the circumstances which made it necessary. Long afterwards the fine imposed upon Jackson was refunded, because his friends, while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have saved him from the punishment due only to a willful offender.

The learned counsel on the other side will not assert that there

was war at Indianapolis in 1864, for they have read Coke's Institute and Judge Grier's opinion in the Prize Cases, and of course 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 absurd 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.

GENERAL BUTLER: We do not take that position.

MR. BLACK: Then they can take no ground at all, for nothing else is left. I do not wonder to see them recoil from their own doctrine when its nakedness is held up to their eyes; but they must stand upon that or give up their cause. 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,—has been the doctrine of the attorney general's office ever since the advent of the present incumbent,—and is the doctrine of their brief, printed and filed in this case. 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? All men who hold the attorney general's opinion to be true, answer the question I have put 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? Because, say our opponents, 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 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 tumble into ruin, and, if we are not all robbed and kidnapped and hanged and drawn and quartered, we will owe our immunity, not to the constitution and laws, but to the mere mercy or policy of those persons who may then happen to control the organized physical force of the country.

This certainly puts us in a most precarious condition. We must have war about half the time, do what we may to avoid it. The president or congress can wantonly provoke a war whenever it suits the purpose of either to do so; and they can keep it going as long as they please, even after the actual conflict of arms is over. When Peace woos them, they can ignore her existence; and thus they can 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 this seems the wildest delusion that ever took possession of a human brain. If there be one principle of political ethics more universally acknowledged than another, it is that war, and especially civil war, can be justified only when it is undertaken to vindicate and uphold the legal and constitutional rights of the people; not to trample them down. He who carries on a system of wholesale slaughter for any other purpose must stand without excuse before God or man. 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—

"Who should against her murderers shut the door,
Not bear the knife themselves."

The opposing argument, when turned into plain English, 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 sneak behind it and 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 howling 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. The oath of an officer to support the constitution is as simple as that of a witness to tell the truth in a court of justice. What would you think of a witness who should attempt to justify perjury upon the ground that he had testified when civil war was raging, and he thought that, by swearing to a lie, he might promote some public or private object connected with the strife? No, no! the great men who made this country what it is—the heroes who won her independence, and the statesmen who settled her 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. It would have been a dangerous experiment for an adviser of his at that time, or at any time, to propose that he should deny a citizen his right to be tried by a jury, and substitute in place of it a trial before a tribunal composed of men elected by himself from among his own creatures and dependents. You can well imagine how that great heart would have swelled with indigna-

tion at the bare thought of such an insulting outrage upon the liberty and law of his country.

In the war of 1812, the man emphatically called the "Father of the Constitution" was the supreme executive magistrate. Talk of perilous times! There was the severest trial this Union ever saw. That was no half-organized rebellion on the one side of the conflict, to be crushed by the hostile millions and unbounded resources of the other. The existence of the nation was threatened by the most formidable military and naval power then upon the face of the earth. Every town upon the northern frontier, upon the Atlantic seaboard, and upon the Gulf coast was in daily and hourly danger. The enemy had penetrated the heart of Ohio. New York, Pennsylvania, and Virginia were all of them threatened from the west, as well as the east. This capitol was taken, and burned, and pillaged, and every member of the federal administration was a fugitive before the invading army. Meanwhile, party spirit was breaking out into actual treason all over New England. Four of those states refused to furnish a man or a dollar even for their own defense. Their public authorities were plotting the dismemberment of the Union, and individuals among them were burning blue lights upon the coast as a signal to the enemy's ships. But in all this storm of disaster, with foreign war in his front, and domestic treason on his flank, Madison gave out no sign that he would aid Old England and New England to break up this government of laws. On the contrary, he and all his supporters, though compassed round with darkness and with danger, stood faithfully between the constitution and its enemies—

"To shield it, and save it, or perish there too."

The framers of the constitution and all their contemporaries died and were buried; their children succeeded them, and continued on the stage of public affairs until they, too,

"Lived out their lease of life, and paid their breath
To time and mortal custom."

And a third generation was already far on its way to the grave before this monstrous doctrine was conceived or thought of,—that public officers all over the country might disregard their oaths whenever a war or a rebellion was commenced.

Our friends on the other side are quite conscious that, when they deny the binding obligation of the constitution, they must put some other system of law in its place. Their brief gives notice that, while the constitution, and the acts of congress, and

Magna Charta, and the common law, and all the rules of natural justice shall remain under foot, they will try American citizens according to the law of nations! But the law of nations takes no notice of the subject. If that system did contain a special provision that a government might hang one of its own citizens without judge or jury, it would still be competent for the American people to say, as they have said, that no such thing should ever be done here. That is my answer to the law of nations. But then they tell us that the laws of war must be treated as paramount. Here they become mysterious. 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 on earth 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. They are in search of an argument under difficulties. When they appeal to international law, it is silent; and when they interrogate the law of the land, the answer is an unequivocal contradiction of their whole theory.

The attorney general tells us 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 offense. 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 ignorant and bigoted 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 very soon) con-

cerning the natural and inherent right of the government to defend itself without regard to law. This is wholly fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense of his authority against the opposition of his own subjects or others, and that is precisely what makes him a despot; but in a limited monarchy the prince must confine himself to a legal defense 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 hurled from his throne, and dragged to the block or driven into exile. This principle was sternly enforced in the cases of Charles I. and James II., and we have it announced on the highest official authority here that the Queen of England cannot ring a little bell on her table, and cause a man, by her arbitrary order, to be arrested under any pretense whatever. If that be true there, how much more true must it be here, where we have no personal sovereign, and where our only government is the constitution and laws! A violation of law, on pretense of saving such a government as ours, is not self-preservation, but suicide.

Salus populi suprema lex. Observe it is not *salus regis;* the safety of the people, not the safety of the ruler, is the supreme law. When those who hold the authority of the government in their hands behave in such manner as to put the liberties and rights of the people in jeopardy, the people may rise against them and overthrow them without regard to that law which requires obedience to them. 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. If this government of ours has no power to defend itself without violating its own laws, it carries the seeds of destruction in its own bosom; it is a poor, weak, blind, staggering thing, and the sooner it tumbles over the better. But it has a most efficient legal mode of protecting itself against all possible danger. It is clothed from head to foot in a complete 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 defense against all these? Yes. 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 merely compelled to use these weapons against your enemies, 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 has no law of its own. Within the last five years we have seen, for the first time, self-constituted tribunals not only assuming power which the law did not give them, but thrusting aside the regular courts to which the power was exclusively given. What is the consequence? This terrible authority is wholly 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. Thierry, the French historian of England, says that, when the crown and scepter were offered to Cromwell, he hesitated for several days, and answered: "Do not make me a king, for then my hands will be tied up by the laws which define the duties of that office; but make me protector of the commonwealth, and I can do what I please, —no statute restraining and limiting the royal prerogative will apply to me." 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.

Ask the attorney general what rules apply to military commissions in the exercise of their assumed authority over civilians. Come, Mr. Attorney, "gird up thy loins now like a man. I will demand of thee, and thou shalt declare unto me if thou hast un-

derstanding." How is a military commission organized? What shall be the number and rank of its members? What offenses 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 punishment? 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 make a reply, for there is no law on the subject. He will not attempt to "darken counsel by words without knowledge," and therefore, like Job, he can only lay his hand upon his mouth and keep silence.

The power exercised through those military commissions is not only unregulated by law, but it is incapable of being so regulated. What is it that you claim, Mr. Attorney? I will give you a definition, the correctness of which you will not attempt to gainsay. You assert 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 offense. 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 has been exercised by the great and small oppressors of mankind ever since the days of Nimrod. It operates in different ways; the tools it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form;

> "It can change shapes with Proteus for advantages,
> And set the murderous Machiavel to school."

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.

Under the old French monarchy the favorite fashion of it was a *lettre de cachet,* signed by the king, and this would consign the party to a loathsome dungeon until he died, forgotten by all the world. An imperial *ukase* will answer the same purpose in Rus-

sia. The most faithful subject of that amiable autocracy may lie down in the evening to dream of his future prosperity, and before daybreak he will find himself between two dragoons on his way to the mines of Siberia. In Turkey, the verbal order of the sultan or any of his powerful favorites will cause a man to be tied up in a sack and cast into the Bosphorus. Nero accused Peter and Paul of spreading a "pestilent superstition," which they called the Gospel. He heard their defense in person, and sent them to the cross. Afterwards he tried the whole Christian church in one body on a charge of setting fire to the city, and he convicted them, though he knew, not only that they were innocent, but that he himself had committed the crime. The judgment was followed by instant execution. He let loose the Praetorian guards upon men, women, and children, to drown, butcher, and burn them. Herod saw fit, for good political reasons, closely affecting the permanence of his reign in Judea, to punish certain possible traitors in Bethlehem by anticipation. This required the death of all the children in that city under two years of age. He issued his "general order"; and his provost marshal carried it out with so much alacrity and zeal that in one day the whole land was filled with mourning and lamentation. Macbeth understood the whole philosophy of the subject. He was an unlimited monarch. His power to punish for any offense or for no offense at all was as broad as that which the attorney general claims for himself and his brother officers under the United States. But he was more cautious how he used it. He had a dangerous rival, from whom he apprehended the most serious peril to the "life of his government." The necessity to get rid of him was plain enough, but he could not afford to shock the moral sense of the world by pleading political necessity for a murder. He must

"Mask the business from the common eye."

Accordingly, he sent for two enterprising gentlemen, whom he took into his service upon liberal pay,—"made love to their assistance,"—and got them to deal with the accused party. He acted as his own judge advocate. He made a most elegant and stirring speech to persuade his agents that Banquo was their oppressor, and had "held them so under fortune" that he ought to die for that alone. When they agreed that he was their enemy, then said the king:

"So is he mine, and though I could,
With barefaced power, sweep him from my sight,
And bid my will avouch it, yet I must not,
For certain friends, who are both his and mine,
Whose loves I may not drop."

For these, and "many weighty reasons" besides, he thought it best to commit the execution of his design to a subordinate agency. The commission thus organized in Banquo's case sat upon him that very night, at a convenient place beside the road where it was known he would be traveling; and they did precisely what the attorney general says the military officers may do in this country,—they took and killed him, because their employer at the head of the government wanted it done, and paid them for doing it out of the public treasury.

But of all the persons that ever wielded this kind of power, the one who went most directly to the purpose and object of it was Lola Montez. She reduced it to the elementary principle. In 1848, when she was minister and mistress to the King of Bavaria, she dictated all the measures of the government. The times were troublesome. All over Germany the spirit of rebellion was rising; everywhere the people wanted to see a first-class revolution, like that which had just exploded in France. Many persons in Bavaria disliked to be governed so absolutely by a lady of the character which Lola Montez bore, and some of them were rash enough to say so. Of course that was treason, and she went about to punish it in the simplest of all possible ways. She bought herself a pack of English bull dogs, trained to tear the flesh, and mangle the limbs, and lap the life blood, and with these dogs at her heels, she marched up and down the streets of Munich with a most majestic tread, and with a sense of power which any judge advocate in America might envy. When she saw any person whom she chose to denounce for "thwarting the government" or "using disloyal language," her obedient followers needed but a sign to make them spring at the throat of their victim. It gives me unspeakable pleasure to tell you the sequel. The people rose in their strength, smashed down the whole machinery of oppression, and drove out into uttermost shame king, strumpet, dogs, and all. From that time to this, neither man, woman, nor beast has dared to worry or kill the people of Bavaria.

All these are but so many different ways of using the arbitrary power to punish. The variety is merely in the means which a tyrannical government takes to destroy those whom it is bound to protect. Everywhere it is but another construction, on the same principle, of that remorseless machine by which despotism wreaks its vengeance on those who offend it. In a civilized country it nearly always uses the military force, because that is the sharpest and surest, as well as the best-looking, instrument that

can be found for such a purpose. But in none of its forms can it be introduced into this country. We have no room for it; the ground here is all preoccupied by legal and free institutions. Between the officers who have a power like this and the people who are liable to become its victims, there can be no relation except that of master and slave. The master may be kind, and the slave may be contented in his bondage; but the man who can take your life, or restrain your liberty, or despoil you of your property at his discretion, either with his own hands or by means of a hired overseer, owns you, and he can force you to serve him. . . . . All you are and all you have, including your wives and children, are his property. If my learned and very good friend, the attorney general, had this right of domination over me, I should not be very much frightened, for I should expect him to use it as moderately as any man in all the world; but still I should feel the necessity of being very discreet. He might change in a short time. The thirst for blood is an appetite which grows by what it feeds upon. We cannot know him by present appearances. Robespierre resigned a country judgeship in early life because he was too tender hearted to pronounce sentence of death upon a convicted criminal. Caligula passed for a most amiable young gentleman before he was clothed with the imperial purple, and for about eight months afterwards. It was Trajan, I think, who said that absolute power would convert any man into a wild beast, whatever was the original benevolence of his nature. If you decide that the attorney general holds in his own hands, or shares with others, the power of life and death over us all, I mean to be very cautious in my intercourse with him; and I warn you, the judges whom I am now addressing, to do likewise. Trust not to the gentleness and kindness which have always marked his behavior heretofore. Keep your distance; be careful how you approach him; for you know not at what moment or by what a trifle you may rouse the sleeping tiger. Remember the injunction of Scripture: "Go not near to the man who hath power to kill; and if thou come unto him, see that thou make no fault, lest he take away thy life presently, for thou goest among snares, and walkest upon the battlements of the city."

The right of the executive government to kill and imprison citizens for political offenses has not been practically claimed in this country except in cases where commissioned officers of the army were the instruments used. Why should it be confined to them? Why should not naval officers be permitted to share in

it? What is the reason that common soldiers and seamen are excluded from all participation in the business? No law has bestowed the right upon army officers more than upon other persons. If men are to be hung up without that legal trial which the constitution guaranties to them, why not employ commissions of clergymen, merchants, manufacturers, horse dealers, butchers, or drovers to do it? It will not be pretended that military men are better qualified to decide questions of fact or law than other classes of people; for it is known, on the contrary, that they are, as a general rule, least of all fitted to perform the duties that belong to a judge. The attorney general thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: that the duty of the commander in chief is to kill, and, unless he has this bureau and these commissions, he must "butcher" indiscriminately, without mercy or justice. I admit that, if the commander in chief or any other officer of the government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the constitution, he will see at once that all the executive and military officers are completely relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury.

You cannot help but see that military commissions, if suffered to go on, will be used for most pernicious purposes. I have criticised none of their past proceedings, nor made any allusion to their history in the last five years. But what can be the meaning of this 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? The counsel in this cause will not insult you by even hinting such an opinion. What righteous or just purpose, then, can they serve? None, whatever. But while they are utterly powerless to do even a shadow of good, they will be omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They will al-

ways be organized to convict, and the conviction will follow the accusation as surely as night follows the day. The government, of course, will accuse none before such a commission except those whom it predetermines to ruin and destroy. The accuser can choose the judges, and will certainly select those who are known to be the most ignorant, the most unprincipled, and the most ready to do whatever may please the power which gives them pay, promotion, and plunder. The willing witness can be found as easily as the superserviceable judge. The treacherous spy and the base informer—those loathsome wretches who do their lying by the job—will 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, will shock the world with the enormity of its crimes. Plied, as it may be, by the arts of a malignant priesthood, and urged on by the madness of a raving crowd, it will be worse than the popish plot or the French revolution,—it will be a combination of both, with Fouquier-Tinville on the bench, and Titus Oates in the witness box. You can save us from this horrible fate. You alone can "deliver us from the body of this death." To that fearful extent is the destiny of this nation in your hands!

DAVID DUDLEY FIELD.

[David Dudley Field was born in Haddam, Conn., February 13, 1805. He was educated at Williams' College, where he was graduated in 1825. He studied law in Albany, N. Y., with Harmanus Bleecker, and was admitted to the bar in New York City in 1828. He formed a partnership with Henry D. Sedgwick, and was soon in active practice. From this time until his retirement, in 1885, he was engaged in most of the celebrated cases of the time, among the most conspicuous of which was his defense of William M. Tweed. In later years his chamber practice exceeded that of any other lawyer at the New York bar. In 1839 he took up the cause of codification, which he never relinquished. He was a prominent figure in the peace conference at Washington. On the eve of the Civil War, and throughout the war, he was a staunch supporter of President Lincoln's administration. In 1873, at Brussels, he was elected president of the Association for the Reform and Codification of the Law of Nations. In 1876 he filled an unexpired term in congress, where he led the supporters of the claims of Samuel J. Tilden to the presidency. In 1889 he was president of the American Bar Association. In 1890 he presided over the peace congress in London. He died April 16, 1894, in his ninetieth year. His life has been written by his brother, Rev. Dr. Henry M. Field. A selection from his speeches and papers was published, in three volumes, by D. Appleton & Co., New York, 1884. The following argument is reproduced by permission of the publishers and Rev. Dr. Henry M. Field.]

David Dudley Field's fame as a law reformer should not be allowed to obscure his eminence as an advocate. He was an advocate first, and a law reformer afterwards; and throughout the period of his herculean efforts in the cause of codification he was a commanding figure at the bar. The fifty volumes of briefs and arguments which he bequeathed to the New York state library indicate a volume of professional work which it is impossible to review within reasonable limits. But justice cannot be done to his career at the bar without particular mention of his efforts in a series of constitutional cases of momentous importance to our republican institutions. At the close of the Civil War there was imminent danger that our institutions would be permanently wrenched from their moorings. In the stress of the actual conflict, many acts became necessary and proper which such a con-

vulsion alone could justify. If the constitution was still to be our guide, it became necessary, with the return of peace, that the victors should return to the ways of peace. This issue was sharply defined in the great case of Milligan, involving the scope and application of martial law, in which Field made one of his ablest arguments. In the Test Oath cases he was again successful in bringing the citizen's means of subsistence, as well as his life and liberty, within the protection of the fundamental law. The two subsequent cases of McCardle and Cruikshank, involving the constitutionality of the methods employed to reorganize the government of the rebellious states, presented issues of hardly less importance. Field's arguments in these cases are monuments of legal learning, and veritable mines of political philosophy. These cases enlisted his strongest convictions, as well as his professional aid. While a vigorous opponent of secession, he was a pronounced Democrat of the old school. He held to the ideal, as he expressed it, of "a self-balanced and self-governed state, where every man stands erect in the fullness of his rights and the pride of his manhood, neither cringing nor overbearing, owing no allegiance but to duty, claiming none but from the heart, filling every service and exercising every right of the citizen; a government founded, not on the traditions of remote ages, not on usurpation, not on conquest, but on things older and firmer than all,—the equality and brotherhood of men."

Field's method of argument was close and technical. He seldom dwelt at length upon those general considerations which furnish such scope to an advocate like Jeremiah S. Black. He was simply a clear, vigorous, and unconventional speaker, whose force and tenacity commanded respect. He brought to his work the most careful preparation, and his singular precision of language appeals strongly to the professional mind. A characteristic specimen may be found in his able and ingenious argument in the case of State of New York v. State of Louisiana, in support of the jurisdiction of the federal courts to enforce payment of repudiated state bonds. His brief in the Tweed case, in the New York court of appeals, is one of the most conspicuous illustrations of his learning.

As a reformer, Field's fame is limited neither to one profession nor to one country. His efforts in behalf of codification began as early as 1839 with his well-known letter to Senator Verplanck. In 1848 he secured the adoption of the first installment of his work,—the Code of Civil Procedure. The Code of Criminal Procedure was adopted in 1881, and this was followed, in

1882, by the Penal Code. The Civil Code, as prepared by Field, has not yet been adopted in New York. These codes, covering the whole field of substantive and adjective law, are the noblest monuments of Field's genius. Their influence upon the law has been immense. The Code of Civil Procedure has been adopted in twenty-four states; the Code of Criminal Procedure in eighteen; and the system now prevails in England, in India, and in many of the colonies. The Civil Code has been in operation in California since 1872. After the completion of his codes of national law, Field turned his attention to international law, and in 1873 presented to the British Social Science Association, at Norwich, his celebrated Draft Outlines of an International Code.

There is a radical difference of opinion among lawyers concerning the policy of codification, but its strongest opponents have freely expressed their admiration of Field's splendid display of energy in its behalf. In a letter to his brother Stephen he said: "Now that my work is finished, as I look back upon it, I am amazed at the difficulties I had to overcome, and the little encouragement and assistance I received. It seemed as if every step I took was to be impeded by something laid across my path. I was opposed in everything. My life was a continual warfare. Not only was every obstacle thrown in the way of my work, but I was attacked personally as an agitator and a visionary, in seeking to disturb long-settled usage, and thinking to reform the law, in which was embodied the wisdom of ages. . . . . One lesson, which I might perhaps have learned by reading, has been taught me by experience, and that is that he who attempts reform must rely upon himself, and that all such enterprises receive their start and impetus from one, or at most a very few, persons." Field was admirably fitted by nature to play his part. He had the combative instinct. He was tenacious, self-reliant, and absolutely fearless, and he had the physical strength that never knew fatigue.

Three volumes of collected speeches and papers attest the extent and variety of his mental activities and interests. He zealously impressed upon young lawyers the obligation of observing the highest ideals of professional duty. Section 511 of the New York Code of 1848, taken substantially from the oath prescribed for advocates by the laws of Geneva, embodies his view of the lawyer's duty:

"It is the duty of an attorney and counselor:

"(1) To support the constitution and laws of the United States, and of this state.

"(2) To maintain the respect due to the courts of justice and judicial officers.

"(3) To counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just, except the defense of a person charged with a public offense.

"(4) To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of law or fact.

"(5) To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets, of his clients.

"(6) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

"(7) Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

(8) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

In a note to this section Field added:

"The law and all its machinery are means, not ends. The purpose of their creation is justice; and he who, in his zeal for the means, forgets the end, betrays not only an unsound heart, but an unsound understanding."

Elsewhere he said:

"Those who were sycophants and cowards before kings in past days would have been sycophants and cowards before the people in ours. They who feared to defend one whom the crown hated would be afraid now to defend one whom the multitude pursued. It is only the object of the flattery or the fear that has changed. Then it was the power above them; now it is the power around them,—but power in both cases all the same. The men who to-day would howl after lawyers for defending unpopular persons would have hooted at Bunyan, and clamored for the blood of Raleigh. They would have applauded Jeffreys, clapped their hands at the sight of Scroggs, and cheered the hangman of Riego."

In a long and distinguished career he was entirely faithful to the standards which he held up to others; and he drew his own portrait when, in an address at Dalhousie University, Halifax, in 1885, he said:

"The true ideal of a lawyer is one who is master of the laws of his own country, and a student of the laws of other countries as they may serve to elucidate or improve his own. A faithful adviser, a fearless defender, prompt to make use of his learning and opportunities, not only for the protection of his own clients, but for the improvement of the laws themselves, whenever he finds them the instruments of injustice. Fidelity to his clients and to the courts is a duty on which we need not dwell, for it is constantly asserted, and never denied. But the duty to improve the system under which he lives and practices, wherever capable of improvement, is not so generally insisted upon or believed. It is supposed to be enough for a lawyer to know the laws of his own country, advise his clients aright, and deal fairly with the courts. But this, I insist, is not enough. The laws themselves are not seldom imperfect or unjust; and whenever they are so, I insist upon the duty of those who know them best, and know best how to improve them, to make their knowledge available for the public good."

The lofty aims of his life are briefly recorded on his tomb:

"He devoted his life to the reform of the law:
To codify the common law;
To simplify legal procedure;
To substitute arbitration for war;
To bring justice within the reach of all men."

ARGUMENT IN BEHALF OF WILLIAM H. McCARDLE, IN THE SUPREME COURT OF THE UNITED STATES,, 1868.

STATEMENT.

In November, 1867, William H. McCardle was arrested by authority of Gen. Ord, commanding the military district of Mississippi under the reconstruction acts, on charges of disturbing the public peace, inciting insurrection, and impeding reconstruction. The prisoner was afterwards surrendered to the United States circuit court on a writ of *habeas corpus*, but on November 25th he was remanded by that court to the custody of the military authorities. From that remanding order the prisoner appealed to the supreme court of the United States. The appeal was allowed, and the prisoner admitted to bail. The case was first heard in the supreme court on a motion to dismiss the appeal for want of jurisdiction of appeals from the judgments of inferior courts in cases of *habeas corpus*. This motion was denied.[1] Subsequently the case was elaborately argued on the merits by a brilliant array of counsel. David Dudley Field, W. L. Sharkey, Robert J. Walker, Charles O'Conor, and Jeremiah S. Black appeared for McCardle. The government was represented by Attorney General Stanberry, Mathew Hale Carpenter, and Lyman Trumbull. While the case was under advisement, congress passed an act taking away the jurisdiction of the supreme court, as defined by the act of February, 1867, in cases of *habeas corpus*, and the appeal was therefore dismissed for want of jurisdiction.[2] McCardle was thereupon discharged, and no further attempt was made to test the constitutionality of the reconstruction acts.

ARGUMENT.

May it Please the Court: If I were ambitious to connect my name with a great event in the constitutional history of my country, I should desire no better opportunity than that which this case affords. What is here transacted will remain in the memory of men long after the feet which are treading the halls of this capitol have made their last journey, and the voices now so loud are forever silent. Although the part borne by the bar in this transaction is inferior to yours, yet even they assume a portion of the responsibility, while the words that are to fall from you will stand forever in the jurisprudence of the land.

In approaching the argument of so great a cause, it is of the first importance to exclude from it every extraneous or disturbing element. We should be lifted, if we may, above the strifes and passions of the hour into a serener air, overlooking a wider horizon. With the struggle for office, with the rise or fall of

[1] 6 Wall. (U. S.) 318. [2] 7 Wall. (U. S.) 506.

parties, with the policy of president or congress, we have nothing to do. Within the walls of this chamber of justice we look only to the law and to the constitution. That, however, does not prevent our taking care that the independence of the bench and of the bar be not menaced, or, if that happen, that the menace be repelled. I say this the rather because one of the gentlemen who argued against us saw fit to declare that it was the duty of counsel to admonish the court. Admonition of what? Of impeachment, because you differ from congress upon a constitutional question; of packing the court at some future time; of enactment that two-thirds or three-fourths of the whole shall be necessary to decide, or the exclusion of the court from its chamber? Admonition from whom? We know that the president has none to give; he disclaims it. Admonition from congress? I have the highest respect for the members who perform the function of legislation for this country, but they are representatives, all of them, of states or districts. And when I reflect that from the great states of New York, New Jersey, Pennsylvania, Ohio, and California they represent but a minority of the people, and that from ten states there are no representatives in either house; and when I reflect, further, that this legislative department for nearly two years submitted to the suspension of the *habeas corpus* by the executive alone; that afterwards, when it passed an act on the subject, it suffered the secretaries of state and war to disregard and disobey its injunctions; that it enacted, besides, "that any order of the president, or under his authority, made at any time during the existence of the present Rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done, under and by virtue of such order,"—a law which has scarce a parallel in history, save that of Denmark two centuries ago, which made a formal surrender to the crown of all right and function of government,—when I reflect on these things, the admonition, even were it otherwise proper, which it is not, appears to me shorn of all its force. As a pendant to the admonition we are told that this court is not a co-ordinate department of the government. Not a co-ordinate department? Is it meant that there is no department co-ordinate with congress? This is the first time when it has been suggested here that the judicial department is not co-ordinate with either of the others. And certain I am that in the great convention, where sat the Conscript Fathers who made this constitution, such an idea never entered; for I find

that at the beginning, for the original plan, it was resolved, as the first resolution of the convention, that "it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary." Turning to the comments of the founders of the government, I find in the "Federalist," the forty-eighth and fifty-first numbers, this remarkable exposition by Mr. Madison, written as if in the spirit of prophecy:

"I shall undertake in the next place to show that, unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained. . . . . It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. . . . . The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . . In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power, and where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes,—it is against the enterprising ambition of this department that the people ought to indulge all their jealousy, and exhaust all their precautions. . . . . To what expedient, then, shall we finally resort for maintaining in practice the necessary partition of power among the several departments as laid down in the constitution? The only answer that can be given is that, as all these exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . ."

Let me now turn to the case before the court. The appellant, McCardle, a citizen of Mississippi, was there arrested in October, 1867, and brought before a military commission, which assumed to act under the authority of the United States, to be tried for publishing in a newspaper, of which he is editor, criticisms upon military officers, and advice to the electors not to vote, or how to vote upon public questions. This citizen was not in the army or navy, or connected with the military service, nor impressed with a military character; and the question is whether he was rightfully brought before that commission to answer for that act. In other words, according to the constitution and laws of this country, could a military commission, sitting in Mississippi, under federal authority, bring to trial and judgment a civilian of that state for words published concerning federal military officers and the duty of the electors? The words may have been coarse and intemperate. That does not enter into the question. But it may be

observed, in passing, that they were not coarser or more intemperate than other words daily uttered concerning the highest civil officers of the country,—the president, the judges of this court, and members of congress,—not only by the public press, but in public bodies which call themselves respectable.

The act of this military commission is defended in this court by counsel deputed by the secretary of war. The defense rests upon certain acts of congress, commonly known as the "Military Reconstruction Acts." And the point to be decided is, therefore, whether these acts are or are not reconcilable with the supreme law of this land. If they are, our great forefathers made a charter of government, intended to last for all generations, of such a character that, within eighty years from its adoption, that federal body to which the states, originally sovereign and independent, surrendered a portion of their power, is able to take upon itself the whole government of a state, and govern it by the army alone. Such is the question which, in the last resort, is brought before you, the supreme judges of the land. There are three of these military reconstruction acts,—one passed March 2, 1867; the second, a supplementary act, passed March 23, 1867; and a third, a further supplementary act, passed July 19, 1867. The first begins in this manner:

"Whereas, 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 whereas, it is necessary that peace and good order should be enforced in said states until loyal and republican state governments can be legally established: Therefore

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that said rebel states shall be divided into military districts, and made subject to the military authority of the United States as hereinafter provided."

After providing for the assignment of an officer of the army to the command of each district, the act proceeds, in the third section, thus:

"And be it further enacted, that it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of and to try offenders. . . . He shall have power to organize military commissions or tribunals for that purpose; and all interference under color of state authority with the exercise of military authority under this act shall be null and void."

The supplementary act of March 23, 1867, is not material to

the present inquiry. The first, second, and tenth sections of the supplementary act of July 19, 1867, are as follows:

"Section 1. Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled 'An act to provide for the more efficient government of the rebel states,' and of an act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas were not legal state governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of congress.

"Sec. 2. And be it further enacted, that the commander of any district named in said act shall have power, subject to the disapproval of the general of the army of the United States, and to have effect till disapproved, whenever, in the opinion of such commander, the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district, under any power, election, appointment, or authority derived from, or granted by, or claimed under, any so-called state, or the government thereof, or any municipal or other division thereof; and, upon such suspension or removal, such commander, subject to the disapproval of the general as aforesaid, shall have power to provide, from time to time, for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise."

"Sec. 10. And be it further enacted, that no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States."

The first and principal question hinges on the preamble to the original act, and the enactments which I have just quoted. There is the preamble, and here is the conclusion. I deny both. I deny that the preamble is true in a constitutional sense, or as a justification for assuming the government of a state; and I deny that, if the preamble were true in every one of its parts, it would justify this military government. The propositions advanced against us are, in short, the preamble is true, and the enactments are justified by the preamble. We dispute both propositions. We say that the preamble is not true, but, if it were, that the conclusion would not follow. It seems most convenient to reverse the order of the propositions, and to discuss the latter first; for, if the conclusion does not follow from the premises, the court need hardly trouble itself about them. I shall, however, not only re-

sist the conclusion, but, when I have done that, I shall examine and disprove the premises.

Let me first ask attention to the proposition that, because "no legal state government, or adequate protection for life or property, now exists" in the state of Mississippi, therefore that state can be placed by congress under absolute and universal martial rule. Where is the authority of the government of the nation for taking upon itself the government of a state, however disordered and anarchical, and carrying on that government by the soldiery? We know that whatever power is possessed by congress, or any other department of the federal government, is contained in a written constitution. Within its few pages are comprised, either in express language or by necessary intendment, every power which it is possible for the federal authorities of any kind to exercise under any circumstances. Show me then, I say, the power to erect this military government. You cannot find it expressed in any one of the eighteen subdivisions of the eighth section of the first article,—that section which contains the enumeration of the powers of congress. If it is implied in any of them, tell me in which one. I cannot find it.

Turn, then, to the fourth section of the fourth article, that which declares that "the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or the executive when the legislature cannot be convened, against domestic violence." Is a military government here sanctioned? Certainly it is not expressed. Is it implied? Supposing, for the sake of the argument, that the United States, uninvited by its legislature or executive, can go into a state for the purpose of repressing disorder or violence, or of overthrowing an existing state government on the ground that it is not republican, I deny that they can introduce a military government as the means to such an end. To avoid misapprehension, I carefully distinguish between the use of military power in aid of the civil, subordinate to it, and military government. The two systems are opposed to each other. In one case the civil power governs; in the other, the military. In one the military power is the servant of the civil; in the other, it is the master. My proposition is that a military government cannot be set up in the United States for any of the purposes mentioned; and the reason is this: military government is prohibited by the constitution. Not disputing the proposition that congress may pass all laws necessary or proper for carrying into effect any of the express powers conferred upon

any department of the government, and that congress is, in general, the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation: that is, that the means must not be such as are prohibited by other parts of the constitution. A lawful end—an end expressly authorized by the constitution—cannot be obtained by prohibited means. This proposition should seem to be beyond dispute. Let us devote a few moments to its examination. The framers of the government could not foresee all the exigencies which might arise in the future, and therefore, after expressing the great ends for which the government was formed, and the powers conferred upon it, they meant to leave the choice of the means generally to the discretion of congress; but fearing that, in seasons of excitement and peril, measures might be adopted not compatible with civil liberty, or consistent with the rights of the states or of the people, various express prohibitions were inserted in the original instrument, and their number was greatly increased by the subsequent amendments. Thus, in the ninth section of the first article, the one immediately following the list of granted powers is a series of prohibitions, seven in number, and among them that relating to the suspension of the privilege of *habeas corpus,* prohibiting it "unless when, in cases of rebellion or invasion, the public safety may require it," and another relating to bills of attainder and *ex post facto* laws, prohibiting them altogether. Stopping for a moment to consider these clauses of the original instrument before going into the amendments, we see clearly that, in the choice of means for carrying into execution any of its powers, congress could not pass an act of attainder, or an *ex post facto* law, or, except in cases of rebellion or invasion, suspend the privilege of *habeas corpus,* however great might be the exigency or the peril, and though not only congress, but the great majority of the country, should think these means the most appropriate, the most sure, and the most speedy for meeting the exigency or avoiding the peril.

Passing, then, to the amendments, we find eleven articles, every one of which contains a prohibition of the use of particular means to obtain a permitted end. If the end be not permitted, the prohibition is unnecessary. It is only when the end is lawful, and there is a choice of means, that the prohibition becomes effective. The manifest design was to prohibit the particular means enumerated in the amendments, however desirable might be the end. Among these prohibitions are the following: That congress cannot abridge the freedom of speech or of the press; cannot infringe the right of the people to keep and bear arms; cannot subject any

person not in the military service to answer for infamous crime, but upon the previous action of a grand jury; cannot bring an accused person to trial but by a jury; and cannot deprive any person of life, liberty, or property without due process of law. Therefore, in the choice of means for obtaining an end, however good, congress cannot authorize the trial of any person, not impressed with a military character, for any infamous crime whatever, except by means of a grand jury first accusing, and a trial jury afterwards deciding the accusation. This prohibition is fatal to the military government of civilians, wherever, whenever, and under whatever circumstances attempted. Such a government cannot exist without military courts, military arrests, and military trials. The military government set up in Mississippi could not exist a day without them. Thence it follows that, even if congress had authority to take upon itself the government of a state, this government could not be a military one; and for this reason, if there were no other, the whole scheme of these military reconstruction statutes fails, and the statutes themselves are unconstitutional and void. If the statutes are void, all acts done under them are illegal. To illustrate, suppose there were no legal state government in Mississippi, and no adequate protection for life or property,—that the state were utterly disorganized. Could congress, for those reasons, pass an act of attainder? Is there any lawyer in this country who will stake his reputation in asserting it? Let us put the strongest possible case. Suppose that Jefferson Davis, the great leader of the Rebellion, were in Mississippi to-day, creating anarchy and opposing the reconstruction of the South, so that, unless he were got out of the way, there could be no reconstruction of the state. I ask whether any lawyer will say that congress could pass an act of this tenor, reciting that, "Whereas there is no state government in Mississippi, and total disorganization prevails; and whereas the continuance of this Union depends upon the reconstruction of the state: Therefore be it enacted, that Jefferson Davis be attainted, and that the marshal be directed to take him forthwith and execute him"? I suppose a case as strong as you may choose to put, and I defy any man to show that congress has the power to pass such an act. Why not? Because our fathers, jealous of authority, knowing from their own experience and from the history of the world that power is liable to be abused, and that in the excitement of party, in the storm of war, the active departments of the government, congress, or the president might be tempted to use means dangerous to freedom, have provided these safeguards, declaring that under no

circumstances and for no end, however desirable, shall any such means be adopted.

It will be observed that I have argued thus far without referring to the case of Milligan, decided by this court more than a year ago. I might have saved myself labor by citing that case in the beginning. But if I have stated the argument in part anew, I nevertheless rely upon the authority of that great judgment,—a judgment which has given the court a new title to the respect of the world, and which will stand forever as one of the bulwarks of constitutional freedom. We may not even yet know how much we owe to the court for that decision. There was danger that the public conscience would become debauched by the spectacle of irregular and usurped power going on without punishment or rebuke. Some persons had come to believe that war, even as to noncombatants, overturned the institutions of peace. Many were disposed to palliate the wrong, if they could not justify it. A larger number had ceased to consider these usurpations, as they were in fact, great crimes. All this is happily changed. Your judgment recalled the people to a sense of the crimes which had been committed against them in the name of loyalty, and to the necessity of preserving at all times intact the defenses of constitutional liberty. Men no longer think that what is called "martial law" can be established by executive power, or applied to civil life. We agree with Goldwin Smith that, "of that phrase, 'martial law,' absurd and self-contradictory as it is, each part has a meaning. The term 'martial' suspends the right of citizens to legal trial; the term 'law' suspends the claim of an enemy to quarter, and the other rights of civilized war. The whole compound is the fiend's charter, and the public man who connives at its introduction—who fails in his day and in his place to resist it at whatever cost or hazard to himself—is a traitor to civilization and humanity, and, though official morality may applaud him at the time, his name will stand in history accursed and infamous forever." It is true that the judgment in Milligan's case did not in terms embrace the rebel states, for the discussions at the bar, as well as the opinions from the bench, appear to have been carefully guarded from their disturbing influence; but it is nevertheless to be observed that the principles declared are universal in their application. Four propositions were decided applicable to the present case. One was that the judges will of themselves take notice that, where the courts are open, there is peace in judgment of law. Another, that the guaranties in the

constitution of trial by jury, *habeas corpus,* etc., were made "for a state of war as well as a state of peace, and are equally binding upon rulers and people at all times and under all circumstances,"—a sentence which deserves to be written in letters of gold, and placed in the chambers of justice, as sentences of *Magna Charta* are written in the judicial halls of England. A third was that a civilian could not be subjected to military trial; and a fourth, that "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.*" I repeat, therefore, that, if it were conceded that congress could, in some possible circumstances, take upon itself the government of a state, it is certain that it could not govern by the army.

Before I proceed from this part of my argument to the next, which is to attack the premises upon which this military legislation is founded, I will make a short digression to consider the objections which have been urged by the learned counsel who last addressed you against the jurisdiction of the circuit court. These objections are very brief, and can be very briefly answered. In fact, they have been answered, as I think, in the opinion pronounced by the chief justice a few days ago, upon the motion to dismiss, in which he said, with reference to the circuit courts, in his own emphatic language, that it was impossible to widen their jurisdiction. The objections are, first, that the act of March 2, 1867, under which the application for discharge was made to the circuit court, does not apply to any case to which the fourteenth section of the judiciary act of 1789 applies; and, second, that it does not apply to this case, because the offense charged against McCardle is a military one. The first objection arises out of a misconstruction of the act of 1867. The judiciary act of 1789 authorized the writ of *habeas corpus* in favor of any person restrained of his liberty under the authority of the United States; the act of 1867 authorizes it in favor of any person restrained of his liberty in violation of the constitution or laws of the United States. Here, it is quite true, both conditions exist. McCardle is restrained of his liberty under the authority of the United States, and he is restrained in violation of the constitution. But, says my learned friend, because the act of 1867 declares that the power which it gives is "in addition to the authority already conferred by law," therefore, if the circuit court could have issued the writ under the act of 1789, it could not issue it under the act

of 1867. Is not this, however, mistaking the form for the substance, and confounding the means with the end? The design of both acts is to release from unlawful custody; not to ordain the useless ceremony of issuing writs. The process might undoubtedly be issued in McCardle's case under the old law, but it would be ineffectual. It may also be issued under the new law, and will then be effectual. He is restrained of his liberty under the authority of the United States, but the restraint is also in violation of the constitution of the United States. Hence his right to discharge, and to the writ as a means to an end.

But, says the counsel, his was a military offense, and a military offense was not within the act. A military offense! The statute says: "It shall be the duty of each officer, assigned as aforesaid, to protect all persons in their rights of person or property; to suppress insurrection, disorder, and violence; to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of and try offenders. He shall have power to organize military commissions or tribunals for that purpose,"—and therefore, argues my learned friend, every case which can be brought before a military commission is a military offense. Then all crimes are military offenses, because all criminals can be brought indiscriminately before "civil tribunals" or "military commissions." Even though an act be an offense against the penal code of Mississippi or of the United States, the offender can be brought before a military commission and tried by military rules. I have a great respect for the learned counsel, but really I cannot argue this point. A military offense is one committed by a military man, or which in some way affects the government of military men. For these reasons I submit to you, as beyond dispute, that the circuit court had jurisdiction to hear McCardle's petition for a discharge, and that his case is rightfully here on appeal from its decision. It is said, I know, that he is not accused of an infamous crime, and therefore that he is not within the purview of the prohibitions which I have mentioned. To this I answer, first, that if the offense with which he is charged be not infamous, he is still within all the prohibitions, except that contained in the fifth amendment; but, secondly, that he is accused of an infamous offense, because he can be subjected to infamous punishment. Under these reconstruction acts he can even be hanged by sentence of the military commission. There is no limit to its authority. He is therefore on trial for a capital crime. Besides,

under the act of congress of July 17, 1862, inciting insurrection is made punishable by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars. It is said again that Mississippi is not a state of the Union, and for that reason the prohibitions do not apply. Mississippi not a state? I shall discuss that question by and by. But granting now, for the sake of the argument, that it is not a state, it is yet within the United States, and this protecting power of the constitution covers every foot of soil over which the flag of the country floats, from the eastern to the western ocean. It is felt in Massachusetts Bay and on the borders of the lakes; it is borne on the winds that sweep the western prairies; you stand on the pinnacle of the Rocky Mountains, and still it hangs above you; it travels with you through the passes of the Sierra Nevada; it watches beside you in California; and, if you go thence northward toward the pole, to far Alaska, there, even there, it flashes over you like the northern light. [In support of this view, Mr. Field quoted from the language of the judges participating in the decision of the case of Dred Scott v. Sandford, 19 How. 449.]

I have, therefore, the opinion of every member of the court against the existence of the power upon which the whole argument of the defendants rests. Congress, though it had the right to do in Mississippi everything that it could do if the country had been gained from Spain yesterday, or from the most unlimited government on earth, yet could not govern it by the army. And, as I have already said, even in the new territory, just purchased from that vast empire which has no constitution, but an autocrat legislating according to his will alone, and we have succeeded that government,—even in that territory, if there be any vitality in our constitution, congress cannot pass a law making the people subject to a military government. If that be so, is there not an end to this argument? A parallel argument is contained in the case of Houston v. Moore,[1] a case to which the gentlemen referred. There the question was whether a citizen of Pennsylvania, being ordered to rendezvous in pursuance of the direction of the president, and by order of the governor, refusing to attend, could be brought before a court-martial. The court-martial was held under the authority of the state of Pennsylvania; and though the judgment is not relevant to this case, I refer to it for the purpose of showing that, in the dissenting opinion of Mr. Justice Story, he declared that, if a person summoned

[1] 5 Wheat. 62.

to the rendezvous could not be considered as in the service of the United States, he could not be tried except by a jury:

"The fourth section of the act of 1795 makes the militia employed in the service of the United States subject to the rules and regulations of war; and those include capital punishment by court-martial. Yet one of the amendments (article 5) to the constitution prohibits such punishment, 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 short, there does not appear to be a dissenting opinion anywhere from the doctrine that a trial for crime of a person in civil life can only be by jury, and, when it is for an infamous crime, it can only be on the accusation of a grand jury. That binds the United States and all its departments conjoined; for let it be understood that the government of the United States means all the departments, and not one. Congress is not the government, any more than this court; but neither the whole government of the United States, nor any department of it, can, by any law or act possible under the constitution, subject a single citizen not in the military service, however high or however low, of whatever race or previous condition, to a trial for crime except by a jury of his peers. That being so, the whole scheme of the reconstruction acts falls to the ground. Here is a military government, resting upon military courts, and enforced by military executions. Congress has not chosen to intervene except by the army; its judges are men with epaulets; its sheriffs are soldiers with bayonets; and its scaffold is the greensward, with a platoon paraded.

This is the first part of my argument, and here, as I think, the whole argument might end; for if military government be a thing prohibited by the constitution, we need go no further, nor trouble ourselves to inquire whether congress has judged rightly in its reasons for intervention. The question is whether McCardle, being a citizen of Mississippi, under the dominion of the United States, regarding Mississippi either as a state or as a territory, can be subjected, under the authority of the government of the United States, to a military trial, which involves his imprisonment or his life, no matter under what pretense or for what end. It is the particular kind of intervention—that is to say, intervention by military power—that I have been objecting to; and if I have shown that to be inadmissible and unconstitutional, it matters little whether the reasons for intervention put forth in the preamble be sufficient or insufficient, or whether any other reasons have been or could be advanced for the interference of congress in the government of Mississippi.

But I will now proceed a step further; and supposing, for the sake of the argument, that a military government is not a prohibited, but a rightful, constitutional means of intervention, I submit that the preamble furnishes no reason for any kind of intervention whatever, and this for two reasons,—first, because it is not true in a constitutional sense; and, second, because, if true, it is not a constitutional reason for intervention. It is not true in a constitutional sense. Of course, I am not going into any question of personal veracity, nor into questions of fact, except such as the court may take notice of judicially. The preamble asserts as facts, first, that there is no legal state government in Mississippi, and, second, that there is no adequate protection for life or property. These two asserted facts are separable and separately stated. There may be a legal state government, though that government may not fulfill, and may not be able to fulfill, all its duties for the protection of life and property. It is most convenient to consider these assertions separately. Was there, or was there not, on the 2d of March, 1867, a legal state government in Mississippi? This inquiry involves another, antecedent to everything else, which is whether the declaration of congress is conclusive upon this court, or, in other words, whether you are at liberty, after this declaration, to make for yourselves inquiry on the subject, or whether you must accept the declaration as conclusive, whatever may be your own knowledge or information. This question may perhaps best be answered by supposing a case. Suppose an act of congress passed to-morrow, with a similar preamble, concerning the state of Massachusetts. Would you accept it as absolute verity? If it declared that, whereas no legal state government exists in Massachusetts, therefore it be made a military district, and subject to the military power of the United States, just as Mississippi is made subject by the act in question, and the commanding general of the district were to seize the ancient state house and Faneuil Hall, and the editors of the Boston newspapers were to be arrested and tried by military commissions for protesting against these violations, would you be obliged to hold that Massachusetts has no legal state government? Would you tell her that, though you do not see why she has not a legal state government, congress has decided otherwise, and that is sufficient for you? I am supposing an extreme case; but an extreme case is a good test of a universal principle. If, as a principle universal in its application, the declaration of congress is conclusive upon the other departments of the government, then,

in the case supposed of Massachusetts, it would prevail. If the principle is not universal, then there are cases in which this court could inquire for itself, notwithstanding the declaration of congress.

Is it true that, under this government of ours, it is competent for congress to declare that a state in this Union—the state of Massachusetts—has not a legal government, and therefore can be governed as a territory? I deny it altogether. Where is the authority of congress to declare whether a state has a legal or illegal government? I am not now discussing the question whether it is or is not republican. I repeat, where does congress get the power to declare whether or not a state has a legal government? Take my state. Has congress the power to say she has not a legal government? What do you mean by "legal"? Legal according to what law,—federal law or state law,—military law or civil law? For "legal" means according to some law. Mr. Justice Nelson knows that the constitution of New York has been changed several times, he himself having been a member of two of the constitutional conventions that made those changes; and he will remember that the opinion of the supreme court of the state was taken on the question whether the convention to frame the present constitution was constitutionally called, and they decided it was not, because the convention was not called in the mode provided by the former constitution of 1821.

Now, I ask my friends,—any of them,—has congress the power to declare that my state has not a legal state government? Everybody will say no. Congress has no more power to come into New York, and tell us that we have framed a constitution contrary to our previous constitution, than to declare that the first government of New York was a void government; and if they should presume to come to us in that way, I think they will get an answer which will be quite sufficient. Let me tell them that New York chooses to frame her government in her own way, and will alter it as she pleases, subject only to the provision that it shall not be anti-republican in form; and, until that question arises, the congress of the United States can have nothing to do with us, any more than we can have to do with them. The true rule I apprehend to be this: The court will take judicial notice of the fact of an existing government in every state of the Union; such a government will be presumed to be legal till it is shown to be illegal; the declaration of congress may be one of the sources of evidence which enter into the case, but not the conclusive or the only one. If there be two rival governments in a state, congress

may have the right to decide between them, and certainly must decide which is to send representatives to congress, and that decision so far will be binding; but that is a very different thing from asserting that no government whatever exists, or that an existing government is *de facto,* and not *de jure.* The authority to declare a fact is only coextensive with the right to decide it; or, in other words, the declaration has no force, except as a decision. This, therefore, is the question: Has congress authority to decide that the existing government of Massachusetts, or of any other state, is not a legal government? To this there should seem to be but one answer. No power is given congress to interfere with the government of the states, any more than power is given the states to interfere with the government of the United States, except in this one respect: that the United States shall guaranty to each state a republican form of government. But this preamble does not deny that Mississippi has a government, republican in form. That she has a government is stated more than once in these acts of congress. It is there called an existing government; and, while it is pronounced not to be legal, it is nowhere pronounced not to be republican.

Having shown, as I trust, that the declaration of congress is not conclusive upon this court in respect to the existence of a legal state government, little need be said respecting the conclusiveness of the declaration that there is no adequate protection for life or property. It is not for congress to decide whether New York fulfills her duty to her citizens of protection for their lives and property; and therefore the declaration of congress on that subject, in respect to New York or Mississippi, has no force whatever.

Now, laying aside the declaration of congress contained in this preamble as of no constitutional force, though entitled to great respect because coming from one of the departments of the government,—laying that aside as not authoritative, I ask you to consider for yourselves whether or not the government of Mississippi was a legal government on the 2d of March, 1867. First, let us see what evidence these reconstruction acts themselves furnish. Though the original act declares that there is no legal state government in Mississippi, yet it provides, in the third section, that the military commander may allow the local civil tribunals to take effect. There is a government, then, as matter of fact. "And all interference, under color of state authority, with the exercise of military authority under this act, shall be null and

void." There is some state authority, then. And in another section it is provided that the citizens may have provisional governments only until they shall be entitled to representation. There is, then, a provisional government. The supplementary act of July 19, 1867, is still more explicit. The first section of that act speaks of "the governments then existing in the rebel states of Virginia, North Carolina," etc., as "not legal state governments." They were existing governments, be it understood. There is no doubt about that. They were *de facto* governments of the rebel states. The state of Mississippi had at the time a *de facto* government, which was exercising all the functions of government. Here,—and this is additional and conclusive evidence,—here are its statutes, and here are its reports. This [holding up the volume] is but one of the two volumes of the reports of the highest court of Mississippi during the time of the Rebellion, excepting the time when the state was occupied by the federal army, which forbade the courts to assemble; and it may not be out of place to say that in this, the last volume, is a decision upon the question whether they have a legal government,—that is to say, whether the government adopted under the provisional governor is a legal state government. Now if, according to the doctrine of the case of Luther v. Borden, you are to follow the decisions of the highest court in the state as to the legality of their own government, then the decision of the highest court in Mississippi is conclusive upon the action of this court. Indeed, it is impossible to shut our eyes to the fact that, however censurable and criminal may have been the conduct of the legislatures of the rebel states during the Rebellion, there were, nevertheless, established governments during all the time, carrying on their operations with regularity.

Let me turn aside for a moment to consider this case of Luther v. Borden, about which so much has been said, to show that, so far from being an authority against us, it is an authority in our favor. The contest in that case was between two rival parties, each claiming to have the lawful government of the state. The contesting party claimed that its government had been adopted by the vote of the whole people, exercising for the first time the elective franchise; the party in possession, having admitted to the exercise of the franchise only a part of the people, rested upon that part for its authority; and the judges were asked to decide that the government of the contestants was the true one, on the ground that it had received the sanction of the whole people. By

whom was the martial law mentioned in that case established? By the state of Rhode Island. Under the charter of Charles II., the legislature of that state had no limitation whatever. It could exercise its powers in a legislative, executive and judicial capacity untrammeled, and the case has no application to the question whether congress can establish martial law. The court, by Chief Justice Taney, decided that "the question which of the governments was the legitimate one, viz., the charter government or the government established by the voluntary convention, had not heretofore been regarded as a judicial one in any of the courts"; that "the courts of Rhode Island had decided in favor of the validity of the charter government, and the court of the United States adopted and followed the decisions of the state courts in questions which concern merely the constitution and laws of the state." Here is language so very pertinent to the present inquiry that I will ask your attention to it particularly: "The fourth section of the fourth article of the constitution," says the chief justice, "provides that the United States shall guaranty to every state in the Union a republican form of government, and shall protect each of them against invasion, and, on the application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence. Under this article of the constitution it rests with congress to decide what government is the established one in a state. For, as the United States guaranty to each state a republican government, congress must necessarily decide what government is established in the state before it can determine whether it is republican or not." So that all that the government of the United States, according to this case, can decide is, as between two contesting governments, which is the established one. And again: "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every state resides in the people of the state, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power; and when that power has decided, the courts are bound to take notice of its decision, and to follow it." The congress is to decide what? Not that the state has not a legal state government, but to decide which is the established government of the state. It must decide what government is established, before it can decide whether it is republican or not. Now, see the argument that is pressed here:

If congress goes on with its reconstruction scheme, and there is set up another government in Mississippi, it can decide between the new government and the present one; therefore congress can set up the new government. Was there ever a claim of power more unfounded? Because you have the right to decide between contesting governments, therefore, when there is only one existing, you can set up another to contest with the first, and decide between the two! That is the whole of the argument. Whether there is "adequate protection for life and property" in the state of Mississippi I do not know, as I do not know what is meant by adequate protection. According to European ideas, there is not "adequate protection for life or property" in some of the most loyal states of this Union. Should we, ourselves, say that there was adequate protection for life or property in the anti-rent districts of New York for the ten years between 1840 and 1850? Is there now adequate protection for life or property in the mining districts of Pennsylvania? How is it in the new settlements? Is it meant by adequate protection that crime is punished with celerity, certainty, firmness, and impartiality? If that be the measure of adequate protection, and congress may interfere for the want of it, I fear they will have their hands full.

Having thus shown that neither part of the preamble is true in a constitutional sense, I add that, if both parts of it were true, they would not furnish a constitutional reason for assuming, even by civil officers of the United States, the civil administration of Mississippi. What I have to say in support of this negative proposition will be given more at length hereafter, as I proceed with my argument, and I will content myself here with observing that the states are, both by the letter and the spirit of the federal compact, exempt from all federal control or interference, except in pursuance of the constitution, and that nowhere, expressly or by implication, is power given to assume the government of a state, for either or both of the causes set forth in this preamble.

Thus far, if the court please, I have gone on the path which I had marked out for myself at the commencement, in considering whether the preamble of the original military reconstruction act is true in a constitutional sense, and whether, if it be true, it justifies the act. And I flatter myself that I have shown that, whether the preamble be true or not, it does not justify this intervention for the government of Mississippi by military power; and, in the second place, going back to the preamble, that it is not true in a constitutional sense, and, if true, would not justify assumption of

the civil administration. But my learned friends go further, and suggest other reasons, as they suppose, for these military governments. Now, I ask, in the first place, is the citizen permitted to go beyond an act of congress to find reasons for the act? Congress has said in the act itself that, whereas no legal state governments exist, and there is no adequate protection for life or property, therefore be it enacted, etc. Confining myself to this, I say that, standing alone, the preamble does not justify this act. My learned friends have departed from this preamble, and say, virtually, that it does not state half the case; that there are other reasons which justify the act. To these reasons I must ask your attention. First, I will consider some of those which are given in debate, though not specially urged by the other side. I purpose, therefore, to consider the reasons generally given for these military acts, and then the reasons given by the counsel who have argued the case. Four reasons have been most insisted upon in political debate,—one, that congress is the sole judge of what is a republican form of government, and when it adjudges the government of a state not to be republican, it may force a military government upon it; the second, that the rebel states were conquered, and, being so, may be governed by the same military force which conquered them, so long as congress sees fit to continue such government; the third, that, by the Rebellion, the government and people of the southern states forfeited all their rights; and the fourth, that congress may now govern the rebel states, in the exercise of belligerent rights. Each of these reasons will be considered by itself, in the order in which I have stated them.

First. The United States are to guaranty to each state a republican form of government. What does this mean? To guaranty, in its ordinary sense, means to warrant something already existing,—the performance of an existing contract; the continuance of an existing state of things. The first treaty made between this government and France, negotiated by Franklin, provided that the United States should guaranty to France the possession of her West India Islands, and that France should guaranty to us the possession of our independence. The guaranty of the constitution here is the guaranty of an existing form of republican government,—that is to say, of a form of republican government, the same being now in existence, and no more justifies the claim to intervene in the government of a state, for the purpose of reconstruction, than for the purpose of creating an emperor. Under color of this power, can the federal authorities destroy exist-

ing state authorities? Our construction is the only one compatible with the public safety. To give the federal government the unlimited power of destroying any state government upon the allegation that it is not republican is to give to the central authority a control over the local authorities greater than was ever dreamed of before, and is to make way for a consolidation fatal to the rights of the states and the liberties of the people. The history and contemporaneous exposition of this clause of the constitution will show that it has no such meaning as the other side claim for it. The subject was first brought before the convention which framed the constitution by Mr. Randolph, who proposed this form: "Resolved, that a republican government, and the territory of each state, except in the instance of a voluntary junction of government and territory, ought to be guarantied by the United States to each state."[2] Afterwards, "alterations having been made in the resolution, making it read, 'That a republican constitution, and its existing laws, ought to be guarantied to each state by the United States,' the whole was agreed to, *nem. con.*"[3] On a subsequent day, after considerable debate, Mr. Wilson moved, as a better expression of the idea, "that a republican form of government shall be guarantied to each state, and that each state shall be protected against foreign and domestic violence." This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and, on the question for agreeing to Mr. Wilson's motion, it passed, *nem. con.*[4] The language was afterwards changed to the form which it now bears in the constitution.

In the forty-third number of the "Federalist" is the following exposition, written by Mr. Hamilton:

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained.

"But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. 'As the confederate republic of Germany,' says Montesquieu, 'consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.' 'Greece was undone,' he adds, 'as soon as the King of Macedon obtained a seat among the Amphictyons.' In the latter case, no doubt, the disproportionate

[2] 2 Madison Papers, 734.
[3] 2 Madison Papers, 843.
[4] 2 Madison Papers, 1139.

force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity, only, in the constitution. But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered that, if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the states, they are guarantied by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions,—a restriction which, it is presumed, will hardly be considered as a grievance."

The purpose of this guaranty of republican government was therefore to protect the states against "aristocratic or monarchical innovations." Who would have thought that in less than eighty years this clause would be invoked as authority for forcing upon the states the most radical innovations in the opposite direction? It is not for me in this place to say whether I think these innovations good or bad, nor is my opinion of any importance. If it depended upon me, and so far as I could constitutionally act, I would make every human being equal before the law; but I would not break the constitution of my country for any innovations whatsoever. Other forms of government, where there are different orders in the state, may be kept up by a balance of power, each struggling to prevent the preponderance of the other; but a republican government in a vast country is an impossibility without a written constitution. An instrument which is not kept inviolate is so far not a constitution. The choice for us, if we are to maintain a united government in this country, is between a written constitution, sacredly kept, preserved inviolate against all attacks, and a monarchical government. History has taught us nothing if it does not teach us that we cannot maintain a consolidated government, on this continent, but by an emperor or a king, and that no other government can exist than a consolidated one, except under a written constitution. Therefore, whoever maintains the integrity of this constitution sacred and inviolable against all opposers maintains for himself and his posterity the freedom and unity of his country.

Secondly, we are told that we may govern the southern states by the right of conquest. This right of conquest is the ground upon which the first counsel placed himself. The right of war is the ground upon which the last placed himself. "We have conquered the people," says the first. "It is well for them to know what is the temper of the North," he says in conclusion. "They are conquered, and we are the conquerors, and we will give them such a government as we choose." Is this argument a sound one? How have we conquered the southern states? In the sense in which the word "conquest" is used in this argument we have conquered the rebel armies, thanks be to God, and there is not a hostile force marshaled—there is not a hostile hand raised against us—between the two oceans; but does that operate to transfer the sovereignty from the conquered to the conqueror? Is the conquered sovereign displaced, and the conquering sovereign seated in his stead? Mississippi was a sovereign before, in a qualified sense. The United States were sovereign before, in a qualified sense also. But when the United States overcame the rebel armies, did they succeed to the sovereignty of Mississippi? The suppression, by the former, of the rebel forces of the latter, was entirely consistent with the relations which previously existed between the two sovereigns; neither the war nor the victory changed the double allegiance of the citizen,—one to his state and the other to his nation.

The laws of conquest have no application to a civil war. When a rebellion is subdued, the sovereign is restored to the exercise of his ancient rights. If a county of New York is declared to be in a state of insurrection, force is applied to put the insurrection down, and, when that is done, the law resumes its sway. The legal relations of the county to the state are not permanently changed, though their operations may have been suspended for the time being. By the laws of war between sovereign and independent states, when one has taken possession of the other, the will of the conqueror becomes the law, because his only relations to the conquered states are those of conqueror and master. If, however, there were antecedent relations, which the war has not broken, they are resumed the moment the war is over. The only inquiry in the present case is whether the rebellion or the war has abolished or changed the legal relations of the state to the Union. Now, as we maintain that no act of the federal government can exclude a state from the Union, so no act of the state can withdraw it from the Union. The war found it in the Union,

subject to its laws; the war left it in the Union, subject to the same laws. In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influence of Christianity and civilization, till now it is the settled public law of the Christian and civilized world that the conquest of one nation by another makes no change in the property, or the personal rights and relations, of the conquered people. "The people change their allegiance," says Chief Justice Marshall;[5] "their relation to their ancient sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed." One change only is effected, and that is, that one sovereign takes the place of the other. In a civil war, sovereigns are not changed unless the rebellion is successful.

It is very true that the rebel states themselves renounced their allegiance to the nation, or, rather, they denied that they owed any such allegiance, and maintained that their relation to the Union was that, merely, of parties to a compact. We, however, denied their theory, and insisted that they owed allegiance which they could not renounce; and, for the support of these opposite theories, each side took up arms. Now that we have won, it is not for us to deny the cause for which we fought. We are striving to maintain the supremacy of the constitution in the southern states, not so much for their sakes as for our own. A little reflection will satisfy us that the opposite doctrine may lead to the most alarming consequences. Suppose that, in Shay's rebellion, the insurgents had got the better of the state government, and the troops of the United States, having been brought in, had suppressed the rebellion, would congress, in that event, have been justified by the constitution in imposing its own government upon Massachusetts? If the federal legislature may impose a government with one view, it may with another. It may impose one with a design to restrict the suffrage, as well as to extend it. Suppose hereafter a negro insurrection to occur in a southern state, or even a peaceable change to be made in its constitution for the purpose of excluding a majority of the whites from the government, and domestic violence and revolt thence to ensue, resulting in federal intervention and suppression. Would congress, in that event, be justified by the constitution in assuming the government of the state, and restricting the suffrage to the whites? Let me put this question: Suppose Mississippi, in a war between the United States and Great Britain, had been conquered by the latter, and then retaken by the United States.

[5] United States v. Percheman, 7 Pet. 87.

Would this government hold the state as conqueror or as federal sovereign under the constitution? Most clearly the latter. The doctrine of *postliminy* rests on that foundation.

Let us look abroad and see what crimes have been committed under the plea of conquest. Ireland is a memorable example. "To the charge of arbitrary government in Ireland," says Goldwin Smith, "Strafford pleaded that the Irish were a conquered nation. 'They were a conquered nation,' cries Pym. 'There cannot be a word more pregnant and fruitful in treason than that word is. There are few nations in the world that have not been conquered, and no doubt but the conqueror may give what law he pleases to those who are conquered; but if the succeeding acts and agreements do not limit and restrain that right, what people can be secure? England hath been conquered, and Wales hath been conquered, and, by this reason, will be in little better case than Ireland. If the king, by the right of a conqueror, gives laws to his people, shall not the people, by the same reason, be restored to the right of the conquered, to recover their liberty if they can?'" Hungary is another example. The house of Hapsburg was deposed by the estates of the kingdom. A bloody war followed, and the estates were conquered. Then ensued a strife between the emperor and his subjects, whether he was king of Hungary by the conquest, or king by the constitution, till, after long years, ending with the disastrous day of Sadowa, he was compelled to yield, and the Hungarians are now resting in the shelter of their ancient constitution. Therefore I insist that the right of conquest gives no countenance whatever to the idea that congress can take into its hands the government of Mississippi. I need not add to what I have already argued that, if congress had any such right, it could not exercise it by the military power.

The third reason given for the military government of Mississippi is that the rebel states and their people forfeited their rights by the rebellion. This is the language: "The state of Mississippi and the people of Mississippi have forfeited all their rights,—that is to say, they are outlaws." How have they forfeited all their rights? Have they forfeited them by the attempt to withdraw from the United States,—the peaceable act of secession, if there could be such a thing,—that is to say, by the mere act of renouncing their allegiance? Most certainly not. They have denied the right of the federal government to keep them in the Union; but does that result in the change of our rights? It is not so in the case of private contracts. One cannot be absolved

from a contract without the consent of the other party. Does war produce these results? When war exists, then there is a levying of war against the United States. But levying war is treason! Did they forfeit their rights by treason? Undoubtedly there is a forfeiture when there is a conviction, but not before. Though every man in Mississippi were guilty of treason, not one could be touched by an act of congress, except upon conviction, because, as we all know, congress is expressly forbidden to pass an act of attainder. There may be in Mississippi a million of people. Congress has not the power to pass an act against one of them declaring that, whereas he has been guilty of treason, he may be taken and punished without conviction. Still less can they pass an act against the whole people.

There is a fallacy in the assertion, so often made, that the rebel states and people have forfeited their rights by the rebellion. The proposition is stated in its strongest form when it is said that the war of the rebels was treason, and that traitors have no rights. But it is not true that traitors have no rights. They have all their rights until they are judicially condemned; or perhaps the better form of stating the proposition is that they are not to be accounted traitors until they are convicted of treason. The constitution has carefully defined treason to consist in levying war against the United States, or adhering to their enemies, giving them aid and comfort, and has declared that no person shall be convicted of this crime, unless on testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason nor penalty of treason until after conviction; and congress has not competency to convict, however great and manifest may be the crime.

There is another answer to the argument of forfeiture, and that is that treason is a personal crime. There can be no treason of a state, though there may be of all the persons who compose it. Whatever may have been the misconduct of the citizens of Mississippi, even though every one of them were guilty, the state—the corporate body—did not, because it could not, commit the crime of treason.

The fourth reason given for governing Mississippi by military power is belligerent right. It is said that congress may assume the government of Mississippi by virtue of this right. The first answer to that argument is this: there can be no belligerent right where there is no belligerent, and there is no belligerent, because the war is ended. There are no belligerents, because there is no *bellum*. That is the first answer. The next is that, during the

war, *flagrante bello,* it was not competent for the United States to assume the entire government of a state which they occupied with their forces. Let me ask your attention to this position for a few moments. What could the United States do by virtue of their belligerent rights? They could wage war as other wars are waged. They could ravage and kill; could fight the armies of their enemies and capture cities; could make assaults upon forts and subdue them. But could they govern? That is to say, could they take into their own hands the whole government of a state which they had succeeded in occupying with their forces? I am not asking what they could do in the act of waging war; but I am supposing that they have occupied the whole state of Mississippi, so that there is not a hostile arm lifted in the state, and that they are carrying on their hostile operations beyond the state. I deny that they have then the power to assume the government of Mississippi to themselves. What authority has an army of a sovereign, occupying its own territory, when every hostile force is subdued, to take into its own hands the government of the country by a right paramount to his antecedent right? Suppose, however, they say,—and this is the way in which the argument is put,—suppose that there is utter anarchy; suppose that, in the state of Mississippi, during the occupation of it by our armies, there is such anarchy that no law is enforced, and not a magistrate is sitting in the state. I am supposing a case which does not exist. It seems to me a very idle discussion; but my learned friends have made an argument upon it, and therefore I must notice it. I therefore ask, what may an occupying army do? The occupying army may keep the peace, and that is all. Is it to force institutions upon the country? What right has New York, I should like to know, to force its institutions upon Mississippi under any circumstance whatever? War does not give the right. What does? Is it anarchy? Then the question comes to this: Does a condition of total anarchy in one state give the other states a right to go in there and construct their government? I deny it. I am not discussing the right of revolution. I may admit that the people of nine-tenths or three-fourths of the states have the right, by an act of revolution, to invade and subdue a state, because the law of self-preservation is above all others; but that is not the question. The question here is one of constitution. I deny that, even in a condition of absolute anarchy, the state of Iowa can be forced to take the institutions of New York. The people of New York cannot go there to demand that the people of Iowa shall receive their form of municipal or state govern-

ment. It is for Iowa to determine for herself. The fundamental doctrine of our government is that the people have a right to change their own form of government as they please. That is set forth in almost every one of our state constitutions, and from that it results that no other state has a right to intervene.

But, as I said, this is, after all, but a speculative discussion. It is one that should not enter into this case at all, and one which I should not have entered upon if I had had the opinion just read by Mr. Chief Justice Nelson, where the revolutionary government of the Confederacy is said to have been a government *de facto,* with all its departments, legislative, judicial, and executive, having every function of government in full operation. If that is so, then the states that compose it had the same, and Mississippi was among the rest. They had *de facto* governments, with all their departments, and the argument from the necessity of assuming the government by reason of anarchy is one that has no foundation whatever. But one of the learned counsel says: "These *de facto* governments were not governments *de jure,* because their members had not taken the oath of allegiance to the United States." Let us look at that. I admit that they were not governments *de jure* in a federal sense, for they had renounced their allegiance. They could not send members to congress. They had legislatures not acknowledging fealty to the United States, and for that reason they could not send senators; and for a similar reason their people could not send members to the house of representatives. But is it true that, because they had thrown off their allegiance, all their acts of legislation were null? Look at Mobile. Is every act of the city council of Mobile since the war began a nullity? When did the Virginia legislature resolve not to take the oath of allegiance to the United States? How long ago? Before the war, I believe. Has not Virginia been a legal state government since that time, I ask? The obligation to take the oath is directory; that is all. If their members do not take the oath, they are none the less governments. The constitution of the United States provides that all legislative and judicial officers shall take oath to support the constitution. Now, if nullity is the consequence of not taking the oath, there has been no lawful judge upon the bench in the South since the war began, and there has been no judgment which is not a nullity from 1861 to 1864. Is that so? Is any man in his senses prepared to assert that? This should seem to be a sufficient reason; but, as the argument is much insisted on, I will follow it further. The ques-

tion of belligerency and belligerent rights received great attention in the Prize Cases, where the court laid down certain fundamental propositions. One of them, relating to the fact of civil war existing, was this: "The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.'"[6] Applying this rule to the present case, it follows that civil war can no longer be recognized as existing in Mississippi, because the courts are open. Therefore, whether, during the war, the just exercise of belligerent rights would have authorized the federal government to take into its hands the entire government of the state or not, there is no warrant for any such exercise now.

Another proposition in that case was that the courts will take judicial notice of the beginning and progress of the civil war. Of course, for the same reason, they will take judicial notice of its end. The court says: "By the constitution, congress alone has the power to declare a national or foreign war. It cannot declare war against a state, or any number of states, by virtue of any clause in the constitution. The constitution confers on the president the whole executive power. He is bound to take care that the laws be faithfully executed. 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 has no power to initiate or declare a war either against a foreign nation or a domestic state."

A further proposition of that case was that, by exercising belligerent rights, the United States did not lose those which were sovereign. If their sovereign rights remained, their duties as sovereign remained also. The exercise of belligerent rights was, in fact, for the purpose of regaining the complete enjoyment of their sovereign rights, and for no other purpose. Here is the language of the court: "The parties belligerent in a public war are independent nations; but it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other." It should not be forgotten that belligerent rights are to be exercised by the

[6] 2 Black, 667.

executive, and not by congress. In the present instance, the executive exercises, and attempts to exercise, none against the state of Mississippi, or any of her people. Indeed, he disclaims any such authority,—these military acts were passed over his veto; and if the argument from belligerency should prevail, we should have the extraordinary spectacle of the legislature exercising an executive function without the consent and against the protest of the executive.

It has been already observed that, while the war lasted, their belligerent rights did not authorize the United States to carry on the entire government of Mississippi. They might govern their own armies, and subdue the armies of the rebels. As soon as that was done, or as fast as they advanced, they could proceed to organize their own displaced government in its former estate, open the federal courts, run the federal mails, collect the federal revenue,—in short, do all that they could do before. But might they not do something more? That depends upon their rights and their duties under the constitution. This government is a limited one, and its rights and duties are defined and limited by the constitution; and if you cannot find there the warrant for its action, it cannot act at all. If a state of this Union should fall into great disorder, so that her finances should become ruinous, her treasury bankrupt, her roads be infested by robbers, property and person be insecure, with an impotent executive, a babbling legislature, and a venal judiciary, could congress step in and take the government of that state into its own hands? I can perceive no authority for their doing so, and, if authority be necessary, it must be sought by an amendment of the constitution. It is as clear as noonday that the theory of our present constitution is that the states shall organize themselves, and that congress has nothing to do with it, except that, if in such organization the states should introduce aristocratic or monarchical innovations, it might then interfere to insist upon their going back to their republican forms. But it may be asked, cannot the federal army, which goes into a state to suppress a rebellion, govern the parts into which it advances? I answer, as a similar question was answered in Milligan's case, *"Necessitas, quod cogit, defendit."* The advancing and occupying army must govern itself by the laws of war. It must keep the peace within its own lines, and for that purpose it must govern the people within them, so far, and so far only, as ordinary civil government is impossible. For example, when the city of New Orleans was taken by the federal forces, all the

federal laws applicable to the port and district went again into operation; but if there were no state officers competent to administer or execute the state laws, the commanding officer of the occupying forces must, of necessity, for the safety of his own army, as well as of the society within his lines, preserve order, and might make regulations for that purpose. This, I suppose, is the rule, and the whole of it. Even this power ceases with the necessity of its exercise. The moment the military occupation *(occupatio bellica)* ceases, that moment the right to govern, even within the narrow limits which I have explained, ceases also. Is there no period, then, after the cessation of hostilities, during which the military occupation may continue? No intermediate state between the state of war and the state of peace? No interval after hostilities, and before the re-establishment of civil government? To this question, as applicable to this case, I answer:

(1) The occupying forces must have reasonable time to retire with their war material, and, so long as they necessarily remain for that purpose, so long the reason of the rule applies, and therefore the rule itself; but they have no right to remain longer.

(2) The federal civil government is, of course, capable of being put into full vigor as soon as the rebellion is suppressed. To guard the federal property, to protect the federal officers, to assist in the execution of federal process, the troops may always remain, in peace as in war.

(3) If no state authorities whatever are left, and the people are absolutely without magistrates or officers of any kind, so that the withdrawal of the federal troops would be the signal of a general massacre or pillage, then the troops may remain, just as any other body of men may remain, in the interest of humanity, and upon principles of common or universal law, to prevent the commission of crime or violent injury to person or property. If the captain of an American frigate in a Chinese port finds a condition of anarchy and general pillage on shore, I suppose he may land the ship's company to stop the violence and rapine; but that does not imply any right in the captain to govern the town.

(4) If there be an existing state government *de facto* or *de jure*, the question cannot arise. There was such a government in Mississippi when the war closed. The retirement of the federal troops would have left the state impoverished and exhausted, no doubt, but not without a government.

If this court is not bound by the declaration of congress that there are no legal state governments in the South, no more is it

bound by the declaration of the president that there were none which I do with great diffidence, the true course at the close of when the war closed. Indeed, if I might venture the suggestion, the war was to consider the governments then in existence as governments *de facto,* which could become governments *de jure* on taking the oath of fidelity to the federal constitution. Congress would not have felt itself obliged to admit any but loyal representatives to seats. This suggestion is not important to my argument, but candor obliges me to say that I think the source of all the difficulty that has since been encountered was in the departure from the true theory of our government when the rebel army surrendered. Indeed, I cannot help thinking that the general form of capitulation arranged by General Sherman was, without reference to its details, constitutional and statesmanlike.

Having thus shown that the occupation of a state by a conquering army did not affect any such change in the rights and duties of the people as is supposed in the defendants' argument, even if the two contending parties were regarded as independent states, and the war what is called by jurists a "public war," I might add, as an additional and conclusive argument of itself, that in a civil war there can be, strictly speaking, no such occupation,—*occupatio bellica.* "In a civil war," says Phillimore, "there could be no *occupatio.*"[7] "A civil war," says Grotius,"'is not of the same kind concerning which this law of nations was instituted."[8] Halleck, in his work on "International Law,"[9] says: "In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists, who have commented on this transaction, agree that the debt was not legally discharged, first, because in a civil war there could be, properly speaking, no occupation; and, second, because it was a private and not a public debt." In a late case in North Carolina, where it was attempted to apply the principles of the *"occupatio bellica"* to the sequestration, by acts of the insurgent state, of a debt due to a citizen of a loyal state, the court rejected the defense, and said:

"These acts did not affect, even for a moment, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offenses against the state, by resisting its officers and defying its authority, can separate him from the state. Such acts may subject the offender even to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

[7] 3 Phillimore, Int. Law, 704.
[8] Grotius, lib. 3, c. 8, § 4.
[9] Page 806, § 29.

After this opinion of the chief justice, let me read from the opinion of Mr. Justice Sprague, in the case of the Amy Warwick:[10]

"An objection to the prize decisions of the district courts has arisen from an apprehension of radical consequences. It has been supposed that, if the government have the rights of a belligerent, then, after the rebellion is suppressed, it will have the rights of conquest; that a state and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error,—a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where the peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored.[11] Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise during peace all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty,—they cannot be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights; but no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation, by force of arms, expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of what it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights.[12] During the war of 1812, the British took possession of Castine, and held exclusive and unlimited control over it as conquered territory. So complete was the alienation that the supreme court held that goods imported into it were not brought into the United States, so as to be subject to import duties.[13] Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all pre-existing political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion, and restoring peace in any state, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the constitution. In a civil war, the military power is called in only to maintain the government in the exercise of legitimate civil authority. No success can extend the powers of any department beyond the limits prescribed by the organic law. That would be not to maintain the constitution, but to subvert it. Any act ot congress which would annul the rights of any state under the constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a state have passed such ordinances can make no difference. They are legal nullities; and it is because they are so that war is waged to maintain the government. The war is justified

[10] 24 Law Rep. 498.
[11] Wheaton, Elements of International Law, 619.
[12] Id. 616.
[13] United States v. Rice, 4 Wheat. 246.

only on the ground of their total invalidity. It is hardly necessary to remark that I do not mean that the restoration of peace will preclude the government from enforcing any municipal law, or from punishing any offense against previous standing laws."

Thus, if the court please, have I gone over these four reasons, and I close what I have to say upon them with a single example from the federal government itself. What was done by that government itself as it advanced? I take its own acts. Although the rebel capital was at Richmond,—although the rebel flag was floating within sight of this capitol,—senators were received from Virginia into the senate, and representatives from Virginia into the house of representatives, upon the ground that, as we advanced into the country, the part occupied immediately reverted to its old condition, and was entitled to its civil government, and to have representation in congress. This is the way in which we dealt with the part which we occupied. We could not hold Alexandria for a moment but by bayonet and cannon. We did so hold it, and we received representatives elected by the people within our lines.

Now, let me pass, with your leave, from the consideration of these four reasons, as they have been stated in debate, for the assumption by congress of the government of the state of Mississippi, and ask your attention to the particular reasons given by my learned friends who have argued on the other side. But before I do that, let me turn aside for a moment to answer what I suppose was intended to be an *argumentum ad hominem*, but which I think entirely fails in this place. This is the argument: The president, at the close of the war, declared that there was no civil government in the rebel states, and proceeded to organize governments. The brief of one of the counsel is much occupied with the correspondence between the president, the secretary of state, and the provisional governors, and the steps taken to govern the states provisionally. The answer to that argument is that we have nothing to do with the action of the president on the subject, and, whether he was right or not,—whether he took a constitutional view of the case or not,—it makes no difference to us. But there is a further answer, which is this: Whether the provisional governments established under the authority of the executive were or were not legally established, *de facto* governments were established under them which were recognized by the people, and were in possession of all the attributes of sovereignty, had legislative, judicial, and executive departments, and were going on as regularly as any states in the Union at the time these reconstruction

acts were passed; and consequently it would not advance the argument at all to show that the antecedent provisional governments were not warranted by the constitution. I therefore pass over that argument because it has no place here. It is enough for us that the governments of the states were in operation. And we know, by the reports of the general of our army, that order prevailed throughout the South before these acts of reconstruction were passed.

I am now ready to examine the terms of the particular propositions which have been stated by the counsel on the other side in support of their case. There are six of them, thus expressed:

(1) "That Mississippi has no state government which is entitled to be recognized by the United States as a state of this Union, and that this has been determined by the political departments of this government."

(2) "That the decision so made is binding and conclusive upon this court, notwithstanding the judges may think the decision erroneous."

(3) "That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in establishing a republican state government for that state, and that the United States is now engaged in the performance of that constitutional duty."

(4) "That the grant of power to the United States to 'guaranty a republican form of government' to the states of the Union not being restricted by the constitution as to the means which may be employed to execute the power, congress is the exclusive judge of what means are necessary in a given case."

(5) "That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by congress for this purpose, violates no provision of the constitution of the United States."

(6) "That inasmuch as congress entered upon the prosecution of the war against the rebel states in 1861, this court is and will be bound judicially to recognize war as still existing, until congress shall declare peace to be restored, or shall cease to exercise any belligerent right toward those states."

The fifth of these propositions is merely a supposed conclusion from other propositions, and need not be separately considered. The fourth is met by what I have already said about the use of prohibited means to secure an end, however constitutional and desirable that end may be. I have shown that military government is prohibited. So that, even if the first three and sixth propositions were all conceded, these military reconstruction acts could not be defended. The third proposition has already been sufficiently answered. The first two and the sixth alone remain to deserve particular attention; and, even in respect to the sixth, I have already shown that belligerent rights cannot continue to be exercised unless the war can be prolonged by a fiction.

The discussion of these three propositions—that is, the first, second, and sixth—may be separated into four divisions: (1)

Is Mississippi, in fact and in law, a state of the Union, having regard only to the conditions of rebellion and war, without reference to the declaration of the legislative and executive departments of the government upon the question? In other words, did the rebellion or the war, or both, put Mississippi, as a state, out of the Union? (2) Is war, in fact and in law, still subsisting between the United States, on one side, and the state, or state government, or people of Mississippi, on the other side, without reference to the declaration of the legislative and executive departments of the government upon the question? (3) What has been the declaration of the legislative and executive departments upon these two questions? (4) What is the legal effect of such declaration? In the first place, did the rebellion or the war, or both, put Mississippi, as a state, out of the Union? This raises what I may call the "metaphysical" question. Horne Tooke protested that he had been the victim of a preposition. If the southern states are to be held by this military government after every hostile army has been surrendered, and every unfriendly hand has been lowered, they will be the victims of metaphysics imported into politics. Mississippi was a state of the Union once. When did she cease to be such? Was it when she adopted the ordinance of secession, on the 9th of January, 1861, before a shot had been fired? That is to say, did the act of renouncing her allegiance alone take her out of the Union? Was a resolution so potent as to dissolve her relations to the United States? The day after that ordinance was passed, was she not still a state in this Union? Suppose the chief justice had been holding court at Jackson the day after secession was declared, and a citizen of Ohio had sued, in the circuit court of the United States, a person in Mississippi, as a citizen of that state. Would the judge have been obliged to hold that there was no such person as a citizen of the state of Mississippi? The jurisdiction of the circuit court could not have been maintained unless one of the parties was a citizen of a sister state, and the other party a citizen of Mississippi. Were the judgments of the courts in Mississippi no longer judgments to be recognized in the other states of this Union? Were the judgments of the other states in the Union no longer to be recognized in the circuit court of Mississippi? I do not ask what the people of Mississippi may have thought, but what this court would have been bound to hold. Of course, the statement of the proposition in this form answers it. It is so absurd that nobody will pretend that the act of secession carried the state out of the Union. In

fact and in law, Mississippi was as truly a state in the Union after secession as before.

The denial of one's obligations can never legally effect his release from them, or change his legal relations to the one to whom the obligations are due. In this complex government of ours, the effect of a change of the legal relations of the state to the Union would be a change of the legal relations of the different states to each other. Let us look at some of the consequences. The mere act of secession of Mississippi, not followed by any collision of forces, would have the effect of depriving a citizen of Wisconsin or Illinois, going there, of his equal rights in Mississippi; would render the judgments in the courts of Mississippi no longer conclusive in the courts of Wisconsin or Illinois, and so of the judgments of those states in Mississippi; would make a judgment in the highest court of Mississippi no longer examinable in this court, however repugnant to the federal constitution and laws; would deprive a citizen of Wisconsin or Illinois of the right of suing in the circuit court of the United States for the Mississippi district; in fact, would drive that court out of Mississippi, for certainly it cannot sit there if that state is not, as such, in the Union. These are but examples; the list may be increased indefinitely. And how could this state of things be remedied? You could not send the army there, for, in the case supposed, there would be no resistance to overcome. The consequences would be then, in effect, the withdrawal of a state from the Union without a blow. Would a collision of forces change the legal relations, so as to effect by war what was not effected by secession? That depends upon the change which war produces,—that is, it depends upon the nature and effect of belligerent rights. But these I have already considered, and I have shown, as I think, that the rights of the United States, as belligerents, give congress no constitutional authority to pass these military statutes.

Let me now recur to the supposed principle upon which the counsel on the other side deduce the result that Mississippi is no longer a state of the Union. It is this, as I take it from their own language: Mississippi is not a state of this Union, because she "has no state government which is entitled to be recognized by the United States as a 'state' of this Union." Here is a fallacy at the outset, arising from a confusion of ideas. A state and the government of a state are two different things,—as much so as a corporation and its governing body, or board of directors, are two different things. The original idea of a state is a community

independent of all other communities. The states of the American Union, being originally independent, became united by the surrender of a portion of their sovereignty to a nation composed of all the states. Whether their relations to this nation can be dissolved or impaired depends upon the nature of the Union,—whether it be or be not indissoluble. We agree that it is indissoluble. No argument is necessary or would be permitted on this point. But it is asked, might the state of Mississippi send senators to congress during the war? I answer, as I have already answered in effect, no; for the simple reason that there was nobody competent to send them. They must be sent by legislatures, acting under the constitution of the United States. The senate is the judge of the election and qualification of its own members, and is not bound to receive those who come in upon contempt of their authority, or with a feigned submission. There may be a state in this Union with a disloyal state government, although state magistrates who reject the federal authority are thereby rendered incapable of executing any federal function. This proposition answers the argument made against us. A state does not change with a change of its government. One of the fundamental doctrines of public law is that the state is immortal. Governments, sovereigns, dynasties appear and disappear, but the state remains. The debts contracted by France under Napoleon I. were the debts of France under Louis XVIII., under the Citizen King, and under the republic.

The proposition of the other side, which we are considering, contradicts in fact their fourth proposition; for, if Mississippi be not a state of the Union, congress has no power under the clause authorizing it to "guaranty to every state in the Union a republican form of government." If you can blot out a state, then, of course, she ceases to be; but she is not blotted out by any change whatever in her state government. New York might make this peaceful revolution a hundred times, so that she be still republican in form, and she would be still the same sovereign state in this Union.

Next, is war, in law and in fact, still subsisting between the United States, on the one side, and the state and people of Mississippi, on the other, laying aside the declarations of the executive and of congress? You, yourselves, in the decisions of the Prize Cases, have given the answer, by holding that war does not exist when the courts are open,—that is to say, when the federal courts are open. You know that the federal courts are open throughout

Mississippi, and you know, therefore, that there is no war, whatever declarations may be made to the contrary. You know that the district courts are sitting throughout the South; you know that some of your own body sit there; you know that this is an appeal from a circuit court in Mississippi. And yet we are told that the United States are at war with Mississippi; that there is a state of war existing which authorizes martial rule.

But, further, what has been the declaration of the legislative and executive departments of the government in respect to Mississippi and the other rebel states, for I consider them together? At the risk of wearying you, I must call your attention to various documents, by which I shall show that congress has recognized these states, Mississippi among the rest, as being in the Union, by many acts since the war commenced, and down to the very day when the first reconstruction act was passed. As to the executive department, you need no documents to be referred to. That this department has recognized Mississippi as being a state in the Union you know. We have had proclamation after proclamation, under the hand of the executive, to that effect. What has congress done? The constitution provides, as you remember, that "representatives and direct taxes shall be apportioned among the several states which may be included within this Union." You cannot apportion representatives and direct taxes except among the states of the Union. What do we find among the first acts of congress on this subject after the rebellion began? On the 5th of August, 1861, congress passed an act "that a direct tax of $20,000,000 be and is hereby annually laid upon the United States, and the same shall be and is hereby apportioned to the states respectively, in manner following: To the state of Mississippi, $413,084 2-3." This was in August. Mississippi seceded in January preceding. Was not that a declaration of congress that Mississippi was one of the states of this Union at that time,—six months after the act of secession, and during flagrant war? These acts have been regularly continued from year to year down to 1866, as you will see by reference to the statute book; so that congress has regularly provided for the apportionment of direct taxes among the states which are included in this Union, Mississippi among the rest. Is not that a recognition? Next, in the act of July 16, 1862, the rebel states are all divided into districts for the different circuit courts. That could not be unless they were states in the Union. On the 2d of March, 1867 (chapter 185), an act was passed in respect to appeals from rebel states.

That could not be unless they were states in the Union. Then the laws as to the public lands show the same recognition; there are several of them. The non-intercourse acts show the same. Look at the joint resolution of the 8th of February, 1865, relating to the electoral colleges. Let me read it to show how completely congress kept in, view the constitutional relations of the states down almost to the day when it passed the first reconstruction act:

"Whereas, the inhabitants and local authorities of the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election for electors of president and vice-president of the United States, according to the constitution and laws thereof, was held therein on said day: Therefore

"Be it resolved," etc., "that the states mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of president and vice-president of the United States for the term of office commencing on the 4th day of March, 1865; and no electoral votes shall be received or counted from said states concerning the choice of president and vice-president for said term of office."

Look at the constitutional amendment,—that great amendment abolishing slavery. Congress proposed it by the requisite majority, and ordered it to be sent to the legislatures of the several states, not excluding any state from the consideration of the proposition. It was sent to every state in the Union, and here is the proclamation of the secretary of state in regard to its adoption, made as early as December, 1865, in respect to which no dissent has ever been expressed by either house of congress:

"Know ye that, whereas, the congress of the United States, on the 1st of February last, passed a resolution which is in the following words, namely [reciting the constitutional amendment abolishing slavery];

"And whereas, it appears from official documents on file in this department that the amendment to the constitution of the United States proposed as aforesaid has been ratified by the legislatures of the states of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia,—in all twenty-seven states;

"And whereas, the whole number of states in the United States is thirty-six;

"And whereas, the before specially named states whose legislatures have ratified the said proposed amendment constitute three-fourths of the whole number of states in the United States:

"Now, therefore, be it known that I, William H. Seward, secretary of state of the United States, by virtue and in pursuance of the second section of the act of congress approved the 20th of April, 1818, entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,' do hereby certify that the amendment aforesaid has become valid, to all intents and purposes, as a part of the constitution of the United States."

Among the ratifying states are Louisiana and South Carolina, without whose votes the amendment would not have been adopted. Consider for a moment the decision of the chief justice in North Carolina. I am not able to say, from the report of the case, whether one of the parties was designated as a citizen of one state, and the other of North Carolina.

THE CHIEF JUSTICE: They were.

MR. FIELD [resuming]: Tell me, then, if that be a legal judgment or not? The chief justice here made a memorable decision, which satisfied the legal mind of the country, when, if the argument of our learned opponents be sound, he had no more jurisdiction than I. There was in the case supposed no citizen of North Carolina, because there was no state of North Carolina, and the judgment was void. But I have not yet done. Has there been a legal government of this Union during the war? Are the acts upon the statute book of congress binding? Is it not a familiar principle that the verdict of a jury, in order to be valid, must be a verdict of twelve men, and it becomes good for nothing if one member be added to the jury, making the verdict of thirteen? During all this war, up to the time when the reconstruction act was under consideration, there were two senators in the senate chamber from the ancient state of Virginia. But Virginia is said now not to be a state in this Union, and of course never has been since the war began, or since she seceded. If so, you have had two members in the senate of the United States all the time who had no right to be there. What is the effect of that upon legislation? Has that been considered? By what sort of legerdemain, I ask, is it that Virginia, which had seats in congress up to 1866, is now declared not to be entitled to any representation? It had four members in the lower house during nearly the whole war, this state of Virginia, which is now alleged not to be a state in the Union at all. Where under the constitution is there power to give any man a vote in the house of representatives unless he be from a state? Congress is receding and going back upon its own footsteps. We are arguing for constitutional, regular governments; our opponents are the revolutionists. Tennessee is another state. There was one senator, at least, who stood his ground, "faithful among the faithless," and he remained in the senate after the secession of his state, I think, two years, till 1863,—yes, two years and over,—and that senator was Andrew Johnson. What right had he to be in the senate if Tennessee was not a state in this Union? Will you tell me? Were any laws

passed with his concurrence and by the help of his vote? If we go into the house of representatives, we find that Tennessee had two members there,—Clemens and Maynard,—Maynard continuing during the whole war. And yet, if you look at the most remarkable joint resolution of the 24th of July, 1866, you may infer that Tennessee has been out of the Union all the time. Here it is:

"Whereas, in the year 1861, the government of the state of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said state, in pursuance of an act of congress, were declared to be in a state of insurrection against the United States; and whereas, said state government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas, the people of said state did, on the 22d day of February, 1865, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession, and debts contracted under the same, were declared void; and whereas, a state government has been organized under said constitution which has ratified the amendment to the constitution of the United States abolishing slavery, also the amendment proposed by the thirty-ninth congress, and has done other acts proclaiming and denoting loyalty: Therefore

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that the state of Tennessee is hereby restored to her former proper practical relations to the Union, and is again entitled to be represented by senators and representatives in congress."

Was there ever such a document as that since the world began? Whereas the state of Tennessee has ratified the constitutional amendment, therefore she may be restored, forgetting that, if she was not a state, with a legal state government, the ratification was just so much waste paper. Let us go to Louisiana. She is in the same predicament. We have had in the house, from Louisiana, Flanders and Hahn, from March, 1863, to March, 1865. What will our friends say to that?

I will now ask your attention to the action of the legislative and executive departments of the government in respect to the question of existing war or peace. You remember that the argument of my learned friend was that we are now in a state of war; that we have a right to exercise the rights of war; and that, exercising the rights of war, we can govern the state of Mississippi as we will. Here is a list of acts and resolutions of congress to show that they have recognized war as ended, and peace as restored throughout the United States. The statute book is full of references to "the late war," and "the war that has closed," and "the war that is happily ended." Among these acts is one of March 2, 1867, passed the same day the first

reconstruction act was passed, increasing the pay of noncommissioned officers and soldiers, as follows:

"Sec. 2. And be it further enacted, that section 1 of the act entitled 'An act to increase the pay of soldiers in the United States army, and for other purposes,' approved June 20, 1864, be and the same is hereby continued in full force and effect for three years from and after the close of the rebellion, as announced by the president of the United States by proclamation bearing date the 20th day of August, 1866."

Here is the proclamation of the president, to which this act refers, reciting the previous proclamations, and ending as follows:

"I do further proclaim that the said insurrection is at an end, and that peace, order, and tranquillity and civil authority now exist in and throughout the whole United States of America."

Can anything be imagined more extraordinary than that the same persons who passed these acts should come here to maintain that we had a right to deal with the South as if there were no peace, but flagrant war to this very hour? There is another comprehensive act which, I should think, might alone determine the question as to the state of the South. It is an act passed the same 2d of March. In the desire of congress to indemnify everybody, they ratified everything that the president had ever done. The act is as follows:

"An act to declare valid and conclusive certain proclamations of the president, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States.

"Be it enacted," etc., "that all acts, proclamations, and orders of the president of the United States, or acts done by his authority or approval after the 4th of March, Anno Domini 1861, and before the 1st day of July, 1866, respecting martial law, military trials by courts-martial, or military commissions, etc., during the late rebellion, are hereby approved in all respects."

Finally, I will read a very appropriate resolution of thanks, as follows, passed in May, 1866:

"Resolved by the senate and house of representatives of the United States of America in congress assembled, that it is the duty and privilege of congress to express the gratitude of the nation to the officers, soldiers, and seamen of the United States, by whose valor and endurance, on the land and on the sea, the rebellion has been crushed, and its pride and power have been humbled, by whose fidelity to the cause of freedom the government of the people has been preserved and maintained, and by whose orderly return from the fire and blood of civil war to the peaceful pursuits of private life, the exalting and enobling influence of free institutions upon a nation has been so signally manifested to the world."

Have I not said enough to show that the legislative department of the government, as well as the executive, has recognized, first, the state of Mississippi as being in the Union; secondly, has recognized a government as there existing; and, thirdly, has

recognized the war as ended, and peace, order, tranquillity, and civil authority as existing throughout the land?

Finally, it has thus become unimportant to consider further what would have been the effect of the declarations of congress and the president if they had, in the face of incontestable fact, declared that Mississippi was no longer a state in this Union, and that war still raged between her and the United States; and I will waste no time upon that subject.

These are my answers, if the court please, to the propositions brought forward by the learned counsel, and elaborately argued; and I hope that I have given—imperfectly, I grant—a sufficient answer to them all.

There yet remains another point, not in the brief, nor do I find it in any written paper, but very much urged in the argument, and constantly referred to in public speeches, and that is necessity. These military governments of the South, they say, are legal because they are necessary. The usual phrase is: "This government has a right to live, and no other government has a right to contest it; and whatever congress determines as necessary to this national life is right, and therefore the executive and this court are to recognize it as so." What necessity do they speak of? There is no federal necessity. The federal courts are open; the federal laws are executed; the mails are run; the customs are collected. There is no interference with any commissioner or officer of the United States anywhere in the country. There is no necessity, therefore, of a federal kind, for an assumption of the government of Mississippi. What, then, is the necessity? "Why," they say, "these are unrepentant rebels." Is that the reason why the military government is there? If you are to wait until you get repentant rebels,—or I should, perhaps, rather say, if you wait until you make rebels repentant by fire and sword,—you will have to wait many generations. Of all the arguments, that of necessity is the most remarkable, and has the least force. "We will not allow the southern states to govern themselves, because, if we do, the government will fall into the hands of unrepentant rebels." Well, what is that to you, if they obey the laws,—if they submit to your government? Do you wish to force them to love you? Is that what you are aiming at? Of course it should be the desire and the aim of all governments to make the people love, as well as obey; but to give that as an argument for a military government is an extraordinary one. "Well, then," they say, "we must protect the loyal men at the South, and therefore the military government, which is the only one adequate

to the end, must be kept up." To that I answer, first, that the general of your armies, the person upon whom this extraordinary power has been thrown, himself certified that there was order throughout the South, so far as he could observe. But are there no other means than military coercion? The Union men of the South, we have been told, are in the majority, and have ever been in the majority, and it is the minority by which the people were driven into secession. Is government by the United States necessary to sustain the majority against the minority? A majority, we are told, of the white people! They say that secession was carried by a minority of the white people against the majority, and that the majority have always been loyal. That is a perfect answer, then, to the objection. Necessity is the staple reason given by tyranny for misgovernment all the world over. It was the reason given by Philip II. for oppressing the Netherlands by the Duke of Alva; it was the reason given for the misgovernment of Italy by Austria; it was the reason given for the misgovernment of Ireland by England. "This nation has a right to live." Certainly it has; and so have the states, and so have the people. Every one of us has the right, and the life of each is bound up with the life of all. For, who compose my nation, and what constitutes my country? It is not so much land and water. They would remain ever the same, though an alien race occupied the soil. There would be the same green hills, and the same sweet valleys, the same ranges of mountains, and the same lakes and rivers; but these, all combined, do not make up my country. They are the body without the soul. That word "country" comprehends within itself place and people, and all that history, tradition, language, manners, social culture, and civil polity have associated with them. This wonderful combination of state and nation, which binds me to both by indissoluble ties, enters into the idea of my country. Its name is the United States of America. The states are an essential part of the name and of the thing. They are represented by the starry flag, which their children have borne on so many fields of glory,—the ever-shining symbol of one nation and many states. They are not provinces or counties, they are not principalities or dukedoms, but they are free republican states, sovereign in their sphere, as the United States are sovereign in theirs, and all essential elements of that one undivided and indissoluble country, which is dearer than life, and for which so many have died. As the state of New York would not be to me what it is if, instead of the free, active commonwealth, it were to subside into a

principality or a province, so neither would the United States be to me what they are if, instead of a union of free states, they were to subside into a consolidated empire. For such an empire we have not borne the defeats and won the victories of this Civil War.

I will here venture to call attention to an agreement put forth with great force and ability by a learned gentleman, now deceased, —Mr. Loring,—who, I think, was the first to propose this mode of dealing with the South, and who has attempted to justify it in a pamphlet, which I have now before me, and from which I will read one paragraph. He says:

"The power to wage war upon a state in rebellion, for the preservation of the Union, is a constitutional power necessarily invested in the government, solely for that purpose, and limited for that necessity. It cannot, therefore, be exercised for any other end, nor beyond the means justly and reasonably required for its accomplishment. It cannot justify the holding of the territory of a state as conquered, or as provinces, under military rule, or deprive them of the rights of civil government any further than may be necessary to enforce present obedience to the constitution and laws, and for security against danger of future like disobedience and revolt."

That is the argument in the best form in which it can be stated. Now, I take leave to say that this is full of fallacies. In the first place, there is no power to wage war against a state for the preservation of the Union. This is a misstatement of the proposition. The power to wage war is to overcome resistance to the execution of the federal laws and the federal constitution, and that is all. You cannot wage war against a state upon the abstract proposition that you are to preserve the Union. The Union takes care of itself when you execute its laws; and you execute its laws when you overcome resistance, and that is the only end for which you can begin or continue war. And, furthermore, what right have you to wage war for the purpose of obtaining security against the danger of future like disobedience and revolt? Is that a constitutional right? Let us put it to the test. In 1860, when we saw, as clearly as men could foresee a future event, by the little cloud rising to darken finally the whole horizon, that war was coming, would it have been a constitutional exercise of power in the general government to wage war upon the South? Have we ever had a president ready to do that, or a congress ready to undertake it? Can you send armies into a state of this Union for the purpose of guarding against the danger of future rebellion and war against it? You may have your armies ready, may garrison your forts, and strengthen your outposts,—that you can do, and ought to do; but you cannot wage war. If you can,

then we have no guaranties, for it will rest forever in the discretion of congress to order an army to make war upon a state, whenever it may determine that there is danger of something being done which ought not to be done.

A short time since, a proposition was made to take into the hands of the federal government the whole state of Maryland and the whole state of Kentucky, upon the ground that their people were disloyal in heart; that they did not mean sincerely to obey, and there was danger that hereafter they would give aid and countenance to a new rebellion. I deny most explicitly that this limited government of ours has power to wage war against a state, upon any suspicion or theory of an intended insurrection against the government. We are limited to our constitutional duties and our constitutional rights, which are to enact laws as authorized by the federal constitution, and to execute those laws by the courts of justice and the executive arm.

Let it not be imagined for a moment that I have the least sympathy with the rebels. As I detested the Rebellion, so do I censure those who rebelled. But, while I censure, I remember that they are still my countrymen, and, remembering also that rights and duties are correlative, as I would exact from them performance of the duties, so I would concede to them the rights, of citizens. To close up the gaping wounds of civil war is the consummate art of statesmanship, and, if history teaches us aright, that end can never be accomplished by proscription. Conciliation is more potent than severity, and forgetfulness than the remembrance of wrongs.

These military governments of the South are said to be only temporary. How do we know that? Is it constitutional to do a thing as a temporary expedient which congress may continue as long as it pleases? The conditions annexed to this first reconstruction act contemplated that the military power should remain in the South until the amendment proposed should be ratified by three-fourths of the states. The argument of danger is an argument of very little force on either side. It is not speaking too strongly to say that this court stands now in the very gateway against the usurpation of military power dangerous to our liberty. What have we seen, and what do we now see?' We have seen the chief justice of this court, before whose robes all bayonets should be lowered, taking his place in a circuit court in North Carolina, after explaining to a committee of congress that he would not hold his court where it was not supreme over all military as well as civil officers, and receiving assurances of the subor-

dination of the military, and, upon appearing, announcing to the bar as a reason why his court had not been held at an earlier day that it was beneath the dignity of a court of the United States to sit where its process might be resisted by military power; and yet we have seen the execution of the process of this very court forbidden by military officers! Of course, if the chief justice had taken his seat again upon that bench, he would have punished the offenders as they deserved. We have seen, in a printed document submitted to congress, the testimony of the secretary of war, asserting his belief that the decision of this court in the Milligan case was erroneous; that it was not founded in law, though it was the unanimous decision of the court; and maintaining still the right to establish military commissions in loyal states. We have seen an act pass through one house of congress which proposes to vest in the general of the army unlimited control over all these eleven states; and we have also seen introduced into the lower house an amendment to an appropriation bill, proposing to make your hall a place to be guarded by soldiers! Here is the proposition, which I will read:

"Provided, that from and after the close of the current fiscal year the police and protection of the capitol building and grounds shall be under the direction of the engineer department of the army, and the secretary of war shall detail for that service from the garrison at Washington such number of noncommissioned officers and privates, not exceeding forty, as may be deemed necessary for the purpose by the chief engineer; and soldiers, when so employed, shall have an extra allowance of twenty-five cents per day for privates, and thirty cents per day for non-commissioned officers."

If we go on as we thus begin, instead of these guardians at your door, you will find soldiers with bayonets, and there will be soldiers with bayonets before the houses of congress. We must resist now! We will not have military government; it is against the constitution, and we stand upon the constitution of our country. We will not have it for an instant, for an instant's voluntary submission to unlawful power is dishonor. An instant may expand into a day, a day into a month, a month may lapse into years, and years into a generation. If we submit for a moment, we forget the lessons of our fathers, and despoil our inheritance.

We were threatened by the counsel that, if in New York we did not conform ourselves a little more diligently to what was required of us, we should have the general of the army there. One of them called it "that infernal city of New York." Pardon me if I repel the calumny. My city is misgoverned, I admit; but that misgovernment, be it remembered, comes chiefly from

the premature admission to the suffrage of those not here accustomed to exercise it. Among her people are as much virtue, as much patriotism, as much honor, as exist anywhere. You, sir, when you came to a discredited treasury, know how your hand leaned upon her, and how her merchants came forward with the most lavish offers to sustain this government; how, at the first summons of the president, the flag of the country floated out from window and tower, and her people called with one voice, bidding loyal men to rise everywhere throughout the land. For social culture, for intellectual activity, for the magnificence of her commerce, for the grandeur of her enterprises, and, not least, for her abounding charities, she stands unapproached on this continent, and unapproachable, even by that younger sister of the Pacific, through whose Golden Gate lies the highway to India. New York sits upon her island rock, and there is no American who, returning to his country, sees her spires above the waters, but rejoices in her prosperity, and is proud of her.

But we are told that this is a political question, which is beyond the competency of the courts to determine. A fortnight ago this objection would have come with more force than it comes now. The experience of a few days has taught many, what was understood by thoughtful observers before, that this court is the great peacemaker, and that nothing but its peaceful interposition can prevent collisions of force. What is a political question? Is it one which affects the policy of parties, or is decided by partisan views? Such a question is the very one that is most likely to lead the legislative department into excesses, which it needs the judicial to correct. If congress were to pass an act of attainder, with a purely political motive, or for a purely political end, does any one suppose that this court is not competent to pronounce it unconstitutional and void? A political question, I apprehend, is one which the political department of the government has exclusive authority to decide. Is it a political question whether McCardle can be imprisoned by military order, and tried by military commission? There are political questions, undoubtedly,—that is, questions which the political department of the government has a right to decide, and, being decided there, the courts will follow. But whether or not a man can be imprisoned and tried by a particular tribunal is always a judicial question, which the judges will determine for themselves. This question, however, has received its final answer in the opinion of this court, delivered by Mr. Justice Nelson, upon the bill exhibited by Georgia against the

secretary of war and others; and it would be presumptuous in me to debate now what is there decided so satisfactorily to all friends of constitutional government, and so authoritatively for us all.

Finally, sir, may I not say that I have shown (1) that there is no reason whatever for the proposition that Mississippi is not now a state of the American Union; (2) that not only is she a state of the Union, but her people have the rights of citizens of a state; (3) that whether she be or be not a state, or her people have or have not the rights of citizens of a state, that people cannot be subjected to military government by the congress of the United States; and (4) that therefore the petitioner, McCardle, is entitled to his release from the military commission which presumed to sit in judgment upon him? And when your judgment is pronounced, as I hope and pray it may be, in the petitioner's favor, it will, I trust, be the endeavor of all good men to promote by their counsel and example the acquiescence of the other departments of the government. As it is your right, in the last resort, upon all cases that come before you, to give final interpretation to the constitution, so it is the duty of all citizens to respect and accept your interpretation. There is no need to strain the authority of the government. The constitutional amendment not only abolishes slavery, and makes freedom the rule throughout the country, but it gives congress the power to enforce that article by appropriate legislation, and to see that the freedom of every man, of every race and condition, is maintained.

It was the boast of an English orator and statesman, on a memorable occasion, when he delivered a message from the king to his faithful commons respecting the expedition to Portugal, that "wherever the standard of England is planted, there foreign domination shall not come." If we will firmly maintain the constitution of our fathers, as modified by the great amendment, we shall be able to make it our higher boast that, where the standard of America is planted, there shall be neither foreign domination nor domestic oppression.

WILLIAM M. EVARTS.

[William Maxwell Evarts was born in Boston, Mass., 1818. His father, Jeremiah Evarts, was a well-known philanthropist, who, though bred a lawyer, devoted himself to the cause of Christian missions and the rights of the Indians. He was educated at Yale College, where he was graduated in 1837 in the same class with Morrison R. Waite, Samuel J. Tilden, and Edwards Pierrpont. He studied law at the Harvard Law School, and in the office of Daniel Lord, in New York City, where he was admitted to the bar in 1841. From 1849 to 1853 he was assistant United States district attorney for the southern district of New York. He was chairman of the New York delegation to the Republican national convention of 1860, and placed William H. Seward in nomination for the presidency. In 1861 he was an unsuccessful candidate for the United States senate. He was appointed attorney general by President Johnson. Under the administration of President Hayes, he was secretary of state. In 1881 he was one of the delegates from the United States to the International Monetary Conference at Paris. In 1885 he was elected to the United States senate from New York. After his retirement from the senate, failing eyesight compelled him to abandon professional work, and for several years he was confined to his house by other infirmities. He died February 28, 1901.

William M. Evarts would have had many titles to fame if his supreme eminence as a lawyer had not so far surpassed his other claims to distinction. As an advocate, as an orator, as a statesman, he commanded during his lifetime a large measure of public admiration and respect. Yet his public honors were but the reflection of his professional eminence. Neither by temperament nor by training was he peculiarly qualified for public life. For the adequate display of his great abilities he required the stimulus of a cause in which his duty was clearly defined in accordance with the scientific and orderly limitations of forensic discussion. Within this sphere he stood for many years without a superior, the recognized leader of the American bar, and it may safely be predicted that his most enduring fame will rest upon his professional labors.

It is the common destiny of lawyers to leave to posterity few traces of their labors. Eloquence and learning, devotion to duty,

strenuous effort, and unyielding courage serve the uses of the day, and are soon forgotten; but Evarts, like Erskine, had the good fortune to display his powers in cases of such great moment and permanent interest that they are likely to prove durable monuments of his genius.

The number of great causes in which he bore a leading part is remarkable. In 1851, as United States district attorney, he prosecuted the "Cleopatra" filibusters, who were on the point of sailing from New York to assist the Cuban insurgents. In 1860, as counsel for the state of New York, he made his able and successful argument before the court of appeals of New York in the Lemmon slave case. This masterly argument was at once accepted in the North as a complete statement of the attitude of the anti-slavery party. In the following year he appeared as counsel for the United States in the prosecution of the officers and crew of the Confederate privateer "Savannah" for piracy. His argument in this memorable case is really a philosophical discussion of the basis of republican government. In 1862 he was one of the counsel for the United States in the Prize Cases, which involved considerations of vital importance in the successful prosecution of the Civil War. Three years later he successfully contested the constitutionality of the New York statute providing for the taxation of the bonds of national banks. In 1865 he successfully defended the owners of the steamship "Meteor," charged with violation of the neutrality act. In 1868 he appeared with Benjamin R. Curtis as counsel for the defendant in the impeachment trial of President Johnson, and distinguished himself by the ability, adroitness, and technical skill with which he conducted the case. In 1868, as counsel for the United States before the international tribunal convened at Geneva to arbitrate the "Alabama" claims, he presented in a remarkable argument the grounds upon which the final award was largely based. In 1877 he was leading counsel for President Hayes before the electoral commission. He was also prominently engaged in the litigation in the supreme court of the United States involving the constitutionality of the legal-tender act, and in the Virginia coupon cases arising out of the repudiation of state debts. In 1875, in the sensational Beecher-Tilton case, he displayed consummate power as a jury advocate. During these years he was also actively engaged in general practice. He argued most of the great will cases of his time, noticeably those of Parish, Hoyt, and Gardiner, and bore a conspicuous part in the extensive elevated railway litigation in the

city of New York. The libel action of Opdyke against Weed, the famous Tweed cases, and the litigation arising out of the Schuyler forgeries of New York & New Haven Railway bonds, in all of which he bore a leading part, further illustrate the extent and variety of his practice.

With a logical power at once calm and clear, and a deep, if not profound, knowledge of legal principles, combined with judgment, adroitness, and ready wit, Evarts easily ranks with the greatest lawyers of the past. As a mere lawyer, he was undoubtedly surpassed by Benjamin R. Curtis, and, perhaps, by Charles O'Conor. But he possessed talents which those great lawyers did not share with him,—talents which served to enhance, in the public mind, the force and effect of his technical attainments.

In his remarkable fluency of speech he may well be compared with Rufus Choate. Facility of speech is a dangerous gift, and there is no doubt that it led Evarts, at times, to relax from the labor and industry which are indispensable to the highest professional achievement. Moreover, it led to obvious faults in style, —it would be idle to recommend his long and involved sentences as models of construction. But this remarkable command of language also manifested itself in Evart's case, as in Choate's, in a singularly effective power of amplification, which enabled him to present a point in many guises without apparent repetition. This is a consideration of the utmost value in jury advocacy. Evarts had, however, none of Choate's feverish and passionate energy. His manner was always cool, calm, and deliberate, inspiring confidence and respect by its candor, and compelling conviction by its intellectual force.

In mere logical force Evarts suffers by comparison with Benjamin R. Curtis. But though his work lacked the simplicity and austere strength which characterized Curtis' efforts, his inferiority in masculine power of reasoning is more apparent than real. It is due rather to the fact that Evarts invariably chose to present a subject in all its philosophical relations, and to relieve the tension of his argument with his ready wit and exuberant humor. His splendid faculty for philosophical observation led him to approach a subject from its widest point of view; but when he reaches the precise or technical issue, he does not seem to suffer in penetration and insight from this breadth and scope. An analysis of any of his great efforts serves, rather, to accentuate his logical and rhetorical powers. It reveals his skill in the formal division of a subject, in the management of particular topics, in

keeping the issue steadily in view, in detecting any variation from it by his opponent, and in comprehending the direction in which an argument is likely to move with least resistance.

In view of the strength and solidity of his argumentation, the readiness with which he wielded the lighter weapons of wit and sarcasm is conspicuous; for this combination, in such a degree of excellence, is very rare. His wit was distinctly individual. It was scholarly, but not pedantic; exuberant and genial, never harsh or venomous.

To the organic structure and scholarly finish which make his work so attractive to the cultivated taste may be added his lofty plane of thought and habitual appeal to the higher motives of action. His stately eloquence was never the mask of petty prejudices or base passions; and it seemed to gain in dignity and elevation with the importance of the cause and the intellectual composition of the tribunal.

Evarts' character, both personal and professional, commanded the highest respect. His instincts and activities were invariably on the side of good government; and whether his client was an individual, a state, or a nation, he never lost influence by losing his mental and moral balance. He had the highest conception of the dignity of his profession, and of its paramount influence in society. Believing, as he said in his eulogy of O'Conor, that the stress of free institutions must finally come upon a well-equipped, upright, and courageous judiciary and an intrepid and independent bar, he proceeded to describe the spirit of his own services when he said: "Let us understand that whatever we, as individuals, may owe to our clients, to our families, to our associates, we owe to the law and the administration of justice the final, the principal, the constant duty, and, if we are remembered well hereafter, it will be mainly for our fidelity to this paramount obligation."

BRIEF AND ARGUMENT IN THE LEMMON SLAVE CASE, IN THE COURT OF APPEALS OF NEW YORK, 1860.

STATEMENT.

In November, 1852, Jonathan Lemmon and Juliet, his wife, citizens and residents of the state of Virginia, brought eight colored persons, who had been held as slaves under the laws of Virginia, into the port of New York, for the purpose of taking then to Texas, to be there retained as slaves. They had come from Norfolk by steamer, with the intention of remaining only until a proper vessel could be obtained to continue their journey. Meantime the slaves were lodged in a boarding house, where they were discovered by a colored man named Louis Napoleon, who thereupon presented a petition to Hon. Elijah Paine, one of the justices of the superior court of the city of New York, for a writ of *habeas corpus* to inquire into the cause of their detention. Mr. Lemmon made a return to the writ, in which he stated that the persons before the court were slaves *in transitu*. To this return the relator interposed a general demurrer, and, upon the issue thus formed, the slaves were liberated from custody.[1] On November 9, 1852, the attorney for Mr. Lemmon sued out of the supreme court of New York a writ of *certiorari* to review the decision of Mr. Justice Paine, which had excited much discussion. The legislature of Virginia, in response to a special communication from the governor, directed the attorney general of that state to prosecute the case before the supreme court of New York. By direction of the legislature of New York, the attorney general, the Honorable Ogden Hoffman, represented the interests of the state of New York. Upon the death of Mr. Hoffman, soon afterwards, William M. Evarts was appointed to act as counsel in his place. The supreme court affirmed the order of Mr. Justice Paine, Mr. Justice Roosevelt dissenting.[2] From this decision an appeal was taken to the court of appeals of New York, where, on January 24, 1860, the case came on for hearing before the full bench. The appellant was represented by Charles O'Conor and H. D. Lapaugh. William M. Evarts, Joseph Blunt, and Chester A. Arthur appeared for the respondents. The argument was opened by Charles O'Conor for the appellant, and by Joseph Blunt for the respondents. Mr. Evarts closed for the respondents with the following argument. At the March term, 1860, the court of appeals announced its decision, affirming the judgment of the supreme court. Opinions in favor of affirmance were delivered by Judges Denio and Wright, in which Judges Davies, Bacon, and Welles concurred. Judge Clerke delivered an opinion in favor of reversal. Chief Judge Comstock dissented without assigning reasons, and Judge Selden expressed no opinion.[3]

BRIEF OF ARGUMENT.

First point: The writ of *habeas corpus* belongs of right to every person restrained of liberty within this state, under any pre-

[1] 5 Sandf. 681.
[2] 26 Barb. 270.
[3] 20 N. Y. 562.

tense whatsoever, unless by certain judicial process of federal or state authority.

2 Rev. St. p. 5263, § 21.

This right is absolute (1) against legislative invasion, and (2) against judicial discretion.

Const. art. 1, § 4; 2 Rev. St. p. 565, § 31.

In behalf of a human being restrained of liberty within this state, the writ, by a legal necessity, must issue. The office of the writ is to enlarge the person in whose behalf it issues, unless legal cause be shown for the restraint of liberty or its continuation; and enlargement of liberty, unless such cause to the contrary be shown, flows from the writ by the same legal necessity that required the writ to be issued.

2 Rev. St. p. 567, § 39.

Second point: The whole question of the case, then, is, does the relation of slave owner and slave, which subsisted in Virginia between Mrs. Lemmon and these persons while there, attend upon them while commorant within this state, in the course of travel from Virginia to Texas, so as to furnish "legal cause" for the restraint of liberty complained of, and so as to compel the authority and power of this state to sanction and maintain such restraint of liberty.

(I) Legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this state. Nothing has, or can claim, the authority of law within this state unless it proceeds:

(A) From the sovereignty of the state, and is found in the constitution or statutes of the state, or in its unwritten common (or customary) law; or

(B) From the federal government, whose constitution and statutes have the force of law within this state. So far as the law of nations has force within this state, and so far as, "by comity," the laws of other sovereignties have force within this state, they derive their efficacy, not from their own vigor, but by administration as a part of the law of this state.

Story Confl. Laws, §§ 18, 20, 23, 25, 29, 33, 35, 37, 38; Bank of Augusta v. Earle, 13 Pet. 519, 589; Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep. 59; Dred Scott v. Sandford, 19 How. 460, 461, 486, 487.

(II) The constitution of the United States and the federal statutes give no law on the subject. The federal constitution and legislation under it have, in principle and theory, no concern with

the domestic institutions, the social basis, the social relations, the civil conditions, which obtain within the several states. The actual exceptions are special and limited, and prove the rule. They are:

(1) A reference to the civil conditions obtaining within the states, to furnish an artificial enumeration of persons as the basis of federal representation and direct taxation, distributively between the states.

(2) A reference to the political rights of suffrage within the states as, respectively, supplying the basis of the federal suffrage therein.

(3) A provision securing to the citizens of every state within every other the privileges and immunities (whatever they may be) accorded in each to its own citizens.

(4) A provision preventing the laws or regulations of any state governing the civil condition of persons within it from operating upon the condition of persons "held to service or labor in one state, under the laws thereof, escaping into another."

None of these provisions, in terms or by any intendment, support the right of the slave owner in his own state or in any other state, except the last. This, by its terms, is limited to its special case, and necessarily excludes federal intervention in every other.

Const. U. S. art. 1, § 2, subds. 1, 31; Const. U. S. art. 4, § 2, subds. 1, 3; Laws of Slave States, and of Free States, on Slavery; *Ex parte* Simmons, 4 W. C. C. R. 396; Jones v. Vanzandt, 2 McLean, 597; Groves v. Slaughter, 15 Pet. 506, 508-510; Prigg v. Pennsylvania, 16 Pet. 611, 612, 622, 623, 625; Strader v. Graham, 10 How. 82, 93; City of New York v. Miln, 11 Pet. 136; Scott v. Sandford, 19 How. 393; Chief Justice, 452; Nelson, J., 459, 461; Campbell, J., 508, 509, 516, 517.

The clauses of the constitution of the United States touching the commercial power of the federal government have no effect, directly or indirectly, upon the question under consideration.

Const. U. S. art. 1, § 8, subd. 3; Const. U. S. art. 1, § 9, subds. 1, 5; The Passenger Cases, 7 How. 283; Groves v. Slaughter, *ut supra;* City of New York v. Miln, *ut supra.*

(III) The common law of this state permits the existence of slavery in no case within its limits.

Const. art. 1, § 17; Sommersett's Case, 20 How. St. Tr. 79; Knight v. Wedderburn, 20 How. St. Tr. 1, note; Forbes v. Cochrane, 2 Barn. & C. 448; Shanley v. Harvey, 2 Eden, 126; The Slave Grace, 2 Hagg. Adm. 104, 118; Story, Confl. Laws, § 96; Co. Litt. 124b.

(IV) The statute law of this state effects a universal pro-

scription and prohibition of the condition of slavery within the limits of the state.

1 Rev. St. p. 656, § 1: "No person held as a slave shall be imported, introduced, or brought into this state, on any pretense whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this state contrary to the laws in force at the time shall be free."

Section 16: "Every person born within this state, whether white or colored, is free; every person who shall hereafter be born within this state shall be free; and every person brought into this state as a slave, except as authorized by this title, shall be free."

2 Rev. St. p. 664, § 28; Laws 1857, p. 797; Dred Scott v. Sandford, 19 How. 591-595.

Third point: It remains only to be considered whether, under the principles of the law of nations, as governing the intercourse of friendly states, and as adopted and incorporated into the administration of our municipal law, comity requires the recognition and support of the relation of slave-owner and slave between strangers passing through our territory, notwithstanding the absolute policy and comprehensive legislation which prohibit that relation, and render the civil relation of slavery impossible in our own society. The comity, it is to be observed, under inquiry, is (1) of the state and not of the court, which latter has no authority to exercise comity in behalf of the state, but only a judicial power of determining whether the main policy and actual legislation of the state exhibit the comity inquired of; and (2) whether the comity extends to yielding the affirmative aid of the state to maintain the mastery of the slave owner, and the subjection of the slave.

Story, Confl. Laws, § 38; Bank of Augusta v. Earle, 13 Pet. 589; Dred Scott v. Sandford, 19 How. 591.

(1) The principles, policy, sentiments, public reason, and conscience, and authoritative will of the state sovereignty, as such, have been expressed in the most authentic form, and with the most distinct meaning, that slavery, whencesoever it comes, and by whatsoever casual access, or for whatsoever transient stay, shall not be tolerated upon our soil. That the particular case of slavery during transit has not escaped the intent or effect of the legislation on the subject appears in the express permission once accorded to it, and the subsequent abrogation of such permission.

1 Rev. St. pt. 1, c. 20, tit. 7, §§ 6, 7; Repealing Act (Laws 1841, c. 247).

Upon such a declaration of the principles and sentiments of the state through its legislature, there is no opportunity or scope for judicial doubt or determination.

Story, Confl. Laws, §§ 23, 24, 36, 37; Vattel, Law Nat. p. 1, §§ 1, 2.

(II) But, were such manifest enactment of the sovereign will in the premises wanting, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when the domestic laws reject and suppress such *status* as a civil condition or social relation.

(A) The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population forbid them in the case of strangers within our territory.

(B) The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists it is an ever new and active violation of the law of nature. Of this no more explicit or unequivocal statement can be framed than is to be found in the constitution of the state of Virginia. Thus, the first article of the bill of rights of that constitution declares:

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

It originates in mere predominance of physical force, and is continued by mere predominance of social force or municipal law. Whenever and wherever the physical force in the one stage, or the social force or municipal law in the other stage, fails, the *status* falls, for it has nothing to rest upon. To continue and defend the *status,* then, within our territory, the stranger must appeal to some municipal law. He has brought with him no system of municipal law to be a weapon and a shield to this *status;* he finds no such system here. His appeal to force against nature, to law against justice, is vain, and his captive is free.

(C) The law of nations, built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it.

(D) A state proscribing the *status* of slavery in its domestic system has no apparatus, either of law or of force, to maintain the relation between strangers. It has no code of the slave owner's rights, or of the slave's submission; no processes for the enforcement of either; no rules of evidence or adjudication in the premises; no guard houses, prisons, or whipping posts to uphold the slave owner's power, and crush the slave's resistance. But a comity which should recognize a *status* that can subsist only by

force, and yet refuse the force to sustain it, is illusory. If we recognize the fragment of slavery imported by the stranger, we must adopt the fabric of which it is a fragment and from which it derives its vitality. If the slave be eloigned by fraud or force, the owner must have replevin for him or trover for his value. If a creditor obtain a foreign attachment against the slave owner, the sheriff must seize and sell the slaves. If the owner die, the surrogate must administer the slave as assets. If the slave give birth to offspring, we have a native-born slave. If the owner, enforcing obedience to his caprices, maim or slay his slave, we must admit the *status* as a plea in bar to the public justice. If the slave be tried for crime, upon his owner's complaint, the testimony of his fellow slaves must be excluded. If the slave be imprisoned or executed for crime, the value taken by the state must be made good to the owner, as for "private property taken for public use." Everything or nothing is the demand from our comity; everything or nothing must be our answer.

(E) The rule of the law of nations which permits the transit of strangers and their property through a friendly state does not require our laws to uphold the relation of slave owner and slave between strangers. By the law of nations, men are not the subject of property. By the law of nations, the municipal law which makes men the subject of property is limited with the power to enforce itself,—that is, by its territorial jurisdiction. By the law of nations, then, the strangers stand upon our soil in their natural relations as men, their artificial relation being absolutely terminated.

The Antelope, 10 Wheat. 120, 121, and cases *ut supra*.

(F) The principle of the law of nations which attributes to the law of the domicile the power to fix the civil *status* of persons does not require our laws to uphold, within our own territory, the relation of slave owner and slave between strangers. This principle only requires us (1) to recognize the consequences in reference to subjects within our own jurisdiction (so far as may be done without prejudice to domestic interests) of the *status* existing abroad; and (2) where the *status* itself is brought within our limits, and is here permissible as a domestic *status*, to recognize the foreign law as an authentic origin and support of the actual *status*. It is thus that marriage contracted in a foreign domicile, according to the municipal law there, will be maintained as a continuing marriage here, with such traits as belong to that relation here; yet incestuous marriage or polygamy, lawful in the foreign domicile, cannot be held as a lawful continuing relation here.

Story, Confl. Laws, §§ 51, 51(a), 89, 96, 104, 113, 114, 620, 624.

(G) This free and sovereign state, in determining to which of two external laws it will by comity add the vigor of its adoption and administration within its territory, viz., a foreign municipal law of force against right, or the law of nations, conformed to its own domestic policy, under the same impulse which has purged its own system of the odious and violent injustice of slavery, will prefer the law of nations to the law of Virginia, and set the slave free.

Impius et crudelis judicandus est, qui libertati non favet. Nostra jura in omni casu libertati dant favorem.

Co. Litt. *ut supra.*

ARGUMENT.

If the Court Please: The question brought originally under judicial examination and for practical determination was an interesting and important one, as it respected the liberty of the persons whose fate was to be determined, under our law, by our jurisprudence, and by the judgment of our courts. Their number was considerable; and ever in enlightened communities there is no question so important as that which touches the liberty of man,—in a free country, important that the full measure of that liberty shall not be unjustly and unlawfully circumscribed, and, in a despotic country, or in a country where slavery exists, important that the poor remnant of that liberty may not be still more abridged. Therefore, that imprisonment should continue an hour longer than it ought by law, or that there should be constraint of limb or voice that the law does not allow, is ever a consideration that should call off courts of justice from the ordinary deliberations on matters of property, however great, until this question be determined, and this great wrong, if it be one, be redressed. But when the question of liberty is presented in the persons not only of so many, and not only for their lives, but for the whole stream of their posterity forever, I apprehend that no court of justice (though limiting the gravity of this question to that of the fate of these eight persons and their posterity) ever had occasion to consider a graver question of human liberty, or ever to be more careful that they should not, by an erring judgment, determine the doom of these people forever. The question is here, and it is not to be evaded. Whatever is done concerning the future of these persons is done by the law of New York, imposed by her own state authority, or by the law of New York, resting upon and imposed by the paramount authority of the federal government. What-

ever of doubt or difficulty there may be, whatever of obscurity or uncertainty there may be, on this question, the determination of this court, as that of last resort in this state, finally impresses the right, the sanction, the force that are necessary, and thus establishes, continues, or permits the slavery of these men and women.

Now, beyond controversy, as it is the duty of an advocate, so much more is it the duty of a court, when a legal question within legal limits is to be disposed of, to meet that question and determine it as a judicial inquiry; and when the responsibilities of the judge and of the advocate are discharged, if the law drives into slavery these unfortunate appellants to your judgment, then, as servants of the law, you are acquitted. The ministers of justice do not always perform an agreeable duty; but, every consideration drawn from general jurisprudence, drawn from the nature of man, drawn from the immutable qualities of right and wrong, may be rightfully invoked in such an inquiry. Unless we live under a government that has renounced all these principles, that, on inducements of policy, of interest, or of whatever perverse influence has guided the public councils, stands upon a denial of natural right, upon the overthrow of general justice, and has established the public policy of injustice and oppression; unless the court sits under a government that has avowed and maintained, and calls upon it to avow and maintain, such a desertion of common right and natural justice, then all arguments and all illustrations that bring the judgment of a free court of a free people to determine what their law is, and how it should be administered, are, in this inquiry, pertinent and appropriate. But, if the court please, the magnitude of this question is not limited to its pressure upon the liberty of the particular persons whose case is before the court. As a part (and a part not to be evaded) of the consideration and determination, both in the legislative councils and in the courts of judicature of the nation and of the separate states, of the question that grows out of the existence in this country, in slavery, of negroes and their descendants, the present inquiry attracts great public attention.

Beyond the *status* of domestic slavery as a local institution,—established, administered, construed, and defended in and by the states, which, under our federal system, maintain it,—three forms of question will obtrude themselves on public attention, and cannot be avoided. The one is, what is the power and authority of the governments of the states that continue and maintain the institution of slavery, in respect of the free citizens or free inhabit-

ants of this country, to protect, by their exclusion, or by their control while within these communities, this institution of slavery against violent, against legal, against moral, against religious, against social influences that may disintegrate and destroy it? This right, asserted to the extent of absolute control, upon the necessity of self-preservation, has never been permitted to be the subject of calm, judicial inquiry within the states that support slavery. Whether free black citizens, or free black inhabitants (if they be not citizens), of the free states of the Union, shall be permitted, in their pursuits of navigation or otherwise, to come within the territory of a slave-holding state; whether white mechanics, merchants, landowners, whether teachers and preachers, free citizens of the United States, shall be permitted within the slave-holding states to establish their residence permanently or temporarily, and pursue their vocations; or whether the institution of slavery, of domestic authority, shall have the power to subjugate the free people of the country, morally, socially, and politically, in order that the slaves may be held in personal bondage,—these are questions that are exhibiting themselves in a form the most significant and important in various parts of this country. It has never yet been permitted in the slave-holding states that judicial inquiry should be instituted and prosecuted to the result of a legal determination of these questions.

Another most important, and, in the public mind, most absorbing, political topic, touches the footing of this domestic institution of slavery in, and in respect to, the territories of the United States that are protected by no government or laws except those of the federal Union. This question, agitated in the public councils, agitated in the popular mind, and discussed to a certain extent in the supreme court of the United States, is one, opinions and determinations upon which are supposed to have an important bearing upon the third and last remaining inquiry connected with the general subject; and that is, what is the legal position of the domestic institution of slavery, as existing in the slave states, in regard to slaves and their owners, when brought within the free states, that are governed by their own constitutions and laws, expounded and administered by their own courts? That is the question now before your honors; and that question concerns what is of more vital importance to a political community than anything else,—its sovereignty. It touches not only this question of sovereignty, vital to the existence of an independent community, but sovereignty in its most central point,—that of the control of the civil and social condition of persons within its bor-

ders. For it may be very well understood that, if a sovereign state has not the power of determining the political, the civil, the social, the actual condition of persons within its borders, it is because some other power has that control; and how it can be admitted that a foreign government, a foreign jurisprudence, a foreign social condition can intrude itself into an independent state, and establish for all time, or for any time, for some persons, or for one person, that condition within the state into which the intrusion is made,—how this admission can consist with the fundamental idea of the sovereignty, or of the separateness of a political community, it passes my intelligence to comprehend. But, upon the view of the learned counsel who sustains the pretensions of the state of Virginia, that state, either by its own authority, or by the aid of the government of the United States, has something to say concerning the legal condition of persons within this state. The pretension that, by the paramount dominion of the federal constitution, we are bound to admit within our borders the institution of slavery, is a claim which, in my judgment, permits of no limitation whatever of time or of circumstance. It presents, therefore, a question of the first importance. If it were presented to you as merely a question of comity, to which you were obliged by your sense of what is fitting and possible, under the recognized will and authority of our own legislature, why, although the public mind might be awakened, the proposition would not be so alarming as that we are controlled in this matter, not by any judgment of our own as to what is proper or fitting or hospitable, but are bound by a superior authority, and to results to which we can put no limit.

Now, if the court please, it will be found that the very general view which has been suggested by the counsel for the appellants here, of their claim respecting obligations and duties on our own part, serves no good purpose whatever, but tends to withdraw the attention of the court from the real subject of judicial inquiry. What is the subject of the present judicial inquiry, and how does it arise? Within this state, and within the limits of the city of New York, were found eight men and women of color; and it was alleged, in such authentic form as our statutes require, to our accredited judicial officer, that these eight persons were restrained of their liberty. What of that? What is it that institutes such an inquiry, and what is the point to be disposed of when such an inquiry is raised? The inquiry is instituted under our statute of *habeas corpus*,—one of the main guards and protections of our

liberty. For the words "liberty" and "slavery," which we may get so used to as to think there is not much difference between them, except that they suggest matters of jurisprudential consideration as to the limits and extent of the one and the other,—liberty and slavery, as civil conditions, are practically nothing more nor less that the establishment of laws, and the methods provided for their enforcement, to define and protect the one institution and the other; and when you look for the liberty that the people of New York enjoy, you find it in their laws and in their system of government. You find their political liberty in the share that they have in the election and change of all persons that form and administer their government. You find their civil liberty, as matter of private and personal right, in the guaranties of the constitution, in the methods of the public administration of justice, in the trial by jury, in the *habeas corpus;* and you may have all the fanciful notions of exemption from bodily restraint in the world, yet, if you do not have the *habeas corpus* act, or some equivalent mode of attracting the public eye and conscience, in administering the law, to the condition of people who are restrained of their liberty, you have no personal liberty, for you have no efficient mode of vindicating and defending it. What does our *habeas corpus* act require, first, in respect to the institution of the investigation, when it shall be alleged to a judicial officer that any person within the state is restrained of his liberty? Why, it creates an absolute legal necessity that the question of fact and of right should at once be withdrawn from the personal or forcible control which exists, and be transferred instantly and completely to the actual and legal control of the state. That is the *habeas corpus* act,—that the question of the restraint of a human being in this state, upon any allegation that it exists in fact, should be at once rescued from the determination of force and personal control, and made a question of the state's maintaining the restraint. From that time, in the theory of the law, the restraint, in fact, cannot continue a moment but by its maintenance by the law of the state, enforced and supported by the power of the state. So essential, in a free state, is this practical form of sustaining personal liberty, that it is protected in a way and with a vigor that no other right whatever is protected, or, consistently with some other general and necessary principles, is supposed to be possibly capable of protection. The right to the writ of *habeas corpus* is protected against invasion from the legislative power of the state, under the constitution,—a protection which it shares with various other pri-

vate rights. But this writ, as a matter of judicial administration, is put upon a footing on which the exercise of no other judicial procedure whatever is put,—that is, upon an absolute legal necessity that, upon suggestion, the writ shall issue. The judge to whom application is made has no discretion to withhold the writ. If he refuses it, he exposes himself to fine, as well as to all the consequences of dereliction of absolute official duty. Why is this? It is to secure, as matter of necessary practical result, that, whatever the future progress of the inquiry and its final determination shall be, the condition of personal and forcible restraint shall not continue one moment, but that, on the fundamental basis of this universal principle of free governments,—that whatever is rightly done is rightly done by law,—the transfer shall immediately, completely, and irresistibly be made from the private force that accompanied the actual restraint, into the region of law and judicial determination, and, from that moment, either the restraint ceases or the law continues it and compels it.

I have said, if the court please, that the policy of our law in support of personal liberty had seen fit to devise a process whereby any actual restraint upon a person within this state shall be immediately changed, in fact, from the restraint by private force into the restraint of the law, and by the public force; that thereafter the law restrained, and by its authority alone was any continued deprivation of liberty possible. I have said that this process was the important practical and effectual support of liberty, without which liberty might remain as a name, and despotism exist as a system. Am I wrong in claiming this efficient agency for the writ of *habeas corpus*, and in attributing to it, when issued, the consequences I have suggested? The personal liberty of the people of this state might doubtless have been left, in the first instance, to their own protection, or for them to find, by ordinary remedies, redress for its infraction. Thus it might have been left to a person held in bondage or under restraint in this state to relieve himself by force if he could, and then in an action to recover damages for false imprisonment. This would be so if the *habeas corpus* act were not in force, and this contest of private force would be determined by superior strength as to who should obtain the victory. The distinctive trait of the *habeas corpus* act is that it will not tolerate this "let alone" policy; that it will not permit the will or power of prince or magistrate or public officer or private person to have sway, but always and only the power of the law, that it will take an active part in the protection and defense

of liberty, and that the existence of the fact of restraint shall be the only prerequisite to remove the question from this region of force and submission into the public jurisdiction of the law. If this be so,—and no one can deny that it is so,—from the moment the writ of *habeas corpus* was issued in this case, if these eight persons are held in this state for any period, brief or permanent, in slavery, or if they are sent away from this state into slavery, it is done by the law of the state of New York, and by it alone. For the private dominion of Jonathan and Juliet Lemmon over these persons has been removed by the writ of *habeas corpus,* and they stand in this court for its judgment and control, as the law shall award. The process once set in motion, there is no escape from its regular procedure and its final result, and the statute permits no answer that shall continue the restraint, unless it shall disclose some cause in law sufficient.

Now, what is answered to the exigency of this writ? The petition for the writ alleges that these persons "were, and each of them was, yesterday confined and restrained of their liberty on board the steamer Richmond City, or City of Richmond, so called, in the harbor of New York, and taken therefrom last night, and are now confined in house No. 5 Carlisle street, in New York, and that they are not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree." The supposed cause of restraint is then set forth by the petitioner, but, as the return states it, we need not consider the charges of the petition in this behalf. The answer gives, as legal reason for holding them in the restraint thus admitted to exist, that in the state of Virginia, the respondents, Jonathan and Juliet Lemmon, being there residents and citizens, these eight persons were their slaves; that they, planning an emigration from Virginia to Texas, where the institution of slavery, equivalent to that under the laws of Virginia, existed, took passage in a steamer to the city of New York, and there landed, awaiting the commencement of a new voyage, that should carry them to Texas; that their residence or being in the state of New York was as part of that transit, and with no other plan or design in regard to their remaining except to complete that proposed voyage from New York to Texas. And they claim that the restraint exercised is justified under the laws of New York, by reason of the facts they have stated. That is

the case, and, that being the case, it is for the court to determine whether, by the laws of New York, that is legal cause of restraint, and, if it be, to give the whole power of the law and of the state of New York to maintain that restraint. The statute provides that, upon the return made to the writ, "the court or officer before whom the party shall be brought on such writ of *habeas corpus* shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such court or officer shall discharge such party from the custody or restraint under which he is held." The necessary result of this procedure, introduced by the writ of *habeas corpus,* is thus shown to be the discharge of these persons from the control under which they are found, unless some legal cause shall have, by the return, been shown for the continuance of the restraint complained of. The only question, then, was and is whether the relation of slavery (as described in terms in the return) existing in Virginia, and existing conformably to the laws of Virginia, is a cause for the restraint, by our law, of these persons under the dominion of their owners as slaves in New York, during a brief or other stay, under the circumstances detailed in the return, and so as to compel the authority of our state to be actively exerted to maintain and continue such restraint of liberty.

We are first, then, brought to the inquiry of what a legal cause of restraint is. It is, I take it, an identical proposition to say that legal cause of restraint can be none other than an authority to maintain the restraint which has the force of law within this state. From whatever source this authority of law is derived,—whether it be directly from state legislation, or is found in the unwritten common (or customary) law of the state itself, or whether it be from the federal government, whose constitution and statutes have as perfect authority within this state as laws originating by state enactment, or by the adoption, for the time being, under the principles of comity, or for whatever reason of a foreign system of law (as a fragment and casually, if you please),—it must have the compulsory force of law in this state, or it is no answer to the writ. Under this last head of authority the inquiry is whether our law, finding such restraint maintained or permitted by other communities with which we have intercourse, chooses to say that, under certain circumstances and limited conditions, it will interpose and

continue that restraint on persons passing through our territory. Your honors will see that, though you may ascribe to these three sources of authority the means or grounds for the restraint under consideration, yet after all they are but two,—the authentic and original law of our state, and the authentic and original law of the federal government. For the legal policy that may make possible and exceptional, in favor of strangers, a condition of things that we do not permit to our own citizens, or tolerate in our own population, though called by the name of "comity," must after all be a part of the jurisprudence either of the federal government in force within this state, or of the state government, administered by our courts.

Having thus, as I think, rightly put before the court the real point for its consideration, and assigned the true limits from which the rules for its adjudication must be furnished, let us look for a moment at the position taken by our opponents. As I understand the learned counsel who supports the pretensions of the state of Virginia, and maintains the case of the appellants here, the form and substance of his argument may be briefly divided thus: The first point on which he insists, which includes mere general topics, expanded through the first seventeen pages of his brief, is designed as an argument to propitiate the court to a favorable consideration, or at least to an impartial estimate, of this stranger,—slavery; to show that it is not as bad as it has been painted, and that some of the men who have given it an ill name have themselves had complacency and toleration for other social faults and defects, in the communities in which they lived, that were quite as bad. Its purpose is to put this court in a disposition to find no repugnance to this institution of slavery in their own breasts, in the public conscience, or in the sentiment or in the action of this state, as evinced by any legislation, any principles of its common law, any judicial determinations, except as they may find written in the statute some imperative prohibition of slavery. He would bring you to think that, if this were an open question (and he will contend that it has been left an open question, so far as any statute of the state is concerned), there are many reasons of conscience, of justice, of benevolence, and of duty which require the maintenance and continuance of the institution of slavery, and require every man, whose hands are untied, to give it a helping and supporting hand; that you must find yourselves subdued by some hard system of positive law, that prohibits you from being hospitable to this social and civil institution of slavery, to justify this

court in frowning upon it. In some future stage of my argument I shall have, more completely and distinctly perhaps, to direct the attention of the court to some of the many positions and illustrations which are embodied in this forensic plea for slavery. But let me say now that, if this court and our people cannot be brought to look kindly upon its fragmentary and temporary existence in our midst, but by trampling down, step by step, all the great barriers against oppression that have been raised by the reason, the justice, and wisdom of age after age,—but by undermining the principles that have built up a great, free, and powerful nation to be the habitation of liberty and justice for the great population of to-day, and for generation after generation yet to come; if the rights, poor, feeble, casual, of the black man, cannot be overborne or overthrown without tearing in pieces the law of nations, confounding all distinctions between civilization and barbarism, subduing right by might, and thinking that force and power can, any day it chooses, call evil good, and good evil, and that a few soft phrases and intricate sentences can obscure, even for an hour, the difference between right and wrong, and the fundamental distinction between a rule of force and a rule of right,—then this class of the community, while here in the state of New York, is abundantly safe; for an adoption of the maxims and the principles that are necessarily claimed in this deliberate argument—that force is right, and power is law—can only be expected by reversing the whole tide of civilization, and by bringing into discussion, in courts of justice, that rest upon nothing but the supremacy of reason for their authority, propositions that make foolish the existence of tribunals of justice, when contests of force alone are important or interesting to man and to society.

The next proposition of the counsel for the appellants is that, up to the time of this judicial inquiry in the court below, there was no legislative act of our state that, by its effect, or in its terms, operated to prevent our courts from withholding a judgment of liberty, on a writ of *habeas corpus,* from slaves brought hither from another state of the Union; and, further, that, if the statutes of the state, rightly construed, should be held to have that force and effect, under the constitution of the United States, such statutes are invalid, and no judgment that was based upon such a construction of the law of this state could be sustained. And this prohibitory control of the constitution of the United States over this subject is based upon the commercial powers of the federal government to regulate that kind of intercourse between the states

of the Union, and upon the provision or guaranty of the constitution to the citizens of each state that they shall be entitled to all the privileges of citizens in the several states. In gaining this effect from the latter clause, the learned counsel holds, by a construction, I think, somewhat novel, that its meaning is that the citizens of each state shall have in each other state, not the same rights as the citizens of the state into which they come, but what the learned counsel describes as the rights of a citizen of the United States, in each state into which they come; and, this being rather a shadowy description of rights, not to be found, I think, defined in any constitution or by any laws, the proposition ends in claiming, as the effect of the clause in question, that the citizens of each state coming into another state, besides the privileges and immunities of citizens enjoyed there, which they are to receive in full, are also to be accorded all the rights that they had at home; and that this clause (in its natural and in its established construction so easily understood, so consonant with general jurisprudence, so important and useful in preserving relations between the citizens of different states, by according freely and at once to every citizen who comes here the same rights which our citizens have) is turned into an instrument and means of the absolute overthrow of state sovereignty,—that is to say, that, under this clause of the constitution, instead of protecting the citizens of every state against disparaging distinctions in any state between them and the citizens of that state,—instead of being a shield and a guard,—the federal constitution arms them with the codes and statutes of their own state, which they carry with them as an additional system of law, to be administered in their favor, while they remain lawfully within the state to which they have made their visit. I say it comes to this substantially in terms; and it must come to this if it varies at all from what seems to me the simple and necessary construction,—that its effect is limited to securing to citizens of other states, while here, the same rights and privileges with our own citizens. For, although it is very easy to talk of a "citizen of the United States," it is very difficult to find a citizen of the United States that is not a citizen of some state, and it is very difficult to find, in my judgment, a citizen of any state who is not a citizen of the United States. I do not see where you will find, in the law or constitution, any description of citizenship of the United States, as distinguished from citizens of the states, except in regard to persons brought in *ab extra*,—persons of foreign nativity,—where an operative citizenship of the United States

proceeds from the federal power. But none of us that were born here ever got any right of citizenship of the United States except by and from and in the fact that we were citizens of some state.

The course that I shall think suitable, if the court please, to adopt in this direct legal inquiry, under this writ of *habeas corpus* now before the court, will be to say, and, I think, to show, that, as for legal cause for the restrain of these persons within the city of New York, under the circumstances detailed, the constitution of the United States and the federal statutes give no law whatever,—none,—and that they have nothing to do with it. In the first place I state, as a point of elementary constitutional law, that the federal constitution, and legislation under it, have, in principle and theory, no concern with the domestic institutions, the social basis, the social relations, the civil conditions which obtain within the several states. Is there any doubt on that subject? We are all familiar with the divisions of political opinion that have arisen on the question whether this or that particular power, sought or claimed to be exercised by the government of the United States, was or was not within the grants of power in the federal constitution. We all know that, as lawyers, we are not unfrequently called upon to determine whether this or that exercise of governmental power by a state authority is or is not an infraction upon the express or implied power of the federal government. But every lawyer knows that the whole jurisprudence of state and federal courts on these subjects,—as to whether the express power or necessary implication of power exists in the United States, and whether the particular action of a state government is a violation of some express prohibition upon its action in the federal constitution, or is an intrusion and encroachment upon some explicit or implied power of the federal government,—every lawyer, I say, knows that the whole matter involved within the limits of this inquiry constitutes, as it were, but the merest fraction of the general rights, laws, institutions, employments, conditions, relations which build up civilized society, and make up the body of the subjects of the jurisdiction of the several state governments.

It is very difficult to see how it can be claimed that, upon any general theory, the federal government has anything to do with any questions regulating the rights and titles to property,—regulating the distribution of rank and orders in society, if they should ever come to exist, or at all touching the great social fabric which makes up a civil state. I am, then, justified in saying that, upon the whole theory of the two governments, state and federal, we

are quite free from any implication or intendment that the federal power has anything to do with the civil conditions and social arrangements within the different states. If we look at the history of the constitution, and at the opinions of the men who framed it, we find that a determined stand was made against anything like the establishment of a general government that should exercise authority at all over the general fabric and system of the domestic condition of the people. All the different provinces had laws and customs and arrangements with which they were satisfied, and they were unwilling, in the language of Mr. Ellsworth, of Connecticut, "to trust the federal government with their domestic institutions." And we know that, since the formation of the constitution, its amendments, and the political controversies that have arisen under it, have all tended to confine the general government to, and to restrict the state governments only in, the particular and main lines of authority that are delegated in the federal constitution. Now, if we had not looked at the federal constitution in this light, it would surprise us to see in how few provisions, and in relation to how few subjects, it at all touches or makes mention of the condition of people within the states. There are but four references, as I construe the constitution, that can bear this construction.

The first is a reference to the civil conditions obtaining within the states to furnish an artificial enumeration of persons, as the basis of federal representation and direct taxation, distributively between the states. The constitution establishes a rule for the distribution of representation in the federal government among the different states of the Union by a reference to the condition of people within it,—that is to say, instead of adopting the natural numeration of population throughout this country as the basis of distribution of federal representation, it does establish an artificial rule or method of count, for that purpose recognizing social differences of condition in parts of the population. It does not make any discrimination between states, but says throughout all the states, from Massachusetts to Georgia, you shall count all the people that come within a certain description (which is intended to include everybody but slaves, without the odium of naming them), and then count three-fifths of the rest, who can be none others than slaves.

The second reference of the federal constitution is to the political rights of suffrage within the states, as supplying the basis of the federal suffrage in them, respectively. Here the federal government comes into the states merely to seek what it shall find

there; not in the remotest degree to establish anything, to preserve anything, to affirm or continue anything. It is demonstrable that each state has a complete control over the suffrage within it, for all federal representation. The constitution has expressly declared that whatever each state shall consider a proper basis of suffrage for representation in the more numerous body of its legislature shall be the basis of suffrage for representation in congress.

The third provision—one to which I have already referred—is that for securing to the citizens of every state, within every other, the privileges and immunities (whatever they may be) accorded in each to its own citizens. Let us look at the phraseology of that section, to see whether it bears any other construction than the simple one which I have attached to it. The words are these: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is claimed by the learned counsel for the appellants that this should be construed as if it read: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the United States, in the several states." But it is very plain, as it seems to me, in the first place, that there is nothing in the condition of a citizen of the United States which would warrant the suggestion that there was any intention that he should carry into any state social or political rights which citizens there did not enjoy; and, in the second place, the natural and necessary construction of the clause is that the privileges and immunities secured to citizens of each state while within another are the privileges and immunities that citizens of the state, where such privileges and immunities shall need to be claimed, enjoy. It establishes, and should establish, a rule of equality and uniformity; not of distinction and confusion.

The fourth provision of the constitution which comes under our consideration is familiarly known as the "fugitive slave clause," and reads as follows: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." This clause undoubtedly does affect the condition of persons in the states of the Union. It undoubtedly does affect an escaped slave while within any state of this Union into which he shall have escaped, with certain restraints, impediments, burdens, and consequences of restoration, which are not imposed by the govern-

ment or laws of the state in which he is found. And here, for the first, does the federal government, by its own force, put upon this particular class of our population, found in the special predicament of escape from the state in which they owed service, the bonds of federal obligation, and destroys entirely their recourse to the protection which otherwise they could have claimed from the laws of the state in which they are found. Now, I have said that these are the only clauses of the constitution that can be held in any sense to relate at all to the condition of persons, civil or political, in the states of the Union, for any purposes of government, and that none of these clauses touch the question now under discussion. The argument to this effect in respect to the "fugitive slave clause" is unanswerable. The general principles of jurisprudence and the decisions of the federal courts all show that, but for the existence of this clause, an escaped slave would be held by no restraint or coercion except such as the state in which he was found chose to establish and enforce, and that the rights of the master would rest upon nothing but the comity or the legislation of the state into which the escape had been made. The existence of this clause in the constitution is not only evidence that the right of reclamation would not have existed but for its insertion, but it is an argument of the utmost force that, even with this clause in the constitution, no right exists for his master to hold in servitude, in the state of refuge, even an escaped slave. An escaped slave, after he is restored, is held in slavery by the laws of the state whence he escaped, and to which he returned, as he was before. But while he is in another state, the "fugitive slave clause" gives no authority to hold and use him as a slave. There is no legal answer that can be made to our writ of *habeas corpus,* in respect to a slave escaped into this state, except that he is held by authority of federal legislation, under the constitution, providing the mode of his recapture and restoration to his home of slavery. Whether now it would be held by the federal judiciary that there existed a general right on the part of the master, personally, to reclaim the slave by his own direct force, as bail may recover their prisoner, is doubtful. But granting that such right exists, still there is no right to hold him in slavery in the state to which he has escaped. There is the right of taking and carrying him away, undoubtedly, either by the process of federal law, or, perhaps, by this personal authority that belongs to the relation of bail and prisoner, or master and slave, but not to hold him in slavery;

and any attempt to do so, or to do anything except with due diligence to remove the escaped slave to the state from which he escaped would not be protected against our writ of *habeas corpus* by the federal constitution or federal legislation.

Before considering the decisions of the United States courts, which I suppose clearly establish the position that the federal legislature and the federal courts have nothing whatever to do with the subject now before this court, I will very briefly place before the court my views as to the existing law of this state on the subject of the allowance or permission of slavery within it. If there is nothing left to be considered but whether our law sustains or permits this relation of master and slave, if this is the kind of legal restraint necessary to defeat of its proper result the writ of *habeas corpus*, then we must find in our state law, in some form, an authority for the restraint. It is necessary for me here only to suggest that it is not requisite, to support a legal restraint, that there should be a positive warrant or mandate of law directing or requiring it. A restraint permitted by our law is as good an answer to the writ of *habeas corpus* as a positive warrant or mandate. It is not necessary that we should have a writ of execution, or a warrant of committal, or that the imprisonment should be in the state prison or in a jail, or that, in any form, there should be a direct command of active authority. The relations that our law recognizes, whether or not they be established or regulated by statute, and which give, in their nature, restraint over the person to this or that degree, constitute a good answer to uphold the exercise of that restraint to that degree. The relations of husband and wife, of parent and child, of guardian and ward, of the drunkard and his committee, of the lunatic and his committee,—all these relations, when the exigency of the writ evokes them as a cause of the restraint of persons, are recognized by our law as justifications for such restraint and control as do not exceed the due measure which the law allows to them. But, if the court please, there can be nothing recognized by law as an occasion or justification of restraint except some general *status* established, allowed, recognized by our law, or some positive mandate or warrant. In one or the other form, as matter of positive, actual, recognized existence in our state, an answer must be made to the writ, or the liberty of the subject of it is at once secured to him. The answer here does not set up any of the natural relations. Nor does it set up the relation of apprentice and master, or of guardian and ward, or any similar rela-

tions, which are not natural, but yet are lawful relations. The answer is slavery; and not slavery of the state of New York, but slavery of the state of Virginia. It is slavery in Virginia, in transit through New York, continuing here the relation created by the law of Virginia, which it is expected or desired shall receive the sanction and support of our law and of this court for the special purpose the occasion requires. But, I maintain, the law of this state does not permit the existence of slavery within its limits. And, first, the common law of the state does not permit the existence of slavery within its limits. I now speak of the common law of this state as we understand it,—as a system of law governing the relations of persons, and of persons to things, in this state, as a body of law discriminated and separated from that which is established by statute. This body of law is derived from England, the source of the common law of this state; and when I say the common law of this state does not permit slavery within its limits, I fear no contradiction, in the known judicial sense of that law.

Whether or not the institution of slavery within this state, while it existed and was regulated by statute, and was modified also, I have no doubt, by subjecting it, in some degree, to the principles of common right and general justice which lie at the foundation of the common law of the state, and of the nation from which we inherited it,—whether or not the institution of slavery in this state was, properly speaking, a part of the common law of this state, seems not to be a very important inquiry. I do not suppose it should be, properly, so considered. I suppose that the whole course of legislation, the whole course of judicial determination, treated the whole system of slavery in this state as foreign,—not incorporated into our system; not permitted to be molded into that relation between master and slave which would have followed from its control by the common law. The cases I have referred to from the English books (and, I take it, they have not been at all shaken by the comments of the learned counsel),—the cases show that, by the common law of England, any such *status* of slavery as is known in the United States, or as is pleaded here as an answer to the writ, never existed. This is not to be doubted. Whether, in former times, villenage existed in England, whether it was a monstrously iniquitous oppression, and whether it was inconsistent for British judges to frown upon negro slavery there, in the eighteenth century, because villenage had obtained in earlier times, and whether

this inconsistency justly subjects them to my learned friend's derision, may be matter of useful inquiry in some other connection than the present. But the common law of England never knew of this condition of slavery which is pleaded as an answer to the writ of *habeas corpus,* and as legal cause for holding these persons. The *status* of slavery, therefore, not being established by the common law of England before the Revolution (and that constitutes our common law), we need to find a positive support for slavery among our population, recognized by the public will of the state, as manifested by legislation, in order to sustain it. If obliged to rest upon the common law, it would have no support whatever.

What may, at earlier periods of our history, have been the condition of our statute law on this subject, comes to be rather an idle inquiry when we consider the plain and comprehensive terms of the existing statute law of the state. My learned friend has called the attention of the court—rather by way of parenthesis, however—to the statute which it is now necessary to look at more distinctly. The Revised Statutes being, in the provisions I am now about to read, a re-enactment of the law of 1817, provide as follows:

"No person held as a slave shall be imported, introduced, or brought into this state, on any pretense whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought in this state, contrary to the laws in force at the time, shall be free." Section 1.

"Every person born within this state, whether white or colored, is free; every person who shall hereafter be born within this state shall be free; and every person brought into this state as a slave, except as authorized by this title, shall be free." Section 16.

I cannot think it important gravely to discuss with my learned friend, whether this law, in its proper construction, does proscribe the existence of a slave within this state, and make it a legal impossibility wherever the law has force. He has argued, I know, that although the legislature, besides the commercial word "imported," and besides the word, of Latin origin, "introduced" (which means "brought within"), has also used the words "brought into," that it has failed to make itself fairly understood, or to accomplish the meaning imputed in our construction, that a slave should not be within this state. It is said that the true force of these terms is satisfied by the construction, and therefore the true construction of the clause should be, "that no slave shall be incorporated into the population of this state; that no slave shall be brought into it, or imported into it, with the de-

sign and purpose that he should become a part of the population of this state." Exactly what that means—exactly what limits to the tolerance or maintenance of slavery in this state this construction of the statute would impose—it is not easy to say, nor do I care to inquire. I respectfully submit that the statute is clear, comprehensive, and decisive in its meaning and in its effect. If the statute has the force of law in this state, there never can be, on any pretense, a person in the condition of slavery within this state, unless some provision of that statute, found between the first and last sections of it which I have read to the court, gives that right. Now, we do find certain exceptions made by the statute under consideration for the allowance of slaves under special circumstances within this state, and among these exceptions the following, being sections six and seven of the title:

"Sec. 6. Any person, not being an inhabitant of this state, who shall be traveling to or from or passing through this state, may bring with him any person lawfully held by him in slavery, and may take such person with him from this state; but the person so held in slavery shall not reside or continue in this state more than nine months, and, if such residence be continued beyond that time, such person shall be free.

"Sec. 7. Any person who, or whose family, shall reside part of the year in this state, and part of the year in any other state, may remove and bring with him or them, from time to time, any person lawfully held by him in slavery, into this state, and may carry such person with him or them out of this state."

In 1841 this act was passed:

"The third, fourth, fifth, sixth, and seventh sections of title 7, chapter 20, of the first part of the Revised Statutes, are hereby repealed."

This express repeal of the sixth and seventh sections, which I have read from the Revised Statutes, presents in the most distinct and absolute form the determination of the people of this state that the temporary introduction of slavery by transient visitors should not, under any circumstances, be permitted.

Your honors will perceive that the question now presented is not at all different from what it would have been while the sixth and seventh sections, that permitted a temporary residence with the slave, were in force, in the case of a slave attempted to be held after the expiration of the limited term. There was a permission for a specified period of time, and a declaration that, if that time were overpassed, the slave should be free. Now no hospitality of any kind, or for a moment, is permitted to the master, with his slave, in any sense of retaining him as a slave. Let us then consider a little more fully whether the federal laws and federal decisions leave any doubt as to the complete exemp-

tion of the several states from federal control in this matter. Now, your honors will perceive that, while we talk of comity permitting to strangers from communities with which we are in peace passing through our state this or that privilege, and so long as the extent of this comity is determined by our jurisprudence and by our own statutes, we do control entirely the condition of persons within our state. If judicial determinations, at any time, show greater hospitality to foreign institutions than public sentiment approves, the legislature may limit or wholly terminate that comity. But when it is claimed that, by a superior and paramount law, Mr. and Mrs. Lemmon can make a good answer to the writ of *habeas corpus,* in this state, that they hold these eight persons in New York as their slaves until they, in pursuance of their proposed voyage, should take them away,—that they bring and hold their slaves here by paramount law, and that law is found in the constitution of the United States,—the question arises, where is the limit of that right? I defy the learned counsel for the appellants, if he claims this right under the constitution of the United States, to fix a limit of any kind, either in time, in circumstance, or in the tenure of slavery here, unless it is to be left to some tribunal to say whether the maintenance of slavery under the circumstances and for the time claimed is within some general obligation of respect and regard between the different states of this Union. And this brings the question back to the region of comity, and not of right.

There is no stopping place, in my judgment, for the right claimed under the constitution of the United States, short of allowing the continuance and maintenance of slavery, just so long as citizens of other states shall choose to reside within this state, without surrendering their character of citizens of other states. Accordingly, the claim now, as I understand it, is that Virginians coming here can bring their slaves and keep them here as long as they remain Virginians. The claim is one of vast proportions, if it be any claim at all; it has no self-imposed limitations whatever. In nature and substance it is a claim that citizens of each state may carry into other states the institutions of their own state. Now, the exclusion of slavery from the states has been the subject of legislation quite as much in the slave as in the free states. I doubt whether there is a slave state in the Union that has not, at some time, or to some extent, legislated for the exclusion of slaves from its territory, and prescribed, as the direct and immediate consequence of their introduction, that they should

become free. Will any one draw a distinction between the right of excluding slaves from a state from the love of liberty, and excluding them from motives of protection and regard for slavery? If South Carolina, from fear of being overstocked with slaves, legislates to prevent the introduction of more slaves, and if New York, regarding one slave an overstock, legislates to exclude that one, is there any difference, as to the power of legislation, growing out of the motive and purpose of it? I take it not. Virginia, as early as her emancipation from the dominion of the British crown permitted, in 1778, passed a law prohibiting the introduction of slaves into Virginia, and prefaced it with a preamble that she had been prevented from doing it before then "by the inhuman exercise of the veto of the King of England." That law and its preamble are a good answer, from the state of Virginia, to many of the views now supported, in its name and behalf, by the learned counsel.

Certainly slavery cannot be "just, benign, beneficent, consistent with pure benevolence, and, indeed, a positive duty," if the exclusion and suppression of the institution had been retarded by an act of authority, which was justly stigmatized as inhuman. Certainly we might suspect that slavery itself was inhuman if the suppression of it was only stopped by an act of inhuman tyranny. But later legislation, and legislation that has been brought into judicial controversy in the slave states and in the federal tribunals, has busied itself upon this same subject. The case of Groves and Slaughter [1] was considered, and should be considered, and is tenaciously adhered to by the present chief justice of the United States, as a decision that the federal government has no voice or authority on the subject whatever. How did that case arise? The constitution of Mississippi, adopted in 1832, had prohibited the introduction of slaves as merchandise or for sale after the first day of May, 1833. Notwithstanding that provision, there having been no affirmative legislation defining penalties and affixing consequences to the introduction of slaves and their sale, the people of Mississippi bought a good many slaves from Kentucky and Tennessee, and other states, and gave their notes for them. When the notes became due, the slaves being in Mississippi, and still held as slaves, the collection of the notes was attempted to be defeated on the ground that the consideration was illegal, because the slaves had been introduced into the state of Mississippi contrary to the provisions of the

[1] 15 Peters, 449.

constitution. The state courts of Mississippi held that that was a sound view of the law, and that from the payment of the notes, amounting altogether to some millions of dollars, the people of Mississippi were quite free; that they might keep the slaves and not pay the notes. The question was brought up before the supreme court of the United States in the case of Groves v. Slaughter, argued by Mr. Webster, Mr. Clay, and General Jones, on behalf of the note holders, and by Mr. Gilpin, attorney general, and Mr. Walker, of Mississippi (since much distinguished in public life), on the other side. A very elaborate discussion was had on one question involved,—whether the constitution of Mississippi, by its own vigor, operated such an illegality in the introduction of slaves as made the notes void, or whether it was only binding upon the legislature to pass laws that should prohibit their introduction, and should affix such consequences, such as forfeiting the purchase, or making the slave free, or declaring the contract or the security void, as they might see fit. It was claimed on the part of the note holders that this constitutional provision did not, of itself, without legislation under it, create such an illegality in the contract of sale as defeated the recovery of the note. They contended, further, that, if that consequence did follow, so as to be a matter of forensic importance in the case, the constitution of Mississippi, which excluded the slaves, was in this provision invalid, under the constitution of the United States; that, under the commercial clause, the federal government had exclusive jurisdiction over the regulation of commerce between the states, and, if commerce between the states, then of commerce in slaves, as well as in any other property. The proposition, therefore, was that this clause in the constitution of Mississippi which excluded slaves from the state as merchandise was void, under the constitution of the United States, in its commercial clause. Well, that case was disposed of by the federal judiciary holding, as matter of law, that the notes were not avoided by the constitution of Mississippi, but that legislation was needed to produce that effect. But the court utterly scouted the notion that the clauses of the constitution of the United States appealed to had anything to do with this question of the introduction of slaves into either slave or free states. The opinion of the court was given by Mr. Justice Thompson, and disposed of the cause, as I have said, on the point that the constitution of Mississippi did not invalidate the notes. But the magnitude of the question involved in this claim that the com-

mercial power of the Union had any authority over the introduction or determination of any *status* inside of a state induced the court to regard it as a matter concerning which they must express the most decisive opinion. And if it be held that the point already decided disposed of the case, and that the further opinions of the judges were unnecessary and superfluous, why, it is at least as good an authority as the reasoning of the judges in the Dred Scott case, beyond the point of decision there, and which is so much relied on in this argument.

At page 506, Mr. Justice McLean states the question:

"Can the transfer and sale of slaves from one state to another be regulated by congress, under the commercial power?"

I take it for granted that there is much more sense in claiming that, when the introduction of slaves has some connection with commerce in a proposed sale, you may invoke the commercial power of the Union, than when their introduction is mere matter of convenience of travel. The learned judge proceeds:

"The constitution treats slaves as persons. . . . . By the laws of certain states, slaves are treated as property; and the constitution of Mississippi prohibits their being brought into that state by citizens of other states for sale, or as merchandise. 'Merchandise' is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the states as merchandise, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected, by the federal authorities; but the constitution acts upon slaves as persons, and not as property. . . . . The constitution of the United States operates alike on all the states, and one state has the same power over the subject of slavery as every other state. If it be constitutional in one state to abolish or prohibit slavery, it cannot be unconstitutional in another, within its discretion to regulate it. . . . . The power over slavery belongs to the states respectively. . . . . **The right to exercise** this power by a state is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence, of a state. Its power to guard against or to remedy the evil rests upon the law of self-preservation,—a law vital to every community, and especially to a sovereign state."

Chief Justice Taney is not at all behind Mr. Justice McLean in his views of the necessary reservation to the states of complete control over this whole subject. He says at page 508:

"In my judgment, the power over this subject is exclusively with the several states, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits from another state, either for sale or for any other purpose, and also to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several states upon this sub-

ject cannot be controlled by congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the constitution of the United States. I do not, however, mean to argue this question. I state my opinion upon it on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence, when another member of the court has delivered his opinion, might be misconstrued."

Mr. Justice Story, Mr. Justice Thompson, Mr. Justice Wayne, and Mr. Justice McKinley concurred in these views of the chief justice and of Mr. Justice McLean.

The next case to which I will briefly ask your honors' attention is that of Prigg v. The Commonwealth of Pennsylvania, in the 16th of Peters, and especially to the parts of the case that are referred to in my points. The court is familiar with the general doctrine of that case. It raised before the federal court for decision the question whether the constitutional clause which provided for the rendition of fugitives from service, and the legislation under it, made the subject one of exclusive federal regulation, and whether the statute of the state of Pennsylvania, and of course those of New York and other states, within the same purview, were constitutional. The exclusive authority of federal legislation in the premises was fully established, and upon general reasons which established equally that, but for the clause in the constitution, the whole subject, even in respect to escaped slaves, would have been absolutely and exclusively within the control of state authority. Judge Story, delivering the opinion of the court, says (speaking of the fugitive slave clause of the constitution):

"The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves as property in every state of the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states, and, indeed, was so vital to the preservation of their domestic interests and institutions that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non slave-holding states by preventing them from intermeddling with or obstructing or abolishing the rights of the owners of slaves. By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in Sommersett's

case,[2] which was decided before the American Revolution. It is manifest from this consideration that, if the constitution had not contained this clause, every non slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters,—a course which would have created the most bitter animosities, and endangered perpetual strife between the different states. The clause was therefore of the last importance to the safety and security of the southern states, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the constitution by the unanimous consent of the framers of it,—a proof at once of its intrinsic and practical necessity."

Again, at pages 622 and 623, he says:

"In the first place, it is material to state (what has already been incidentally hinted at) that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever state of the Union they may be found, and of course the corresponding power in congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the constitution of the United States, and are there, for the first time, recognized and established in that peculiar character. Before the adoption of the constitution, no state had any power whatever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other states. Whenever the right was acknowledged or the duty enforced in any state, it was as a matter of comity and favor, and not as a matter of strict moral, political, or international obligation or duty. Under the constitution it is recognized as an absolute, positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation. It is therefore, in a just sense, a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy."

And, at page 625, he proceeds:

"These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusive in congress. To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the constitution of the United States, and owes its whole efficacy thereto."

These opinions, included in the judgment as pronounced by the court, were assented to by all the judges who assisted in the actual determination of the case.

The next case is that of Strader v. Graham, in 10th Howard, and was of this kind: Graham was a Kentucky slave owner,

[2] Lofft, 1, 11 St. Tr. by Harg. 340, 20 How. St. Tr. 79.

and had permitted some of his slaves to cross over into the state of Ohio, habitually, for the purpose of instruction in music, designing to retain his property in them, and to make this talent, thus to be cultivated, productive to himself. The slaves receiving this instruction returned to their master, and afterwards fled from his service, making their escape by means of a steamboat on the Ohio river. By the law of Kentucky, in the protection of slave property against such casualties as this, the proprietors of any steamboat or other vessel upon the river, by means of which the escape should be made, are made responsible to the slave owners in an action for the value of the slave. An action was brought, under this law, by Graham, against the owners of the boat upon which the escape had been made, in equity to enforce a lien given by the statute against the boat. The litigation, commenced in the state court of Kentucky, terminated in a final judgment in the court of last resort in favor of the slave owner. From that decision an appeal was taken under the 25th section of the federal judiciary act to the supreme court of the United States, the defense in the court below being on the ground, in part, at least, as a good and sufficient one, that these slaves had become free by their master's voluntary introduction of them into the state of Ohio, and that the state of slavery thus dissolved was incapable of reinstatement. The 25th section, as your honors know, carries up cases from the courts of last resort in the states when the decision is alleged to have involved the consideration of a right, secured under the constitution of the United States, and has resulted in a decision adverse to that right. The appellants in that case, on the question of freedom or slavery, and the considerations it involved, stood precisely, to illustrate the matter, as these appellants now before this court would stand in the supreme court of the United States if your honors' judgment here should affirm the judgment of the court below, and an appeal should be prosecuted from your judgment to the supreme court of the United States upon the ground that the right, to which your decision had been adverse, was protected by the federal constitution.

Now, the first and important question in all cases that are carried into the federal judiciary by that method of appeal is whether the appellate court has jurisdiction of the cause; in other words, whether the judgment below does contain an adjudication upon any right under the constitution of the United States, and whether the determination has been adverse to the

right claimed, for both these elements must be found in the decision of the court of last resort of the state, or there is no appeal to the supreme court of the United States to reverse the judgment, although it may be clearly erroneous. The direct point, therefore, of federal control over the civil *status* of persons within the states, was raised in the case of Strader v. Graham, as a question of jurisdiction. Chief Justice Taney, in delivering the opinion of the court, says:

"The Louisville chancery court finally decided that the negroes in question were his slaves, and that he was entitled to recover $3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with the costs of suit. This decree was afterwards affirmed in the court of appeals in Kentucky, and the case is brought here by writ of error upon that judgment. Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the state court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio had made them free when they returned to Kentucky. But this question is not before us. Every state has an undoubted right to determine the *status* or domestic and social condition of the persons domiciled within its territory, except in so far as the powers of the states in this respect are restrained, or duties and obligations are imposed upon them, by the constitution of the United States, and there is nothing in the constitution of the United States that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return. The court of appeals have determined that, by the laws of the state, they continue to be slaves; and their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it."

A comparison of this case with the Dred Scott decision, and with the narrative of the litigation concerning Dred Scott, as given in the report of that decision, will exhibit to the court the reason, as I suppose, that the Dred Scott controversy was not brought into the supreme court of the United States by appeal from the judgment of the court of Missouri. The litigation concerning the liberty of Dred Scott, generally considered to have been a case made up for the purpose of raising certain questions for judicial determination, started in the courts of the state of Missouri, and had reached final judgment in the last court of that state adverse to the liberty of Scott. Scott claimed his liberty by virtue of the constitution of the United States, just as the freedom of Kentucky negroes was claimed under the constitution of the United States. Pending this litigation in the Mis-

souri case, the decision was made in the case of Strader v. Graham, dismissing the appeal under the twenty-fifth section for want of jurisdiction. As this absolutely shut out any consideration of the rights or doctrines on which the freedom of Scott was supposed to have been gained, an abandonment of the litigation in the state courts of Missouri followed, and a new litigation by Scott in the federal courts was commenced, whereby, through regular and general appeals from the circuit court to the supreme court of the United States, the whole cause was brought up, and the court found itself, as it thought, at liberty to deliberate upon some matters of grave and general import, political and ethical, after they had disposed of the inquiry as to the freedom of Dred Scott.

The case *Ex parte* Simmons,[3] to which I have referred your honors, seems a direct authority upon the question before us. There the question was as to the freedom of a slave brought voluntarily by his master into the state of Pennsylvania during the prevalence of laws there which permitted the temporary residence of a master with his slave within the jurisdiction of that state. The period allowed by the statute being overpassed, the point was whether the slave was entitled to his liberty, and Judge Washington decided that he was.

I come now, if the court please, to the decision in the Dred Scott case, the general doctrines of which are invoked by the appellants here, as appears by the brief, though not insisted upon orally in the argument, and my learned friend has not called the attention of the court to the particular principles laid down in the case, upon which his reliance was based. The general character of that case, and the exact limit of judicial inquiry that its facts presented, have been already fully stated by my learned associate. An examination of the opinion of Judge Nelson in that case will show that he has confined himself to the precise inquiry that the litigation properly presented for judicial determination, to wit, whether Dred Scott was, in Missouri, and by its law, a slave. If he was a slave, it must be universally conceded that he was not a citizen. As the jurisdiction in question of the federal judiciary is confined to suits between citizens of different states, the moment you put the plaintiff in the condition of not being a citizen of any state, of having no citizenship, and no civil rights whatever, of course there is no jurisdiction, as the plaintiff's standing in court rests, not upon personality, but upon

[3] 4 Wash. C. C. 396.

citizenship. But the court, after deciding this, did, through many of their judges, express opinions upon, and elaborately argue, two very important general principles,—one of a political nature, and the other coming within the larger range of general ethics and morality. One of these points was that the restrictive clause of the Missouri compromise act was unconstitutional and void. There was an opportunity for discussion, though none for decision, on that point, by reason of this fact. Although the question of Dred Scott's freedom was fairly presented by a two-years residence with his master in the state of Illinois,—a residence, with the effect of which the validity or invalidity of the Missouri compromise act had nothing to do,—yet, as the question of the freedom of his children and of his wife was also involved in the case, their residence, upon which their claim of liberty rested, happened to be within the portion of the Missouri territory secured to freedom by the restriction of the Missouri compromise act, subject, of course, to its constitutional validity. The other point of inquiry was purely historical and ethical, and resulted in a very brief and summary deduction by the learned chief justice, from the judicial and general annals of the country, that black men have no rights "that white men are bound to respect." Now, both these topics are without any application to the real inquiry before this court, and I have no occasion to refer to the Dred Scott decision as a determination or discussion of the *status* of slavery in the territories of the United States. That subject is to be considered, either legislatively or judicially, where it may properly arise. But I understand the principles announced in the opinions of the judges who concur in the judgment of the court in the Dred Scott case to establish, in the fullest manner, the entire control of state authority over the condition of all people within it, and to reaffirm the decisions of the supreme court to which I have called your honors' attention. Thus, the chief justice, delivering the opinion of the court, says:

"But there is another point in the case which depends on state power and state law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the state of Illinois, independently of his residence in the territory of the United States, and, being so made free, he was not again reduced to a state of slavery by being brought back to Missouri. Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader v. Graham, reported in 10 Howard, 82. In that case the slaves had been taken from Kentucky to Ohio with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their *status* or condition, as free or slave, depended upon the laws of Kentucky when they were

brought back into that state, and not of Ohio, and that this court had no jurisdiction to revise the judgment of a state court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned on it, as will be seen by the report of the case. So in this case, as Scott was a slave when taken into the state of Illinois by his owner, and there held as such, and brought back in that character, his *status*, as free or slave, depended upon the laws of Missouri, and not of Illinois. It has, however, been urged in the argument that, by the laws of Missouri, he was free on his return, and that this case, therefore, cannot be governed by the case of Strader v. Graham, where it appeared by the laws of Kentucky that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may at one time have been entertained on this subject, we are satisfied, upon a careful examination of all the cases decided in the state courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the state that Scott and his family, upon their return, were not free, but were, by the laws of Missouri, the property of the defendant, and that the circuit court of the United States had no jurisdiction when, by the laws of the state, the plaintiff was a slave, and not a citizen. Moreover, the plaintiff, it appears, brought a similar action against the defendant in the state court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the supreme court of the state, was fully argued there, and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant, and reversed the judgment of the inferior state court, which had given a different decision. If the plaintiff supposed that this judgment of the state court was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the supreme court of the state, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of Strader v. Graham is directly in point; and, indeed, independent of any decision, the language of the twenty-fifth section of the act of 1789 is too clear and precise to admit of controversy."

Is it not entirely clear that the same principles of reasoning and construction apply to this case, now before your honors, and that your judgment is not the subject of appeal to the supreme court of the United States? Mr. Justice Nelson, on the same point, says:

"This question has been examined in the courts of several of the slaveholding states, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is that the question is one which belongs to each state to decide for itself, either by its legislature or courts of justice, and hence, in respect to the case before us, to the state of Missouri,—a question exclusively of Missouri law, and which, when determined by that state, it is the duty of the federal courts to follow. In other words, except in cases where the power is restrained by the constitution of the United States, the law of the state is supreme over the subject of slavery within its jurisdiction. As a practical illustration of the principle, we may refer to the legislation of the free states in abol-

ishing slavery, and prohibiting its introduction into their territories. Confessedly, except as restrained by the federal constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the state of Missouri? The power flows from the sovereign character of the states of this Union,—sovereign not merely as respects the federal government, except as they have consented to its limitation, but sovereign as respects each other. Whether, therefore, the state of Missouri will recognize or give effect to the laws of Illinois within her territories on the subject of slavery is a question for her to determine. Nor is there any constitutional power in this government that can rightfully control her."

Now, certainly, if this be good law in favor of slavery, it is good law in favor of liberty. The *status,* slave or free, is the same *status* for consideration and determination, whether the judgment be in favor of slavery or in favor of liberty. And when, in behalf of the free state of Illinois, it is claimed that it so changes the *status* of any slave who may come within its borders that thereafter nothing but positive re-enslavement can deprive him of his condition of freedom, and the judgment is that Missouri must determine that for itself; when Virginia claims that slaves held lawfully within its limits may still retain that condition in the state of New York,—must not the decision be that New York must determine that for itself, by its own inherent sovereignty, uncontrolled by the federal constitution, and that the supreme court at Washington has no jurisdiction to reverse the judgment of this high tribunal?

I read now from the opinion of Mr. Justice Campbell:

"The principles which this court have pronounced condemn the pretension then made on behalf of the legislative department. In Groves v. Slaughter[4] the chief justice said: 'The power over this subject is exclusively with the several states, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits.' Justice McLean said: 'The constitution of the United States operates alike in all the states, and one state has the same power over the subject of slavery as every other state.' In Pollard v. Hagan[5] the court says: 'The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in cases where it is delegated, and the court denies the faculty of the federal government to add to its powers by treaty or compact.'"

So much for the Dred Scott decision, and the opinions of the learned judges who concurred in the judgment then pronounced. I have cited passages from their opinions above; the whole tenor of the dissenting opinions of Mr. Justice McLean and Mr. Justice Curtis, of course, carrying these principles to even further results.

[4] 15 Pet. 449. [5] 3 How. 212.

The passenger case, City of New York v. Miln (in the 11th of Peters), will be found fully to sustain these views. The later passenger cases, which fill a great part of the 7th of Howard, are much relied upon by the learned counsel for the appellants, and references to them are largely spread upon his points, with the view of showing that this introduction of persons into the states does, in some sort, fall within the commercial power of congress, and that the doctrine of these cases, which held invalid the law of New York and the similar law of Massachusetts, imposing a tax upon the introduction of passengers into those states respectively, has a bearing upon the question at bar. Those cases were decided by a court as nearly divided as a court of an uneven number can be,—five judges holding the statutes to be unconstitutional, but solely upon the ground that they were, in effect and form, a tax upon commerce. The five judges who concurred in the opinion were Justices McLean, Catron, McKinley, Wayne, and Grier. Those who dissented were the chief justice and Justices Nelson, Woodbury, and Daniel. But your honors will perceive that the majority of the court was made by the adhesion of Justice McLean to the decision. The chief justice manfully contended that the decision in Groves v. Slaughter had foreclosed the court from considering any question, even as a question of taxation, touching the regulation or prevention of the introduction of any persons into the states, this being a most sensitive point with the slave-holding states. Mr. Justice McLean, however, joined in the opinion that it was a tax upon commerce, and, in that light alone, regarded the state laws as an unconstitutional interference with the commercial power of congress. The criticism which I have made upon the composition of the majority of the court in the instance of Justice McLean will apply to Justice Wayne and the other members of the court from slave-holding states, who never have been doubtful in their opinions or judgments upon this exclusive control by the slave states of the whole subject of slavery. A reference to the opinions of the majority of the court in these cases will show that it is solely as taxation upon commerce, imposed upon a vessel as it arrives, with its freight of passengers on board, that interference with the commercial power of the federal constitution can be rightfully charged upon the state legislation then brought in question. Your honors are aware that the modification of our passenger laws, made in consequence of the decisions I have cited, have accomplished, in effect and in result, substantially the

same security and indemnity to this state, against the introduction of burdensome emigrants, as the obnoxious laws produced. The method now taken exacts a bond that each passenger shall not become chargeable upon the state, and then, by a general provision, permits in lieu of this bond a moderate commutation in money. The chief justice, in his dissenting opinion in these cases, reiterates his opinions, so plainly and decisively expressed in the cases which I have cited. The chief justice says:

"The first inquiry is whether, under the constitution of the United States, the federal government has the power to compel the several states to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or the pleasure of the United States to admit. In my judgment, the question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of congress, required the state of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of congress which can be justly so construed. But it is not necessary to examine that question until we have first inquired whether congress can lawfully exercise such a power, and whether the states are bound to submit to it. For if the people of the several states of this Union reserved to themselves the power of expelling from their borders any person or class of persons whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be a usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute. It was distinctly decided in Holmes v. Jennison,[6] in Groves v. Slaughter,[7] and in Prigg v. Commonwealth of Pennsylvania.[8] If these cases are to stand, the right of the states is undoubted. If the state has the power to determine whether the persons objected to shall remain in the state in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of Groves v. Slaughter, the Mississippi constitution prohibited the entry of the objectionable persons, and the opinions of the court throughout treat the exercise of this power as being the same with that of expelling them after they have entered. Neither can this be a concurrent power, and, whether it belongs to the general or to the state government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the state in conflict with a treaty or act of congress would be void; and if the states possess it, then any act on the subject by the general government, in conflict with the state law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the states as to who should and who should not be permitted to reside in a state would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion. I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several states have a right to remove from among their people, and to prevent from enter-

[6] 14 Pet. 540.
[7] 15 Pet. 449.
[8] 16 Pet. 539.

ing the state, any person, or class or description of persons, whom it may deem dangerous or injurious to the interest and welfare of its citizens, and that the state has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government."

This review of the judgments of the federal court shows that, in whatever points the judgment and doctrines of the supreme court of the United States, as recently promulgated, may be supposed to be unfavorable to personal liberty, they cannot be charged with being at all inconsiderate of the vital and essential point that, within the states, the civil and social condition of all persons is exclusively governed by state authority, excepting only in the precise case of a fugitive from labor. In that case the inquiry arises, not under the commercial clause, nor under the privilege and immunity clause, but under the express clause applicable in terms to the subject.

Before passing from this topic, I ought, perhaps, to notice one suggestion in regard to the construction of this privilege and immunity clause,—that to give it its apparent and natural meaning involves an absurdity. It is said for a citizen of Virginia to claim, by virtue of that clause, in the state of New York, the full privileges of a citizen of New York, would include the political rights of a citizen in the government of the state. The very statement of this difficulty refutes it. The clause confers or secures no privileges or immunities except so long as the sojourner remains a citizen of the state whence he comes. Its operation ceases the moment the citizenship of the state into which he has come is assumed. It cannot, therefore, clothe the sojourner with rights, the exercise of which transmutes him, by the mere act, into a citizen of the new state, and, by the same act, divests him of his original citizenship. No one can be a citizen of two independent sovereignties at the same time. The required limitation it found in the terms used, and in the nature of the subject to which they are applied.

I now beg to ask the attention of the court to some cases in the Virginia reports, of much interest on this subject, of the power of a sovereign state over the *status* of slavery within it, and of the limitation of the condition of slavery to that form and extent alone in which it is supported by the positive law of the state. The case of Butt v. Rachel, found in 4 Munford's reports, page 209, was decided in 1813 in the court of appeals of Virginia. The case did not arise under the constitution of the United States, but affirms the general doctrine that no state,

even if it has a *status* of slavery within it, and recognizes such condition in its population as lawful and politic, by comity, recognizes the lawfulness within its borders of any other than that very slavery which its own law creates and upholds. The note of the case is as follows:

"A native American brought into Virginia since the year 1691 could not lawfully be held in slavery here, notwithstanding such Indian was a slave in the country from which he or she was brought."

Now, this slave introduced into Virginia, and concerning whose *status* this litigation was raised, was brought from the island of Jamaica, and was lawfully there a slave in the hands of his master. The master, coming into Virginia with the slave, claimed the right of holding him in slavery there. Your honors will not fail to notice how differently Virginia stood in relation to this subject of slavery from the state of New York. Virginia did not proscribe the enslavement of Indians as an unlawful source of slavery. On the contrary, as your honors have been informed by the learned counsel for the appellants, the comprehension of slavery in Virginia embraced the native tribes; many of their number became slaves, and now their descendants form a portion of the slave population of Virginia. But in 1691 the colonial government of Virginia passed a law, not in terms abolishing the system of Indian slavery, but a law permitting free trade with the Indians. This statute was immediately seized upon by the courts of justice of Virginia as involving the necessary legal intendment that the enslavement of these people, that were thus recognized as lawful parties to commercial intercourse, was unlawful, such recognition being inconsistent with the absolute denial of personal rights which lay at the foundation of slavery. Here, then, was a question of the hospitality of the laws and policy of Virginia—a slave-holding community—to this condition, in the person of a slave brought within it from another slave-holding community. Certainly none of the reasons for aversion to, and proscription of, slavery *per se*, could very well apply, on the part of Virginia, against permitting this imported slave of Indian origin to continue a slave in Virginia. But what was the question? It was whether there was any positive municipal law of Virginia whereby such a *status* of slavery could be affirmatively maintained in respect of such a person, and the court decided that there was not, and that this man, a slave in Jamaica, was free in Virginia. No slaves but her own could breathe the air of Virginia! The application may seem strange; neverthe-

less, upon the soundest principles of jurisprudence, of the slave, as well as of the free, states, the judgment was correct. The cause was argued by Mr. Wickham and Mr. Wirt, two of the ablest lawyers which our country has produced. Mr. Wirt, arguing for the freedom of the alleged slave, says:

"Since 1691, no Indian could be held in bondage. I do not contend merely that Indians could not be reduced into slavery, but they could not be held as slaves. This was the plain consequence of 'free and open trade with all Indians whatsoever, at all times and in all places.' It was not conferring any boon upon them, but merely acknowledging the rights which God and nature gave."

Mr. Wickham, in answer, seems to have recognized fully the general rules of jurisprudence for which I have occasion to contend. He says:

"Mr. Wirt contends that Indians are naturally entitled to freedom. So are negroes; but this does not prevent their being slaves. I admit the right to make them slaves must depend on positive institution. What I contend for is that all persons to whom the general provisions of our slave laws apply may be slaves here, provided they were slaves by the laws of the country from which they were brought hither."

In the 2d of Henning and Munford, in a case decided in 1808, the same question arose and was thus disposed of in the judgment of the court:

"No native American Indian brought into Virginia since the year 1691 could, under any circumstances, be lawfully made a slave."

The remaining consideration, if the court please, to which I shall ask your attention, and which will require from me some brief illustration, concerns the law of nature and of nations, as bearing upon the doctrine of comity. For, after all, a support for this hospitality to slavery must be looked for from some other source than in the constitution or laws of the United States, or in the decisions of the supreme court of the United States. No appeal can be addressed to this court on which to rest their judicial toleration of slavery, except, first, that the state, by its authentic positive legislation, has not proscribed and prohibited the temporary allowance of this condition within our territory; or, second, that nothing in the public and general law, or in the customs or institutions of this state, has this effect.

This brings me to the third point of my brief, to which I respectfully ask the attention of the court. The citation from Story's Conflict of Laws is to the effect that the whole judicial inquiry open to any court is simply whether, in the laws and institutions, social and civil, of the state, can be found any such principles as make it possible or proper that the rights claimed

to be exercised during their stay within the state, by transient or other residents, not subjects or citizens, should be permitted. If the court find no positive, clear, certain, and explicit expression of the public will through the authentic organs of its manifestation, it may then explore the regions of general jurisprudence and social ethics, to determine whether the desired comity can be extended without injury to the policy of the state. The reference to Vattel, under the same point, gives the view of that eminent publicist upon the moral personality of a political society. He says:

"Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantge, by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common; thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights."

Your inquiry, then, is whether this moral person, the state of New York, having an understanding and a will of its own, after deliberation, and taking resolutions, has or has not thought fit to manifest hostility to the institution of slavery. The learned counsel for the state of Virginia says that the resolution of 1857, passed by the legislature of this state, is not to be taken into account in determining the rights of these parties, or the policy and purpose of the state of New York on the subject of slavery. Well, as far as I can see, this resolution does not really go beyond the scope and effect of the legislation of 1830, as modified by the amendment of 1841, to which I have called the attention of the court. This resolution is certainly very moderate in its phrase, to have drawn upon it so severe an epithet from the learned counsel in his points as to characterize it as "a treasonable resolution"; a phrase which, when used otherwise than in the newspapers, or at the hustings, may be supposed to have some definite moral, if not legal, force. This resolution is simply to this effect: that slavery shall not be allowed within our borders, in any form, or under any pretense, or for any time, however short. The second section of the act of 1830 expressly provides that nothing in the first section thereof (the section prohibiting slavery already quoted) shall be deemed "to discharge from service any person held in slavery in any state of the United States, under the laws thereof, who shall escape into this state." This certainly is a loyal and respectful recognition of the binding obligation of the federal constitution in respect to the rendition of fugitive slaves. In this state of our law, where is the treason in the resolution of 1857? How can there be treason without traitors? Who are

the traitors? Is this a bold figure of speech, or does the learned counsel, speaking as the representative, here, of the state of Virginia, mean to be understood as imputing treason in act or word or thought to the honorable senators and representatives who joined in that legislative resolution? Is it just, is it suitable, to charge a law or a resolution of this state with being treasonable, because it does not accord with the learned counsel's construction of the meaning and effect of the federal constitution? Were the laws by which we taxed passengers treasonable laws because the supreme court of the United States held that they were unconstitutional? Is a resolution which, only by a most extravagant construction, can in its own terms be tortured into a conflict with the fugitive slave clause of the constitution of the United States, and when there stands upon our statute book an express exception of the case covered by that clause,—is such a resolution to be charged with treason? I take it not, and that the epithet can only be excused as an unguarded expression. But we say that, if the statute cited has not the construction which we claim for it, and if the resolution of 1857, so far as the case at bar is concerned, cannot be regarded as indicating to this court what the disposition of this state in respect to slavery is, we say, without and aside from such manifest enactment of the sovereign will in the premises, as matter of general reason and universal authority, the *status* of slavery is never upheld in the case of strangers, resident or in transit, when and where the domestic laws reject and suppress such *status* as a civil condition or social relation. The same reasons of justice and policy which forbid the sanction of law and the aid of public force to the proscribed *status* among our own population forbid them in the case of strangers within our own territory. The *status* of slavery is not a natural relation, but is contrary to nature, and at every moment it subsists it is an ever new and active violation of the law of nature.

Citations from the "law of nature," I am aware, are open to the objection of vagueness and impossibility of verification, and a grave English judge is said once to have discomfited a rhetorical advocate, who appealed frequently to the "book of nature" for his authority, by asking for the volume and page. I am fortunate in my present appeal to the "law of nature" in finding a literal and written statement of its proscription of slavery in a document, of which I make profert, and of whose "absolute verity," as a record, the counsel for the state of Virginia can hardly make question. I mean, to be sure, the constitution of the state

of Virginia. It is true the portion of this instrument which I shall read labors under the double opprobrium of having been originally written when men's minds were inflamed with the love of liberty, at the period of 1776, and of bearing the impress of the same pen which drafted the great charter of our national existence, the Declaration of Independence. But the force of these aspersions upon its credit, let us hope, is somewhat broken by its readoption in 1829, and again so late as 1851.

In the bill of rights of the constitution of Virginia, and as its first article, we find it thus written:

"(1) That all men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

I may be permitted to observe, in passing, that I find in this Virginia "bill of rights" a most distinct statement of the doctrine I have asserted as to the absolute and exclusive supremacy of its own laws in every state. The text reads as follows:

"(14) That the people have the right of uniform government; and therefore that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof."

That, I take it, means that the laws or customs of no other state are to control the *status* of any person in Virginia, for any length of time, or under any circumstances, but uniformity must prevail in the laws and in their administration. I find, too, in this instrument, the best evidence that the statesmen of Virginia felt no such contempt for "general principles," and their practical influence in the conduct of society, in the framing of government, the enacting and administration of laws, as her learned counsel here has made so prominent. The Virginians were always doctrinarians, and liked to see things squarely set forth in black and white. The "bill of rights" thus teaches the true basis of freedom and the best hopes for its security:

"(15) That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles."

But to return to the argument. In dealing with this question of comity, we must look with some definiteness at this institution of slavery which seeks, however transiently and casually, the tolerance of our society, the support of our law. We must look

slavery squarely in the face. Certainly, no man could be braver than the learned counsel in the moral, social, juridical, and legal principles which he avows. Yet I notice that, upon his points, and in his speech, he a little prefers to glide off from the name "slaves" to that of "servants," and from "slavery" to "pupilage." Now, if we are to determine whether it consists with the spirit of our institutions, with the purity of our justice, to tolerate and enforce, at all, the system of slavery, let us see what it is. We all agree, I suppose, that slavery—that is, chattel slavery, the institution in question—finds neither origin nor home in any nation, or in any system of jurisprudence, governed by the common law. Among barbarous nations, without law or system, slavery exists, and is maintained by mere force. Among civilized nations it is the creature of the civil law. From an elementary book of acknowledged authority[9] I beg to read a concise view of the characteristic traits of this institution:

"Slaves were held *pro nullis, pro mortuis, pro quadrupedibus,*"—that is to say, they were looked upon as no persons; as those in whom human personality was dead; as beasts. "They had no head in the state, no name, title, or register; they were not capable of being injured, nor could they take by purchase or descent; they had no heirs, and therefore could make no will, exclusive of what was called their *peculium,* whatever they acquired was their master's; they could not plead, nor be pleaded for, but were excluded from all civil concerns whatever; they could not claim the indulgence of absence *reipublicae causa;* they were not entitled to the rights and considerations of matrimony, and therefore had no relief in case of adultery; nor were they proper objects of cognation or affinity, but of *quasi cognation* only: they could be sold, transferred, or pawned as goods or personal estate, for goods they were and as such they were esteemed."

The laws of the slave-holding states, while they concur in degrading slaves from persons into things, differ in the rules of conveyance and of succession pertaining to them as property. In Louisiana and in Kentucky they are governed, in these respects, by the rules pertaining to real estate. In most, if not all, of the other states, they are in all respects chattels; as, for instance, in South Carolina, where the law declares:

"Slaves shall be deemed, sold, taken, reputed, and adjudged in law to be chattels personal in the hands of their owners and possessors, and their executors, administrators, and assigns, to all intents, constructions, and purposes whatsoever."[10]

Such, then, is slavery, the *status* now under consideration. Such it continues to be, in all essential traits, while it preserves its identity. It needs positive statutes to relieve it materially from any

[9] Taylor, Elements of the Civil Law, p. 429.
[10] 2 Brev. Dig. 229; Prince, Dig. 446; Thompson, Dig. 183.

of these odious traits, to raise the slave into any other condition than that of being no person. When therefore, we say that slavery is "just, benign, and beneficent," if we have due regard to the appropriate use of words, we mean that that condition—that relation of man to man—is "just, benign, and beneficent." Horrible it is, says the learned counsel, if it be maintained between men of the same race; lamentable, if it be maintained toward men like the Indian, for whom some sentiment may be exhibited; but it is "just, benign, and beneficent" if applied to the negro. This is the condition of slavery, concerning whose tolerance within this state your honors are to determine, whether the system and order of society in this state permit you, as judges and magistrates, to entertain, to maintain, to enforce it. I know of no reported case in which this true character of slavery, in its just, legal lineaments, is more fairly and candidly considered, in a slave state or in a free state, than in the case of State v. Mann.[11] The supreme court of North Carolina there gives a very careful and deliberate judgment upon the essential relations between master and slave as established by their laws, as a matter of judicial limitation and recognition. In delivering the opinion, Judge Ruffin, one of the ablest judges of that state, or of this country, was obliged to say what the nature of slavery was in respect to the right of the master and the subjection of the slave. How this case arose, and how necessary it was to meet the questions discussed, the court will perceive from the very brief narrative which prefaces the case:

"The defendant was indicted for an assault and battery upon Lydia, the slave of one Elizabeth Jones. On the trial it appeared that the defendant had hired the slave for a year; that during the term the slave had committed some small offense, for which the defendant undertook to chastise her; that while in the act of so doing, the slave ran off, whereupon the defendant called upon her to stop, which being refused, he shot at and wounded her. His honor, Judge Daniel, charged the jury that, if they believed the punishment inflicted by the defendant was cruel and unwarrantable, and disproportionate to the offense committed by the slave, that in law the defendant was guilty, as he had only a special property in the slave. A verdict was returned for the state, and the defendant appealed.

"RUFFIN, J. 'A judge cannot but lament when such cases as the present are brought into judgment. It is impossible that the reasons on which they go can be appreciated, but where institutions similar to our own exist and are thoroughly understood. The struggle, too, in the judge's own breast, between the feelings of the man and the duty of the magistrate, is a severe one, presenting strong temptation to put aside such questions if it be possible. It is useless, however, to complain of things

[11] 2 Dev. 268.

inherent in our political state; and it is criminal in a court to avoid any responsibility which the laws impose. With whatever reluctance, therefore, it is done, the court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina. The indictment charges a battery upon Lydia, a slave of Elizabeth Jones. Upon the face of the indictment, the case is the same as State v. Hale.[12] No fault is found with the rule then adopted, nor would be, if it were now open. But it is not open; for the question, as it relates to a battery on a slave by a stranger, is considered as settled by that case. But the evidence makes this a different case. Here a slave had been hired by the defendant, and was in his possession, and the battery was committed during the period of hiring. With the liabilities of the hirer to the general owner for an injury permanently impairing the value of the slave, no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment. The query here is whether a cruel and unreasonable battery on a slave, by the hirer, is indictable. The judge below instructed the jury that it is.

" 'Upon the general question, whether the owner is answerable, *criminaliter*, for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute, the court entertains but little doubt. That he is so liable has never yet been decided, nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort. The established habit and uniform custom of the country in this respect is the best evidence of the portion of power deemed by the whole community requisite to the preservation of the master's dominion. If we thought differently, we could not set our notions in array against the judgment of everybody else, and say that this or that authority may be safely lopped off. This has, indeed, been assimilated at the bar to the other domestic relations, and arguments drawn from the well-established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us. The court does not recognize their application. There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them. The difference is that which exists between freedom and slavery, and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with that governor, on whom the duty devolves of training the young to usefulness, in a station which he is afterwards to assume among freemen. To such an end, and with such an object, moral and intellectual instruction seem the natural means, and for the most part they are found to suffice. Moderate force is superadded only to make the others effectual. If that fail, it is better to leave the party to his own headstrong passions, and the ultimate correction of the law, than to allow it to be immoderately inflicted by a private person. With slavery it is far otherwise. The end is the profit of the master, his security, and the public safety; the subject, one doomed, in his own person and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him of what it is impossible but that the most stupid must feel and know can never be true,—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness. Such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute to render the submission of the

[12] 2 Hawks, 582.

slave perfect. I most freely confess my sense of the harshness of this proposition. I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population; but it is inherent in the relation of master and slave. That there may be particular instances of cruelty and barbarity, where, in conscience, the law might properly interfere, is most probable. The difficulty is to determine where a court may properly begin. Merely in the abstract it may well be asked, which power of the master accords with right? The answer will probably sweep away all of them. But we cannot look at the master in that light. The truth is that we are forbidden to enter upon a chain of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped, but is conferred by the laws of man, at least, if not by the laws of God.

" 'I repeat that I would gladly have avoided this ungrateful question. But being brought to it, the court is compelled to declare that, while slavery exists among us in its present state, or until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground that this dominion is essential to the value of slaves as property, to the security of the master and the public tranquillity, greatly dependent upon their subordination, and, in fine, as most effectually securing the general protection and comfort of the slaves themselves.'

"PER CURIAM. 'Let the judgment below be reversed and judgment entered for the defendant.' "

Now, this is a very gloomy view of slavery. It is, however, the only view that is permissible of this institution as a matter of legal power and legal subjection between the parties to it, and it comes precisely to this: that the slave, before the law, has no rights at all, no more than any mere thing, that, by the law of nature, is subject to the dominion of man. If, indeed, the slave be cruelly injured, as matter of his master's property, then an action for damages will lie, governed, as the court says, by the "law of bailment." If the state, as matter of public policy, chooses to make acts committed in respect to the slave criminal, it may do so, just as it may acts of malicious mischief in respect of an inanimate substance; as it may protect trees planted in the highway against depredation or injury, or as it may protect public grounds from intrusion or defilement. In such cases an indictment under the statute will lie, because the state has so declared; but there is no recognition or comprehension of the slave, as respects rights or remedies for himself, within any of the moral, social, and human relations that govern duties or rights

between person and person. When, therefore, we are asked to be hospitable in feeling, in speech, or in law to slavery, we must take it as it is, and with the traits which are inseparable from it, and which, as the court, in the case cited, say, cannot be abrogated without destroying the relation between master and slave, for they exist in the relation itself. Now, I say that all history and all jurisprudence show that slavery originated in the mere predominance of the physical force of one man over another. That, I take it, must be conceded. It is equally indisputable that it is continued by mere predominance of physical force, or of social force, in the shape of municipal law. Whenever this force fails at any stage, then the *status* falls, for it has nothing to rest upon. When the stranger comes within our territory, and seeks to retain in slavery a person that he claims to be subject to his dominion, he must either rely upon his own personal force, or he must appeal to some municipal law, which sustains that relation by the pressure of its force. When such a claim is made in this state, our answer is that he has brought with him no system of municipal law, to be a weapon and a shield to this *status*, and he finds no such system here. Where does he find it? We have no such system. We know of no such relations. His appeal to force against nature, to law against justice, to might against right, is vain, and his captive is free.

In Neal v. Farmer[18] the court will find a distinct adoption of this view, that the title of the slave owner to his slave is of the kind that I have stated, derived from, and maintained by, force; indeed, that the planter's title is but the title of the original captor. The action was brought by Nancy Farmer against William Neal to recover damages for the killing of a negro slave, the property of Mrs. Farmer. On the trial the plaintiff proved the killing, and closed. The jury found a verdict for plaintiff for $825. An objection was made to the legality of the verdict on the ground that in cases of felony the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. This principle was admitted, but the court below held that the killing of a slave was not a felony at common law, and refused a new trial. The question of law was brought before the supreme court by a writ of error. The court held:

"In cases of felony, the civil remedy is suspended until the offender is prosecuted to conviction or acquittal. It is not felony in Georgia, by the common law, to kill a slave, and the only legal restraint upon the

[18] 9 Ga. 555.

power of a master over the person of the slave in Georgia is such as is imposed by statute."

At page 580 of the report, the learned court proceeds:

"Licensed to hold slave property, the Georgia planter held the slave as a chattel; and whence did he derive title? Either directly from the slave trader, or from those who held under him, and he from the slave captor in Africa. The property in the slave in the planter became, thus, just the property of the original captor. In the absence of any statutory limitation on that property, he holds it as unqualifiedly as the first proprietor held it, and his title and the extent of his property were sanctioned by the usage of nations which had grown into a law. There is no sensible account to be given of property in slaves here but this. What were, then, the rights of the African chief in the slave which he had captured in war? The slave was his to sell, or to give, or to kill."

The law of nations, built upon the law of nature, has adopted this same view of the *status* of slavery, as resting on force against right, and finding no support outside of the jurisdiction of the municipal law which establishes it. Now, it is very easy to say, as is said by the learned counsel in his points, that we are not justified in prohibiting the slave owner from any state of the Union from bringing his slaves hither, and it may be urged that there is no disturbance of our public peace, and no encroachment upon the public morals, or upon social and political principles of this community, in allowing the slave owner to bring his slaves hither, in allowing them to remain here, and in allowing him to take them away. But this is not a correct statement of the proposition. It is not a question of the officious interference of our law with the agreeing dispositions of the master and his slaves for the maintenance of the relation. The question in form and substance is, what is the duty of our law, what its authority, what are its powers and processes, what the means and the principles of enforcing it, in case this amicable agreement between master and slave shall, at any point of the continuance of the *status* in our community, cease? This was the point with Lord Mansfield in the case of Sommersett. Lord Mansfield, if he has been sainted by philanthropists, as the learned counsel has said, for his devotion to liberty, as exhibited in the case of Sommersett, very little deserves such peculiar veneration. Lord Mansfield tried as hard as a judge ever did to avoid deciding that case. He was held as firmly by habit, by education, by principle, by all his relations with society, to what would be called, in the phrase of our day, a conservative and property view of the subject, as any man could be. It is amusing to follow the report in the State Trials, and see how the argument was postponed, from time to time, on a suggestion thrown out by the court of the immense influence on property that the decision in the particular

case would have. If your honors please, at the time the point was raised before Lord Mansfield, there were within the realm of England fourteen thousand slaves, brought from the plantations, and held, without a suspicion of their right by their masters, under the professional opinions of the eminent lawyers, Sir Charles York and Lord Talbot, that the Virginia negro might be lawfully held as a slave within the realm of England. But, notwithstanding all the suggestions of the court, for some reason or other, it was not thought useful or proper to cover up, or to buy up, this question of personal liberty on English soil and under English law. Then, Lord Mansfield being, as my learned friend has suggested, a mere common-law judge in a mere common-law court, being the chief justice of England, a great magistrate, the head of the court to which was committed the care and protection of the personal rights of the community, as established and regulated and defended by the law of the realm, was obliged, by the mere compulsion of his reason, to decide that case as he did. There is no poetry, no sentiment, no philanthropy, no zeal, no desire to become a subject of sainthood with future generations, to be found in his decision. Not one word of any of these. It was extorted in submission to the great powers of his own reason. He says, most truly, that the difficulty is that, if slavery be introduced and sustained at all, it must be introduced and sustained according to its length and breadth, with all its incidents and results, and, if our law recognizes it, then we must adopt and administer some system of positive municipal law, external to our own, for we have no such domestic *status* in our own society. Therefore, says Lord Mansfield, if the merchants will not settle this case, if no appeal to parliament for legislation on the subject will be made, and if I must decide it, I do not know of any law of England which permits the master of this vessel, on which the slave Sommersett is embarked, to hold him in confinement, and he must be set free. And the court below was asked to say in this state: "Does the law of New York furnish any ground and authority by which it can permit, or sustain, or enforce the restraint upon the liberty of these Virginia negroes, in the city of New York, practiced by this man and woman,—Mr. and Mrs. Lemmon?"

Now, it will readily be seen, as suggested (under subdivision D of my third point), that this consequence must follow; for the idea that our law can have a mere let-alone policy—can leave these people to manage the affair among themselves—is pre-

cluded the moment the process of *habeas corpus* has brought them within the control of the magistrate. Certainly we have no law to prohibit the master and mistress from coming here with their faithful servants, from remaining here peaceably under this tie of fidelity, and leaving here under the same tie of fidelity. If there is no writ of *habeas corpus* sued out, if no action of false imprisonment is brought, no complaint for assault and battery is made, and nothing comes up for judicial inquiry, then this contented "pupilage"—this relation of "honorable slaveholder to devoted and attached slaves"—is not interfered with by us. When liberty was awarded to these eight persons, they were not prohibited from going back to No. 8 Carlisle street, to the dominion of the Lemmons, or from embarking on a steamship for a voyage to Texas. All the judgment declares is that, if you are restrained by force, and against your will, there is no such restraint allowed by law. The question is, as Lord Mansfield says, what the law shall do when its force and authority are invoked. It is the same practical difficulty that arose under Dogberry's instructions to the watch: "This is your charge; you shall comprehend all *vagrom* men. You are to bid any man stand, in the prince's name." "How," inquires the watch, not impertinently, "how, if he will not stand?" Dogberry bravely meets the emergency: "Why, then take no note of him, but let him go, and presently call the rest of the watch together, and thank God you are rid of a knave." Whoever, in the name of our law, undertakes to maintain a slave's subjection, will find no wiser counsel than Dogberry's to follow if the slave objects to his authority. The train of consequences which must follow from the recognition of slavery by our law, as a *status* within our territory, I have illustrated by a few instances or examples, under subdivision D of my third point. I will not enlarge upon them. Certainly I take no pleasure in repeating them for any purposes of sarcasm or invective.

I pass now to a subject considered in distinct propositions upon my points, and concerning which the course of my learned friend's argument requires a few observations from me. I refer to the proposition that the rule of comity which permits the transit of strangers and their property through a friendly state does not require our laws to uphold the relation of slave owner and slave, within our state, between strangers. By that general system of jurisprudence, made up of certain principles held in common by all civilized states, known as the "law of nations," in one of the senses in which the term is used by publicists, men are not the subject of property. This proposition the learned counsel has

met by the argument that property does not exist at all by the law of nature, but is wholly the growth of civil society, and the creature of positive or municipal law. If he means by this argument that the title of an individual to a particular item or subject of property is not completely ascertained or established by the law of nature; that I do not make title to the house in which I live, or the books which I read, by the law of nature,—I have no dispute with him; but if he means that the distinction between man, as the owner, and things, as the subjects, of property, does not arise by the law of nature, he is, I think, entirely in error. I suppose that the relation of man as lord over all ranks of the brute creation, and all inanimate things in this world, is derived from nature, as by direct grant from the Almighty Creator of the world and all things therein; that by this law the relations of persons to things, which is but another name for the institution of property, is a natural relation. If it is not a natural relation,—if it does not spring out of the creation of man, and his being placed on this earth by his Maker,—I do not understand its origin. When we accord to strangers a transit through our territory, with property, we limit that right to what is the subject of property by the law of nature, unless our municipal law recognizes property other than such as the law of nature embraces. But, further, the learned counsel has argued that, because we recognize, under the general principles of comity, certain rights that grow out of the condition of slavery, under the foreign municipal system, which accredits and supports it, we are involved in the obligation of not imputing immorality to that relation; and that, upon the same reasons or inducements of comity by which we recognize these rights thus grown up, we must enforce and maintain the condition itself in our own municipal system. If the court please, we ought not to be called upon to confound propositions naturally so distinct as these, and which, I respectfully submit, are justly discriminated upon my printed brief, under subdivision F of the third point.

We recognize, unquestionably, the establishment of slavery in Virginia as the lawful origin of certain rights, and open our courts to the maintenance and enforcement of those rights. As the learned counsel has said, if, upon the sale of a slave in Virginia, a promissory note be taken by the vendor, and suit be brought upon it in our courts, the action would be sustained. The security would not be avoided as founded upon an immoral or illegal consideration. Nay, further than that. Suppose the

relation of master and slave, once lawfully subsisting in Virginia, to have ceased, and the slave to have become free, by manumission, or otherwise. Suppose the freedman to have become an inhabitant of our state, and, finding his master accessible to process here, to have sued him for wages, for the service in Virginia, while a slave, alleging that he had performed labor, and had been paid nothing for it. By our law no such action would lie. No debt accrued by the law of Virginia, and that law must give the right before our law can afford a remedy. We might suppose the relation to have terminated advantageously to the master, the slave having been a charge and burden upon the master beyond any service he could render. The slave become free, and found here in the possession of property, could the master sue him here for his support during the time that, without being remunerated by his labor, he had maintained, fed, clothed, and cared for him? Certainly no such action could be sustained. Apply these principles to the ordinary domestic relations, and there is no mystery in this distinction. We recognize a foreign marriage, good according to the laws of the community in which it is celebrated, as giving title to property here, in this state, real or personal, dependent upon that relation. When a husband and wife, united under a foreign marriage, come here, we recognize their relation as husband and wife, with such traits and consequences as accord with our laws. But suppose a man to have married a wife in Massachusetts, and that, by the law of Massachusetts, while the parties continue there, the husband has the supposed common-law right to beat his wife with a stick no bigger than his thumb,—suppose this a trait of the conjugal relation, a marital right, in Massachusetts. Now, the claim of the learned counsel is not only that we should accord to the relation of marriage arising under the law of Massachusetts consequences in respect of property here which belong to the relation, but, that, when husband and wife come here, as residents, or, at least, *in transitu,* we should allow this special marital right to continue, and be exercised under our law here, although unlawful between husband and wife by our laws. The absurdity of such a claim strikes every one. If the husband pleaded, as a defense against punishment here, that by the law of Massachusetts, where the marriage was instituted, the violent acts were permitted, no court would tolerate so idle and frivolous a suggestion.

The relation of master and apprentice presents a nearer analogy to that of slavery than any civil relation now recognized by our

law. It is wholly the creature of positive statute, and we take no notice whatever of the relation, of the same name and substance, established by the laws of the other states of the Union, as giving any personal *status* within our territory. A master and his apprentice coming here from Connecticut, in the judgment of our law, no longer hold that relation to each other. Our law furnishes no aid to the master's authority; no compulsion upon the apprentice's obedience.

The learned counsel, in his plea for your indulgence to the institution of chattel slavery, has thought to disparage the great names in the British judiciary which have proscribed that condition as unworthy to be tolerated by their laws, by holding up to odium the system of white slavery, which, under the name of "villenage," long ago subsisted in England. However nearly the traits of this servitude may, at one time or another, have resembled the system of slavery which finds support and favor in parts of our country, there was always this feature of hope and promise of the amelioration and final extirpation of villenage, which will be sought in vain in the system of slavery in our states: Villenage was within the comprehension, and subject always to the influences, of the common law, which, indeed, is but another name for common right and general justice. No system of injustice and of force brought within the grasp of the principles of the common law but must, sooner or later, be vanquished and exterminated. The heaviest gloom which rests upon the system of chattel slavery comes from this very fact that it is outlawed from all these influences; that reason and justice, duty and right, as they reject it, are rejected by it, and find no inlet through the proof armor of force and interest in which it is cased.

The learned counsel has remarked upon the silent and gradual retreat of villenage before the growing power of justice and civilization, till it finally disappears from English history, one scarcely knows when. It wore out, he says, without bloodshed, without violence, without civil or social disturbance or disquiet. It is not strictly true that villenage was never the cause of serious civil disorder in England. Jack Cade's rebellion and Wat Tyler's insurrection were really servile insurrections, to which intolerable oppression had urged this abject class. But be this as it may, the learned counsel's complacency, first in the long endurance of villenage, and, second, in its peaceful abrogation, has not restrained him from a sarcastic suggestion that, if there had been in England "a sect of abolitionists" hostile to villenage, that sys-

tem would have survived to our day. If the tendency and effect of the teachings of this "sect of abolitionists" be, indeed, to confirm and perpetuate the system of slavery, it should attract the favor, rather than the wrath, of one who, like my learned friend, thinks slavery to be "just, benign, beneficent, not inconsistent with strict justice and pure benevolence." But I can relieve the learned counsel from any doubt or uncertainty as to the efficient influences which caused the decay and final extinction of villenage in England. They were the common law and the Christian religion. The common law, having, as I stated, comprehended villenage within its principles and processes, showed it no quarter, but by every art and contrivance reduced it to narrower and narrower limits. It admitted no intendments in its favor,—gave every presumption against it; knew no mode to make a villein of a freeman,—a hundred to convert a villein into a freeman. Mr. Hargreave, in his celebrated argument in Sommersett's case, gives a just account of these successful efforts of the common law.

"Another cause," says this eminent lawyer, "which greatly contributed to the extinction of villenage, was the discouragement of it by courts of justice. They always presumed in favor of liberty, throwing the '*onus probandi*' upon the lord, as well in the writ of *homine replegiando*, where the villein was plaintiff, as in the *nativo habendo*, where he was defendant. Nonsuit of the lord after appearance in a *nativo habendo*, which was the writ for asserting the title of slavery, was a bar to another *nativo habendo*, and a perpetual enfranchisement; but nonsuit of the villein after appearance in a *libertate probanda*, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind. If two plaintiffs joined in a *nativo habendo*, nonsuit of one was a nonsuit of both; but it was otherwise in a *libertate probanda*. The lord could not prosecute for more than two villeins in one *nativo habendo;* but any number of villeins of the same blood might join in one *libertate probanda*. Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord; from every act or omission which legal refinement could strain into an acknowledgment of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Suffering the villein to be on a jury, to enter into religion and be professed, or to stay a year and a day in ancient demesne without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his action without protestation of villenage, imparling in them or assenting to his imparlance, or suffering him to be vouched without counter pleading the voucher, were also enfranchisements by implication of law. Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward. I have been the more particular in enumerating these instances of extraordinary favor to liberty, because the anxiety of our ancestors to emancipate the ancient villeins so well accounts for the establishment of any rules of law calculated to obstruct the introduction of a new stock. It was natural that the same opinions which influenced to discountenance the former should lead to the prevention of the latter."

The other operative agency in the gradual extinction of the offensive system of villenage was the influence of the Christian religion, under the auspices of the Church of Rome, then, as well, the national church of England. Macaulay thus ascribes the chief merit in this beneficent social reform to the Romish priesthood:

"It is remarkable that the two greatest and most salutary social revolutions which have taken place in England—that revolution which, in the thirteenth century, put an end to the tyranny of nation over nation, and that revolution which, a few generations later, put an end to the property of man in man—were silently and imperceptibly effected. They struck contemporary observers with no surprise, and have received from historians a very scanty measure of attention. They were brought about neither by legislative regulation nor by physical force. Moral causes noiselessly effaced, first, the distinction between Norman and Saxon, and then the distinction between master and slave. None can venture to fix the precise moment at which either distinction ceased. Some faint traces of the old Norman feeling might, perhaps, have been found late in the fourteenth century. Some faint traces of the institution of villenage were detected by the curious so late as the days of the Stuarts; nor has that institution ever, to this hour, been abolished by statute. It would be most unjust not to acknowledge that the chief agent in these two deliverances was religion; and it may, perhaps, be doubted whether a purer religion might not have been found a less efficient agent. The benevolent spirit of the Christian morality is undoubtedly adverse to distinctions of caste, but to the Church of Rome such distinctions are peculiarly odious, for they are incompatible with other distinctions which are essential to her system." "How great a part the Catholic ecclesiastics had in the abolition of villenage we learn from the unexceptionable testimony of Sir Thomas Smith, one of the ablest counselors of Elizabeth. When the dying slave holder asked for the last sacraments, his spiritual attendants regularly adjured him, as he loved his soul, to emancipate his brethren, for whom Christ had died. So successfully had the church used her formidable machinery that, before the Reformation came, she had enfranchised almost all the bondmen in the kingdom, except her own, who, to do her justice, seem to have been very tenderly treated."[14]

These influences, then, of law and of religion, were the efficient agents in extirpating villenage,—a civil condition which, so long as it subsisted, was a reproach to the liberty of England, and to the principles of the common law. Why should the learned counsel hope to heap opprobrium upon these principles of justice and religion, when invoked in favor of an inferior race, and against a system of slavery so much more oppressive than the system of villenage, because our people who have espoused and maintain views opposed to this present system of wrong against right, and force against justice and nature, are the offspring of the British nation, which, in the early stages of its civilization, had such a system, or a similar system? If these, our ancestors, and we,

[14] 1 Hist. Eng. pp. 20, 21.

had nourished and developed it; if we had extended it; if we had made it the basis of prosperity in England and this country; if we had boasted its justice and benevolence; if we had extended it so as to embrace more and more of the nation; if we had made the law astute and even violent to support and maintain it; if we had discouraged every intendment against it, and if it was now approved and applauded as an institution which the civilization and Christianity of the present day accept,—then we might well be accused of inconsistency in being hostile to chattel slavery in the negro race. But it seems to me that the influences of the common law of England, which we inherit, and of the Christian religion, as vindicated in the absolute extirpation of villenage from the social system of England, by peaceful means, will suffer no dishonor by performing the same service, and impressing upon the judiciary of this state the same principles of absolute inhospitality to negro slavery within our borders, even for the briefest period, or over the most narrow space.

If the court please, the judgment below, the reasons for which are very tersely and properly expressed by the court which pronounced it, is either to be affirmed or reversed. You are to declare the law of this state. If you declare that slavery may be introduced here, there is no appeal from your decision. If you hold that it may not be introduced here, and affirm the judgment of the court below, an appeal may carry the question to the supreme court of the United States. That such appeal must be dismissed by that supreme tribunal for want of jurisdiction of the subject, I confidently submit, must follow from the authorities and the principles I have had the honor to present to this court. The result of your judgment cannot be doubtful, if I am right in the opinion that it is constrained by no paramount control of federal power. It is as true now as in the time of Littleton and of Coke, that he shall be adjudged guilty of impiety toward God, and of cruelty toward man, who does not favor liberty; and what they, in their day, declared of the law of England, your decision shall pronounce as the law of New York,—that, in every case, it shows favor to liberty.

I have, your honors will bear witness, confined myself in this discussion to mere judicial inquiries, and have strictly abstained from any mention of popular or political considerations. I should not now think myself justified in any allusions to those considerations but for the very distinct suggestion of the learned counsel that there was a momentous pressure upon the freedom of your

judgments in this matter, growing out of a certain formidable, and yet, as he thought, inevitable, result to follow from a decision of this question adversely to the views he has had occasion to present. He has named to you as the parties to this controversy, the state of New York and the state of Virginia,—one, first in population and in wealth and greatest in the living energies of her people; the other, richest in the memories of the past and most powerful in the voices of her dead. I am not aware that the state of New York, in any public act or declaration, has failed, to any degree, of that respect for Virginia which belongs to her as a sister state, or as a political community. Nor do I know or think that any citizens of this state fall at all behind the learned counsel in his affection and veneration for the great men in the history of Virginia, by whose careers of public service and of public honors she has gained the proud title of the "Mother of Presidents." Nor do I know that that portion of our people—its great majority—who, with their veneration for Washington, and Jefferson, and Madison, and Henry, and Wythe, and Mason, cherish and defend the opinions upon slavery which those statesmen held, honor them or Virginia less than those who raise statues of brass or of marble to their memory, and follow their principles with contumely and persecution. I do not know that an imputation can fairly be thrown upon any part of our community of having less respect and affection for our common country and the federal government than is claimed here by the learned counsel on behalf of those who, with himself, espouse the views concerning the institution of slavery which he has presented to the court. Yet I understand him distinctly to insist here that, unless this court shall reverse this judgment, or unless a court of paramount authority, that can control still further the question, shall reverse it, our federal system of government is actually in danger, —that, indeed, it cannot long exist without both a judicial and popular recognition of the legal universality of slavery throughout our country.

If it please the court, I am unable to discern in the subject itself, or in the aspect of the political affairs of the country, any grounds for these alarming suggestions, which should disturb, for a moment, your honors' deliberations or determinations on the subject before you. I may be permitted to say, however, that, if the safety and protection of this local, domestic institution of slavery, in the communities where it is cherished, must ingraft upon our federal jurisprudence the doctrine that the federal constitution,

by its own vigor, plants upon the virgin soil of our common territories the growth of chattel slavery, thus putting to open shame the wisdom and the patriotism of its framers; if they must coerce, by the despotism of violence and terror, into its support at home, their whole white population; if they must exact from the free states a license and a tolerance for what reasons of conscience and of policy have purged from their own society, and subjugate to this oppression the moral freedom of their citizens; if the institution of slavery, for its local safety and protection, is to press this issue, step by step, to these results; if such folly and madness shall prevail,—then, by possibility, a catastrophe may happen. This catastrophe will be, not the overthrow of the general and constituted liberties of this great nation,—not the subversion of our common government,—but the destruction of this institution, local and limited, which will have provoked a contest with the great forces of liberty and justice which it cannot maintain, and must yield in a conflict which it will then be too late to repress.

ARGUMENT ON BEHALF OF THE UNITED STATES BEFORE THE TRIBUNAL OF ARBITRATION CONVENED AT GENEVA, 1872.

STATEMENT.

Upon the recognition of its belligerency by the European governments, in 1861, the Confederacy at once took active steps to procure warships and naval supplies in England. There was then upon the British statute book an act, dating from 1819, known as the "Foreign Enlistment Act," which was expressly designed, in the words of its title, to "prevent the enlistment or engagement of his majesty's subjects to serve in foreign service, and the fitting out and equipping in his majesty's dominions of vessels for warlike purposes." By the terms of this act it was made a misdemeanor for any person within the United Kingdom to equip or attempt or endeavor to equip, furnish, fit out, or arm, or to procure to be equipped, or knowingly aid, assist, or be concerned in equipping, furnishing, fitting out, or arming, any ship with intent that such ship should be employed in the service of any foreign state, with intent to cruise or commit hostilities against any state with whom his majesty should not then be at war. Nevertheless, the agent of the Confederacy was able to obtain from the most eminent English lawyers an interpretation of this act which completely nullified its spirit and purpose. According to their interpretation, any shipbuilder could build any ship in her majesty's dominions, provided he did not equip her therein, and he had nothing to do with the act of the purchasers done within her majesty's dominions without his concurrence, nor without her majesty's dominions even with his concurrence. In other words, there was nothing in the act which made illegal the building of a warship, as one operation; nor anything which prevented the purchase of arms and munitions to equip such vessel when built, as another independent operation. If, then, having been thus kept separate, they subsequently came together, this combination constituted no violation of the law, provided the result was brought about in foreign waters. Armed with such opinions the Confederate agents had little difficulty in supplying their needs, and the shipbuilders on the Mersey and the Clyde began building war vessels for the Confederacy. The facts concerning the Alabama will serve to illustrate the methods pursued. This vessel was built by Laird & Sons, at Birkenhead, on the Mersey. While the British government debated whether it should act upon the well-founded suspicions brought to its notice by the United States authorities, and detain her, she slipped away under the pretext of a trial trip. Her arms and munitions were conveyed to her from the Mersey in two other vessels, and in the waters of the Azores, where the three ships met by arrangement, the Alabama was armed and equipped, and began her notorious cruise against the commerce of the United States. The Alabama was built with British money, under a Confederate loan, in a British port, armed with British guns, manned by British seamen, frequently displayed the British flag, and was welcomed in British ports throughout the world.

While these vessels—the Florida, Georgia, Alabama, Shenandoah and others—were building, the United States minister, Mr. Adams, had repeatedly called upon the British authorities to prevent their escape. The substance of the contrary views of Mr. Adams and the British minis-

ters, as stated in the subsequent argument, was as follows: The United States claimed that the general principles of international law made it incumbent upon neutral states to prevent either belligerent from making any place subject to their jurisdiction a base of hostile operations against the other. To this contention Great Britain replied, with much force, that the British parliament was the exclusive interpreter of the principles of international law for the British executive, and that what were called the general principles of international law had no validity for the British executive unless expressed in an act of parliament. If, therefore, the foreign enlistment act was not broad and strong enough to enable the government to cope with the facts presented, its responsibility was at an end. That the latter act was not sufficient was demonstrated in July, 1863, in the case of the Alexandra, in which the British government undoubtedly made a sincere effort to punish the offenders. Chief Baron Pollock instructed the jury in that case that, to warrant conviction, there must be evidence of an intent to arm the vessel on British soil, and, as there were naturally no specific facts in proof of such an intent, the jury returned a verdict of not guilty. The appeal in this case went off on a question of procedure, so that no decision on the merits was obtained from the higher courts. But Mr. Adams very forcibly combated the British pretension that its domestic legislation constituted the measure of its duty in the premises. He contended that, if the parliamentary statute was not sufficient to enable it to enforce its obligation, the ministers of the crown could always procure the necessary legislation from parliament. The continued use of British ports by the Confederacy as a base of supplies was therefore justly looked upon by the United States as evidence of hostile feeling, and the two nations were for a long time on the verge of war. No self-respecting nation could bear such a flagrant wrong without resentment.

When, after the fall of Vicksburg and the repulse of the Confederates at the battle of Gettysburg, it became apparent that the North would succeed in saving the Union, neutrality was much more strictly observed. But the feeling against Great Britain was still so strong at the close of the war that there was a disposition in some quarters to use the great military establishment then in existence to force an immediate accounting from England. More peaceful counsels prevailed, however, and adjustment was sought through diplomatic negotiations. These negotiations continued without perceptible progress towards a satisfactory conclusion until President Grant suggested in his message to congress, December 5, 1870, that all private claims arising out of the destruction of property by the Confederate cruisers be taken over by the government, so that it might have responsible control of all demands against Great Britain, with a view to the final adjustment of the matter. This veiled threat was well timed, for the Franco-Prussian war had so far unsettled the affairs of continental Europe that Great Britain made haste to renew the negotiations which at length led to the Treaty of Washington, May 8, 1871. The first eleven articles of this treaty relate to the claims for damages arising out of the default of Great Britain during the Civil War. Beginning with an expression of regret on the part of Great Britain for the escape of the Confederate vessels from British ports, and for the depredations committed by them, they referred the whole subject to a court of arbitration, to sit at Geneva, Switzerland. They provided for a tribunal composed of five members, one of whom should be named by the president of the United States, one, by her Britannic majesty, one by the king of Italy, one by the president of the Swiss confederation, and one by the emperor of Brazil. After specifying certain details concerning the presentation and consideration of the controversy,

the treaty further provided that, in deciding the matters submitted, the arbitrators should be governed by the following rules: "A neutral government is bound, first, to use diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

While it was further provided that the contracting parties would "agree to observe these rules as between themselves in the future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them," the British government qualified its acceptance of the foregoing three rules by inserting the following statement: "Her Britannic majesty has commanded her high commissioners and plenipotentiaries to declare that her majesty's government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in article 1 arose, but that her majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that her majesty's government had undertaken to act upon the principles set forth in these rules."

In pursuance of the treaty the following gentlemen were named as arbitrators: The president of the United States appointed Mr. Charles Francis Adams; her majesty, Queen Victoria, appointed Sir Alexander Cockburn, chief justice of the queen's bench; the king of Italy named Count Frederick Sclopis, an eminent Italian jurist and statesman; the president of the Swiss confederation named Mr. Jacob Staempfli, an ex-president of the Swiss confederation; and the emperor of Brazil designated the Baron d'Itajuba, the Brazilian minister at Paris. The president of the United States appointed Mr. J. C. Bancroft Davis as the agent of the United States before the tribunal, and Mr. Caleb Cushing, Mr. William M. Evarts, and Mr. Morrison R. Waite as counsel. Her majesty's government appointed Lord Tenterden as the agent of Great Britain, and Sir Roundell Palmer (afterwards Lord Chancellor Selborne) as counsel.

The arbitrators assembled at Geneva on December 15, 1871, and organized the tribunal, with Count Sclopis as president. The printed case of each of the parties having been filed by their respective agents, the tribunal ordered the counter cases to be filed on or before the 15th day of the following April, and then adjourned to June 15th following. Then ensued a heated debate, stimulated by the British press, over the American claim for national and indirect damages, as well as direct damages to individuals. Without going into this matter here, it may be said that the claim for national and indirect damages was eliminated from the case, and on June 27th the whole case, as provided for by the treaty, was before the tribunal. The substance of these elaborate arguments follows:

The United States maintained, as matter of fact, that the British government was guilty of want of due diligence—that is, of culpable negligence—in permitting, or in not preventing, the construction, equipment,

manning, or arming of Confederate cruisers in the ports of Great Britain or of the British colonies; that such acts of commission or omission constituted a violation of the international obligations of Great Britain towards the United States, whether she be regarded in the light of the treaty friend of the United States, while the latter were engaged in the suppression of domestic rebellion, or whether in the light of a neutral in relation to two belligerents; that such absence of due diligence on the part of the British government led to acts of commission or omission, injurious to the United States, on the part of subordinates, as well as of the ministers themselves; and that thus Great Britain became responsible to the United States for injuries done to them by the operation of such cruisers of the Confederates. Great Britain, in reply, took issue with the United States on the question of imputed negligence, or disregard, in other respects, of the rules of public law laid down in the treaty; alleged as legal theory that, in the incidents brought under review, the British government acted in conformity with, and in obedience to, the provisions of an act of parliament, commonly known as the "Foreign Enlistment Act," and that, by the law of nations, or the public law of Great Britain, the obligations of the British government were to be measured in execution by that act; and, finally, in justification or extenuation of its own imputed delinquencies in the premises, adduced certain incidental considerations derived from the history and jurisprudence of several foreign governments, including the government of the United States.

On the 25th of July, Baron d'Itajuba called upon the British counsel for an additional argument on the questions of due diligence, of the effect of commissions held by Confederate vessels, and of the supplies of coal to Confederate vessels in British ports. Pursuant to this request, Sir Roundell Palmer filed a printed argument, which, while dealing with the three points suggested, distributed itself over a very general examination of the whole argument on behalf of the United States. It was in reply to this supplemental argument by the British counsel that Mr. Evarts, on the 5th and 6th of August, delivered the following oral argument. The tribunal reached a decision on the 9th of September, and on the 14th it was announced. Before the arbitrators were able to apply the rules furnished them in the treaty, it became necessary to place an interpretation upon some of the terms there used, and to define the rules of international law upon certain points which were involved in the judicial determination of questions not covered by the rules themselves. It was therefore decided: (1) That due diligence "ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part." (2) "The effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence." (3) "The principle of extraterritoriality has been admitted into the law of nations not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality."

The tribunal decided, Sir Alexander Cockburn dissenting, that the British government had failed to exercise due diligence in the discharge of its neutral duties towards the United States in the cases of the Alabama and the Florida and their respective tenders, and also in the case

of the Shenandoah from the time she left the port of Melbourne, but exonerated it in all the other cases; and the gross sum of fifteen millions five hundred thousand dollars in gold was fixed as the indemnity to be paid by Great Britain to the United States in satisfaction of the claims referred to the consideration of the tribunal.

Thus ended this great example, so full of promise of peace among nations. For the first time in history, two powerful nations, with so weighty a matter of difference between them, submitted the measure of right and wrong, of injury and redress, to intermediary arbitrament. The high hopes which on all sides attended this great experiment were not disappointed, and the disposition of the controversy on principles adequate to its profound interest to the parties, and in the observant eyes of other nations, gave assurance to the civilized world of a more general resort to the arbitrament of reason instead of force.

ARGUMENT.

Mr. President and Gentleman of the Tribunal: In the course of the deliberations of the tribunal it has seemed good to the arbitrators, in pursuance of the provision of the fifth article of the Treaty of Washington, to intimate that on certain specific points they would desire a further discussion on the part of the counsel of her Britannic majesty for the elucidation of those points in the consideration of the tribunal. Under that invitation, the eminent counsel for the British government has presented an argument which distributes itself, as it seems to us, while dealing with the three points suggested, over a very general examination of the argument which has already been presented on the part of the United States. In availing ourselves of the right, under the treaty, of replying to this special argument upon the points named by the tribunal, it has been a matter of some embarrassment to determine exactly how far this discussion on our part might properly go. In one sense, our deliberate judgment is that this new discussion has added but little to the views or the argument which had already been presented on behalf of the British government, and that it has not disturbed the position which had been insisted upon, on the part of the United States, in answer to the previous discussions on the part of the British government, contained in its case, counter case, and argument. But to have treated the matter in this way, and left our previous argument to be itself such an answer as we were satisfied to rely upon to the new developments of contrary views that were presented in this special argument of the British government, would have seemed to assume too confidently in favor of our argument that it was an adequate response in itself, and would have been not altogether respectful to the very able, very comprehensive, and very thor-

ough criticism upon the main points of that argument which the eminent counsel of her majesty has now presented. Nevertheless, it seems quite foreign from our duty, and quite unnecessary for any great service to the tribunal, to pursue in detail every point and suggestion, however pertinent and however skillfully applied, which is raised in this new argument of the eminent counsel. We shall endeavor, therefore, to present such views as seem to us useful and valuable, and as tend in their general bearing to dispose of the difficulties and counter propositions opposed to our views in the learned counsel's present criticism upon them. The American argument, presented on the 15th of June, as bearing upon these three points now under discussion, had distributed the subject under the general heads of the measure of international duties; of the means which Great Britain possessed for the performance of those duties; of the true scope and meaning of the phrase "due diligence," as used in the treaty; of the particular application of the duties of the treaty to the case of cruisers on their subsequent visits to British ports; and then of the faults, or failures, or shortcomings of Great Britain in its actual conduct of the transactions now under review, in reference to these measures of duty, and this exaction of due diligence.

The special topic now raised for discussion in the matter of "due diligence," generally considered, has been regarded by the counsel of the British government as involving a consideration, not only of the measure of diligence required for the discharge of ascertained duties, but also the discussion of what the measure of those duties was; and then of the exaction of due diligence as applicable to the different instances or occasions for the discharge of that duty, which the actual transactions in controversy between the parties disclosed. That treatment of the point is, of course, suitable enough if, in the judgment of the learned counsel, necessary for properly meeting the question specifically under consideration, because all those elements do bear upon the question of "due diligence" as relative to the time and place and circumstances that called for its exercise. Nevertheless, the general question, thus largely construed, is really equivalent to the main controversy submitted to the disposition of this tribunal by the treaty, to-wit, whether the required due diligence has been applied in the actual conduct of affairs by Great Britain to the different situations for and in which it was exacted. The reach and effort of this special argument in behalf of the British government seem to us to aim at the reduction of the duties incumbent on Great Britain, the reduction of the obligation to perform those

duties, in its source and in its authority, and to the calling back of the cause to the position assumed and insisted upon in the previous argument in behalf of the British government,—that this was a matter not of international duty, and not of international obligation, and not to be judged of in the court of nations as a duty due by one nation, Great Britain, to another nation, the United States, but only as a question of its duty to itself, in the maintenance of its neutrality, and to its own laws and its own people, in exerting the means placed at the service of the government by the foreign enlistment act for controlling any efforts against the peace and dignity of the nation. We had supposed, and have so in our argument insisted, that all that long debate was concluded by what had been settled by definitive convention between the two nations as the law of this tribunal, upon which the conduct and duty of Great Britain, and the claims and rights of the United States, were to be adjudged, and had been distinctly expressed and authoritatively and finally established in the three rules of the treaty.

Before undertaking to meet the more particular inquiries that are to be disposed of in this argument, it is proper that, at the outset, we should take notice of an attempt to disparage the efficacy of those rules, the source of their authority, and the nature of their obligation upon Great Britain. The first five sections of the special argument are devoted to this consideration. It is said the only way that these rules come to be important in passing judgment upon the conduct of Great Britain in the matter of the claims of the United States is by the consent of her majesty that, in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that, during the course of these transactions, her majesty's government had undertaken to act upon the principles set forth in these rules and in them announced. That requires, it is said, as a principal consideration, that the tribunal should determine what the law of nations on these subjects would have been if these rules had not been thus adopted. Then, it is argued that, as to the propositions of duty covered by the first rule, the law of nations did not impose them, and that the obligation of Great Britain, therefore, in respect to the performance of the duties assigned in that rule, was not derived from the law of nations; was not, therefore, a duty between it and the United States, nor a duty the breach of which called for the resentments or the indemnities that belong to a violation of the law of nations. Then, it is argued that the whole duty

and responsibility and obligation in that regard on the part of Great Britain arose under the provisions of its domestic legislation, under the provisions of the foreign enlistment act, under a general obligation by which a nation, having assigned a rule of conduct for itself, is amenable for its proper and equal performance as between and towards the two belligerents. Then, it is argued that this assent of the British government that the tribunal shall regard that government as held to the performance of the duties assigned in those rules, in so far as those rules were not of antecedent obligation in the law of nations, is not a consent that Great Britain shall be held under an international obligation to perform the rules in that regard, but simply as an agreement that they had undertaken to discharge as a municipal obligation, under the provisions of their foreign enlistment act, duties which were equivalent in their construction of the act to what is now assigned as an international duty; and this argument thus concludes:

"When, therefore, her majesty's government, by the sixth article of the Treaty of Washington, agreed that the arbitrators should assume that her majesty's government had undertaken to act upon the principles set forth in the three rules (though declining to assent to them as a statement of principles of international law, which were in force at the time when the claims arose), the effect of that argument was not to make it the duty of the arbitrators to judge retrospectively of the conduct of her majesty's government, according to any false hypothesis of law or fact, but to acknowledge, as a rule of judgment for the purposes of the treaty, the undertaking which the British government had actually and repeatedly given to the government of the United States, to act upon the construction which they themselves placed upon the prohibitions of their own municipal law, according to which it was coincident in substance with those rules."

Now, we may very briefly, as we think, dispose of this suggestion, and of all the influences that it is appealed to to exert throughout the course of the discussion in aid of the views insisted upon by the learned counsel. In the first place, it is not a correct statement of the treaty to say that the obligation of these rules, and the responsibility on the part of Great Britain to have its conduct adjudged according to those rules, arise from the assent of her majesty thus expressed. On the contrary, that assent comes in only subsequently to the authoritative statement of the rules, and simply as a qualification attendant upon a reservation on the part of her majesty that the previous declaration shall not be esteemed as an assent on the part of the British government that those were in fact the principles of the law of nations at the time the transactions occurred. The sixth article of the treaty thus determines the authority and the obligation of these rules. I

read from the very commencement of the article: "In deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith;" and then the rules are stated. Now, there had been a debate between the diplomatic representatives of the two governments whether the duties expressed in those rules were wholly of international obligation antecedent to this agreement of the parties. The United States had, from the beginning, insisted that they were. Great Britain had insisted that, in regard to the outfit and equipment of an unarmed ship from its ports, there was only an obligation of municipal law, and not of international law; that its duty concerning such outfit was wholly limited to the execution of its foreign enlistment act; that the discharge of that duty and its responsibility for any default therein could not be claimed by the United States as a matter of international law, nor upon any judgment otherwise than of the general duty of a neutral to execute its laws, whatever they might be, with impartiality between the belligerents. To close that debate, and in advance of the submission of any question to this tribunal, the law on that subject was settled by the treaty, and settled in terms which, so far as the obligation of the law goes, seem to us to admit of no debate, and to be exposed to not the least uncertainty or doubt. But in order that it might not be an imputation upon the government of Great Britain, that while it presently agreed that the duties of a neutral were as these rules express them, and that these rules were applicable to this case, that a neutral nation was bound to conform to them, and that they should govern this tribunal in its decision in order that, from all this, there might not arise an imputation that the conduct of Great Britain at the time of the transactions (if it should be found in the judgment of this tribunal to have been at variance with these rules), would be subject to the charge of a variance with an acknowledgment of the rules then presently admitted as binding, a reservation was made. What was this reservation?

"Her Britannic majesty has commanded her high commissioners and plenipotentiaries to declare that her majesty's government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in article 1 arose, but that her majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of these claims,

the arbitrators should assume that her majesty's government had undertaken to act upon the principles set forth in these rules."

Thus, while this saving clause in respect to the past conduct of Great Britain was allowed on the declaration of her majesty, yet that declaration was admitted into the treaty only upon the express proviso that it should have no import of any kind in disparaging the obligation of the rules, their significance, their binding force, or the principles upon which this tribunal should judge concerning them. Shall it be said that, when the whole office of this clause, thus referred to, is of that nature and extent only, and when it ends in the determination that that reservation shall have no effect on your decision,—shall it, I say, be claimed that this reservation shall have an effect upon the argument? How shall it be pretended, before a tribunal like this, that what is to be assumed in the decision is not to be assumed in the argument? But what does this mean? Does it mean that these three rules, in their future application to the conduct of the United States,—nay, in their future application to the conduct of Great Britain,—mean something different from what they mean in their application to the past? What becomes, then, of the purchasing consideration of these rules for the future, to-wit, that, waiving debate, they shall be applied to the past? We must therefore insist that, upon the plain declaration of this treaty, there is nothing whatever in this proposition of the first five sections of the new special argument. If there were anything in it, it would go to the rupture, almost, of the treaty; for the language is plain, the motive is declared, the force in future is not in dispute, and, for the consideration of that force in the future, the same force is to be applied in the judgment of this tribunal upon the past. Now, it is said that this declaration of the binding authority of these rules is to read in the sense of this very complicated, somewhat unintelligible proposition of the learned counsel. Compare his words with the declaration of the binding authority of these rules, as rules of international law, actually found in the treaty, and judge for yourselves whether the two forms of expression are equivalent and interchangeable. Can any one imagine that the United States would have agreed that the construction, in its application to the past, was to be of this modified, uncertain, optional character, while, in the future, the rules were to be authoritative, binding rules of the law of nations? When the United States had given an assent, by convention, to the law that was to govern this tribunal, was it intended that the law should be construed as to the past differently from what it was to be construed in reference

to the future? I apprehend that this learned tribunal will at once dismiss this consideration, with all its important influence upon the whole subsequent argument of the eminent counsel, which an attentive examination of that argument will disclose. With this proposition falls the further proposition, already met in our former argument, that it is material to go into the region of debate as to what the law of nations upon these subjects now under review was or is? So far as it falls within the range covered by these rules of the treaty, their provisions have concluded the controversy. To what purpose, then, pursue an inquiry and a course of argument which, whatever way in the balance of your conclusions it may be determined, cannot affect your judgment or your award? If these rules are found to be conformed to the law of nations in the principles which it held antecedent to their adoption, the rules cannot have, for that reason, any greater force than by their own simple, unconfirmed authority. If they differ from, if they exceed, if they transgress the requirements of the law of nations, as it stood antecedent to the treaty, by so much the greater force does the convention of the parties require that, for this trial and for this judgment, these rules are to be the law of this tribunal. This argument is hinted at in the counter case of the British government. It has been the subject of some public discussion in the press of Great Britain. But the most authoritative expression of opinion on this point from the press of that country has not failed to stigmatize this suggestion as bringing the obligation of the rules of this treaty down to the "vanishing point."

At the close of the special argument we find a general presentation of canons for the construction of treaties, and some general observations as to the light or the controlling reason under which these rules of the treaty should be construed. These suggestions may be briefly dismissed. It certainly would be a very great reproach to these nations, which had deliberately fixed upon three propositions as expressive of the law of nations, in their judgment, for the purpose of this trial, that a resort to general instructions for the purpose of interpretation was necessary. Eleven canons of interpretation drawn from Vattel are presented in order, and then several of them, as the case suits, are applied as valuable in elucidating this or that point of the rules. But the learned counsel has omitted to bring to your notice the first and most general rule of Vattel, which, being once understood, would, as we think, dispense with any consideration of these subordinate canons which Vattel has introduced to be used only in case his first general rule does not apply. This proposition is that "it is

not allowable to interpret what has no need of interpretation." Now, these rules of the treaty are the deliberate and careful expression of the will of the two nations in establishing the law for the government of this tribunal, which the treaty calls into existence. These rules need no interpretation in any general sense. Undoubtedly there may be phrases which may receive some illustration or elucidation from the history and from the principles of the law of nations; and to that we have no objection. Instances of very proper application to that resort occur in the argument to which I am now replying; but there can be no possible need to resort to any general rules, such as those most favored and insisted upon by the learned counsel, viz., the sixth proposition of Vattel, that you never should accept an interpretation that leads to an absurdity; or the tenth, that you should never accept an interpretation that leads to a crime. Nor do we need to recur to Vattel for what is certainly a most sensible proposition,—that the reason of the treaty, that is to say, the motive which led to the making of it and the object in contemplation at the time, is the most certain clue to lead as to the discovery of its true meaning. But the inference drawn from that proposition, in its application to the case, by the learned counsel, seems very wide from what to us appears natural and sensible. The aid which he seeks under the guidance of this rule is from the abstract proposition of publicists on cognate subjects, or the illustrative instances given by legal commentators. Our view of the matter is that, as this treaty is applied to the past, as it is applied to an actual situation between the two nations, and as it is applied to settle the doubts and disputes which existed between them as to obligation and to the performance of obligations, these considerations furnish the resort, if any is needed, whereby this tribunal should seek to determine what the true meaning of the high contracting parties is.

Now, as bearing upon all these three topics,—of due diligence, of treatment of offending cruisers in their subsequent visits to British ports, and of their supply, as from a base of operations, with the means of continuing the war,—these rules are to be treated in reference to the controversy as it had arisen, and as it was in progress between the two nations when the treaty was formed. What was that? Here was a nation prosecuting a war against a portion of its population and territory in revolt. Against the sovereign thus prosecuting his war there was raised a maritime warfare. The belligerent itself, thus prosecuting this maritime warfare against its sovereign, confessedly had no ports and no waters that could serve as a basis of its naval operations. It

had no ship yards, it had no foundries, it had no means or resources by which it could maintain or keep on foot that war. A project and a purpose of war was all that could have origin from within its territory, and the pecuniary resources by which it could derive its supply from neutral nations was all that it could furnish towards this maritime war. Now, that war, having in fact been kept on foot, and having resulted in great injuries to the sovereign belligerent, gave occasion to a controversy between that sovereign and the neutral nation of Great Britain as to whether these actual supplies—these actual bases of maritime war from and in neutral jurisdiction—were conformable to the law of nations, or in violation of its principles. Of course, the mere fact that this war had thus been kept on foot did not, of itself, carry the neutral responsibility; but it did bring into controversy the opposing positions of the two nations. Great Britain contended, during the course of the transactions, and after their close, and now here contends, that, however much to be regretted, these transactions did not place any responsibility upon the neutral, because they had been affected only by such communication of the resources of the people of Great Britain as under international law was innocent and protected; that commercial communication and the resort for asylum or hospitality in the ports was the entire measure, comprehension, and character of all that had occurred within the neutral jurisdiction of Great Britain. The United States contended to the contrary. What, then, was the solution of the matter which settles amicably this great dispute? Why, first, that the principles of the law of nations should be settled by convention, as they have been, and that they should furnish the guide and control of your decision; second, that all the facts of the transactions as they occurred should be submitted to your final and satisfactory determination; and, third, that the application of these principles of law settled by convention between the parties to these facts as ascertained by yourselves should be made by yourselves, and should, in the end, close the controversy, and be accepted as satisfactory to both parties. In this view, we must insist that there is no occasion to go into any very considerable discussion as to the meaning of these rules, unless in the very subordinate sense of the explanation of a phrase, such as "base of operations," or "military supplies," or "recruitment of men," or some similar matter.

I now ask your attention to the part of the discussion which relates to the effect of a "commission," which, though made the subject of the second topic named by the tribunal, and taken in

that order by the learned counsel, I propose to consider first. It is said that the claims of the United States in this behalf, as made in their argument, rest upon an exaggerated construction of the second clause of the first rule. On this point I have first to say that the construction which we put upon that clause is not exaggerated; and, in the second place, that these claims in regard to the duty of Great Britain in respect to commissioned cruisers that have had their origin in an illegal outfit in violation of the law of nations, as settled in the first rule, do not rest exclusively upon the second clause of the first rule. They, undoubtedly, in one construction of that clause, find an adequate support in its proposition; but if that construction should fail, nevertheless the duty of Great Britain, in dealing with these offending cruisers in their subsequent resort to its ports and waters, would rest upon principles quite independent of this construction of the second clause. The second clause of that rule is this: "And also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike use." It is said that this second clause of the first rule manifestly applies only to the original departure of such a vessel from the British jurisdiction, while its purposes of unlawful hostility still remain in intention merely, and have not been evidenced by execution. If this means that a vessel that had made its first evasion from a British port, under circumstances which did not inculpate Great Britain for failing to arrest her, and then had come within British ports a second time, and the evidence, as then developed, would have required Great Britain to arrest her, and would have inculpated that nation for failure so to do, is not within the operation of this rule, I am at a loss to understand upon what principle of reason this pretension rests. If the meaning is that this second clause only applies to such offending vessels while they remain in the predicament of not having acquired the protection of a "commission," that pretension is a begging of the question under consideration, to-wit, what the effect of a "commission" is under the circumstances proposed.

I do not understand whether these two cases are meant to be covered by this criticism of the learned counsel. But let us look at it. Supposing that the escape of the Florida from Liverpool, in the first instance, was not under circumstances which made it an injurious violation of neutrality for which Great Britain was responsible to the United States,—that is to say, that there was no

such fault, from inattention to evidence, or from delay or inefficiency of action, as made Great Britain responsible for her escape; and supposing, when she entered Liverpool again, as the matter then stood in the knowledge of the government, the evidence was clear and the duty was clear, if it were an original case,—is it to be said that the duty is not as strong, that it is not as clear, and that a failure to perform it is not as clear a case for inculpation as if, in the original outset, the same circumstances of failure and of fault had been apparent? Certainly the proposition cannot mean this. Certainly the conduct of Great Britain in regard to the vessel at Nassau—a British port into which she went after her escape from Liverpool—does not conform to this suggestion. But if the proposition does not come to this, then it comes back to the pretension that the commission intervening terminates the obligation, defeats the duty, and exposes the suffering belligerent to all the consequences of this naval war, illegal in its origin, illegal in its character, and, on the part of the offending belligerent, an outrage upon the neutral that has suffered it. Now, that is the very question to be determined. Unquestionably, we submit that, while the first clause of the first rule is, by its terms, limited to an original equipment or outfit of an offending vessel, the second clause was intended to lay down the obligation of detaining in port, and of preventing the departure of, every such vessel whenever it should come within British jurisdiction. I omit from this present statement, of course, the element of the effect of the "commission," that being the immediate point in dispute. I start in the debate of that question with this view of the scope and efficacy of the rule itself. It is said, however, that the second clause of the first rule is to be qualified in its apparent signification and application by the supplying a phrase used in the first clause, which, it is said, must be communicated to the second. That qualifying phrase is: "Any vessel which it has reasonable ground to believe is intended," etc. Now, this qualification is in the first clause, and it is not in the second. Of course, this element of having "reasonable ground to believe" that the offense which a neutral nation is required to prevent is about to be committed is an element of the question of due diligence always fairly to be considered, always suitably to be considered, in judging either of the conduct of Great Britain in these matters, or of the conduct of Great Britain in the past, or of the duty of both nations in the future. As an element of due diligence, it finds its place in the second clause of the first rule, but only as an element of due diligence.

Now, upon what motive does this distinction between the purview of the first clause and of the second clause rest? Why, the duty in regard to these vessels embraced in the first clause applies to the inchoate and progressive enterprise at every stage of fitting out, arming, or equipping, and while that enterprise is or may be, in respect to evidence of its character, involved in obscurity, ambiguity, and doubt. It is therefore provided that, in regard to that duty, only such vessels are thus subjected to interruption in the progress of construction at the responsibility of the neutral as the neutral has "reasonable ground to believe" are intended for an unlawful purpose, which purpose the vessel itself does not necessarily disclose either in regard to its own character or of its intended use. But after the vessel has reached its form and completed its structure, why, then, it is a sufficient limitation of the obligation, and sufficient protection against undue responsibility that "due diligence to prevent" the assigned offense is alone required. Due diligence to accomplish the required duty is all that is demanded, and accordingly that distinction is preserved. It is made the clear and absolute duty of a nation to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use,—that is, when a vessel has become ready to take the seas, having its character of warlike adaptation thus determined and thus evidenced, so upon its subsequent visit to the neutral's port, as to such a vessel, the duty to arrest her departure is limited only by the—

SIR ALEXANDER COCKBURN: What should you think, Mr. Evarts, of such a case as this? Suppose a vessel had escaped from Great Britain with or without due diligence being observed; take the case of the Florida or the Shenandoah,—take either case. She puts into a port belonging to the British crown. You contend, as I understand your argument, that she ought to be seized. But suppose the authorities at the port into which she puts are not aware of the circumstances under which the vessel originally left the shores of Great Britain. Is there an obligation to seize that vessel?

MR. EVARTS: That, like everything else, is left as matter of fact.

SIR ALEXANDER COCKBURN: But suppose the people at the place are perfectly unaware from whence this vessel—

MR. EVARTS: I understand the question. We are not calling in judgment the authorities at this or that place. We are calling into judgment the British nation, and if the ignorance and want of knowledge in the subordinate officials at such a port can be brought to the fault of the home government in not advising or keeping them informed, that is exactly the condition from which the responsibility arises. It is a question of "due diligence," or not, of the nation, in all its conduct in providing or not providing for the situation, and in preparing or not preparing its officials to act upon suitable knowledge. We find nothing of any limitation of this second clause of the first rule that prevents our considering its proper application to the case of a vessel which, for the purpose of the present argument, it must be considered ought to be arrested under it and detained in port, if the "commission" does not interpose an obstacle.

We have laid down in our argument what we consider the rules of law in regard to the effect of the "commission" of a sovereign nation, or of a belligerent not recognized as a sovereign, in the circumstances involved in this inquiry. They are very simple. I find nothing in the argument of my learned friend, careful and intelligent as it is, that disturbs these rules as rules of law. The public ship of a nation, received into the waters or ports of another nation, is, by the practice of nations, as a concession to the sovereign's dignity, exempt from the jurisdiction of the courts, and all judicial process of the nation whose waters it visits. This is a concession—mutual, reciprocal—between nations having this kind of intercourse, and resting upon the best and surest principles of international comity. But there is no concession of extraterritoriality to the effect or extent that the sovereign visited is predominated over by the sovereign receiving hospitality to its public vessels. The principle simply is that the treatment of the vessel rests upon considerations between the nations as sovereign and in their political capacities as matter to be dealt with directly between them, under reciprocal responsibility for offense on either side, and under the duty of preserving relations of peace and good will, if you please, but nevertheless to be controlled by reasons of state. Any construction of the rule that would allow the visiting vessel to impose its own sovereignty upon the sovereign visited would be to push the rule to an extreme that would defeat its purpose. It is the equality of sovereigns that requires that the process and the jurisdiction of courts should not be extended to public vessels. But all other qualifications as to how the sovereign visited shall deal with public vessels rest in the dis-

cretion of the sovereign. If offense is committed by such vessels, or any duty arises in respect to them, he, at his discretion, and under international responsibility, makes it the subject of remonstrance, makes it the subject of resentment, makes it the subject of reprisal, or makes it the subject of an immediate exercise of force, if the circumstances seem to exact it. What, then, is the tenor of the authorities in respect to a public vessel not of a sovereign, but of a belligerent who has not been recognized as a sovereign? The courts of the country, when the question arises as a judicial one, turn to the political authority, and ask how that has determined the question of the public character of such vessels; and if that question (which is a political one) has been determined in recognition of the belligerency, then the vessel of the belligerent is treated as exempt from judicial process, and from the jurisdiction of the courts. But that vessel remains subject to the control—subject to the dominion—of the sovereign whose port it has visited, and it remains there under the character of a limited recognition, and not in the public character of a representative of recognized sovereignty.

We understand the motives by which belligerency is recognized while sovereignty is refused. They are the motives of humanity; they are the motives of fair play; they are the motives of neutral recognition of the actual features of the strife of violence that is in progress. But it is in vain to recognize belligerency, and deny sovereignty, if you are going to attract, one by one, all the traits of sovereignty in the relations with a power merely recognized as belligerent, and to whom sovereignty has been denied. What is the difference of predicament? Why, the neutral nation, when it has occasion to take offense or exercise its rights with reference to a belligerent vessel not representing a sovereign, finds no sovereign behind that vessel to which it can appeal, to which it can remonstrate, by which, through diplomacy, by which, through reprisals, by which, in resentments, it can make itself felt, its dominion respected, and its authority obeyed. It then deals with these belligerent vessels not unjustly, not capriciously, for injustice and caprice are wrongful towards whomsoever they are exercised, but, nevertheless, upon the responsibility that its dealing must reach the conduct, and that the vessel and its conduct are the only existing power and force to which it can apply itself. I apprehend that there is no authority from any book that disturbs in the least this proposition, or carries the respect to belligerent vessels beyond the exemption from jurisdiction of courts and judicial process. The rule of law being of this nature, the question, then, of how a

neutral shall deal with one of these cruisers that owes its existence to a violation of its neutral rights, and then presents itself for hospitality in a port of the neutral, is a question for the neutral to determine according to its duty to itself, in respect to its violated neutrality, and its duty to the sovereign belligerent who will lay to its charge the consequences and the responsibility for this offending belligerent.

Now, I find in the propositions of the eminent counsel a clear recognition of these principles of power on the part of the sovereign, and of right on the part of the sovereign, requiring only that the power should be exercised suitably and under circumstances which will prevent it from working oppression or unnecessary injury. That makes it a question, therefore, as to the dealing of the sovereign for which the law of nations applies no absolute rule. It then becomes a question for the tribunal whether (under these circumstances of cruisers that owe their origin or their power to commit these injuries to their violation of neutrality) Great Britain is responsible to the injured sovereign, the United States, for this breach of neutrality, for this unlawful birth, for this unlawful support of these offending cruisers. As to what the duty of a neutral nation is in these circumstances and in these relations, when the offending cruiser is again placed within its power, I find really no objection made to the peremptory course we insist upon, except that seizing such a vessel, without previous notice, would be impolite, would be a violation of comity, would be a violation of the decorous practice of nations, and would be so far a wrong.

Well, let us not discuss these questions in the abstract merely; let us apply the inquiry to the actual conduct of Great Britain in the actual circumstances of the career of these cruisers. If Great Britain claimed exemption from liability to the United States by saying that, when the cruisers had, confessedly, in fact escaped in violation of neutrality, and confessedly were on the seas propagating those enormous injuries to the property and commerce of a friendly nation, it had promptly given notice that no one of them should ever after enter its ports, and that, if it did enter its ports, it would be seized and detained, then this charge that the conduct of Great Britain towards these cruisers in their subsequent visits to its ports was such as to make it responsible for their original escape, or for their subsequent career, would be met by this palliation or this defense. But no such case arises upon the proofs. You have, then, on the one hand, a clear duty towards the offended belligerent, and, on the other hand, only the supposed obliga-

tion of courtesy or comity towards the offending belligerent. This courtesy, this comity, it is conceded, can be terminated at any time at the will of the neutral sovereign. But this comity or this courtesy has not been withdrawn by any notice or by any act of Great Britain during the entire career of these vessels. We say, then, in the first place, that there is no actual situation which calls for a consideration of this palliative defense, because the circumstances do not raise it for consideration. On the contrary, the facts, as recorded, show the most absolute indifference on the part of Great Britain to the protracted continuance of the ravages of the Alabama and of the Florida, whose escape is admitted to be a scandal and a reproach to Great Britain, until the very end of the war. And yet a subtraction of comity, a withdrawal of courtesy, was all that was necessary to have determined their careers!

But, further, let us look a little carefully at this idea that a cruiser, illegally at sea by violation of the neutrality of the nation which has given it birth, is in a condition, on its first visit to the ports of the offended neutral after the commission of the offense, to claim the allowance of courtesy or comity. Can it claim courtesy or comity by reason of anything that has proceeded from the neutral nation to encourage that expectation? On the contrary, so far from its being a cruiser that has a right to be upon the sea, and to be a claimant of hospitality, it is a cruiser, on the principles of international law (by reason of its guilty origin, and of the necessary consequences of this guilt to be visited upon the offended neutral), for whose hostile ravages the British government is responsible. What courtesy, then, does that government owe to a belligerent cruiser that thus practiced fraud and violence upon its neutrality, and exposed it to this odious responsibility? Why does the offending cruiser need notice that it will receive the treatment appropriate to its misconduct, and to the interests and duty of the offended neutral? It is certainly aware of the defects of its origin, of the injury done to the neutral, and of the responsibility entailed upon the neutral for the injury to the other belligerent. We apprehend that this objection of courtesy to the guilty cruiser that is set up as the only obstacle to the exercise of an admitted power—that this objection which maintains that a power, just in itself, if executed without notice, thereby becomes an imposition and a fraud upon the offender because no denial of hospitality had been previously announced—is an objection which leaves the ravages of such a cruiser entirely at the responsibility of the neutral which has failed to intercept it. It is said in the spe-

cial argument of the learned counsel that no authority can be found for the exercise of direct sovereignty on the part of an offended neutral towards a cruiser of either a recognized or an unrecognized sovereignty. But this, after all, comes only to this: that such an exercise of direct control over a cruiser, on the part of an offended neutral, without notice, is not according to the common course of hospitality for public vessels, whether of a recognized sovereign or of a recognized belligerent. As to the right to exercise direct authority on the part of the displeased neutral to secure itself against insult or intrusion on the part of a cruiser that has once offended its neutrality, there is no doubt. The argument that this direct control may be exercised by the displeased neutral without the intervention of notice, when the gravity and nature of the offense against neutrality on the part of the belligerent justify this measure of resentment and resistance, needs no instance and no authority for its support. In its nature it is a question wholly dependent upon circumstances.

Our proposition is that all of these cruisers drew their origin out of the violated neutrality of Great Britain, exposing that nation to accountability to the United States for their hostilities. Now, to say that a nation thus situated is required by any principles of comity to extend a notice before exercising control over the offenders brought within its power seems to us to make justice and right, in the gravest responsibilities, yield to mere ceremonial politeness. To meet, however, this claim on our part, it is insisted, in this special argument, that the equipment and outfit of a cruiser in a neutral port, if it goes out unarmed (though capable of becoming an instrument of offensive and defensive war by the mere addition of an armament), may be an illegal act as an offense against municipal law, but is not a violation of neutrality, in the sense of being a hostile act, and does not place the offending cruiser in the position of having violated neutrality. That is but a recurrence to the subtle doctrine that the obligations of Great Britain in respect to the first rule of the treaty are not, by the terms of the treaty, made international obligations, for the observance of which she is responsible under the law of nations, and for the permissive violation of which she is liable, as having allowed, in the sense of the law of nations, a hostile act to be perpetrated on her territory. This distinction between a merely illegal act and a hostile act which is a violation of neutrality is made, of course, and depends wholly upon the distinction of an evasion of an unarmed ship of war being prohibited only by municipal law, and not by the law of nations, while the evasion of an armed ship

is prohibited by the law of nations. This is a renewal of the debate between the two nations as to what the rule of the law of nations in this respect was; but this debate was finally closed by the treaty. And, confessedly, on every principle of reason, the moment you stamp an act as a violation of neutrality you include it in the list of acts which, by the law of nations, are deemed hostile acts. There is no act that the law of nations prohibits within the neutral jurisdiction that is not in the nature of a hostile act, that is not in the nature of an act of war, that is not in the nature of an application by the offending belligerent of the neutral territory to the purposes of his war against the other belligerent. The law of nations prohibits it, the law of nations punishes it, the law of nations exacts indemnity for it, only because it is a hostile act.

Now, suppose it were debatable before the tribunal whether the emission of a war ship without the addition of her armament was a violation of the law of nations; on the same reason, and only on that reason, it would be debatable whether it were a hostile act. If it were a hostile act, it was a violation of the law of nations; if it were not a violation of the law of nations, it was not so only because it was not a hostile act. When, therefore, the rules of the treaty settle that debate in favor of the construction claimed by the United States in its antecedent history and conduct, and determine that such an act is a violation of the law of nations, they determine that it is a hostile act. There is no escape from the general proposition that the law of nations condemns nothing done in a neutral territory unless it is done in the nature of a hostile act. And when you debate the question whether any given act within neutral jurisdiction is or is not forbidden by the law of nations, you debate the question whether it is a hostile act or not. Now, it is said that this outfit, without the addition of an armament, is not a hostile act, under the law of nations antecedent to this treaty. That is immaterial within the premises of the controversy before this tribunal. It is a hostile act against Great Britain, which Great Britain—

SIR ALEXANDER COCKBURN: Do I understand you, Mr. Evarts, to say that such an act is a hostile act against Great Britain?

MR. EVARTS: Yes; a hostile violation of the neutrality of Great Britain, which, if not repelled with due diligence, makes Great Britain responsible for it as a hostile act within its territory against the United States. This argument of the eminent counsel concedes that, if an armament is added to a vessel within the neu-

tral territory, it is a hostile act within that territory,—it is a hostile expedition set forth from that territory. It is therefore a violation of the law of nations, and, if due diligence is not used to prevent it, it is an act for which Great Britain is responsible. If due diligence to prevent it be or be not used, it is an offense against the neutral nation by the belligerent which has consummated the act.

A neutral nation, against the rights of which such an act has been committed, to-wit, the illegally fitting out of a war ship without armament (condemned by the law of nations as settled by this treaty), is under no obligation whatever of courtesy or comity to that cruiser. If, under such circumstances, Great Britain prefers courtesy and comity to the offending cruiser and its sponsors, rather than justice and duty to the United States, she does it upon motives which satisfy her to continue her responsibility for that cruiser, rather than terminate it. Great Britain has no authority to exercise comity and courtesy to these cruisers at the expense of the offended belligerent, the United States, whatever her motives may be. Undoubtedly the authorities conducting the Rebellion would not have looked with equal favor upon Great Britain if she had terminated the career of these cruisers by seizing them or excluding them from her ports. That is a question between Great Britain and the belligerent that has violated her neutrality. Having the powers, having the right, the question of courtesy in giving notice was to be determined at the cost of Great Britain, and not at the expense of the United States. But it ceases to be a question of courtesy when the notice has not been given at all, and when the choice has thus been made that these cruisers shall be permitted to continue their career unchecked.

. . . .

I will now take up what is made the subject of the third chapter of the special argument, which has reference to coaling and "the base of naval operations" and "military supplies," as prohibited by the second rule of the treaty. The question of coaling is one question, considered simply under the law of hospitality or asylum to belligerent vessels in neutral ports, and quite another considered, under given facts and circumstances, as an element in the proscribed use of neutral ports as "a base of naval operations." At the outset of the discussion of this subject it is said that the British government dealt fairly and impartially in this matter of coaling with the vessels of the two belligerents, and that the real complaint on the part of the United States is of the neutrality which Great Britain had chosen to assume for such impartial deal-

ing between the two belligerents. If that were our complaint, it is certainly out of place in this controversy, for we are dealing with the conduct of Great Britain in the situation produced by the queen's proclamation, and there is here no room for the discussion of any grievance on the part of the United States from the public act of Great Britain in issuing that proclamation; but nothing in the conduct of the argument on our part justifies this suggestion of the eminent counsel. On the subject of "coaling" it is said that it is not, of itself, a supply of contraband of war, or of military aid. Not of itself! The grounds and occasions on which we complain of coaling, and the question of fact whether it has been fairly dealt out as between the belligerents, connect themselves with the larger subject (which is so fully discussed under this head by the eminent counsel), a topic of discussion of which coaling is merely a branch,—that is to say, the use of neutral ports and waters for coaling, victualing, repairs, supplies of sails, recruitment of men for navigation, etc. These may or may not be obnoxious to censure under the law of nations, according as they have relation or not with facts and acts which, collectively, make up the use of the neutral ports and waters as "the bases of naval operations" by belligerents. Accordingly, the argument of the eminent counsel does not stop with so easy a disposition of the subject of coaling, but proceeds to discuss the whole question of base of operations,—what it means, what it does not mean, the inconvenience of a loose extension of its meaning; the habit of the United States in dealing with the question both in acts of government and the practice of its cruisers; the understanding of other nations, giving the instances arising on the correspondence with Brazil on the subject of Sumter,—and produces as a result of this inquiry the conclusion that it was not the intention of the second rule of the treaty to limit the right of asylum. In regard to the special treatment of this subject of coaling provided by the regulations established by the British government in 1862, it is urged that they were voluntary regulations, that the essence of them was that they should be fairly administered between the parties, and that the rights of asylum or hospitality in this regard should not be exceeded. Now, this brings up the whole question,—the use of neutral ports or waters as a "base of naval operations," which is proscribed by the second rule of the treaty.

You will observe that, while the first rule applies itself wholly to the particular subject of the illegal outfit of a vessel which the neutral had reasonable ground to believe was to be employed to cruise, etc., or to the detention in port of a vessel that was in

whole or in part adapted for war,—while the injunction and duty of the first rule are thus limited, and the violation of it, and the responsibility consequent upon such violation, are restricted to those narrow subjects,—the proscription of the second rule is as extensive as the general subject, under the law of nations, of the use of ports and waters of the neutral as the basis of naval operations, or for the renewal or augmentation of military supplies, or the recruitment of men. What, then, is the doctrine of hospitality or asylum, and what is the doctrine which prohibits the use (under cover of asylum, under cover of hospitality, or otherwise) of neutral ports and waters as bases of naval operations? It all rests upon the principle that, while a certain degree of protection or refuge, and a certain peaceful and innocent aid, under the stress to which maritime voyages are exposed, are not to be denied, and are not to be impeached as unlawful, yet anything that, under its circumstances and in its character, is the use of a port or of waters for naval operations, is proscribed, although it may take the guise, much more if it be an abuse, of the privilege of asylum or hospitality. There is no difference in principle, in morality, or in duty between neutrality on land and neutrality at sea. What, then, are the familiar rules of neutrality within the territory of a neutral in respect to land warfare? Whenever stress of the enemy, or misfortune, or cowardice, or seeking an advantage of refreshment carries or drives one of the belligerents, or any part of its forces, over the frontier into the neutral territory, what is the duty of the neutral? It is to disarm the forces, and send them into the interior till the war is over. There is to be no practicing with this question of neutral territory. The refugees are not compelled by the neutral to face their enemy; they are not delivered up as prisoners of war; they are not surrendered to the immediate stress of war from which they sought refuge. But from the moment that they come within neutral territory they are to become noncombatants, and they are to end their relations to the war. There are familiar examples of this in the recent history of Europe.

What is the doctrine of the law of nations in regard to asylum, or refuge, or hospitality in reference to belligerents at sea during war? The words themselves sufficiently indicate it. The French equivalent of *"relache forcee"* equally describes the only situation in which a neutral recognizes the right of asylum and refuge; not in the sense of shipwreck, I agree, but in the sense in which the circumstances of ordinary navigable capacity to keep the seas, for the purposes of the voyage and the maintenance of the cruise, ren-

der the resort of a vessel to a port or ports suitable to and convenient for their navigation under actual and *bona fide* circumstances requiring refuge and asylum.

There is another topic which needs to be adverted to before I apply the argument. I mean the distinction between commercial dealing in the uncombined materials of war, and the contribution of such uncombined materials of war in the service of a belligerent in making up military and naval operations by the use of neutral territory as the base of those contributions. What are really commercial transactions in contraband of war are allowed by the practice of the United States and of England equally, and are not understood to be proscribed as hostile acts by the law of nations, and it is agreed between the two countries that the second rule is not to be extended to embrace, by any largeness of construction, mere commercial transactions in contraband of war.

SIR ALEXANDER COCKBURN: Then I understand you to concede that the private subject may deal commercially in what is contraband of war?

MR. EVARTS: I will go even further than that, and say that commercial dealings or transactions are not proscribed by the law of nations as violations of neutral territory because they are in contraband of war. Therefore I do not seek any aid in my present purpose of exhibiting the transactions under the second rule by these cruisers, as using Great Britain as the base for these naval operations, from any construction of that rule which would proscribe a mere commercial dealing in what is understood to be contraband of war. Such is not the true sense of the article, nor does the law of nations proscribe this commercial dealing as a hostile act. But whenever the neutral ports, places, and markets are really used as the bases of naval operations, when the circumstances show that resort and that relation and that direct and efficient contribution and that complicity and that origin and authorship which exhibit the belligerent himself drawing military supplies for the purpose of his naval operations from neutral ports,—that is a use by a belligerent of neutral ports and waters as a base of naval operations, and is prohibited by the second rule of the treaty. Undoubtedly the inculpation of a neutral for permitting this use turns upon the question whether due diligence has been used to prevent it. The argument upon the other side is that the meaning of "the base of operations," as it has been understood in authorities relied upon by both nations, does not permit the resort to such neutral ports and waters for the purpose

of specific hostile acts, but proceeds no further. The illustrative instances given by Lord Stowell or by Chancellor Kent in support of the rule are adduced as being the measure of the rule. These examples are of this nature: A vessel cannot make an ambush for itself in neutral waters; cannot lie at the mouth of a neutral river to sally out to seize its prey; cannot lie within neutral waters, and send its boats to make captures outside their limits. All these things are proscribed. But they are given as instances, not of flagrant, but of incidental and limited, use. They are the cases that the commentators cite to show that even casual, temporary, and limited experiments of this kind are not allowed, and that they are followed by all the definite consequences of an offense to neutrality and of displeasure to a neutral, to-wit, the resort by such neutral power to the necessary methods to punish and redress these violations of neutral territory. [Mr. Evarts then contrasted the asylum or hospitality in the matter of coal or similar contributions in aid of navigable capacity with the use of neutral ports as a base of naval operations, by reference to the facts in connection with the Nashville and the Shenandoah.]

All that I have said has been intended to show that what was done by these cruisers did make the neutral ports a base, just as much as if a shallop was stationed at the mouth of a neutral river, and sent out a boat to commit hostilities. In either case, the neutral is not responsible unless it has failed to exercise due diligence. But there is this further consequence carrying responsibility: that, when the neutral does not know of such an act until after it has been committed, it is its present duty to resent it, and to prevent its repetition, and to deny hospitality to the vessels that have consummated it. Now, these questions can certainly be kept distinct. If the fact is not known, and if there is no want of due diligence, then the neutral is not in fault; if the facts are afterwards known, then the cruiser that has committed the violation of neutrality is to be proscribed, to be denied hospitality, to be detained in port, or excluded from port, after notice, or without notice, as the case may be. The question then arises whether a nation thus dealt with by a belligerent, and having the power to stop the course of naval operations thus based, if it purposely omits so to do, does not make itself responsible for their continuance. I do not desire to be drawn into a discussion upon the facts which are not included in the range of the present argument. I am now simply endeavoring to show that the illustrations of Kent and Stowell, taken from navigation and maritime war then prevailing, do not furnish the rule or the limit of the responsibil-

ity of neutrals in respect of allowing such use of naval bases, nor of the circumstances which make up the prohibited uses of neutral ports for such bases.

I proceed to another branch of the subject. It is said that the concerted setting forth of the Laurel from the neutral port to carry the armament and the munitions of war and the officers and the crew to be combined outside the neutral jurisdiction with the Shenandoah, already issued from another port of the same neutral, is only a dealing in contraband of war. I deny that such a transaction has any connection with dealing in contraband of war. It is a direct obtaining by a projected cruiser of its supply of armament, munitions, and men and officers from a neutral port. There may be no fault on the part of the neutral in not preventing it. That will depend upon the question of "due diligence to prevent," "reasonable ground to believe," etc. But the principle of contraband of war does not protect such a transaction, and that is the only principle that has been appealed to by the British government in the discussions of this matter to justify it. The facts of the going out of this vessel were known—

SIR ALEXANDER COCKBURN: Not until afterwards.

MR. EVARTS: The law of nations was violated. Your territory had been used, as a matter of fact, we claim, as a base of naval operations, and it was not a dealing in contraband of war. It was not a commercial transaction. It was a direct furnishing of a cruiser with armament from your port. It might as well have been accomplished within three miles of your coast. Yet it is said this is no offense against your law!

SIR ALEXANDER COCKBURN: I do not say that.

MR. EVARTS: Unfortunately for the United States, through the whole war we had quite other doctrine from those who laid down the law for Great Britain in these matters. Fortunately, we have better doctrine here and now. But according to the law as administered in England, such combinations of the materials of naval war could be made outside her ports, by the direct action of the belligerent government, deriving all the materials from her ports, and planning thus to combine them outside.

SIR ALEXANDER COCKBURN: If that had been shown.

MR. EVARTS: The proofs do show it, and that the doctrine was that it was lawful and should not be interfered with. . . . .

The correspondence is full of evidence that I was correct in my

statement of the doctrine of the British government, and of its action from beginning to end being controlled by that doctrine; and all the remonstrances of the United States were met by the answer that the law of nations, the foreign enlistment act, the duty of neutrality, had nothing whatever to do with that subject, as it was simply dealing in contraband of war. The importance of this view, of course, and its immense influence in producing the present controversy between the two nations, are obvious. The whole mischief was wrought by the co-operating force of two legal propositions: (1) That the unarmed cruiser was not itself a weapon of war,—an instrument of war,—and therefore was not to be intercepted as committing a violation of the law of nations; and (2) that the contributory provision, by means of her supply ships, of her armament, munitions, and men, to make her a complete instrument of naval hostilities, was also not a violation of the law of nations, but simply a commercial dealing in contraband. It was only under those combined doctrines that the cruiser ever came to be in the position of an instrument of offensive and defensive war, and to be able to assume the "commission" prepared for her, and which was thenceforth to protect her from interference on the doctrine of comity to sovereignty.

So, too, it will be found, when we come to consider the observations of the eminent counsel on the subject of due diligence, to which I shall have occasion soon to reply, that the question whether these were hostile acts, under the law of nations, was the turning point in the doctrine of the government of Great Britain, and of its action as to whether it would intercept these enterprises by the exercise of executive power, as a neutral government would intercept anything in the nature of a hostile act under the law of nations. The doctrine was that these were not hostile acts separately, and that no hostile act arose unless these separate contributions were combined in the ports of Great Britain; that there was no footing otherwise for the obligation of the law of nations to establish itself upon; that there was no remissness of duty on the part of the neutral in respect of them; and, finally, that these operations were not violations of the foreign enlistment act. All this is shown by the whole correspondence, and by the decisions of the municipal courts of England, in regard to the only question passed upon at all,—that of unarmed vessels, so far as they ever passed even upon that question. . . . .

It will be, then, for the tribunal to decide what the law of nations is on this subject. If the tribunal shall assent to the prin-

ciples which I have insisted upon, and shall find them to be embraced within the provisions of the three rules of this treaty, and that the facts in the case require the application of these principles, it stands admitted that Great Britain has not used, and has refused to use, any means whatever for the interruption of these contributory provisions of armament and munitions to the offending cruisers.

It is not for me to dispute the ruling of the eminent lawyers of Great Britain upon their foreign enlistment act; but, for the life of me, I cannot see why the Alar and the Alabama and the Laurel, when they sailed from the ports of England with no cargo whatever except the armament and munitions of war of one of these cruisers, and with no errand and no employment except that of the rebel government, through its agents, to transport these armaments and munitions to the cruisers which awaited them, were not "transports" in the service of one of the belligerents, within the meaning of the foreign enlistment act of Great Britain. That, however, is a question of municipal law. It is with international law that we are dealing now and here. The whole argument, to escape the consequences which international law visits upon the neutral for its infractions, has been that whatever was blameworthy was only so as an infraction of the municipal law of Great Britain. And when you come to transactions of the kind I am now discussing, as they were not deemed violations of the foreign enlistment act, nor of international law, and as the powers of the government, by force, to intercept through the exercise of prerogative or otherwise, did not come into play, the argument is that there were no consequences whatever to result from these transactions. They were merely considered as commercial transactions in contraband of war. But the moment it is held that these things were forbidden by the law of nations, then, of course, it is no answer to say you cannot indict anybody for them under the law of Great Britain. Nor does the law of nations, having laid down a duty and established its violation as a crime, furnish no means of redressing the injury or of correcting or punishing the evil. What course does it sanction when neutral territory is violated by taking prizes within it? When the prize comes within the jurisdiction of the neutral, he is authorized to take it from the offending neutral belligerent by force, and release it. What course does it sanction when a cruiser has been armed within neutral territory? When the vessel comes within the jurisdiction of the neutral, he is authorized to disarm it. Now, our proposition is that these cruisers, thus deriving their force for war by these outfits

of tenders, with their armament and munitions and men, when brought within the British jurisdiction, should have been disarmed, because they had been armed, in the sense of the law of nations, by using as a base of their maritime hostilities, or their maritime fitting for hostilities, the ports and waters of this neutral state. [After adverting again to the construction of the rules of the treaty, Mr. Evarts continued:]

I now come to the more general chapter in the argument of the learned counsel,—the first chapter, which presents, under forty-three sections, a very extensive and very comprehensive, and certainly a very able, criticism upon the main argument of the United States upon "due diligence," and upon the duties in regard to which due diligence was required, and in regard to the means for the performance of those duties, and the application of this due diligence, possessed by Great Britain. Certainly these form a very material portion of the argument of the United States; and that argument, as I have said, has been subjected to a very extensive criticism. Referring the tribunal to our argument itself as furnishing at least what we suppose to be a clear and intelligible view of our propositions, of the grounds upon which they rest, of the reasoning which supports them, of the authorities which sustain them, of their applicability and of the result which they lead to,—the inculpation of Great Britain in the matters now under judgment,—we shall yet think it right to pass under review a few of the general topics which are considered in this discussion of "due diligence."

The sections from seven to sixteen (the earlier sections having been already considered) are occupied with a discussion of what are supposed to be the views of the American argument on the subject of prerogative or executive power, as distinguished from the ordinary administration of authority through the instrumentality of courts of justice and their procedure. Although we may not pretend to have as accurate views of constitutional questions pertaining to the nation of Great Britain, or to the general principles of her common law, as the eminent counsel of her Britannic majesty, yet I think it will be found that the criticisms upon our argument in these respects are not, by any means, sound. It is, of course, a matter of the least possible consequence to us, in any position which we occupy, either as a nation before this tribunal, or as lawyers in our argument, whether or not the sum of the obligations of Great Britain in this behalf under the law of nations was referred for its execution to this or that authority under its constitution, or to this or that official action under its ad-

ministration. One object of our argument has been to show that, if the sum of these obligations was not performed, it was a matter of but little importance to us or to this tribunal where, in the distribution of administrative duty, or where, in the constitutional disposition of authority, the defect, either of power or in the due exercise of power, was found to be the guilty cause of the result. Yet, strangely enough, when, in a certain section of our argument, that is laid down as one proposition, we are accused by the learned counsel of a *petitio principii*,—of begging the question that the sum of her obligations was not performed by Great Britain.

With regard to prerogative, the learned counsel seems to think that the existence of the supposed executive powers under the British constitution, and which our argument has assigned to the prerogative of the crown, savors of arbitrary or despotic power. We have no occasion to go into the history of the prerogative of the British crown, or to consider through what modifications it has reached its present condition. When a free nation like Great Britain assigns certain functions to be executed by the crown, there does not seem to be any danger to its liberties from that distribution of authority when we remember that parliament has full power to arrange, modify, or curtail the prerogative at its pleasure, and when every instrument of the crown in the exercise of the prerogative is subject to impeachment for its abuse. The prerogative is trusted, under the British constitution, with all the international intercourse of peace or war, with all the duties and responsibilities of changing peace to war or war to peace, and also in regard to all the international obligations and responsibilities which grow out of a declared or actual situation of neutrality when hostilities are pending between other nations. Of that general proposition there seems to be no dispute. But it is alleged that there is a strange confusion of ideas in our minds and in our argument in not drawing the distinction between what is thus properly ascribable to extra-territoriality or *ad extra* administration; what deals with outward relations, and what has to do with persons and property within the kingdom. This prerogative, it is insisted, gives no power over persons and property within the kingdom of Great Britain; and it is further insisted that the foreign enlistment act was the whole measure of the authority of the government, and the whole measure, therefore, of its duty within the kingdom. It is said the government had no power, by prerogative, to make that a crime in the kingdom which is not a crime by the law, or of punishing a crime in any other manner than through the courts of justice. This, of course, is sound,

as well as familiar, law. But the interesting question is whether the nation is supplied with adequate legislation, if that is to furnish the only means for the exercise of international duty. If it is not so supplied, that is a fault as between the two nations; if it is so supplied, and the powers are not properly exercised, that is equally a fault as between the two nations. The course of the American argument is to show that either on the one or the other of the horns of this dilemma the actual conduct of the British government must be impaled. We are instructed in this special argument as to what, in the opinion of the eminent counsel, belongs to prerogative, and what to judicial, action under the statute; but we find no limitation of what is in the power of parliament, or in the power of administration, if adequate parliamentary provision be made for its exercise. But all this course of argument, ingenious, subtle, and intricate as it is, finally brings the eminent counsel around to this point: that, by the common law of England within the realm, there is power in the crown to use all the executive authority of the nation, civil and military, to prevent a hostile act towards another nation within that territory. That is but another name for prerogative. There is no statute on that subject, and no writ from any court can issue to accomplish that object. If this is undoubtedly part of the common law of England, as the learned counsel states, the argument here turns upon nothing else but the old controversy between us,—whether these acts were in the nature of hostile acts, under the condemnation of the law of nations as such, that ought to have been intercepted by the exercise of prerogative, or by the power of the crown at common law, whichever you choose to call it. The object of all the discussion of the learned counsel is continually to bring us back to the point that, within the kingdom of Great Britain, the foreign enlistment act was the sole authority for action and prevention, and, if these vessels were reasonably proceeded against, under the requirements of administrative duty in enforcing the foreign enlistment act, as against persons and property for confiscation or for punishment, that was all that was necessary or proper.

Sir Alexander Cockburn: Am I to understand you, as a lawyer, to say that it was competent for the authorities at the port whence such a vessel escaped to order out troops and command them to fire?

Mr. Evarts: That will depend upon the question whether that was the only way to compel her to an observance.

SIR ALEXANDER COCKBURN: I put the question to you in the concrete. . . . . She is going out of the port. They know she is trying to escape from the port. Do you, I again ask you, —do you, as a lawyer, say that it would be competent for the authorities, without a warrant, simply because this is a violation of the law, to fire on that vessel?

MR. EVARTS: Certainly, after the usual preliminaries of hailing her and firing across her bows, to bring her to. Finally, if she insists on proceeding on her way, and thus raises the issue of escape from the government or forcible arrest by the government, you are to fire into her. It becomes a question whether the government is to surrender to the ship or the ship to the government. Of course, the lawfulness of this action depends upon the question whether the act committed is, under the law of nations, a violation of the neutrality of the territory, and a hostile act, as it is conceded throughout this argument the evasion of an armed ship would be. . . . .

Sections seventeen to twenty-five are occupied with a discussion concerning the preventive powers and punitive powers under the legislation of Great Britain as compared with that of the United States. . . . . It never was of any practical importance to the United States whether the British government confiscated a ship or imprisoned the malefactors, except so far as this might indicate the feelings and sympathy of that nation. All we wished was that the government should prevent these vessels from going out. It was not a question with us whether they punished this or that man, or insisted upon this or that confiscation, provided the interception of the cruisers was effected. When, therefore, we claimed, under the foreign enlistment act or otherwise, that these vessels should be seized and detained, one of the forms of punitive recourse under that act would have operated a detention, if applied at the proper time, and under the proper circumstances. Confiscation had its place whenever the vessel was in the power of the government; but it was only by interception of the enterprise that we were to be benefited. That interception, by some means or other, we had a right to; and if your law—if your constitution—had so arranged matters that it could not be had except upon the ordinary process, the ordinary motives, the ordinary evidence, and the ordinary duty by which confiscation of private property was obtained, and that provision was not adequate to our rights, then our argument is that your law needed improvement. . . . .

Sections twenty-seven to thirty of this special argument are occupied with a discussion of that part of our argument which alleges, as want of due diligence, the entire failure of Great Britain to have an active, effective, and spontaneous investigation, scrutiny, report, and interceptive prevention of enterprises of this kind. Well, the comments upon this are of two kinds,—first, concerning the question, under a somewhat prolonged discussion of the facts, whether the government did or did not do this, that, or the other thing; and then concerning the more general question as to whether the rules of this treaty call upon this tribunal to inquire into any such deficiency of diligence which was not applicable to the case of a vessel respecting which the British government "had reasonable grounds to believe" that a violation of the law was meditated. Our answer to this latter question is that the rules together, in their true construction, require the application of due diligence (particularly under the emphasis of the third rule) "to prevent" the occurrence of any of the infractions of the law of nations proscribed by the rules. There are two propositions in these rules. Certain things are assigned as violations of the law of nations, and as involving a duty on the part of a neutral government to prevent them; and, besides in and towards preventing them, it is its duty to use due diligence. In regard to every class of alleged infractions of these rules there comes to be an inquiry, first, whether, in the circumstances and facts which are assigned, the alleged infractions are a violation of any of the duties under the law of nations as prescribed by those rules. If not, they are dismissed from your consideration; but if they are so found, then those rules, by their own vigor, become applicable to the situation, and then comes the inquiry whether Great Britain did, in fact, use due diligence to prevent the proscribed infractions. It is under the sections now under review that the learned counsel suggests whether it is supposed that this general requirement of the use of due diligence by Great Britain is intended to cover the cases of vessels like the Shenandoah and the Georgia (which, it is alleged, the British government had no reasonable ground to believe were meditating or preparing an evasion of the laws or a violation of the duties of Great Britain), or the cases of these tenders that supplied the Georgia and the Shenandoah and the Florida and the Alabama with their armaments and munitions of war,—it is under these sections that this discussion arises. The answer on our part to this suggestion is that the general means of diligence to keep the government informed of facts, and enable it to judge whether

there was "reasonable ground to believe" in any given case, and thus enable it to be prepared to intercept the illegal enterprise, are required in cases that the rules proscribe as infractions of neutrality. I will agree that, under the first clause of the first rule, the duty is applied to a vessel concerning which the government "shall have reasonable ground to believe," etc. Under the second clause of the first rule, this phrase is omitted, and the question of "reasonable ground to believe" forms only an element in the more general question of "due diligence." Under the second rule, also, the whole subject of the use of the neutral ports and waters as a base of naval operations is open; and if there has been a defect of diligence in providing the officers of Great Britain with the means of knowledge and the means of action to prevent such use of its ports and waters as a base of operations, why, then, Great Britain is at fault in not having used due diligence to prevent such use of its ports and waters. That is our argument, and it seems to us it is a sound argument. It is very strange if it is not, and if the duty of a government to use due diligence to prevent its ports and waters from being used as a base of naval operations does not include the use of due diligence to ascertain whether they were being, or were to be, so used. It was a fault not to use due diligence to prevent the ports and waters of Great Britain from being used as a base of naval operations, or for the augmentation of force, or the recruitment of men. And to admit that it was a fault in any case not to act where the government had cause to believe that there was to be a violation of law, and yet to claim that it was no fault of the government to be guilty of negligence in not procuring intelligence and information which might give a reasonable ground to believe, seems to be absurd. This, indeed, would be to stamp the lesser negligence of not applying due diligence in a case when there was "reasonable ground to believe" as a fault entailing responsibility upon a neutral government, and to excuse the same government for the systematic want of due diligence, which, through indifference to duty and voluntary ignorance, did not allow itself to be placed in a position to judge whether the ground of belief was reasonable, or whether there was any ground at all for its action. The lesser fault infers that the same or greater responsibility is imputable to the greater fault. . . . .

Sections thirty-eight to forty-one of the special argument call in question our position as to *onus probandi*. It is said that we improperly undertake to shift, generally, the burden of proof, and require Great Britain to discharge itself from liability by affirma-

tive proof in all cases where we charge that the act done is within the obligation of the three rules. This criticism is enforced by reference to a case arising in the public action of the United States under the treaty of 1794 with Great Britain. I will spend but few words here. The propositions of our argument are easily understood upon that point. They come to this: that whenever the United States, by its proofs, have brought the case in hand to this stage, that the acts which are complained of, the actions and the result which have arisen from it, are violations of the requirements of the law of nations as laid down in the three rules, and this action has taken place within the jurisdiction of Great Britain (so that the principal fact of accountability within the nation is established), then, on the ordinary principle that the affirmative is to be taken up by that party which needs its exercise, the proof of "due diligence" is to be supplied by Great Britain. How is a foreigner, outside of the government, uninformed of its conduct, having no access to its deliberations or the movements of the government, to supply the proof of the want of due diligence? We repose, then, upon the ordinary principles of forensic and judicial reasoning. When the act complained of is at the fault of the nation, having been done within its jurisdiction, and is a violation of the law of nations for which there is an accountability provided by these three rules, the point of determination whether due diligence has been exercised by the authorities of the country to prevent it, or it has happened in spite of the exercise of due diligence,—the burden of proof of due diligence is upon the party charged with its exercise. . . . .

Now, in conclusion, it must be apparent that the great interest, both in regard to the important controversy between the high contracting parties, and in regard to the principles of the law of nations to be here established, turns upon your award. That award is to settle two great questions,—whether the acts which form the subject of the accusation and the defense are shown to be acts that are proscribed by the law of nations as expressed in the three rules of the treaty. You cannot alter the nature of the case between the two nations as shown by the proofs. The facts being indisputably established in the proofs, you are then to pass upon the question whether the outfit of these tenders to carry forward the armament of the hostile expedition, to be joined to it outside of Great Britain, are according to the law of nations or not. When you pass upon the question whether this is a violation of the second rule, you pass upon the question, under the law of nations,

whether an obligation of a neutral not to allow a hostile expedition to go forth from its ports can be evaded by having it sent forth in parcels, and having the combination made outside its waters. You cannot so decide in this case, and between these parties, without establishing, by your award, as a general proposition, that the law of nations proscribing such hostile expeditions may be wholly evaded, wholly set at naught, by this equivocation and fraud practiced upon it; that this can be done, not by surprise,—for anything can be done by surprise,—but that it can be done openly and of right. These methods of combination outside of the neutral territory may be resorted to for the violation of the obligations of neutrality, and yet the neutral nation knowingly suffering and permitting it is free from responsibility! This certainly is a great question.

If, as we must anticipate, you decide that these things are proscribed by the law of nations, the next question is, was "due diligence" exercised by Great Britain to prevent them? The measure of diligence actually used by Great Britain, the ill consequences to the United States from a failure on the part of Great Britain to use a greater and better measure of diligence, are evident to all the world. Your judgment, then, upon the second question, is to pronounce whether that measure of diligence which was used and is known to have been used, and which produced no other result than the maintenance, for four years, of a maritime war, upon no other base than that furnished from the ports and waters of neutral territory, is the measure of "due diligence" to prevent such use of neutral territory which is required by the three rules of the treaty of Washington for the exculpation of Great Britain.

ARGUMENT IN THE CASE OF CHURCHILL AGAINST THE BANK OF UTICA, IN THE SUPREME COURT OF THE UNITED STATES, 1866.

STATEMENT.

Prior to the enactment of either of the national banking acts,[1] the legislature of New York had enacted that the capital stock of the banks of the state should be "assessed at its actual value, and taxed in the same manner as other personal and real estate of the country." Soon after the outbreak of the Rebellion, several New York banks became owners of large amounts of United States bonds, with respect to which congress had enacted that, "whether held by individuals or corporations, they shall be exempt from taxation by or under state authority."[2] Upon an issue between these state banks and the tax commissioners of the state, the supreme court of the United States decided, in 1863, that a tax by the state authorities upon the bonds and other securities of the United States was, in accordance with the doctrine laid down by Chief Justice Marshall in McCulloch v. Maryland,[3] invalid.[4] The legislature of New York then provided for the taxation of the capital stock of banks by an arbitrary valuation,—that is to say, by requiring the valuation for taxation to be equal to the sum of the capital stock paid in and secured to be paid in, without reference to its actual value at the time of the valuation. In support of this act it was insisted that this was a tax upon the franchise, not upon the property, and therefore no inquiry could be made as to the component elements of the capital to ascertain whether any of them were exempt from taxation. But the supreme court of the United States held that it was in reality a tax upon the property of the bank, and could not be constitutionally assessed upon that part which consisted of United States bonds and securities.[5] Within a few days after this decision, the legislature of New York passed an act "enabling the banks of this state to become associations for the purpose of banking, under the laws of the United States." The section of this act relating to taxation was as follows:

"All the shares in any of the said banking associations organized under . . . . the act of congress, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this state: Provided, that the tax so imposed on such shares shall not exceed the par value thereof; and provided, further, that the real estate of such associations shall be subject to state, county, or municipal taxes to the same extent, according to the value, as other real estate is taxed."[6]

The national bank act of 1864 provided,[7] in the first place, for taxation by the United States by imposing a prescribed tax upon the circulation, upon deposits, and upon the capital, beyond the amount invested in United States bonds; and then proceeded:

[1] 1863 and 1864.
[2] Act Feb. 25, 1862.
[3] 4 Wheat. 316.
[4] Bank of Commerce v. City of New York, 2 Black, 620.
[5] The Bank Tax Case, 2 Wall. 200.
[6] Act March 9, 1865, § 10.
[7] Section 41.

"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: provided, also, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

It will be observed that, although the New York act laid no rate or tax upon the shares of the state banks, it laid a tax upon their capital. In the case of many of the national banks whose shares were taxed under the state laws, their whole capital was invested in various obligations of the federal government, all of which, as heretofore stated, congress had exempted from taxation by the states. Nevertheless, in the case of Van Allen against the assessors, the court of appeals of New York sustained the legality of the tax imposed by the assessors under the state law. The case was taken to the supreme court of the United States by a writ of error. At the hearing, on appeal, counsel representing similar cases pending in the New York courts presented arguments. Among them was William M. Evarts, who represented the Bank of Utica. Mr. Evarts' associates were Messrs. Sedgwick, Tremaine, and Edmonds. Messrs. Kernan, Reynolds, and A. J. Parker appeared in behalf of the state of New York. The supreme court decided unanimously that the enabling act of New York was void because it contained no limitation of the tax to the rate imposed upon the shares of the state banks, as required by the act of congress. The banks of the state were taxed upon their capital; and although the act provided that the tax upon the shares of the national banks should not exceed the par value, yet, inasmuch as the capital stock of the state banks might consist of bonds of the United States, which were exempt from state taxation, this tax upon the capital was not equivalent to a tax upon the shares of the stockholders. But on the main question, as to whether the state might lawfully tax the shares of national banks whose capital was invested in stocks and bonds of the United States, the court was divided. The majority of the court were of opinion that the tax was valid. Chief Justice Chase and Justices Wayne and Swayne dissented.[8]

ARGUMENT.

May it Please the Court: I cannot think that the learned counsel on the one side or the other, who have addressed the court in this discussion, which it is permitted to me now to close, have at all overrated the importance of the subject presented to your honors. As a pecuniary interest, it is probably as large as ever came under your cognizance,—larger than, in the course of jurisprudence, has ever been submitted to any other court; for, if looked at only in the measure of an annual tax to be laid by the various states upon the whole mass of the property of these national banks, it

[8] 3 Wall. 573.

comes to an enormous value, and, regarded as a rule, not for a year, but for the continual course of taxation, the proportions swell to still larger dimensions. So, too, in the extent of the application of your rule to be laid down in this case, which, though coming from the state of New York, yet, since that state is under the constitution and under the laws of the United States, must be substantially of the same character, and have the same effects, in all the states of the Union, the magnitude of the interests is again presented as most serious. But while I thus agree in the gravity of the issues from the pecuniary interests at stake, I must think that some of the topics insisted upon by our learned opponents as great elements in the importance of this question were misconceived. The question whether such a great mass of property should be withdrawn from the funds accessible to the taxation of the states, which presented itself to the learned court that decided this cause in the state of New York, so that, somewhat beyond the bounds of ordinary judicial decorum, the learned judge spoke of it as "frightful," and which, in the arguments of my learned opponents, has been brought to your notice in various tones of alarm and lament, is really not a topic for insisting upon the importance of this question. Whatever there is to disturb the equanimity of a court in that subject has already been disposed of by your honors in the previous decisions, which have withdrawn absolutely, and under any form of property or ownership, the securities of the federal government known as the "public debt." This matter of the three or four hundred millions of bank stock which we are considering is not the cause or the occasion of the subtraction of these funds from state taxation. It is as investments in the securities of the federal government that these stocks are presented to your honors as entitled to the immunity which belongs to these securities; and it is under decisions of this court, which have made three billions of dollars of federal debt not subject to state taxation, that this derangement of the funds, of the property, which, on one side or the other, is to bear the burdens of our double government, is effected. For the like reason there is as little foundation, on an accurate attention to the subject, for the suggestion of the impropriety of the want of uniformity which would be produced among citizens and in respect to property if these investments, these bank capitals, these bank operations should be withdrawn from the whole support of the state governments under which they are protected in common with the whole mass of property of the same description,—that is, the mass of personal property,—and for the statement that this gives

great magnitude to the interests presented to you, as if it were a question whether this mass of property, now before you, should escape taxation or not. That is not the question. It has been suggested to you already by my learned associates that, under the taxation of the national government, as prescribed in the frame and as a part of the bill creating these banks, they are made to pay, in the support of our common burdens, a very large measure of taxation, amounting from two and a half to three per cent., in the average, upon their whole capital, and that they thus pay from ten to twelve millions of dollars annually towards the support of the federal government.

At a time when practically we paid no taxes to the federal government, and the states had, undisturbed, the whole area of the real and personal property of the citizens of the United States by which to support their own institutions, a subtraction from the state government of a fund of taxation was equivalent to a withdrawal of it from contribution to the public burdens in any direct form. But now that we bear the burdens of taxation in our property in support of both the federal government and our state governments, it is apparent that the suggestion that the withdrawal of property from the legitimate exercise of the power of taxation by the states is relieving it from the payment of taxes no longer has support in the fact. It becomes, therefore, as respects the burdens which the citizens of the United States and the citizens of the states, both being the same persons, are to bear, a question merely of the prudence, wisdom, and policy of the adjustment of taxes; for just so far as these banks contribute to federal taxation, just so far they relieve all the other property of the citizens of the different states from their contributions to the burden of federal taxation. If it be true that they no longer are computed in the mass of property that shares the burdens of state taxation, nevertheless the citizens of the states, in their other property, feel the contribution of these national banks to the needs of the national government just as distinctly and just as directly as they would if they contributed to the support of the state governments. We are therefore relieved from both of these elements of difficulty and these disturbances in respect to the judgment of the court, so loudly insisted upon. If the present rate of taxation does not exact from this kind of property its full share of the burdens which it should be called upon to bear, then the federal government, the common master of all these institutions in all portions of the country, acting in the general interest, but regarding, also, the private interest of the citizens of all the

states, may increase the taxation; so that, instead of contributing ten or twelve millions of dollars, as they now do, by enlarged rates they may be made to contribute twenty or twenty-four millions of dollars. That is wholly a question of policy and wisdom in the taxing power.

Your honors will thus see that all these considerations really do not touch the burdens of the citizens, but only the question what, in the complex system of our government, which now is required, both in its general control and in its separate state jurisdiction, to demand taxes from the citizens, is the proper and beneficial adjustment for us in our capacity of citizens of the state and citizens of the United States. Nor am I at all disposed to dissemble or disguise the difficulties of the discussion. If they seem to me less formidable than the zeal and ability of my learned opponents, in the interest of their clients, have represented in urging them upon the court, yet the respect due to the unanimous, adverse opinion of the highest court of the state of New York, expressed in the judgment of one of the most distinguished judges that the state has produced, who now, by voluntary retirement, has closed one of the most honorable judicial careers that our history can show; the great *"dictum,"* as it is called, of Chief Justice Marshall, and the carefully weighed opinion of Mr. Webster, speaking always as one having authority,—would admonish me of the rashness of my judgment. After all the difficulties, I apprehend that a thorough examination of the case will show that, though the question comes here under the appellate jurisdiction of this court, under the 25th section of the judiciary act, and though the subjects of discussion here, and the decision appealed from and to be reviewed here, do touch the construction of the constitution and the laws of the United States, and the great constitutional conflict between the powers of the general government on the one hand, and the rights and jurisdiction of the states on the other, yet all these questions, belonging to that high region of jurisprudence, have been really disposed of by the previous judgments of this court; and the limit of the discussion which, on the presentation of the case and your honors' scrutiny of it, will prove to be needed for its determination, will be found to fall quite short of this elevated region, and really will turn upon questions of corporation law as to what the relations of shareholders are, in the just idea of the constitution of a corporation, to the property and franchise, which, as an aggregate, are undoubtedly represented by the corporation itself. Since, then, it turns upon this question, what the relations of share-

holders are to the property and franchise of a corporation, I shall consider whether or not the previous decisions of this court have disposed of the question already by its adjudications on the capital and the franchises of corporations, or whether, not having thus been absolutely covered by the previous decisions, the relation of shareholders to a corporation is such as to require their inclusion within the principles that this court has already laid down in regard to the aggregate property and franchise, or, if this is not the case, whether a discrimination can be made which shall find a place for it as new and separate property in the hands of the shareholders, to be unaffected by the rules established in reference to the aggregate property.

Now, if the court please, I have but a word to say in regard to the particular circumstances of the case in which I especially speak; for the question to be discussed in it is the same as in the other cases, and is substantially the same question, I imagine, that must come up from the different states whenever attempts shall be made to exercise the right of state taxation on this subject-matter. This Bank of Utica was constituted as a national bank under the act of 1863, and its capital was wholly invested in public securities of the United States that were issued before the 1st day of June, 1864,—a date only important since it distinguishes those securities as being previous to the banking act of 1864, in which latter banking act, for the first time, appears the clause cited from the 41st section, which gives a license or permission for the taxation of shares. Whatever, then, there may be in any differences in this respect, as has been hinted at in the judgment of the court below, this bank occupies the most favorable position, for its securities were taken by it as investments, while there was the open and general pledge of the public faith that they, protected by the national arm, were wholly free from state taxation. And the bank, organizing and acquiring these securities under such circumstances, if there be much for judicial consideration in what has been adverted to more or less in the argument, to-wit, the question of a breach of faith in the government in allowing taxation by permission of section 41 of the act of 1864, is within the most favorable consideration in that respect. But I confess I cannot see that the correction of the alleged breach of faith on the part of the government, if it has been shown in any degree,—I do not think it has been,—could be made by a judicial determination of this court. Undoubtedly we do press it, and properly, as an argument of much force, tending to the proper construction of section 41 and the license there given,

that, in the view contended for by our learned opponents, a breach of faith might be involved, whereas, in the construction which we suppose it properly bears, no such imputation is admissible.

If the court please, this plaintiff in error, owning fifty shares in this bank, of the par value of $5,000, has been rated thereon as a tax-payer under the laws of the state of New York, and is compelled thus far by the judgment of the courts of our state, and, unless your honors shall reverse their decision, will be finally compelled, to pay a tax, at whatever the rate of taxation is in the local community where this bank is placed, upon the par value of those shares. All the other stockholders are exposed to the same application of law, and, under this decision, the united stockholders are to pay a rate of taxation under the jurisdiction of the state upon what is equivalent, in their shares taken together, to the capital of the bank. In other words, $200,000 being the capital of this bank,—a national bank,—and being wholly invested in federal securities, that capital is, by the form of assessing and collecting a due proportion of the tax on it from each shareholder, made to produce to the state of New York precisely the same amount of taxation as if the same rate had been laid upon the capital of the bank; and it is made to affect the actual beneficial value of the shares, and the receipts and profits of the shareholders, precisely in the same manner, and to the same effect and measure, as if the tax had been laid upon the aggregate capital. I think, in the whole course of this discussion, your honors have not heard from our learned opponents any contradiction of that proposition,—that this form and manner of taxation produces, as its fruit to the state, precisely the same amount as the same rate of taxation upon the aggregate capital in the hands of the bank, and that it produces the same effect, in diminishing the value of the capital stock, by diminishing the profits of that capital stock, laid in the form now proposed, that it would produce if it were laid upon the aggregate capital, and upon the corporation as the taxable person.

These matters of fact being thus clearly ascertained free from dispute, we need next to look accurately and attentively to what are the premises concerning the taxability of the corporations themselves, having their capital in such investments, from which we are to start upon the only inquiry left for discussion in this court,—whether the stock, as an aggregate, and the franchise, as a part of the value in the hands of the corporation, and the corporation, as a person subject to taxation, being exempt from this

tax, this rate, this payment to the state of New York, the shareholders are subject to all from which the corporation itself is free. I think that, on the second page of my brief, I have accurately stated the result of the determinations of this court, both on this topic as it relates to the investment in United States securities, and to the corporation as a national institution within the protection of the constitution, operating as an agency and means employed by the government; and I say that it is settled by adjudged cases in this court that no tax can be imposed by the laws or authority of a state upon the securities in which the capital of this bank was invested, nor upon any person or corporation standing in the relation of owner of such securities, nor by any measure of his or its property as including such securities. The cases are familiar to your honors, and I will only read a word or two from the former bank-tax case in the court of appeals, to show that the principle is as thoroughly recognized by that court —obeying the decision of this court, which had corrected its former errors—as it is by this court itself. In that case, which is not reported as yet in any volume of our reports, but is the case which came up to this court, and is reported here in 2 Wallace, Chief Judge Denio said:

"It must be considered a settled point that the power of taxation residing in the state governments does not embrace, as a possible subject, the securities of the public debt of the United States."

Upon that clear recognition that the subject, the *res*, the investment, was absolutely protected against state taxation, his honor, giving the opinion of the court of appeals in that case, went on to hold that, whenever the tax was laid, not upon the capital of the bank at its value to be ascertained by assessors, but upon the nominal or original capital of the bank, it was not a tax upon the federal securities, although the whole of that capital was invested in those securities. That error this court corrected by the decision in 2 Wallace; and now, more than ever, the court of appeals admits this principle, and submits to that application of the principle, but has found a means, in a decision and opinion in these cases, to say that, although federal securities are not a possible subject of state taxation, yet that federal securities, under the form of ownership which their relation to the shareholders of a national bank exhibits, can be made to pay precisely the same tax that they would if they were a possible or real subject of state taxation.

The other immunity which we claim here, and concerning which it is important to know what the determination, up to this point,

of this court has brought us, is the immunity of these banks in capital, in operations, and in franchises from state taxation, not because of any form of investment of their property in federal securities, but, in the absence of that investment, because of their mere character of federal institutions. What, from this point of view, is their situation in regard to state taxation? Upon that point I apprehend this is a just postulate, not to be contested, and not really contested, by the arguments of the learned counsel,—that it is settled by adjudged cases in this court that this bank, in its corporate capacity, is not subject to state taxation by the laws or under the authority of a state, upon its franchise, operations, or capital (aside from the question of investments in federal securities), but that it is wholly exempt from such taxation, by reason of its relation to the federal government, as an agency or instrument of that government in the exercise of its constitutional power. Without adverting or recalling your honors' attention to the cases in your own court, insisted upon so frequently, and so familiar to you, I will, upon this point, only call your attention to the complete recognition of this proposition by the court of appeals. In the first bank-tax case—the one which was decided on appeal by this court in 2 Black; a case reported in 23 New York reports—Judge Denio gives this as the clear judgment of that court upon the proposition:

"But when it had once been settled that the bank was a constitutional agency and instrument for the moneyed operations of the government, it followed necessarily, as it seems to us, that it could no more be taxed by state authority than the treasury department, the mint, the post office, or the army or navy; and it was upon this ground that the Maryland statute was held to be unconstitutional."

And, too, his honor, Judge Comstock, in giving a dissenting opinion in that case, in which he obtained the concurrence of this learned court on the appeal to it, made these observations:

"As to all subjects over which the taxing power of a state extends there are no limitations dependent on the power of its exercise. If we admit the right to tax this credit in any mode and to any extent, we must admit it in a different mode and to a greater extent. There is no limit to the principle. The acknowledgment of the right in any degree involves a conflict between the federal Union, and the parts of which it is composed; but, as the Union is supreme in the exercise of all its powers, including the vital one of borrowing money, no authority can be constitutionally opposed to it which confines the exercise of those powers. This is a principle which requires the absolute exemption of the national credit from state taxation."

Has the last proposition that I have mentioned been questioned,—that this bank, in its capital, its operations, and its franchise, was wholly exempt from state taxation? Has that been

questioned in the decision of the court below, or in the arguments here? I must say that, in the decision of the court below, I do not think it is questioned, although there are some observations that go to support the point that the decision with regard to the United States bank stood upon surer grounds, in respect to the character of that institution, than the argument about these national banks, in respect to their character, could stand; but nevertheless I understand that learned court to place its decision wholly upon the proposition that this tax, not being constitutional if laid upon the capital of the bank and its franchise in bulk, by reason of an exemption of both as an accredited agent of the federal government within its constitutional power, can nevertheless be assessed upon the shareholders. But one of the learned counsel who last addressed the court in favor of the defendants,—Judge Parker,—in his brief, and orally, has somewhat questioned the fact that these banks, in their aggregate and corporate interests, are exempt from state taxation. He has presented an analysis of the power of the United States bank, as we call it, and the powers and duties of these banks, and has intimated that the discrimination is wholly unfavorable to the position of these banks; yet, if your honors please, it can hardly come to this: that he here contends that these banks are not within the exemption which the principles laid down by this court extended to the United States bank, for to say that would be to say that these national banks were not constitutional creations, because, as Chief Justice Marshall said in the discussions in the case of McCulloch v. State of Maryland, if the bank is not one of the means and agencies of the federal government, which, by mere force of that relation, comes to be protected from state taxation, then it has no lawful existence, "for who," says he, "can point out the right of the government of the United States to establish a banking corporation, unless it be as a means, an agency, and performing some of the functions of government attributed to the national authority by the federal constitution?" So I think we may start with this proposition: that these banks, both in respect to the investment and in respect to their corporate immunities, are absolutely protected against this very rating and assessment and taxation which has been enforced against the shareholders. The law of the state of New York, under which, during the last year, these taxes have been laid, and under which it is proposed to lay them in the future, to-wit, the "enabling act," as it is called, which has been placed before your honors, assumes to levy taxes "on all the shares" of the banks in the assessment of taxes "in the

town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward or not"; and then it provides that, for the purpose of collecting such taxes, it shall be the duty of every banking association, organized under the act of congress, "to retain so much of any dividend or dividends, belonging to any shareholders, as shall be necessary to pay any taxes hereby authorized." Under that law, transferring taxation from the body corporate and in its aggregate investments to the owners of proportionate shares of its corporate franchise, of its corporate investment, it has been held by the court of appeals that, notwithstanding the principles which exempt the bank, and which the court of appeals itself recognizes, the shareholders can be made to pay what comes to the same in regard to the state, and comes to the same in regard to their own pockets. This is supported by that court upon one of two grounds, or perhaps upon both: First, by the mere authority of the state, without asking leave or allowance from this government; and, secondly, by the authority communicated or permitted by the proviso of the 41st section of the national currency act of June 3, 1864. Is it not, then, entirely true that there is but one question for discussion here, having, if you please, a two-fold application,—one to the question of investment in federal securities, and one to the corporate aggregate known as the "national bank." And that question is whether what cannot be done to the bank as a whole can be done, from the peculiar form of organization, to the property held by the shareholders, so that what the state loses by the immunity that this court has thrown over the investment in the aggregate is recovered by the state with the full power of taxation over the same *res,* in a different form of approach and attack; that what this court has decided is necessary, is essential, is vital to the public credit, in respect of the investment,—that what this court has decided is necessary, is essential, is vital to the corporate existence, for the public purposes of the government of the United States, and so must be protected by the power of interpreting the constitution lodged in this court; and the authority of its mandate to be executed by the power of the nation is nevertheless to be wrested from federal control, to the destruction and ruin of institutions created to be preserved, to the injury and burden of the public credit, intended to be advanced, simply by the form of saying to the tax rater and the tax collector: "Lay the tax that you would have enacted from the cor-

poration distributively upon the shareholders, and we escape from the federal constitution and the supreme court of the United States, by the form and manner of assessing and collecting;" since there is, in the practice of the states, a well-known habit of levying taxes indifferently upon the aggregate or upon the shareholders, as convenience dictates, always recognizing that, whichever form they adopt, they tax the same thing, acquire their returns from the same persons, and receive into the treasury the same results. Certainly there never was such a discomfiture of fact and substance, of constitutional power, and of the firm, strong reasoning of this court as would result if this ingenious combination between the legislature of a state and its officers for the assessment and collection of taxes can effect this result, and destroy what this court has undertaken to preserve.

I will first consider, as most briefly and satisfactorily to be attended to, the question whether the state, in the taxation it insists upon against these shareholders, derives any authority from the 41st section of the act of congress of June 3, 1864, and I say unquestionably that it does not; and without any discussion of whether that section be, as Mr. Webster imagined it would not be, unconstitutional, and without examining the particular construction of that section, whether it be such as to allow these stocks, thus invested in federal securities, to be taxed or not,—irrespective of that, but supposing that the section communicates a license according to its terms, and that, if its terms were observed, this tax would be protected and allowable under it, I say that there is no credit nor power given to the state in this taxation from that section, simply for the reason that it has not observed the conditions. The conditions are that, if the state taxes the shares of the national banks, it shall impose upon them no other nor higher rate of taxation than it imposes upon the general investment of personal property of the state; and, secondly, observing that, that it shall also tax them at no other rate than it imposes specifically upon the shares of state banking institutions. It is undisputed here that, under the laws of the state of New York, no rate nor tax whatever is laid upon the shares of state banking institutions. The statutes of the state of New York say that the shares of state banking institutions shall not be taxed to the shareholders, and they are not taxed. What, then, is the taxation upon a state banking institution in the state of New York? It is a tax upon the aggregate capital of the bank, exacted from the corporation itself. Now, will my learned friends tell me that, although the

state of New York does not lay any tax upon the shareholders of state banks, and so does not observe the condition of the 41st section of the act of congress, it does lay the same rate upon the capital of the bank in the hands of the corporation, and that that is equivalent to laying it on the shareholders? If they will only do that, they will relieve me from the need of any argument; for, if laying a tax on the capital is the same as laying it on the shares for the purposes of a state corporation, then laying it on the shares is the same as laying it on the capital of the national banks, and that is all I have undertaken to prove. But even if they thus surrender the practical question to escape from a special difficulty, the actual state of the system of taxation, and its enforcement in the state of New York, would not relieve them, because, in regard to the tax rated and collected from the corporations created by state laws as the persons taxed, and taxed upon their aggregate capital, under the decisions of this court, controlling and acted upon in the state of New York, it is required that, before the capital of the state bank presents its aggregate for the rating of the tax and its payment, there should be a deduction from it of every dollar that is invested in federal securities; so that, as a matter of fact, if, side by side with this national bank in the city of Utica, there were a state bank, of the same capital of $200,000, having that capital invested precisely as the capital of this national bank is invested,—in federal securities,—while, under the form of taxation laid and enforced by the state upon the banks which I represent, there would be paid a full rate upon the $200,000, distributed upon the shares, there would not be one dollar of tax laid or claimed against the state institution that carried on business in the same street, under the authority of the state of New York. Therefore, put it on matter of form, or put it on matter of substance, your state authority lays no taxation on state institutions situated precisely as this national institution is situated; and hence, when you seek authority by permission and license of the act of congress, the limitations and the conditions must, of course, be observed, and they wholly fail. I ask your honors' attention to a very intelligent and well-considered opinion, given in our state, in which it has been held by a branch of the supreme court that, conceding that the shares may be taxable for aught that the authority of the United States gives under the permission of the 41st section of the national banking act, yet, for the want of the observance of its conditions, the law against which we are now remonstrating and arguing is wholly invalid, because the state does not lay a tax. That learned court say:

"The system of taxation adopted by the state under the provision of the Revised Statutes is that the laws of the state provide for the taxing the capital of a state bank, and the stockholder is not to be taxed, as an individual, upon his shares. Therefore there is no state law making provision in any case for taxing the shareholders in state banks for their shares. Consequently, the shareholders of national banks or state banks are not liable to taxation on such shares."[1]

This your honors will rest upon as satisfactory proof that the system of taxation is such as I have stated; and the authority of that court—indeed, I think no authority is needed for it—is that, if the permission to tax by the state rests upon the 41st section, this tax cannot be sustained, for the reason that the conditions are not observed. I shall therefore, for the rest, confine myself to asking what is the great and principal question of the case presented to the court, to-wit, the assumed power of the state of New York to levy taxes upon this fund and capital by the form and means of taxing shareholders, when it cannot do it in any other way,—a power against the will of the government, against the decisions of this court, against any construction of the constitution of the United States that would seek to inhibit it. But I ask attention, for one moment, to what I assume will be regarded, when a case shall properly arise for it, as the proper construction of this proviso. Your honors will notice that the 41st section provides for the taxation of these institutions by the national government, and then goes on to say:

"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 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 any 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."

I apprehend that no one can claim that there is anything in this act that had relation to exemptions, except such as grew out of its creating these public institutions agencies of the government. In other words, the exemption created or inferable from this act would be the exemption that belonged to these banks as agencies: and there is nothing in this act that has any connection with the exemption of United States securities. When, therefore,

[1] People v. Town of Barton, 29 How. Pr. (N. Y.) 371.

you are construing this proviso which is intended to save from the operation of an inferential exemption from this act, you must not carry your proviso or saving clause beyond the principal provision, which it is designed to define, not to avoid. It means, then, that nothing in the nature of these institutions, as agencies or instruments of the authority of the United States under the constitution, shall save them from taxation on their property, in the same way as other moneyed capital may be taxed by states; but it was under other laws of the United States that the immunity of the investment in federal securities was claimable, and was created. The congress of the United States, adopting and following the judgment of this court, enacted, in the statute of February 25, 1862, that the federal securities, whether held by individuals, corporations, or associations, should be exempt from all taxation under state or municipal authority. It is, then, under that and similar statutes that this form and application of immunity is derived; and this saving clause does not operate on that act. It merely means: "You may tax the investments in the corporate property made by these corporations as you might do if the immunity of federal agency was not over them." When you come to the question whether, under cover of this saving clause against a particular effect of the statutes, you have opened to the states taxation upon federal securities owned by these corporations,—when you have closed it against taxation in any and every other form of ownership,—you are proposing to give to this section a force which it never, in legislative intent, could have been designed to have, and which, on any sound principle of construction, it cannot bear. Its meaning, so far as the question of these investments by these banks in the federal securities goes, would be to put them, in that respect, on the same footing with an individual having his moneyed capital invested in that manner, and on the same footing in which a state corporation, having its capital invested in these securities, would stand. Is it to be said that, when all the moneyed capital in the hands of individuals and state corporations, that is invested in the United States securities, is protected against taxation by the state, as soon as one of the national banks invests in United States securities, it has opened and exposed to taxation those very securities which are exempt by the law of 1862 by force of a proviso which says that the banking act shall not be construed to exempt the national banks from state taxation? I think, therefore, that, on any construction of that section (even if, by conformity of the state to the rate of taxation on state bank shares

that it has laid on national bank shares, the permission of that section could be invoked in favor of this tax), these three banks would be still exempt from the payment of any tax on that portion of their capital which was invested in the United States securities, for the reason that I have stated to the court. But if this proviso is not before the court for adjudication, because it has not been followed by the state, it will be for your honors to consider how far that point can be disposed of in your judgment. It seems really as if we were reduced to but a very narrow region of reasoning, if we are so far advanced successfully. It must come to this, that the state, having no power (for this law gives none) to pass the act which it has actually passed,—no power derived from the federal government,—assumes a right to tax these investments and tax this capital in the form of shares, although it cannot tax them, as has been so often urged, in the aggregate or corporate capacity. The argument can rest upon nothing but this: it asserts a distinction between the capital stock of the corporation in the aggregate and all the shares of such capital stock as subjects of taxation,—such a distinction between these two descriptions of property (I say two descriptions of the same thing) that a tax levied upon the shares is constitutional, although a tax levied upon the aggregate is unconstitutional. It asserts another distinction,—a distinction between the corporation and the shareholders or members of the corporation; for are not shareholders members of the corporation? Is not the corporation composed of members? When all the members of a corporation cease to exist, does not the corporation cease? It asserts a distinction between the corporation and the shareholders or members of the corporation, as taxable persons, to the effect that a tax upon, or in respect of, the same property, distributed upon the corporate members, is constitutional, though, laid upon the corporate body, it is unconstitutional. I have looked in vain through the briefs, and listened in vain to the arguments of my learned friends, to find any other ground for them to discriminate for the constitutionality of the tax on the shareholders, admitting the unconstitutionality of the tax on the corporation and its property, except in the one or the other of these two forms.

I will take up, first, the question of investments. I say that the proposition that the investments of a corporation in federal securities of the whole or a part of its capital stock cannot be made subject to state taxation, laid upon its capital stock, and yet that the same investments may be subjected to state taxation, laid upon the divisions or parts of its capital stock, known as

"shares," cannot be maintained. The first reason I assign for this is because the attempted distinction overlooks the legal character and grounds of the exemption. The exemption is of the *res,*—of the subject of the securities. It has no relation to any form of enjoyment or ownership of them. It says that this subject of property shall not yield a tax; and the exemption is laid for the sake of the investment, and not from partiality to any owner, or any form of ownership. It is that the thing itself may be better, that it may be worthier, that it may be more valuable, the occasions and the duties of the federal government requiring that it should be made so and kept so; and it has no more concern with any form of ownership, as matter of policy, or as matter of personal protection, than it has with the remotest considerations from the topic. It is that this thing shall have the virtue in it of being worthier than other property, because it is exempted from state taxation. When you are talking about the different relations which the shareholder and the corporation have to the corporate property, and the different relations that the corporation and the shareholders have to what are called "shares," you are talking of what is interesting and important in some views of the law; but you are talking of a subject that has no relation to this question,—whether, for the purposes of maintaining the exemption of this investment from taxation, the exemption is to attend it in every form of substantial ownership; for it is only through forms of substantial ownership that the worthiness of the thing is to be preserved. There is no such separation possible as leaving the securities as worthy as before, but disparaging their purchase, because, in a certain form, they cannot be owned without being taxable. But it also overlooks the legal ground and character of taxation. Taxation pertains to the subject,—the *res,*—and has nothing to do with ownership, and cares nothing about it. It is wholly immaterial to the taxing power what the form of ownership may be; it is the value that it is after. In whatever owner it finds that value, the taxing power will extract it by proceeding *in rem,* if you please, and not care who is the owner; or, if convenient, it collects the tax through the medium of the owner, and the coercion is only to make him pay it. The taxing power, in pursuing its method of taxing, is no respecter of persons or forms or title. It is the thing it looks to; and when land is the subject of taxation, as we all know, the exaction of the tax or enforcement of it is wholly unconcerned with titles, incumbrances, liens, divisions of equity and at law in the enjoyment of the owner. It taxes the property, and sells

it by an absolute and paramount title, dealing with the thing itself. The relation is the same towards personal property, although there may not be occasion or opportunity to apply practically the same effect. I say, then, you overlook the nature of the distinction when you say that the same thing is to be extracted from taxation in one form of enjoyment, and not in another.

Now, suppose that a government, wishing to invite population, or to improve the domestic habits of its people, establishes an arrangement promising freedom from taxation to all dwelling houses that should be built. The dwelling houses are built, the law being that dwelling houses shall be exempt from taxation. Can you tax the owner of a dwelling house on the rent he gets from his tenant? Is not that taxing his dwelling house? Is the promise performed—is the faith kept—when you say, "We do not tax your dwelling house; we do not tax you on the fee of your dwelling house; we tax you on the rent of your dwelling house"? You tax the dwelling house in one of the forms of its owner's enjoyment of it as property. Can you tax the tenant and say, "We tax you in proportion to the rent that you pay to your landlord"? That is taxing the dwelling house; that is taxing the house,—the thing which has been procured by the public interests, upon the promise that it should not bear taxation. Is not the taxation of the occupation of the house, whether it be imposed upon the landlord or upon the tenant, a tax upon the house? Certainly it is. And this shows us that "taxation" and "exemption," correlative terms, touch and adhere to the subject, and have no concern with ownership, title, property, or enjoyment. All title, ownership, property, enjoyment is lesser than, and is included in, the matter that is the subject of property, and that swallows up title, interests, legal and beneficial relations; and when, in the sense of taxation and the sense of exemption, the subject has been rescued from burdens, nobody can feel them. Has the subject been rescued if anybody can feel the burden in consequence of the subject? Has the subject been saved from contribution if anybody, in consequence of connection with the subject, has to contribute? Certainly not. You must find some other relation than that of ownership, whether it be legal or equitable, that you tax, or else you tax the property itself. This, too, exalts the forms and phrases of the law above the law itself. The United States government have thought it necessary to give to their securities this credit, and thus to send them out into the whole nation and to the world. They have not broken their faith

by any legislation. They have not broken their faith by any construction of legislation. They have not broken their faith by any adjudication of this court up to this time, whatever the court of New York may have thought. Twice corrected by this court on these subjects, now, with legal effrontery, not personal, that learned court comes here and says: "You have told us over and over again that we cannot tax United States securities; cannot tax them in the measure of anybody's property; cannot tax them in the form of value in property at a nominal, and not a real, standard; but we have found one shape in which we can tax them in spite of you,—if a national bank owns them, we can make the shareholders pay the tax." This, I say, stultifies the acts of congress and nullifies the decisions of this court on that subject. How do you get a tax on these securities and make a shareholder in a bank pay it? The whole capital of the bank is free. That is admitted. It is free by its own nature by its being invested in these securities. It is free, because it has been decided that the states cannot tax this capital. That is all admitted. But it is said: "We tax the shareholders." They must tax the shareholders upon this property,—this value,—either because they do not own it, or because they do. You may tax it because they do not own it, as you would tax A. in property of B., and tell him that, since B. is not able to pay your tax, you tax A. on his property. That, however, is not to be imputed. Then you tax the shareholders because they do own this property,—because they have some ownership in this investment; and yet the brief of my learned opponents admits that the owner of United States securities cannot be taxed by the states for them.

Let us look at that a little more closely. Suppose that A. holds, as trustee, $100,000 worth of the securities of the United States, and is asked to give an account of his taxable property in his relation as trustee, and he states that the trust fund is all invested in United States securities. That exempts him from taxation. Then the tax gatherer hunts up the *cestui que trust,* and says, "What have you?" The answer is, "My only income is from a trust fund in the hands of A., my trustee; he is the man to pay the tax." "Oh, we cannot tax that, because he holds United States securities. What is your beneficial property?" "It is $100,000." "Then we will tax you." "Well, but," the *cestui que trust* says, "I do not own the property. A. is the legal owner,—my trustee; why not tax him, if anybody is to be taxed? I do not own the property. If anybody is to pay the tax, the owner—the trustee—is to pay." "No," says the tax gatherer,

"we cannot tax the owner,—he is exempt on account of the investment; but we tax you, as the *cestui que trust,* because you are the beneficial owner, and not the legal owner, and you shall pay the tax." I imagine that, if the state should pursue that method, this court would correct it and say "that this $100,000, in its legal estate, in its equitable estate, in its legal control, in its beneficial enjoyment, is free from taxation." Yet no man can distinguish between a legal owership in United States securities and an ownership in those same securities, lodged in a form and organization by which twenty people part with their legal control over them, and turn themselves into the enjoyment of them as beneficial or equitable owners. Take this case: Twenty men meet together, with $5,000 in federal securities each, as private property, and put them in bodily, and make the capital of $100,000, invested in them, of a bank organized under this act, and come out what? Organized into a bank, with their federal securities owned by the bank, of which they are the owners, of which they are the members, of which they are the stockholders, the legal institution holding the legal property. Has that transmutation made the securities taxable that were not taxable before, when the exemption adheres to the securities, and not, by name, to any form of ownership?

But, if your honors please, the proposition that the corporations, created and performing their public functions as agencies of the federal government, cannot be taxed by the state on their capital, franchise, or operations, and yet that the shareholders, in respect of their membership and ownership of the corporate body, franchise, and capital, can be taxed, is self-repugnant and illusory; and, in connection with this point, let me look for a moment, and briefly, though a subject inviting for illustration, upon the frame and scheme of the national bank system,—one of the most remarkable creations in the progress of this nation; one of the most essential means of carrying this nation through its late trials, and saving it from the disasters and convulsions which attend a restoration of peace in the financial circumstances of the nation and its citizens. What is it, and what is the whole idea of it? What is the whole service of it? What is the whole genius of it? It is this: it is to call into the fiscal operations of the government, in the execution of its powers and duties under the constitution, the capital, the resources, the processes of private interest and business, and employ them as agencies and means in the public service. It is the connection of the special duty and function of the general government with the living circulation of the great body of the

nation, over which it is the government. Government might have loan offices, loan agencies, sub-treasuries, and multiply them in every village, and they would be a dead organization of the government,—mere functionaries; but, by this system, by a happy improvement upon everything we had ventured or imagined in our financial experience, the government seized upon the living energies of the American people, and made them, by their voluntary organizations, agents in the public service of the country just as distinctly, just as usefully, as, in calling upon the citizens to enroll their persons in the military service of the country, you have, instead of a dead organization, a living body of citizen soldiers. This is what the bill did, and what it wanted to do, and what it has successfully and wonderfully accomplished. That was the thing. It was the private persons, and the private interests, and the private processes, and the private energy of the people that it wanted to unite in this public service. That was the substance, and the rest was nothing but form. It was to combine or organize the collective private capital and resources of the nation under the well-known form of legal incorporation, as the most convenient, if not the necessary, form of accomplishing public objects. Now, as I have said of an army, it is the array that constitutes the army. It is the power, it is the array, that you want; and the rest of organization, of articles of war, or arrangement of ranks and grades, and all the machinery of control is for the array, and not the array for it; and so it is the array under this organized banking system that is useful. It is the array of the private enterprise, capital, and business that is wanted; and the corporate form, a well-known arrangement for managing property, is adopted, because it is suitable to this, just as it is for the purely private operations and affairs of life.

Upon this mere statement, which cannot be contravened, it is apparent that the instrumentality adopted by congress for executing these powers of the government has for its essential element this associated capital and these personal exertions, and that the corporation is but the form of wielding and operating the capital. Then, as I have said, it is not the artificial person that is the object of government's care, or that is the principle or substance of its object. That is but a form, and, as a form alone, it is to be allowed to operate and to have its consequences. If immunity from state taxation be the prerogative and the necessity of these legal organizations, it is the immunity of the contributed capital and of the contributors that is needed. If the immunity is essential for the government's purpose to maintain the cor-

poration, it is essential for the government's purpose that this immunity should rest upon those who are to contribute their capital and find their inducements to volunteer in this service of the government; and any protection or immunity that shall occupy itself, and confine itself to the protection of the corporate capacity, and leave the individuals the members unprotected, would soon exhibit the fact that it is the members who make up the corporation, and not the corporation which secures its own masters and members. All the arguments which we have heard about the bank and the shareholders,—that the bank holds its property by its own title, and that no shareholder has any title in it; that all the shareholders together cannot assign nor transfer nor convey any of its property, but that a share in a corporation is a new form of property, and that it belongs to the shareholder, and that the corporation does not own that, and the corporation cannot sell that, cannot convey that,—perfectly sound, as familiar as any other of the first elements of the law,—insisted upon here to carry certain consequences, have no effect whatever on those consequences. As to the subject-matter of this controversy, they can have no effect. Various definitions have been given about the relation of a shareholder to a corporation. My friends seemed to prefer that loosest connection, which makes the shareholder the holder of a chose in action or right of action against a corporation, the same as a creditor, and they pushed it so far as to say that they think, on the whole, that a creditor has a nearer and closer right to the property of a corporation than a shareholder has, because he will have to be first paid when the affairs of the corporation are closed, and the learned court below has adopted that idea to some extent. These familiar doctrines are not in dispute here. It is for the very reason that a corporate organization has these consequences that a corporate organization has been selected by congress as the means of wielding this public operation, that is essential to the service of the government. It is for the very reason of these effects that it has adopted it, to-wit, that a form is provided in our law, whereby the various owners of property may combine to manage it in a common agency, having this great principle: that its identity shall be preserved, although individual owners may dispose of their interests, and that the public will, or major voice, or administrative delegation shall govern the common property for the common good, instead of having it stand always on the individual right of every man to have his own will carried out.

That is all there is to a corporation. You may talk about it forever. It is wholly a form, known in our law, whereby men may put their property together, and keep it in that form of ownership and organization for purposes of convenience, and nothing else, and nobody own it but they, after they have done that. It is purely a short, elliptical expression to say that the corporation owns it. It is owned by the shareholders; it is owned by the owners of the property. As against each other, they have committed it and themselves to a form of organization which permits of the disposition of the property and the maintenance of the title with the advantages that I have named. But to say that there are two properties, to-wit, $200,000 of investment that belongs to the corporation, and another $200,000 that belongs to the shareholders, is perfectly absurd. To say that this united ownership in a subject of property, when the subject of property is free from taxation, leaves the individual shareholder subject to taxation on their shares,—I mean when it is exempt from taxation by an authority stronger than that which undertakes to divert the form of taxation,—is simply saying that the paramount government is master of the question of the taxation of the property, and the state government is yet final master of the question, by being master of form and devise. This government is no master of the question whether this property shall be taxed, if the state government is master of the question of any form or contrivance, which, by paltering about corporations and shareholders, and shares being personal property, individual property, and the corporation being aggregate property, can exact a tax from the property. Therefore I say that no rule of law has ever asserted, and no refinements of argument can ever maintain, that the corporation has its capital invested in certain property, and the shareholders have their shares represented by other and different property. When the *res* cannot be taxed, I want you to find some other *res* than the shareholders, which can be taxed. Can the property of the corporation perish, and that of the shareholder survive? The rule of law is *"res perit domino";* the owner loses property when it is destroyed. The shareholders lose their property when the capital of the corporation is sunk. That we all know, and some of us have felt, and we never heard of such a distinction as that the corporation had one property and we had another property; that the corporation could not be taxed on its, but we might on ours.

Now, put this question: Suppose, as may be done, unless there be some distinction in our states,—and there is not in the

constitution of New York, or in the constitution of most of the states,—that the ordinary rate of taxation is three per cent.,—that is the rate in New York City on capital; three per cent. is laid on the aggregate capital of a bank, and three per cent. upon the shareholders on the par value of their shares. In that case, are two values taxed, or is it one value that is taxed twice? Does that property pay the usual rate of single taxation,—three per cent.,—or does it pay six per cent.? It pays $12,000,—$6,000 exacted from the corporation, and $6,000 from the shareholders. Is that three per cent. on $400,000, or is it six per cent. on $200,000? It is a question of one value, as a subject of taxation. However they may be distributed on interests, they are really the different forms of owning the same thing. Suppose that a government, interested to invite capital in favor of manufactures, declares that it will not tax the capital of manufacturing companies that shall be formed under it, and, having got them formed, it taxes the shareholders on their shares. It says: "We cannot tax the capital; we promised not to tax the capital; but we tax your shares." Would that be allowable? All of this illustrates that it is form and arrangement of ownership in the same thing that is meant to be taxed in one form, and cannot be taxed in another form, but still is the same thing, and that the exemption is not formal and modal, but is of the thing itself.

We are prepared now for a further proposition of general reasoning, which I am able to support also by the distinctest and most explicit authority. If one of the states issues a charter to a corporation, with a clause in it exempting the capital stock from taxation for a limited term, and within that term lays a tax upon the shareholders, will not this court correct that legislation as a breach of the clause of the constitution against impairing the obligation of contracts? I submit that the premises of that question are the premises of this question. We have a provision of the constitution of the United States that the obligation of contracts shall not be violated by the states. We have a state making an obligatory contract that it will not tax the bank, and it afterwards taxes the shareholders. Does it not thereby violate that contract? What are the premises of this question? The premises of this question are that the constitution of the United States protects this aggregate investment and the aggregate capital, franchise, and operations of these facts from state taxation, and the state taxes the shares. Does that violate, or not, the constitutional protection? I submit that, to a legal mind, this question carries its own answer; and it is only from

the peculiarity of the jurisdiction of this court, under the constitution of the United States, in relation to sovereign communities, that we are enabled to have, in the form of a lawsuit and a legal decision, a question that would usually be left to the discussions of public faith, and the maintenance of the honor of a state.

In the third volume of Howard's Reports, this whole subject is disposed of by the unanimous judgment of this court. Having handed that case to my learned opponents before their argument, Judge Parker ventured to make some remark upon it by saying that it turned upon contract; and they conceded that, under this clause of the constitution, if the state had bound itself not to tax the bank, it could not tax the shares. Now, with great respect to my learned friend, conceding that, he might as well concede that, if the state of New York under the constitution cannot tax the bank, it cannot tax the shares; and no lawyer can draw a discrimination between the two cases. Now let us be sure that this case, of so grave consequences to the discussion before us, is as applicable as I have stated it. It is the case of Gordon v. Appeal Tax Court,[2] an appeal from the court of appeals of the state of Maryland. I will read the section of exemption of the Maryland statute:

"That, upon any of the aforesaid banks accepting of, and complying with, the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them."

This is the phrase of the exemption,—the state is pledged "not to impose any further tax or burden upon them during the continuance of their charters under this act," and that is all,—there is not a word about stockholders there. The bank accepted this law, complied with its provisions, and some years afterwards a law was passed taxing the shareholders for their shares, as component parts of their general personal property. Let us see how counsel stated the question. On page 139 the counsel for the shareholder stated it thus:

"The tax of 1841 clashes with the exemption. It is laid on everything which constitutes the property of the bank, because, in a schedule, everything, even the franchise, goes to make up the aggregate value of the stock; and the tax is laid on the cash value of the stock. By the 17th section, the assessors are directed to value it at the market price. But the market price is governed by the value of all the different species of property held by the bank, including even the franchise, because a purchaser looks at all these when about to invest. It is impossible to sepa-

[2] 3 How. 133.

rate that portion of the tax which falls upon the franchise, and, as the legislature has covered the whole, the entire tax must fall."

The counter proposition, at pages 141 to 143, is precisely what is laid down here,—that the bank could not be taxed. But this is not a taxation of the bank; this is a taxation of the shares, as component parts of the property of the individual, in common with the other taxable property of the state, against which it has not precluded itself by a correlative obligation not to tax the bank. It was insisted upon there, as here, that the difference of title made the difference of substance; that the stock was personal property, transferable by and belonging to its owner; and that the stockholders do not own the property of the bank, and cannot convey any title to it. In other words, we had the same disputable facts and law about the relations of stockholders and stock capital and shares that are insisted upon here as regards the modal administration of the *res* owned, and that was urged upon the court as a reason for saying that a tax on the shareholders was not a violation of the contract not to tax the bank; but the answer of the court was: "That is not the way to keep the contract you have made; the subject-matter, the purpose, the object, the promise, the result, all make your promise cover the property in its beneficial, and not its formal, ownership, and the promise is broken when you tax the shares of the bank." And his honor, Judge Wayne, delivering the unanimous opinion of the court, put the subject on the same grounds; nay, its reasons and its phrases will answer for a decision of this cause. After that, a similar case arose before a very learned court in New Jersey, which is reported in 3 Zabriskie, 484. Chief Justice Green, a judicial authority well known to this court, in giving the opinion of the supreme court of New Jersey, said:

"When an incorporated company is, by its charter, exempt from taxation, the stock of the company, in the hands of the stockholders, cannot be taxed. It represents, and is, the title to the property of the company, and is therefore included in the exemption of the charter."

There the exemption of the charter was in regard to the railroads of New Jersey. The form of it, I think, was this: Fish was taxed upon his shares in the railroads as a part of his personal property in the aggregate. It was put down at its value with all the other items of his property and he contested the valuation, insisting that that portion of his property which was represented by the shares was not taxable. The exemption of the stock was found in the charter of the company which provided that it should pay ten cents to the state on each passenger,

"and that no other tax or impost shall be levied or assessed upon said company." The state did not assess the company, but assessed the shareholders. The supreme court of New Jersey said that could not be done, and your honors were not troubled with that case, because you had disposed of the Maryland case. This also confirms, by judicial authority, what I insist upon,—that taxation upon the bank, and again upon the shares, is nothing but double taxation. In the same opinion the New Jersey court say:

"The stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax on the same property. Double taxation may be unequal, oppressive, and unjust, but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature, and courts cannot declare void a statute, within the constitutional power of the legislature, because its operation may appear unjust and oppressive."

Of course this topic had relation to another item of taxation, not coming within the perfection of the promise of the charter and the constitution of the United States. The chief justice says that we cannot strike down a tax that our legislature has put upon shares, because it has also put it on the stock. It is two taxations of the same thing; but, as our legislature can put a double rate upon one thing and a single rate upon another, however oppressive it may be, it is not for us to interfere.

There seems then, if your honors please, to be very little reason for regretting the absence of judicial authorities upon what must be considered the principal question of the case. The solution is very simple. The relation of a corporation and of the stockholders, in respect to the property which constitutes but one subject of ownership and of taxation, is a two-fold relation to a single capital or value. The relation of legal and equitable title in the same land is the best analogy. So long as a tax is laid upon property, no variety, diversity, nor complexity of title can increase the property or the tax. You cannot make the subject of taxation any larger by reason of these different titles that are carved out of it, or these different arrangements for its management. If congress means to protect this capital under the constitution, and this court has held that it has authority so to do, then it means to do it in a way that practically saves it from the tax; and so long as the exemption is applied to the property, it will exempt every form and every title in that property. The statutes of our state, in an unbroken course of legislation, have recognized this fact: that stock in the aggregate,

and the corporation as a person to be taxed, represent the same property as the shares of stock and the shareholders as persons to be taxed; and they have varied, as his honor Judge Nelson well knows, in the course of years, their forms of applying taxation to corporations. as seemed to them most convenient. Under the statute of 1813 and until the change by the Revised Statutes, all the interests of corporations in the state of New York were taxed upon the shareholders in respect of their shares, as included in the bulk of their property. From the period of the Revised Statutes, a change was made by collecting the bulk of the tax from the bulk of the property; and, as a part of the same system of assessing and collecting the tax, it was in so many words enacted that no shares of stockholders, in corporations that were taxed by the state, should themselves pay any tax. When the stockholders paid the tax, under the old system, there was no tax on the corporation. When the corporation paid the tax under the new system, there was none on the stockholders, by the arrangement of the law which treated the form clearly as modal, for the convenience of the state, for the security of the collection of the tax, and for the considerations of policy which prefer secondary, rather than direct, taxation, which latter our systems have avoided as much as possible.

There is no reason to hold that in the state of New York or anywhere else there are any principles of law by which these propositions that are established can possibly be disturbed. I have referred in my brief to a couple of cases in the Massachusetts reports, where this question is well considered and presented; that it is all one subject of taxation, and is taxable, under the system of the laws, either to the persons or to the corporation, as may be found convenient.

If the court please, the exemption from taxation enjoyed by the national banks under the constitution and laws of the United States is of the capital by reason of its investment in federal securities; and again, of its capital, its franchise, and its operations, all that it is in character, in property, and in faculty, by reason of its being an instrument of the general government in the exercise of its constitutional powers. As the learned Judge Comstock says, in the case in 23 New York reports: "No corporation aggregate that the world ever saw ever owned anything but its capital, property, and its franchise." Nothing is added, by the creation of a corporation, to the property that the contributors put in by way of capital, except the franchise. That is

added, making the artificial person a creation of law; but the franchise is all that has been added. Here we have these bodies, that are in their capital exempt, and in their franchise exempt. What is there about them that can be taxed? This left nothing that constitutes an element of value or of possession or of property to be taxed. If the franchise had come from the state, if the franchise were taxable by the state, as the creature of the state, you might find something in the constitution of the corporation (although its capital be exempted if invested in United States securities) that would endure state taxation. They might tax the franchise inordinately, or moderately; they made the franchise, and they may tax it; and the investment of the capital in United States securities does not exempt the taxation of the franchise from the power of the state; and that was the distinction which was made by some observations of Mr. Justice Nelson in the first bank tax case, in 2 Black, referring to the state of the law in New York. Franchise may bear a tax, he said. The legislature changed their law, but did not come up to the point of taxing the franchise, which was taxing for the right to be, and with reference to nothing else. The right to be a bank, the right to continue from year to year to be a bank, may be taxed. That was all that was open under the observation of this court. They did not put the tax on franchise, but they put the tax on capital, on the valuation that did not make it necessary to find what it was really worth, but took a nominal value for it, and thought they had avoided the judgment of this court by that contrivance. They had not taxed the right of the corporation to be,—they had taxed its capital upon a nominal, instead of a real, value. The court said: "You may have any form of valuation you choose; but, whatever your form of valuation, you must exempt United States securities from it." That is the case in 2 Wallace. Now, the contrivance here is that of having a bank, with its franchise from the federal government, with its property protected under federal law, with its operations and its capital protected as agents and instruments of the government, incapable of taxation, withdrawn from the taxable property of the state, and they pursue all these into the divided shares, and exact the tax upon them distributively.

What is a stockholder in a corporation? He is nothing, and has nothing, in a corporation, except by his proportion in the capital stock, and his participation in the franchise. It is to the stockholders by name that the franchise is given, they being

natural persons, that they should have the franchise to be an artificial person. Is not that a form in which the natural persons are, in the purpose and apparatus of the law, used as one? There is neither fragment nor figment for a tax to rest upon when there is that extent of exemption.

Now, if the court please, on the general question, as something has been said, so inconsiderately, about the comparative magni tude or connections of the interest with the government of the old United States Bank, and of this many-headed institution, distributed all through the country, let me call your honor's attention to the importance of the relations of these banks, even in the single subject of the distribution of the public debt. There was issued in one year the whole bulk, in three series, of the seven-thirty currency notes, eight hundred and thirty millions in twelve months; and, of that issue of the federal debt, these national banks took and distributed seven hundred and thirty-six millions, leaving to the government, in its official organizations of treasury, sub-treasury, and special agencies, only sixty-six millions out of eight hundred and thirty millions to be so disposed of,—illustrating thus what I have ventured to suggest was the genius of this institution. Now, to say of these two great governments, federal and state, standing against one another, under the constitution, with their relations adjudicated by this court, that all these relations are suddenly changed by the intervention of this corporate form of a national bank, and that the state becomes the master of the two governments by taking away from the federal government what it had reserved to itself, by giving back to the state governments what they had lost under the legislation of the country,—this is to make the corporation the mere form, the master of the substance, and controller of those political and public relations. It is like the *genie* of the bottle,—when the seal is up, he becomes the master of servants. This contrivance of the national banks instituted for other and additional public purposes and serving the great public needs, immediately takes in its hands hundreds of millions of federal stocks, with which to serve the government, and in its hands, and in the hands of nobody else in this country, they can be taxed through the medium of shareholders! At this moment these banks hold six hundred and twenty-two millions of dollars of the federal securities of the United States,—a third of the debt that is out in any other shape than that of mere currency; perhaps more than a third, for I have not the statistics in

my mind; and yet that mass of public debt, free by impression on its face from taxation by the states, free in the hands of every individual, of every corporation, of every association, must contribute such taxes as the states may choose to impose, discriminating or destructive or otherwise, simply because one agency of the government is helping it in the advancement of its interests in another public matter, to-wit, the debt.

If the court please, it will not avail anything to meet these propositions by the argument that the states, by their natural authority, have dominion for taxation over every subject of property and every person within their jurisdiction. This right and this power, as necessary parts of the state's sovereignty, are conceded; for it is idle to talk of taxation as being a special prerogative of sovereignty. It is sovereignty. It is the sovereign that taxes. It is as universal as the sovereign. "The decree went out that all the world should be taxed," because the Roman empire extended over what was then called the world. Taxation takes all you have. Put taxation and conscription together, and it is the sovereignty over the person and the property to the extent of the jurisdiction of the state. But taxation goes no further than sovereignty; and whatever impedes or qualifies or displaces the sovereignty of the states impedes, qualifies, displaces taxation by the states. What power there is in taxation to destroy is shown by the recent act of congress inimical to the continuance of the state banks, which taxes their circulation, after a certain prospective period, ten per cent. If a state has power to tax, there is no limit. That you have decided over and over again. It can tax these shares discriminately if it chooses; hostilely, destructively, fatally, if you concede the power. You say, with jealous preservation of the constitution, "There is no such power," and the state says, "True, but we will tax the shares or part hostilely, destructively, fatally;" and you are called upon to say that they can,—you are called upon to surrender, as I say, to this dominant fiction in law, the personality of a corporation. As by the decisions is expressly stated, whenever the government have called the property of the citizens into the service of the United States, in the performance of a public duty under the constitution as an instrument and an agency, that becomes an instrument of the United States, and exempted from state taxation, unless it be compatible with the public interests that the government of the United States should concede it. There are but two methods to deal with this subject. One is

that which the state of New York has always avowed, and, I believe, honestly intended to conform to. Looking at it from the side of the state, it may differ from the view that is taken on the side of the federal government, but still the principles laid down in 23 New York Reports by Chief Judge Denio are that, when there is a conflict, the adjudications of the supreme court of the United States are final as to the supremacy of the federal power, and that the only question for a state court, as new circumstances, one after another, present new cases, is to see whether there is a conflict, and to yield. There is but one other method, and that is the method of South Carolina, in the decisions that are cited on the briefs. The argument of Mr. Grimke for the United States, than which none abler was ever made on this question, was never answered by Mr. Legare, nor was it ever answered by the court. The decision was put upon the ground that, if there was a conflict, the state of South Carolina could not help it, but it governed what was within its own dominions. That was the proposition, that the reasoning of the supreme court, by the mouth of the great chief justice, was vicious, unsound, dangerous. Its only viciousness was that the supremacy of the Union over the states was asserted; its only unsoundness was that the supremacy of the Union over the states was asserted; its only danger was that the supremacy of the Union over the states was asserted; and this, the South Carolina, method of dealing with the conflict, as we all know at last, is war!

LORD BOWEN.

[Charles Synge Christopher Bowen was born in Wolaston, Gloucestershire, 1835. He was educated at Rugby, and afterwards at Balliol College. At Oxford he gained the Hertfort and Ireland scholarships. He was a university prizeman, a Fellow of Balliol, and subsequently received the honorary degree of Doctor of the Civil Law. He was called to the bar at Lincoln's Inn in 1861, and joined the Western circuit. In 1872, through the influence of Lord Coleridge, he was appointed recorder of Penzance, and junior standing counsel to the treasury. In the latter capacity he had charge of the pleadings in the famous Tichborne Case. In 1879 he was elevated to the bench in the place of Justice Mellor. In 1882 he became a lord justice of appeal, and was sworn of the privy council. In 1893 he was made a lord of appeal, with the title of Baron Bowen of Colwood. He was a frequent contributor to the Saturday Review, and his published writings include a translation of Virgil, an historical essay on Delphi, and a pamphlet on the Alabama question. A biographical sketch of Lord Bowen, by Sir Henry Cunningham, was published in 1897. A review of his judicial services may be found in the Harvard Law Review, February, 1897.]

Lord Bowen was a representative of the best culture of his time. Certainly no man ever came to the bar with a greater reputation for scholarship. Too academic in style and manner, perhaps, to distinguish himself in general practice, he found his true sphere on the bench. As lord justice of appeal, Bowen delivered a series of opinions, which, for legal learning and literary grace, are unsurpassed in the reports of English law. His subtle intellect, his cultured taste, his unique knowledge of legal history and mastery of the historical method as applied to the evolution of law, and his singular felicity in expounding legal principles, were the qualities which gave him pre-eminence among his contemporaries. To a mind capable at once of entertaining the broadest views and the most subtle distinctions, he added the habit of patient industry, without which intuitions are deceitful, and gifts of exposition vain.

The most obvious characteristic of Lord Bowen's opinions is the purity, ease, and accuracy of his style. Along with legal acquirements, which he shared with many of his contemporaries, he

had what is rare in such minds,—a fine sense of literary form; "an instinctive preference for the right way of saying a thing, and the literary conscientiousness which impelled him to seek for the best expression of his thoughts." One of his colleagues in the court of appeal said of him in this connection: "I doubt whether those who listened to or read his brilliant judgments would have the least notion how much thought and persistent effort he had given to them; and the extreme rapidity of his mental operations made this all the more remarkable to those who, by daily intercourse, saw the pulse of the machine."

Turning to the more formal characteristics of his method, one finds the same perfection of execution. Whatever the outward form of the argument may be,—whether the pure development of principle, without the citation of a single authority,[1] or elaborate analysis and review of a mass of conflicting cases;[2] a perfect example of systematic logic,[3] or a series of detailed answers to specific points;[4] statutory construction[5] or argument on the facts,[6]—there is invariably the same precision, sense of proportion, and force of logic. Whatever the form might be, the result is well described in his own words:[7] "As soon as one applies one's mind to dissect the ingenious argument, ... the light breaks through and makes the case perfectly plain." It was his invariable method to eliminate with dexterity all superfluous and irrelevant circumstances, to break up complex questions into their components, and thus narrow the controversy at once to an issue. The reports of his time are filled with admirable illustrations of his subtlety in clearing the ground by going straight to the pith of the case, and of his skill in placing his premises beyond misconception by careful and accurate definitions of terms which involved any possibility of ambiguity.[8] Nothing could be more admirable by way of analysis, for instance, than this statement of the way in which the lower court had gone wrong on an issue of partnership:[9]

"To my mind, the true test of partnership has been settled by the house of lords, and by court after court, in a way which leaves it no longer open to discussion. The real test is that which is decided by a catena of cases, beginning with Cox v. Hickman,[10] and ending, I hope,

[1] Allcard v. Skinner, 36 Ch. Div. 145.
[2] Phillips v. Homfray, 24 Ch. Div. 439.
[3] Ratcliffe v. Evans [1892] 2 Q. B. 524.
[4] Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q. B. 256.
[5] Hewlett v. Allen [1892] 2 Q. B. 663.
[6] Abrath v. Northeastern Ry. Co., 11 Q. B. Div. 440.
[7] In re Portuguese Consolidated Copper Mines, 45 Ch. Div. 16.
[8] Johnstone v. Milling, 16 Q. B. Div. 472.
[9] Badeley v. Consolidated Bank, 38 Ch. Div. 262.
[10] 8 H. L. Cas. 268.

with this case, though I am not sure of that. The question is whether there is a joint business, or whether the parties are carrying on business as principals and agent for each other. Now, where has Mr. Justice Stirling gone wrong? He has gone wrong because he has not followed that test. What he has done is this: he has taken one of the circumstances which in many cases affords an ample guide to truth. He has treated that circumstance as if, taken alone, it shifted the *onus* of proof,—as if it raised a presumption of partnership,—and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now, that cannot be the right way of dealing with the case. You have a group of facts,—A, B, C, D, E, and F,—and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that, if A stood alone, it would shift the *onus* of proof, and then to look over B, C, D, E, and F, and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised. The truth is that all the cases which go beyond the line, or the test, or the definition, which has been explained once more by Lord Justice Cotton, are cases which depend on exploded fallacies. One fallacy after another has been exploded about the way in which to deal with these partnership cases, and no fallacy has been harder to kill than that about participation in profits. Of course, as the lord justice has pointed out, there may be cases in which participation in profits is enough to enable the court to decide the matter; but if you once lay down a principle of law that participation in profits is a determining factor, at that moment you depart from the region of law into the region of fact."

In discussing the grounds of the decision of the house of lords in the celebrated case of Derry v. Peek,[11] in which it was finally held that an action for deceit will not lie for misrepresentation which is simply negligent and not fraudulent, he said:

"It always has been the law that a man must have a belief, because . . . . a man who affirms that he knows a thing affirms implicitly that he believes it, and, if he does not believe it, that affirmation is false. It is not the less false because the affirmation he makes is an affirmation about the state of his own mind. A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own digestion. It makes, to be sure, the inquiry a difficult and complicated one . . . . as to what the state of his mind may have been; but, once arrive at the inference of fact that the state of his mind was, to his own knowledge, not that which he describes it as being, then he has told a lie, just as if he made an intentional misstatement of something outside his own mind, and visible to the eyes of all men. A great deal of the argument which has been addressed to the court arises, as it seems to me, under cover of the fallacious use, first of all, of the principle that you cannot look into a man's mind. It is said you cannot do that; therefore, what follows? It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it if you are going to find fraud against him,

[11] 14 App. Cas. 337.

and, unless you think you can see what must have been in his mind, you cannot find him guilty of fraud. . . . . Now, whether you take the inquiry in the one order or in the other,—whether you regard it from the point of view . . . . that a man is bound to have some honest belief in a statement if he makes it, or whether you treat the matter in the inverse order with regard to the necessity of finding at least some recklessness to truth, that is to say, some indifference to truth which amounts to dishonesty,—in either view, it seems to me, the result is the same. A man ought to have a belief that what he is saying is true; but a man may believe what he is saying—the expression which he uses —to be true, because he is honestly using the words in a sense of his own, which, however inappropriate, however stupid, however grossly careless, if you will, is the special sense in which he means to use the words, without any consciousness being present to his mind that they would convey to other reasonable persons a different sense in which he is using them,—a man may believe a statement in that sense of his own, and yet the use of the language may be wholly improper, that is to say, in respect of want of caution in the use of it. It does not follow, because a man uses language, that he is conscious of the way in which it will be understood by those who read it. Unless he is conscious that it will be understood in a different manner from that in which he is honestly, though blunderingly, using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest. What is honest is not dishonest."[12]

An example of simple exposition may be cited. The vendee, under a contract of sale of certain property, resisted specific performance on the ground of misrepresentation, the vendor having stated that the property was let to "a most desirable tenant," when in fact the tenant had been in arrears on his last quarter's rent, and soon afterwards went into liquidation.

"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to another is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of a man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is; but if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now, a landlord knows the relation between himself and his tenant. Other persons either do not know them at all, or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now, are the statements here statements which involve such a representation of material facts? They are statements on a subject to which *prima facie* the vendors know everything, and the purchasers nothing. . . I agree that it is not a guaranty that the tenant will go on paying his rent, but it is to my mind a guaranty of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlord and the tenant which can be considered to make the tenant an unsatisfactory one. That is

[12] Angus v. Clifford [1891] 2 Ch. 470.

an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. . . . . In my opinion, a tenant who had paid the last quarter's rent by driblets under pressure must be regarded as an undesirable tenant."[13]

To Lord Bowen law was not a mere collection of rules. As he said in one case, "There is no magic at all in formalities."[14] He recognized, to use his own language, the duty of endeavoring to apply legal doctrines so as to meet "the broadening requirements of a growing country, and the gradual illumination of the public conscience." When he cited authorities, it was only to support conclusions which he had already reached by the independent exercise of his own judgment. He had no patience with the servile citation of cases to define general terms which are necessarily relative, and which, if inflexibly fixed, would lose half their efficacy. In dismissing a needless action he said:

"I regret that we have to add one more to the cloud of cases which are collected around this particular point. The law has been clear for fifty years, and all the cases that have been reported since that time are merely illustrations of the way in which the court applies the principle."[15]

His unusual intellectual acquirements were well balanced by good sense. He repeatedly used the terms "common law" and "common sense" as equivalents. He likened the common law to "an arsenal of sound common sense principles." The boldness with which, on occasion, he could apply established principles to new subject-matter is illustrated by his opinion in Dashwood v. Magniac,[16] where the law with respect to grants of minerals, according to which, under certain circumstances, the consumption of the inheritance is held to be no waste, was applied to the periodical cutting of timber by the tenant of a freehold estate.

"The instance to which the legal principle is now for the first time adapted by this court may be new," he said, "but the principle is old and sound; and the English law is expansive, and will apply old principles, if need requires it, to new contingencies. Just as, in America, the law of water courses and of waste has modified itself to suit the circumstances of enormous rivers and wide tracts of uncultivated forest, so the English law accommodates itself to new forms of labor, and new necessities of culture. It favors the profitable holding of land."

Finally, in addition to the characteristics already mentioned, which Lord Bowen shared in degree with his contemporaries, in his knowledge of legal history, and mastery in the application of

[13] Smith v. Land & House Property Corp., 28 Ch. Div. 14.
[14] Miles v. New Zealand Alford Estate Co., 32 Ch. Div. 289.
[15] Green v. Humphreys, 26 Ch. Div. 479.
[16] [1891] 3 Ch. 306.

the doctrine of evolution to legal and political philosophy, he was wholly unique. Not a few of the errors and much of the confusion in the administration of the law are due to an attempt to give a rational or scientific basis to doctrines which owe their origin to historical accidents. "The only reasonable and the only satisfactory way of dealing with English law," according to Lord Bowen's theory, "is to bring to bear upon it the historical method. Mere legal terminology may seem a dead thing. Mix history with it, and it clothes itself with life." In the application of this method, he treated law and legal history with an acuteness and sympathetic grasp which, indeed, vitalize his conclusions.[17]

[17] Maxim-Nordenfelt Guns & Ammunition Co. v. Nordenfelt [1893] 1 Ch. 631; Finlay v. Chirney, 20 Q. B. Div. 502; Steinman v. Angier Line [1891] 1 Q. B. 621; Brunsden v. Humphrey, 14 Q. B. Div. 141; Dalton v. Angus, 6 App. Cas. 779.

JUDICIAL OPINION IN THE CASE OF THE MOGUL STEAMSHIP COMPANY AGAINST McGREGOR AND OTHERS, IN THE COURT OF APPEAL, 1889.

STATEMENT.

This important and timely case involved the legal limits of trade competition. The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of five per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and, in consequence of such exclusion, sustained damage. The issue was, therefore, whether the defendant's acts were unlawful. On the trial before Lord Chief Justice Coleridge and a jury it was decided that they were not.[1] In the court of appeal, this decision was affirmed, Lord Esher, the master of the rolls, dissenting.[2]

OPINION.

We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law, —the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants, in the conduct of their commercial affairs, have done anything that is unjustifiable in law. The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants, during the "tea harvest" of 1885, combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus

[1] 21 Q. B. Div. 544. [2] 23 Q. B. Div. 598.

rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of five per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year,—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage, by such measures, the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows: First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled; secondly, the sending of special ships to Hankow in order, by competition, to deprive the plaintiffs' vessels of profitable freight; thirdly, the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights, and frighten the plaintiffs from the field; fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed, with regard to all these acts of which complaint is made, that they were acts that, in themselves, could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that, in reality, what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started,—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously" and "wrongfully" and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure," in strictness, means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an

intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports, in its turn, the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which, in its earlier stages, began with but an imperfect line of demarkation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi,* may enter into or affect the conception of a personal wrong.[1] All personal wrong means the infringement of some personal right. "It is essential in tort," say the privy council in Rogers v. Rajendro Dutt,[2] "that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining,—that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does, in fact, damage, another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong.[3] The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade; but in order to see whether they were wrongful, we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants, on their side, assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a

[1] See Chasemore v. Richards, 7 H. L. Cas. 349, at page 388.
[2] 13 Moore, P. C. 209.
[3] See Bromage v. Prosser, 4 Barn. & C. 247; Capital & Counties Bank v. Henty (per Lord Blackburn) 7 App. Cas. 741, at page 772.

trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming, always, that there is no just cause for it. The intentional driving away of customers by show of violence;[4] the obstruction of actors on the stage by preconcerted hissing;[5] the disturbance of wild fowl in decoys by the firing of guns;[5] the impeding or threatening of servants or workmen;[7] the inducing person under personal contracts to break their contracts,[8]—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade, which would, but for such a motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a

[4] Tarleton v. McGawley, Peak, N. P. C. 270.
[5] Clifford v. Brandon, 2 Camp. 358.
[6] Carrington v. Taylor, 11 East, 571, and Keeble v. Hickeringill, 11 East, 574, note.
[7] Garret v. Taylor, Cro. Jac. 567.
[8] Bowen v. Hall, 6 Q. B. Div. 333; Lumley v. Gye, 2 El. & Bl. 216.

length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction of some other personal right *in rem* or *in personam,* there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries), beyond which competition ought not, in law, to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates, provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight"? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to reap a fuller harvest of profit in the future; and, until the present argument at the bar, it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them, in respect of their competitive tariffs: "Thus far shalt thou go, and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law, no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo, ut alienum non laedas.* If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable.[9] If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that, even if the acts complained of would not be wrongful had they been com-

[9] See Chasemore v. Richards, 7 H. L. Cas. 349.

mitted by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct, not criminal in any one individual, may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle, it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed, in passing, that, as a rule, it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy.[10] But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means;[11] and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants, must have been the intentional doing of some act, to the detriment of the plaintiffs' business, without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only *differentia* that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only.

The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I

[10] See Skinner v. Gunton, 1 Wm. Saund. 229; Hutchins v. Hutchins, 7 Hill (N. Y.) 104.

[11] O'Connell v. Reg., 11 Clark & F. 155; Reg. v. Parnell, 14 Cox, C. C. 508.

find it impossible to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause,—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible,—would be only another method of attempting to set boundaries to the tides. Legal puzzles, which might well distract a theorist, may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up, by preconcerted action, all the provisions in a market or district in times of scarcity;[12] to combine to purchase all the shares of a company against a coming settling day; or to agree to give away articles of trade gratis, in order to withdraw custom from a trader? May two itinerant match venders combine to sell matches below their value in order, by competition, to drive a third match vender from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then

[12] See Rex v. Waddington, 1 East, 143.

comes the question, was it done with or without "just cause or excuse"? If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable.[13] But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may, with advantage, borrow for the benefit of traders what was said by Erle, J., in Reg. v. Rowlands,[14] of workmen and of masters: "The intention of the law is, at present, to allow either of them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in Hilton v. Eckersley,[15] is, I think, not to be supported. No action at common law will lie, or ever has lain, against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in Cousins v. Smith[16] is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his Lives of the Chancellors. If, indeed, it could be plainly proved that the mere formation of "conferences," "trusts," or "associations," such as these,

[13] See the summing up of Erle, J., and the judgment of the queen's bench, in Reg. v. Rowlands, 17 Q. B. 671.
[14] 17 Q. B. 671, at page 687, note.
[15] 6 El. & Bl. 47.
[16] 13 Ves. 542.

were always necessarily injurious to the public,—a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron *regime* of statutory monopolies, such confederations can ever be really successful,—and if the evil of them were not sufficiently dealt with by the common-law rule which held such agreements to be void, as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover, within its arsenal of sound common-sense principles, some further remedy commensurate with the mischief. Neither of these assumptions, are, to my mind, at all evident, nor is it the province of judges to mold and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the master of the rolls. The substance of my view is this: that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform. In my opinion, accordingly, this appeal ought to be dismissed, with costs.

JUDICIAL OPINION IN THE CASE OF RATCLIFFE AGAINST EVANS, IN THE COURT OF APPEAL, 1892.

STATEMENT.

This was an action by an engineer and boiler maker, who had carried on his business for many years under the firm name of Ratcliffe & Sons, against the publisher of a newspaper called the "County Herald," to recover damage for the false and malicious publication of a statement which imported that the plaintiff had ceased to carry on his business, and that the firm of Ratcliffe & Sons no longer existed. On the trial, after proving the publication of the statement complained of, together with its falsity, the plaintiff proved a general loss of business since the publication, but he gave no specific evidence of the loss of any particular customers or orders, by reason of such publication. The remaining facts are stated in the opinion.[1]

OPINION.

This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, among others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the County Herald, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel, but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to and did in fact cause him damage. The only proof, at the trial, of such damage, consisted, however, of evidence of general loss of business, without specific proof of the loss of any particular customers or orders, and the question we have to determine is whether, in such an action, such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods not actionable *per se*, nor even defamatory, where they are maliciously published, where they are calculated, in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the

[1] [1892] 2 Q. B. 524.

case for damage willfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that, in such an action, it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general, and not special, damage, and general damage, as often has been said, is the gist of such an action on the case.

Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right.[1] In all such cases the law presumes that some damage will flow, in the ordinary course of things, from the mere invasion of the plaintiff's rights, and calls it "general damage." "Special damage," in such a context, means the particular damage (beyond the general damage) which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously, in old authorities, "express loss," "particular damage,"[2] "damage in fact," "special or particular cause of loss."[3] The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public if his action is to be supported, such particular damage being, as is obvious, the cause of action.[4] In this judgment we shall endeavor to avoid a term which, intelligible enough in particular contexts,

[1] See Ashby v. White, 2 Ld. Raym. 938.
[2] Cane v. Golding, Styles, 169.
[3] Law v. Harwood, Cro. Car. 140; Tasburgh v. Day, Cro. Jac. 484.
[4] See Iveson v. Moore, 1 Ld. Raym. 486; Rose v. Groves, 5 Man. & G. 613.

tends, when successively employed in more than one context, and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance.

In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business,—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself,—is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Justice Gould in Iveson v. Moore,[5] in actions against a wrongdoer, a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is, under the circumstances, to be relied on by the plaintiff, such particular damage must, of course, be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage," says Pollock, C. B., in Harrison v. Pearce,[6] "it is general damage resulting from the kind of injury the plaintiff has sustained." So, in Bluck v. Lovering,[7] under a general allegation of loss of credit in business, general evidence was received of a decline of business, presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial.[8]

Akin to, though distinguishable in a respect which will be mentioned from, actions of libel, are those actions which are brought for oral slander, where such slander consists of words actionable in themselves, and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong, and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander

[5] 1 Ld. Raym. 486.
[6] 32 L. T. (O. S.) 298.
[7] 1 Times, L. R. 497.
[8] See, also, Ingram v. Lawson, 6 Bing. N. C. 212.

cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition.[9] General loss of custom cannot properly be proved in respect of a slander of this kind, when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that, in slanders actionable *per se*, general damage may be alleged and proved with generality, must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might, in the ordinary course of things, have directly produced the general damage that has in fact occurred. Evans v. Harries [10] was a slander uttered in such a manner. It consisted of words reflecting on an innkeeper in the conduct of his business, spoken openly in the presence of divers persons, guests, and customers of the inn,—a floating and transitory class. The court held that general evidence of the decline of business was rightly receivable. "How," asked Baron Martin, "is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander unless he is allowed to give general evidence of a loss of custom?" McLoughlin v. Welsh[11] was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of the claim.[12]

[9] Ward v. Weeks, 7 Bing. 211; Holwood v. Hopkins, Cro. Eliz. 787; Dixon v. Smith, 5 Hurl. & N. 450.
[10] 1 Hurl. & N. 251.
[11] 10 Ir. L. Rep. 19.
[12] See Ashley v. Harrison, 1 Esp. 48.

From libels and slanders actionable *per se* we pass to the case of slanders not actionable *per se*, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that, in such a case, the actual loss must be proved specially and with certainty.[13] Many such instances are collected in the judgment in Iveson v. Moore,[14] where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said, in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim: "Damages in the *'per quod,'* where the *'per quod'* is the gist of the action, should be shown certainly and specially." But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. Hartley v. Herring [15] is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander.[16] The broad doctrine is stated in Buller's Nisi Prius[17] that, where words are not actionable, and the special damage is the gist of the action, saying, generally, that several persons left the plaintiff's house, is not laying the special damage.

Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference, in this respect, whether the falsehood is oral or in writing.[18] The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries.[19] But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the

[13] Law v. Harwood, Cro. Car. 140.
[14] 1 Ld. Raym. 486.
[15] 8 Term R. 130.
[16] Dixon v. Smith, 5 Hurl. & N. 450; Hopwood v. Thorn, 19 L. J. C. P. 95.
[17] Page 7.
[18] Malachy v. Soper, 3 Bing. N. C. 382.
[19] Lowe v. Harewood, W. Jones, 196; Cane v. Golding, Styles, 176; Tasburgh v. Day, Cro. Jac. 484; Evans v. Harlow, 5 Q. B. 624.

general subject-matter.[20] In all actions, accordingly, on the case, where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these actions are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of Hargrave v. Le Breton,[21] decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons, who would have purchased at the auction, left the place, but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that, in the nature of the transaction, it was impossible to specify names; that the injury complained of was, in effect, that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had therefore become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, that, in an action for falsehood producing damage to a man's trade, which, in its very nature, is intended or reasonably likely to produce, and which, in the ordinary course of things, does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In Hargrave v. Le Breton,[22] it was a falsehood openly promulgated at an auction. In the case before

[20] J'Anson v. Stuart, 1 Term R. 754; Lord Arlington v. Merricke, 2 Saund. 410, note 4; Grey v. Friar, 15 Q. B. 907; Westwood v. Cowne, 1 Starkie, 172; Iveson v. Moore, 1 Ld. Raym. 486.

[21] 4 Burrow, 2422.

[22] 4 Burrow, 2422.

us to-day it is a falsehood openly disseminated through the press,—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse, with reference to such a subject-matter, to admit such general evidence, would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in Riding v. Smith[23] can be justified, it must be justified on the ground that the court, rightly or wrongly, believed the circumstances under which the falsehood was uttered brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection, and no improper admission of evidence, and this appeal should be dismissed, with costs.

[23] 1 Exch. Div. 91.

JUDICIAL OPINION IN THE CASE OF THE MAXIM-NORDENFELT GUNS & AMMUNITION COMPANY AGAINST NORDENFELT, IN THE COURT OF APPEAL, 1892.

STATEMENT.

This case finally settled the law, hitherto involved in much obscurity, with respect to contracts in restraint of trade. It appears that Mr. Nordenfelt, who was interested in several enterprises, including the business of manufacturing guns and ammunition, sold the latter business, in 1886, for a large sum, to a limited company called the "Nordenfelt Guns & Ammunition Company," whose business was in turn taken over by another limited company, incorporated partly for that purpose under the name of the Maxim-Nordenfelt Guns & Ammunition Company. Mr. Nordenfelt then entered into an engagement with this latter company, whereby he was to act as their managing director at a fixed salary, covenanting that he would not, "during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns . . . . or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company"; but other business in which he was interested was excepted from this restriction. Under this agreement, Mr. Nordenfelt acted as the company's managing director until 1890, when he ceased to be such director, and he afterwards joined a rival gun and ammunition company. The plaintiff company then brought this action against Mr. Nordenfelt to enforce the covenant by injunction. Justice Romer held that the restricting covenant was void, being unreasonable and beyond what was required for the protection of the company; but in the court of appeal it was decided that the covenant, as restricted to the gun and ammunition business, though unlimited as to space, and practically covering the remainder of the defendant's life, was, under the circumstances, reasonable, and would be enforced.[1] The judgment of the court of appeal was afterwards affirmed by the house of lords.[2]

OPINION.

There was an early period in English history when the courts set their face apparently against all restrictions upon trade alike, whether limited or unlimited. This period has long since passed away; but it has been, in my opinion, the doctrine of the courts of common law, ever since the reign of Queen Elizabeth, that contracts in general restraint of trade are void as being contrary to public policy. Contracts in general restraint of trade may be defined as those by which a person restrains himself from all ex-

[1] [1893] 1 Ch. 630.

[2] [1894] App. Cas. 535.

ercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. It is necessary to insist on this distinction, which is embedded in the reports and text books of the last three centuries, since it is through not preserving the exact meaning of the term, "in general restraint of trade," that some confusion has apparently at times arisen. The common law is as precise as it can be on the point. Contracts unlimited in area, although they may be limited in time, are, as a rule, held bad on the ground of public policy.

The broad principle is to be found as far back as the year 1614, in Rogers v. Parre,[1] and in Broad v. Jollyfe.[2] It is reaffirmed explicitly by Chief Justice Parker in the leading case of Mitchel v. Reynolds,[3] where "general restraint of trade" is explained and defined. The doctrine is assumed to be unquestioned in Chesman v. Nainby,[4] and in Clerke v. Comer.[5] "Any deed," says Chief Justice Best in Homer v. Ashford,[6] "by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." A note to Hunlocke v. Blacklowe,[7] sufficiently states the reason why a covenant does not cease to be in general restraint of trade merely because the time is limited. "The principle," says the learned editor, "on which restraints of trade partial in point of space have been supported, has not been applied to restraints general in point of space, but partial in point of time; for that which the law does not allow is not to be tolerated because it is to last for a short time only."

A similar explanation is given by Baron Parke in Ward v. Byrne,[8] where a covenant indefinite as to the area of restraint, but limited to nine months after the end of the covenantor's employment, was held void in law. "When," he says, "a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction on trade, limited only as to time." An ambiguous expression as to limits in respect of time in the case of Mystery of Gunmakers v. Fell[9] is explained by Baron Parke, and is due probably to an oversight. Baron

[1] 2 Bulst, 136.
[2] (1620) Cro. Jac. 596.
[3] (1711) 1 P. Wms. 181.
[4] (1726) 2 Ld. Raym. 1456.
[5] (1734) Cas. temp. Hardw. 53.
[6] (1825) 3 Bing. 322, 326.
[7] 2 Saund. 156.
[8] (1839) 5 Mees. & W. 548, 562.
[9] Willes, 388.

Rolfe's judgment is on the same lines as that of Baron Parke. Partial restrictions, he says, "have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as it did before the restriction took place. But in this case"—*viz.*, in a case of general restraint for a time certain—"the whole of the public is restrained during the period in question." Ward v. Byrne[10] was followed, in 1840, by Hinde v. Gray.[11] Chief Justice Tindal repeats the proposition in Proctor v. Sargent:[12] "Where we once hold a restriction to be unreasonable in point of space, the shortness of the time for which it is imposed will not make it good."

The truth is that the classification which seems to distinguish restraints which are limited in point of space from restraints which are limited in respect of time is a cross division. The antithesis between time and space looks so plausible that some text books, and more than one judge in the last few years, have lapsed into the mistake of supposing that it corresponds in some way to the line of cleavage upon which general restraints and partial restraints are divided. "In respect of space," says Lord Campbell in Tallis v. Tallis,[13] "there must be some limit." Since the reign of Queen Elizabeth, the common-law authorities are really—all of them—one way. Scores of cases have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common-law judges.

Distinguished from these general restraints, which the English law discountenances, are partial or limited restraints, or, as they are sometimes termed, particular restraints, which, upon certain conditions, the English law permits and enforces. An agreement in "particular" or "partial" restraint of trade may be defined as one in which the area of restriction is not absolute, but in which the covenantor retains for himself the right still to carry on his trade, either in some place, or for the benefit of some persons, or in some limited or prescribed manner. Particular restraints, according to the language employed in Mitchel v. Reynolds,[14] are those in which there is some limitation in respect of places or persons short of an absolute and total restriction. But there is also a third kind of limitation, which the law will sanction

[10] 5 Mees. & W. 548.
[11] 1 Scott, N. R. 123.
[12] (1840) 2 Man. & G. 33.
[13] (1853) 1 El. & Bl. 391, 411.
[14] 1 P. Wms. 181.

under reasonable conditions, namely, a limitation in respect of the mode or manner in which a trade is to be carried on.

The above are the three kinds of partial restraint recognized by the law. The English rule, which strikes indifferently at all general restraints in trade, makes the validity of a partial restraint depend on the circumstances of each case. A partial restraint will be binding in law if made on good consideration, and if it is reasonable.[15] In the history of the application to partial restraints of this test, the courts of common law from time to time have been driven by good sense and by altered social circumstances to make gradual advances in the direction of toleration and indulgence. Judges as far back, possibly, as the reign of Henry V., and certainly during the reign of Queen Elizabeth, appear, as has been already stated, to have considered that even partial restraints of trade were uniformly bad in law. But as trade progressed, it was necessarily discovered that a doctrine so rigid must be injurious to the state itself. In the same way, and at about the same date, by-laws which were in mere regulation of trade came to be distinguished by the courts from those which were in unlimited restraint of it. Nevertheless, as late as the year 1601, in Colgate v. Bacheler,[16] the court held that it was against law to prohibit or restrain "any to use a lawful trade at any time or at any place." This severe view is recorded in a *dictum* of Justice Croke in Rogers v. Parrey,[17] though it was repudiated by Chief Justice Coke and the remainder of the court.

One reason for the adoption of a more elastic doctrine appears from a judgment delivered in Broad v. Jollyfe.[18] In London and other large towns it had become usual already for traders to let their shops and wares to their servants when they were out of their apprenticeship, and for the servants to covenant that they would not use that trade in such a shop or in such a street. The courts, yielding to the progress of industry and commerce, finally decided that a man might restrain himself voluntarily and upon valuable consideration from using his trade in a particular place. The *onus*, however, at this time, still lay on the covenantee to show that the covenant on which he was insisting had been made for good consideration, and that it was reasonable. The law is so expounded in Mitchel v. Reynolds.[19] "A particular restraint is not good without just reason and consideration." In Chesman v. Nainby[20]

[15] Collins v. Locke, 4 App. Cas. 674, 686.
[16] Cro. Eliz. 872.
[17] (1613) 2 Bulst. 136.
[18] (1620) Cro. Jac. 596.
[19] (1711) 1 P. Wms. 181, 187.
[20] (1726) 2 Ld. Raym. 1456; 1 Brown, Parl. Cas. 234.

the house of lords affirmed the doctrine and the qualification, and their decision was followed in Clerke v. Comer,[21] Davis v. Mason,[22] and Bunn v. Guy.[23] The reason for favoring such partial restraints is enforced also in Homer v. Ashford.[24] "It may often happen," says Chief Justice Best, "that individual interest and general convenience render engagements not to carry on trade or to act in a profession in a particular place proper." Down to as recent a period as Young v. Timmins,[25] it was still, however, considered to be for the person propounding a contract in partial restraint of trade to satisfy the court of the adequacy of the consideration. It was only in 1837, in Hitchcock v. Coker,[26] that a fresh step forward was taken in reference to partial restraints of trade. The exchequer chamber there for the first time decided that, in cases of partial restraint, the examination of the adequacy of the consideration was not properly for the court, but for the parties, although the burden remained, as before, upon the covenantee to show that there was some good and valuable consideration. The cases of Wallis v. Day,[27] Leighton v. Wales [28] and Archer v. Marsh [29] were determined on the amended principle. By this date, the idea was fully recognized that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good consideration were not an injury, but a benefit, to the public.[30]

A further progress in the views with which the law regarded partial restraints was made in Tallis v. Tallis.[31] It was then at last resolved that the *onus* lay upon the person who attacked a covenant in partial restraint of trade to displace the consideration,—a change in the position of the parties which is illustrated by the language of Chief Justice Erle in Mumford v. Gething:[32] "Contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties."[33]

Cases where the contract still leaves to the covenantor a right to trade with particular persons fall, as has been pointed out, under the same head as those where the restraint is partial in respect of

[21] (1734) Cas. temp. Hardw. 53.
[22] (1793) 5 Term R. 118.
[23] (1803) 4 East, 190.
[24] (1825) 3 Bing. 322, 326.
[25] (1831) 1 Tyrw. 226.
[26] 6 Adol. & E. 438.
[27] (1837) 2 Mees. & W. 273.
[28] (1838) 3 Mees. & W. 545.
[29] (1837) 6 Adol. & E. 959.
[30] Ward v. Byrne (1839) 5 Mees. & W. 548, 559; Proctor v. Sargent (1840) 2 Scott, N. R. 289; Rannie v. Irvine (1844) 7 Man. & G. 969, per Maule, J.; Mallan v. May (1843) 11 Mees. & W. 653.
[31] (1853) 1 El. & Bl. 391.
[32] (1859) 7 C. B. (N. S.) 305, 319.
[33] See, also, Harms v. Parsons, 32 Law J. Ch. 247.

space. In both instances alike, the restriction upon the trade is not general, but limited in area, and such contracts, if reasonable and for good consideration, will be supported by the law. The trader, it is true, is prohibited in such cases from serving a portion of the public; but trade in another quarter is still left open to him. "Where one party," says Lord Lyndhurst in Young v. Timmins,[34] "agrees to employ another in the way of his trade, and the other undertakes to work exclusively for him, that is a particular restraint of trade which may be supported by proof of adequate consideration." The covenant in Wallis v. Day[35] was of this description, and was pronounced good by the court, although its validity was not in fact a necessary condition to the plaintiff's success in that description of action. "It cannot be said," according to Lord Abinger, "to be a contract in absolute restraint of trade, when he [the contractor] contracts to serve another for his life in the same trade." Instances where one trader covenants not to supply the customers of another, such as in Rannie v. Irvine,[36] fall within this category. "It is to be observed," says Chief Justice Tindal, "that this is not a general restraint of trade, but only restricts the defendant from trading with a very limited number of persons."[37]

Lastly, a covenant ceases to be referable to the class of general restraints of trade when it only regulates or confines the manner in which the trade is to be worked. Such contracts are contracts in partial restraint of trade only, and are recognized accordingly as valid if reasonable and for good consideration.[38] Jones v. Lees[39] is an illustration of this branch of partial restraints. The plaintiff, who was the owner of a patent, had sold to the defendant a license to use a patented invention, the defendant covenanting in turn that he would not make any machines in future without applying the invention to what he so made. If the defendant covenanted, on the one hand, not to sell the machine without the patented invention, he obtained the privilege, on the other hand, of selling the same machine with that improvement to all England. This, as is pointed out in Williams' Saunders,[40] is a restraint which affects the mode of exercising the trade, and which, therefore, is partial. The only real question that remained, on such a

[34] 1 Tyrw. 226, 236.
[35] 2 Mees. & W. 273, 281.
[36] 7 Man. & G. 969, 976.
[37] So, also, Pilkington v. Scott, 15 Mees. & W. 657.
[38] See Collins v. Locke, 4 App. Cas. 674.
[39] 1 Hurl. & N. 189.
[40] 2 Saund. 156a.

view of that particular bargain, was whether it was a reasonable one, as to which point the remark that the privilege was commensurate with the restraint appears conclusive. The case is similar to those in which rules regulating trade have been distinguished from rules made in restraint of it.[41] The inquiry as to the reasonableness of the restraint in any particular instance is, however, one that appertains only to the case of partial restraints. It is no objection necessarily to such partial restraints that they are sometimes to continue during the life of the covenantor, who may possibly survive the covenantee, for such an arrangement enables the goodwill of the business to become the object of purchase and sale.[42]

Such is a *resume* of the history of the common-law doctrine as to restraint of trade. The first cloud upon the clear sky of the common-law narrative comes in the equity decision of Lord Langdale in Whittaker v. Howe,[42a]—a decision all the more inexplicable since it was given within three or four years of Hitchcock v. Coker,[42b] Wallis v. Day,[42c] Leighton v. Wales,[42d] Archer v. Marsh,[42e] Ward v. Byrne,[42f] Hinde v. Gray,[42g] and Proctor v. Sargent,[42h] from a careful study of which cases alone the broad doctrine of the law as I have above described it may be gathered with perfect ease. The case of Whittaker v. Howe was one in which a solicitor, for a valuable consideration, agreed not to practice as a solicitor in any part of Great Britain for twenty years. Everything appears clear in the case except the judgment of the court. The covenant was not a covenant in partial, but in general, restraint of trade, and, the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction. Lord Langdale, nevertheless, begins by stating that the question was whether the restraint intended to be imposed on the defendant was reasonable; and he cites, as a guide for himself, the words of Chief Justice Tindal in Horner v. Graves.[43] Yet Horner v. Graves is an instance of partial, and not general, restraint of trade, and Chief Justice Tindal, in giving

[41] Freemantle v. Silk Throwsters' Co. (1668) 1 Lev. 229; Wannel v. Chamberlain of London (1725) 1 Strange, 675; Bosworth v. Hearne (1737) Andrews, 92; Harrison v. Godman (1756) 1 Burrow, 12; Rex v. Harrison (1762) 3 Burrow, 1323, 1328.

[42] Atkyns v. Kinnier, 4 Exch. 776, 782; Pemberton v. Vaughan, 10 Q. B. 87, 89.

[42a] (1841) 3 Beav. 383.

[42b] 6 Adol. & E. 438.

[42c] 2 Mees. & W. 273.

[42d] 3 Mees. & W. 545.

[42e] 6 Adol. & E. 959.

[42f] 5 Mees. & W. 548.

[42g] 1 Scott, N. R. 123.

[42h] 2 Scott, N. R. 289.

[43] 7 Bing. 743.

judgment, explicitly so states. Lord Langdale next refers, in support of his conclusion, to Davis v. Mason,[44] which, again, is a case not of unlimited, but of limited, restraint. Lord Langdale thus appears to miss the whole point of the common-law classification, and treats the matter before him under the wrong category. It is to be observed, however, that Whittaker v. Howe [45] was merely a decision upon an application for an interlocutory injunction, and that Lord Langdale himself appears to have reserved the right to reconsider the matter at the hearing. "In the progress of the cause," he says, "it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received the consideration is, to say the least, so far doubtful that he ought not to be permitted to take the law into his own hands." As Justice Patteson points out in Nicholls v. Stretton,[46] the decision in Whittaker v. Howe,[47] cannot be reconciled with Ward v. Byrne,[48] or, indeed, with the whole stream of common-law authority.

In 1869, the case of Leather Cloth Co. v. Lorsont[49] occurred before Vice-Chancellor James. To the soundness of the actual decision in that case of the illustrious equity lawyer who tried it I have no objection to urge; but his language seems calculated, in several passages, to confuse, and not to throw light upon, our conceptions of the established common-law doctrine. The vice-chancellor's expressions are at times colored by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in Whittaker v. Howe.[50] The defendant in Leather Cloth Co. v. Lorsont[51] had sold to the plaintiff company certain letters patent for the manufacture of American leather cloth, together with all the processes of manufacture. He covenanted in return not to carry on, in any part of Europe, the manufacture which was the subject of the patent, and not to communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the plaintiff company of the benefits agreed to be purchased. This was nothing but the sale of a secret process, with a corresponding covenant not to use it or divulge it, and the sale, moreover, of a process which could not be used without being divulged. Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction

[44] 5 Term R. 118.
[45] 3 Beav. 383.
[46] 10 Q. B. 353.
[47] 3 Beav. 383.
[48] 5 Mees. & W. 548.
[49] L. R. 9 Eq. 345.
[50] 3 Beav. 383.
[51] L. R. 9 Eq. 345.

in such cases, the public gains on one side what is lost on the other; and unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale at all of secret processes of manufacture. In order to justify such an obvious exception, it was not necessary to deny the existence of the common-law rule against general restraints of trade. Yet the vice-chancellor observes that a man may enter into any stipulation, however restrictive, provided that the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract. In so saying, he apparently ignores the distinction that had been drawn for more than two hundred and fifty years between general and partial restraints of trade. The test he suggests as the true one in all cases entirely leaves out of sight the interests of the public, on the consideration of which interests the rule against general restraint of trade is built. In Allsopp v. Wheatcroft,[52] Vice-Chancellor Wickens restated and reaffirmed the common-law doctrine as to general restraints of trated at length in Mitchel v. Reynolds[55]) which always has subas an exception due to the character of the subject-matter.

Some years later, in Rousillon v. Rousillon,[54] Lord Justice (then Mr. Justice) Fry, in one of the many striking and brilliant judgments for which the profession will long admire him, proclaimed his disbelief in the existence of the rule of the common law, and laid down the proposition that there is no absolute doctrine that a covenant in restraint of trade is void merely because it is unlimited in regard to space. The question in each case, he held, was whether the restraint extended further than was necessary for the reasonable protection of the covenantee, and, if it did not do so, the performance of the covenant would be enforced, even though the restriction was unlimited as to space. This broad negation of the rule appears to me to destroy the distinction (illustrated at length in Mitchel v. Reynolds [55]) which always has subsisted between general and partial restraints of trade. In destroying it, Lord Justice Fry appears to me to overlook the importance of the principle which underlies the entire doctrine of the unlawfulness of general restraints of trade,—that the interests of the contracting parties are not necessarily the same as the interests of the commonwealth. Rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice ex-

[52] (1872) L. R. 15 Eq. 59, 65.
[53] L. R. 9 Eq. 345.
[54] 14 Ch. Div. 351.
[55] 1 P. Wms. 181.

pedient which formerly was mischievous to commerce; but it is one thing to say that an occasion has arisen upon which to adhere to the letter of the rule would be to neglect its spirit, and another to deny that the rule still exists. The *dicta* which Lord Justice Fry cites from Hitchcock v. Coker,[56] from Tallis v. Tallis,[57] and from Mallan v. May[58] are all *dicta* in cases of partial restraints where the reasonableness of the particular contract necessarily came under consideration. The necessary protection of the individual may in such cases be the proper measure of the reasonableness of the bargain. When Lord Justice Fry passes on[59] to examine the question of the existence of the common-law rule, he assumes, as it appears to me, without sufficient justification, that complete protection of the individual is the only reason which ought to lie at the root of the doctrine. But the reasonableness of the legal principle which forbids general restraint altogether is not the same thing as the reasonableness, as between the parties, of the bargain in any particular case. With regard to the argument that the rule, if it existed, would be an artificial one, and would therefore admit of no exceptions, the judgments of the judges and of the house of lords in the case of Egerton v. Brownlow,[60] illustrate, I submit, the distinction between a fixed rule of customary law and a rule based on reason and policy. The latter may admit of exceptions, although the former may not. Nor does the lord justice, to my mind, sufficiently allow for the weight of a multitude of decided cases when he states that there are "undoubtedly cases in which it has been said that the restraint must not be universal," and illustrates this by reference to Ward v. Byrne,[61] Hinde v. Gray,[62] and Allsopp v. Wheatcroft.[63] The entire history of the subject of restraint of trade proceeds surely on the basis of the existence of the rule in question. With Whittaker v. Howe [64] I have already dealt. Jones v. Lees [65] was, as I have pointed out, a case of partial restraint in respect of the mode of manufacture. "I consider," says Lord Justice Fry in conclusion,[66] "that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable." Is it not a truer view that the courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition

[56] 6 Adol. & E. 438.
[57] 1 El. & Bl. 391.
[58] 11 Mees. & W. 653.
[59] 14 Ch. Div. 366.
[60] 4 H. L. Cas. 1.
[61] 5 Mees. & W. 548.
[62] 1 Scott, N. R. 123.
[63] L. R. 15 Eq. 59.
[64] 3 Beav. 383.
[65] 1 Hurl. & N. 189.
[66] 14 Ch. Div. 369.

has been unlimited as to area? In Davies v. Davies,[67] opposite opinions on the subject of the common-law rule were expressed by Lord Justice Cotton and by Lord Justice Fry, but the matter did not call for decision.

The result seems to me to be as follows: General restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which the trade is to be carried on are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee. A limit in time does not, by itself, convert a general restraint into a partial one. "That which the law does not allow is not to be tolerated because it is to last for a short time only." In considering, however, the reasonableness of a partial restraint, the time for which it is to be imposed may be a material element to consider.

Such, I think, is a *resume* of the common-law doctrine up to this day. I proceed now to consider, upon this view of the law, the appeal before us. The facts relating to the incorporation of the plaintiff company have been sufficiently stated by my brother Lindley. By an agreement dated the 5th of March, 1886, Mr. Nordenfelt had agreed to sell the old Nordenfelt Company all the goodwill of one of his businesses, with the land, stock, plant and machinery, patents, and other property connected with it, for the sum of £287,500, £237,500 of which was to be in cash, and £50,000 in fully paid up shares; and on the transfer of that business to the plaintiff company he agreed with the plaintiff company, by an agreement dated the 12th of September, 1888, that for seven years he was to be the managing director, at a salary and commission. He covenanted that he would not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, engage, either directly or indirectly, in the trade of a manufacturer of guns or ammunition, or in any business competing, or liable to compete, in any way with that for the time being carried on by the company. This restriction was not to apply to explosives other than gunpowder, to submarine boats or torpedoes, or to castings or forgings of steel, and some other manufactures. It was further provided that Mr. Nordenfelt was not to be released from this restriction by the company ceasing to carry on business

[67] 36 Ch. Div. 359.

merely for the purpose of reconstitution, or with the view to the transfer of its business to another company, so long as such other company was to continue carrying on the same. Mr. Nordenfelt received the consideration, acted for a while as the managing director of the new company, but now seeks to break the covenant in question, and asserts his right so to do on the ground that it is void in law as contrary to the principle which prohibits general restraint of trade. The business of the new company includes, as a fact, other things besides guns and ammunition, and it was urged on this ground, among others, that the covenant which restrained Mr. Nordenfelt from all competition in any aspect of the case was too large to be reasonable. In my opinion, the different parts of the covenant are really capable of being separated from each other. The present breach relates to one portion only, and the covenant, even if it were invalid as to the rest, might, I think, nevertheless be binding as to part.

The real question in respect of which the action is brought was, as we were informed, a threat by Mr. Nordenfelt to engage abroad in the sale or manufacture of guns and ammunition. The case thus raised is a new and unprecedented one. Mr. Nordenfelt's old business did not, broadly speaking, consist in the supply of commodities to any English city or district, nor of any article intended for English consumption or use at all. He may have at times, for anything we know, supplied the English government with some materials for war; but his trade consisted in manufacturing and selling guns and ammunition for the use and benefit of the foreign world, or of the middlemen and agents who negotiate orders for foreign exportation. The area over which he might distribute his guns or ammunition was a foreign one, unlimited in geographical space, no doubt; but it must be remembered that the governments or bodies who require to use guns and materials of war are capable of approximate enumeration. A covenant in restraint of trade, made by such a person as the defendant with a company he really assists in creating to take over his trade, differs widely from the covenants made in the days of Queen Elizabeth by the traders and merchants of the then English towns and country places. When we turn from the homely usages out of which the doctrine of Mitchel v. Reynolds [68] sprang, to the central trade of the few great undertakings which supply war material to the executives of the world, we appear to pass into a different atmosphere from that of Mitchel v. Reynolds. To apply to such transactions as the present the rule that was invented cen-

[68] 1 P. Wms. 181.

turies ago in order to discourage the oppression of English traders, and to prevent monopolies in this country, seems to be the bringing into play of an old-fashioned instrument. In regard, indeed, of all industry, a great change has taken place in England. Railways and steamships, postal communication, telegraphs, and advertisements have centralized business, and altered the entire aspect of local restraints on trade. The ancient rules, however, still exist; it is desirable that they should be understood to remain in force, but great care is evidently necessary not to force them upon transactions which, if the meaning of the rule is to be observed, ought really to be exceptions. "The determination of what is contrary to the so-called 'policy of the law,'" say the privy council in Evanturel v. Evanturel,[69] "necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which, for the time being, guide public opinion." This passage from the judgment of the privy council appears to foreshadow exactly the problem we have in the present appeal to solve. Is this case one which falls within the rule against general restraint of trade, or ought it to be an exception?

Exceptions to rules which are not "artificial," but based on reason and public policy, ought themselves to be instances in which to apply the letter of the rule would be to violate its true meaning, and in which the very reason on which the rule is based militates in favor of the exception. One instance of an exception to the rule which discourages general restraints of trade is admitted to exist in respect of the assignment of trade secrets; and it may here be useful again to allude to the ground upon which such dispositions of property are excluded from the operation of the ordinary doctrine. In the case of the assignment of a trade secret, there arises a conflict between two ideas, both of which are developments in opposite directions of the larger principle that English industry and trade ought to be left free. The first of the two seemingly antagonistic corollaries to which this larger principle leads is the maxim that no one should be allowed to contract himself out of his liberty to trade. The second, which appears to conflict with the first, is that every man should be at liberty to sell the goodwill of his trade on any terms that are neither oppressive to himself nor injurious to the state. These two antinomies are

[69] L. R. 6 P. C. 1, 29.

well contrasted by Vice-Chancellor James in Leather Cloth Co. v. Lorsont.[70] The history, indeed, of the entire doctrine as to restraint in trade, is itself nothing but a narrative of the continual efforts of the English law, amidst all the changing conditions of English industry and commerce, to adjust and harmonize these two opposite points of view. It has been in the process of such gradual adjustment that the more indulgent law as to partial restraint of trade has been evolved. The laxer rule as to partial restraint is thus itself an exception, the definition of which again expanded from time to time, as society required it. The law as to trade secrets, like the law of partial restraint, is an exception, too. Before the manufacturer or trader sells his trade secret, he is the sole possessor of it. If he is to sell it to advantage, he must, of necessity, be able to undertake not to retain the right to use it or to communicate it to others. A covenant that he will not destroy the value of that which he himself is handing over causes, in such a case, no diminution in the supply of commodities to the world, but tends, in nine cases out of ten, to stimulate it. There is no tendency, in such a transaction, to create a monopoly, for the monopoly existed *ex hypothesi* already. Trade cannot suffer by the substitution of one possessor of a secret for another. The analogy between the sale of a trade secret and the sale or transfer of a goodwill of such a business as Mr. Nordenfelt's is not, of course, exact, but there is a strong similarity between the two cases. Mr. Nordenfelt has assisted in creating the plaintiff company to take over what really had been his own business. It never could have been called into existence as a substantial undertaking if he had not been willing to retire, in the company's favor, from the whole field of competition. He obtained ample consideration for what he gave. But he also retained (as ought not to be forgotten) the right still to continue trading in a substantial portion of his old manufacture,—torpedoes, submarine boats, explosives other than gunpowder, and other matters.

So much as to the reasonableness of the agreement itself; but it still remains to be considered whether such an agreement can be calculated to injure the public. It seems to me that it would almost amount to legal pedantry if courts of law were to discover in Mr. Nordenfelt's covenant the elements of danger to the commonwealth. He agreed to disappear from the number of those who make guns and ammunition for other countries. How can the British public possibly be inconvenienced by this? He ceases, it may be said, to employ English labor so far as his manufacture

[70] L. R. 9 Eq. 345.

of guns and ammunition is concerned. But he only does so in order to enable a thriving company to take his place, at the disposal of which he was to place, for a time, his services; and the restriction on himself to which he has consented will only last while his place in the trade is actively filled by the company or the successors to whom in turn it may resell the goodwill. So far as he might have had occasion to supply the English government with guns and ammunition, this company can act in his stead; although out of his liberty to do so, if he desires it, he cannot in law contract himself, nor is his agreement to be read as imposing any such invalid or possibly illegal stipulation. Can it then be said that a contract by which he consents to the transfer of the business of making guns and ammunition for foreign lands to an English company, with whom he undertakes not to compete so long as the old trade is flourishing in their hands, is against the policy of the English law? So to hold would surely be to reduce to an absurdity the law of restraint of trade. I answer the question in the words of Lord Nottingham in The Duke of Norfolk's Case,[71] "Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."

For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is so interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of; provided, always, that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public, and a rule founded on public policy does not admit of any exceptions that would really produce public mischief. Such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use,—a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important. As good faith demands that Mr. Nordenfelt should be bound by his solemn agreement, and as the public can in no way be injured by his being held to it, I think

[71] 3 Ch. Cas. 33.

the injunction as defined by my brother Lindley should be granted, and the order made in the form he has suggested.[72]

[72] "The order appealed from ought to be varied by declaring that the covenant in question is valid so far as it relates to the trade or business of a manufacturer of guns, gun mountings or carriages, and gunpowder explosives or ammunition. An injunction restricted to those businesses ought to issue, and an inquiry ought to be directed to assess the damages sustained by the plaintiff company by reason of the breach by the defendant of his covenant as restricted."

JUDICIAL OPINION IN THE CASE OF ALLCARD AGAINST SKINNER, IN THE COURT OF APPEAL, 1887.

STATEMENT.

Miss Allcard, a young woman of about thirty-five years of age, being desirous of devoting herself to good works, was introduced, in 1868, by her spiritual adviser, Rev. D. Nihill, to Miss Skinner, the lady superior of a Protestant organization known as "The Sisters of the Poor," a voluntary association of ladies who resided together in East Cheapside in devotion to works of charity. Mr. Nihill and Miss Skinner were the founders of the sisterhood, and the former, besides being the spiritual confessor of the sisterhood, had drawn up the rules by which it was governed. In consequence of the acquaintance thus begun, Miss Allcard, in 1870, became a postulant of the sisterhood, and, in the following year, a professed member, binding herself to observe, among others, the rules of poverty, chastity, and obedience. The rule of poverty required a member to give up all her property to her relatives, or to the poor, or to the sisterhood itself; but the forms in the schedule to the rule were in favor of the sisterhood, and provided that property made over to the lady superior should be held by her in trust for the general purposes of the sisterhood. The rule of obedience required the member to regard the voice of her superior as the voice of God. The rules also enjoined that no sister should seek advice of any extern without the superior's leave. Within a few days after becoming a member, Miss Allcard made a will leaving all her property to Miss Skinner, and from time to time, while still a member of the sisterhood, she made over to Miss Skinner checks and stocks to the amount of more than £7,000, the greater part of which had been spent for the purposes of the sisterhood. In 1879 Miss Allcard left the sisterhood, and forthwith revoked her will, but made no claim for the return of her property until 1885, when she brought suit for its recovery. In the statement of her case she claimed that she had been induced to make over the property while acting under the direction and paramount influence of Miss Skinner, without any separate and independent advice, and without any due consideration of the reasons for or effect of what she was doing. The defense replied that Miss Allcard had joined the sisterhood of her own independent desire and deliberate choice, and, at the time she became a member, had voluntarily determined to employ her property for the benefit of the sisterhood; that the sisterhood, while the plaintiff was a member, and with her concurrence and approval, had expended, in erecting hospitals and other buildings, a much larger sum than the amount of stocks claimed by the plaintiff, and had undertaken obligations which they could not fulfill without the assistance of the funds voluntarily contributed by her; and that the defendant, Miss Skinner, made no personal claim to the property except as a member of the sisterhood, and relied on the laches and acquiescence of the plaintiff as a bar to her claim.

The case was elaborately argued by Sir Charles (afterwards Lord Chief Justice) Russell and Mr. Finlay, for the plaintiff, and by Sir Edward Clarke and Mr. Warnington for the defendant. At the original hearing before Justice Kekewich it was held that since, at the time she made the gifts, she was subject to undue influence, Miss Allcard would have been entitled, on leaving the sisterhood, to claim restitution of such of her prop-

erty as was still in the hands of Miss Skinner; but it was further decided by this judge, and in the court of appeal by Lords Justices Lindley and Bowen (Lord Justice Cotton dissenting), that, under the circumstances of the case, the plaintiff's claim was barred by her laches and acquiescence since her withdrawal from the sisterhood.[1]

OPINION.

This is a case of great importance. There are no authorities which govern it. My brethren, on whose experience in matters of equity I naturally should rely, differ, and on that ground I have thought it right to express my own views upon the point. It is a question which must be decided upon broad principles, and we have to consider what is the principle, and what is the limitation of the principle, as to voluntary gifts, where there is no fraud on the part of the defendant, but where there is an all-powerful religious influence, which disturbs the independent judgment of one of the parties, and subordinates, for all worldly purposes, the will of that person to the will of the other.

It seems to me that it is of essential importance to keep quite distinct two things which in their nature seem to me to be different,—the rights of the donor, and the duties of the donee, and the obligations which are imposed upon the conscience of the donee, by the principles of this court. As to the rights of the donor in a case like the present I entertain no doubt. It seems to me that persons who are under the most complete influence of religious feeling are perfectly free to act upon it in the disposition of their property, and not the less free because they are enthusiasts. Persons of this kind are not dead in law. They are dead to the world, so far as their own wishes and feelings about the things of the world are concerned, but such indifference to things external does not prevent them, in law, from being free agents. In the present instance there was no duress, no incompetency, no want of mental power on the part of the donor. It seems to me that, so far as regards her rights, she had the absolute right to deal with her property as she chose. Passing, next, to the duties of the donee, it seems to me that, although this power of perfect disposition remains in the donor under circumstances like the present, it is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making

[1] 36 Ch. Div. 145.

the gift, was allowed full and free opportunity for counsel and advice outside,—the means of considering his or her worldly position, and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play. If this had been the gift of a chattel, therefore, the property then would have passed in law, and the gift of this stock may be treated upon a similar method of reasoning. Now, that being the rule, in the first place, was the plaintiff entitled to the benefit of it? She had vowed, in the most sacred and solemn way, absolute and implicit obedience to the will of the defendant, her superior, and she was bound altogether to neglect the advice of externs,—not to consult those outside the convent. Now, I offer no sort of criticism on institutions of this sort; no kind of criticism upon the action of those who enter them, or of those who administer them. In the abstract, I respect their motives, but it is obvious that it is exactly to this class of cases that the rule of equity which I have mentioned ought to be applied if it exists. It seems to me that the plaintiff, so long as she was fettered by this vow,—so long as she was under the dominant influence of this religious feeling,—was a person entitled to the protection of the rule. Now, was the defendant bound by this rule? I acquit her most entirely of all selfish feeling in the matter. I can see no sort of wrongful desire to appropriate to herself any worldly benefit from the gift; but, nevertheless, she was a person who benefited by it so far as the disposition of the property was concerned, although, no doubt, she meant to use it in conformity with the rules of the institution, and did so use it. I pause for one moment to say a word as to Mr. Justice Kekewich's view, which is not altogether consistent with the above. He seems to have thought that the question turned on the original intention of the donor at the time she entered the convent, and that what passed subsequently could be treated as if it were a mere mechanical performance of a complete mental intention originally formed. I entirely agree with the view presented to us by the appellant as to that part of Mr. Justice Kekewich's judgment. It seems to me that the case does not turn upon the fact that the standard of duty was originally created by the plaintiff herself, although her original intention is one of the circumstances, no doubt, which bears upon the case, and is not to be neglected. But it is not the crucial fact. We ought to look, it seems to me, at the time at which the gift was made, and to examine what was the condition of the donor who made it. For these reasons I think

that, without any interference with the freedom of persons to deal with their property as they please, we can hold but one opinion,—that in 1879 the plaintiff could have set this gift aside.

Then comes the question of the time which has elapsed since. What effect has time upon a right to the protection of this rule? The rule is an equity arising out of public policy. I do not think that the delay, in itself, is an absolute bar, though it is a fact to be considered in determining the inference of fact which appears to me to be the one that we must draw on one side or the other. I have described, to the best of my power, what to my mind the principle of the rule is. It is a principle arising out of public policy, and one which imposes a fetter upon the conscience of the recipient of the gift. When is that barrier removed from the conscience of the recipient of the gift? It seems to me that the common-sense answer ought to be, and I think the right answer is: As soon as the donor escapes from the religious influence which hampered her at the time,—as soon as she becomes free, and has determined to leave the gift where it is. Now, if she has so acted,—if her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief, that the gift is to lie where it has been laid,—then, by estoppel, it appears to me that the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel. Yet a long time has elapsed. Five years is a long time in the life of anybody, and it is a long time in the life of a person who has passed her life in seclusion, like the plaintiff. Every day and every hour during those five years she has had the opportunity of reflecting upon her past life, and upon what she has done. She has had that opportunity since she passed away from the influence of the defendant; and that she did pass away from it most completely is proved to demonstration by the fact that she entered a different religious community. Having belonged to the Church of England, she at once entered the Church of Rome. The influence, therefore, ceased completely. She was surrounded by persons perfectly competent to give her advice. She had her solicitor. She had her brother, a barrister himself, and she had the directors of the consciences of the community which she had entered. I draw unhesitatingly the inference, under the circumstances, that she did, in or shortly after 1879, consider this matter, and determine not to interfere with her previous disposition. Was she aware of her rights at the time she formed this resolution? In my view, I incline to think that she must have been, having regard to the character of the advisers who surrounded her, but I do not consider it to be essential to draw that inference; it is enough if she was

aware that she might have rights, and deliberately determined not to inquire what they were, or to act upon them. There, again, I unhesitatingly draw the inference that she was aware that she had rights, or might have them, and that she deliberately made up her mind not to enforce them. In drawing this inference of fact I do no discredit to the character of the plaintiff, which is above all reproach; but, on carefully considering her evidence, I do not feel that I can place reliance upon her memory, and, in my view, it would be wrong to draw the inference from her evidence that she did, in her own mind, never form any definite view about the property she left behind in the convent.

I need hardly say that I feel great embarrassment in having to give the casting voice in a matter of such great importance, when two, whose opinions and authority are far greater than my own, differ in the matter. In my view, this appeal ought to be dismissed on the ground that the time which has elapsed, though not a bar in itself,—though not accurately to be described as mere laches which disentitles the plaintiff to relief,—is nevertheless, coupled with the other facts of the case, a matter from which but one reasonable inference ought to be drawn by men of the world, namely, that the lady considered her position at the time, and elected and chose not to disturb the gift which she then at that moment felt, if she had the will, she had the power to disturb.

JAMES C. CARTER.

[James Coolidge Carter was born in Lancaster, Mass., October 14, 1827. He was educated at Harvard College, graduating from that institution with distinction in 1850. He studied law at the Harvard Law School, and in the office of William Kent, the son of Chancellor Kent, in New York City, and was admitted to the bar in 1853. He at once entered upon the practice of his profession in the city of New York. He was for some time associated with Charles O'Conor. By Gov. Tilden he was appointed a member of the committee to devise a form of municipal administration for the cities of New York state. In 1888 he was appointed by Gov. Hill a member of the constitutional commission. He has been president of the American Bar Association, and is a Doctor of Laws of Harvard. At the present time he is the senior member of the firm of Carter & Ledyard, New York.]

Mr. Carter is universally recognized as one of the ablest members of the present bar. As a jury advocate he is perhaps surpassed by Mr. Joseph H. Choate, and others may equal him in learning or in native ability; but in the combined qualities of sterling character, breadth of mind, and varied culture, he has had few superiors among American lawyers, past or present.

Mr. Carter's experience has been extensive. He has represented the municipality of New York in some of its most important litigation,—noticeably the proceeding known as the "Six Million Dollar Audit," to recover from William M. Tweed money fraudulently abstracted from the city treasury; the bank assessment and wharfage rights cases; and the controversy over the taxation of the surface and elevated railways. He was actively engaged in the long contest between the Sixth Avenue Elevated Railway and the Gilbert Elevated Railway, and that between the Metropolitan Elevated Railway and the Manhattan Elevated Railway Companies. He was also one of the counsel in the celebrated Jumel will case. For many years he has been one of the most prominent advocates at the bar of the United States supreme court. Among his ablest efforts in that court may be mentioned

the case of The Scotia,[1] involving important questions of liability for marine torts; the matter of Neagle, arising out of the attempted assassination of Mr. Justice Field; Counselman v. Hitchcock,[2] on the limits of compulsory examination of persons accused of violating the interstate commerce act; the series of cases involving the transcontinental railway land grants; the Louisiana Lottery litigation;[3] the Bate refrigerator case,[4] involving fundamental questions of patent law, and Hilton v. Guyot,[5] on the *status* of foreign judgments. Two of his late cases of general interest were the Income Tax cases,[6] and the Tilden will case.[6a] He made his most conspicuous public appearance as counsel for the United States before the international tribunal at Paris in 1893, charged with the settlement of the fur-seal controversy.

Mr. Carter has not been unmindful of the debt which a lawyer owes to his profession. He has taken an active interest in local, state, and national bar associations, before which he has made several notable addresses. His pamphlet on "The Proposed Codification of Our Common Law," written for the Bar Association of the City of New York, and his address before the Virginia State Bar Association on "The Province of the Written and Unwritten Laws," are philosophical arguments in opposition to codification. Although a vigorous opponent of codification, Mr. Carter's knowledge of the letter of the law is animated by a lofty conception of its spirit. In his address before the American Bar Association on "The Ideal and the Actual in the Law," he said:

"Justice itself, the true foundation, the ultimate aim, of all law, is, in its essence, an ideal conception. It is the animating principle of every rule, observance, and statute. . . . . Every step which has ever been made in human progress by conscious effort must have had its origin in some previous idea, and the problem of reform in the law, as in everything else, is to form just ideas, and contrive the methods by which they may be realized. The one idea which the lawyer must ever cherish and strive to hold clearly and firmly in his conceptions is that of justice. To say precisely what this is seems to transcend the power of human analysis. We attempt to describe it at one time and another by calling it what is right, or good, or fit, or convenient; but it is neither of these things alone,—perhaps because it is all of them together. It is the subtle essence which animates every rule deserving the name of law, but which we cannot separate from the actions in which it dwells.

"'Guest of million painted forms,
Which, in turn, its glory warms,'

—we find the chase after it to be endless, and guess that it is a divinity. But we do know that all reform and progress in the law consists in

[1] 14 Wall. 170.
[2] 142 U. S. 547.
[3] 143 U. S. 110.
[4] 157 U. S. 1.
[5] 159 U. S. 113.
[6] 157 U. S. 429.
[6a] 130 N. Y. 29.

lifting up the actual system which we administer into a more perfect harmony with the ideal conception."

Mr. Carter stands in the front rank of the bar because he is in every way thoroughly equipped for his work. He has emphatically a legal mind. He is master of the principles of the law, and skilled in their exposition and application, and his technical knowledge is informed by wide culture and scholarly tastes. His own characteristics were brought out in what he once said of a distinguished judge: The qualities which have given him a professional character so universally admired are not the possession, in a remarkable degree, of any single faculty, but the possession, in harmonious union, of a great variety of traits, some intellectual and others moral,—large natural gifts,—and the ambition to develop them; an early severe intellectual discipline and mastery of the principles of the law; an entire intellectual candor and perfect moral integrity; a just appreciation of the greatness and solemnity of his vocation, and the courage and resolution necessary to discharge it. Throughout his long and distinguished career, Mr. Carter has consistently maintained the dignity, honor, and independence of his order, and it would be impossible to find a better contemporary model of the professional mind and character.

ARGUMENT ON BEHALF OF THE UNITED STATES BEFORE THE TRIBUNAL OF ARBITRATION CONVENED AT PARIS, 1893, UNDER A TREATY BETWEEN GREAT BRITAIN AND THE UNITED STATES.

STATEMENT.

The tribunal of arbitration which convened at Paris in 1893 was charged by treaty with the determination of certain questions concerning the jurisdictional rights of the United States in the waters of Bering Sea. The immediate controversy arose out of the seizure and condemnation, in 1886, of three British vessels engaged in pelagic sealing, in violation of the laws of the United States.

Since the principal facts relating to seals and to seal life are discussed in the course of the following argument, it will suffice to state, by way of introduction, that the seals which make the Pribilof Islands their summer home roam the Pacific Ocean from October to May in search of food. In the early spring they start northward, and by the month of May are found in great numbers on the shores of the Pribilof Islands. They congregate on low patches of ground near the shore, in what are called "rookeries." In these rookeries they separate into families or harems. The first seals to arrive on the islands in the spring are the bulls, who come early in order to secure the best places on the rookeries, nearest the beach. When they first come ashore, they are stored with a thick layer of blubber, from which they derive their sustenance for three months; for, from his arrival, in May, until his departure, in the autumn, the bull seal does not feed. Soon after the "cow," as the female seal is termed, reaches the islands, she gives birth to an offspring, called a "pup." These pups, at an early age, congregate and live on the rookeries in crowded swarms. The younger males, known as "bachelors," do not live on the rookeries, but on what are called the "hauling grounds." It is from these hauling grounds that the bachelors, which, according to the methods of legitimate sealing, are the "killable" seals, are driven to the killing fields. After nursing her offspring for a short period, the cow returns to the sea for food. In a few days she comes to land again to feed her pup. It is at this time that the pelagic sealer makes his appearance, and begins the slaughter of seals in the open sea. The pelagic sealing season opens at the time that the cows are out in the sea in search of food. Consequently, the catch is made up almost entirely of females, whose death means the starvation of a corresponding number of pups. Furthermore, at least one-fourth of the seals killed or fatally wounded by pelagic sealers are not recovered. Pelagic sealing is therefore plainly destructive of the stock. It cannot be carried on without encroaching *pro tanto* upon the normal numbers of the herd, and, if prosecuted to any considerable extent, inevitably leads to extermination.

The negotiations leading to the arbitration may be briefly noticed. The seizures mentioned brought a prompt protest from the British government, the ground of objection being that they involved an attempt to enforce a municipal law of the United States upon the high seas. Mr. Bayard, then secretary of state, in reply to the protest, avoided discussion of the grounds mentioned by the British authorities, and suggested that the case was one of a peculiar property inter-

cst, warranting the exercise of an exceptional marine jurisdiction; that it would avoid a useless, and, perhaps, an irritating and abortive, discussion of the question of right, if the attention of nations could be called to the great fact that here was a useful race of animals, an important blessing to mankind, threatened with extermination by certain practices, and that, therefore, it should be the duty, as it was certainly the interest, of all nations to join pacifically in regulations designed to prevent the mischief. These pacific proposals of the American secretary were received in a friendly spirit by Lord Salisbury, the British secretary for foreign affairs, and an agreement was substantially concluded, which would have been carried into effect but for the objection interposed by Canada. So far as appears, no different scheme, no modified suggestion, designed to carry out the same object, was ever formulated by the government of Canada, which remained in a position of simple protest to any scheme of prohibition such as had been presented. In consequence of that objection there was a cessation, apparently final, of negotiations.

The second stage of the controversy opened with the energetic measures of the administration of President Harrison. Proclamations designed to prohibit pelagic sealing were issued, instructions were given to American cruisers to enforce the law, and British vessels were again seized. In consequence of the renewal of the protests of Great Britain, Mr. Blaine, then secretary of state, addressed a communication to Sir Julian Pauncefote, the British ambassador at Washington, under date of January 22, 1890, in which, for the first time, the grounds upon which the United States defended their action in making these seizures in Bering Sea were fully stated. In substance, these grounds were that the United States was carrying on an industry in connection with these seals, caring for them, taking the natural increase from the herd, and preserving the stock on the Pribilof Islands; that this was an industry advantageous not only to its lessees, but, what was of much more importance, advantageous to mankind; that the pursuit of pelagic sealing threatened that industry with destruction, and was essentially and absolutely wrong, and should not be permitted; that, therefore, the United States had a right to prevent it, when, added to its essentially destructive and illegitimate character, it had this injurious effect upon a special industry and right of the United States. In other words, Mr. Blaine took the position, first, that, from the point of view of international morality, pelagic sealing was wrong, and, second, that this circumstance furnished to the United States a ground upon which, in time of peace, it might arrest and condemn a vessel engaged in the practice. Lord Salisbury, in his reply, rather avoided discussion of the ground thus taken by the United States, and, in the course of subsequent negotiations, succeeded in drawing Mr. Blaine, to some extent, away from his original position, and into a controversy over the matter of Russian pretensions in Bering Sea,—the effect of the ukase of 1821, the treaties of 1824 and 1825, and the exact meaning of the phrase "Pacific Ocean," as used in those treaties.

Proposals for arbitration were now considered and carried forward. The suggestion of a joint commission to investigate the facts was reduced to distinct points, and the various agreements were at last consolidated in a treaty, which was concluded at Washington February 29, 1892, and promptly ratified by both powers. In accordance with the terms of this treaty, commissioners were appointed by both parties. They visited Bering Sea, and made investigations. When, however, upon the termination of their labors, the two sets of commissioners came together, they found themselves unable to agree, except upon one or two limited conclusions. They agreed that the numbers of the herd of seals which made its home on the Pribilof Islands were in the

course of diminution, that such diminution was increasing, and that it was in consequence of the hand of man. They were unable to go any further, and therefore the hopes of the two governments in being able to unite in a convention in respect to regulations, based upon an agreeing joint report of these commissioners, were disappointed, and it became necessary that the arbitrators should be called together.

In accordance with the terms of the treaty, the tribunal was constituted as follows: Mr. Justice Harlan and Senator Morgan, named by President Harrison; Lord Hannen and Sir John Thompson, named by Queen Victoria; Baron de Courcel, named by the President of the French Republic; Marquis Emilio Visconti Venosta, named by the King of Italy; and Mr. Gregers Gram, named by the King of Sweden and Norway. The precise questions to be determined by these seven arbitrators were specified in articles 6, 7, and 8 of the treaty. By article 6 it was provided:

"In deciding the matters submitted to the said arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to-wit:

"(1) What exclusive jurisdiction in the sea now known as the 'Bering's Sea,' and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"(2) How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"(3) Was the body of water now known as the 'Bering's Sea' included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering's Sea, were held and exclusively exercised by Russia after said treaty?

"(4) Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that treaty?

"(5) Has the United States any right, and, if so, what right, of protection or property in the fur seals frequenting the islands of the United States in Bering's Sea, when such seals are found outside the ordinary three-mile limit?"

By article 7 it was further agreed:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur seal in, or habitually resorting to, the Bering Sea, the arbitrators shall then determine what concurrent regulations, outside the jurisdictional limits of the respective governments, are necessary, and over what waters such regulations should extend. The high contracting parties furthermore agree to co-operate in securing the adhesion of other powers to such regulations."

Article 8 provided for the submission of questions of fact involved in claims for damages sustained by either party, leaving the question of liability of either government, upon the facts found, for further negotiation.

Accordingly, the parties proceeded to frame their cases and counter cases, and to exchange them; and at length, on February 23, 1893, the tribunal convened at Paris, and organized by electing Baron de Courcel president. The United States was represented by the following counsel: The Hon. E. J. Phelps, late minister to England, James C. Carter, Esq., of the New York bar, the Hon. Henry W. Blodgett, late judge

of the district court of the United States for the northern district of Illinois, and Frederick R. Coudert, Esq., of the New York bar. The counsel for Great Britain were Sir Charles Russell, Q. C., M. P., attorney general of England, Sir Richard Webster, Q. C., M. P., and Mr. Christopher Robinson, Q. C. The oral arguments on the merits of the controversy began on April 12th with the opening argument by Mr. Carter, covering the whole case on behalf of the United States. Mr. Coudert followed with an argument on the facts. The case of Great Britain was then argued by the three counsel representing that government, when the discussion was closed by Mr. Phelps' argument in reply. The oral arguments were concluded on July 8th. On August 15th the tribunal announced the award, as follows:

"We decide and determine as to the five points mentioned in article 6 as to which our award is to embrace a distinct decision upon each of them:

"As to the first of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine as follows:

"By the ukase of 1821, Russia claimed jurisdiction in the sea now known as the 'Bering Sea' to the extent of one hundred Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States, and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering Sea, or any exclusive rights in the seal fisheries therein, beyond the ordinary limit of territorial waters.

"As to the second of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Bering Sea, outside of ordinary territorial waters.

"As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the 'Bering Sea' was included in the phrase 'Pacific Ocean,' as used in the treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water now known as the 'Bering Sea' was included in the phrase 'Pacific Ocean,' as used in the said treaty.

"And as to so much of the said third point as requires us to decide what rights, if any, in the Bering Sea, were held and exclusively exercised by Russia after the said treaty of 1825, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that no exclusive rights of jurisdiction in Bering Sea, and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the treaty of 1825.

"As to the fourth of the said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the treaty between the United States and Russia of the 30th March, 1867, did pass unimpaired to the United States under the said treaty.

"As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit."

As this determination left the subject in such a position that the concurrence of Great Britain was necessary to the establishment of regulations for the proper protection and preservation of the fur seals, the majority of the arbitrators submitted a scheme of regulations. Under article 8 of the treaty, the arbitrators found certain facts as proposed by the agent of Great Britain, and agreed to by the agent for the United States.

Thus closed this most important discussion. At an early point in the preparation of their case, the counsel for the United States became aware that it would be difficult to sustain the claims which had been put forward by the United States, in the diplomatic correspondence, as to the exclusive jurisdiction exercised by Russia over the waters of Bering Sea previous to the cession of Alaska. Notwithstanding, therefore, the earnest effort of the counsel for the United States to support, as far as possible, the position assumed by the diplomatic correspondence of their government, the decision of the tribunal on the first four points of article 6 was not unexpected. The main reliance of the American case was upon the fifth point of article 6. The momentous significance of this issue was clearly pointed out by the president of the tribunal in his closing address:

"We have felt obliged to maintain intact the fundamental principles of that august law of nations which extends itself, like the vault of heaven, above all countries, and which borrows the laws of nature herself to protect the peoples of the earth, one against another, by inculcating in them the dictates of mutual good will. In the regulations which we were charged to draw up, . . . our work inaugurates a great innovation. Hitherto the nations were agreed to leave out of special legislation the vast domain of the seas, as in times of old, according to the poets, the earth itself was common to all men, who gathered its fruits at their will, without limitation or control. You know that, even to-day, dreamers believe it possible to bring back humanity to that golden age. The sea, however, like the earth, has become small for men, who, like the hero, Alexander, and no less ardent for labor than he was for glory, feel confined in a world too narrow. Our work is a first attempt at a sharing of the products of the ocean, which has hitherto been undivided, and at applying a rule to things which escaped every other law but that of the first occupant. If this attempt succeeds, it will doubtless be followed by numerous imitations, until the entire planet—until the waters, as well as the continents—will have become the subject of a careful partition. Then, perhaps, the conception of property may change among men."

The moral significance of the arbitration was fully sustained by the elevated tone of the proceedings. It was recognized that it was a victory for peace; an appeal to that law which, as Sir Charles Russell said, "has grown up in response to that cry of humanity heard through all time,—a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all ages, for peace on earth and good will amongst men." At the conclusion of Mr. Carter's argument the president of the tribunal said: "Mr. Carter, at the conclusion of this long and weighty argument, without presuming to express any opinion with reference to the merits of your case, I cannot refrain from ex-

pressing my acknowledgment of the lofty views which you have taken of the general principles involved in your subject, and which you have developed before us. You have spoken in a language well worthy of this high court of peace between nations. You have spoken for mankind."

Mr. Carter's argument occupied nine days of four hours each in delivery, and fills two hundred and eighty pages of the printed record. He began with a sketch of the subject-matter of the controversy, of the particular occasions out of which it grew, and the successive stages through which it had passed. As another question, somewhat preliminary to the main controversy, he then advanced some observations as to the law which should govern the tribunal in its deliberations. He then proceeded to present the case for the United States upon the two points specified in the treaty: (1) With reference to the rights gained by Russia over the waters of Bering Sea, and the rights derived by the United States from the cession of the Alaskan territory by Russia; (2) with reference to the property interest of the United States in the herd of seals which frequents the Pribilof Islands, and, irrespective of their interest in the herd, with respect to their property interest in the industry established by them on those islands. Having reached the conclusion that the United States had a property interest in the seals, or a property interest in the industry, he concluded this part of his argument with a discussion of the question as to what action the United States might take to protect themselves in the enjoyment of such rights. Finally, in view of the possibility of an adverse decision on the foregoing propositions, he closed the argument with a consideration of the regulations necessary for the preservation of the seals. The following selection from Mr. Carter's argument deals with the question of property rights, and is reproduced without material abridgment. The omitted portions, which are always indicated, relate almost entirely to interruptions by the court or counsel, and to the review or summary by which the thread of the argument was taken up from day to day. Whenever quotations from authorities have been omitted, reference has been made to them in the foot notes.

ARGUMENT.

Mr. President: It would be evidence of insensibility on my part if in opening the discussion upon the important questions with which we are to deal I should fail to express my sense of the novelty, the importance, and the dignity of the case, and of the high character of the tribunal which it is my privilege to address. You, Mr. President, in acknowledging the honor conferred upon you by your election as president, expressed in appropriate language those aspirations and hopes which are excited and gratified by so signal an attempt as this to remove all occasion for the employment of force between nations by the substitution of reason in the settlement of controversies. I beg to express my concurrence in those sentiments.

Nor should I omit a grateful recognition of the extreme kindness with which the agent and counsel on the part of the United States government have been received. Not only has this mag-

nificent building with all its appliances been freely offered for the deliberations of the tribunal itself, but every aid and assistance which we as counsel could desire have been freely extended to us. We recognize in this a fine and generous hospitality, worthy of France and her great capital,—the fair and beautiful capital of the world. . . . .

In the discussion, Mr. President, of the questions which the tribunal is to determine, it seems to me that it will be important in the first place that the arbitrators should have before them some sketch, as brief and concise as possible, of the subject-matter of the controversy, of the particular occasions out of which it grew, and the successive steps through which it has from time to time passed, until it has reached the stage at which we now find it. The learned arbitrators will, I think, thus be able to breathe the atmosphere, as it were, of the case; to approach the questions as the parties themselves approached them, and thus be able to better understand and appreciate their respective contentions. This, therefore, will be my apology, if apology were needed, for endeavoring to lay before you an outline as concise as I shall be able to make it, of the controversy from the beginning, before proceeding to discuss the particular questions which are to be submitted to you for decision.

The case has reference to the great fur-sealing interests which are centered in Bering Sea and in the waters which adjoin that sea. Those interests began to assume importance something like a century ago. During most of the eighteenth century, as all are aware, the efforts and ambitions of various European powers were directed towards the taking possession, the settlement, and the colonization of the temperate and tropical parts of the American continent. In those efforts, Russia seems to have taken a comparatively small part, if any part at all. Her enterprise and ambition were attracted to these northern seas,—seas which border upon the coast which in part she already possessed,—the Siberian coast of Bering Sea. From that coast explorations were made by enterprising navigators belonging to that nation, until the whole of Bering Sea was discovered and the coasts on all its sides explored. The Aleutian Islands, forming its southern boundary, were discovered and explored, and a part of what is called the northwest coast of the American continent, south of the Alaskan peninsula, and reaching south as far as the 54th or 50th degree of north latitude, was also visited by Russian navigators, and establishments were formed upon it in certain places. The great object of Russia in these enterprises and explorations

was to reap for herself the sole profit and the sole benefit which could be derived from these remote and ice-bound regions; namely, that of the fur-bearing animals which inhabited them and which were gathered by the native inhabitants. To obtain for herself the benefit of those animals and of the trade with the natives who were engaged in gathering them constituted the main object of the original enterprises prosecuted by Russian navigators. They had at a very early period discovered what we call the "Commander Islands" on the western side of the Bering Sea, which were then, as they are now, one of the principal resorts and breeding places of the fur seals. They were carrying on a very large, or a considerable, industry in connection with those animals upon those islands.

Prior to the year 1787 one of their navigators, Capt. Pribilof, had observed very numerous bodies of fur seals making their way northward through the passes of the Aleutian chain. Whither they were going he knew not; but, from his knowledge of the habits of the seals in the region of the Commander Islands, he could not but suppose that there was, somewhere, north of the Aleutian chain in the Bering Sea, another great breeding place and resort for these animals. He, therefore, expended much labor in endeavoring to discover these resorts, and in the year 1786, I think it was, on one of his voyages, he suddenly found himself in the presence of that tremendous roar—a roar almost like that of Niagara, it is said—which proceeds from the countless multitudes of those animals upon the islands. He knew then that the object for which he was seeking had been attained; and, waiting until the fog had lifted, he discovered before him the islands to which his name was afterwards given. That was in 1786. Immediately following that discovery many Russians, sometimes individually and sometimes associated in companies, resorted to those islands, which were uninhabited, and made large captures of seals from them. The mode of taking them was by an indiscriminate slaughter of males and females; and of course it was not long before the disastrous effects of that method became apparent. They were greatly reduced in numbers, and at one or more times seemed to be upon the point almost of commercial extermination. By degrees those engaged in this pursuit learned what the laws of nature were in respect to the preservation of such a race of animals. They learned that they were highly polygamous in their nature, and that a certain draft could be taken from the superfluous males without sensibly depreciating the enormous numbers of the herd. Learning those facts, they

gradually established an industry upon the islands, removed thither a considerable number of the population of one or more of the Aleutian Islands and kept them permanently there for the purpose of guarding the seals upon the islands, and taking at the time suitable for that purpose such a number of superfluous males as the knowledge they had acquired taught them could be safely taken.

Finally the system which they established grew step by step more regular and precise; and some time, I think I may say, in the neighborhood of 1845, they had adopted a regular system which absolutely forbade the slaughter of females and confined the taking to young males under certain ages and to a certain annual number. Under that reasonable system, conforming to natural laws, the existence of the herd was perpetuated and its numbers even largely increased; so that at the time when it passed into the possession of the United States I think I may say it was true that the numbers of the herd were then equal to, if not greater than, ever had been known since the islands were first discovered. A similar system had been pursued by the Russians with similar effect upon the Commander Islands, possessions of their own on the western side of the Bering Sea.

The advantage of these results, so beneficial to Russia, so beneficial to mankind, may be more easily perceived by comparing them with the results which have flowed from the discovery of other homes of the fur seal in other seas. It is well known that south of the equator and near the southern extremity of the South American continent there were other islands, Masafuera, Juan Fernandez, the Falkland Islands and other places, where there were seals in almost equal multitudes. They were on uninhabited islands. They were in places where no protection could be extended against the capture of them. They were in places where no system of regulations limiting drafts which might be made upon them could be established; and the consequence was that in a few short years they were practically exterminated from every one of such haunts, and have remained ever since practically, in a commercial point of view, exterminated, except in some few places over which the authority of some power has been exercised, and where regulations have been adopted more or less resembling those adopted upon the Pribilof Islands, and by which means the race has, to a certain extent. although comparatively small, been preserved.

That was the condition of things when these islands passed into the possession in the United States under the treaty between

that government and Russia of 1867. At first, upon the acquisition by the United States government, its authority was not immediately established, and, consequently, this herd of seals was exposed to the indiscriminate ravages of individuals who might be tempted thither by their hope of gaining a profit; and the result was that in the first year something like 240,000 seals were taken, and although some discrimination was attempted and an effort was made to confine the taking as far as possible to males only, yet those efforts were not in every respect successful. That great draft thus irregularly and indiscriminately made upon them had undoubtedly a very unfavorable effect; but the following year the United States succeeded in establishing its authority and at once readopted the system which had been up to that time pursued by Russia and which had been followed by such advantageous results.

In addition to that, and for the purpose of further insuring the preservation of the herd, the United States government resorted to national legislation. Laws were passed, the first of them as early as the year 1870, designed to protect the seal and other fur-bearing animals in Bering Sea, and the other possessions recently acquired from Russia. At a later period this statute—with others that had been subsequently passed—was revised, I think in the year 1873, when a general revision of the statutes of the United States was made. They were revised and made more stringent. It was made a criminal offense to kill any female seal; and the taking of any seals at all except in pursuance of the authority of the United States and under such regulations as it might adopt was made a criminal offense. Any vessel engaged in the taking of female seals "in the waters of Alaska," according to the phrase used in the statute, was made liable to seizure and confiscation; and in this way it was hoped and expected that the fur seals would be preserved in the future as completely as they had been in the past, and that this herd would continue to be still as productive as before, and if possible made more productive. That system thus initiated by the United States in the year 1870 produced the same result as had followed the regulations established by Russia. The United States government was enabled even to take a larger draft than Russia had prior to that time made upon the herd. Russia had limited herself at an early period to the taking of somewhere between 30,000 and 40,000 seals annually; not solely perhaps for the reason that no more could be safely taken from the herd, but also for the reason, as I gather from the evidence, that at that time the demand for seals was not so great as to

justify the putting of a larger number of skins upon the market. At a later period of the occupation by Russia, her drafts were increased. At the time when the occupation was transferred to the United States, I think they amounted to somewhere between 50,000 and 70,000 annually. The United States, as I say, took 100,000 from the beginning, and continued to make those annual drafts of 100,000 down to the year 1890. That is a period of something like 19 years. The taking of this number of 100,000 did not, at first, appear to lead to any diminution in the numbers of the herd; and it was only in the year 1890, or a few years prior to that time, that a diminution in the numbers of the herd was first observed. This diminution was at that time attributed to causes of which I shall presently say something.

Such was the industry established by the United States. It was a very beneficial industry—beneficial, in the first instance, to herself. She had adopted the practice of leasing these islands upon long terms—twenty years—to a private corporation; and those leases contained an obligation to pay a large annual sum in the shape of a revenue tax, and a gross sum of some $60,000 as rent. In addition to that, the lessees were required by the terms of the lease to pay to the United States government a certain sum upon every seal captured by them, which of course resulted in the enjoyment by the United States of a still larger revenue. It was beneficial to the lessees, for it is to be supposed, and such is the fact, that they were enabled to make a profit, notwithstanding the large sums they were compelled to pay to the United States government, upon the sealskins secured by them. But while it was profitable to the United States and profitable to the lessees, I may say—and this is what at all times I wish to impress upon this tribunal—it was still more important and beneficial to the world at large. The fur seal is one of the bounties of Providence, bestowed, as all the bounties of Providence are, upon mankind in general, not for the benefit of this particular nation, or that particular nation, but for the benefit of all; and all the benefit, of course, which mankind can get from that blessing is to secure the annual taking, use, and enjoyment of the increase of the animal. That is all they can obtain from it. If they seek to obtain more, it is an abuse of the blessing, involving destruction, necessary destruction, and they soon deprive themselves of the benefit altogether.

This, therefore, was the benefit to mankind which was made possible, and which was enjoyed by mankind by this particular mode of dealing with the fur seals which had been established and

carried on upon the Pribilof Islands. Mankind received the benefit of the entire annual increase, and at the same time the stock was perpetually preserved and kept from any sort of peril; and in that benefit the citizens of the United States enjoyed, of course, no advantage over the rest of the world. The whole product of the herd was contributed at once to commerce, and through the instrumentality of commerce was carried all over the world to those who desired the sealskins, wherever they might be on the face of the globe, and whatever nation they might inhabit, and they got them upon the same terms upon which the citizens of the United States enjoyed them. This contribution of the annual product to the purposes of commerce, to be dealt with as commerce deals with one of its subjects, of course amounted substantially to putting it up at auction, and it was awarded to the highest bidder, wherever he might dwell. The effect of this was, also, as we shall have occasion to see in the course of this discussion, to build up and maintain an important industry in Great Britain. It was there that the sealskins were manufactured and prepared for sale in the market, and thousands of people were engaged in that industry; many more, indeed, than were engaged in the industry of gathering the seals upon the Pribilof Islands. That particular benefit was secured to Great Britain in consequence of this industry.

In the few years preceding 1890, the government of the United States was made aware of a peril to the industry which had thus been established, and which it was in the enjoyment of—a peril to the preservation of this race of seals—a peril, not proceeding from what may be called natural causes, such as the killing by whales and other animals which prey upon the seals in the water, but a peril proceeding from the hand of man. It was found that the practice of pelagic sealing, which had for many years, and indeed from the earliest knowledge of these regions, been carried on to a very limited extent by the Indians who inhabited the coasts for the purpose of obtaining food for themselves and skins for their clothing, and which had made a limited draft upon the herds in that way—it was found that this practice was beginning to be extended so as to be carried on by whites, and in large vessels capable of proceeding long distances from the shore, of encountering the roughest weather, and of carrying boats and boatmen and hunters, armed with every appliance for taking and slaughtering the seals upon their passage through the seas. That practice began, I think, in the year 1876, but at first its extent was small. The vessels were fitted out mostly from a port in

British Columbia, and confined their enterprise to the North Pacific Ocean, not entering Bering Sea at all; and their drafts upon the seals, even in the North Pacific Ocean, were at first extremely small, only a few thousands each year. But the business was found to be a profitable one, and, of course, as its profit was perceived, more and more were tempted to engage in it, and a larger and larger investment of capital was made in it. More and more vessels prosecuted the fishery in the North Pacific Ocean, and in 1883, for the first time, a vessel ventured to enter Bering Sea.

The learned arbitrators will perceive that up to this time, during the whole of the Russian, and the whole of the American, occupation of these islands, there had been no such thing as pelagic sealing, except in the insignificant way already mentioned by the Indians. Those two nations had enjoyed the full benefit of this property, the full benefit of these herds of seals, in as complete a degree as if they had been recognized as the sole proprietors of them, and as if a title in them, not only while they were ashore and upon the breeding islands, but while they were absent upon their migrations, had been recognized in them during that whole period; or as if there had been some regulation among the nations absolutely prohibiting all pelagic sealing. Up to the period when pelagic sealing began to be extended, those advantages were exclusively enjoyed by Russia and the United States; and at first, as I have said, this pelagic sealing did not extend into Bering Sea, but was carried on in the North Pacific Ocean, and south and east of the Aleutian chain.

Why Bering Sea was thus carefully abstained from, it may perhaps be difficult at the present time altogether to say. It may be for the reason that it was farther off, more difficult to reach. It may be for the reason that the pelagic sealers did not at first suppose that they had a right to enter Bering Sea and take the seals there, for it was well known that during the whole of the Russian occupation, Russia did assert for herself an exclusive right to all the products of that region of the globe; and it was also well known to all governments, and to these pelagic sealers, that the United States had, when they succeeded to the sovereignty over these islands, asserted a similar right, and made the practice of pelagic sealing, in Bering Sea at least—perhaps farther, but in Bering Sea, at least—a criminal offense under their law. But from whatever cause, it was not until the year 1883 that any pelagic sealers ventured into Bering Sea. During that year a single vessel did enter there, took a large catch, was very successful, and was not called to any account; and this successful experiment was, of course, followed during the succeeding years by

many repetitions of the same enterprise. The extent to which pelagic sealing was thus carried on in Bering Sea, its probable consequences upon the herds which made their homes upon the Pribilof Islands, was not at first appreciated either by the United States, or by the lessees of the islands. There was no means by which they could easily find out how many vessels made such excursions, and they did not at first seem to suppose that their interests were particularly threatened by it. Consequently, for the first two or three years no notice seems to have been taken of these enterprises by the government of the United States, although it had laws against them. But in 1886 this practice of taking seals at sea became so largely extended that it excited apprehensions for the safety of the herd; and it was perhaps thought at that time that there was already observable in the condition of the herd some damaging, destructive consequence of that pursuit of them by sea.

The attention of the United States having been called to the practice, that government determined to prevent it, and the first method to which it resorted was an attempt to enforce the laws upon its statute book, which prohibited the practice and subjected all vessels engaged in it to seizure and confiscation. Instructions were accordingly given to the cruisers of the United States to suppress the practice, and to enforce those laws. The result was that in the year 1886 three British vessels and some American vessels were taken while engaged in the pursuit illegally under the laws of the United States. They were carried in and condemned. These seizures were in 1886. They were followed by protest on the part of Great Britain, and that protest was made by a note addressed by Sir Lionel Sackville West to Mr. Bayard.

[After giving a detailed account of the diplomatic negotiations which led to the treaty, Mr. Carter addressed some observations to the tribunal upon another question, somewhat preliminary to the main controversy, namely, what law should govern it in its deliberations. The substance of his argument on this point was that the rule which should govern must be some rule of right, and therefore a moral rule founded upon moral considerations; not necessarily the moral rule which governs the jurisprudence of England and the United States, even if they should happen to coincide, but that moral rule which is generally recognized by the civilized nations of the world; that general standard of justice—that international standard of justice—which is universally recognized, and which is only another name for international law. This international law is, for the most part, derived from, and is determined by, what is called the "law of nature." It is called the "law of nature" partly because it is a code not derived from legislation,—not derived from any human institution at all,—but founded in the nature of man, and in the environment in which he is placed. This is, indeed, the foundation, not only of international law, but it is the foundation of all law,—municipal as well. All the municipal codes are but attempts on the part of particular societies of men to draw precepts and rules from

the law of nature, and re-enact them for the guidance of its individual members. Mr. Carter fortified his statement by quoting from the following authorities: Sir James Mackintosh, The Law of Nature and Nations; Lord Bacon, De Augmentis Scientarium; Blackstone, Commentaries, bk. 1, p. 41; Sir Robert Phillimore, International Law (3d Ed.) vol. 1, § 60; Story, Conflict of Laws, c. 2, § 35; La Jeune Eugenie, 2 Mason, 449; Pomeroy, Lectures on International Law, c. 1, § 29; Kent, Commentaries, pt. 1, pp. 2-4; Hantefeville, Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime, vol. 1, p. 20; Ferguson, Manual of International Law, vol. 1, c. 3, § 21. At the same time, men are not absolutely agreed as to all the particulars of this body of moral rules. There are differences in the moral convictions of different men, and there are differences in the moral convictions of the same people and the same nation at different periods of time. Law is a progressive system, advancing step by step with human progress, and it is constantly aspiring, as it were, to reach a more complete harmony with theoretical moral rules. We cannot, therefore, in applying international law, apply those moral rules which we ourselves may deduce from our study of moral precepts. Others may not agree with us; but still there is a great body of simple moral rules to which all men and all nations may safely be presumed to agree, and to that extent we may enforce them. What we have to enforce, then, are the rules so far as they are actually recognized. When we come to look for the evidence which is to enable us to ascertain what the law of nations is in any particular case, we must resort, in the first place, to the actual practice and usages of nations, for the practice and usages of nations must evidence the points upon which they are agreed; and where the practice and usages of nations speak, we need look no further. The actual practice and usages of nations are to be learned from history, in the modes in which the relations and intercourse of nations with one another are conducted, in the acts commonly done by them without objection from other nations, in the treaties which they make with each other,—although these should be considered with caution, because they are sometimes exacted by a more powerful from a weaker nation, and do not always contain the elements of justice,—in the diplomatic correspondence between nations, and in the judgments of those courts which profess to administer the laws of nations, such as prize tribunals. When these sources fail to discover the rule by which we are to be bound, we must look to the great source from which all law flows; that is to say, natural law, the dictates of right reason, or what is best termed, perhaps, the "law of nature." One of the most useful sources for ascertaining the law of nature is municipal law. It is so because municipal law is founded upon the law of nature, and has been cultivated in every civilized state by learned experts, either jurisconsults or judges. We know what rules are prescribed by the law of nature from the results of their inquiries; and therefore, when any question of right arises between nations similar to those questions of right which arise in municipal jurisprudence, the municipal jurisprudence of the several states of the world, so far, at least, as it is concurring, is a prime source of knowledge. And, finally, the authority of the jurists, from Grotius, the great master of the science, down through succeeding writers to the present day, constitutes a source of information always respected by judicial tribunals.

Having thus disposed of these preliminary considerations, Mr. Carter proceeded to discuss the questions at issue. After presenting the case of the United States upon the first four points specified in article 5 of the treaty, having reference to the rights gained by Russia over the waters of Bering Sea, and the rights derived by the United States from the cession of the territory by Russia, he proceeded to the fifth

and fundamental question: "Has the United States any right, and, if so, what right, of protection or property in the fur seals frequenting the islands of the United States outside the ordinary three-mile limit?" Mr. Carter's argument on this question follows.]

The United States assert a property interest connected with these seals in two forms, which, although they approach each other quite closely, and to a very considerable extent depend upon the same evidence and the same considerations, are yet so far distinct and separate as to deserve a separate treatment. Those two assertions of a property interest are these:

First, that the United States have a property interest in the herd of seals which frequents the Pribilof Islands, and which has its home and its breeding place there; and,

Second, that, irrespective of any property interest which they may have in that herd, and even if it were held that they had no property interest in the herd at all, they do yet have a property interest in the industry which has been established by them on those islands, of caring for and maintaining that herd and selecting from it the annual increase for the purposes of commerce; in other words, in the husbandry which is carried on by the United States on those islands.

We assert those two forms of property interest; but my discussion will be directed in the first place to an endeavor to support the assertion of property in its first form, that is to say, in the herd of seals itself. Now, questions of property are extremely common in municipal jurisprudence, as we know; but they are for the most part such as relate to the transfer and devolution of property, and do not touch the point whether any particular thing is the subject of property at all. In this discussion, what we have to consider chiefly is whether these fur seals are, while they are on the high seas, the subject of property at all. The assertion on the part of Great Britain I assume to be—indeed, they so inform us in their case, counter case, and argument—that the fur seals are wild animals—animals *ferae naturae*—and that they are therefore not the subject of property at all; that they are *res communes*, as the civilians sometimes say, or, as they at other times say, *res nullius*,—things common to all men, or things which belong to no one man in particular. Their contention is that while on the high seas, at least, being wild animals, they are not the subjects of property at all. The United States take the contrary position, and assert that such are the nature and habits of these animals, and such is the relation which they have to these animals on the breeding places, that they are at all times, not only

while they are upon the Pribilof Islands, but also while upon the seas, the property of the United States, and property which they are entitled to defend and protect, just as much as they would one of their ships when navigating the seas.

My learned friend, Sir Charles Russell, made an observation when he was speaking upon one of the preliminary motions which have been made before the tribunal to the effect, as I understood him, that property could not be established outside of municipal law, or that anything, in order to be held as property, must have its characteristics as property "rooted in municipal law." I do not know that I am correctly stating his observation; but it is as near as I remember. Well, that appears to be an intimation that we are obliged, in order to determine whether the seals are the subject of property, to recur to municipal law. But it seems to me that if we were limited to municipal law in our inquiries, we might find the greatest difficulty. The municipal law of what country? If we speak of municipal law, we must go to the municipal law of some particular country. Will you settle it according to the municipal law of the United States? That would be a short settlement of it; for in every form and manner in which a nation can declare its policy by the adoption of municipal laws, the United States have declared seals to be property. My learned friend, I apprehend, would not agree that the question of property in seals should be determined by municipal law, if we are to determine it by the municipal law of the United States; and I do not know of any law of Great Britain which is to the effect that seals are not property. According to my view, the law by which this question, as any question which arises between nations, is to be determined is not municipal law, but international law. To be sure, any question in reference to property which has a *situs* in any particular country, like land, must be determined by the municipal law of the country where it is situated. That is undoubtedly true, if it has a *situs;* but I suppose that my learned friends would not agree with me that seals have a *situs* in the territory of the United States at all times. If they have no admitted *situs* in the United States, the question as to whether they have a *situs* there cannot be determined by any appeal to municipal law alone, but must be determined by an appeal to international law.

In all this I do not mean that municipal law in relation to property is of no importance in this discussion. On the contrary, it is of the very highest importance that we should seek it, and know just what it is; and it is of consequence in this discussion because it is evidence of what the law of nature is. Property

never was created by municipal law at all; that is to say, by positive legislative enactment. Societies have not come together and created property. Property is a creation anterior to human society. Human society was created in order to defend it and support it. It is one of its main objects. It rests upon the law of nature; and the whole jurisprudence respecting property as it stands in the municipal law of the civilized states of the world is a body of unwritten law for the most part. It is derived from the law of nature. Even in those nations where the civil law is crystallized into the form of codes, there are no laws, no enactments, which declare what shall and what shall not be the subjects of property. At least, I apprehend so. Property is assumed as already existing. It stands upon the law of nature. The questions, however, what shall be property and what shall not be property, and what shall be the rules respecting the protection which is given to it—all these questions have been discussed for a thousand years and more, in municipal law, by learned tribunals, in many different forms; and, consequently, the whole law of nature, so far as it affects the subject of property, will be found to be developed in a high degree in municipal law. Therefore, and to that extent, I concur with my learned friend, that it is highly important to investigate the municipal law upon the subject of property; and wherever it is found universally concurring upon a given point, it may be taken as the absolute voice of the law of nature, and therefore of international law. . . . .

The rival contentions of the two parties upon the question of property I should perhaps briefly repeat. That of Great Britain is that the fur seals of Alaska are *res communes*, not the subjects of property, but open to the appropriation of all mankind; and that because they are wild animals. The position taken on the part of Great Britain is in substance that no wild animals are the subjects of property, and that seals, being wild, are not the subjects of property. The United States, on the other hand, insist that whether an animal is the subject of property or not depends upon its nature and habits; that the two terms "wild" and "tame" are descriptive of nature and habits to a certain extent; but, in order to determine whether any particular animal, whether wild or tame, is the subject of property, we must go into a closer inquiry into its nature and habits; and if it be found that an animal, although commonly designated as "wild," has such nature and such habits as enable man to deal with it substantially as he deals with domestic animals, to establish a species of husbandry in respect to it, then, in respect to the question of property, the same

determination must be made as in the case of domestic animals, and the animal must be declared to be the subject of property. The point, therefore, upon which we first insist is that in considering whether an animal, whether he is designated as "wild" or "tame," is the subject of property or not, we must institute a careful inquiry into its nature and habits and the results of that inquiry will determine the question. In this particular I think I am supported by the best authorities. Chancellor Kent, whose authority I am glad to say is recognized by my learned friends on the other side, for they refer to this very passage which I am about to read to the tribunal, says:

"Animals *ferae naturae*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner. The difficulty of ascertaining with precision the application of the law arises from the want of some certain determinate standard or rule by which to determine when an animal is *ferae, vel domitae naturae*. If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then a subject clearly of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long only as the tameness and dominion remain. It is a theory of some naturalists that all animals were originally wild, and that such as are domestic owe all their docility and all their degeneracy to the hand of man. This seems to have been the opinion of Count Buffon, and he says that the dog, the sheep, and the camel have degenerated from the strength, spirit, and beauty of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power. Grotius, on the other hand, says that savage animals owe all their untamed ferocity, not to their own natures, but to the violence of man; but the common law has wisely avoided all perplexing questions and refinements of this kind, and has adopted the test laid down by Puffendorf, by referring the question whether the animal be wild or tame to our knowledge of his habits, derived from fact and experience."

In addition to that I will refer the tribunal to two other authorities; and those are decisions of British tribunals. The first is the case of Davies v. Powell, reported in Willes' reports, page 46. In that case the question was whether deer caught in an inclosure and having certain characteristics and used for certain purposes were distrainable for rent. I may say to those not familiar with the special doctrines of the common law of England that there was a process by which a landlord might recover his rent by going upon the premises of his tenant and taking prop-

erty on the premises; but it was confined to personal property. So the question whether deer were distrainable for rent or not involved the question whether they were personal property in that particular instance. The court in that case took notice of the proofs which were offered in respect to the nature of those particular deer, their habits, and the purposes for which they were kept; and, finding that they were kept, not for pleasure, but for profit, that they were carefully preserved, and reared for the beneficial purpose of taking venison from them and furnishing a supply of it to the market, determined that they were personal property and therefore distrainable for rent. The ground was that although deer belong to the class of what are commonly designated "wild" animals, nevertheless when they are taken and kept by man for the purposes for which it was proved in that case they were kept, when they were treated by man in the way in which they were proved to have been treated in that case, although wild animals, yet, being used for the same intents and purposes as domestic animals are used, they should be classed as personal property just as domestic animals are so classed.

Substantially the same decision was made in reference to the same animals in the case of Morgan v. The Earl of Abergavenny, which is reported in the 8th Common Bench reports. There the question was, upon the death of the owner of a park, whether deer contained in the park went to the heir of the owner, or to his executor; in other words, it was the question whether they were attached to the soil, and formed a part of the realty, and therefore were not distinctly personal property, or whether they went to the executor, as being distinctly personal property. In that case a great deal of evidence was gone into upon the trial for the purpose of showing the habits of those particular deer, and how they were kept, treated, and used in that park. The whole question of property in live animals was very much gone into and discussed. It was shown by evidence that there was a large number of deer there; that they were cared for; that at times they were fed; that they were in the habit of resorting to particular places in the park; and that from time to time selections were made from the number for slaughter and the victims were sold in the market for venison. All that was proved. There was a verdict in that case for the plaintiff which was based upon the charge of the judge to the jury that they might take this evidence into consideration in determining the question whether the deer were personal property or not; and that verdict for the plaintiff established that they were the property of the executor; that they went to the executor

instead of to the heir, and were therefore personal property. On a review by the whole court of that verdict it was decided that this evidence was all proper and relevant to the question; that it was all appropriate, and relevant to the point whether the animals were property or not; and that it did satisfactorily determine, or was a sufficient ground upon which the jury might find, that the animals were personal property.

These authorities to which I have thus alluded are quite sufficient to establish the only point for which I at present cite them, namely, that in order to determine whether an animal commonly designated as "wild" is the subject of property or not we must institute an inquiry into the nature and habits of the animal,—that the general terms "wild" and "tame" are not sufficiently significant for the purpose; that a close inquiry into its nature and habits with the view of seeing whether such nature and habits and the uses to which the animal is put are the same as in the case of ordinary domestic animals. If so, they are property the same as domestic animals are.

Now, then, what is the case with the fur seal? So far as respects municipal law—for I am now examining the question wholly as it is affected by the doctrines of municipal law—it must be admitted that the case of the fur seal is a new one. It has nowhere been specifically decided; but cases as to whether animals more or less resembling the seal may or may not be the subject of property have arisen and been decided in municipal law. There have been a great many cases decided in respect to animals as to which it was doubtful whether they belong to the category of wild or tame—that is if you treat the terms "wild" and "tame" as a juridical classification—or whether their nature and habits were such as to make them properly the subjects of property. Take the case of wild bees, for instance. There is an animal which lies quite near the boundary line which separates wild from tame animals; and the inquiry was made at an early period in municipal law—a period so early that tradition does not inform us of the first instance when the case arose—whether that animal was the subject of property or not. The same question has arisen in reference to wild geese, and swans. Those animals belong to the classes commonly designated as "wild"; but they lie near the boundary. They may sometimes be "reclaimed," as it is called. The question has arisen and been determined whether, when reclaimed, they are, notwithstanding the wildness of their nature, the subject of property. The same question has also arisen in reference to deer and pigeons and other animals.

Now, therefore, we are to examine those instances in which the municipal law has dealt with the cases of animals commonly designated as "wild," but which still have, in their nature and habits, some characteristics which assimilate them to tame ones, and see what conclusions municipal law arrives at. In general these conclusions are all exceedingly well stated by the most familiar of authorities in the English law and one of the most elegant and precise,—I mean Blackstone. I refer to his treatment of the question.[1]

[1] Mr. Carter read the following passage from Blackstone's Commentaries (book 2, p. 391):

"Other animals that are not of a tame and domestic nature are either not the objects of property at all, or else fall under our other division, namely, that of qualified, limited, or special property, which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist; in discussing which subject I shall, in the first place, show how this species of property may subsist in such animals as are *ferae naturae*, or of a wild nature, and then how it may subsist in any other things when under particular circumstances.

"First, then, a man may be invested with a qualified, but not an absolute, property in all creatures that are *ferae naturae*, either *per industriam, propter impotentiam*, or *propter privilegium*. A qualified property may subsist in animals *ferae naturae, per industriam hominis*, by a man's reclaiming and making them tame by art, industry, and education, or by so confining them within his own immediate power that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom, as horses, swine, and other cattle, which, if originally left to themselves, would have chosen to rove up and down, seeking their food at large, and are only made domestic by use and familiarity, and are, therefore, say they, called *mansueta, quasi manui assueta*. But however well this notion may be founded, abstractly considered, our law apprehends the most obvious distinction to be between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *dominatae naturae*, and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man,—such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dove house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning,—a maxim which is borrowed from the civil law, *"Revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint."* The law therefore extends this possession further than the mere manual occupation; for my tame hawk, that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi*. So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *ferae naturae;* but, when hived and reclaimed, a man may have a qualified property in them by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same words with the civil law, speaks Bracton. Occupation—that is, hiving or including them—gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them than I have in the birds which make their nests thereon; and therefore, if another hives them, he shall be their proprietor; but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight and have power to pursue them, and in these circumstances no one else is entitled to take them. But it hath been also said that with us the only ownership in bees is *ratione soli*, and the charter of the forest, which allows every freeman to be entitled to the honey found

The term which describes this species of property in wild animals—property *per industriam*—indicates the foundation upon which it rests. It is property created by the art and industry and labor of man. It points out that this labor, art, and industry would not be called into activity, and would not produce its useful and beneficial results, unless it had the reward of property in the product of it, and that therefore the law assigns to such animals the benefits and the protection of property for the purpose of encouraging the industry which produces them. That is the language of Blackstone. It is taken almost bodily from an earlier writer in the law of England—I mean Bracton. And it was by him undoubtedly derived from the civil law in which all or nearly all of these doctrines were established at a very early period indeed.[2]

I call the attention of the tribunal to a decision by the supreme court of the state of New York, one of the courts enjoying the highest authority in the United States, and especially enjoying the highest authority at the time this decision was made. It is the case of Amory v. Flyn, and is reported in 10th Johnson's reports, 102. In that case one Amory brought an action of "trover," as it is called in the English law, against Flyn before a justice of the peace for two geese. That is to say he brought an action for damages for a trespass done to him in taking geese which he alleged to be his property. This was a case where geese wild by nature had been reclaimed by man to such an extent that

within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

"In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible,—a property that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again, and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine; and an action will lie against any man that detains them from me or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals; but not so if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner, though it is such an invasion of property as may amount to a civil injury, and he redressed by a civil action. Yet to steal a reclaimed hawk is felony both by common law and statute, which seems to be a relic of the tyranny of our ancient sportsmen. And, among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime, and subjected the offender to a fine, especially if it belonged to the king's household, and was the *custos horrei regii*, for which there was a very peculiar forfeiture. And thus much of qualified property in wild animals reclaimed *per industriam*."

[2] Mr. Carter read further extracts from writers upon municipal law, as follows: Mackenzie, Studies in Roman Law (6th Ed.) p. 174; Gaius, Elements of Roman Law, trans. by Poste (2d Ed.) § 68; Savigny, on Possession in the Civil Law, compiled by Kelleher; Puffendorf, Law of Nature and Nations, lib. 3, §§ 14, 15; Bowyer, Modern Civil Law, p. 72 et seq.

they were wonted to a particular spot, and yet were in the habit of straying away from it; and having strayed off upon a certain occasion another man took them and handed them over to still another, and that other refused to give them up on demand. The question was whether the plaintiff had a property in them. It appears to have been held in the court below that he had no property; but the supreme court reversed this judgment, saying:

"The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained, they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no color for the inference that the geese had regained their natural liberty as wild fowl, and that the property in them had ceased. The defendant did not consider them in that light, for he held them in consequence of the lien which he supposed he had acquired by the pledge. This claim was not well founded, for he showed no right in the persons who pawned them for the liquor so to pawn them, and he took them at his peril. Here was clearly an invasion of private right."

I call attention to a later decision by the same supreme court of New York which is reported in 15 Wendell's reports. The propositions which are prefixed to the report in the case as being those which are decided by it are these:

"The owner of bees which have been reclaimed may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees, and takes the honey. Where bees take up their abode in a tree, they belong to the owner of the soil, if they are unreclaimed; but if they have been reclaimed, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of trespass."

The facts of that case appear to be these: One Kilts had brought an action against Goff in a justice's court, an action in the nature of an action of trespass, for taking and destroying a swarm of bees and the honey made by them. The plaintiff in his suit before the justice recovered a judgment, and that was affirmed on appeal by the court of common pleas of the county where the suit was brought. The defendant then carried the case, by what is called a writ of error, to the principal court of the state of New York at that time—not the highest appellate court, but yet a high appellate court. Mr. Justice Nelson, very celebrated in the United States as one of the most distinguished judges of his time, delivered the opinion of the court. He says:

"Animals *ferae naturae*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases.

During the existence of the qualified property, it is under the protection of the law, the same as any other property, and every invasion of it is redressed in the same manner. Bees are *ferae naturae;* but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation—that is hiving or inclosing them—gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant,—in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. 2 Bl. Comm. 393; 2 Kent, Comm. 394."

A case decided by the court of common bench in Great Britain, and to which I have already referred, that of Morgan and another against the Earl of Abergavenny, is printed almost *in extenso,* beginning on page 119 of our printed argument. It is too long to be read; but the whole of it has been printed in order that the tribunal may observe the circumstances under which that case arose, and thus ascertain the precise point which was decided. But I will call the attention of the arbitrators to the paragraph near the bottom of page 125. I have said that in that case, the question being whether deer were property or not, evidence was given tending to show their nature and habits and the purposes to which they were applied. The court says:

"In considering whether the evidence warranted the verdict upon the issue whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of Davies v. Powell are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times from that which anciently prevailed, as pointed out by Lord Chief Justice Willes, cannot be overlooked. It is truly stated that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks or in modern inclosures so called, the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And, in this case, the evidence before adverted to was that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed, with no difference of circumstance than what attached, as before stated, to animals kept for profit and food. As to some being wild, and some tame, as it is said, individual animals, no doubt, differed, as individuals in almost every race of animals are found, under any circumstances, to differ, in the degree of tameness that belongs to them. Of deer kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness. Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and in this case, the court think that the facts were such as were proper to be submitted to the jury, and, as it was a

question of fact for the jury, the court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence, and do not feel authorized to disturb the verdict."[8]

From all those authorities drawn from the municipal law of different nations, and confirmed by the ancient Roman law, these propositions are exceedingly clear: That, in respect to wild animals, if by the art and industry of man they may be made to return to a particular place to such an extent that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in the law likened to domestic animals and are made property just as much as if they were domestic animals; and that property continues, not only while they are in the actual custody of the owner of that particular place, but when they are away from his custody, and no matter how far away, so long as they have an intention of returning to it. The property in them ceases only when this intention ceases; and the cessation of that intention is to be inferred, and can only be inferred, from the cessation of the habit of returning. When they have abandoned that habit and have returned to their ancient wildness, they cease to be property and may be taken by any person without an invasion of property right. I may state another proposition fully substantiated by these authorities. It is scarcely another proposition indeed. It is almost the same; but the language is somewhat different, and I may be justified therefore in stating it in a different form: That wherever man is capable of establishing a husbandry in respect to an animal commonly designated as "wild," such a husbandry as is established in reference to domestic animals, so that he can take the increase of the animal and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as "wild," is the subject of property and remains the property of that person as long as the animal is in the habit of voluntarily subjecting itself to the custody and control of that person. Those are doctrines of the municipal law everywhere agreed to. There is no dissent that I am aware of in reference to them; and being the universal doctrines of municipal law they may be taken, I apprehend, in the absence of evidence to the contrary, as being the doctrine of international law. . . . .

There are certain observations which I shall venture to make respecting the law so far as I conceive myself to have established

[8] Mr. Carter also read part of Lord Chief Justice Willes' opinion in Davies v. Powell.

it, so far as I have stated it. I mean, in the first place, that it is uniform in all countries and that it may therefore be taken to be international. Second, that it is not founded upon legislation, but upon the principles of the law of nature; declared by the decisions of judicial tribunals as founded upon the law of nature; that that doctrine is made to turn upon the existence of an *animus revertendi;* but I may say that this *animus revertendi* must be of itself wholly unimportant. It is indeed a mere fiction anyway. What do we know about the *animus* of one of these wild animals? All we know of the intention of the wild animal is that exhibited by its habits; and indeed the law says that the intention is to be inferred only from its habits. As long as the habit of returning exists, the intention exists, and when the habit of returning ceases, then the intention to return is held to cease. Of what consequence, in itself considered, is this habit of returning, unless it has some social uses and purposes? Why should it be said that a wild animal is the subject of property if he has the habit of returning to the same place, and is not the subject of property if he has not that habit, and ceases to be the subject of property when once he has lost that habit? Why should we say that? There must be some reason for that. Can it be anything else than this: that the existence of the habit enables man to treat the animal in the same way as he treats domestic animals and to make the animal subserve the same useful public and social purposes which domestic animals subserve? Plainly that must be the reason for it.

Take the case of wild swans and geese. They are generally held not to be the subject of property. The law, however, takes notice of the exception where those animals have been so far reclaimed that they will continually and habitually resort to a particular place. There the law says they are property; and so long as they have that intention nobody save the owner can lay hands on them, wherever they are, whether in that particular place or not. Why does the law say that? Because there is a public utility which may be subserved by that. If you allow the possessor of the place to which they resort to have the right of property in them he will devote himself to the business of reclaiming those animals; and consequently society will be supplied with those animals, whereas otherwise it will not. Property is the price which society must pay for the benefit which is thus gained from those animals. They are the product of the art, and the industry, and the labor which is expended upon them;

and being that product, the benefit of it is properly awarded to the person who exhibits that art and industry. . . . .

Take deer. Why is it that as long as deer are kept for the purposes of sport the law will not regard them as property? Because as long as they are kept for such purposes they subserve no useful social purpose; but the moment a man undertakes to reclaim deer, to take care of them, to feed them, to treat them as he does domestic animals and to supply the markets of society with venison from them, he is awarded the rights of property in them. That is because he is doing a useful public service; because it is a public service that would not be performed unless it was paid for, and because it can be paid for only by the award of the right of property to the one who thus expends his labor.

Take the case of bees. Nothing can be more wild in its nature than a bee. That nature is not in the slightest degree changed when a hive is put inside of a box on the premises of a private individual; and that is all it is necessary to do. But what is the consequence of that? It is that a supply of honey may be taken from that animal, and a much greater supply than if you were driven to hunt through the woods to find hives. The consequence is that when that hive swarms, the swarm can be taken and put in another box and thus the number of swarms be multiplied indefinitely and the product of honey indefinitely increased. That is a great service to society. It furnishes it with an article of great utility which otherwise it would not have, or would not have in anything like the same degree of abundance; and therefore the art and industry, simple though it be, which is expended upon those particular bees, is rewarded by assigning to the possessor of the place where the hives are a right of property in the bees. When a hive swarms he can pursue it away from his own premises upon the premises of another man. It remains his property; and, as appears from the decision which I read to the learned arbitrators, if the bees go onto the premises of another person who will not permit the owner of the swarm to go there and take them, they still remain his property; and if they are appropriated by the owner of the land where they take refuge, he is guilty of a trespass. All of those privileges are awarded to the owner of bees as a reward and encouragement to him for protecting the bees. It is an appeal to the great motive of self-interest so powerful in human nature, and which is the foundation of a great part of all the blessings of society. It is calling into activity a care, industry, labor, and diligence which otherwise would not be exercised. I might add instances of

other animals; but the learned arbitrators will perceive what the rule is which has been established, the different animals to which it is applied, and the obvious grounds upon which the doctrine is based.

Now let me see whether those doctrines apply to the case of the fur seal or not. It is only necessary to allude to a few of the characteristics of the seal. In the first place he comes upon the Pribilof Islands voluntarily, and there submits himself absolutely to the control, custody, and disposition of the owner of that place. He is defenseless against man. Still he voluntarily comes there and submits himself to the power of man. In the next place, after migrating from that place he returns to it in obedience to the most imperious of all animal instincts. Nothing can stop him unless he is driven away. Although his absence from that spot is very prolonged and the distances over which he travels very great, that instinct to return is never for a moment absent. It is superior—very far superior—to any instinct that a deer may have to go to a particular place, or the wild swans, or geese, or pigeons, or animals of that sort. Seals will go through all obstacles and all dangers and certainly return to that spot. What is the social utility to subserve which this habit offers an opportunity? Man is enabled by means of it to practice a species of husbandry. He can take the annual increase of that animal without in any respect diminishing its stock. In other words, he can deal with the animal precisely as he does with domestic animals and precisely as if the animal were domestic. Therefore we find here all the elements, all the foundations, upon which, as Blackstone calls it, property *per industriam* stands. You may ask what care, what industry man practices in reference to the seal. He does not take him and teach him to return; he does not laboriously wont him to this particular spot; the animal is inclined to go there anyway; but you will perceive upon a very little reflection the degree of care and industry which is exercised. In the first place the United States, or Russia before the United States, carried thither to these islands several hundred people, and instituted a guard over those islands and preserved the seals and protected them against all other dangers except that of being slaughtered in the manner which I have described,—a very great labor and a great deal of expense. The seals are freely invited to come to those islands. No obstacle is thrown in their way. Their annual return is cherished in every way in which it can be cherished. Very great expense is undergone in extending this sort of protection over them. In the next place, and what is particu-

larly important, the United States, and Russia before the United States, practiced a self-denial, an abstinence, in reference to that animal. They did not club him the moment he landed and apply him to their purposes indiscriminately, male and female. They did not take one in this way. They carefully avoided it. They practiced a self-denial. And that self-denial, and the care and industry in other respects which I have mentioned, lead those seals to come to those islands year after year, where they thus submit themselves to human power so as to enable the whole benefit of the animal to be applied to the uses of man. Let me ask what would have been the case if this care and industry had not been applied? Suppose the art and industry of the United States and its self-denial had not been exerted, what would have been the result? We have only to look to the fate of the seal in other quarters of the globe where no such care was exerted, to learn what would have been the result. They would have been exterminated a hundred years ago. That herd would not exist there now, and could not exist. Every marauder who thought he could make a profitable voyage by descending upon the islands in the the hope of getting seals would have gone there and killed indiscriminately all that he could find. The herd would have been exterminated just as such herds have been exterminated in every other quarter of the globe where this care has not been exercised. Therefore, I respectfully submit to you that the present existence of that herd on those islands—the life of every one of those seals, be they a thousand, or be they five millions—is the direct product of the care, industry, labor, and expense of the United States; and they would not be there except for that care and industry.

What is contended for upon the part of Great Britain here is the right to prey upon a herd of animals which are in every sense the creation of the labor and industry of the United States and which would not exist—would not exist for the world, would not exist even for those who thus prey upon them—except for the exercise of that care and industry. There is no contradicting that position at all. It is not susceptible of denial, or of doubt. It is absolutely certain that this herd would not exist a day on the Pribilof Islands, nor would it have existed on any day within the last half century, but for the exercise of the care, labor, industry, and self-denial by Russia, and her successor, the United States. If the exercise of those qualities in the case of the wild swan, of deer, of bees, and of the other animals to which I have alluded are sufficient grounds and reasons why an award of property

should be made to those who exhibit them, why should it not be made in this case? Therefore I say that upon the plain doctrine of the municipal law, the position of the United States, that these seals are the subject of property, and that they belong to the United States, not only while they are on the islands, but at all times during their migrations, near or remote, is fully established.

I might properly leave the argument here. The propositions in respect to property which I have shown to be true in reference to other animals, wild in their nature but reclaimed by man, are true in respect to seals. There are indeed differences between seals and the other animals; but the differences are wholly immaterial to the question in dispute. They do not affect it at all. The right of property is awarded in those instances for social reasons and in consequence of great social benefits; and these social reasons and social benefits are as strong—I may say much stronger —in the case of the seals than they are in the case of any other animals to which allusion has been made as being subjects of property after they are reclaimed. It may be said that in the case of the other animals, like wild geese, and swans and deer, that the disposition to return has been created by man. Suppose it was created by man in those instances, and not created by man in the case of the seals. Would that make any difference? No. The public and social benefits which result from an award of property are the same in the one case as in the other. But it is not true, this suggestion that the instinct is created in the case of the other animals. The instinct to return is natural in all the cases alike. Man only acts upon it; and he acts upon it in the one case just as he acts upon it in the other. If there was not a natural instinct to return in the case of wild geese and swans, they could not be made to return. It is their native qualities, their natural instincts, which are acted upon by the art and industry of man and which produce the useful result; and they are acted upon in the case of the seals just as much. Of course it is true that the wanderings of the seals from the place to which they thus resort are much wider and more protracted than in the case of the other animals; but has it ever been suggested in the case of the other animals that the question whether an award of property could be made would depend upon the extent of their wanderings? Not at all. No matter how widely they may stray, no matter how long they may be absent, so long as you can say that the *animus revertendi* remains, so long the property exists and will be protected. In respect to seals, we may say, with a certainty and absoluteness which cannot be declared with refer-

ence to other animals, that the *animus revertendi* does always exist. It may be said—indeed, is said, as I observe, in the argument of my learned friends on the other side—that the seals do not return to the same particular spot. It is said that a seal may go one year to the Island of St. George and in another year he may go to the Island of St. Paul. Of what consequence is that? . . . . The only important thing about it is that the animal should return to the human owner; that he should return to the custody of the owner who has exhibited the care and diligence which enables him to put that return to advantage. All these islands are the property of one proprietor, and all the benefits which can possibly arise from the return of an animal to a particular place, and a submission of himself to the power of man, can be reaped in the case of the seals.

It is suggested that we are not certain that the seals that come this year are the same seals that were there last year, and it is suggested that there is an intermingling between the two herds on the two sides of the Pacific Ocean; that seals which frequent the Commander Islands, belonging to Russia, are found mingled with the herds which go to the Pribilof Islands. That is all conjecture. There is not an item of evidence tending to show that any such commingling as that occurs in point of fact. It is against the teachings of natural history. It is against everything which we know in reference to the habits of this particular herd. All parties were agreed, until it became of some importance to suggest some failure of identification, that this particular herd that visits the Pribilof Islands confines itself to the western coast of America. It goes nowhere else. These are its sole places of resort for the purposes of breeding; and it is proved with a certainty which any court of justice would act upon anywhere that any seal found upon the western coast of America belongs to that particular herd and makes those islands his home. . . . .

I have said that these doctrines are clear upon the settled rules of municipal law; and for reasons which we find plainly apparent in the doctrines of municipal law. But I am not disposed to leave the question there, because the argument can be strengthened. I have said nothing about the original principles and rules upon which the institution itself of property stands. The institution of property is anterior to municipal law, or anterior, at least, to any considerable degree of development of that law. It is assumed to exist by municipal law; and it is only in these comparatively rare instances, exceptional instances, such as swans and bees, pigeons

and deer, that the question of the foundation of the institution of property has been inquired into by those who administer the municipal law. There are those instances; but what if we should inquire into the foundations of property generally, and see what the reasons are which support it? Why is it that the institution of property exists at all? Why is it that one man is permitted to own one hundred thousand acres, if you please, of the earth's surface, and another man have not where to lay his head? Why is it that society permits one man to hold, and defends him in holding, storehouses, whole magazines of provisions, while another is starving for hunger? Those things cannot be arbitrary. Such an institution cannot be the result of chance, cannot rest upon any arbitrary reasons. It must stand upon great social grounds; and therefore it is very pertinent to inquire what those social grounds are.

I therefore invite this tribunal to accompany me in a somewhat larger inquiry, very pertinent to the matter which is now before them,—an inquiry as broad as the social interest of all nations, which this tribunal is supposed to represent.

THE PRESIDENT: You want to take us into a discussion of socialist theories or principles?

MR. CARTER: I do not object to discussing socialist theories, provided they are pertinent, and I can reduce them into some brief compass. The president's question reminds me of an observation of one of his countrymen, called illustrious by his friends, and, I suppose, denounced as notorious by his enemies. It was the Frenchman Prudhon, who said that property is robbery; and he was right. Property is robbery, unless you can defend it on some great social grounds, and support it upon the basis of great social benefits. If you can show that it is necessary to society, necessary to order, necessary to civilization, and necessary to progress, then you can defend it. Otherwise, it is robbery.

What is property? It is sometimes said to be the right to the exclusive enjoyment of a thing; but that rather indicates the jural right which belongs to it and is attached to it, and not the thing itself. What is it? I think it is well expressed by one or two writers to whom I will call attention. It is very hard to define what property is. We can feel it; it is hard to define it.

Savigny says:

"Property, according to its true nature, is a widening of individual power. It is, as far as tangible things are concerned, an extension of the individual to some part of the material world, so that it is affected by his personality."

And the philosopher Locke expresses the same idea. He says:

"The fruit or venison which nourishes the wild Indian . . . . must be his, and so his, i. e., a part of him, that another can no longer have any right to it," etc.[3a]

A German writer of great distinction, Ihering, gives substantially the same definition of it:

"In making the object my own I stamped it with the mark of my own person; whoever attacks it attacks me; the blow struck it strikes me, for I am present in it. Property is but the periphery of my person extended to things."[3b]

That is a very happy definition of what property really is. It is a part of the person, and whoever touches the property of a person touches him. Whoever touches the property of a nation touches the nation itself.

That is a description of the thing itself. Now, what is the right on which it is founded? In going into this inquiry as to what the right of property is founded upon, I am not going to deal with any abstract question; nor am I going to deal with questions that have not been considered as within the province of jurists. On the contrary, I am entering on a question which has been, from the first, considered peculiarly the province of jurists, and especially of jurists dealing with the law of nature and the law of nations. The great writers upon that law, beginning with Grotius, have considered that no ethical system could be complete, and, consequently, that no system of the law of nature and nations could be complete, which did not deal with the institution of property and the foundations upon which it rested. And in what I am going to say, I shall do little more than recall views which have been before stated and developed by very many different writers. Possibly I may carry them a little further in the development; but for the most part I shall only repeat what has been said before.

These writers, in endeavoring to ascertain the foundations of the institution of property, take first into consideration its universal prevalence everywhere all over the globe, and in every stage of human history, and then recognize in this the truth that it is and must be founded upon the facts of man's nature, and the circumstances, the environment, in which he is placed. They tell us that man is by nature a social animal, and must live in society, and that society is not possible unless we can have order and peace. Wherever there is anything desirable to men, wherever there is an object of human desire, of which the supply is limited

[3a] Civil Government, c. 5, § 25.
[3b] Ihering, quoted by George B. Newcomb, Pol. Science Quarterly, vol. 1, p. 604.

—where there is not enough for all—there will necessarily be struggle and contention for the possession of it; and if there were nothing to prevent it, those who had the most power would engross the most valuable things of the world. There would be constant warfare for the possession of desirable things where there was not enough for all, unless there were some rule and some means by which that warfare should be prevented. Therefore, property at once becomes a necessity, in order that there may exist peace and order in human society.

We may say, therefore, that the foundation of property, its first and original foundation, was in necessity, the necessity of peace and order; and that necessity requires that property be carried to this extent: that every object of desire, the supply of which is limited, must be owned by somebody. When you have that state of things, you have peace, and until that state of things is established, you cannot have peace. Therefore we find that everywhere where men are formed into human societies, a determinate owner is assigned to every object of human desire, the supply of which is limited. Those views are well expressed in the early part of Blackstone's Commentaries on the Law of England. He has a very elegant chapter, to which I would refer the particular attention of the members of the tribunal. He says:

"Again, there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance, and which yet would frequently be found without a proprietor had not the wisdom of the law provided a remedy to obviate this inconvenience, Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands. Such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of "game." With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the sovereign of the state, or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner."[4]

And Lord Chancellor Chelmsford made use of the same doctrine in rendering the decision of the house of lords in the case, very familiar to my friends on the other side, doubtless, of Blades v. Higgs. That was a case where a trespasser entered the grounds of another where he had no right, and killed some game there;

[4] Mr. Carter also referred to Maine, Ancient Law, c. 8, p. 249.

and the question was, to whom the game belonged, whether to the trespasser, or to the owner of the property. The judgment of Lord Chancellor Chelmsford proceeded along this line. He says, everything that is capable of ownership must be owned by somebody, and therefore in this case this dead game must be owned either by the man who killed it, the trespasser, or by the man upon whose ground it was killed. He says it cannot be the property of the trespasser, for a man cannot be permitted to work out for himself an advantage by the commission of a wrong; and it must therefore be the property of the owner of the soil. That was the conclusion of the court—quite contrary to what the rule of the civil law would be in the same case; but I cite it for the purpose of showing that this doctrine upon which I am insisting, that the necessities of society require, and always have required, that everything should have a determinate owner, is one which is everywhere received, and even so far received as to be made the foundation of judicial decision. . . . .

And therefore the institution of property is coeval with the existence of human society upon the earth. That institution stands upon the immutable basis of necessity; and, to employ the language of Blackstone, I may say that "necessity begat property." Necessity requires that everything capable of being property must be assigned to some legal and determinate owner. If that is done peace is secured; if that is not done, there is strife and warfare in society, and society can no longer exist. But what is capable of being property? All things are not thus capable; and we must, therefore, clearly understand the requisites which enable anything to be the subject of property. Now, there are three things necessary in order that property may subsist in anything: First, the thing, in order to be a subject of property, must be an object of human desire; that is to say, it must have a recognized utility. Property cannot exist in noxious animals, such as reptiles, or in weeds. A thing that is not an object of human desire cannot be property. Nobody wants such things, and what nobody wants nobody will seek to appropriate to himself. In the second place, the thing must be limited in supply; there must not be enough for all. It must be exhaustible. Therefore, there cannot be any property in the air, in the sunlight, in running water, or things of that sort. They exist to an infinite extent, and there is abundance to satisfy the wants of everyone, and there can be no contention respecting the ownership of such things. Then, thirdly, the thing must be susceptible of exclusive appropriation. Take animals called "game," for instance. There is no question as to

their utility. There is not enough for all; yet they cannot be made the subjects of exclusive appropriation; no man can take them and hold them. If one should attempt to do it to-day, they would escape to-morrow, and he could not recapture or identify the fugitives. The three fundamental conditions of property are, therefore, first, that the subject of it should be useful; second, that it should be limited in supply; and, third, that it should be capable of exclusive appropriation. These are deductions of reason from the admitted facts of man's nature, and from the circumstances in which he is placed; but they will be found at once confirmed upon appeal to experience. We cannot now find, we could not find in any stage of civilized human society, anything embracing these three conditions—utility, exhaustibility, and capacity of exclusive appropriation—which is not regarded as the determinate property of some individual or corporation.

Now this is true not only of property as between individuals, but also of property as between nations; for the same necessity of peace and order exists in the larger society of nations as in the smaller municipal societies of the world. The larger society of nations cannot exist in comfort unless there is established the means of putting an end to strife and contention. If there is no rule to settle disputes, nations would be always at war; and consequently we find that, in respect to such things as are not susceptible of ownership by individuals, if they are objects of desire, if the supply is limited, and if they are capable of exclusive appropriation, they must be owned by some nation. Now that principle in respect to nations finds its apt illustration in the case of newly-discovered countries. When the New World was revealed to the Old, there were vast tracts of the earth's surface which became the object of contending ambitions, and there would have been wide-spread war among the different nations had there not been some rule by which international strife could be appeased, a rule which ordained that everything must be owned by somebody. It is there that we find the efficacy of the title of first discovery. The rule was early established that the nation that first discovered any new region should be regarded as having a fixed and perfect title to it. Why should that be? Why should the mere circumstance that the citizen of one nation had coasted along the shore of a hitherto unknown region give his country as a nation the power of enjoying the benefits of the discovery? Because the nations felt the necessity of some rule which would prevent strife among them; and therefore the least circumstance giving a superior moral right to one over another was

recognized, and new territory was awarded to the one who first discovered it.

THE PRESIDENT: Where did you find that rule? Did the mere fact of discovery confer a title? That is not the law as it stands now. The conference which met in Berlin two years ago held that discovery would not create title without occupation.

MR. CARTER: I think that doctrine does not vary from the one I am endeavoring to state. Of course, if a nation has discovered a new region and has abandoned all intention of occupying it, it should not be regarded as the owner of it, and such abandonment is evidenced by the fact that the nation does not follow up discovery by occupation. The failure, after a sufficient lapse of time, to occupy the tract would be considered as a relinquishment of the right to occupy.

THE PRESIDENT: The practical consequences are the same.

MR. CARTER: Yes. I fully agree to the apparent modification suggested by the learned president. Authority for the view I have just taken will be found frequently stated by the writers on the law of nature and the law of nations. It is very clearly put by Chief Justice Marshall of the supreme court of the United States, in the noted case—in America, at least—of Johnson v. McIntosh.[5]

Property in newly-discovered lands is founded, therefore, upon the right of discovery, which gives the title, although a failure to occupy may be evidence of abandonment. There is another circumstance that I may mention as having a tendency to support the line of argument which I am following. It will be remembered that at this period, when the riches of the New World were discovered and there was danger of so much strife, one of the popes made a grant to Spain of all undiscovered regions of the globe west of the 100th meridian of longitude. Well, we should perhaps not recognize such a title in these days; but it will be remembered that at that time the authority of the papacy was more highly held than now—

THE PRESIDENT: It was more universal.

MR. CARTER: Yes, more universal. And who will say that when the object is to find a rule to prevent war, the acquisition of a title like that would be insignificant? No, it was respected by a great many, and it was not so absolutely unfounded and preposterous as some at the present day may think it; it had a weight and importance at that time which we cannot fully appreciate now. These things go to show that the institution of property was to

[5] Quoting from that case, as reported in 8 Wheaton, at page 572.

prevent strife, and they prove that we must find an owner for everything.

But, so far as the prevention of strife is concerned, it is not necessary that private, individual property should exist. The institution of property is necessary, but there are two forms of that institution. One is community property, and the other private, individual property; and the single necessity of the prevention of warfare and strife would be satisfied by the institution of community property. And, accordingly, we find that in the earlier periods of society, under rude social conditions, private individual property did not exist, but the community, the tribe, the *gens,* owned all the property, and there was substantially no individual property.

Whence, then, have we derived that other form of property called "private, individual property"? It does not proceed upon the ground of the necessity for the prevention of strife and warfare; it comes from another circumstance to which I will now call the attention of the tribunal. That circumstance is the necessity of civilization, and the irresistible tendency towards it, coming from the fact that man has a desire to better his condition, to enjoy more and more the good things of life. He has a desire to establish a family and to increase the number of those dependent upon him, and to these ends he is ambitious for more and more property, and it is upon those tendencies that the civilization of the earth is founded. Civilization brings along with it several distinguishing features. In the first place, there comes a desire for fixed habitations, instead of a wandering life. Then there follows a great increase in the population of the earth. In the next place there comes the division of employments and the exchange of products, which is called "commerce"; and, lastly, the introduction and use of money. All these elements are features of civilization; they make their appearance simultaneously, and gradually, and by degrees, they change the face of the earth; and they are, as I shall submit to you, not the foundation of the institution of property itself, but of that form of it which is called "private, individual property." And the principal one of these features which constitutes the foundation of private property and makes it necessary is the increase of the population of the earth; and it is to this fact that I wish to ask your attention. Under barbaric conditions men live upon the spontaneous fruits of the earth and upon such animals as they can obtain by hunting. They cultivate nothing; the earth affords them support, but it is a support sufficient for but very few, and there can be only a sparse population under these

conditions. But as civilization advances increasing numbers make their appearance upon the earth, and these increasing numbers must be fed. The necessity of feeding them requires the cultivation of the earth and the turning to account of all the bounties of nature and making them sufficiently productive to supply the increasing wants of the increasing population. Labor therefore becomes at once necessary. And how are you going to induce men to labor? Society cannot compel them to it; that is not practicable. The way in which they are induced to labor is to promise them the fruits of their labor; it is an appeal to the imperious and everywhere present motive of self-interest. No man will cultivate fields, none will sow, if another be permitted to reap the produce. No man will undertake to tame the animals of the earth and increase their numbers if the increase can be taken from him by any one who will. Labor cannot be brought into activity, men cannot be induced to exert their natural powers, unless you promise and secure to them the product of their labor; and it is in these necessities that the institution of private property begins; it is the necessity of supplying the wants of the increasing numbers which civilization brings along with it which has established that form of property known as "private, individual property." It is now that the land comes to be cultivated; and society says to its members: "If you cultivate this land you shall have the product of the fields." Society says again: "Here are the various races of animals. If you will domesticate them, you shall have the increasing numbers for yourself." Society says also, in reference to all articles of manufacture: "If you will make these weapons, those implements, that furniture, they shall be yours." Society everywhere says to its members: "The products of your art and industry and labor shall belong to you." And therefore we have, with the increasing numbers which civilization brings with it, the change from community property into private, individual property.

Now I have said all I intend to say for the purpose of showing how property, whether in the form of community property, or private, individual property, has its origin; and I now wish to say something as to the extent of the dominion over things which is implied by the term "property." And, first, it is not an absolute dominion. No man and no nation has, under the law of nature, or under the moral law, or in any view consistent with the moral order of the world, an absolute property in anything. It is at all times coupled with what may be called a trust for the benefit of mankind. There is no absolute right in any man to anything on

the face of the earth. The earth and all its bounties were originally the gifts of Almighty God to mankind in general; not to this nation, not to that nation, but to all men equally and alike; and that title, that beneficial title, belongs to all men without exception. Nor does it wholly disappear with the establishment of individual property. The custody of the thing is indeed given to individuals, or to particular nations; but it is at all times accompanied with a trust for the benefit of mankind, for whom it was originally designed and for whom nature still designs it. Well, now, how is that trust worked out? How shall men all over the earth be enabled to enjoy this beneficial interest which nature originally intended them to have in all the productions of the earth? It is through the instrumentality of commerce, which is another result of civilization. It is by means of the exchange of products between different regions of the earth, and between different peoples, that all are enabled to enjoy this beneficial interest in the things of the earth which was originally designed by Providence. They could not indeed have these products except through the agency of individual property, or national property and the instrumentality of commerce. Take these seals for instance. They were intended and created for the benefit of mankind—for mankind in Europe, as well as for the people living in the vicinity of the islands where they have their home. But how were they used before commerce existed? They were turned to account only by the few hundreds, or thousands, of Indians who lived along that coast, and no other people were benefited, or could be benefited, by them, for there were no means of getting them. But when commerce is introduced, the sealskins, through the instrumentality of commerce, make their way all over the world, and eventually come into the possession of the very persons who want them, wherever those persons dwell. In that way the general benefit of all mankind is fully and effectively worked out, although the custody and possession of the thing is given to some particular nation, or to some particular men.

And how perfectly this operates will be seen when we consider that, originally, the seals, even to the people capable of gathering them and taking their skins—I mean the tribes of Indians—were of no utility except for supplying their immediate wants; and a few hundreds or a few thousands were sufficient for this purpose. The rest were not utilized, because there were no means by which the benefits to be derived from these animals could be carried to the other parts of the world to be enjoyed by distant peoples. But when commerce was instituted, then the inhabitants of Europe who

wished to possess a sealskin could furnish some of his own products to those who gathered the seals and thereby obtain some of the skins. In other words, the giving of these seals to commerce, or the product of them to commerce, is tantamount to putting them up at auction, and the man who lives in Europe can thus have them on the same terms as the man in the United States. And therefore there is a supply to all mankind, that is, to all who want them. And this truth will be further illustrated when we inquire who would be the losers if this commerce did not exist. For instance, if the seals were destroyed, who would lose? You may say that the loss would fall upon those who gathered them; but that would be a temporary loss, for the persons so engaged could direct their energies to other forms of industry. So, also, of the persons engaged in the manufacture of sealskins in Great Britain. A temporary loss might fall upon them; but there are plenty of other kinds of employment, and the loss would be only a temporary one. But when you come to the person who wants the sealskin for his own use, his loss is irreparable and cannot be supplied.

Now I have said that the title, whether of nations or of men, to particular things is not absolute, but coupled with a trust for the benefit of mankind. So far as any man or any nation has more of a particular thing than is necessary for his, or its, own purposes, there is an obligation to let others share in the enjoyment of it,—the thing is held upon trust. Of course I do not mean a trust enforceable in an ordinary judicial tribunal, but a moral trust, and one which is, in a manner, enforceable. And we shall see that the law of nature perfectly recognizes that trust; for commerce is by the law of nature obligatory. No nation has a right, without sufficient cause, to withdraw itself from commercial communication with the rest of the world, and say to the other peoples that it will not afford to them a share of its own blessings and benefits.[6]

Let me suppose an article like India rubber, which has become a supreme necessity to the human race all over the world. It is produced in very few places. It is possible that the nation which has dominion over those places might seek to exclude it from the commerce of the world. It might go so far as to attempt to destroy the plantations which produce the tree from which the gum is extracted. Would such an attempt give any right to any other nation? Most certainly it would. It would give a right to other nations to interfere and take possession, if necessary, of the re-

[6] Mr. Carter read from the following authorities: Hautefeville, Rights and Duties of Neutral Nations in Time of War, vol. 1, p. 256; Vattel (7th Am. Ed.) bk. 2, c. 11, p. 143; Felice, International Commerce, p. 293; Levi, International Law (2d Ed.) vol. 1, Preface, pp. xxxix, xl.

gions in which that article so important, so necessary to mankind, was alone grown, in order that they might supply themselves; and the ground of such action would be that the nation which had possession of this product refused to perform its trust by sharing that blessing.

THE PRESIDENT: Do you mean a legal right?

MR. CARTER: I mean a perfect legal right in international law. Let me carry that a little further, if there be any doubt about it. In international law we have a whole chapter in regard to the instances in which one nation may justly interfere in the affairs of another; and there are numerous instances in history in which such interferences have been had. Take one instance, which is generally spoken of as the means adopted to "preserve the balance of power." When one nation in Europe seeks to so extend itself as to threaten what has been styled the "balance of power," this has from an early period in European history been deemed a cause of interference by other nations, and, if necessary, of war. That interference is defended upon moral grounds, and it is perfectly defensible; for what right has a nation to threaten the peace of the world?

THE PRESIDENT: It is one of the forms of self-defense.

MR. CARTER: Now, as I have said before, the benefits of nature were originally given to mankind, and all the members of the human family have a right to participate in them. The coffee of Central America and Arabia is not the exclusive property of those two nations; the tea of China, the rubber of South America, are not the exclusive property of those nations where they are grown; they are, so far as not needed by the nations which enjoy the possession, the common property of mankind; and if the nations which have the custody of them withdraw them, they are failing in their trust, and other nations have a right to interfere and secure their share.

LORD HANNEN: May they sell them at their own price, although it may be a very high price?

MR. CARTER: Yes, until they come to put a price upon them which amounts to a refusal to sell them—when they arrogate to themselves the exclusive benefits of blessings which were intended for all, then you can interfere. I do not dispute the right of a nation to say: "For certain reasonable purposes we must interdict commerce with such and such a place." There may be grounds and reasons for that; there may be reasons why a nation should refuse for a time to carry on commerce at all; there may be excep-

tional circumstances which would entitle a nation to act in this manner. But what I do assert is that where a nation says, "We will forever exclude the world from participating in these benefits of which we have sole possession," that nation commits a violation of natural law, and gives other nations a right to interpose and assert for themselves a claim to those blessings to which they are entitled under the law of nature.

And let me next assert that the practice of mankind has universally proceeded upon these principles. Upon what other ground can we defend the seizures by the European powers of the territories of the New World—the great continents of North and South America? England, France, Spain, nearly all the European maritime nations, engaged in the enterprise of taking possession of enormous tracts of territory in the New World from the peoples which occupied them. They never asked permission; they took them forcibly and against the will of the natives. They said to those uncivilized nations: "These countries are not intended for your sole benefit, but for ours also, and we choose to treat them as such." That policy has been pursued by civilized nations for centuries. Is it robbery, or is it defensible? I assert that it is not robbery, because those barbarous and uncivilized peoples did not apply the bounties they possessed to the purposes for which nature and nature's God intended them; they were not faithful to the trust which was imposed upon them; they were incapable of discharging to mankind the duties which the possessors of such blessings ought to discharge. The nations of Europe say these vast tracts of the most fertile parts of the earth, capable of affording measureless comforts to mankind, and of sustaining a valuable commerce, shall not be allowed to remain a waste and a desolation. It was not for such purposes that the earth was given to man, and it is the mission of civilized man to take out of the possession of barbarous man whatever can contribute to the benefit of the human race in general, but which is left unimproved. . . . . What did England do in the case of China in 1840, for instance? She made war upon China and subdued her. Why? The real cause of war is not always correctly stated in the pretext given for it, and in that instance the pretext was, I believe, some discourtesy which had been shown to individuals, some maltreatment of British officials. But if we look into the history of the matter, we find that the dispute began when China closed her ports, and that it terminated with the treaty by which she bound herself to keep them open. This war was defensible; I do not put it as an offense on the part of Great Britain. When a nation refuses to perform the duties incumbent upon her in respect to the

blessings confided to her care, there is a cause for the intervention of other nations.

Take the case of Peruvian bark. This product is commonly regarded as absolutely necessary in the economy of society; it is a necessity for the cure of certain diseases; it is a specific for them; they will rage unrestrained unless you have Peruvian bark. Now, suppose the countries where it is grown should say that for some reason or other they will not carry on commerce; and not only that, but that they propose to devastate the plantations where the bark is cultivated: is mankind going to permit that? I will refer to another and recent example which we read about every day in the newspapers. Why is Great Britain in Egypt maintaining a control over the destiny of that nation? What reason has she for asserting a dominion over these poor Egyptians? Is it because they are weak and defenseless? Is that the only reason? No; I suppose that those who have the destinies of Great Britain in their charge can make out a better case than that. Egypt is the pathway of a mighty commerce; it is necessary that that commerce should be free and unrestrained—that great avenue and highway of traffic must be made to yield the utmost benefit of which it is capable. If the government of Egypt is not capable of making it yield its utmost—if that government is incapable of doing so, other nations have a right to interfere and see that the trust is performed.

THE PRESIDENT: I am afraid that you take a very high point of view, Mr. Carter, because you seem to anticipate the judgments of history. I cannot say more at present.

MR. CARTER: Not a higher view than is sustained by the practice of mankind for three hundred years. It may be a high point of view, as you say, Mr. President; but it is a view which is defensible both as to theory and practice. Will any one maintain that where a broad tract of the earth's surface, happening to be in the possession of an inhospitable nation, abounds in a blessing sufficient to afford comfort and convenience to a very large part of mankind—will any one maintain that that nation may, if she choose, wholly withhold from other countries the benefits she is capable of conferring? If that is true, then all that the writers upon the law of nature tell us to the effect that the gifts of Providence were bestowed upon mankind in general—all that is erroneous! Are these statements erroneous? I must appeal to some of them. I may refer to Vattel. He says:

"Sec. 203. Hitherto we have considered the nation merely with respect to itself, without any regard to the country which it possesses.

Let us now see it established in a country which becomes its own property and habitation. The earth belongs to mankind in general. Destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants."[7] . . . .

"All men ought to find on earth the things they stand in need of. In the primitive state of communion, they took them wherever they happened to meet with them, if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right, and, consequently, it cannot take place without leaving them, in general, some means of procuring what is useful or necessary to them. This means commerce; by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent, nor are they usually to be had for nothing; but they may be bought, or exchanged for other things of equal value. Men are therefore under an obligation to carry on that commerce with each other, if they wish not to deviate from the views of nature; and this obligation extends also to whole nations or states. It is seldom that nature is seen in one place to produce everything necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, etc. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than for another, as, for instance, fitter for the vine than for tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its lands and its industry in the most advantageous manner, and mankind in general prove gainers by it. Such are the foundations of the general obligations incumbent on nations reciprocally to cultivate commerce."[7a]

International law is filled with statements of the general doctrine, that the earth was given to all mankind for their common benefit, that that original gift cannot be changed or perverted, and that it must be so administered as to enable mankind to enjoy that common benefit; that commerce is the means by which that common benefit can be extended to all nations, and therefore the carrying on of commerce is an obligation resting upon all nations. When we speak of an obligation resting upon nations, as it is spoken of by almost every writer who has dealt with the question, we are not dealing in mere empty words. These things are not mentioned by them as meaning nothing. They mean what they say. They mean that this is an obligation, and that it is an obligation which in a suitable case can be enforced.

So much for the first limitation which I have stated property was subject to, whether held by nations or by individuals. It is

[7] 7th Am. Ed. 1849, c. 18. Quoting, also, from Bowyer, Commentaries on Constitutional Law, p. 127; Locke, Treatise on Civil Government; Stephens' Commentaries, vol. 1, pp. 159-165.

[7a] 7th Am. Ed. bk. 2, § 21.

held subject to a trust for the benefit of the world. As to so much of it as is not needed for the purposes of the particular owner, be that owner nation or man, the benefit of it must be extended on just terms to those for whose benefit it was designed.

I now have to state a second limitation upon property, whether held by nations or by men, and that is, that things themselves are not given, but only the use of them. That is all—the use of them. The world is given to be used, and only to be used, not to be destroyed. Men bring into the world their children, those who are to follow them. They are under an obligation to leave the means of support to them. Is it necessary for me to argue that no man has so absolute a property in anything that he can be permitted to destroy it? Surely that is not necessary.

THE PRESIDENT: *Uti et abuti,* say the Romans.

MR. CARTER: Yes, *uti et abuti,* so that a man has power not only to use, but abuse. It is given to us to use; it is not given to us to abuse and destroy. We have no right to do that. Property is sometimes said, in municipal law, to be regarded as absolute. If a man chooses to throw away a bushel of wheat, there is nobody to call him to account. The state does not call him to account. It does not do that, because the probability that such a thing will be done is extremely remote. We can safely rely upon the selfish element in human nature to prevent such action on any considerable scale. But suppose it was a common thing, and likely to occur, would the laws be silent about it then? By no means. I think I have some citations upon that very point.[8]

The definition of property does concede formally to the individual the right to abuse it, a right to destroy it. It concedes the power—I will not say it concedes the right; for it does not concede the right. On the contrary, legislation in a thousand forms is aimed against unnecessary destruction of property; and wherever there is any considerable probability that individuals will abuse the right of property, the law will step in to repress it.

The law of nature, the philosophy upon which all law is founded, must necessarily preserve property, and apply, wherever it may be needed, such remedies as may be suitable to prevent any destruction of it. Let me call to mind in how many ways our municipal law exerts its efforts in that direction. We impose public taxes for the purpose of sustaining bodies of men to make scientific inquiry by which agriculture may be encouraged, and the produc-

[8] Referring to Ahrens, Course of Natural Law, vol. 2, bk. 1, div. 1, § 64.

tion of the earth increased; and this shows the effort that society makes not only to prevent the destruction of property, but to increase it. We restock the rivers; we attempt even to restock the seas,—and expend a great deal of money in those attempts. These are efforts going further than the effort to preserve property. They are efforts to increase it. They are efforts, indeed, to preserve the sources of blessings which are in the course of extinction. And see how the use of private property is interfered with. Here is an individual; he may be an idiot, a lunatic, a drunkard or a spendthrift, having a large property. Does society permit that man to deal with his property as he likes? No. He is likely to abuse it; he is likely to destroy it. He will not manage it well. It is taken out of his control and put into the hands of a trustee. Is it to benefit him particularly? Is it out of tenderness to the feelings or the convenience of a worthless wretch like him? No; it is for the preservation of society. It is for the preservation of that property for the use of society generally. This individual might himself have no heirs at all, and the state might be the next person who would come in and take possession of it at his death. Would that alter the action of society in reference to it? No; it would take the control of it out of his hands just as quickly.

. . . .

What I have said goes to show that the right of property, whether of nations or of individuals, is not absolute under the law of nature, but is subject to limitations—limitations of a two-fold character; one that it is held subject to a trust for the benefit of mankind; another that the use only is given, and not the absolute thing itself. If the absolute thing itself were given, so that the individual had a right to destroy it, then it would not be proper for human society to take notice of any attempts to destroy property; but there is, as I have said, a vast deal of legislation on the statute books of municipal states based upon this law of nature of which I speak; based upon this policy which ought always to animate the jurisprudence of any nation, namely, to prevent the destruction of property. The preservation of property, and the increase of the amount of property in a community is, or ought to be—is, indeed —the policy of all states. All their legislation, or a great part of their legislation, is enacted for the purpose of securing that end; and indeed the extent to which the institution of property is permitted to be carried is only an illustration of the importance which society attaches, not only to the preservation of property, but to the increase of the amount of it. Society places no limit to the extent to which property may be held. Attention is often called to

the enormous fortunes which individuals acquire, especially in recent times; and the question is sometimes asked, why should individuals be permitted to engross property by the hundreds of millions? When we look into the real nature of it, we see that the permission of carrying the institution of property to that extent, of allowing individual possessions to that extent, is only a part of this generally wise and beneficent system which encourages the preservation of property. Those who are most successful in the acquisition of property, and who acquire it to such an enormous extent, are the very men who are able to control it, to invest it, and to manage it in the way most useful to society. It is because they have those qualities that they are able to engross it to so large an extent. They really "own," in any just sense of the word, only what they consume. The rest is all held for the benefit of the public. They are the custodians of it. They invest it; they see that it is put into this employment, that employment, another employment. Labor is employed by it, and employed in the best manner; and it is thus made the most productive. These men who acquire these hundreds of millions are really groaning under a servitude to the rest of society; for that is practically their condition. And society really endures it because it is best that it should be so.

I have called the attention of the tribunal to the various forms and methods in which society manifests and enforces its policy of preserving property and increasing the amount of property and making the natural bounties of the earth more productive. I have pointed out several modes in which that policy is illustrated. I could point out many more. I have this further suggestion to make upon that point: that it is one of the duties particularly incumbent upon civilized society to take these methods and means of preserving property and of preserving the sources from which property proceeds, because civilization makes a very dangerous attack upon the fruits of the earth. The moment the numbers of mankind are increased, the attack which is made upon the fruits of the earth which can support and maintain mankind are proportionately increased, and there is danger, therefore, of destroying them. There is danger of destroying the races of animals, and therefore with the increased attack which civilization brings there comes a corresponding duty resting upon civilization to prevent those attacks from becoming effective. I might, and shall by and by, bring this argument to bear upon the case of these seals. When these seals were discovered a hundred years ago, they were a blessing tributary only to barbaric man. A few hundreds were

all that were taken. And those few hundreds—it may have been a few thousands—sufficed to supply all the wants of the inhabitants along the shores where they were found. That was the only attack which the barbaric world made upon this bounty of Providence; but civilization and commerce come in now, and what is the result? The whole world is attacking them. Everybody that wants a sealskin, in Europe, or Asia, or South America, or China, is attacking these few remaining herds; and of course there is nothing that can withstand that attack unless civilization brings along with it some remedy by which it can be resisted and its consequences averted. . . . .

I must finish this line of my argument by summarizing the conclusions which I think I have established. They are:

First. The institution of property springs from and rests upon two prime necessities of the human race:

1. The establishment of peace and order, which is necessary to the existence of any form of society.

2. The preservation and increase of the useful products of the earth, in order to furnish an adequate supply for the constantly increasing demands of civilized society.

Second. These reasons, upon which the institution of property is founded, require that every useful thing, the supply of which is limited, and which is capable of ownership, should be assigned to some legal and determinate owner.

Third. The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:

1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the enjoyment.

2. As a corollary or part of the last foregoing proposition, the things themselves are not given; but only the increase or usufruct thereof.[9]

It will be my purpose now to endeavor to make an application of these views as to the grounds and reasons upon which the institution of property rests to the particular question which is before us. The general principles I have gone through at some length. I make no apology for going into them at that length; for the question which this tribunal is to try is a question of

[9] Mr. Carter supported these conclusions by reference to Schouler on Personal Property, Introd. c., pt. 1; Herron, Introduction to the History of Jurisprudence, bk. 1, c. 4, p. 71; De Rayneval on the Law of Nature and Nations, § 2, p. 96; John P. Thomas, Treatise on Universal Jurisprudence, c. 2, p. 25.

property as between nations. It is the first time, so far as I am aware, that any such question has been submitted to an international tribunal, or indeed to any tribunal at all; and the decision of it, therefore, requires a thorough investigation into the grounds and reasons upon which the institution of property rests. In order to apply these views to the case before us it is necessary, of course, that we should have a more particular and precise view of the facts in relation to the fur seals themselves; we should have a clear knowledge of the facts respecting their nature and habits; the methods by which they are pursued and captured; the dangers which threaten the existence of this species of animal, and the means which we can employ to avert those dangers.

The arbitrators will bear in mind one of the general conclusions which I had reached in respect to the right of property was this: That it extended to everything which embraced these three conditions: First, that it was an object of utility and desire to man; second, that the supply was limited, that there was not enough for all; and, third, that it was capable of exclusive appropriation.

Now, first as to the utility of these animals. That is obvious and conceded. Every part of them is useful to man, their skins, their flesh and the oil which they afford; but their skins are the most useful part, as they furnish a garment of great beauty and utility and which is greatly desired all over the globe. The extraordinary eagerness with which the animals are pursued is full evidence of their utility, and the great prices which these skins bear in the market also evidences that fact so completely that I need not dwell upon it any further.

Next, as to their nature and habits. Where are we to go for our sources of information upon that topic? What is the evidence before this tribunal to which it can resort for the purpose of informing itself respecting those facts? There are several classes of evidence. In the first place, there is a large body of common knowledge in respect to animals, their nature and habits, which every intelligent person is supposed to possess, and all this may properly be appealed to. In the next place, there are the works of naturalists of recognized authority which may also be appealed to, works, written in whatever language, by men who have given attention to those studies to such an extent as to establish themselves as authorities upon the topics of which they treat. In the next place there are the reports of the commissioners appointed under the terms of the treaty, which, as will be perceived from examining the treaty, are made evidence; and al-

though the commissioners could be personally cognizant of only a small part of the facts which it was necessary for them to learn, still their reports and their opinions are made evidence, not only in relation to facts which fell under their observation, but facts of which they gained their knowledge by such methods as seemed to them suitable and best. Both the joint and several reports are alike made evidence. I do not say they are made evidence of equal value, but they are both made evidence for the information of this tribunal. Besides that, we have, from each side, a very large number of depositions of witnesses whose testimony has been taken, *ex parte,* of course, because there was no opportunity for cross-examination; but nevertheless they are a source of information of the character of testimony, the best which the nature of the case admits of, and both parties have resorted to them.

[Mr. Carter then entered upon an elaborate examination of the facts with relation to seals and seal life. From his recital of the facts needful to be taken into consideration he deduced the following propositions:

[1. The seal is a mammal highly polygamous, but producing only one each year. Its rate of increase is therefore exceedingly slow.

[2. It is defenseless against man on the land, and is easily found and captured at sea.

[3. The present draft made upon the herd by pelagic sealers is not by a few barbarians to supply their immediate wants, but by civilized man to supply the larger demand of the whole world.

[4. The race may be substantially exterminated by man by either form of attack,—that on the land or that upon the sea.]

Now let me call the attention of the tribunal to the striking difference between dealing with a herd of fur seals like these, as regards keeping up their numbers, and dealing with polygamous domestic animals of any sort, such as horses, cattle, or fowls. The latter can be raised all over the surface of the globe; there is hardly a spot where they cannot be produced. If there is a great demand for them in the market the production of these animals will be stimulated, and there is immediately a saving of females, and the numbers killed will be taken from the males. Consequently, there is an immense increase, and that increase can be carried on indefinitely. In reference to the females of domestic animals, there need be no rule against killing females, because these animals can be multiplied to a perfectly indefinite extent. With the seals, however, the case is far different. There are only four places on the globe where this animal is produced, and the demand for sealskins far exceeds the supply; and the object is not only to preserve the present normal number, but to increase it. To do this there is no way except by saving all the

females. Every reason and motive unite to condemn the slaughter of any single female unless she be barren; for you cannot destroy one without diminishing the race *pro tanto.* And, owing to the circumstance that there are only four places on the globe where these useful animals can be produced, we must accept the conditions and content ourselves with them.

Now, having shown the difference between these animals and domestic animals of polygamous character, I will proceed to speak of the difference between the seals and wild animals, such as birds of the air, wild ducks, fishes of the sea, mackerel, herring and all those fishes which constitute food for man and upon which he makes prodigious attacks. There you cannot confine yourself to the annual increase. You do not know it; you cannot separate it from the stock; you cannot tell male from female, and you do not know whether there are any more males than females. There is no reason why, in making drafts, you should make them from males rather than females. Therefore you cannot practice any kind of husbandry in reference to wild animals of the description I have mentioned. That is one of the distinguishing characteristics of these seals as compared with other animals over which man has no control. With the seal, man, if he does his duty, and accommodates himself to the law of nature, can practice a husbandry and obtain the whole benefit which the animal is capable of affording without diminishing the stock; but with other wild animals, such as ducks, fishes, wild game, etc., he can practice no such husbandry at all.

And here it will be observed how nature seems to take notice of the impotence of man and furnishes means of perpetuating the species of the wild animals last mentioned. In the first place, she makes provision for the production of prodigious numbers. Take the herring, the mackerel, the cod; they do not produce one only at a birth, but a million! They produce enough, not only to supply all the wants of man, but the wants of other races of fishes that feed upon them. They inhabit the illimitable regions of the sea; their sources of food are illimitable, and their productive powers are illimitable also, and therefore man can make such drafts upon them as he pleases without working any destruction of them. There is another mode designed by nature for their preservation, and that is the facility which she gives them to escape capture. Man lays hold of some of them which come within his range, but the great body of them never come there. With the seals it is otherwise. They have no defense. They are obliged to spend five months of the year on the land where

man can slaughter them; and even at sea they cannot escape him, as the evidence clearly proves. The distinction between the seals and the domestic polygamous animals and other wild animals is extremely important and worthy of careful observation because of its bearing upon this question of property.

MARQUIS VISCONTI VENOSTA: Do you know any other animals besides the seal that are situate in like conditions?

MR. CARTER: None under precisely the same conditions. I hear my learned friend whisper "sea otter"; but you cannot practice any sort of husbandry with the sea otter. It never places itself like the seal under the power of man. And yet, such is the value of the sea otter, that man has almost exterminated that animal, notwithstanding its facilities for escape.

THE PRESIDENT: They are not protected.

MR. CARTER: They are nominally protected by the laws of the United States; they are a part of the wealth of the northern sea. They were formerly the principal element of value in those northern seas; and the value attached to the skin of this animal was very great even when it was found in larger numbers.

THE PRESIDENT: You will not put the sea otter on the same legal footing as you do the fur seal?

MR. CARTER: No. So far as I am aware, man has no sure means of preserving the sea otter, for it seems to me that he has exterminated it almost altogether. Then take the case of the canvas-back duck, a bird which abounded in America. As long as man made but a slight attack upon its numbers—fifty years ago, when there were no railroads and when the means of transporting it were quite imperfect—this bird was found in great plenty, but the abundance was confined to the locality where it was found. But now it can be transported five thousand miles without injury, and the whole world makes an attack upon it. The law may protect it a little, but it cannot protect it altogether from the cupidity of man; and this creature, too, is fast disappearing. In other words, these birds have all the characteristics of wild animals, and none of the characteristics of tame animals. You cannot practice any husbandry in regard to them. No man and no nation can say to the rest of the world that he has a mode of dealing with them which will enable him to take the annual increase without destroying the stock. I shall make use of that hereafter; and you see now the important bearing it has. No man and no nation can say with regard to the fish in the sea that they can protect

them. If they are in danger of destruction, they cannot say, "We can enforce by our power a limitation of the annual draft to the annual increase." There may be some fish as to which that may perhaps be said. When a more accurate knowledge is had of the habits of fishes, it may come to be ascertained that the inhabitants of some shores can protect some races of fishes which resort to that shore, provided other persons are required to keep their hands off.

THE PRESIDENT: And that would give a right of appropriation, in your view?

MR. CARTER: Yes; that would tend that way. If they could furnish the protection and no one else could. That would be the tendency of my argument. I am glad to see that the learned president catches it.

The consequence of the proved facts is that the fur seal cannot maintain itself against unrestricted human attack. It cannot do it. That is admitted here. We have a joint report by all these commissioners which is to the effect that the fur seal is at present in the process of extermination, and that this is in consequence of the hand of man. The treaty itself under which you are sitting admits it; for it admits the necessity of regulations designed to prevent extermination. The cause of this diminution, the grounds and reasons which are working the extermination of the seal are disputed between us. My learned friends upon the other side say it is this taking of the seals on the islands that is, in part, causing it. We say it is the pursuit of them by pelagic sealers; but, whatever the cause, there is no dispute between us as to the fact. These seals are being exterminated; and that means that the race cannot maintain itself against the hand of man unless the assaults of man are in some manner restricted and regulated. As I have already shown, this consequence of the inability of the race to maintain itself is inseparable from the killing of females. That race cannot maintain itself unless the slaughter of females is prohibited. It is a mammal, producing one at a birth. The rate of increase is extremely slow, and that increase can be cut down by a very small annual killing of the mothers from whom the offspring is produced. This inability of the race, this infirmity of the race to hold its own in presence of the enormous temptation to slaughter which is held out to man, is inseparable from the slaughter of females. The killing of males, if it were excessive, would produce the same effect. No doubt about that. We do not dispute, or deny, that. All we say is that you can

carry the killing of males to a certain point without any injury whatever. . . . .

I have gone thus far only upon facts which I conceive either to be admitted, or overwhelmingly established—established in such a manner that we may say they are beyond dispute. There are a good many other particulars in which there is very considerable conflict in the evidence. We have our own assertions in respect to those points upon which this conflict exists, and we shall endeavor to satisfy the arbitrators that our view is correct; but at this point I choose to say that in my view they are not material upon this question of property. . . . .

The following things are more or less disputed, and I do not base any part of my argument at present upon them: In the first place, it is said that not so large a proportion as seventy-five per cent. of the pelagic catch is females. If it were not anywhere near that figure—if it was even twenty per cent., it would answer all the purposes which I desire.

Second. It is not agreed that so great a number as one-quarter or twenty-five per cent. are wounded and are not recovered.

Third. It is not agreed that females go out for food at great distances upon the sea. Indeed, I cannot say it is agreed upon the side of Great Britain that nursing females ever go out for food.

Fourth. It is not agreed that coition takes place on the land. They assert that it takes place elsewhere. It is quite immaterial where it takes place.

Fifth. It is asserted on the part of Great Britain that more or less commingling takes place between the Russian and the Alaskan herds. There is no evidence that there is the slightest commingling; but as far as conjectures go, it is only to the effect that there may be a commingling of some few individuals—wholly unimportant.

Sixth. It is not admitted on the part of Great Britain that the seals stay so long on the Pribilof Islands as the United States assert that they do. That again is of no importance, whether they stay there three or four or five months; if they stay there long enough to submit themselves to human power, so that man can take from them the annual increase without disturbing the stock, that answers all the purposes of my argument.

Again, it is said that raids take place upon the islands and a point is made that a great many seals are lost, not by pelagic sealing, but by illegitmate raids upon the island by sealers which the United States does not protect against. It is immaterial whether

there are or whether there are not for the purposes of my argument; but there are not, in our view, any of any consequence.

And again, what I have already said, it is alleged that a draft of 100,000 young males is too large. We do not think it too large. But what if it is? We can find out the right number. Experience will tell us that; and of course self-interest, the strongest motive operating upon men, will insure our obedience to its dictates.

Then again it is said that the lessees of these islands are careless and negligent in the methods of taking these seals and separating them and driving them for slaughter, the assertion being that the drives are too long, that they are made in a way that is oppressive to the seals, that a good many of the seals driven and which are not fit for capture, but turned aside to go back again, are so much injured that they never get back and are practically lost to the herd. We conceive all those statements are unfounded; but even if they were true, they would not be material. They would simply show we had been guilty of negligence there. There is nobody who is under so strong a motive to practice diligence as we are, and it is presumable certainly, if there are any neglects, that they will be ascertained and corrected. . . . .

I am now to call attention to the inquiry how the question of property is affected by those facts in the light of the principles which I have endeavored to lay down respecting the institution of property and the grounds and reasons upon which it rests. I wish to apply those principles to the question of property in the fur seals, and bring those principles to bear upon the conclusions of fact to which I yesterday arrived.

Let me recall the main proposition early established in the course of my argument, and which I have endeavored to keep in view throughout, namely, this: That the institution of property extends to all things which embrace these three conditions—First, that they are objects of human desire, that is to say that they possess utility. Second, that they are exhaustible, that is to say, the supply of them is limited, there not being enough for all. And, third, that they are capable of exclusive appropriation. All things of which those three conditions can be predicated are property, and nothing which does not unite all those conditions can be regarded as property.

Concerning the first two of these conditions, no debate whatever is necessary. The utility of the animal is admitted. That they are objects of extreme human desire is conceded. That the supply is limited is also conceded. The race is exhaustible.

There is not enough for all. The only question, therefore, as to whether they are property or not, must turn upon the determination of the point whether or not they are susceptible of exclusive appropriation. That is the interesting point in reference to the question whether seals are property or not. Are they capable of exclusive appropriation by man?

In the first place, we must have a very clear perception of what is meant by the term "exclusive appropriation." What is it that must be done in order that a thing may be exclusively appropriated? Is it necessary that the thing should be actually *in manu,* as it were—in the actual possession of the owner so that no person can take it from him without an exercise of force? Is that necessary, or is something short of that sufficient? In the early ages of society that seems to have been necessary; and possession and ownership were in those early ages identical, or rather they were confounded. There were no recognized rights of property, except in respect to such property as the owner was in the actual possession of. The skins upon the back of the hunter, the bow and arrow which he used in the chase, and the hut, or the cave, which he inhabited, were all in his actual possession, or under his immediate power. They could not be taken from him without an act of force. He was always present to defend them; and there were no other subjects of property. But we see that as the institution of property is developed his actual, immediate possession is no longer necessary. A man may own not only the half acre of ground which he tills, and which he can immediately defend, but he may own a hundred thousand acres by as perfect a title as he can own the half acre; and in reference to all personal property, the extent of the ownership which is permitted to him is unlimited. He may not actually possess it. He may not be present to defend it; and yet the law stamps his personality upon it so that it becomes his property, a part of him, an extension of his personality to that portion of the material world, so that when that thing which he thus owns is invaded his rights are touched, and his personality is touched. Here we see the difference between the two conceptions of possession and ownership, originally closely identified, inseparable from each other, as it were, confounded together; but with the progress of society and the development of the institution of property, separated, and the conception of ownership, as distinct from the necessity of possession, fully recognized.[10]

[10] Mr. Carter referred to the numerous authorities cited in the printed argument of the United States.

The inquiry is, therefore, under what circumstances and to what extent will the law stamp the quality of ownership upon things which either are not possessed, or cannot be actually possessed, by any owner during a considerable part of the time? Under what circumstances and to what extent will the law assign to a man a title to such things and defend it? That is the interesting question. The best way to answer that is to see what the law actually does; and we may take, in the first instance, the case of land. As I have already said, land may be owned by a private individual to any extent. He may own a province if he can acquire it. The law places no limit upon his acquisition and it will defend him in the enjoyment of it. Why is it? As I have already shown, the institution of property does not depend upon any arbitrary reasons, but upon great social reasons and great social necessities; and, therefore, the answer to the question why the law allows an extent of property to be owned by a man which he cannot by any possibility actually possess, must be found in some great social need; and this we quickly see comes from the demands of civilization to satisfy which it is necessary that the fruits of the earth should be increased in order to accommodate the wants of the increasing population of mankind. No land will be cultivated unless you award to the individual the product of his labor in cultivating it. The motives of self-interest are appealed to, and men are told: "You may have, and we will defend your title to, as much land as you can acquire." That is the only way in which the general cultivation of the earth could ever be brought about. That is the only way in which it is made to produce the enormous increase which it now produces; and although large tracts of land are not capable of direct actual possession by the owner, yet in view of the prodigious advantages which are acquired by stamping the character of ownership upon them, the law concedes that ownership, assigns the title to an individual, and protects and defends him in it.

The same is the case in reference to all movable property, all products of manufacture and of labor—agricultural implements and tools, goods of all descriptions. A man may own magazines full of them which he cannot by any possibility, by his individual arm, protect and defend. Why is he permitted to do this? Because the world cannot otherwise have them. They are the price which the world must necessarily pay for these possessions, or otherwise it must do without them; and it cannot do without them and support the population which civilization brings upon the earth.

Take the case of useful domestic animals; the same thing is true. Man may own as many as he can acquire and breed; and they may roam over almost boundless areas, over his own property or the property of the public, and still his title is complete and perfect. In the barbaric ages a man could own but few, and when the number increased they became the property of the tribe; but that condition of things would not support the demands of civilization. We must appeal to the cupidity of men and arouse them to labor and to efforts for the purpose of increasing the stock of domestic animals; and therefore a title is awarded to as many as a man can bring into existence. The great prairies and wastes of the interior of the United States and of large regions in South America are fed upon by countless herds, and yet the title of the owner to every one which he can identify is distinct and absolute. That is for the same reason. You could not have them unless you gave that ownership. And society could not enjoy the benefit unless it paid this price.

You will see that in all these cases the owner is enabled to preserve the principal thing without destroying it and yet produce a great increase for the use of mankind. The cultivator of land, the title to which is assigned to him, does not waste it. He does not destroy it. He does not convert it into a desolation. He does not extract its richness from it and then leave it incapable of further product. He cultivates it. He manures it. He not only extracts a great product from it, but he increases its ability for further production; and so also in regard to the races of animals. The stock is not invaded so long as you allow individuals the ownership of whatever they are able to produce. They preserve the stock everywhere, and they increase overwhelmingly the product which can be afforded for the uses of mankind.

But step for an instant to the cases in which this result cannot be accomplished, and we see that society at once refuses to allow individual property beyond actual, literal possession. It refuses to consider the things as the subjects of exclusive appropriation. Take the birds of the air, the fishes of the sea—wild animals generally. A man cannot by any exercise of his art or industry so deal with them as to furnish their increase for the use of mankind without destroying the stock. He cannot do it. He can only take them indiscriminately. He can practice no husbandry in relation to them; and if they maintain their existence under his attacks it is not because of any effort, art, or labor on his part, but because nature has made such an enormous provision that they are practically inexhaustible, or because nature

has furnished them with such facilities for escape that man cannot capture any considerable number of them. Consequently in reference to all of these wild animals where the award of ownership to an individual man would produce no great social blessing, in other words, where there are no social reasons for awarding exclusive possession, an exclusive possession is not awarded, and the thing is regarded as incapable of exclusive appropriation. But, even in the case of wild animals, although the institution of property in respect to them would not accomplish any social good, would not prevent their extermination, still society resorts to the best means in its power to prevent their destruction, and it assumes a sort of custody over them by the establishment of what are called "game laws," more or less effective for preserving the wild races of animals, but still ineffective where the demand for them is so great and their facilities for escape so little that the ravages of man become destructive.

There are some animals which lie near the boundary line between the wild and tame, and it is very interesting to see how the law deals with these, and how perfectly in accordance with the principle I am endeavoring to sustain. Take the case of bees; they are perfectly wild. Nothing can be wilder. Nevertheless man can induce them to return to a particular spot; and in consequence of that can take from the bees their product, and can therefore increase the production of honey—a most useful article—to an almost indefinite extent. If men were driven for their supply of honey to find the hives of wild bees in the forest, their demand could never be supplied, and the bees themselves would be taken away; but if you award a property to man in such bees as may take up their abode in the hives prepared for them; permit him to defend his title to them, and to every swarm that, at the appropriate season, leaves in order to create a new habitation for itself—if you give him a title to such bees, enable him to practice a husbandry, allow him to consider as exclusively appropriated to himself what in its own nature is absolutely incapable of appropriation,—if the law will step in to the aid of human infirmity and grant these rights,—then you can have this product of honey multiplied to an indefinite extent. Society does it. It does it for that purpose. Our municipal law, which I have heretofore shown upon this point, is based upon this ground.

The same is true of the wild geese and swans. The breeding of these is an industry, to be sure, not carried on on so large a scale, but it presents the same principles. If we were driven for our supply of such birds to pursue the wild flocks with such

means as are adapted for that purpose, the supply procurable would be extremely small; but if man by art and industry can so far reclaim them as to wont them to a particular place, take the annual increase from them and preserve the stock, then, without taking from others, we greatly multiply the product which is applicable to the uses of man. In other words, another like occasion is furnished upon which the law will lend its aid to man, and say that these animals shall be deemed exclusively appropriated; and it does so. And yet for the greater part of the time these animals are roaming in waters not belonging to their owner and would fly from him as quickly as from others, should he attempt to capture them there. The case of deer upon which I have already enlarged is the same; pigeons the same. The reindeer of Lapland is another instance of an animal naturally wild, but in which the law assigns to man a property interest and deems them exclusive property although they wander over vast regions, and instead of following their owners, I believe the owners follow them.

Now we see the principle which lies at the foundation of the municipal law which I alluded to in the early part of my argument, the municipal law of all civilized nations concurring upon these points, and declaring, in regard to every one of these animals commonly designated as "wild," that if man can so deal with them as to take their annual increase and preserve the stock, then, notwithstanding they may fly out of his possession at will, still, the law will regard them as subjects of exclusive appropriation.

But the law does not stop there. It is interesting to observe that it will go to all extremities, wherever there is a social advantage to be gained, and will allow a thing to be the subject of property and to be regarded as the subject of exclusive appropriation, although it is absolutely intangible. Take patents for useful inventions, products of the mind, and, originally, not the subjects of property at all. As society advances, as civilization develops, as the need of these products of the mind increases, society perceives that it cannot have them unless it encourages the production of them; and there is no other way of encouraging the production except by awarding to the meritorious authors of them all the benefits of a property interest; and it does so. We have had for a very long series of years a property awarded in respect to inventions in the useful arts. The principle of a monopoly, odious in general, is applied here; and society does not, or rather will not, stop there. That extension

of the rights of property to inventions in the useful arts did not go so far as to give a right of property in all the products of the mind. Literary works, the contents of books of every description, were still not the subject of property. They could be appropriated the world over, by whomsoever pleased to appropriate them, and without giving any ground of complaint to the author; but all of us understand how gradually and by degrees that has been considered to be a wrong and not in accordance with the principles of natural law, not in accordance with the principles of justice; and so, after a while, the rights of authors in their intellectual products were secured to them by copyright laws which are enacted in every civilized state; and now there is a tendency and disposition and determination, let me say, to carry it still further. An international copyright, securing the benefits of ownership in the products of the mind all over the world, is impatiently awaited and will probably, ere long, be enacted.

Such, then, Mr. President, is the development of the institution of property. It is the development of the conception of ownership as distinguished from actual possession. The law will award this right of property, and will determine that things incapable of absolute and permanent possession may yet be exclusively appropriated wherever there is a social good which may thus be accomplished. It is thus that human society, proceeding step by step, and from age to age, rears its majestic arrangements, making provision for the satisfaction of every want of man, and every aspiration towards civilization, and shaping and conforming all its methods in accordance with the dictates of natural law.

What then is the general conclusion in respect to animals which I conceive to be established by this reasoning? It is this: That wherever an animal, although commonly designated as "wild," voluntarily subjects itself to human power to such an extent as to enable particular men, or a particular nation, by the exercise of art, industry, and self-denial, to deal with that animal so as to take its annual increase and at the same time to preserve the stock, and any taking of it by others would tend to destroy the race, it becomes the subject of property. That proposition seems to me to be so reasonable upon the mere statement that it ought to be allowed without argument; but I have endeavored to begin at the beginning, and to show that every ground and every reason which supports the award of property anywhere and to any extent applies to that case, and makes the animal the subject of property.

It only remains to apply that conclusion to the particular animal about which our controversy is concerned, namely, seals. I need not, of course, recapitulate again the facts. They are all fresh in your recollection. It is enough to say that they do submit themselves voluntarily to the power of man to such an extent as to enable the owners of the Pribilof Islands, to whose power they thus submit themselves, to take, by the exercise of art, industry, and self-denial, the superfluous annual increase without destroying the stock; and that is the way and the only way in which the human race under civilized conditions can continue to enjoy the benefits of that blessing of Providence. Unless an award of property is made to the United States in that animal, or what is equivalent to it, the fate of the animal is already sealed.

In looking at the meritorious features which the owners of the Pribilof Islands exhibit, and which constitute their title to this award of property, it may at first sight appear that they do not have the same sort of merit that the cultivator of the land has to the bushel of grain that he produces, or that the manufacturer of an agricultural implement has, which is in every part of it the fruit of his labor; but when you look closely into the case you will see that the merit of the owners of those islands is precisely of the same character and goes to the same extent; and that the present existence of that herd is just as much due to a meritorious, voluntary exercise of effort on the part of the owners of those islands as any product of mechanical industry is due to the workman who fashions it. This species of property it will be remembered is called by Blackstone property *per industriam* and very properly called so. Now, what industry is exhibited by the owners of these islands to entitle them to say that the seals are their property *per industriam?* They remove a population of hundreds of people at great expense to those islands, feed them, keep them there to protect these animals and their breeding places against all enemies, and maintain at prodigious expense a marine guard along the coast for the same purpose. Unless that were done, marauders would swoop down upon those islands and destroy them at once. In the next place they do not kill the seals indiscriminately. They practice abstinence, self-denial. They might kill every animal as it arrives and put its skin on the market at once and get the full benefit of it. That is the temptation always to man, to take the utmost that he can, and to take it at once for present enjoyment. But the owners of the Pribilof Islands practice a self-denial. They forego present enjoyment. They forbid themselves that enjoy-

ment, and they do it in the hope of obtaining a future and a larger good. They practice art and self-denial and confine their drafts to the superfluous males.

I wish to dwell a moment upon the merits of that particular feature of self-denial. I have given in the printed argument a multitude of citations which illustrate the merit of this quality of abstinence as a foundation for property. All political economists, for instance, in treating of the question of interest, and the moral right which a man has to exact interest for the use of money, defend it upon this ground. Capital is lent and interest is taken upon it. What is capital? It is the fruit of saving. A man who has produced something, instead of spending it in luxuries, saves it; no man can save for himself alone. He saves for the whole world as well. He saves something which will support productive industry, and the whole productive industry of the world depends upon the savings of the world. If it was not for the practice of this abstinence which leads to the accumulation of wealth which may be employed for the purpose of sustaining productive industry, productive industry would be impossible. .

Mr. Senior, in his Political Economy (he is an author of recognized authority), says:

"But although human labor and the agency of nature, independently of that of man, are the primary productive powers, they require the concurrence of a third productive principle to give them complete efficiency. The most laborious population inhabiting the most fertile territory, if they devoted all their labor to the production of immediate results, and consumed its produce as it arose, would soon find their utmost exertions insufficient to produce even the mere necessaries of existence.

"To the third principle or instrument of production, without which the two others are inefficient, we shall give the name of 'abstinence,' a term by which we express the conduct of a person who either abstains from the unproductive use of what he can command, or designedly prefers the production of remote to that of immediate results."

After defining capital as "an article of wealth, the result of human exertion employed in the production or distribution of wealth," he goes on to say:

"It is evident that capital, thus defined, is not a simple productive instrument. It is in most cases the result of all the three productive instruments combined. Some natural agent must have afforded the material; some delay of enjoyment must in general have reserved it from unproductive use, and some labor must in general have been employed to prepare and preserve it. By the word 'abstinence' we wish to express that agent, distinct from labor and the agency of nature, the concurrence of which is necessary to the existence of capital, and which stands in the same relation to profit as labor does to wages."

Wherever you can find among men a disposition to forego immediate enjoyment for the purpose of accomplishing a future good you find a prime element of civilization, and it is that which society encourages, and worthily encourages. I have no time to read further from these citations upon the merit of abstinence; but I especially commend them to the attention of the learned arbitrators. That is what is exhibited upon these Pribilof Islands. The United States, or its lessees, do not disturb these animals as they come. They invite them to come. They devote the islands entirely to their service. They cherish them while they are there. They protect them against all enemies. They carefully encourage, so far as they can, all the offices of reproduction, and, at the appropriate time, they select from the superfluous males, that cannot do any good to the herd, and may, under certain circumstances, do injury to it, the entire annual increase of the animal and apply it to the purposes of mankind; and, without the exercise of those qualities, as is perfectly plain, that herd would have been swept from existence half a century ago, and the Pribilof Islands would have been in the same condition in respect to seals as the Falkland Islands, or the Masafuera Islands, and other localities, once the seats of mighty populations of these animals.

It is upon these considerations that I base the position of the United States, that it has a right of property in those seals. There is no principle upon which the law of property rests which does not defend it, and there is no rule of the municipal law itself, so far as that law speaks, which does not support it. They defend it completely and absolutely; and when we step beyond the boundaries of municipal law to the moral law, the law of nature, that law which is the foundation of international law, it also speaks with a concurring voice; and in whatever direction we prosecute our inquiries we find uniform support for the same doctrine. All the rules and the whole spirit of municipal and international law concur and contribute to this conclusion that the property of the United States in that seal herd is complete and absolute, not only while it is upon the islands, but wherever it wanders, and is protected by the safeguards which property carries with it wherever it has a right to go.

If there were anything which might be urged against this conclusion, we might be disposed to hesitate. But what is there that can be urged against it? What right is there that can be set up against it? If there were anybody who could set up a right against this conclusion, a different case would be made. If any

man or set of men, or any nation, could say: "This conclusion of yours, plausible enough in itself, defensible enough in itself, nevertheless comes into collision with a right of ours, defensible upon like grounds, that is, moral grounds." If that could be set up, it would raise a doubt. But what is there? What right is there in these pelagic sealers—for they are all we have to deal with —to contend against this conclusion? As near as I can ascertain it is asserted to be a right to pursue the animal because it is a free swimming animal, in the first place, and because, in the next place, there is no power on the sea to prevent it. That does not suggest a principle of right at all. How can it be said that there is a right to pursue an animal because he swims freely in the sea? What ground is that upon which to attempt to establish a right, I should like to know. Why should one be permitted to destroy a useful race of animals, a blessing of mankind, because they happen to move freely in the sea? I cannot conceive that that suggests even the shadow of a right. The other ground asserted as a defense for pelagic sealing, namely, that however perfect the property right of the United States may be, they have no power to interfere with pelagic sealers on the high seas, is wholly untenable. It seems to amount to the solecism that there may be a right to do a wrong upon the sea!

There is no more right to do a wrong upon the sea than there is upon the land. What is this right to carry on pelagic sealing? What is this right to take these free swimming animals in the sea, mostly females heavy with young, or suckling their pups? What kind of a right is that? We have seen that it necessarily involves the destruction of the animal. How can you connect the notion of a right with that? It is a right to sweep from the face of the earth a useful race of animals, and to deprive mankind of the benefit they afford. What sort of an act is that, to destroy a useful race of animals? It is a crime; is it not? How else can it by any possibility be correctly described? It is a crime against nature. It is a defiance of natural law; and if it were committed within the boundaries of any civilized and Christian state, would be punished as a crime by municipal law. It has no characteristic, and no quality, except those which mark a crime. What good does it accomplish? Does it give to mankind a single seal which cannot be taken in a cheaper and a better way? I have already shown that the entire product of this animal can be taken upon the islands by a less expensive method, and in a way such as to preserve the quality of the skins in a better manner. It does no good in any particular to

mankind. It is possible that seals may be afforded at a less price for a short time by the practice of pelagic sealing. Of course if you can put upon the market, in addition to what is taken upon the islands, another hundred thousand seals taken in the water, you can temporarily reduce the price; and, although the method of taking them is more expensive, the world may get them for a while at a less cost; but you are taking the stock, are you not? You are not taking the increase. The question, and the only question, is how the increase of the animal can be best taken for the purposes of mankind. We have no right to anything else. Anything else is destruction. Therefore these sealers are doing no good to mankind. They are doing no good to anybody. They are destroying the occupations of the large number of manufacturers, of whom there are thousands, residing in Great Britain and whose occupation consists in manufacturing the skins for market. Their occupation is taken away by it. They are doing injury in every direction. They are doing no good to any one, not even themselves, for their own occupation will be gone in a few years. Nature has so ordered it that any pursuit or occupation like this, which consists simply in destroying one of the blessings of Providence, does no good, and nothing but evil, in any direction. We say we, the United States, can take the entire product of this animal, furnishing it to the commerce of the world in the least expensive and in the best manner. Why do you not permit us to do it? Why break up this employment? There seems to be no reason for it. Then again, as I have already said in an earlier part of my argument, one of the limitations to which property is subject, and especially property owned by nations, is a trust for the benefit of mankind. Those who have the custody of it and the management of it have a duty in respect to it. Indeed the whole subject of rights should be regarded as one dependent upon duties, rights springing out of duties, rather than duties out of rights. It is the duty of the United States to cultivate that bounty of nature, the possession of which is thus assigned to them, and to make it productive for the purposes of the world. That is their duty. Why should they not be permitted to perform it? Can a reason be assigned why they shall not be permitted to perform that duty? They cannot perform that duty if the animal is destroyed.

Has the United States even the right to destroy that seal? It has the power. Has it the right? Has it the right to go upon those islands and club every seal to death and thus deprive the world of the benefit of them? Certainly not. Have these pelagic

sealers any better right to do that than the United States have? I have no doubt that if the United States should willfully say: "We will destroy that property. Although having the ability to preserve it, we will destroy it"—and it were the case of a piece of property the use of which was absolutely necessary to mankind—if the seal contained some quality which was highly medicinal, a specific against certain diseases which afflict the human race, and the possession of which was necessary in order to enable the human race to withstand such disease—the world would have a right to interfere, take possession of those islands, and discharge those duties which the United States were betraying. What duty have these pelagic sealers in respect to these seals? They have none because they cannot do anything but mischief with them. The United States has a duty. It is to cultivate that advantage which in the great partition among nations of the blessings of the earth has fallen to their lot. It is the duty of the United States to preserve it, to cultivate it and to improve it. Shall they not have the power to do it? Is it not the duty of other nations and other men to abstain from interference? It seems to me that nothing can be plainer than that conclusion.

There is no right, therefore, that can be set up against the claim of the United States. Well, if there were something less than a right, if there were some inconvenience to which mankind would be subjected if pelagic sealing were prohibited, and an exclusive property interest awarded to the United States, we might hesitate; but there is not. There is no inconvenience even. There is indeed a suggestion on the part of Great Britain of an inconvenience in this particular. It is said that it is building up a monopoly for the United States, enabling them to gain a monopoly in the sealskins and thereby acquire a great profit. Well, I admit that it would be a monopoly. There is always a monopoly when one particular nation, or particular men, own an entire source of supply. It is not an absolute monopoly, for there is a certain competition on the part of Russia and Japan; but it is in the nature of a monopoly of course. Where there is an object in nature of which the supply is limited, if the source lies wholly within the power of some particular nation it must necessarily have a monopoly. That is unavoidable. But it is a monopoly to the United States, of course, only because the United States happens to have those particular islands. The possession of them, the sovereignty over them, must be awarded to some nation, and therefore a monopoly is in a certain sense necessary. But is it an injurious monopoly, is it an objectionable monopoly?

Not at all. . . . . When does a monopoly become injurious to man? It is only when it is an artificial monopoly. If there is a natural monopoly in a particular product and the whole annual supply of that particular product is thrown upon the world the price of it will necessarily depend upon the relation between the supply and the demand. Sometimes there is a monopoly in a particular region of the world of a particular article, but the supply is yet so abundant that if the whole product of that particular region were thrown upon the market the price of it would be extremely low, and pay but a small profit, and mankind would get it at a very low rate. That is supposed to have once been the case with the Spice Islands, belonging to Holland. If all the pepper and other spices produced upon those islands were thrown upon the markets of the world, they would be glutted. The world would get them at a very trifling sum and the producers of the spices would make no profit at all. What did the proprietors of the Spice Islands do? They did not simply withhold from the market, for that would answer no purpose; but they made an artificial scarcity by destroying half the crop, and the world needing more than half, they were enabled to exact very high prices and to make a great profit. That is the only way in which a monopoly of a natural production can be made use of unfairly and disadvantageously to mankind, and be made the means of exacting an extortionate price. You must artificially limit the supply. But not only has that never been done here, but it never can be done. I say it never can be done, because no profit can ever be found in it. There is a demand for every sealskin that can be produced, and a profitable demand; and the whole supply is thrown upon the market. There is not one withheld. The world is not compelled to take a single seal; and if there is a large price paid for the seals under those circumstances, that price is simply the result of competition among those who want them. If anybody is required to pay a large price for them, it is because somebody else is ready to pay a large price. They are all contributed to the commerce of the world, as I have already said, just as if they were put up at auction. The world bids for them and they go where the highest price can be obtained for them.

If the lessees of the islands under those circumstances make, as they probably do make, a large profit, is there anything unfair or unjust about it? Taking into account what is paid to the United States and the profits of the lessees besides, all of which must be fairly regarded as the profits of the industry, there is of course a very large profit upon every skin that is sold; that

is to say, the price of the skins may pay two or three times over for all the labor and all the expense which the gathering of the product costs. There is a very large profit. That goes to the United States, and to these lessees—is distributed among them. It is exacted, of course, from the citizens of the United States the same as it is from the rest of the world; but it goes to the United States and these lessees. What objection is there to that? Is that anything more than a fair remuneration from this bounty of Providence which is placed in their custody and in their control, and for their labor, their efforts, and their exertions in preserving it and furnishing it for the use of mankind? Of course not. It is perfectly fair. It may be the source of a profit. So there are a thousand things in commerce which are the sources of profit to particular nations which have natural advantages over other nations in producing them. The advantage is not different in its nature in this case.

In short it comes to this: That it is only by the exercise of the care, industry and self-denial on the part of the government of the United States that the world can have this blessing. The whole of it is thrown upon the world and the price is determined solely by the buyers and by what they see fit to give. If the owners of the islands should see fit to withhold from the market at any particular time any considerable number of these skins, what would they do with them? How would they gain by that procedure at all? The next year, or the next—some time after that—they would be obliged to throw the part withheld upon the market, and that would depress the market so that the loss they would incur in that way would far exceed any gain that there was any promise of. No, there never can be any temptation for keeping any part of the product, except under very unusual circumstances, such as a decline in the demand owing to some special circumstance, which might induce the proprietors of the islands to say: "We think we can do better with the skins next year than this year." But in general they can reap no unfair advantage from the possession of this natural monopoly.

There is another suggestion I observe in the case and argument on the part of Great Britain. These meritorious grounds upon which the title of the United States depends are, of course, perceived by the other side, and they seek to find something of a similar nature upon which to support their alleged right. What have they? I have discovered two things which they put forward or suggest. They recognize the natural advantage which

the owners of the islands have, owing to the seals submitting themselves fully to the power of man there, and the thing they put against that is this: They say this seal has two habitats; one on these islands, and the other in the sea along the coast of British Columbia. That is, they seek to attach the seals to British territory, Canadian territory, and say that they have a superior right also grounded upon favorable conditions of locality, etc. That does not amount to enough to talk about. It is not an advantage which enables them to deal with the seals in any different way. They still cannot take them in any other way than by this indiscriminate pursuit which sacrifices males and females alike—or females to a larger extent than males. It does not enable them to practice a husbandry in respect to the animal, and to give to mankind the benefit of the increase without destroying the stock; and so it should be dismissed, even if it were true in fact. But it is not true in fact. It is only a conjecture. The seal has no winter habitat. He is on the move all the time; if he has a habitat along the coast of British Columbia, he has the same habitat along the coast of California and Oregon, which is territory of the United States, and along a vast extent of this southern part of Alaskan territory and of the Aleutian chain. A winter habitat along the coast of British Columbia, if it were anything but an imagination, is too slight a consideration to form any figure in this discussion.

What is the other ground of merit? That is rather more singular, as it seems to me. They say the seals consume along the shore of British Columbia a great many fish in the sea. The suggestion is, I suppose, that if the seals did not consume those fish, the inhabitants of those shores would catch them, and that, therefore, the seals take away those fish from them! In other words the intimation is: "We feed these seals with our fish!" All I have to say in reply to that is that the fish which they consume, these squids, and crustaceans and cods, and what not, are not the property of Canada, or of Great Britain. They are the property of mankind. Mankind feeds these seals. It is from mankind that they get their sustenance. They take it out of the illimitable stores of the sea. It is not the property of any nation, but of mankind. I grant you that the circumstance that mankind feeds these seals with its fish is a circumstance tending to give mankind an interest in the product. The seals in a beneficial sense belong to mankind. That is our position; and we give them to mankind; and mankind works out its true and

beneficial title only by employing the agency and the instrumentality of the United States. That is the only way whereby mankind can reach or ought to reach them. The world says to the United States: "You have, by nature, this extraordinary advantage of locality, and possession. You, and you alone, have the ability to take the whole annual increase of this animal and furnish it to the world if you will only cultivate it. It is your duty to improve your natural advantages by taking the annual increase, and when you do that, we get the benefit of these seals, and we get it in the only way which it can be afforded to us. No other nation can touch the animal except on the high seas, and to take it there is to destroy it." Therefore, the argument that the fish which these seals consume are fish belonging to British Columbia and that, therefore, the inhabitants of that region have an equity of a superior character in the seal entirely disappears. There is neither fact nor reason to support it.

In reaching these conclusions as to property in seals, it will be observed that I rely on no disputed facts; upon no facts which are in serious dispute. I have said so at least. My assertion in that particular may not be accepted; but I feel quite sure that when the members of this tribunal come to consider the facts, they will agree that all the facts I rely upon are placed beyond dispute. They are conceded or placed beyond dispute by the evidence; but I could really make the whole argument upon a much narrower ground of fact and keep myself within what is absolutely indisputable. Here is the report of the joint commissioners:

"(5) We are in thorough agreement that for industrial as well as for other obvious reasons it is incumbent upon all nations, and particularly upon those having direct commercial interests in fur seals, to provide for their proper protection and preservation.

"(6) Our joint and several investigations have led us to certain conclusions, in the first place, in regard to the facts of seal life, including both the existing conditions and their causes, and, in the second place, in regard to such remedies as may be necessary to secure the fur seal against depletion or commercial extermination.

"(7) We find that, since the Alaska purchase, a marked diminution in the number of seals on and habitually resorting to the Pribilof Islands has taken place; that it has been cumulative in effect, and that it is the result of excessive killing by man."

I take that finding to mean this: That this herd of seals is at the present time in the course of extermination, and that that extermination is due to killing by the hand of man. I take those two facts, and that is all that is necessary for the purpose of establishing a full foundation for the property argument. It fol-

lows from that fact that fur seals must perish unless their killing is regulated; and it follows from that that all unregulated killing is wrong. It follows, I say, from that that the extermination of the seals which is in progress is due to unregulated killing. I do not say now where unregulated. It follows that all unregulated killing is wrong, because it leads to destruction. We know that there is a mode of regulated killing by which the race can be preserved, and that is by confining it to the Pribilof Islands; and we know that sealing upon the high seas cannot be regulated. All unregulated sealing is wrong. Sealing upon the high seas is, and must be, unregulated, because no discrimination is possible between the stock and the increase; and, more than that, the attack of the pelagic sealers is principally upon the stock, and not upon the increase, for wherever a single female is killed the stock is struck directly. Therefore, standing upon the mere finding of this joint report there is fact enough upon which all the conclusions of my argument may be sustained.

There are some technical objections that are urged against the award of property. It is said, you cannot identify these seals; that the seals found upon the Pribilof Islands may perhaps come from the Commander Islands. As I have already said, that is founded upon conjecture. In dealing with a large subject like this, the mere possible circumstance that there might be a few individuals intermingling is of no consequence at all. No judicial tribunal would take notice of it at all. The great fact is obvious, and I think admitted, that the great bulk of the herd which goes on the northwest coast of America and between the Pribilof Islands and the state of California has its breeding place at the Pribilof Islands; and every individual of it, at some time or other, visits those islands and submits itself to the power of man there.

There is another thing that is suggested, and that is if a property right should be allowed in these animals to the United States it might interfere with, and prevent, the enjoyment by the Indians along the coast of an immemorial right and privilege of theirs to hunt seals for their own purposes. That right of the Indians, such as it is, deserves very respectful consideration. It stands upon something in the nature of moral grounds, I admit. They have something of a better claim than these pelagic sealers. There is some reason for saying that you should not deprive these Indians who have lived along that coast always, and who have from time immemorial supported themselves to a greater or less extent by going out in their canoes in the sea and spearing these

seals, of that mode of sustaining existence. It might subject them to starvation. You must support them at least if you do deprive them of it. The force of these considerations I have no disposition to disguise. But what is the nature of that case? That is a pursuit of the animals, not for the purpose of commerce, but by barbarians—for they are such—for their own existence. It is a pursuit which of itself makes an insignificant attack upon the herd. It is a pursuit which is properly classified among the natural sources of danger to the herd just as much as the killer whale; and I have at an early point in my argument so considered it. It is insignificant in amount. It does not affect the size of the herd; it does not affect any of the conditions which I have considered as necessary for the preservation of the existence of the herd. It is, therefore, a pursuit which might be tolerated without danger to the herd.

Therefore, it is quite possible that the United States should have a property interest in the seals, subject, however, to the right of the Indians to pursue them in the manner in which they were accustomed to do in former times; that is to say, for their own purposes, and in canoes from the shore. That is a barbaric pursuit. That is an instance with which the government of the United States is quite familiar, of the survival of barbaric conditions down into civilized life. It is a condition with which the government of Great Britain is also perfectly familiar, for it has to deal with it in many quarters of the globe. So long as the Indians exist, and until they are provided with other means of support, they should be allowed to continue their natural pursuits so far as possible; and it cannot be supposed that the United States would ever undertake to interfere with these Indians so as to deprive them of their rights.

But there is one limitation to that. This is a survival of barbaric conditions. It is a barbaric pursuit, and being a barbaric pursuit, does not endanger the existence of the herd, because it is not carried to sufficient extent. There is not a large population dependent upon it; but it will not do, under cover of that pursuit, to allow civilization to invade in that manner the herds of fur seal. It will not do to employ these Indians and man large vessels with them upon the high seas there to attack these seals for the purpose of furnishing them to commerce. That is not a dealing of barbaric nations with seals. That is a dealing of civilized nations with the seals. Barbaric nations have rights which civilized nations have not, in certain particulars. As I have said many times in the course of my argument, the attack

by barbarians upon the fruits of the earth is limited, confined, and generally not destructive because it is small; but when civilization makes its attack upon them, its methods are perfectly destructive, unless those appliances are made use of which civilization supplies, and by which that destruction may be avoided. This is the precise function which the institution of property performs. Therefore there is no difficulty in awarding to the United States a right of property subject to the right of the Indians to capture in the manner in which they were formerly accustomed to do before the use of vessels for pelagic sealing, but not the right to go out in pelagic sealing vessels.

THE PRESIDENT: Do you not think it is very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may be allowed or permitted to do in the service of a European or civilized man?

MR. CARTER: There are always practical difficulties connected with the dealings with barbaric tribes. There are always greater or less difficulties; but there are no insuperable difficulties connected with it.

THE PRESIDENT: Do you find there is a substantial legal difference between the two cases?

MR. CARTER: There is a substantial difference.

THE PRESIDENT: Between the case of an Indian fishing on his own account and an Indian fishing on the account of a civilized man?

MR. CARTER: I think there is a very substantial one.

THE PRESIDENT: A substantial legal difference?

MR. CARTER: Yes; I think so. When I speak of legal, I mean moral or international grounds. There is no sharp distinction.

THE PRESIDENT: Moral and international are two different fields of discussion, I think, though they may often join.

MR. CARTER: Not so different as may be supposed.

THE PRESIDENT: They are not contrary.

MR. CARTER: Not so different as may be supposed. International law rests upon natural law, and natural law is all moral. The law of nature is all moral; and it is a great part of international law. If the dictates of the law of nature are not repelled by any actual usage of men, then they must be allowed to have their effect, and the dictates of the law of nature are the

dictates of international law. To say that they are moral does not distinguish them at all from such as are legal. We have sharp distinctions, of course, in municipal law between what is moral and what is legal, but in international law whatever relates to actual human concerns, the property of nations, and actual affairs, whatever is dictated in respect to these by the law of nature, is not only the moral law, but the legal law also. There is the broadest sort of difference between the two cases. The Indian goes out and attacks and kills the seals for the purpose of sustaining himself, making a skin which he is going to wear, and getting food to eat.

LORD HANNEN: Is it to be confined to merely their sustenance? Were they not the only suppliers of the skins in the first instance? They bartered the skins, for there was no other source until the Pribilof Islands were discovered. That trading so frequently referred to was a trading in these, amongst other skins.

MR. CARTER: That is true; they were original traders. They were made use of for the purposes of commerce. But that was commerce.

LORD HANNEN: Yes; carried on by the natives.

MR. CARTER: But it was commerce. They were supplying the commerce of the world. They were not furnishing themselves with clothing. They were not furnishing themselves with seals for food.

THE PRESIDENT: That you consider was allowed at the time, and would not be allowed now.

MR. CARTER: Before the Russians discovered these regions, they were inhabited by Indians, and those Indians did pursue the seals in that way. That is pursuit by barbarians without method; without making any effort to preserve the stock, destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal. As I have said, it is only when the world makes its attack through commerce that the existence of the race of animals is in danger. It is only then. When that begins, then the danger begins. Of course at the first beginning of it, when the Russians discovered this country, and traded with these Indian and got these skins, that was the beginning of an attack by the world generally upon this stock of seals. That was the beginning of an attack by civilization through commerce, which is its great instrumentality. Of course, at that very early period, when the draft was very small, it did not threat-

en the existence of the stock at all; but by and by it did. When the existence of the stock is threatened, what are you to do? That is the question.

THE PRESIDENT: That is a point of fact which may create a difference in right, according to your view?

MR. CARTER: The distinction which I mean to draw is between a pursuit of these seals for the purposes of personal use of the people, such as they were in the habit of making before they were discovered by civilized man, and a pursuit of them for the purpose of supplying through commerce, the demands of the world. That is the distinction. The first pursuit, which is confined to the barbarian, is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions; but when it is increased, then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock. And what are the measures which society always employs for that purpose? I have detailed them already. It is by establishing and awarding the institution of property. Must society withhold its effort? Must it forbear to employ those agencies because here are a few hundred Indians in existence who may have some needs in reference to them? No; they are not to be considered, surely. We cannot allow this herd of seals to be extinguished just for the purpose of accommodating a few hundred Indians upon that coast. Surely not. Civilization is not to subordinate itself to barbarism.

. . . .

The survival of barbaric conditions in civilized life is a perfectly familiar problem, both to Great Britain and the United States, in many parts of the world. It presents its difficulties, no doubt. They are dealt with as they can best be dealt with. It has been stated, and sometimes with truth, that at times cruelty has been shown to the native inhabitants, and that at other times perhaps too much generosity is shown to them. The problem is a difficult one; but the difficulty does not dispense with the necessity of a proper dealing with it. How is it to be dealt with? Here were thousands and thousands of Indians in the western part of the United States, living upon the buffalo, living upon herds of buffalo that roamed over a boundless area of territory; and here was a vast population pressing in that direction all the time. What are you to do? Are you to station an army along the boundary, along the frontier, to protect these savage lands from invasion, and say that civilization shall not go on beyond

this point? Are you to protect these Indians and the buffalo in their wild condition forever, and say that this part of the fruitful earth shall remain forever a forest and a waste? Is that what you are to do? Is that the dictate of civilization? No; you cannot do it if you would. Civilization will press forward and will drive out the Indians in some way or other. The only thing you can do is to deal with them gently and gradually, and protect them from violence and secure them a subsistence as best you can.

LORD HANNEN: Was there ever any law in the United States for the preservation of the bison except in the Yellowstone Park?

MR. CARTER: No; none that I am aware of. I think not.

SENATOR MORGAN: No; there never was any law of that sort except in that park.

MR. CARTER: No; none of that kind. The consequence was that the United States in dealing with that problem did it by treaty; but what are treaties between a powerful nation and these tribes of Indians? They are not capable of giving consent. They do not deserve the name of treaties. They are called so; but what is the effect of them? You take away from the Indian his hunting ground. You have to support him by giving him rations; and I suppose the same thing is done in Canada. That is what it comes to. They occupy territory which is fitted to produce prodigious quantities of wheat. That earth must be cultivated. The Indians will not do it. If you take it from them, what do you do? You give them rations. That is what they do in Canada. That is what they do in the United States. That is what they do wherever this problem of dealing with barbaric tribes is treated with generosity and with justice; but the interests of civilization and the demands of civilization cannot be made to wait upon the destinies or demands of these few barbarians. That cannot be done; and when the question comes whether they are to be permitted to exterminate a race of animals like the seal, not for the purpose of supplying themselves, but because they are the employes of men who are prohibited from doing it, of course you must prohibit them as well.

THE PRESIDENT: That is their livelihood also?

MR. CARTER: The livelihood of the Indians. Thay have a right to pursue their livelihood as long as it is confined to getting the seal for the purpose of clothing for their bodies or for meat; but when they want to engage in commerce and clothe themselves

in broadcloth, and fill themselves with rum in addition to their original wants, and for that purpose to exterminate a race of useful animals, a different problem is presented. But practically it would be of no account. The only way in which they pursue or ever have pursued the seals is in open boats, going out short distances from the shore. They can take a few seals that approach the shore rather more closely. The pelagic sealing that threatens the existence of the herd is carried on by means of large vessels provided with perhaps a dozen or fifteen or more boats and a very large crew, which follow the seals off at sea, it may be hundreds of miles, capable of standing any weather and continuing on the sea for months. These vessels follow them up, put out their boats wherever they see a number sufficient to engage attention, and slaughter them in that way. That is what threatens the existence of the herd. If sealing in open boats from the shore were permitted, probably it would never occasion any serious danger. No boat can go out, of course, and stay over night. They cannot go more than a few miles, because they must come back again before dark. It is but a few seals they can take; and that does not threaten the existence of the herd. The attack which civilization makes upon it, and which it has no right to make in a destructive way, is this sealing by vessels with crews and boats which go on long voyages. It is that which is destructive. The answer to this suggestion of the right of the Indians to make their attack upon the seals is this: that it does not create any serious practical difficulty in relation to the problem. Of course it is not to be supposed that the United States are going to take away from that people their means of subsistence, at least without supplying them in turn. Their history abundantly repels any suggestion of that sort. They have never inflicted any such barbarity. Their right might be declared to be subject to that of the Indians. . . . .

Let me say in concluding my argument upon this question of property—and I am about to conclude it now—that I have endeavored to put the case of the government of the United States upon no selfish reasons or grounds, but upon grounds which interest alike the whole world. I have not put this property in seals as the peculiar property of the United States, in the selfish sense of property, but as a property which mankind is interested to have awarded to the United States; all mankind having a right to enjoy, all mankind seeking to enjoy them; but absolutely limited in the enjoyment to one method, and that is by employing the instrumentality of the United States in this husbandry upon

the Pribilof Islands. . . . . We ask for nothing here which is not equally for the interest of all nations. We ask for nothing that is going to injure anybody. We ask only for that which enables the world to enjoy the benefits of this property; and to grant what we ask takes nothing away from anybody, not even from these pelagic sealers, except the pursuit of an occupation of doubtful profit for a few years. In the allotment between the different nations of the world, of the various advantages which the earth affords, this particular one happens to fall to the United States. It is their duty to improve it and make it productive. The performance of that duty will indeed be profitable to them, and rightfully so; and nobody ought to grudge them that. But it will be equally advantageous to the whole world, and all they ask is for an international tribunal, representing the whole world, to award them the unembarrassed opportunity of doing it. They have done it in the past. They are capable of doing it in the future, if permitted to do it by the abstinence of the rest of mankind from a destructive pursuit of the animal. That is all they ask. . . . .

I come now to the other branch of the question of property, namely, the property which the United States government asserts in the industry carried on by it on the Pribilof Islands irrespective of the question whether they have property in the seals or not. Supposing, for the purpose of argument, that my conclusions were not admitted that the United States have a property in the seals themselves, or the seal herd which frequents the islands, they assert that they have a property interest in the industry which is there carried on of such a character that they are justified in protecting and defending it against any wrongful invasion. Now, for the purpose of the argument upon that question, I employ the same basis of fact which I have employed in discussing the question of property in the seals. And, briefly, I assume as facts those statements before read by me, and which are substantially undisputed. They are these: that this industry was established originally by Russia, and that she employed care and labor and devoted expense to its establishment, carrying thither a large number of native Aleutians from the Aleutian Islands, for the purpose of guarding the seals and carrying on the business of selecting the superfluous increase in order to supply the market; that no interference was made with Russia in the enjoyment of that industry during the entire period of her occupation, down to the time when the islands passed into the possession of the United States; that the United States continued to carry on that

industry also without interference until pelagic sealing was introduced; that the effects of that industry were in all respects beneficial, not only to the United States, but also to the whole world; and that they succeeded in securing the entire annual increase of these animals and devoting it to the purposes of commerce without diminishing the stock; and that by means of this industry the stock of seals has been actually preserved. And to show the beneficial results in that particular, we have only to compare the condition of the Pribilof Islands with that of the islands in the southern ocean—the Falkland Islands, and others where the race has been entirely destroyed. And I might add that it is quite possible that with the prohibition of pelagic sealing, and the establishment of similar rules and regulations over the sealing grounds of the southern seas for the preservation of the animals, those islands might be stocked anew, and similar advantages might be enjoyed in many parts of the world to those now produced by the industry of the Pribilof Islands. This result might be brought about and the benefit to mankind greatly increased.

THE PRESIDENT: Do you mean that that should be a matter for international consideration, or that it should be effected by municipal laws?

MR. CARTER: If it were recognized that the seals were property, there would then be an inducement to nations holding sealing grounds, pelagic sealing being prohibited, to cause those grounds to be protected, and regulations might be made for the prosecution of the industry.

THE PRESIDENT: It might be a result of the present arbitration.

MR. CARTER: It might be, and that is one of the considerations which should engage the attention of the tribunal. It is not only a question of preserving the seals which now exist, but of making the natural resources of the earth available for all their possibilities. Now that industry established and carried on by Russia formerly, and now carried on by the United States, is unquestionably a full and perfect right. That is not disputed. It is a lawful occupation. It interferes with the rights of no one else. It is useful to the persons who carry it on, and useful to the whole world, and it has a further utility in the sense that it preserves these races of animals and applies the benefit to mankind, while at the same time preserving the stock. In its several aspects, therefore, it is a full and perfect right; and that right

is not disputed. What is asserted against it is, that the United States have no right to prevent other industries which come in conflict with it. It is said on the part of Great Britain: "We also have an industry in these seals and our industry is a right just as much as yours is a right." Now of course the validity of that argument rests upon the question whether it is a right; we are thus again brought face to face with the question whether this practice is a right. If it is a wrong, then of course there is no defense for it. Upon what ground can it be defended as a right? What moral reasons support it? I know of none; I hear of none suggested, I hear of no consideration in the nature of a moral right suggested as a foundation upon which that pelagic sealing can be sustained. The only grounds I hear mentioned are two—first, that the seal is a free-swimming animal; and, secondly, that the seas are free, and there is no municipal power which can restrain the pursuit which is thus carried on on the high seas. That assertion, therefore, rests upon the assumption that there is a right to destroy any free-swimming animal in the sea. However great a blessing, however useful that animal may be, it is said by the pelagic sealers "we have a right to destroy it, a right to pursue it, although that pursuit involves its destruction." But they have no right to destroy a free-swimming animal or any other animal, either by pursuit on the sea, or by pursuit on the land. If you are taking only the increase, you may have a right, but if you are destroying the race, then your right is gone. To be sure, there are many free-swimming animals in the sea—the herring, the cod, the menhaden, the mackerel—the taking of which must necessarily be indiscriminate. You cannot take them in any other way; you cannot otherwise appropriate them to the uses of mankind. Mankind must seek them in that way, or do without them. And therefore the pursuit of those animals on the high seas is right enough. And in this connection I have observed that nature, in the enormous provision which she makes, of these animals, supplies barriers against their destruction by man. But the seal is an animal which can be taken and applied to the uses of mankind without diminishing the stock, and consequently you have no right to adopt another mode of pursuit which sweeps these animals from existence. . . . .

Now I say we are met face to face with the question whether this pelagic sealing is a right or not. There cannot be a right to destroy any free-swimming animal, if there is another way by which he can be taken without destruction. I next have to say that what constitutes one element of the property of the United

States in the seals, and of their property interest in this industry, is that they, the United States, are performing a duty to mankind. They are cultivating and improving an advantage which, in the division of the blessings of the earth, has fallen to them. Has any nation the power of taking the increase and yet preserving this race of seals for the use of all mankind by pelagic sealing, and is there any corresponding duty on the part of any nation to prosecute pelagic sealing? None whatever; it is mere destruction.

Now the other ground on which Great Britain seeks to maintain this practice is that the seas are free. They say: "You cannot interfere on the high seas with us and our industry, which is a rightful one. That does not follow. Whether a thing is right or not depends upon its moral qualities, and not upon the ability to punish it. A great many wrong things may be done on the sea, because there is no municipal law to prevent them, but that does not give any semblance of right to such proceedings. The distinction between right and wrong is not abolished on the sea; it goes all over the world, and there is no part of the sea which is not subject to the dominion of law. Therefore, to say that "the seas are free for this practice because you cannot punish us for it" is to make an assertion that has no foundation whatever in moral or legal reason. Of course in saying that the practice of pelagic sealing is wrong, we do not insist that the United States have, for that reason alone, a right to repress it. The United States do not assume the office of redressing wrongs all over the world; but what they do say is that where their right of property in an industry is injured by an act on the high seas which is, in itself, a wrong, then they have a right to interfere and defend themselves against that wrong. Now there are two foundations upon which the right to this industry carried on at the Pribilof Islands is maintained by the United States, and they have quite a close resemblance to each other and yet are in certain particulars distinct. The first is that that industry is made possible in consequence of a particular natural advantage which attaches to the soil of the United States at this spot, and that that advantage consists in the fact that the race of seals regularly resort thither and spend a considerable portion of their life there, enabling man to carry on a husbandry in them. This right is therefore founded on a natural advantage peculiar to the spot, and is as much a right of the nation as any other. The other contention is that it is a na-

tional industry which cannot be broken up by the wrongful attacks of individuals of other nations. I call it a national industry for this reason; it is an industry which requires the establishment of rules and regulations for its conduct, which rules and regulations cannot be carried into effect except by the authority of a nation. . . . .

Now, where a nation has created an industry by the aid of rules and regulations which it has established; where it has brought in a population to engage in that industry, so that the destruction of that industry would deprive them of their means of subsistence, I maintain that the citizens of another nation cannot, for their own temporary benefit, come in and break up that industry. Let me illustrate that. I may assume that there are races of fishes which regularly visit a shore. They may not be the property of the owners of that shore, they may not be the property of the nation which holds dominion over that shore; nevertheless, it is possible by making rules and regulations to create an industry in them, and when that is done there is a thing, a creation, which that nation has a right to maintain against the attacks of the people of other nations.

THE PRESIDENT: That would create a right of protection over the species.

MR. CARTER: That is what I am arguing; it would give a right of protection; the right of protection stands upon the industry which is created. Writers upon the law of property tell us that property has many forms. Sometimes it is the right to the exclusive use and disposition of a thing; sometimes it may consist of a mere lien on a thing; sometimes it may be a right to go upon the land of another and do something there; and sometimes it is what jurists call *jura merae facultatis;* but it is a right, and in the nature of property also. Now I wish to give some illustrations which will show what I mean by the right to carry on this industry. These Pribilof Islands are one instance, and there are others. In our case are given many instances, where people having a right of legislation have passed laws for the purpose of protecting fisheries and other industries against invasion. There are many different instances of that sort. There are many instances where Great Britain has passed laws of that character. I proceed upon the assumption that lawful and useful industries can be created and preserved by the exercise of national authority in that way. Whether this authority is susceptible of being asserted against the citizens of other nations, or only against the citizens

of the nations by which the laws were passed, is another question, but the policy is in all instances the same. Now I have instanced the Pribilof Islands. Another instance is the fisheries on the banks of Newfoundland. Great Britain asserted at an early period a right to the fisheries there, because she had established an industry which had been maintained by her subjects, who resorted thither for the purpose of catching fish. When the United States gained their independence, they claimed to share in these fisheries. They said: "We went there and established that fishery; and now, having gained our independence, we have a right to share in the benefits to be derived from it." That right was denied by Great Britain and the attempt to assert it was unsuccessful; but it was admitted by both parties that it was a national industry, although the United States contended that they had a right to participate in it. And there are numerous other cases where laws have been passed by Great Britain for the protection of her fisheries.

THE PRESIDENT: Are these rights asserted now?

MR. CARTER: Well, I do not think they are practically asserted on the banks of Newfoundland now as against other nations. But they were originally, and they tend to illustrate my argument. . . . .

Now the pearl fisheries of Ceylon are another instance, as also the coral beds in certain parts of the world which are protected by the laws of the nations that are situated contiguous to them, and in some instances for the benefit of the citizens of those nations only. In the American case we have referred to a great number of instances where laws have been passed to establish and preserve, govern and regulate, fisheries and other pursuits carried on on the high seas. Now the general answer to that which Great Britain makes is, that these laws, whether the laws of sovereign states, or of their colonial dependencies, are designed to operate only on their own citizens, and are not aimed at the citizens of other nations, and that they do not, therefore, furnish any support to the assertion that they may be operative against the citizens of other nations. It is said that they are only designed to regulate the conduct of citizens of the nations by whom they are made. It is not my purpose to go through the particular instances in which these regulations have been adopted, for it would occupy altogether too much time. In general, I suppose that though these regulations were drawn in terms limited to the citizens of the nations by whom they are passed,

yet in reality they are designed to be operative upon citizens of all nations; otherwise they would serve only to facilitate a fuller enjoyment of the benefits of the industry by the citizens of other nations, without the competition and rivalry of the nation by whom they are passed, which I do not suppose is their intent. But there are several instances of rules and laws respecting the practice of these industries on the high seas which are admitted by the counsel for Great Britain to be operative upon the citizens of other nations. Turning to the argument on the part of Great Britain (page 59) we find this:

"It is next submitted—

"That international law recognizes the right of a state to acquire certain portions of the waters of the sea and of the soil under the sea, and to include them within the territory of the state. This affords a legitimate explanation of the cases of foreign extraterritorial fishery laws cited by the United States, quite apart from any question whether they apply to foreigners or not. But it affords no justification for, nor are they analogous to, the Alaskan seal statute, as is contended by the United States. The territory of the nation extends to low-water mark; but certain portions of the sea may be added to the dominion. For example, the sea which lies *inter fauces terrae*, and, in certain exceptional cases, parts of the sea not lying *inter fauces terrae*. The claim applies strictly to the soil under the sea. Such claim may be legitimately made to oyster beds, pearl fisheries, and coral reefs; and, in the same way, mines within the territory may be worked out under the sea below low-water mark. Isolated portions of the high sea cannot be taken by a nation unless the bed on which they rest can be physically occupied in a manner analogous to the occupation of land. These principles, though they explain legitimately all the examples of foreign laws dwelt on by the United States, show also that no right to or on so vast an area of the high sea as Bering Sea can be acquired. Nor has any such claim ever been made."

Now, we have it admitted here that it is competent to particular nations to assert for themselves the exclusive benefits of an industry connected with oyster beds, pearl-fishery beds, and coral-reef beds, although they are out on the high seas beyond the territorial three-mile limit, and to assert that right against the citizens of other nations. They are obliged to make that admission, for it is impossible to examine the various statutes which have been passed by independent states upon these particular subjects, without recognizing the fact that they are designed to apply to the citizens of all nations, and are actually enforced against the citizens of all nations. What is the implied assertion upon which such legislation is founded? Why, that the state has, by the operation of its rules and regulations, created a national industry in respect to those fisheries, oysters, pearls, and coral, which it is justified in protecting against invasion by the citizens

of other nations, although these fisheries are situate on the high seas.

THE PRESIDENT: That does not seem to have been the contention. It was founded rather upon the right of occupation.

MR. CARTER: Well, I am going to discuss the ground upon which the counsel for Great Britain put it, but they assert that there is a right to protect, against the invasion of other nations, products of the sea outside the three-mile limit. I know they seek to base that upon a right of property in the land at the bottom. I contend that a nation has a right to establish an industry of that sort and protect it against the invasion of other nations, irrespective of any right of property in the bottom. They suggest reasons upon which their asserted right of property is founded. I am going to inquire into the validity of these reasons. They say it is a property right to the bottom, and that it exists wherever the bottom may be occupied, and does not exist where the bottom cannot be occupied. Well, that amounts to this, then, that wherever a nation can occupy the bottom, although outside the territorial limits, it may rightfully occupy it and exclude other nations from it. But how can you occupy the bottom of the sea? Well, you can occupy it only by taking such possession as is possible. You can buoy it where you can reach the bottom, and establish a naval force and exclude the citizens of other nations from it; and that is all the occupation of the bottom that you can effect. The assertion on the part of my learned friends is, that wherever you can take such possession of the bottom, you can exclude other nations from it. Now that goes much further than the argument of the United States, no part of which supports a general right to thus occupy the sea outside the three-mile limit. We do not assert any such right, nor do we suppose that any such right exists; but that is their assertion; and if it be true, you can take possession of the bottom of the sea anywhere; and if there is any particular piece of coast off Great Britain, twenty miles away, where the bottom can be easily reached, and which is a particularly favorable place for carrying on a cod fishery or a herring fishery, Great Britain can take possession of it and exclude the rest of mankind from it. If this bottom theory, upon which they put themselves, has any validity or foundation, that can be done. If the right to establish the industry rest upon an ability to occupy the bottom, then you can establish one wherever you can reach bottom; and if you can establish it in one place, you can establish it in an-

other. I do not suppose it is possible to defend any right like that over the high seas. I do not suppose it is possible to defend any such right as that over the fisheries of the seas. There must be some other principle which may be called into play.

These regulations are found in the cases of oyster beds, coral beds, beds where the pearl fishery is carried on, beds which are found in a certain proximity to the coast of a country, and which can be worked more conveniently by the citizens of that country than any other. We find that the industries are confined to such instances, and in those instances we find rules and regulations passed for the purpose of securing the products of the seas, and designed to make them more regular and abundant. Those are the cases in which it can be done, and in those cases it is perfectly justifiable. It is where there is a natural advantage, within a certain proximity to the coast of a particular nation, which it can turn to account better than the citizens of any other nation. In such cases, if the particular nation is permitted to establish and carry out a system of national regulation, it may furnish a regular, constant supply of a product of the seas for the uses of mankind, which product, if it were thrown open to the whole world, would be destroyed. That is reasonable. That stands upon the principles which I have been asserting. That is a solid foundation; but it does not rest upon any notion of a right of occupying the bottom. It rests upon the fact that there is a natural advantage—a particular locality offering advantages to a particular nation, which, if improved, will lead to the prosecution of a useful and profitable industry, useful to the nation, and useful to the world.

Under those circumstances, if the contiguous nation is permitted to cultivate undisturbed that natural advantage, free from the invasion of others, that industry can be profitably carried on, but if all come in, it is broken up. In such cases, therefore, the nation which enjoys this advantage says to other nations, rightfully: "Here is an advantage which Providence has placed within our reach, rather than in yours. We can turn it to account; you cannot. We can use it so that it may produce its natural advantages. In order to do that, it requires regulation. It must not be used at all times. It must be allowed certain periods of rest. The animals which form the basis of it are at one time of the year breeding, and should not be disturbed. There are times when the industry should be pursued; times when the industry should be closed. That cannot be accomplished without national regulation. We have done that. We

have created an industry. There is a particular population of ours devoted to the work. Now, you must let us prosecute it alone. It is not reasonable, it is not fair, it is not just, that you should come in here after we have created this advantage and despoil it, for a mere temporary gain. You will not come habitually, you will only come occasionally; and you will interfere only with the effect of ruining us, without reaping any permanent advantage to yourselves." . . . .

So I have to say that upon conceded principles there is a right in a nation to protect an industry for which it has natural advantages, and which it can create, preserve, and improve by means of rules and regulations which it alone has the power to adopt and to enforce. It is conceded that this may be done in the cases to which I refer of the oyster beds, the pearl beds, and the coral beds, even though they lie far outside the three-mile limit. If they are so situated as to be the special advantage of a particular power, and that particular power chooses to improve that natural advantage by the creation of an industry, it establishes a right which it can defend from invasion by the citizens of other nations. The explanation of this which is attempted to be made in the printed argument of the other side is that it depends upon an ability to occupy the bottom. That does not explain it. That furnishes no ground of reason whatever. If it were true, it would justify the occupation of a portion of the bottom in any place in the seas, irrespective of the question whether there was a natural advantage to a particular nation or not; and such right to occupy the bottom certainly does not exist. Nor can you occupy the bottom of the sea. It is not susceptible of occupation, unless the law should choose to declare that it should be deemed to be the subject of exclusive occupation; and as I have already, I think, sufficiently shown, the law will not do that merely to gratify the whim or the ambition of any particular individual, or any particular nation, but only for the accomplishment of some great social and general good.

That right of creating a national industry based upon peculiar natural advantages, and based sometimes upon the mere circumstance that it has been created by rules and regulations, is one that is fully established, in reference to many of several different products of the sea. In the protecting of industries of that sort, does the nation extend its jurisdiction over those places? Does it make them a part of its territory? Certainly not. It has no right to do that. It is not consistent with the law of nations that it should do that. There is no occasion for it to do that. There

is no need of it. All that it is necessary for it to do is to enforce such regulations on those places as are effective and sufficient to protect the right from invasion by the citizens of other nations.

Now let me bring the case of the seal fisheries on the Pribilof Islands before the attention of the tribunal, and compare them with the doctrine thus established. What natural advantage have the United States, the owners of those islands? One of the highest; and an advantage, indeed, not attached to the bottom of the sea, but an advantage on the dry land above the sea, which is within their admitted jurisdiction. By the creation and carrying on of this industry there, they have established a business profitable to themselves, highly useful to the whole world. Shall they not be able to protect it from invasion? If the coral beds can be protected from invasion far out at sea, if the pearl beds can be protected from invasion by municipal regulations operative upon the sea, why should not this fishery be protected in the like way? It requires no greater exercise of authority. It requires no straining whatever of the ordinary rules which govern the conduct of nations in respect to their interests. It is a more illustrative instance, by far, than the case of the coral beds, or the pearl beds, or the oyster beds; a more illustrative instance for the application of the principle that the nation may protect the industry which has thus been created.

To make it entirely analogous, if these seals were in some manner attached to the bottom, if they were in the habit of congregating at some particular place on the bottom of the sea, then, according to the doctrine which seems to be made the foundation of the right by our friends on the other side, the United States would have a right to go out and take possession of that bottom, incorporate it into its own territory, and treat it as a part of its own nationality. I am sure we assert no such right as that. We do not ask to go to any such length as that. All we ask is the right to carry on the industry on our own admitted soil, and to protect it from being broken up by repressing acts upon the high seas which are in themselves essential wrongs.

Let me defend these particular instances of the coral beds, the pearl beds, and the oyster beds upon the same principles upon which I have defended the assertion of property interest, not only in the seals, but in the seal industry upon the Pribilof Islands. In all these cases, there is a peculiar natural advantage connected with those places and belonging to the nations which lie in nearest proximity to them. In the next place, they are exhaustible. There is not enough for all; and therefore there arises an occa-

sion when you may assert the same principles which govern the laws of property. In the next place, these industries, if left open to the unregulated invasion of the citizens of all nations, would be used up and destroyed. The only condition upon which they can be preserved and made beneficial to mankind is that they be allowed to be worked and operated by the particular power which has the best facilities for that purpose. In the next place, they can be preserved only by putting them under a system of regulation, which shall be operative upon the citizens of all nations. It is necessary that the citizens of the particular power, who go out there and improve these advantages, should also be made subject to these regulations. In other words, the general condition is presented that mankind may have the benefit of these advantages if they are disposed of in this way, and not otherwise; and, consequently, they ought to be disposed of in this way. The bottom of the sea in these places is not made the property of the particular powers who assert the right to the industries. It is not their property at all. It is not within their sovereign jurisdiction at all, any more than any other part of the high seas, but it is a theater where their defensive regulations may be put in operation, and where the industries of their citizens may be defended.[11]

Now, upon that very firm basis of reason and authority we place the right of the United States to protect themselves in the enjoyment of the industry which they have established upon these islands. They have peculiar advantages, supreme advantages, for appropriating the annual increase of the seal, without diminishing the stock. They have established an industry and made rules and regulations which are devised to preserve it, and to make this blessing perpetual to mankind. The seal is exhaustible. There is not enough for all, and they are entitled to challenge for themselves the benefits of this industry in consequence of these advantages, and in consequence of the steps which they have taken to improve them. I cannot think that there is any sound answer to an assertion of the right of a property interest in this industry placed upon that basis, and this, too, irrespective of a property in the seals themselves.

That concludes my argument upon this question of the property interest of the United States in the industry established upon the islands, irrespective of a property interest in the seals.

I now pass to the consequences of the establishment of those

[11] Mr. Carter supported these views by quoting from Puffendorf, Law of Nature and Nations, bk. 4, c. 5, § 7, and from Vattel, bk. 1, c. 23, § 287, p. 126.

rights for which I have contended so far as they involve the question, what action the United States may take for the purpose of protecting themselves in the enjoyment of such rights.

I must assume, in the first place, that if she has the right of property in the seals themselves, or a right to the exclusive enjoyment of this industry of taking seals, in consequence of her natural advantages and of the exhaustible character of the product, she has the authority in some manner to enforce such right. Otherwise we should be talking to no purpose. What is a right which there is no means of enforcing? It would be mere words. It would amount to nothing at all. There would be nothing substantial about it. Such things are not the subject of discussion. When it is said that a man, or a nation, has certain rights of property, it means that they have rights which can be enforced in some manner. How shall they enforce them? That is the question. What acts may the United States do? Can they extend their sovereignty over the seas to an illimitable extent wherever it may be necessary to protect the right? No; they cannot. We make no assertion of that sort. We could not substantiate it, if we did. The sovereign jurisdiction of a nation is bounded by her territory, with an addition which carries, to a certain qualified extent, her sovereignty over a distance on the seas commonly taken as three miles. Beyond that the sovereign jurisdiction of the nation cannot be extended. Beyond that her laws, as laws, have in general no force or operation. Beyond that her legislative powers have no effect. All that we take to be admitted.

SIR CHARLES RUSSELL: You mean as against those who are not subjects or citizens?

MR. CARTER: Yes; against those who are not subjects or citizens. That is what I mean. If her legislative power extended over the sea, she would have a right, of course, to legislate for everybody that came within the limits of that legislative power. We make no such pretension as that. This supreme legislative jurisdiction must be bounded necessarily by some line, and that line is, for the boundary of her absolute legislative jurisdiction, high-water mark. It does not go beyond that, although she may extend it, for most purposes, over a further space which is commonly taken to be—I do not mean to say it is absolutely limited to that, but is commonly taken to be—a distance of three miles; but even there her legislative power is not absolute, for she cannot exclude the passage of foreign vessels over

her waters. She cannot, as she can do with regard to her territory, exclude foreigners from it. Over the land she has an absolute power of exclusion; but over these territorial waters, although she may generally extend her legislative power over a belt three miles in width, she cannot extend it so far as to exclude foreign ships. Her right to protect her property or industry is not derived from her legislative power. Where do you get it then? How does she acquire any right to protect it? She has a right to protect it, just as any individual has a right to protect his property, where there are no other means, that is, by force; not by the exercise of legislative power, but by the exercise of executive power—an exercise of natural power—an exercise of what you may call "force." Individuals can defend their rights and property by the employment of force to a certain extent. If a man attacks me, I may resist him and subdue him and use violence upon him for that purpose; and I may go as far as it is necessary for that purpose; not farther. Whatever force it is necessary to employ to defend myself, I may employ against him. So if a man comes upon my property, I may remove him, if I have to carry him five miles; and I may employ as much force as is necessary for the purpose of removing him from my property; but I cannot employ any more force than is necessary.

Those rights of self-defense and self-protection survive to individual man even in civil society, but we may not go any further than strict necessity. For the general protection of rights, members of a civil municipal society must appeal to society itself. They appeal to its courts for protection. They appeal to the judicial power, and that furnishes a remedy. What can nations do? Is there any court to which they can appeal? No; they cannot make any such appeal as that. There is no tribunal into which one nation can summon another nation for judgment. What can nations do? They can only use this same sort of self-defensive power that an individual does. That is all. That they can use under all circumstances, limited, however, by the same rules and by the same boundaries which limit it in the case of an individual—necessity. Whatever is necessary to be done by a nation for the protection of its rights, it may do, and it may do it as an individual, and it is no exertion of its legislative power at all.

We may make that very plain and palpable by turning to admitted instances of the exercise of it, and take for that purpose what are commonly called belligerent rights. Here is a nation

engaged in war. It blockades the enemy's ports. The ship of a neutral nation, friendly to both parties, undertakes to enter that blockaded port, and the belligerent that has established the blockade captures her by an exercise of force, carries her into one of his own ports, and confiscates her, and sells her. What kind of an exercise of power is that? Not legislative power, certainly. That act was committed on the high seas, and outside of the jurisdiction of any power. It therefore was not legislative power. It did not operate to extend the jurisdiction of the nation over the place. It was simply an act of reasonable and necessary force employed for the purposes of self-defense. The nation had the right to carry on the war. Its existence, perhaps, depended upon its ability to subdue its adversary. It could not carry on the war successfully unless it had the right of shutting up the ports of the enemy, and, therefore, the necessary purposes of self-defense gave it the liberty to seize the ship of another power, carry it into port, and condemn it. That is not legislative power. It was not exerted by reason of any extension of the sovereignty of the nation over the seas. It was simply an exercise of self-defensive power, standing upon the principle of necessity, and limited by the principle of necessity. Wherever the necessity exists that power exists. I instance the case of blockade. There are other instances of belligerent rights.

THE PRESIDENT: You would not admit of that power in times of peace?

MR. CARTER: That is another question. Whether you may exercise a power of that sort in time of peace is a question to which I shall presently come. What I am explaining now is the character of the act. It is not legislative; that is certain. It is an act of self-defensive power. There are other instances of it in the case of belligerent rights. Take the case of contraband of war. A belligerent can capture a vessel that is carrying contraband of war, upon any of the high seas. You can enter even the territory of a friendly state, if it is necessary for the purpose of protecting yourself against your adversary; and even when there is no condition of war. They had a rebellion in Canada some years ago, and a vessel was fitted out by persons making use of the soil of the United States for the purpose of aiding the "rebellion," as it was called. A British military force crossed the Niagara river, captured that vessel in the territory of the United States—not on the high seas, but in the territory of the United States. I refer to the case of the Caroline. There

was a conflict between Great Britain and the United States upon the point as to whether the former had the right to do that; but the conflict was not upon the point of principle at all, it being admitted on both sides that if there was a necessity for doing that act Great Britain was right in doing it; that if there was a well-grounded apprehension that that vessel was going to proceed across the river and engage in enterprises hostile to the authority of Great Britain in Canada, she was justified in that action.

A celebrated instance in history was the seizure by Great Britain of the Danish fleet in the harbor of Copenhagen. There was the fleet of a friendly power. There was absolute peace between Great Britain and Denmark; but Great Britain was apprehensive that that fleet would fall into the possession of France, and the seizure was defended by her ablest statesmen on the ground of necessity. This necessity of nations, when it appears, must have its way; and the inconvenience, the trouble, the damage, the loss which individual citizens of another nation may occasionally suffer in consequence of these exertions of self-defensive authority, are not to be taken into account.

THE PRESIDENT: Do you not think that all of that takes us out of this sphere of law and right?

MR. CARTER: Not at all. We are right within the sphere of law and right.

THE PRESIDENT: I do not think the whole world generally considers it so.

MR. CARTER: We are right within the sphere of law; and the exercise of these acts of self-defensive authority—the extent to which they may go, the necessities which create them, how far the necessities extend—constitute a great chapter in international law, and are all dealt with, all their limitations defined, and the principle which governs them laid down.

What is said upon the other side? They agree that all these things may be done. What do they say? Well, they say that they cannot be done in time of peace,—that you cannot defend yourself by the exercise of force on the high seas in time of peace. Where, I should like to know, is any such doctrine as that laid down? I hope my learned friends will find some authority for those positions. I have never been able to find such authority. The assertion is that a nation cannot defend itself by an act of necessary force in time of peace—a thing that an in-

dividual may do in civil society, a nation cannot do; and cannot do when there is no other means of protecting itself! Of course it must be instantly perceived that if this power of defending itself and its property from injury against the citizens of other nations is something which a nation cannot exercise in time of peace—if that is true—the assertion that it has any rights at all is mere empty sound. A right that cannot be defended amounts to nothing. I would like to have those who assert that a nation cannot defend itself and its property in time of peace by acts of necessary self-defense tell me how it can defend them. I hope they will be able to tell me. If a nation cannot defend its admitted and conceded rights in that way, I hope they will be able to point out some way in which those rights can be defended and protected.

But there is no truth in the assertion that the exercise by a nation of the right of self-defense, by the employment of acts of necessary force, is confined to times of war. There is no substance in that. The right exists in time of peace just as well. Whenever the necessity arises, the right arises, whether it be in time of war or time of peace. It may arise in peace just as much as in war. In point of fact the principal occasions, and the most frequent occasions, for the exercise of this right happen to occur in time of war, and, therefore, the instances in which it is exercised and the rules which govern its exercise are found in belligerent conditions far more than in conditions of peace. The absence of the occasion is the reason why we find less discussion of these rights in time of peace, and a want of rules for regulating them; but nevertheless the occasion may arise, and when it does arise, then the power must be put in force.

Now, let me call the attention of the tribunal to occasions when it does arise in times of peace. In the first place, let me allude to those municipal regulations which are devised by different states for the purpose of protecting their revenue. I before remarked that the protection of the revenue of a nation could not well be effective unless the conduct of foreign vessels could be controlled at a greater distance than three miles from the land. If a vessel intending a breach of the revenue laws of a nation had the power to approach its shores to a distance of three miles from the land, and wait outside of that limit for a favorable opportunity to slip in, or to unload its cargo into another vessel sent clandestinely from the shore, it might at all times evade its revenue laws, and, consequently, most nations—certainly Great Britain and the United States—Great Britain from a very early

period and the United States almost from the period of her independence—have enacted laws prohibiting vessels from transshipping goods or hovering at a distance much greater than that of three miles—three or four leagues from the shore being the area commonly fixed upon. What is the penalty which they denounce for that purpose? The penalty is capture and confiscation. Does that penalty, and the enforcement of that penalty, involve an extension of jurisdiction out to that limit of three or four leagues? Certainly not. It is an act of self-defense. It is an executive act, designed to protect the revenue interests of the country. So also in the case of colonial trade, a similar device was formerly adopted for the purpose of preventing the approach of vessels in the neighborhood of the colonies of another country, for the purpose of engaging in illicit trade with such colonies. In order to enforce such prohibitions, it was necessary that regulations should be adopted prohibiting vessels from hovering off the coasts. Consequently, if a vessel appeared off the coast and did what was called "hover," that is, not proceed upon her voyage, but wait there apparently for a favorable time to run in, she subjected herself to the penalty of those laws, and might be captured. I think no nation has ever resisted the enactment or enforcement of those laws.[12] . . .

It is, however, true—and a distinction is to be noticed here—that regulations designed to govern the exercise of this right of self-defense sometimes go a step further than the mere making of provision for the seizure and capture of a vessel on the high seas, when she is actually engaged in an offense against the laws of the nation which undertakes the seizure. They sometimes go a step further than that, and make the conduct of a vessel, if it justifies a suspicion that she intends illicit or prohibited trade, or intends any other violation of the laws of the nation adopting the regulation, itself an offense, although, in point of fact, it might be true that the vessel was not actually engaged in such violation.

When regulations of this character go to that length, they go beyond the mere right of employing force, and enter the field of legislation, and assume a limited and qualified right to make laws operative upon the high seas. That is the nature of regulations when they undertake to make acts offenses which are not, in their nature, necessarily offenses. If a vessel is actually engaged in an attempt to carry on a prohibited trade with the colony of a nation, that act is, necessarily, in itself a violation of the

[12] Citing Church v. Hubbart, 2 Cranch, 189; Cockburn, C. J., in Queen v. Kehn, 2 Exch. 320.

rights of that nation; but if she is not so engaged, but happens to be involved in circumstances which throw suspicion upon the nature of the enterprise in which she is engaged, and justify a suspicion that she is really contemplating a prohibited trade, if there is a regulation which makes that conduct, of itself, a crime, that, we must admit, is a piece of legislation, and assumes the right—a limited right, it is true—of passing laws operative upon the high seas.

All the doubt and all the controversy which have arisen in reference to this question of the exercise by a nation of the right of self-defense upon the high seas, turns upon the validity of regulations of that sort, regulations which go beyond the mere shaping of the right of self-defense and prescribing how it shall be exercised, and undertake to create distinct offenses. The power of a nation to do that has been disputed, and may perhaps be still the subject of dispute. It will be observed that this exercise, even of the right of legislation in the cases which I have mentioned, does not involve an assumption of a general authority to legislate over the seas. It is limited strictly to the case of self-defense, and is calculated to provide means by which that right of self-defense may be more efficiently exerted; but, nevertheless, it does partake of the quality of legislation. Whether it is valid or not, has been disputed.

That precise question arose in the supreme court of the United States in the case of Rose v. Himely, which is reported in 4th Cranch, p. 241. The circumstances of that case were substantially these: The French authorities had made an ordinance prohibiting vessels from sailing within two leagues of the island of San Domingo at certain places, and under certain conditions. A vessel was captured that had violated that ordinance, but the capture was made outside of the two-league limit. The question was whether that capture could be sustained, that is to say, whether a capture by one nation upon the high seas of a vessel belonging to another nation, which had been engaged in violating a municipal regulation, was lawful. Chief Justice Marshall was of opinion that it was not lawful; but a majority of the members of the court did not agree with him upon that point, and so the question was passed over without being decided, the case being disposed of upon another point. It again arose for decision in the case of Hudson v. Guestier, 6 Cranch, 281. That case involved a violation of the same ordinance, and the capture had been made outside of the two-league limit. This case of Hudson v. Guestier is reported twice. It came before the su-

preme court on two occasions; and the proof upon the last occasion, which is the one to which I refer, as to the locality of the capture, was different from what it was when it came before the court in the first instance. In the last instance the evidence showed that the capture had taken place outside of the two-league limit. Upon the second argument it was held by a majority of the court that the capture was lawful; and the expressions in the opinion of Mr. Chief Justice Marshall, in Rose v. Himely—his *dicta* to the contrary effect—were overruled; and therefore, so far as the supreme court of the United States is concerned, it is held that regulations of the character I have mentioned, even when they go further than to merely provide for capturing a vessel that is actually engaged in a violation of the right of a nation, and constitute a prohibited area within which a vessel must not go, whether upon a rightful or a wrongful mission, are in accordance with international law.

Let me say, however, that the United States, upon this argument, avoids all controversy of that sort. We do not ask for the application of any doctrine, even although we might, to the effect that we can establish any prohibited area on the high seas and exclude the vessels of other nations from it. We do not ask to have it determined that the United States has the right to say that the offense of pelagic sealing when committed by vessels of another nation is a crime for which we can punish the officers and crew of such vessel. That would be legislating for the high seas. We do not ask for a decision that the United States can make a law and enforce it, by which she could condemn a vessel that had been engaged at some past time in pelagic sealing, if the vessel was not so engaged at the time of seizure. The doctrine maintained by us simply amounts to this, that whenever a vessel is caught red-handed, *flagrante delicto,* in pelagic sealing, the government of the United States has the right to seize her and capture her; that is to say, it has the right to employ necessary force for the purpose of protecting, in the only way in which it can protect, its property in the seals, or its property interest in the industry which it maintains upon the islands. That is the extent of our claim.

If the United States cannot protect their property in that way, how is it possible for them to protect it at all? My argument assumes, of course, that I have been successful in showing that the United States has a property interest in these seals wherever they are, and upon the high seas, as well as upon the land; or, if not that, that it has a property interest in the industry which

it carries on at the Pribilof Islands, which they are entitled to protect. The practice of pelagic sealing, we have shown, is destructive of both, and is a wrong in itself. The United States cruiser finds a vessel actually engaged in destroying these seals, the property of the United States. She warns her off—commands her to desist from the trespass in which she is engaged. Suppose the vessel refuses, what is to be done then? Is the cruiser to allow her to proceed in the execution of her trespass, stay by her, follow her into some port, and there, in the name of the United States, seek redress in the municipal tribunals? Is the remedy of the United States limited to that? That, of course, would be wholly ineffective; and if it were effective in any degree, or in any instance, it would require the entire navy of the United States to carry it fully out. You would require a ship of war for every pelagic sealer. That, of course, would be absolutely ineffective; nor would it comport with the dignity of a nation. No nation has ever yet condescended, in the defense and protection of its rights upon the high seas, to wait until it could resort to the municipal tribunal of some power and there seek to obtain such justice as might be afforded.

One other resort might be suggested. It might be said that the government of the United States might make the conduct of these Canadian pelagic sealers under such circumstances the subject of complaint to Great Britain herself. What should it say to Great Britain? Ask her to prohibit this conduct? How could Great Britain prohibit it? Only by employing a part of her fleet to do it. Is it the business of one nation to furnish a force to protect rights of another nation? Would not the prompt answer of Great Britain under such circumstances be: "This is not our act; we do not adopt these acts of the Canadian sealers; we agree that you have a property in these seals; we do not command, encourage, or in any manner assist, the action of these pelagic sealers; if they are trespassing upon the rights of the United States, is that nation so feeble that it cannot defend itself upon the high seas?" What reply could the United States make to such a response as that? No; there is no way in which a nation can protect its rights upon the high seas other than by the employment of force—force employed as an individual would employ it; force not derived from any law whatever, but force derived from the fact that the nation has a right upon which some one is trespassing, a trespass which the nation cannot prevent in any other way, except by the employment of force. These methods of defending national rights, frequently asserted in time

of war, are not so frequently asserted in time of peace, but only because the necessity does not so frequently arise. But still they are asserted, and must be asserted, whenever a nation seeks to protect with efficiency her colonial trade from invasion, or her revenue laws against smuggling by citizens of other nations; and must be asserted whenever she wishes to enforce with efficiency in time of contagion her quarantine laws. They must be asserted whenever a case arises in which the rights, or the property, or the well-being of a nation are endangered by the acts of citizens of other nations upon the high seas, whether in peace or war.[13]

Those, then, are the grounds upon which the United States asserts its right to the employment of reasonable force. If it has a property in the seals, that property is invaded whenever they are attacked by pelagic sealers, and that property interest in the seals themselves, and the necessity of defending it, give the United States the right to prevent that practice by the arrest and seizure of the guilty vessel. If it should be decided that it has not a property interest in the seals themselves, but has a property interest in the industry which it maintains upon the Pribilof Islands—a rightful, lawful and useful industry—then its right to arrest the practice of pelagic sealing upon the sea does not depend upon a property interest in the seals, but upon the fact that that practice is an essential wrong, and is, besides, an invasion of the rightful industry which the United States carries on upon the land. To justify that act of pelagic sealing, it is necessary to show that it is in itself a right, and if that were shown, then the United States would have no right to interfere with it; but if it is in itself a wrong—if, upon the fundamental and immutable distinctions between right and wrong everywhere prevalent, upon the sea as well as upon the land, that act of destroying a useful race of animals is not defensible as a right, then, interfering as it does with the lawful rights and industry of the United States, it has the right to prevent it, and to prevent it by the employment of force.

We have two grounds, therefore, upon which we assert the existence of this right to the employment of force: The first is, the reason and necessity of the thing; because the declaration that we have a right involves the concession that there is some means of defending it. To say that a nation has a right which at the same time the citizens of every other nation may trample upon and violate with impunity is to commit a solecism. Such a thing

[13] Mr. Carter here presented a series of specific propositions embracing his views upon this particular subject.

as that would have none of the characteristics of a right. We defend it, in the next place, upon the practice and usage of nations. Wherever a nation is shown to have a right upon the high seas which is endangered by the wrongful acts of the citizens of other nations, there, according to the usage and practice of nations, at all times, in peace or in war, that right has been defended by the employment of reasonable force.

[In view of the possibility of an adverse decision upon the foregoing propositions, Mr. Carter completed his argument by considering what regulations were necessary for the preservation of the seals. In conclusion he said:]

Mr. President, I have said heretofore in the course of my argument—and I cannot too often insist upon it—that the duty of preserving this useful race of animals belongs to that people which has such a control over them that they can take and apply the annual increase and benefit of the animal to the uses of mankind without diminishing the stock. It is their duty, because they alone have the power to perform the task, and because self-interest furnishes them with a sufficient motive to insure its performance. Nature has so linked together duty and self-interest as to make the gratification of the one assure the performance of the other. The United States believed that this was its duty, and it engaged in an effort to perform it. There are those who thought, and who still think, that that duty should never have been relinquished by the United States, but that it should have performed it at all hazards, even though it had been obliged to meet the "three-quarters of the globe in arms." If it had engaged in its performance with the full exertion of all its power, naval and military, and calamitous consequences had resulted, the humane sentiment of mankind—the public opinion of the world—history, in making her final award—would have charged all the responsibility for those calamities upon that nation which had refused to be bound by those great natural laws which ought to be the rule governing the intercourse between nations.

But other counsels were followed; and a different course was pursued. The United States, abominating war, viewing hostilities with a power kindred in speech and blood with unutterable dread, always inclined to pacific measures, when a tribunal was offered, made up from the selected wisdom of the world, for the determination of the rectitude of their contention against Great Britain, could not help accepting that offer, and thus obliged itself to forbear from any further efforts in enforcing its rights, and in discharging that corresponding duty to preserve this race of ani-

mals which had been imposed upon it by its situation and by its advantages. That duty it has relinquished; but, although the duty has been relinquished, it has not been extinguished. It has only been transferred from the United States to others. It has been transferred to the members of this tribunal; and it remains for them to discharge this high duty of preserving from destruction a bounty of Providence designed to be a perpetual blessing to man. That duty is one which it is perfectly easy to perform. The destruction of this race of seals is wholly, absolutely unnecessary. It can be easily, certainly preserved, either by an award of property to the United States, or by the establishment of regulations tantamount to such an award of property, which shall prevent any slaughter of the species on the seas, and remit the entire taking to the islands, where it can be carried on forever consistently with natural laws, as it has already been carried on for half a century.

If the decision of this tribunal shall be in accordance with those great laws of nature which I have attempted to elucidate and to support, it will remain a guide, an instructive guide, for present and for future times in the adjustment of international controversies. If it shall be otherwise, it will be, of itself, a new source of strife and contention, and will add to the difficulties, already sufficiently great, which embarrass the intercourse of nations. Such is the responsibility of this high tribunal, and I am not to doubt that it will be resolutely, faithfully, and effectively discharged.

PROFESSIONAL OPINION ON THE CONSTITUTIONALITY OF THE PROPOSED ACT OF THE LEGISLATURE OF NEW YORK TO ENABLE THE CITY OF NEW YORK TO HOLD A WORLD'S FAIR, 1889.

STATEMENT.

In furtherance of a movement to hold a World's Fair in the city of New York on the four hundredth anniversary of the discovery of America by Columbus, a bill was introduced in the legislature of the state of New York, with the design of giving to the municipal authorities of New York City certain rights and privileges, which were deemed essential to the success of the proposed exhibition. The following opinion on the constitutionality of the measure was prepared by Mr. Carter for Miss Mary G. Pinckney, a taxpayer.

OPINION.

My opinion is requested upon the question whether it is within the constitutional power of the legislature to enact a law, as proposed in the bill now before the legislature of this state, entitled "An act to provide for exhibitions of arts, sciences, manufactures, and products of the soil, mine, and sea in the city of New York"; and my attention is particularly called to its two principal provisions,—the one authorizing the mayor, aldermen, and commonalty of the city of New York to acquire lands in the said city for the purpose of erecting buildings thereon for public exhibitions of the arts, sciences, manufactures, etc., and of establishing and maintaining such exhibitions, and the other requiring the comptroller of the city of New York to issue, from time to time, bonds or stock of that city to an amount not exceeding ten millions of dollars, payable from taxation, for the purpose of meeting the expenditure which may be made under the authority of the act in acquiring property, or for other purposes.

The first question involves a consideration of the circumstances which justify an exercise by the legislature of the public right which is commonly called the right of "eminent domain," but which really is the right of taking property for public purposes against the will of the owner,—that is to say, by force. Although the instances are numerous in which the nature of this right, and the circumstances under which it may be resorted to, have been discussed, it cannot be said that the principles upon which it depends are very well settled by judicial determination. It is everywhere agreed that, in order to justify an exercise of this power, it is necessary that the use to which the property is designed to be devoted shall be a public one,—that is to say, that it should be for

the general benefit and advantage of the public; and in most of the controversies, concerning the power, which have arisen and been determined, the question has been whether the use for which the property was sought was really a public, and not a private, use. The decision, therefore, has generally been made to turn upon that question alone; and it has happened from this that the usual form of stating the rule which governs the exercise of this power is to say that, where property is needed for a public use, the power may be employed. This form of statement has tended to create an impression that there is no other limitation upon the exercise of the power.

I think this is a plain error. The supplying of any general public need is a sufficient justification for raising money by taxation; but it will hardly be contended that any intended use of property for public purposes which would justify its purchase in the ordinary way by contract, and the payment therefor out of the public annual revenue, is also enough to justify a forcible taking of the property. Provisions for the support of the occupants of prisons and almshouses, fuel for public offices and schools, are very clear instances of property which is needed for public use, but no one will say that an act of the legislature authorizing the forcible taking of any such property, unless, indeed, in some very special and hitherto unknown emergency, would be within its constitutional authority. The question is one concerning the proper means of supplying the public needs. The needs of society, like those of the individual, are many in number, and of every varying degree of importance, extending, on the one hand, from things in the nature of luxuries which may be dispensed with without serious inconvenience, to what, on the other hand, may be regarded as absolutely necessary. The ordinary means of satisfying these wants is the common one, which is open to all individuals, of purchase, and it is only where this fails that permission is given to resort to the extraordinary procedure of force. When we consider the traditional jealousy with which our law regards any invasion of the private ownership of property, and also that, where the power to take it by force can be exercised at all, it can be exercised to any extent, so as even to turn citizens out of their long-cherished homes, and compel them to part with their possessions at prices not fixed by themselves, but by others, the conclusion will be readily accepted that the exercise of such a power springs from necessity, and can be defended by necessity alone. This view may not have been distinctly taken by all the text writers, nor in all the judicial decisions which have touched upon the subject. This

comes from the reason, already stated, that most of the controversy has hitherto turned upon the question whether the use designed was a public or a private one, but I think it is really implied by most of them. It is, indeed, implied in the ordinary statement of the rule, which is that property needed or required for public purposes may be taken. Mr. Justice Cooley, who is an authority of the very highest rank upon such questions, distinctly places it upon this ground. He says, in case of People v. Salem:[1] "If we examine the subject critically we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need." The power is thus defined by the supreme court of the United States, speaking through Mr. Justice McKinley in Pollard's Lessees v. Hagen:[2] "The right which belongs to society or to the sovereign of disposing, in case of necessity and for the public safety, of all the wealth contained in the state, is called the 'eminent domain.'" And the same view is expressed with great emphasis by Mr. Justice Woodbury in the case of West River Bridge Company v. Dix.[3]

Necessity is indeed the universal justification for the exercise of all unusual power. It is this which defends the making of a draft to raise an army; the forcible taking of provisions with which to supply an army; the destruction of property to prevent the spread of a conflagration; the removal of persons affected with contagious diseases, etc. The very expression that a necessity exists for anything means that it must be had or done. In such cases where it cannot be had or done in one way, it may be in another. This necessity, which must be shown to justify an exercise of this extraordinary power, is of a two-fold character. In the first place, if the case is one of the acquisition of property for a public purpose, the public want designed to be supplied must be a necessary one; that is to say, the thing desired must be one which the public cannot dispense with. As already pointed out, there are many things which may contribute to the public advantage, and are, therefore, in a perfectly proper sense, public wants, and which may be properly procured by purchase with moneys derived from taxation, but which cannot be deemed, in any just sense, necessary. Provision for the healthful recreation of the people, such as for music in public parks, may be a just ground for public expenditure, but yet is not necessary, in the sense that it cannot be dispensed

[1] 20 Mich. 452, 480, 481.
[2] 3 How. 212, 223.
[3] 16 How. 507, 544.

with. The higher education of the people in taste and the fine arts is a meritorious public object, but yet not strictly necessary. Society can get along without it; but suitable provision for highways and public schools, for the support of paupers, etc., is absolutely indispensable. I do not, however, mean that those public needs to supply which the power of eminent domain may be employed must be of a character absolutely essential to the existence of society, but such as are fairly and reasonably requisite in order to accomplish the principal purposes for which society exists. In the second place, in order to justify the taking of property by force, there must be a necessity of procuring it in that way,—that is to say, it must be something which must be wholly dispensed with unless procured in that way. It is this sort of necessity which characterizes the class of cases to which highways, forts, aqueducts, etc., belong. In such cases there is an absolute need, not only for the provision, but that it should be placed in a particular locality. The natural features of a country determine that a highway, whether an ordinary road, turnpike, or railroad, should be in a particular place. It can be nowhere else; and so, also, with a fort, or an aqueduct, or a reservoir for the storage of water. If the public were limited to the ordinary method of procuring the property, it would be placed at the mercy of the private owner, for he would put his own price upon it. Such an exaction cannot be permitted, and the only way to avoid it is to exercise the power of taking the requisite property against the will of the owner. Again, there is sometimes no necessity for exercising the power in question because the public need will be fairly satisfied by the zeal, liberality, and public spirit of private individuals. A sufficient satisfaction of the public wants connected with many branches of the fine arts is sometimes found without any resort to public provision; and where this may be safely relied upon, and has usually been relied upon, it may be said that there is no necessity for the taking of property for the purpose.

It seems to me, therefore, that there are three requisites which must be complied with in order to justify any exercise of the power of eminent domain: First, the use which is designed for the property must be a public one; second, the want sought to be supplied must belong to that class of public needs which are properly deemed to be necessary, in the sense that provision for them is indispensable; third, the property sought to be taken must be of a character which is not, or may not be, procurable by an exercise of the ordinary power of purchase.

If the foregoing views are well founded, they seem to furnish

a solution of the main question under consideration. That question should be carefully stated. It is matter of notoriety that the real purpose sought to be accomplished by the bill referred to is to have in the city of New York what is commonly called a "World's Fair." This purpose, however, seems to be industriously concealed in the present bill, for it is nowhere stated in it that the lands to be acquired are to be used for that object exclusively or principally. The bill is drawn with great skill and adroitness, and apparently with a view to obviate what were felt to be serious difficulties. The purpose avowed by it is to acquire lands, etc., "for exhibitions of arts, sciences, manufactures, and products of the soil, mine, and sea, and to establish and maintain such exhibitions." But such purpose is put forth, not as a temporary, but as a permanent, one, for authority is given to acquire a title in fee to the lands, and the members of the board of commissioners constituted for the purpose of establishing and maintaining such exhibitions are to retain their offices until January, 1896, and provision is made for the appointment of successors indefinitely for terms of five years. The scheme, therefore, apparent upon the face of the bill, contemplates the establishment and permanent maintenance of exhibitions of arts, sciences, manufactures, etc. It was, perhaps, thought by the framers of the bill that the proposition of the scheme in this form would aid in disposing of the obvious objection that a World's Fair was a merely temporary thing, and for that reason not a fit subject for calling into activity the exercise of this extraordinary power. But I apprehend that, if this was the design, it will not be successful. Whether the occasion and the purpose are sufficient to justify the exercise of the power of eminent domain—that is to say, whether they present a case which exhibits the public necessity requisite to justify such a power—is unquestionably a matter for judicial, and not legislative, determination. I mean by this that it is for the courts to say whether it belongs to the class of necessary public objects, within the meaning of the rules above laid down. Whether, provided it does belong to that class, it is an instance in which it is necessary or fit that the power should be exercised, is a matter of legislative discretion, with which the courts will not interfere. In performing their function the courts will not deem themselves restricted by the language which is employed in the act, but will, if they think fit, look outside of the act, and ascertain what the real purpose is. This very thing was done in a well-known case.[4] This was the

[4] In re Niagara Falls & Whirlpool Ry. Co., 108 N. Y. 375.

case of an attempted taking of property under the general law for the purpose of a railroad. That general law authorized such taking in all ordinary cases, and there was nothing apparent, in the articles of association under which this company was formed, to indicate that the railroad was not one of the ordinary character designed to serve the ordinary purposes of that species of public highway. But the court of appeals deemed itself at liberty to look outside of these documents for the purpose of ascertaining the real object, and, finding it to be only to construct a railroad for a short distance along the banks of the Niagara river for the better convenience of sightseers in viewing the rapids and falls, it declared that such an object was not one to carry out which an exercise of the right of eminent domain could be resorted to. In the present case I apprehend that it is a matter of clear and absolute notoriety that the real purpose of the scheme is to make provision for the temporary thing known as the "World's Fair," and, if the proposed acquisition of property cannot be defended for that purpose and for such a case, it cannot be defended at all.

I am of the opinion that, if the question should assume this form before the court, namely, that of a scheme to take private property for such merely temporary purpose, lasting but a few years, it should be properly answered in the negative. But the supposal must be indulged that the question will assume the form which the framers of this bill have plainly sought to give it. It would then be whether it is competent for the legislature to authorize a taking of private property for the purpose of erecting buildings, etc., for permanent exhibitions of arts, sciences, manufactures, etc. It may well be doubted whether the first of the three above-mentioned requisites is complied with by such a case. The objection that such exhibitions are primarily and principally for the benefit of exhibits, and of those particular classes of the community who will be pecuniarily benefited by them, may not be easily answered. I am not, however, inclined to base my opinion upon this ground; but I think it clear that such exhibitions are not indispensable for any of the main purposes for which society is formed and government exists. It will be enough to say that we have, so far, got along quite well without them, and that, for most of the substantial benefits derivable from such exhibitions, the public may safely rely, and always rely, upon the zeal and generosity, seconded by the self-interest, of private individuals.

That such a case should be treated as one belonging to that high and extraordinary class of public necessities, in the presence of

which the great safeguards which our law erects for the defense of private property, such as those of war, invasion, or pestilence, or those of supplying the community with highways, or crowded populations with water,—needs which must be supplied, or society cannot exist,—seems to me a proposition which must be promptly rejected. I cannot but think that this was the real ground which determined the judgment of the court of appeals in the case last above referred to. It was the circumstance that a railroad for the accommodation of sightseers at Niagara was not indispensable which really moved the court to declare that property for the purpose could not be taken *in invitum*. The case seems to me to turn upon substantially the same question. The object of the railroad proposed by the Niagara Falls & Whirlpool Railroad Company was the general accommodation of the public, just as much as in the case of any other railroad company. That the object was a public one seems quite clear; and it was none the less a public one because that part of the public which it was designed to accommodate were sightseers, and needed the road only to gratify their curiosity. Surely it was more plainly a public object than the one disclosed by the bill under discussion. But the element which determined the judgment of the court was the circumstance that the main object of the proposed road was to afford facilities for the public, or that part of it which visits Niagara Falls, for viewing the natural attractions of the place. That this is really a public object cannot be denied; but yet it plainly is not a public necessity. It is something which may be dispensed with without serious inconvenience, and therefore not one justifying a resort to the extraordinary power of taking property by force. The court does not say that the proposed use was not a public one, but expresses itself thus: "We feel constrained to say that, in our judgment, this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise."[5] And in assigning the reasons for its judgment it gives a principal place to this consideration of necessity. It says:[6] "In considering the question what is a public use for which private property may be taken *in invitum*, Judge Cooley[7] remarks: 'That can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity which, on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision

[5] Page 384.
[6] Page 385.
[7] Const. Lim. 699.

for them otherwise, it is alike proper, useful, and needful for the public to provide.'" It may be said, indeed, that very many of the railroads which have been incorporated under the general laws for that purpose are not indispensable, and that, upon the view herein contained, they could not sustain their right to take property; but the answer is that railroads belong to the class of public highways. This is the typical class of cases of absolute necessity. It is the first duty of a civilized state to provide highways for its citizens. Society cannot exist and perform its functions without them. How many of such highways are needed, and in what particular places they are needed, is a matter for legislative discretion alone, with which the courts will not interfere. It is enough that they belong to a class of cases in which the requisite necessity unquestionably exists. The legislature has chosen to perform its duty by passing an act which is based upon the supposal that highways will be built only where they are reasonably necessary, because it may justly be said that they are reasonably necessary whenever they will be profitable, and of that those who propose to build them are the best judges. But an exhibition of the arts, manufactures, and sciences, whether temporary or permanent, does not belong to the class of necessary things which are properly viewed in government and society as indispensable.

For the above reasons, I am of the opinion that the provision in the bill conferring upon the municipality of the city of New York the right to acquire property for the purposes indicated in it would not be a constitutional exercise of legislative power, and, as it constitutes the main feature of the scheme, no part of the bill could be held valid if this feature of it should be determined to be invalid.

The other matter in the bill to which my attention is called is the one embraced by the twenty-fifth section, which subjects the city of New York to the payment of all the expenses which may be incurred in carrying out the objects proposed, including the damages awarded for lands taken, and all other expenditures, and authorizing an issue of bonds for that purpose to an amount not exceeding ten millions of dollars, which are to be paid, upon maturity, from the proceeds of taxation. Whatever view may be taken of the scheme,—whether it be regarded as one for the temporary purpose of establishing and carrying through a World's Fair, or for permanent exhibitions of arts, sciences, etc.,—I do not think it can be questioned that, so far as it is designed for the public benefit, it is designed for the equal benefit of all the people in the state. The second section declares: "The said lands and buildings and said

exhibitions shall be devoted to public use and to public institutions and healthful recreation, and, subject to reasonable rules and regulations, shall be open to all the people without discrimination, upon the same terms, conditions, and admission fees." It will thus be perceived that the citizens of New York are to have no property or any advantages whatever in it superior to those of the people in any other part of the state. No valid rule could be established giving them any such advantage, or subjecting the people of the rest of the state to any discriminating advantage, and the probabilities are that the fact will accord with the design. It will be resorted to, and its benefits enjoyed, as much by the people outside of the city of New York as by those within it. There appears to be nothing in the nature of locality about it, except that necessary locality which comes from the circumstance that an exhibition, by whomsoever it be enjoyed, must be somewhere placed,—the same sort of locality, and no other than that, which is exhibited by a state asylum for the insane. It may perhaps be said that it will bring to the citizens of New York large amounts of money in the shape of profits, equivalent, perhaps, to the actual cost. But among whom will these profits be distributed? Not among all, certainly, and, in fact, only among a comparatively few,—that is to say, among those classes who specially minister to the needs of strangers; but the burden is thrown equally upon all, and no effort is made, if indeed it were possible, to equalize the advantages.

The proposition, then, is to impose a heavy pecuniary burden, to be raised by taxation by the people of New York City alone, to defray the expenses for an object in which they have no interest other or greater than that of the people of the whole state, except to the extent in which a comparatively few may be accidentally favored. Whatever may be said of the constitutional validity of such a proposition, it seems to me that one thing is clear, and that is that it is in defiance of every principle of justice, and of every rule which ought to regulate the imposition of public burdens. But the rules which regulate the modes in which the public revenue may be raised and expended are not, in the state of New York, so fully imbedded in the constitution as to make it easy to say whether this incident of the scheme is valid. The rights and interests of the people of this state in this particular are less defended by constitutional safeguards than they ought to be, and I could not reach a conclusion on this point satisfactory to myself without more time than is allowed to me for the purpose, and, if my views upon the other question which has been discussed are well founded, there will be little need for an opinion upon the question of taxation;

but I think it may, at least, be said that the validity of this provision is open to the most serious doubt.

It may seem to some that, if the foregoing rules are correct, great difficulties are found in this country in carrying out very desirable and commendable public objects, which the governments of Europe seem to manage with great apparent ease. This may be so. The validity of legislative acts under governments either despotic, or which inherit the traditions of despotism, are seldom the subject of inquiry in courts. This is the main distinction between constitutional republican governments, like ours, and all others. All that it is needful or perhaps proper for me to say in answer to this suggestion is that it furnishes no just ground for questioning the correctness of the conclusions I have reached. Those conclusions are to be tested by comparing them with the constitutional principles everywhere recognized in the United States, and expressly formulated in the fundamental law of New York. But I cannot help adding that, if the advantages, the glory, and the splendor of a World's Fair cannot be had among us without the surrender of some one, even though it should be the very least, of those safeguards which the jealousy of freemen has interposed against the exercise of power, and for the security of property, they would be purchased at too dear a price, and that the citizens of New York had best hesitate before establishing a precedent which would justify the imposition of a tax upon them alone to pay the general expenses of the state.

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