Ex parte Virginia
100 U.S. 339

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL, 1879

No. 4

EX-PARTE, THE COMMONWEALTH OF VIRGINIA, UPON PETITION FOR MANDAMUS.

BRIEF FOR THE PETITIONER

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STATEMENT OF THE CASE.

Burwell Reynolds and Lee Reynolds were jointly indicted for murder in the county court for the county of Patrick, in the State of Virginia, at its January term, 1878.

On being arraigned they pleaded not guilty, and demanding to be tried in the circuit court of said county, were remanded for trial in that court.

When brought up for trial at the April term, 1878, of said circuit court, they made the motion and application for a jury composed in part of their own race (they being colored persons), which will be found on pages 6 and 7 of the record.

Said motion and application being overruled and refused, they then filed the petition, which will be found on pages 7 and 8 of the record, praying for the removal of the prosecution against them to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville. The prayer of said petition was denied by the court.

As explanatory of the reason given by the court for overruling said motion, it is proper to state that the law under which the *venire* had been summoned was the act approved on the 27th March, 1876, a copy of which, as well as of the statutes now in force in reference to the qualifications and mode of summoning juries in Virginia, is filed with this brief.

The prisoners having elected to be tried separately, Burwell Reynolds was then put upon his trial, and being found guilty of murder in the first degree, on his motion the verdict was set aside by the court and a new trial awarded him.

Lee Reynolds having, at the same term, been put upon his trial, was found guilty of murder in the second degree, and the period of fifteen years was fixed by the jury as the term of his confinement in the penitentiary; whereupon he moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was against the law and the evidence; which motion being overruled by the court, he excepted to the opinion of the court overruling the same, and the facts proved on the trial having been set forth in the bill of exceptions, a writ of error was sued out by him from the supreme court of appeals of Virginia, on the hearing of which on the 30th day of July, 1878, the judgment of the circuit court was reversed, the verdict of the jury set aside, and the cause remanded to the circuit court for a new trial to be had therein.

At the October term, 1878, of said circuit court Burwell Reynolds and Lee Reynolds were again brought up for trial, and before the empanelling of the jury for their trial, they moved the court to remove the prosecution against them to the next term of the United States circuit court to be held in Danville, Virginia, upon the ground set forth in their petition presented and filed at the April term, 1878; which motion was again overruled and the prayer of the petitioners refused, as will appear on page 15 of the record.

The prisoners were then again tried separately.

In the case of Burwell Reynolds, the jury being unable to agree upon a verdict, a juror was withdrawn, by consent, and he was remanded to jail to be thereafter tried.

Lee Reynolds was again convicted of murder in the second degree, and eighteen years fixed by the jury as the term of his confinement in the penitentiary.

He moved for a new trial, but his motion was overruled by the court and sentence pronounced in accordance with the verdict, he being remanded to jail until he should be removed to the penitentiary. He excepted to the opinion of the court overruling his motion for a new trial, and his bill of exceptions was duly signed and sealed and made part of the record of the case.

While the said Burwell and Lee Reynolds were thus imprisoned in the jail of Patrick county, the former until he should be again tried for the offence with which he was charged, the latter until he should be removed to the penitentiary under the sentence aforesaid, they procured from the clerk of the circuit court of Patrick county a copy of the record of said proceedings against them, which they offered to file in the circuit court of the United States for the western district of Virginia, held at Danville, submitting to said court the petition by them presented as aforesaid to the circuit court for the county of Patrick for the removal of the prosecutions against them into said United States circuit court, and prayed of said last mentioned court that said prosecutions should be therein docketed and proceeded with; which prayer was granted by the Hon. Alexander Rives, who, as district judge of the United States for the western district of Virginia, was then holding said circuit court, and an order was entered by said court, on the 15th day of November, 1878, directing said causes to be docketed in said court for trial, and authorizing the clerk to issue forthwith a writ of *habeas corpus cum causa* to the marshal of said district to take the bodies of said Burwell Reynolds and Lee Reynolds into his custody to be dealt with according to law, and the orders of said court, and also directing the clerk to direct to the marshal of the court, in vacation, a writ of *venire facias* for twenty-five jurors, qualified as such by the laws of the State of Virginia, to attend on the first day of the next term thereafter, for the trial of said causes at the bar of said court.

In obedience to said order a writ of *habeas corpus* was issued on the 22d day of November, 1878, by the clerk of said court, which was executed on the 24th day of that month by one of the deputies of the marshal of said district, by taking the said Burwell Reynolds and Lee Reynolds from the jail of Patrick county, Virginia, and out of the custody of the officers of said State; and the said Burwell Reynolds and Lee Reynolds have ever since been and still are in the custody of

said marshal, held for trial in the said circuit court for the western district of Virginia, at Danville.

The petition in this case has been filed in conformity with joint resolutions of the general assembly of Virginia, adopted on the 8th day of February, 1879 (a copy whereof is filed with this brief), in order that said state may regain, through her proper officers, the custody of the said Burwell Reynolds and Lee Reynolds, that they may be dealt with by her under and pursuant to her laws.

The Hon. Alexander Rives, judge as aforesaid, in his answer to the rule awarded against him to show cause why a *mandamus* should not be issued requiring him to cause the bodies of the said parties to be redelivered by the marshal of his district to the jailor of Patrick county, admits the facts as hereinbefore stated, and justifies his action upon the ground that the refusal of the circuit court of the State of Virgina, to set aside the *venire* which had been summoned for their trial, and give them a jury composed in part of their own race and color, was a denial to them of "the equal protection of the laws," and rendered it proper that their cases should be removed, under sections 641 and 642 of the Revised Statutes, into his court for trial.

BRIEF OF ARGUMENT.

The petitioning Commonwealth insists that the action of Judge Rives is wholly without authority, and that his court has not, and cannot have under the Constitution of the United States, any jurisdiction whatever of the cases over which he has assumed jurisdiction. The prosecutions against Lee and Burwell Reynolds are in the name and on behalf of the Commonwealth of Virginia, one of the States of the Federal Union; for the crime of murder committed within the territorial limits of said State.

By the Constitution of the United States it is expressly provided in paragraph 2, article 3, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a *State shall be a party*, the supreme court shall have original jurisdiction." The reference here to the State relates to her in her sovereignty, as one of the original sovereignties which called into existence the United States under a written constitution, in which certain powers and parts of her sovereignty were delegated, and all others reserved.

In the constitution conferring the delegated powers, a judiciary sys-

tem was provided for, to consist of one *supreme* court and such inferior courts as Congress may from time to time ordain and establish. (See section 1, article 3 of United States Constitution.) Having provided for the supreme court *eo nomine*, the second paragraph of section 2 of the same article, provided that in *all* cases in which a State (one of the constituent sovereignties) should be a party, the supreme court shall have original jurisdiction.

We insist that this means an *exclusive* original jurisdiction; and under no circumstances can an inferior court, called into existence by act of Congress, ever be clothed with the power to deal with a State or to decide any question of controversy with her respecting or arising out of her sovereignty. If Congress has ever attempted to clothe any such inferior tribunal with such a power or jurisdiction, then such attempt is nugatory, as being *ultra vires*. But in the further progress of this argument we propose to try to show that Congress has never made any such attempt.

Now, are the cases of which Judge Rives proposes to assume jurisdiction, cases in which the Commonwealth of Virginia is a party in the character of a sovereign State? That this is so, we think will be conceded. If not conceded, it is susceptible of a demonstation. The right to make laws and to punish crime are acts of sovereignty. Chief Justice Waite, in delivering the opinion of the court in United States *vs.* Cruikshank & *al.*, 2 Otto, page 553, says: "The rights of life and personal liberty are natural rights of man." "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed."

"The very highest duty of the States when they entered into the Union, under the constitution, was to protect all persons within their boundaries in the enjoyment of these 'inalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." In the same case, at page 555, the Chief Justice further says: "The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if

within its power. That duty was originally assumed by the States and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right."

At page 551 the Chief Justice further says: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

In the case of Moore *vs.* The People of the State of Illinois, 14 Howard, p. 19, Justice Grier delivering the opinion of the court and speaking of the State of Illinois, which made it an offence to harbor or secrete a negro slave, &c., says: "It is but the exercise of the power which every State is admitted to possess of defining offences and punishing offenders against the laws. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and the public peace, has never been surrendered by the States, or restrained by the constitution of the United States."

To allow the intervention of the United States in the administration and execution of the criminal laws of the State is to destroy the autonomy of the State government. In delivering the opinion of this court in Texas *vs.* White, 7 Wallace, p. 725, Chief Justice Chase said: "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or the right of self-government by the States. Under the articles of confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.'

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the constitution, but it may not unreasonably be said that the preservation of the States and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National Government. The constitution in all its provisions looks to an indestructible Union composed of indestructible States."

In delivering the opinion of this court in the case of The Collector *vs.* Day, Mr. Justice Nelson said: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limits of their powers not granted, or in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."—11 Wallace, 124. Mr. Justice Bradley, in dissenting from the opinion of Mr. Justice Nelson in the above case, said: "I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments."—*Ibid*, 129.

We submit, if there are any "just powers" of the State with which the general goverment cannot interfere, the power to try and punish the violations of her criminal laws occurring within her territorial limits and jurisdiction is one of them. Here, as Mr. Justice Nelson says, the State is a "*separate and distinct sovereignty.*"

The State acting here as a "separate and distinct sovereignty," it is not within the power of Congress, by any law which it may enact, to subject her to the jurisdiction of any tribunal ordained by it. If amenable to any judicial tribunal under the constitution of the United States, that tribunal is the supreme court.

The next proposition we submit is, that the Constitution of the United States does not invest the supreme court with any jurisdiction or control over the State or its courts in the administration of its criminal laws, except so far as by writ of error, when a federal question arises, the accused is entitled to take the case from the court of last resort in the state to the supreme court of the United States.

Murder is a common-law offence. The United States have no

common-law jurisdiction in criminal cases; therefore the trial for murder must be in the courts of the State within the territorial jurisdiction of which the crime was committed. In the first proposition we tried to maintain that as the State in the prosecution of the indictment against Reynolds was acting in her character of sovereign, that no United States court, under any circumstances, could take jurisdiction of the case but the supreme court.

The State courts must then remain the sole and exclusive tribunals of trial, subject under the limitation above mentioned, to the right of the accused to a writ of error to the supreme court.

That the State courts, and not the United States courts, are the exclusive tribunals for the trial of crime committed within the State and against the laws of the State, we refer to the following cases: Corfield *vs.* Coryell, 4 Washington's Circuit Court Reports, 371; Ward *vs.* State of Maryland, 12 Wall. 430; The Slaughter-house Cases, 16 Wall. 36, 130; United States *vs.* Cruikshank, 2 Otto, 542.

From what has preceded, we claim, with submission, that Congress has not conferred upon the United States court for the western district of Virginia, held by Judge Rives, the jurisdiction he has assumed and is now exercising. Nor do we think it has attempted to confer the jurisdiction. Judge Rives claims to act by virtue of section 641 of the Revised Statutes of the United States, edition of 1878, page 115. Does this statute confer the jurisdiction? We claim that it does not, nor was it intended to do so. So much of said section as is deemed necessary to the proper understanding of the question now being considered is as follows: "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest, imprisonment or other trespass or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the

trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending." This section relates to the removal of causes having their origin in the denial of some civil right, and is so declared to be on the margin of the statute. Before a cause can be removed under this section it must be made to appear that some civil right is denied, or cannot be enforced in the tribunals of the State, or in that part of the State where such suit or prosecution is pending, as pointedly laid down by Justice Bradley in delivering the opinion of the court in the case of the State of Texas *vs.* Gaines, 2 Wood's Circuit Court Reports, page 344—

That is to say, there must be,

1st. The denial of rights secured by the first section of the act.

2d. Inability to enforce in the court any of said rights.

The rights here referred to are the rights secured by sections 1977 and 1978 of Revised Statutes, page 347. The sections are as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"All citizens of the United States shall have the same right in every State and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

These two sections confer the civil rights referred to.

The civil rights conferred upon the colored race are the rights enjoyed by white citizens in the States and Territories at the time the law was enacted. Congress did not create any new rights. It merely extended to the colored race rights existing and enjoyed by white citizens, and provided that these rights should not be denied to the colored citizens.

All that the colored citizen can claim is that his rights shall be the same as that of the white citizen, and that he shall be permitted to enforce these rights in the courts.

The right to have a jury of a particular race or color, in whole or in part, to try rights of property or rights of person, is not one of

the rights conferred by the act above referred to. Hardly will it be maintained that a violator of the criminal law of a State can claim as a civil right to be tried by a jury of a particular race or color. The offender would always demand a jury from that race or color which he thought most favorable to him or least likely to punish the offence. Congress cannot be supposed to have enacted a law tending to this result. When crime is committed the perpetrator must be tried according to law, and that law must be the same for all colors and all nationalities. The Indian within the State committing crime cannot demand for his trial a jury of Indians, nor a Chinaman a jury of Chinese, nor an African a jury of Africans, nor an Irishman a jury of Irish. Each has the right to be tried according to law by an impartial jury. Then the right to have a jury of any particular race or color is not a right conferred by Congress under the fourteenth amendment. The State of Virginia has not by her laws denied to any race or color the equal protection of her laws. In reference to jury service her statute is as follows: "All male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws of this State, shall be liable to serve as jurors, except as hereinafter provided"—Code of 1873, page 1058. The attention of the court is invited to the jury law of the State, which has been printed and filed in this case for the inspection of the court.

In providing juries the judges of the county, corporation and hustings courts are required to select from the qualified voters persons of honesty, intelligence and good demeanor, and suitable in all respects to serve as grand jurors.

This law gives the most perfect equality of right, and in its execution imposes on the judges above mentioned the exercise of a sound discretion in selecting from the body of the people the persons of whom service as jurors will be required. Hundreds and thousands of the most favored class of citizens are never called upon for this service (because the service is rendered by comparatively a few) and yet it was never thought that they were denied any right, or were unable to enforce their rights in the courts by reason of their not serving as jurors.

With much more propriety could it be claimed that civil rights had been denied where *judges* were not taken in equal proportion from all races and colors without reference to previous condition of servi-

tude. We do not believe there is a State in the Union the bench of which is adorned by judges selected from the colored race.

The equality of right is one thing, the rendition of service another. The refusal of Judge Tredway, of the circuit court of Virginia for the county of Patrick, to discharge the venire summoned for the trial of Reynolds upon the motion of the accused and award a new *venire facias* requiring jurors to be summoned because of color, was not a denial of any right secured by the civil rights bill, and, therefore, was not such a case as could be removed from the State court to the circuit court of the United States under section 641, even though the constitutional validity of that section were conceded, and was not a case of which the circuit court of the United States had or could take jurisdiction.

The act of Judge Rives, in taking jurisdiction, and in assuming the custody of the prisoners and depriving the State of that custody, is without authority of law and should be declared null and void.

Now, as to the remedy of the State. We submit that *mandamus* is an appropriate and complete remedy, and the only remedy, as there seems to be no right of appeal or *writ of error* to this court

This court is the proper tribunal to award said writ of *mandamus*. The application is made by and on behalf of the State of Virginia, and the writ is to be directed to a court or judge appointed under the authority of the United States. The 688th section of the judiciary act is as follows: "The supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, *where a State*, or an ambassador or other public minister, or consul or vice-consul is a party." (See Revised Statutes, edition of 1878, page 127.)

Supposing the court of Judge Rives to be without jurisdiction, *mandamus* is the remedy to which the State is entitled. Upon this point we beg to make an extract from a paper prepared by Judge William M. Tredway, on the 13th December, 1878. The learned judge says: "Here is a wrong for which there is no remedy, unless it be *mandamus*.

"The writ of *mandamus* is, in general, a command issuing, &c., and

directed to any person or corporation, or inferior court of jurisdiction, &c., requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least assumed to be consonant to right and justice. * * * But issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance—Wendeil's Black. Com. 3 vol., p. 110 (marginal).

"A *mandamus* is a writ commanding the execution of an act, where otherwise justice would be obstructed, or the King's charter obstructed, issuing regularly, only in cases relating to the public and the government—Bacon's Abr. Mandamus.

"It is now an established remedy and every day made use of, to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office obliged to do—same book, p. 420.

"In many cases the writ was used for restoring or admitting persons to offices and places they were entitled to, and it is said '*mandamuses* have been granted to oblige justices of the peace to discharge prisoners, pursuant to acts of parliament, made for relief of insolvent debtors'—same book, p. 436.

"It was introduced to prevent disorder from a failure of justice and defect of police, therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one—per Lord Mansfield, Rex *vs.* Barker, Burrows' Rep., p. 1267.

"He also said in this case, which was an application for *mandamus* to compel trustees to admit a minister to possession of a church as a pastor: 'Here is a function with emoluments and no specific legal remedy; the right depends upon election, which interests all the voters. The question is of a nature to influence men's passions, the refusal to try the election in a feigned issue, or to proceed to a new election, proves a determined purpose of violence, should the court deny this remedy; the congregation may be tempted to resist violence by force, a dispute 'who shall preach Christian charity,' may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government and the scandal of religion. To deny this writ would be putting Protestant Dissenters and their religious worship out of the

protection of the law. This case is entitled to that protection, and cannot have it in any other mode than by granting this writ—*Ib.* 1269.

"Under the American system it is still, however, regarded as an extraordinary remedy, in the sense that it is used only in extraordinary cases, and when the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and when, without its aid, there would be a failure of justice—High's Ex. Leg. Rem., 8, 9.

"By statute the power is given to the supreme court to issue writs of *mandamus* in cases, warranted by the principles and usages of law, to any court appointed under the authority of the United States, or to persons holding offices under authority of the United States, where the State or ambassador is a party—Sec. 688, R. S. U. S.

"The case of *ex parte* Bradly, 7 Wallace, 365, is conclusive, we think, of our view of the office of *mandamus*, as applicable to the case at hand: 'It was then decided that *mandamus* issues from supreme court to an inferior court, to restore an attorney-at-law disbarred by the latter court, when it had no jurisdiction in the matter, as (*ex. qr.*) for a contempt committed by him before another court.'"

If we succeed in establishing the proposition that Judge Rives' court is without jurisdiction, then it follows, we think, upon well established principles, that *mandamus* is the remedy, and that it must issue from this court. The case of *ex parte* Bradly, and cases there cited, are conclusive upon this point. Mr. Justice Nelson in delivering the opinion of the court in the above case, at page 377, 7 Wallace, says:

"For we agree that this writ does not lie to control the judicial discretion of the judge or court, and hence when the act complained of rested in the exercise of this discretion, the remedy fails.

"But this discretion is not unlimited, for if it be exercised with manifest injustice, the court of king's bench will command its due exercise. It must be a sound discretion and according to law. As said by Chief Justice Taney, in *ex parte* Secombe: 'The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility.' And by Chief Justice Marshall, in *ex parte* Burr, 'The court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.'

"We are not concerned, however, to examine in the present case how far this court would enquire into any irregularities or excesses of the court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. Whatever views may be entertained concerning it, they are wholly immaterial and unimportant here. The contrary must be maintained before this order can be upheld and the writ of *mandamus* denied. *No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case.*

"The subject matter is not before it; the proceeding is *coram non judice* and void. Now this want of jurisdiction of the inferior court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen from the definition and office of it, that it is issued to the inferior courts 'to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them, and this, not only by restraining their *excesses*, but also by quickening their negligence and obviating their denial of justice.'"

Again, at page 379, the learned justice further remarks: "But the proceeding (that is by *mandamus*) is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or *without jurisdiction.*"

Mr. Justice Miller in delivering a dissenting opinion in the above case, at page 380–1, seems to base his dissent upon the ground that the court below had jurisdiction of the person of Mr. Bradley, and of the offence charged, and that the action of the court was but the exercise of a discretion clearly within the jurisdiction of the court.

In the case now at bar, the circuit court of the United States for the western district of Virginia had no jurisdiction of the State of Virginia, and under the United States constitution could have none, and it had no jurisdiction of the offence charged, to-wit: the murder of Shelton by Reynolds, an offence against the State law. As Mr. David Dudley Field remarked in the very able argument he made in Crnikshank's case: "*The United States cannot punish the violation of State laws, any more than the States can punish the violation of Federal laws.*"

Thus we see that the grounds upon which Mr. Justice Miller based

his dissent in *ex parte* Bradley, are absent in the case we are now considering. There does not seem to be even a colorable jurisdiction. A criminal prosecution is a proceeding directly by the sovereign to punish an offence against its sovereignty. Suppose the trials should proceed in Judge Rives' court and the accused should be convicted. They, or either of them, would have the right to apply for executive clemency. To whom should the application be made? To the President? We think not, for he has no power to pardon for offences against the State. To the Governor? We think not, for he has no power to pardon when the accused has been sentenced by a United States court. If this jurisdiction is sanctioned, Congress ought to declare at once where the pardoning power resides. Condemned men without a pardoning functionary to whom they could apply for clemency, would be a blot upon our civilization.

If the United States courts can intervene and take from the State courts their criminal jurisdiction, would it not be well for congress to provide their jails, their penitentiaries and their gallows in every State?

It is worthy of observation that section 641 gives to any person whatsoever who will allege on oath that he is denied or cannot enforce in the judicial tribunals of a State any right secured to him by any law providing for the equal civil rights of citizens of the United States, the absolute right to remove his case into a circuit court of the United States, section 642 making it the duty of the clerk of the circuit court to issue the writ of *habeas corpus cum causa*, without the order of the judge.

As was said by Mr. Justice Bradley, in Texas *vs.* Gaines, 2 Woods, 344: "If every citizen who is prosecuted in a State court can, on his own allegation, remove his case to the United States courts, it will present a powerful temptation to litigants, especially of the criminal class, and the United States courts will be flooded with cases in which one of the parties imagines, or says, that he cannot have a fair trial in the State courts. We cannot think that this is the true construction of the statute."

If, however, it shall be held that it must be so construed, then we insist that it is unconstitutional and void. It deprives the States of their right to try and punish, in their own courts, offenders against their laws; and confers upon the Federal courts power to try and

punish offenders for crimes which are not, and, under our system of government, cannot be within their jurisdiction.

The judicial power of the United States is defined and limited by the second section of Article III of the constitution. By no latitude of construction can the power thereby conferred be extended to the punishment of offences against the States, and not against the United States.

The inhibitions upon the power of the States contained in the 14th amendment, do not any more than those of the 10th section of Article I of the constitution, confer upon congress the right to take into their hands the administration of the civil or criminal laws of the States as a means of preventing them from violating those inhibitions.

The only way in which the constitutional restraints upon the power of the states can be made effectual by the action of congress, is by providing that acts done in violation of them shall be treated as null, and providing the means of having them so declared, and their operation stayed by the federal judiciary.

This has been effectually provided for by the law granting writs of error from the supreme court of the United States to the State court in cases in which federal questions and rights are involved.

In the cases now under consideration, if the accused were entitled to require that the juries by which they were to be tried should be composed in whole or in part of persons of their own race and color, nothing was easier than for them to take their cases to the supreme court of appeals of Virginia on that point, and upon an adverse decision by that tribunal, to take them to the supreme court of the United States and have the question there decided.

In this way all the rights of the accused would have been completely secured, and the State and her officers held to a due observance of the constitution of the United States and laws made pursuant thereto, without impairing her sovereign rights by depriving her courts of jurisdiction over offences against her laws. The State and Federal courts would thus have moved circumspectly in their appropriate orbits, and the State and Union saved the excitement incident to the conflict between State and Federal judicial authorities.

It is not pretended that the State of Virginia has made or attempted to enforce any law by which the privileges and immunities of citizens of the United States are abridged; or that there is any law of the

State pursuant to which any person is denied "the equal protection of the laws."

On the contrary, Judge Rives, in the opinion delivered by him when he directed the removal of the cases (filed with his answer to the rule), says:

"The State law is not in fault here. Under it all voters are competent jurors, the selection devolving on the county judge, so that no discrimination is made by it on account of color or race. I have endeavored to follow, as closely as practicable, this State law in the selection of my juries at this bar."

If any provision of the fourteenth amendment has been violated in this case, the State did not authorize it. If the act complained of was in conflict with any provision of that amendment, it was also an infraction of the State law, and it is not to be presumed that the error would not be corrected by her own tribunals.

It was therefore manifestly premature to invoke the intervention of the Federal courts until the party supposing himself to be aggrieved had attempted and failed to have the alleged error corrected by the State courts of last resort, when, as hereinbefore indicated, a writ of error might be sued out from the supreme court of the United States.

The fourteenth amendment applies to the States in their corporate capacity; and it is difficult to understand how the act of a judge of an inferior State court, in contravention of the State law, which conforms to that amendment, can be held to be the act of the State. But conceding for argument sake that Judge Rives is right in holding that the act of such judge must be taken to be the act of the State, how does it appear that "the equal protection of the laws" has in this case been denied to the accused?

All they could ask was to be put on the same footing with white persons—that the jury to try them should be constituted in the same manner that it would be for white persons. This they had a right to demand—no more, and no less. There is no law, State or Federal, which gives to persons of either race or color, the right to insist that the juries by which they are to be tried shall be composed, either in whole or in part, of their own race or color. A law so providing would be contrary to the whole spirit of the constitutional amendments, which were designed to put both races on a footing of entire equality under the law. Judge Rives in requiring that persons of color

shall be placed on juries for the trial of persons of color, *makes* the very discrimination between the races which he denounces.

Colored persons as well as white ones have in Virginia a right to be tried by an impartial jury, without distinction of race or color; and if in any case it can be shown that from any cause whatsoever a jury that has been summoned is not impartial it will be set aside and an impartial one selected in its place. The court in which the trial is had must in each case determine whether the jury is or is not impartial, its decision being subject to review, and, if erroneous, to reversal, by the court of appeals. If in any case it can be shown that a person called as a juror, whether from race, color, or other cause, is not impartial, he will be rejected.

A person is as much denied "the equal protection of the laws" when the court errs in overruling an objection made by him to a juror of his own race and color as if it were made to a juror of different race or color. It will hardly be claimed that such an erroneous ruling would give him the right to remove his case for trial to a Federal court. Yet it seems that there would be as much ground for asserting the right in that case as in the case now under consideration, for there is no warrant in fact or in law for the assumption upon which Judge Rives' action is based, that there is an imperative necessity, in order to obtain impartial juries for the trial of colored persons, that they shall be composed in part of persons of their own race and color. A jury composed of the white race only may be fairer and more impartial than a jury thus constituted.

Besides, who is to determine in each case what proportion of the jury shall be of the same race and color with the accused? Must it be one-third, or one-half, or the whole? If the views of Judge Rives are correct, a mistake of the court in failing to allow as many jurors of the race and color of the accused as would be proper in the opinion of the accused, or of the United States circuit judge (if indeed that judge has the power to remand the case), would give the right of removal.

Prejudice against a person charged with murder, very often exists in the county or locality of the murder, without reference to the race or color of the accused, rendering it difficult, if not impossible, to obtain an impartial jury in the county. The law of the State, to meet this difficulty, provides for obtaining a *venire* from a distant county, or of

changing the ***venue*** and sending the case for trial to a distant county. An application on the part of the accused, to the judge of the circuit court of Patrick, supported by affidavits, would have secured a change of ***venue*** and a trial in a county unaffected by local prejudice.

In the answer of Judge Rives, at page 20 of printed record, he insists that the provisions of section 641, upon which the jurisdiction of his court depends, were fully complied with, and that the application for removal was not too late. Upon this point he cites the cases of Gordon *vs.* Longest, 16 Peters, 97; and The Insurance Company *vs.* Dunn, 19 Wall. 214.

We do not controvert the proposition that the application for removal was made in time, if it shall be held that the circuit court could properly take jurisdiction of the case. We therefore pass directly to the consideration of Judge Rives' second proposition, to wit: the constitutionality of the proceeding by removal, and the authorities cited by Judge Rives in its support.

We admit that the remedy by removal is coeval with the judiciary act of 1789, and that it has been sanctioned by the courts and approved by the illustrious statesmen and jurists whose names are given. But we maintain that the remedy is only co-extensive with the right of jurisdiction. The court to which the removal is sought must have a rightful jurisdiction of the case, and did have such jurisdiction in the cases cited by Judge Rives. Neither of them affected in any way the administration of the criminal laws of the State, and to neither of them was a State a party in any respect whatsoever. Of course Mr. Justice Swayne, in The Mayor *vs.* Cooper, could say with emphasis, "We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen." The subject matter of litigation in these suits had no relation to the 14th amendment or the civil rights bill. We therefore insist that these cases are not authorities sustaining the action of Judge Rives.

The third proposition of Judge Rives, at page 21 of printed record, is that section 641 is strictly analogous to the acts thus pronounced constitutional, and that the 14th amendment gives it validity. Upon this proposition depends the question at issue. We deny that the 14th amendment confers the right to a jury of a particular race or color, and the amendment not conferring such a right, section 641 does not authorize a removal merely because such right is claimed and denied.

We have argued this in the former part of our brief, and will not repeat the argument here. We do not think the Slaughter-house cases support or even tend to support the proposition of Judge Rives.

We now come to his fourth and last proposition, to-wit: "That a Federal question arising under the 14th amendment was involved in, and a Federal right invaded by the action of the circuit court of Patrick," &c. In answer to this we respectfully refer the court to a former part of this brief.

JAS. G. FIELD,
Attorney-General of Virginia.
WM. J. ROBERTSON,
Counsel for Virginia.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 4

EX PARTE, J. D. COLES, *On Petition for a Writ of Habeas Corpus,*

AND

EX PARTE, THE COMMONWEALTH OF VIRGINIA, *On Petition for a Writ of Habeas Corpus.*

BRIEF FOR PETITIONERS

JAMES G. FIELD,
Attorney General of Virginia.
WM. J. ROBERTSON,
Counsel.

In the Supreme Court of the United States.

Ex Parte, J. D. COLES, on petition for a writ of Habeas Corpus,

and

Ex Parte, THE COMMONWEALTH OF VIRGINIA, on petition for a writ of Habeas Corpus.

BRIEF FOR PETITIONERS.

The authority of the Supreme Court of the United States to issue the writ of Habeas Corpus "and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority is no longer open to question"—*Ex Parte Lange*, 18 *Wallace*, 166.

The only doubt as to its authority to issue the writ upon the application of the petitioner, Coles, arises from the fact that no previous application has been made by him to a Circuit Court, or Judge.

We respectfully submit that no such application was necessary.

Since the Act of 27th March, 1868, no appeal can be taken to the Supreme Court from the decision of a Circuit Court in a Habeas Corpus case. But, as was held in *Ex Parte Yerger*, 8 *Wallace*, 85, this act did not deprive the Supreme Court of its jurisdiction by virtue of its general appellate, or supervisory power over all courts inferior to it, to issue the writ of Habeas Corpus, aided by the writ of certiorari, for the relief of parties unlawfully imprisoned under the order of any such court; although such imprisonment might be on a criminal charge of which the Supreme Court could take no jurisdiction on writ of error.

There can be no reason why the writ should not be issued to relieve from imprisonment, in this case, because the order complained of is not that of a *Circuit*, but of a *District* Court.

Metzger's Case, 5 Howard, 176, (which, as this Court has said, "stands alone") is no authority to the contrary.

That case can only be reconciled with the well established doctrines of this Court, by supposing that the District Judge was not considered to be acting as a Court; or even by virtue of his general power as a Judge; but under a special authority, conferred on him by statute, over which no Court whatever had any appellate or supervisory power.

The opinion in Yerger's case indicates plainly that the Court did not consider that it made any difference whether the imprisonment was under the order of *District*, or of a *Circuit* Court.

The orders referred to as subject to revision are spoken of, not as orders *of the Circuit Courts*, but as orders of the "*inferior Courts of the United States;*" and it is declared to be "established, upon principle and authority, that the appellate jurisdiction, by Habeas Corpus, extends to all cases of commitment by *the judicial authority* of the United States, not within any exception made by Congress."

The Circuit and the District Courts stand upon precisely the same footing, as to this matter, so far as the appellate power of the Supreme Court is concerned. No writ of error can be sued out, or appeal taken from the judgment of either, and the general supervisory jurisdiction of the Supreme Court exists alike as to both.

Nor is there any reason to question the jurisdiction of the Supreme Court to issue the writ of Habeas Coopus, in this case, because no application has been previously made to an inferior court, or Judge.

It is immaterial whether the unlawful imprisonment is under an order made on a petition for the writ of Habeas Corpus, or in the exercise of power wrongfully claimed by an inferior

court. Here too the supervisory jurisdiction of the Supreme Court is the same in the one case as in the other.

Accordingly we find that in *Ex Parte Jackson*, 96 *U. S. Rep.*, 727, a rule to show cause why a writ of Habeas Corpus should not be issued was awarded on the petition of a party seeking to be relieved from imprisonment under a judgment of a Circuit Court of the United States, alleged to be unlawful because of the want of jurisdiction in that court to render it, and the application was heard and decided upon its merits, although no application for the writ had been previously made to the Circuit, or District Court, or Judge.

In *Ex Parte Madison Doom*, a petition was filed at the October term, 1876, of this court, for a writ of Habeas Corpus to be relieved from imprisonment under a judgment of the District Court of the United States for the Western district of Virginia upon an indictment under the same act of Congress under which the indictment in this case was found. No application had been made to the Circuit, or District Court, or Judge, for a writ of Habeas Corpus. On the day before the application was to be heard upon its merits, the petitioner was pardoned by the President, and of course no further proceedings were had in the case. The brief of Solicitor General Phillips had, however, been filed, and in it no objection was made to the jurisdiction of this Court on the ground that the application was made to be relieved from the judgment of the District, rather than of the Circuit Court, nor upon the ground that no application for a writ of Habeas Corpus had been previously made to the Circuit or District Court, or Judge. The application was about to be heard upon its merits, that is to say, upon the question of the constitutionality of the law under which the petitioner was sentenced, when the further action of the Court was rendered unnecessary by the pardon granted by the President.

So that if the application in this case were made only in the name of the petitioner Coles, we think it clear that the Court would have jurisdiction to grant the writ, if the position can

be maintained that the section of the act of Congress under which he has been indicted is unconstitutional and void.

But the State of Virginia has, in her own name, applied for the writ in his behalf, and this, as we conceive, calls for the exercise of *original* jurisdiction by this Court, and removes all possible doubt as to its power and duty to grant the writ, if the law under which he has been taken in custody is unconstitutional and void.

Supposing it so to be, the right of the State to apply for his discharge can hardly be questioned. He is one of her judicial officers whose services are necessary to the administration of her laws, and she has a direct interest in having him set at liberty that he may be placed in a position to render those services in a proper manner, as well as in seeing to it that he shall not be controlled in the discharge of his official duties by any power other than herself.

If a father can sue out a Habeas Corpus on behalf of his child (the King *vs.* Ward, 1 W. Black's Rep., 386,) a wife in behalf of her husband (per Lord Campbell, C. J., in Cobbett *vs.* Hudson, 10 Eng. Law and Eng. Rep., 318,) an agent or friend in behalf of a prisoner (14 Howell's State Trials, 4 resolution, p. 814,) it will hardly be denied that it ought to be granted on the application of a State seeking to have one of her Judges discharged from imprisonment under an arrest made by a marshal of the United States, upon process issued from a Court of the United States, under an indictment found against him for an act done in the regular discharge of his duties as such Judge, which indictment and arrest she deems to be unwarranted by the Constitution of the United States, and in violation of her rights as a sovereign State.

It may, however, be suggested that the State asks for the writ to be issued to one of her own citizens, commanding him to produce the body of the party held in his custody; and that the judicial power of the United States, so far as the States are concerned, extends only to controversies "between two or more States;" "between a State and citizens

of another State;" and "between a State and citizens thereof, and foreign States, citizens or subjects," and not to controversies between a State and her own citizens. To this it may be answered, that the party against whom the State of Virginia asks that the writ shall be issued is an officer of the United States, acting under process issued from a Court of the United States, and under color of the authority of the United States, that, while he is thus acting, the State of Virginia has no control over him and he is not subject to her jurisdiction. If a writ of Habeas Corpus issued by one of her courts were served upon him, it would be his right and duty to decline to obey such writ, further than to state the character in which, and authority under which he was acting, and upon such return the jurisdiction of the State court to proceed further would be ousted. So that if the jurisdiction of this court to issue the writ should be held to depend on the citizenship of the marshal, it might well be insisted that, for the purpose of giving jurisdiction, he should be treated as a citizen of a Foreign State, within the meaning of the constitutional provision, being unquestionably a citizen and officer of a government distinct from and independent of the State Government.

But the jurisdiction in this case does not depend upon citizenship. It is a case "arising under the constitution and laws of the United States," and if the Supreme Court can, as it rightfully and uniformly does, take jurisdiction, under its appellate power, on behalf of a citizen against his State, of cases thus arising, it would seem to follow *a fortiori* that it may and should take original jurisdiction in favor of the State, of a case arising in like manner, against one of her own citizens, jurisdiction over whom has been taken away from her by the Government of the United States, when she seeks relief against acts done by him under color of the authority of the United States.

If it be admitted that the State of Virginia has a right to make the application, there can be no doubt of the power of

this court, in the exercise of the original jurisdiction conferred on it by the constitution, to issue the writ prayed for.

The decision in Ex Parte Barry, 2 Howard, 65, to the effect that the *original* jurisdiction of this court does not extend to Habeas Corpus cases, is expressly confined to cases of petitions filed by "*private individuals.*" The Constitution giving original jurisdiction to this court in *all cases* "in which a State shall be a party."

The question for consideration therefore is whether or not the 4th section of the Act of 1st March, 1875, under which this prosecution is had, is constitutional. If it is not a constitutional and valid law, then, upon the principle of the Yerger and Lange cases, this court should order the discharge of Coles. The decision in Ex Parte Parks, 93 U. S. Rep., 18, has no application to this case.

In Ex Parte Parks there was no doubt of the power of Congress to make the act of which the petitioner had been convicted an offence under the law; and the only question was whether or not it was so made by the statute under which the prosecution was had. It was simply a question of construction of a valid statute, and was clearly within the jurisdiction of the court before which he was tried. All therefore that was decided, was, that this court would not, upon Habeas Corpus, review the action of the court below, upon a question which it had jurisdiction to pass upon.

In the case now under consideration we insist that Congress had no power under the Constitution to make the act with which the petitioner is charged an offence against the United States. That the law declaring it to be such an offence is null and void, so that no court of the United States can exercise any jurisdiction under it.

The constitution and laws of Virginia confer upon all of her citizens, of every race and color, "equal civil and political rights and public privileges."

No discimination is made by them between the races in the selection of jurors. They are to be selected by the Judge of

each county or corporation court within the State, who is required, annually, at the May or June term of his court, to "prepare a list of such inhabitants of the county or corporation not exempt" (from service on juries) "as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception."

For the proper exercise of the discretion thus conferred on them, the Judges are responsible to the State of Virginia, and held accountable to her, and they can properly be held accountable to her only. For her to permit them to be made so to any other government or power on earth, would be an abdication of her sovereign right to administer her own laws.

The State alone has a right to determine who shall serve as jurors in her own courts.

Jury service is not a "right or privilege" of the citizen, but a *duty* imposed upon him. Even if it could be regarded as a "privilege or right," it would belong to him as a citizen of the State, and not as a citizen of the United States, and Congress would have no power to pass a law securing it to him.

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured, are left under the protection of the States." (From the opinion of the court in United States *vs.* Cruikshank, 92 U. S. Rep., 551.)

In the case of the United States *vs.* Railroad Company, 17 Wallace, 322, Mr. Justice Hunt, delivering the opinion of the court, says, on page 327:

"The right of the States to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded

by the uniform decisions of this Court, and by the practice of the Federal Government from its organization."

There is nothing in the Constitution of the United States, or in any of the amendments, conferring on any person, or on any class of persons, the right to serve upon juries in State courts.

There was much more ground for the claim that the right to practice law in State courts, and the right of **suffrage,** were conferred by the constitution as amended; yet this Court in Bradwell *vs.* The State, 16 Wallace, 130, and in Minor *vs.* Happersett, 21 Wallace, 178, held that neither of them was so conferred.

It seems to be clear, therefore, that the constitution has conferred no power upon Congress to pass any law defining the qualifications of jurors in State courts, or requiring the States to permit any particular class of persons, of any race or color, to serve on juries in their courts, and that the act of 1st March, 1875, so far as it seeks to accomplish this, is null and void.

But if it were conceded that Congress has a general power to provide that colored persons shall be permitted to serve on juries in State courts, it would have no right to make State Judges criminally responsible for failing or refusing to select them.

It is true that Congress is the judge of the appropriateness of its legislation to carry into effect any power conferred on it by the constitution. But this right of determining what legislation is appropriate to carry into effect any particular provision of the constitution must, of necessity, be limited by other constitutional provisions, and by the fundamental principles on which our system of government is based.

No legislation can be "appropriate" which is in conflict with these principles, or which is prohibited, either expressly or by implication, by any provision of the constitution.

The autonomy of the States within the limits of their reserved powers is as essential to the preservation of our system

of government, as is the maintenance of the authority of the Federal Government within its appropriate sphere.

As was said by Chief Justice Chase, in delivering the opinion of the Court in Texas *vs.* White, 7 Wallace, 725:

"The perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States." * *

"It may not be unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National Government. The constitution in all of its provisions, looks to an indestructible Union, composed of indestructible States."

Although the power of Congress "to lay and collect taxes" is apparently unlimited, this Court held in the case of the Collector *vs.* Day, 11 Wallace, 113, that "it is not competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State."

Mr. Justice Nelson, in delivering the opinion of the Court, says, on page 124:

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Again, on page 125, he says:

"Such being the separate and independent condition of the States in our complex system, as recognized by the constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their

governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the constitution, should remain unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws."

* * "It is one of the sovereign powers vested in the States by their constitutions, which remained unaltered, and in respect to which the State is as independent of the general government as that general government is independent of the States."

Again, on page 127, he says:

"It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the States; nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great laws of self preservation; *as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.*"

In the case of the Commonwealth of Kentucky *vs.* Dennison, 24 Howard, 66, it was held that no power "is delegated to the general government, either through the Judicial Department or any other department, to use any coercive means to compel the governor of a state to discharge the duty imposed on him by an act of Congress to cause to be delivered up, to the State having jurisdiction of the crime, a fugitive from justice in accordance with the express requirement of Section 2, Article IV, of the Constitution of the United States.

Chief Justice Taney, delivering the opinion of the Court, says, on page 107:

"The words 'it shall be the duty' in ordinary legislation, imply the assertion of the power to command and to coerce

obedience. But looking to the subject matter of this law, and the relations which the United States, and the several States bear to each other, the Court is of opinion, the words 'it shall be the duty,' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, *nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the constitution which arms the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights.*"

It is indeed difficult to understand how, in view of the character of our system of government, and especially after these adjudications of the Supreme Court, it can be seriously contended that Congress has power to pass a law making Judges of State Courts criminally responsible in Courts of the United States for their official acts as such Judges.

If the power exists, the administration of Justice by the States, in her own tribunals, is at the mercy of Congress.

If Congress can fine a Judge for his judicial acts, it can imprison him during his whole term of service, or depose him from office. If it has the power claimed for it over the judicial officers of a State, it has like power over members of the legislature who may vote for a law, supposed by Congress to be in violation of any provision of the Constitution of the United States, and over the Executive Officers who may undertake to execute it.

In short, it converts this Government into a consolidated despotism, the despot being the congressional majority of the day.

That this Court will protect the people of the whole Union from the disastrous consequences that must result to all-north as well as south, from the recognition that Congress possesses any such power, is confidently hoped for.

JAMES G. FIELD,
Attorney General of Virginia.
WM. J. ROBERTSON, *Counsel.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1879

Original, No. 4

EX PARTE COMMONWEALTH OF VIRGINIA AND J. D. COLES, *Petitioners for Habeas Corpus.*

BRIEF FOR THE UNITED STATES

CHARLES DEVENS,
Attorney General.
EDWIN B. SMITH,
Assistant Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

ORIGINAL, NO. 4.

EX PARTE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS FOR HABEAS CORPUS.

BRIEF OF THE UNITED STATES ATTORNEY-GENERAL.

STATEMENT.

J. D. Coles, judge of the court of Pittsylvania County, Virginia, is arrested and held upon an indictment found in the United States district court for the western district of Virginia, for excluding from the jury lists, officially made by him, certain persons solely "on account of their race, color, and previous condition of servitude, and for no other reasons." (Record, 1.)

Claiming a standing in court because of Judge Coles' judicial position, and the right the people of that State have to his services in that capacity, the commonwealth of Virginia petitions this court for a writ of *habeas corpus*, and to have him discharged from arrest.

Judge Coles also presents to you a similar petition in his own behalf.

BRIEF.

1. Who can apply to the Federal courts for a writ of *habeas corpus*?

2. Where, and how is the application to be made, and the writ to issue?

3. What circumstances require the issue of the writ and the discharge of the prisoner? Do such circumstances exist in the present case?

I.

R. S., "SEC. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States," &c. * * *

The prisoner himself must make, sign, and verify the application therefor. (See R. S., sec. 754.)

II.

Application may be made, in appropriate cases, to either of the courts of the United States, or to any judge thereof.

R. S., "SEC. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of *habeas corpus*."

" SEC. 752. The several justices and judges of the said

courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

It is not meant by these provisions that application is to be made indiscriminately to either of these courts, at the election of the applicant.

1. This court will not issue a writ of *habeas corpus* as an exercise of its original jurisdiction; which is what is here asked of it. Congress had neither the power nor the intention to authorize such a course. (Marbury *v.* Madison, 1 Cranch, 174, 175, *et seq.*; Ex p. Watkins, 7 Peters, 572; Ex p. Barry, 2 Howard, 65: Ex p. Metzgar, 5 *Ib.*, 176; Ex p. Yerger, 8 Wallace, 85; Ex p. Parks, 93 U. S., 18.) There has been no action by, or application to, the court below.

2. The fact that the commonwealth of Virginia has filed a petition does not make it one of which this court has original jurisdiction.

The controversies to which a State is party, that Art. III, sec. 2, of the Constitution allows to be here heard are those arising "between two or more States; between a State and citizens of *another* State; * * * and between a State, or the citizens thereof, and foreign states, citizens or subjects." The present matter cannot be comprehended in this category; therefore the use of the name of Virginia cannot confer jurisdiction.

The proper form of application for the writ is set forth in R. S., sec. 754: "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge, *authorized to issue the same*, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue

of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

The verification must be by some person liable to be indicted for perjury, if the statements contained in the application are found to be willfully false.

In any case the court will look into the interest of the State, where it claims to be a party. (Penn. *v.* Wheeling Bridge Co., 13 Howard, 559.) R. S., sec. 755, provides that the writ shall issue "unless it appears from the petition itself that the party is not entitled thereto."

Desire to obtain an equivalent for money paid—a creditor-interest—will not authorize the making of an application: nor will the interest which the State has in having the functions of the judicial department faithfully and promptly performed, for the benefit of her citizens.

In all cases except those specially mentioned jurisdiction is appellate, and not original, even though a State be a party.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction in cases where a State shall be a party to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible

that its framers designed to include in the first class those cases in which jurisdiction is given because a State is a party, and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law." (Cohens *v.* Virginia, 6 Wheaton, 393.)

3. This court possesses no "supervisory" power over the circuit and district courts, such as is exercised by the courts of King's bench and by the supreme court of many of the States over the proceedings of inferior tribunals.

4. The issue of a writ of *habeas corpus* by this court is an exercise of its appellate jurisdiction. (Cases *passim:* Ex p. Watkins, 7 Peters, 568; Ex p. Milburn, 9 *Ib.*, 104; Ex p. Metzger, 5 Howard, 176; Ex p. Kaine, 14 *Ib.*, 103; Ex p. Yerger, 8 Wall., 85; Ex p. McCardle, 7 Wall., 506; Ex p. Parks, 93 U. S., 18.)

Its appellate power—the instances in which and circumstances under which it can be appealed to—are distinctly defined by law. Though this power is conferred by the Constitution, it is limited to those matters for which Congress has made express statutory provision. (Ex p. McCardle, 7 Wallace, 513; Ex p. Vallandigham, 1 Wallace, 251.)

"This court can exercise no appellate jurisdiction which is not given to it by statute." (United States *v.* Nourse, 6 Peters, 495.)

"This affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." (Durosseau *v.* United States, 6 Cranch, 314.)

"The Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, *or by any other mode of proceeding*, than that which the law prescribes." (Barry *v.* Mercein, 5 Howard, 119; United States *v.* Curry, 6 *Id.*, 113; Wiscart *v.* Dauchy, 3 Dallas, 327; Forsyth *v.* United States, 9 Howard, 572.)

No court "can assert a just claim to jurisdiction exclusively conferred upon another, or withheld from all." (Sheldon *v.* Sill, 8 Howard, 449.)

The appellate power is distinct from a supervisory power. (Baxter *v.* Brooks, 29 Ark., 180, 181; Milliken *v.* Huber, 21 Cal., 169; Mead *v.* Thompson, 15 Wall., 638; Hall *v.* Allen, 12 Wall., 454; Morgan *v.* Thornhill, 11 Wall., 80; Palmer *v.* Dayton, 4 Cush., 270; Thompson *v.* Thompson, *Ib.*, 127; Harlow *v.* Tufts, *Ib.*, 452; Cheshire Iron Co. *v.* Gay, 3 Gray, 533; Hestres *v.* Brennan, 50 Cal., 211.)

The supervisory power, like the appellate, is entirely the creature of statute.

If this court could issue *habeas corpus* as a *supervisory* writ, it must be done as an exercise of original jurisdiction, in the exercise of an assumed power to regulate and control all proceedings in inferior Federal courts by some other precept than a writ of error or upon appeal. Not only has no such power been conferred by Congress, but the early case already cited declares that it is not competent to be done. Substituting "habeas corpus" for "mandamus," the language of that opinion answers this petition: "To enable this court to issue mandamus [habeas corpus] it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction." (Marbury *v.* Madison, 1 Cranch, 175.

5. No appellate jurisdiction can be exercised upon these petitions since there is nothing to appeal from. There has been no judgment in the court below. A direct appeal to this court from the finding of a grand jury is a thing without precedent.

"APPEAL.—When used with reference to proceedings in courts of justice, appeal signifies one mode of obtaining a review of a judicial decision." (1 Abbott's Law Dict., *h. t.*)

Burrill gives this definition: "The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse." He also says: "An appellate jurisdiction necessarily implies that the subject-matter has been already instituted in, and acted upon by, some other court whose judgment or proceedings are to be revised."

Abbott thus defines "Appellate: Pertaining to the judicial review of adjudications."

It is to be noted that the action of the district court is, under the act of March 3, 1879, c. 176 (20 Stats., 354), subject to review or appeal by the circuit court, whether subsequently reviewable here or not under the fifth section of the act of March 4, 1875, c. 114 (18 Stats.,336–7), printed *infra*.

The proposition of these petitioners is that this court shall go *per saltum* over the circuit court to reach the district court; and that, not waiting for the regular course of procedure, shall go at once, before Judge Rives or the circuit judge have had occasion or opportunity to act.

Judge Rives is entitled to an opportunity to act upon this case, and to pass some judgment thereon before

it is taken to this court in any way. Until he does so there can be no appellate proceeding.

In Jackson's case (96 U. S., 727–737, No. 6, Original, October term, 1877), there had been a verdict of guilty and judgment thereon. Judge Blatchford had also been applied to for *habeas corpus* while the accused was awaiting trial and had refused to release him because he found the statute constitutional and the commitment regular and lawful. True, the ground now taken was argued in that case, because the application to Judge Blatchford was before trial and there had been none after judgment. Under this state of facts the court proceeded to discuss the merits of the case upon the prisoner's application and at his request; though the closing paragraph of the opinion (p. 737) intimates that the applicant was not entitled to a decision upon the merits. In that case it was not necessary to consider whether or not the court might properly issue the writ, because the court were of opinion that the statute was constitutional, and that the circuit court had properly exercised its jurisdiction.

6. The legal conclusion from the decisions of this court, from the earliest to the present day, is this: *Original* jurisdiction exists only in those specified cases, and as to those particular persons enumerated in the Constitution, and it cannot be extended beyond these by any legislation; *appellate* jurisdiction is limited to those causes, questions, and methods declared and established by Congress. A *supervisory* power, neither original nor appellate, if it can be conceived of as a legal abstraction, finds no sanction anywhere either in the Constitution or the laws. The supreme court of California has so construed this phraseology. (Milliken *v.* Huber, 21 Cal.,

169; Wilcox *v.* Oakland, 49 Cal., 31; Hestres *v.* Brennan, 50 Cal., 211.)

Whenever appellate jurisdiction is exercised, under existing statutes, it must be either through the medium of a writ of error, or by appeal; if that appeal be by *habeas corpus*, it must be from a decisiou below upon a similar writ; nor will the fact that neither of these methods will meet the requirements of the supposed emergency justify the resort to any other. (Forsyth *v.* United States, 9 Howard, 572.)

If the act of March 4, 1875, c. 114, § 5, authorizes bring ing the present case to this court for final review—after an appeal to the circuit court, under the act of March 3, 1879, c. 176—there is no propriety in anticipating the result to be reached by that course; if the act of 1875, c. 114, § 5, does not apply to criminal cases, so that it cannot be brought here by appeal or writ of error, the effect of those proceedings cannot be obtained by *habeas corpus.*

No supervisory power, properly so called, is known to us to exist, except the limited power given by R. S., Sec. 688, to issue writs of prohibition in certain defined cases, and writs of mandamus.

III.

Judge Coles himself has prematurely sought the interference of this court, which the judgment of the United States district court or of the circuit court, when obtained, might render unnecessary.

It is the right of the district court in the first instance to express its opinion upon the law and facts of the indictment found against Judge Coles.

It is enough that the district court had power to entertain the complaint. That gives jurisdiction. Power to decide that it must be dismissed because of the unconstitutionality of an enactment, or for any other reason, implies power to decide differently. It is jurisdiction. (Central Pac. R. R. Co. *v.* Placer Co., 43 Cal., 368–9; Ex parte Bennett, 44 Cal., 88; King *v.* Poole, 36 Barb., 242.)

The United States district court had conferred upon it by Congress jurisdiction over the subject-matter and over the person. Whether the statute under examination was constitutional or not was a question of law, arising in the case, to be primarily decided by that court, since no provision is made to anticipate its determination of legal propositions in any case. (Sheldon *v.* Newton, 3 Ohio St., 499; Ex p. Kellogg, 6 Vt., 509, 511; Ex p. Tracy, 25 Vt., 93, 96; Ex p. Greenough, 31 Vt., 279, 285; Ex p. O'Connor, 6 Wis., 288.)

"If a plaintiff obtain a judgment, and by his own showing has no cause of action, yet if the court had jurisdiction of the cause, it is only an erroneous judgment; but if the court has no jurisdiction of the cause, it is a void judgment." (McNamara on Nullities, 137, and authorities *passim*.)

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented that brings this power into action," &c. (United States *v.* Arredondo, 6 Peters, 709; King *v.* Poole, 36 Barb., 242.)

In 1870 the supreme court of Missouri said of an applicant for *habeas corpus*: "He was arrested and detained upon legal process by a court having jurisdiction of the person and the offense; he is in custody of the proper

officer, and by virtue of a provision of the law. The law to prevent the introduction of Texas cattle into the State during certain periods of the year was intended as a police and sanitary regulation, and whether the legislature exceeded its powers in the passage of that law we will not inquire in this proceeding. The petitioner can have his trial, and if he is dissatisfied with the verdict and judgment and desires to test the validity of the law the courts are open to him, as they are to all other persons charged with the violation of the laws of the land. Admit this proceeding, and then every person charged with committing an offense of every kind and description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned." (*In re* Harris, 47 Mo., 165. See also Ex. p. Fisher, 6 Nebr., 309.)

It is the *allegation* of facts which, under an act of Congress, constitute an offense, that authorizes the Federal courts to inquire into the truth of the allegation and the constitutionality of the law; especially when those facts are regularly presented to the court by a grand jury. In Blyew *v.* United States this is recognized. The opinion says: "If, therefore, they are persons affected by the cause, whenever they might be witnesses, were they competent to testify, it follows that, in any suit between white citizens, jurisdiction might be taken by the Federal courts whenever it was *alleged* that a citizen of the African race was or might be an important witness. And such an allegation might always be made. *So in all criminal prosecutions a similar allegation would call into existence the like jurisdiction.*" (13 Wall., 592.)

A case in which one party asserts and the other de-

nies the validity of a Congressional enactment, vital to the maintenance of the action, is one arising under the Constitution and laws of the United States, of which the Federal courts must have jurisdiction. (Mayor *v.* Cooper, 6 Wall., 252, 253.) What authority has this court to determine the constitutionality of any act of Congress that is not in like manner conferred upon the subordinate tribunals? If the assertion of the unconstitutionality of a law ousts the jurisdiction of the district court, how can this court take cognizance of it? What greater right has this court, in the first instance, as between party and party, to determine the constitutional character of legislation than the lower courts have? All Federal tribunals alike derive their authority from the Constitution—"that pure fountain from which the jurisdiction of all the Federal courts is derived" (Am. Ins. Co. *v.* Canter, 1 Peters, 545)—and the laws made in pursuance thereof. Therefore, in causes like the present, this court has no jurisdiction, in the first instance, and the lower courts have it all; because it is there deposited by the Constitution and laws which govern them all.

To say that this statute, now to be examined, is unconstitutional, is to assume the vital question involved in the case.

To repeat: If the lower court had no jurisdiction, because of the unconstitutionality of the statute, neither has this; if this court has jurisdiction so far as to inquire into the constitutionality of the statute, where it comes collaterally in question upon *habeas corpus*, certainly the court below has the power, duty, and *right* to institute the same inquiry upon the indictment, where it is directly involved. The determination of that ques-

tion should not be had here in anticipation of the decision of the court below. In fact, it rests *exclusively* with the court below, except where error or appeal lies.

The supreme court of Wisconsin, in the matter of Sherman M. Booth, declined to accede to the proposition then presented, upon which the present petitions rest, viz, "That no court can have jurisdiction to try a person for an alleged violation of a void statute." That court replied thus to the suggestion: "But it is to be remembered that that court (the United States district court), having the case pending before it, is of necessity compelled to decide every question which the case involves, that of its own jurisdiction included." (Ex p. Booth, 3 Wisc, 145.) Nor was this proposition controverted in the opinion given in this case when it reached this court.

In Ableman *v.* Booth (21 Howard, 519, 520), Taney, C. J., calls attention to the language of the Constitution declaring "this Constitution and the laws of the United States which shall be passed *in pursuance thereof*" the supreme law of the land, and compares it with the terms in which jurisdiction is conferred upon the Federal courts, in which the words above italicized are omitted. Italicizing these three words in his quotation of them, the Chief Justice thus proceeds in his opinion: "The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and,

indeed, certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal. The Constitution has accordingly provided, as far as human foresight could provide, against this danger; and in conferring judicial power upon the Federal Government it declares that the jurisdiction of its courts shall extend to all cases arising under 'this Constitution' and the laws of the United States, leaving out the words of restriction contained in the grant of legislative power which we have above noticed. *The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.*" (21 Howard, 519, 520.)

Power over the person under *any* act of Congress is jurisdiction.

The same position is restated by Mr. Justice Swayne in Mayor *v.* Cooper (6 Wall.).

If a judgment is absolutely *void*, then *habeas corpus* would lie to release one from imprisonment under it; if good until reversed, as would be the case here, *habeas corpus* will not prevent its execution. (See 3 Peters, 202, and other cases cited *supra* and *infra;* Ex p. Bushnell, 9 Ohio St., 183; Ex p. Williamson, 26 Penn. St., 9; People *v.* Orser, 12 Howd. Pr. (N. Y.), 550; Ex p. Baker, 11 Howd. Pr., 425-6; Ex p. Prime, 1 Barb., 349, 350; People *v.* Cavanagh, 2 Abb. Pr., 85; People *v.* McCormack, 4 Parker's Crim. Cas., 9; Ex p. Van Aernam, 3 Blatch., 160.)

For causes of detention arising *after* judgment and execution, the writ may issue (People *v.* Cavanagh, 2 Parker's Crim. Cas., 650); that is, for a cause arising or existing after the decree and jurisdiction of the court is exhausted, as it was in Lange's case (18 Wall., 163). There the court had exhausted its power, and had no further authority or jurisdiction over the *person* or *cause.* (93 U. S., 23.)

It may be urged that the lower court, having jurisdiction over the person and cause, its judgment cannot be void, nor can it be reversed, in a criminal case like the present, because no writ of error will lie to bring it here (Ex parte Parks, 93 U. S., 18); and thus a man may be imprisoned or fined under an act of Congress which this court, if that act could be brought before you for consideration, would think unconstitutional. If that were so, the answer to that suggestion would be that the citizen is only entitled to a hearing before, and to the judgment of, that tribunal which the Constitution and laws have designated as the arbiters of his cause, whether it involve a constitutional question or not.

Congress has, and has exercised, the power to permit the subordinate courts to decide without appeal to this court questions of constitutional law arising in certain civil and criminal cases. If recourse can be had to this court in criminal cases arising under the act of March 4, 1875, c. 114, by virtue of its fifth section, this privilege is an exception to the usual course of Federal criminal procedure.

Whether it would be proper to allow all parties an appeal to this court from the district or circuit court where a constitutional question is involved is a proper subject for legislative consideration; but it may be re-

marked that the mode by which such inquiries are brought into this court by certificate of decision from the circuit court, has for ninety years been found satisfactory and amply sufficient to guard all parties in their constitutional rights. No reason is perceived why, in this case, which may be brought into the circuit court by appeal, this course may not be sufficient to protect the rights of the defendant.

No man has a right to your judgment, unless that right is given by law. (United States *v.* Nourse, 6 Peters, 495, middle; Durosseau *v.* United States, 6 Cranch, 314; Wiscart *v.* Dauchy, 3 Dallas, 327; Barry *v.* Mercieu, 5 Howard, 119, bottom; United States *v.* Curry, 6 *ib.*, 113, bottom; Forsyth *v.* United States, 9 *ib.*, 572; Ex p. Vallandigham, 1 Wallace, 251; Ex p. McCardle, 7 *ib.*, 513.)

Within their spheres of final jurisdiction, the inferior Federal courts possess like powers, derived from the same source, with the highest; and their ultimate decrees have the same sanction. It is, therefore, not properly to be considered a hardship that a party has no appeal from the adverse judgment of whatever tribunal the law has made final arbiter of his dispute. In a civil case in the circuit court involving but $5,000 it is no more a hardship that the losing party must abide the event than it is in a cause where a larger sum is in dispute that the winner there cannot retain his judgment, but is liable to have it reversed here.

The highest penalty that can be inflicted under act of March 4, 1875, c. 114, § 4, is $5,000—the sum required to authorize the appeal of a civil case.

So, in a criminal case, it is no hardship that a different court than this renders final judgment—unless a person accused should be allowed to go from court to

court until he found a favorable decision. Could both parties appeal in such cases, one acquitted below might not fare so well here. That no injustice has resulted from the existing legislation upon this subject can well be supposed from the fact that it has been in operation, without complaint, for nearly a century.

The last section of the act of March 4, 1875, c. 114, is: "SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." (18 Stats., 337.)

But if that section will not permit the case to come here for review or upon appeal, after the facts have been ascertained below, that will not justify present interference, nor be any hardship upon the respondent.

This point was well stated by the Solicitor-General in the Doom case.

"There being no constitutional authority for punishing an innocent man, he who is in prison upon the misinterpretation of a statute is there as much in violation of the Constitution as he who is there in execution of an unconstitutional statute. In either case there is no law for the sentence. The former case shocks public opinion as much as the latter, is equally vexatious to the person involved, and equally dangerous to common right.

"In Parks's case, however, this court has said in effect that allegations of *nullity* against the sentence below because of misinterpretation of the statute mainly in-

volved, are for any practical purpose inadmissible, because by our system the *finis litium* in that respect is in the court below—or rather, that the court which has decided is not in that respect a court *below*, but, on the contrary, is a court of *last resort.*

"In the absence of legislation making a distinction between the administration of *constitutional* questions, and other legal questions equally important to the accused, it seems that both classes are equally confided to the judgment of the circuit court. Under a constitutional government constitutional questions become ordinary matters of consideration in courts of all grades, and it s to be presumed that all courts are competent to meet and dispose of them, and, as I have already said, in the absence of legislation giving a review thereof, equally competent to give them final determination. (Ex parte Wilkins, 7 Pet., p. 573.)

"The question is not whether the court below has *usurped* a portion of the general jurisdiction of the United States, but whether that general jurisdiction itself is competent; *i. e.*, in the present case the jurisdiction of the circuit court fails only if the jurisdiction of the United States fails.

"No one can practically deny to the United States any jurisdiction asserted *by them*, *i. e.*, by tribunals intrusted in the last resort with the power of making such assertion.

"The check upon unconstitutional legislation applied by the judiciary does not necessarily reside in the Supreme Court, nor has that court universally the power of reviewing the manner in which such check may have been applied by other tribunals. Its powers in that respect vary with different cases, and in general depend upon some statute.

"I submit that in the present condition of statutory law the question whether the act under consideration be constitutional is intrusted to the circuit court, without appeal. In other words, that as regards any particular case decided in those courts, every department of the government must take such act to be constitutional.

"The contention by the government here is that, for any purpose of practical relief, no tribunal competent to pass without appeal upon the questions *Constitutional* or *unconstitutional? Legal* or *illegal?*, can violate the Constitution or the law.

"The circuit courts of the United States are not *inferior* in the sense in which that word is used by the authorities to denote certain courts whose jurisdiction is questionable collaterally, and is liable to unfavorable presumptions. As the United States themselves, although possessing enumerated powers, have within those powers (including the right of deciding what they are) all the sovereign *quality* which any governments have, so the circumstance that their higher tribunals are confined by whatever confines themselves, does not disentitle the latter to the favorable presumptions possessed in general by tribunals of superior jurisdiction." (See Skinner *v.* Moore, 2 Dev. & Batt., 144.)

IV.

Though we believe it entirely for the inferior court to decide upon the constitutionality of the law upon which the present indictment is found, yet as the petitioners have raised and discussed that issue, and the court did consider a similar one in Jackson's case (96 U. S., 727), we will address ourselves briefly to that subject.

The recent amendments to the Constitution, so far as they relate to this matter, and the act of which the constitutionality is questioned, are as follows:

ARTICLE XIII.

"1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XIV.

"SEC. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make* OR ENFORCE *any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any State deprive any person of life, liberty, or property without due process of law, *nor deny to any person the* EQUAL *protection of the laws.*"

* * * * *

"SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The concluding sections of the act of March 4, 1875, c. 114, are these:

"SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or

fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

"SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." (18 Stats., 336, 337.)

Attention is called to these two sections of the Revised Statutes:

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." * * *

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

These latter provisions, now incorporated in the Revised Statutes, were originally part of the civil-rights act,

approved April 9, 1866 (14 Stats., 27), passed under the thirteenth amendment, and re-enacted May 31, 1870 (16 Stats., 144), after the adoption of the fourteenth amendment.

They all evidently contemplate a protective legislation by Congress to prevent interference by the States with the rights of a citizen, not only by adverse statutes, but by customs, usages, &c.

The amendments were not only the result of a great civil convulsion, but were innovations upon the previous course of the government and of legislation in authorizing Congress to interfere between the State and its citizens, and to legislate so as to preserve the freedom, privileges, and rights of the citizens from invasion or curtailment by the State.

Before these amendments were passed, from the time the Constitution first went into operation, Federal authority has been exercised over the action of State courts. "Nor can such a right be deemed to impair the independence of State judges. *It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States.* In respect to the powers granted to the United States they are not independent; they are expressly bound to obedience by the letter of the Constitution," &c. (Martin *v.* Hunter, 1 Wheaton, 344.)

Article VI, declaring the supremacy of the Constitution and laws made in pursuance thereof, says that "the *judges* in every State shall be bound thereby," &c., not mentioning by name of office any other of the State functionaries.

The amendments were not simply declaratory, without provision for carrying them into effect, but it was con-

templated that Congressional action should secure freedom and prevent any abridgment by the State of the privileges and immunities of citizens and any denial of the equal protection of the laws.

Even without the provisions that Congress should enforce the amendments by appropriate legislation, Congress would, under the general authority of the Constitution, have that power. These provisions emphasize such power, and show that the amendments of the Constitution, so far as they bore upon the States, were not left to the enforcement of the States alone; but that the rights guaranteed by them to the people of the United States was committed to the guardianship of Congress.

In Blyew *v.* United States (13 Wall., 581), it was held that under the civil-rights bill of April 9, 1866, a criminal prosecution is not to be considered as "affecting" those who were merely witnesses. It was there said "that a criminal case affects nobody but the party accused and the public." (13 Wall., 587.) In the present instance the total omission of colored citizens from the jury-lists, solely on account of "race, color, and previous condition of servitude," did affect the parties entitled to be placed thereon, and all of their race whose civil rights and personal liberty might become the subject of litigation in causes committed to such juries.

True, jury service is a duty as well as a right; but it is a duty in which it is for the interest of colored men to participate. Without participation in this, they are not under "the equal protection of the law" which it is the duty of Congress to secure to them, as against the State, by appropriation legislation.

It may be observed that the constitution of Virginia

confers upon all her citizens equal civil and political rights, regardless of color; and that no State legislation discriminates between the races in the selection of jurors; but it is required of the judges of the county or corporation courts annually to "prepare a list of such inhabitants of the county or corporation, not exempt, as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception." And it will be argued that "the State alone has a right to determine who shall serve as jurors in her own court."

The answer is, that it is against the State that the prohibitions of the fourteenth amendment are directed, and it contemplated that they shall be enforced by Congressional enactments and interference.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," &c.

What is the "State," within the fair meaning of this provision? "That the word 'State' is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited (Texas *v.* White, 7 Wall., 720–1), but from a reference to the various places in which it is used by the Constitution of the United States. A few only of these will be referred to." (United States *v.* Reese, 92 U. S., 249, per Hunt, J., dissenting.) Upon the bottom of the next page (250) he refers to the provisions that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." "By whom? By the sovereign State, by its agencies and authorities." Then he observes that the courts of one State must give full faith and credit to the proceedings

of the courts of another State. For this purpose, the court is the State. The State can only act by its agents and officers, and when these, in the discharge of a duty reposed in them by the State, violate the principles of the fourteenth amendment and the express requirements of appropriate legislation intended to carry these amendments into effect, it is done by the State. No possible enactment of Congress can be appropriate or effective to carry out the ideas embodied in these amendments unless it can be made to operate upon some individual. It is competent not only to annul antagonistic State legislation, but to punish administrative disregard of statutes passed to carry out the purposes of these amendments.

In Virginia, as in many other States, the decisions of the court constitute and embrace more of the law applicable to the administration of justice and to the daily affairs of common life than will be found upon the pages of the statute book. These decisions are the laws of the State. Those who promulgate them speak with the voice of the State. To that extent, in their official action, they are the State. "The decisions of the courts of the United States within their sphere of action are as conclusive as the laws of Congress made in pursuance of the Constitution." (Mayor *v.* Cooper, 6 Wall., 253.)

The amendment (fourteenth) says "no State shall make or *enforce* any law," &c. The enforcement of any law must be through the courts and its officers. "Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority." (Martin *v.* Hunter, 1 Wheaton, 363.)

Of the fourteenth amendment, as of that guaranteeing a republican form of government, it may be said, in the language of Mr. Justice Hunt, it "is a guaranty to the *people* of the State, and may be exercised in their favor against the political power called 'the State.'" (92 U. S., 251.)

In his Essay on the Constitution and Government of the United States, Mr. Calhoun, arguing the invalidity of the twenty-fifth section of the judiciary act, because of the supremacy thus given to Federal over State laws and authority, remarks that "the laws and the acts of the government and its departments, if opposed, reach the people individually only through the courts." This obvious truth makes it apparent that any legislation which should prevent the State courts and authorities from disregarding and practically annulling the fourteenth amendment, in its actual operations, would be "appropriate."

The Solicitor-General thus stated our position in his brief in Doom's case, which never came to a hearing:

'In interpreting the above constitutional provision it seems:

"I. That by the phrase 'any State' is meant, or at all events included, whatever agency *authorized by the State* in any case acts immediately upon 'life, liberty, or property.' *Whoever by virtue of public position under a State deprives another of property, or liberty, or life, without due process of law, thereby violates the law of the United States.* It is the duty of the State to see that those who are clothed in any degree with its powers do not commit such offenses; and if it do not, the United States interfere to punish the offender.

"II. The above principle applies to all persons, no

matter how humble the grade of their office, who have for a shorter or longer time a position which confers power over public privileges. As between the United States and the offender, it will be enough to show that really (or perhaps even in pretense) in passing upon the rights which he has violated he was administering a function derived from the State."

We may add, that whoever deprives one of his right to be placed upon the jury, or deprives the accused or litigant of his right to be tried or heard before an impartially, legally drawn jury commits an offense within the purview of the fourteenth amendment and of appropriate legislation thereunder.

In his very able and valuable opinion upon the queue ordinance, Mr. Justice Field, after quoting the first section of the fourteenth amendment, says:

"*This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government;* to its executive, legislative, and *judicial* departments; and to the subordinate legislative bodies of cities and counties. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come or of whatever race or color he may be, implies not only that the courts of the country shall be open to him upon the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that, in the administration of criminal justice, he shall suffer for his offenses no greater or different punishment. Since the adoption of the fourteenth amendment Congress has legislated for the pur-

pose of carrying out its provisions in accordance with these views.

Some of these provisions are recited by the learned judge, who then adds: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is caught upon the broad shield of our blessed Constitution and our equal laws."

It is idle to argue that there is no discrimination, because the statute makes none, or because white men are tried by white jurors. If all colored men are excluded by Judge Coles from the jury lists made up by him solely on account of race, color, or previous condition, this is a discrimination, and one made by the State through its only agent that can make it.

In his opinion declaring the invalidity of the queue ordinance of the city and county of San Francisco, Mr. Justice Field thus alludes to an attempt to argue that the ordinance did not discriminate against a class because couched in terms apparently of universal application:

"The class character of this legislation is none the less manifest because of the general terms in which it is expressed. * * * Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect, or class, it being universally understood that it is

to be enforced only against that race, sect, or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so the most important provisions of the Constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled."

By Blackstone's definition "trial by jury is the unanimous suffrage of twelve of one's equals and neighbors, indifferently chosen and superior to all suspicion."

It is said by Lord Commissioner Maynard "to be the subject's birthright and inheritance, as his lands are, and without which he is not sure to keep them, or anything else; * * * his fence and protection against all frauds and surprises and against all storms of power."

An English writer has said, "the whole establishment of King, Lords, and Commons, and all the laws and statutes of the Realm, have only one great object, and that is to bring twelve men into a jury-box." "This," says Mr. Forsyth, "is hardly an exaggeration. For to what end is the machinery of the Constitution employed but to give every man his due, and protect all in the enjoyment of their property, liberty, and rights? And the twelve men in the jury-box are in this country the great court of appeal, when, in case of the humblest as well as the most exalted citizen, those or any of them are attacked." (Forsyth, Trial by Jury, 341.)

As to the importance and character of the trial by

jury, and upon the question whether it is the equal right of every free citizen, we call attention to Magna Charta, cap. 29 (as divided by Coke); Coke's Institutes, part 2, p. 45, part 1, s. 189, part 2, p. 28; as to the meaning of jurors, 3 Blackstone Com., 360, 379–381; Forsyth's Trial by Jury, 230–240; Finlason's Introduction to Reeve's Common Law, xcviii, 1 Reeve, 285; Constitution, art. 3, amendments v, vi, vii; Story on the Constitution, sections 1779–1785.

It is believed that in every State constitution the trial by jury is guaranteed as one of the indefeasible rights of every free citizen. (Constitution of Massachusetts, Arts. XII, XV; Constitution of New Hampshire, Arts. 15, 16, 17, 20; Constitution of Virginia, Art. I, §§ 10, 13; Constitution of West Virginia, Art. III, §§ 10, 13, 14.)

This trial, to be worth anything, must be impartial and without discrimination, at least (whatever may be the qualifications assigned to jurors) against the race or color of the freeman to be tried.

If it be said that this is not the act of the State which deprives colored men of their rights in the jury-box, and colored men of their right to juries from which all of their race and color are not excluded, it should be observed by the resolutions of the State of Virginia, and by her petition, that she is engaged in vindicating the acts which these judges are doing, in creating and enforcing such exclusion.

CHARLES DEVENS,
Attorney General.
EDWIN B. SMITH,
Assistant Attorney General.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1879

No. 4—Original

EX PARTE, IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA AND J. D. COLES,
Petitioners for Writ of Habeas Corpus.

BRIEF FOR THE UNITED STATES

W. WILLOUGHBY,
On behalf of the United States.

In the Supreme Court of the United States.

No. 4—ORIGINAL.

EX PARTE, IN THE MATTER OF THE Commonwealth of Virginia and J. D. Coles, petitioners for writ of *habeas corpus*.

BRIEF AND ARGUMENT OF W. WILLOUGHBY, ON BEHALF OF UNITED STATES, AGAINST POWER TO ISSUE WRIT.

It is certainly a novel idea that a writ of *habeas corpus* should issue upon the petition of a State in behalf of one of its citizens, and that in behalf of such citizen it should invoke the original jurisdiction of this court, which by the Constitution is allowed to the State only in controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, and subjects.

I do not, however, propose to discuss this, as it seems to me, that if the petitioner, Coles, presents a case proper for the issuing of the writ, his own petition, in

his own behalf, would be sufficient, without undertaking to avail himself of those privileges accorded to his State as a State.

Passing by the question as to whether there should have been a previous application for the writ to the district court, and by other questions which may be presented by others, I desire to discuss only the question as to whether a case is presented which would justify this court in issuing the writ, and in so doing I rely upon the want of power of this court to supervise or control the inferior court in a criminal cause in any way, except by a certificate of division of opinion under section 697 of the Revised Statutes of the United States.

The statute has provided that this court may issue "writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Sec. 752.) Under this statute applications have frequently been made, and upon the subject of jurisdiction a number of decisions have been made generally by a divided court, and from these and the language used in delivering the opinion results a great difference of opinion as to the extent of such jurisdiction; but the following rule seems to me to be consistent with the statute, and with all of the authorities upon the subject, to wit: *That no action, decision, or question which a criminal court has power to make or adjudge at the trial, affecting the guilt or innocence of the accused, can be anticipated or reviewed by this court.*

It is well settled that while the writ of *habeas corpus* may be issued by this court, yet it is only by the exercise of an appellate power. There must have been some action or decision of a court to which its appellate power extends. The question is, what actions or decisions of the inferior court may be passed upon by this court by

virtue of this writ, and upon what grounds the judgment of this court may be invoked.

Let us examine the principal authorities upon this question of jurisdiction, applying to them the test of this rule.

In Hamilton's case (3d Dallas) a party charged with high treason was *admitted to bail.* This was purely a question of "restraint of liberty." There was no decision upon any question affecting the guilt or innocence of the prisoner *upon the trial.* No *such* question was before the court. It was sitting simply in the capacity of committing magistrates.

In Burford's case (3d Cranch) there was no *trial* in fact or in contemplation. There was no question before the court but that of imprisonment. But even in such a case it is quite strongly intimated that if there had been a hearing of the case *de novo* by the circuit court, this court would have been concluded by its action.

In Bollman and Swartwout's case (4 Cranch, 75) the question of jurisdiction was thoroughly examined, and the distinction made which I have endeavored to express, and which I think has never been departed from by this court. The question before the court, it will be observed, was only a question of bail. To determine this nothing was examined or passed upon but the evidence. This, of course, has no relation to the evidence which may be used *upon the trial.* When the party is before a court sitting as a committing magistrate no authoritative decision can be made which could have any binding force *at the trial.* It is then only a question of *probable cause.*

The court say: "The question brought forward on a *habeas corpus* is always distinct from that which is in-

volved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried and may be decided in different courts." In this case the court say, at the close of the opinion, that its decision to discharge the accused had no effect upon the trial, and was no objection to a trial. No decision was made nor could have been made affecting the trial, nor upon any question which was proper to be passed upon *at the trial.* It would not be claimed that refusing to hold to bail or to discharge could have any effect *at the trial.* Suppose that the Supreme Court should discharge the petitioner charged with an offense from imprisonment, and notwithstanding this the court below should go on with the trial, as in Virginia it may do in the absence of the accused in case of misdemeanor, and should convict him and sentence him to imprisonment, what could be done about it? This court could do nothing, and therefore it would not attempt to make an authoritative decision which could have no force only by way of advice.

In Kearny's case (7 Wh., 38) the court refused the writ where the petitioner was in contempt of the circuit court in refusing to answer a question. The court say: "The objection is not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law. This would be asserting a right to control a criminal court and to revise its opinion. This court cannot revise such a judgment or the proceedings which lead to it."

In the case of *Tobias Watkins* (3 Peters, 193) the motion was founded "upon the allegation that the indictment *charged no offense* for which the prisoner was punishable in the court below, or of which the court

could take cognizance, and consequently that the proceedings were *coram non judice* and totally void." But this court held that the judgment was conclusive as to the *law* as well as to the facts. "To determine whether the offense charged in the indictment be *legally* punishable or not is among the most unquestionable of its powers and duties. The *decision of this question* is the exercise of jurisdiction, whether the judgment be for or against the prisoner. It must remain in full force until reversed regularly by a superior court *capable* of reversing it." (See page. 207; also *ex parte* Watkins, 7 Peters, 574; *ex parte* Gordon, 1 Black, 503.)

In re Kaine (14 How.), at page 129, the court says: "The circuit court has power upon its own views of the law to inflict not only punishment but even the punishment of death without appellate control by this court. Even when it is alleged that the proceedings of a circuit court by which a citizen is imprisoned are *coram non judice* and void its judgment is final, and no relief can be had here by writ of error or appeal or by *habeas corpus*."

In *ex parte* Parks it was claimed that the indictment did not set out an offense against the United States, and that for that reason the court did not have jurisdiction to try it. This court said that this was one of the very questions which was to be submitted to the circuit court, and that for that very reason such a question could not be considered on an application for a writ of *habeas corpus*. Counsel admit that it is the sole province of the inferior court to pass upon the *construction* of a statute, but attempt to distinguish this from passing upon the constitutionality of an act. But why is not the question of the *constitutionality* of an act as much of a judicial

question for the circuit court to pass upon as the *construction* of an act? If the court is trying the prisoner upon a charge which is *no offense*, does it matter whether such charge is no offense because there is no act of Congress against it, or because, if there is such an act, it is unconstitutional? Would not the charge be as absolutely void in one case as in the other?

In both cases it is a question for the court to pass upon *at the trial.* This question is for such court alone. Whether wisely or unwisely it is not submitted to this court. In this respect the two courts—the circuit court and the Supreme Court—are independent of each other, and this court must be concluded by the action of the court. What, then, is meant by the declaration that this court can interfere where the circuit court has no jurisdiction, or where it has acted beyond its powers? Let us look at some of the cases where the jurisdiction of this court has been maintained.

The cases of *ex parte* Lange (18 Wall.) and *ex parte* Yerger (8 Wall.) are cases relied upon by the petitioner to sustain the jurisdiction to issue the writ.

In Lange's case the decision of this court was that the circuit court had undertaken to imprison the petitioner *after* he had fully and completely satisfied the judgment of the court itself. The court had adjudged the payment of a fine *and* imprisonment when it could lawfully impose but one—fine *or* imprisonment. *After* he had paid the fine, and it had been paid into the Treasury, so that it could not be returned, the court undertook to change its sentence and impose imprisonment without relieving him from the punishment already inflicted and *fully executed.* This the circuit court had no *power* to do. This want of power is illustrated by a court under-

taking to impose a punishment of death in a case of libel; also by the case of Bigelow *vs.* Forrest, 9 Wall., where the court undertook to confiscate the fee when the statute allowed the confiscation only of a life estate. This as to the excess was held to be void even in the collateral action of ejectment.

Suppose that a statute imposes as a punishment of an offense described by it imprisonment for one year, and that for this offense the circuit court should impose an imprisonment of three years. We can readily see how this would be *beyond the power of the court.* It can easily be seen, too, how, in such a case, the question of imprisonment merely is entirely distinct from any question which has been submitted by law to the inferior court and from the question of guilt or innocence.

In *ex parte* Lange the turning point seems to have been that one legal sentence had been *fully satisfied* before any attempt was made to impose another, and *after this* such change could not be made even by the same court. But no attempt was made to impeach the *judgment* or to question any matter passed upon prior to the judgment. The question was as to the *sentence.* It will be seen that this is no violation of the rule I have attempted to define.

In *ex parte* Yerger (8 Wall.) the simple question was whether the petitioner was in military custody or in the custody of the court. He had applied to the circuit court to be relieved from military custody, and had been remanded by order of the circuit court, and then he applied to this court for the writ, and it was held that he was in custody under the order of the court, and *therefore* by a tribunal over which this court had *appellate* jurisdiction. No question of guilt or innocence or affecting it was considered.

The case of *ex parte* Bradley (7 Wall.) has been cited to show that this court will review the action of the inferior court when acting beyond its powers and jurisdiction. This was the case of an application for a mandamus. One court had undertaken to disbar Mr. Bradley as an attorney for a contempt committed *before another court.* There was no judgment that he had committed a contempt before the court that had passed the order to disbar him. Justice Miller seemed to think that the order of the court did not show that it was for a contempt committed before *another* court, and therefore dissented, but in this the majority of the court disagreed with him.

In all of these cases it can be seen that this court does not review any question which the law had submitted to the judgment of the circuit court or which it was its duty to pass upon *at the trial.*

The question whether an act of Congress presenting an offense and declaring the mode of trial is constitutional is a *question* submitted to the judgment of the circuit court alone. It is most plainly a question relating to the guilt or innocence of the prisoner to be passed upon by the court at the trial. Such a *question* is within the jurisdiction of the court, and its judgment thereon is final whether erroneous or not.

Let us look a little more closely at the proceedings of a criminal cause. They can be divided into these two classes: those that relate to the punishment or imprisonment, or those that relate to the guilt or innocence of the accused, the question at issue and to be determined at the trial.

The question of bail before trial is only a question of probable cause, and the judgment of the court as to this

question has no connection with the judgment of the court upon the trial. If the only purpose here were to admit to bail, perhaps this court would for such purpose have jurisdiction, for its judgment on such a question would not be an interference with the judgment of the court at the trial; but such is not the purpose, for in fact the accused is not imprisoned and is practically already bailed for trial. The object here is to prevent a trial and to get an authoritative decision for the purpose of controlling the action of the court at the trial. There has been no refusal by the court below to admit to bail.

Again, *after* the trial, and when the court has passed its judgment as to whether an offense has been committed within the law or the Constitution, which questions, we say, are committed to the court below alone, and the decision of which is binding upon all other courts, whether erroneous or not, then another and distinct question is presented to the court, and that is as to the *sentence.* This is a distinct matter from the judgment. So far as the court acts within the discretion committed to it by the law in passing the sentence its decision upon this is binding upon other courts. But if it then sentences the prisoner to a term of imprisonment not allowed by the law, as to this the Supreme Court can correct it. When the court exceeds its powers, such an excess of power is subject to correction by *habeas corpus* or *mandamus*, whichever may be the appropriate remedy. It is in such cases only that the Supreme Court has assumed jurisdiction.

If the court releases an imprisoned party *after* trial and judgment, its power is effectual to accomplish the object proposed; but if it releases a party *before* trial, what is the process or mandate that would be issued to

the court below to enforce its judgment at the trial? If none can be named, is not the absence of any such process a strong argument against the jurisdiction of the court? This court does not hear cases simply for the purpose of giving *advice* or expressing opinions.

It may be suggested that upon sentencing a prisoner after the judgment a question may arise as to the construction of the powers of the court in that respect. This may depend upon the construction of a statute, as, for example, whether the court has power to sentence to a term of one year upon each count of an indictment, making four years if there are so many counts, or only one year in all. This question of construction is submitted to the court, and it must pass thereon. Now, it may be asked, why can the decision of *this* question be reviewed and not the question of the construction or the constitutionality of the act upon which the indictment and the judgment are based?

The answer is simply this: Because in the first case the statute gives to this court the power to issue the writ for the purpose of inquiring into the "*cause of restraint of liberty*," while the power is denied to question any decision which goes to make up the judgment. The court will look at the judgment simply to ascertain whether it is a sufficient "cause" for the *restraint of liberty*, but will not undertake to impeach the judgment itself for any reason whatever. The judgment of the court to which the question has been submitted is just as conclusive upon the constitutionality of the act upon which the charge is based as upon any other judicial question.

It may be regarded as a question of abstract right and propriety that the judgment of the court as to ques-

tions properly arising at the trial should be reviewed by this court as well as to matters relating purely to the question of restraint of liberty, but it is sufficient for us to reply such is not the will of the legislative power.

Whether this is a sufficient reason or not for the distinction I have endeavored to make, still the fact remains that this court has acted upon such a distinction, and has not in a single instance transcended the rule I have expressed, and has never undertaken upon an inquiry as to the cause of commitment simply, to pass upon the construction or constitutionality of an act upon which a criminal charge is based, or upon any other question properly cognizable at the trial of the cause.

By the act of March 3, 1879 (20 Stat. L., p. 354), writ of error may now issue from the circuit court of the United States to correct any error of the district court. The petitioner alleges that he is held under process issuing from the district court. He has a full and complete remedy for any possible wrong that may be done to him by application in the proper form to the circuit court. There can certainly be no necessity for him to come to this court in the first instance; and can he do it, passing by the circuit court? I suggest this inquiry for the consideration of the court.

As to the propriety and constitutionality of the proceedings complained of, I beg leave to refer to a brief filed by me in the case of Virginia *vs.* Rives, original No. 1, now pending in this court.

W. WILLOUGHBY,
On behalf of United States.