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"STATE RIGHTS AND FEDERAL UNION."

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THE WILLOW.

Oh, willow, why forever weep,
As one who mourns an endless wrong?
What hidden woe can be so deep?
What utter grief can last so long?

The Spring makes haste with step elate
Your life and beauty to renew;
She even bids the roses wait,
And gives her first sweet care to you.

The welcome red-breast folds his wing
To pour for you his freshest strain;
To you the earliest blue-birds sing,
Till all your light stems thrill again.

The sparrow trills his wedding song,
And trusts his tender brood to you;
Fair flowing vines, the Summer long,
With clasp and kiss your beauty woo.

The sunshine drapes your limbs with light,
The rain braids diamonds in your hair;
The breeze makes love to you at night—
Yet still you droop and still despair.

Beneath your boughs, at fall of dew,
By lovers' lips is softly told
The tale that all the ages through
Has kept the world from growing old.

But still, though April's buds unfold,
And Summer sets the earth aleaf,
Or Autumn pranks your robes with gold,
You sway and sigh in graceful grief.

Mourn on forever, unconsoled,
And keep your secret, faithful tree!
No heart in all the world can hold
A sweeter grace than constancy.
—*Exchange.*

NOBILITY OF LABOR.

The noblest men I know on earth
Are men whose hands are brown with toil,
Who, backed by no ancestral graves,
Hew down the woods and till the soil,
And thereby win a prouder fame
Than follows king or warrior's name.

The working men! whate'er the task,
To carve the stone, or bear the hod;
They wear upon their honest brows
The royal stamp and seal of God!
And brighter are the drops of sweat,
Than diamonds in a coronet.

God bless the noble working men,
Who rear the cities on the plain;
Who dig the mines and build the ship,
And drive the commerce of the main.
God bless them! for their swarthy hands
Have wrought the glory of all lands!
—*Exchange.*

GREAT SPEECH OF

HON. JEREMIAH S. BLACK,

Of Pennsylvania, before the United States Supreme Court, in the case of Milligan, Bowles and Horsey, the "Indiana Conspirators."

In September, 1864, Col. L. P. Milligan, a distinguished lawyer of Huntington, Indiana, and a man of advanced age; Col. Wm. A. Bowles, of French Lick, in the same State—a brave officer in the Mexican war, and a man of great age and extensive local influence; and Stephen Horsey, a citizen, also, of Indiana, were arrested by the military forces of the United States, and dragged before a Military Commission for trial, on the charge of being officers of a States-Rights Association, known as "Sons of Liberty." They objected to the jurisdiction, but, notwithstanding, were tried and sentenced to be hanged as being "in league with armed rebels." The President, afterwards, commuted that sentence to one of perpetual imprisonment. Meantime, through their counsel, they sued out a writ of *habeas corpus*, demanding their discharge. The judges of the circuit court were divided in opinion upon this application, and certified the following questions, on which they differed, to the Supreme Court for decision:

1. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued according to the prayer of said petition?"
2. "On the facts stated in said petition and exhibits, ought the said parties to be discharged from custody, as in said petition prayed?"
3. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said parties in manner and *form as in said petition and exhibits is stated?*"

After the action of the circuit court, certifying the case to the Supreme Court for final decision, the President commuted the sentence of the petitioners to imprisonment for life.

The argument of these questions, which commenced on the 5th and terminated on the 13th of March, 1866, was conducted on the part of the petitioners by J. E. McDonald, esq., of Indiana, Hon. J. A. Garfield, of Ohio, Hon. J. S. Black, of Pennsylvania, and David Dudley Field, of New York; and on behalf of the United States by B. F. Butler, esq., of Massachusetts, Hon. H. Stanberry, of Ohio, and Hon. James Speed, Attorney General of the United States. The argument of Judge BLACK for the petitioners was as follows:

May it please your Honors: I am not afraid that you will underrate the importance of this case. It concerns the rights of the whole people. Such questions have generally been settled by arms. But since the beginning of the world no battle has ever been lost or won upon which the liberties of a nation were so distinctly staked as they are on the result of this argument.—The pen that writes the judgment of the Court will be mightier for good or for evil than any sword that ever was wielded by mortal arm.

As might be expected from the nature of the subject, it has been a good deal discussed elsewhere, in legislative bodies, in public assemblies, and in the newspaper press of the country. But there it has been mingled with interests and feelings not very friendly to a correct conclusion. Here we are in a high atmosphere, where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself, when I say that we have no thought to suggest which we do not suppose to be a fair element in the strictly legal judgment which you are required to make up.

In performing the duty assigned to me in the case, I shall necessarily refer to the mere rudiments of constitutional law; to the most common-place topics of history, and to those plain rules of justice and right which pervade all our institutions. I beg your honors to believe that this is not done because I think that the Court, or any member of it, is less familiar with these things than I am, or less sensible of their value; but simply and only because, according to my view of the subject, there is absolutely no other way of dealing with it. If the fundamental principles of American liberty are attacked, and we are driven behind the inner walls of the Constitution to defend them, we can repel the assault only with those same old weapons our ancestors used a hundred years ago. You must not think the worse of our armor because it happens to be old fashioned and looks a little rusty from long disuse.

THE CASE IN POINT.

The case before you presents but a single point, and that an exceedingly plain one.—It is not encumbered with any of those vexed questions that might be expected to arise out of a great war. You are not called upon to decide what kind of rule a military commander may impose upon the inhabitants of a hostile country which he occupies as a conqueror, or what punishment he may inflict upon the soldiers of his own army or the followers of his camp; or yet how he may deal with civilians in a beleaguered *city or other place in a state of* actual seige, which he is required to defend against a public enemy. This contest covers no such ground as that. The men whose acts we complain of erected themselves into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and National, were in the full exercise of their functions.

My clients were dragged before this strange tribunal, and, after a proceeding which it would be mere mockery to call a trial, they were ordered to be hung. The *charge against them was put into writing,* and is found on this record, but you will not be able to decipher its meaning. The relators were not accused of treason; for no act is imputed to them which, if true, would come within the definition of that crime. It was not conspiracy under the act of 1861; for all concerned in this business must have known that conspiracy was not a capital offence. If the commissioners were able to read English, they could not help but see that it was made punishable even by fine and imprisonment, only upon condition that the parties should first be convicted before a circuit or district court of the United States. The Judge Advocate must have meant to charge them with some offence unknown to the laws, which he chose to make capital by legislation of his own, and the commissioners were so profoundly ignorant as to think that the legal innocence of the parties made no difference in the case. I do not say what Sir James MacIntosh said of a similar proceeding: that the trial was a mere conspiracy to commit wilful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with just principles of natural justice, and quite unable to comprehend either the law or the facts of a criminal cause.

Keeping the character of the charges in mind, let us come at once to the ample question upon which the court below divided in opinion. Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offence of which they were accused? We answer, no; and therefore the whole proceeding from beginning to end was utterly null and void. On the other hand it is absolutely necessary for those who oppose us to assert, that the commissioners had complete legal jurisdiction both of the subject matter and of the parties, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction nor open to inquiry in any court whatever. Of these two opposite views, you must adopt one or the other; for there is no middle ground on which you can possibly stand.

JURISDICTION CONSIDERED.

I need not say (for it is the law of the horn books) that where a court (whatever may be its power in other respects) presumes to try a man for an offense of which it has no right to take judicial cognizance, all its proceedings in that case are null and void. If the party is acquitted, he cannot plead the acquittal afterward in bar of another prosecution. If he is found guilty and sentenced, he is entitled to be relieved from the punishment. If a circuit court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the State courts, the judgment should have no effect. If a country court in the interior of a State should arrest an officer of the Federal navy, try him and order him to be hung for an offense against the law of nations committed upon the high seas or in a foreign port, nobody would treat such a judgment otherwise than with mere derision. The Federal courts have jurisdiction to try offenses against the laws of the United States, and the authority of the State courts is confined to the punishment of acts which are made penal by State laws. It follows that where the accusation does not amount to an offense against the law of either the State or the Federal Government, no court can have jurisdiction to try it. Suppose, for example, that the Judges of this Court should organize themselves into a tribunal to try a man for witchcraft, or heresy, or treason against the Confederate States of America, would anybody say that your judgment had the least validity?

I care not, therefore, whether the relators were intended to be charged with treason or conspiracy, or with some offense of which the law takes no notice. Either or any way, the men who undertook to try them had no jurisdiction of the subject-matter.

Nor had they jurisdiction of the parties. It is not pretended that this was a case of impeachment or a case arising in the land or naval forces. It is either nothing at all or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the Government are answerable for the offenses which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3, 1863, which was passed with express reference to persons precisely in the situation of these men, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject-matter or of the parties, you are bound to relieve the petitioners. It is as much the duty of a judge to protect the innocent as it is to punish the guilty. Suppose that the Secretary of some department should take it into his head to establish an ecclesiastical tribunal here in the City of Washington, composed of clergymen "organized to convict" everybody who prays after a fashion inconsistent with the supposed safety of the State. If he would select the members with a proper regard for the *odium theologicum*, I think I could insure him a commission that would hang every man and woman who might be brought before it. But would you, the judges of the land, stand by and see their sentences executed? No; you would interpose your writ of prohibition, your *habeas corpus*, or any process that might be at your command, between them and their victims. And you would do that for precisely the reason which requires your intervention here—because ecclesiastical commissions, like military commissions, are not among the judicial institutions of this people. Our fathers long ago cast them both aside among the rubbish of the dark ages; and they intended that we, their children, should know them only that we might blush and shudder at the shameless injustice and the brutal cruelties which they were allowed to perpetrate in other times and other countries.

But our friends on the other side are not at all impressed with these views. Their brief corresponds exactly with the doctrines propounded by the Attorney General, in a very elaborate official paper which he published last July, upon this same subject.—He then avowed that the military might "take and kill, try and execute" (I use his own words,) persons who had no sort of connection with the army or navy. And though this be done in the face of the open courts, the judicial authority, according to him, are utterly powerless to prevent the slaughter which may thus be carried on.—That is the thesis which the Attorney General and his assistant counselors are to maintain this day, if they can maintain it, with all the power of their artful eloquence.

We, on the other hand, submit that a *person not in the military or naval service* cannot be punished until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try for that specific offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other.

THE RIGHT TO TRY CIVILIANS DENIED.

Our proposition ought to be received as true without any argument to support it; because if that, or something precisely equivalent to it, be not a part of our law, this is not what we have always supposed *it to be, a free country. Nevertheless* I take upon myself the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very frame work of the Government, so that it is utterly impossible to detach it without destroying the political structure under which we live. By removing it you destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the Government *is the exercise of judicial authority.* That is a kind of authority that would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so-called, which the United States can lawfully exercise. That was the compact made with the General Government at the time it was created. The States and the people agreed to bestow upon that Government a certain portion of the judicial power which otherwise would have remained in their own hands, but gave it a solemn trust and coupled the grant of it with this express condition that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way not only violates the law of the land, but he treacherously tramples upon the most important part of that sacred covenant which holds these States together.

WHAT THE FOUNDERS OF THE REPUBLIC INTENDED.

May it please your Honors, you, and I know, and everybody else knows that it was the intention of the men who founded this Republic to put the life, liberty and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear *criminal accusations* when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent because their salaries could not be reduced, and free from party passion because their tenure of office was for life. Although this would place them above the *clamors of the mere mob* and beyond the reach of Executive influence, it was not intended that they should be wholly irresponsible. For any wilful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgements they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

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

On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact; that if the executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done; they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals, composed of men whose *gross ignorance and supple subservience* could always be relied on for those base uses to which no Judge would ever lend himself. But the *framers* of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his Government. To that end they could think of no better provision than a public trial before an impartial jury.

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

OUR INHERITANCE.

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

If the men who fought our revolutionary contest, when they came to frame a government for themselves and their posterity, had *failed to insert a provision making* the trial by jury perpetual and universal, they would have covered themselves all over with infamy as with a garment; for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the *Federalist*, the universal sentiment of his time, when he said, *that the arbitrary power of conviction and* punishment for pretended offences, had been the great engine of despotism in all ages and in all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave, consists only in this: that the master holds the lash in his hands, and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it.

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

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

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

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

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

4. He shall be entitled to a speedy trial; not *kept in prison for an indefinite time* without the opportunity of vindicating his innocence.

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

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

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

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

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

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

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by the law to his offence. It cannot be doubted for a moment that if a person convicted of an offence not capital were to be hung on the order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, tuck up the sleeves of his gown, and let out the prisoner's blood with his own hand.

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

Those rules apply to *all criminal prosecutions.* But in addition to these, certain special regulations were required for treason—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. The party in power never fails when it can to stretch the law on that subject by construction, so as to cover its honest and conscientious opponents. In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of the basest minions that skulk under the *pay of the Executive. Therefore* a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction.—And lastly, the punishment was so limited that the property of the party could not be confiscated and used to reward the agents of his persecutors, or strip his family of their subsistence.

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

I say they are in force, and they will remain in force. We have not surrendered them, and we never will. If the worst comes to the worst we will look to the living God for His help and defend our rights and the rights of our children to the last extremity. Those men who think we can be subjugated and subjected to the condition of mere slaves are wholly mistaken. The great race to which we belong has not degenerated so fatally.

EXISTING RIGHTS.

But how am I to prove the existence of these rights? I do not propose to do it by a long chain of legal argumentation, nor by the production of numerous books with the leaves dog-eared and the pages marked.—If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom under any kind of prescription, I could prove a good long possession in ourselves and those under whom we claim it. I might begin with Tacitus, and show how the contest arose in the forests of Germany more than two thousand years ago; and how the rough virtues and sound common sense of that people established the right of trial by jury, and thus started on a career which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion; and all that they suffered of tyranny and oppression during the period of their subjugation resulted from the want of trial by jury. If that had been conceded to them the reaction would not have taken place which drove back the Danes to their frozen homes in the North. But those ruffian sea-kings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes and the wisest monarch that ever sat upon a throne, made the first use of his power, after the Saxons had restored it, to re-establish their ancient laws. He had promised them that he would, and he was true to them because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power—a kind of power that everybody covets—the power to punish without regard to law. He was obliged to hang forty-four judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the parliament of that time. During the subsequent period of Saxon domination no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister or any king, in war or in peace, had ordered to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole population; all orders of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bockman and soc-man, would have risen *en masse* and burned the offender to death, or followed him in his flight and torn him to atoms. It was *again trampled down by the Norman* conquerors; but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended, finally, in the revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

ATTEMPTS TO JUSTIFY MILITARY TRIALS.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II. closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in *Parliament*, assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, because *the courts were open and he might have had* a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the State, ordered that certain offenders, not of her army, should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that, upon that subject the English people would never consent to be trifled with. Stafford, as Lord Lieutenant of Ireland, tried the Viscount Stormont before a military commission, and *cut off his head.* When *impeached for it,* he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the King himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I. issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded it; for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody.—*Yet the Parliament demanded in their petition of right,* and the King was obliged to concede, that all his commissions were illegal. James II. claimed the right to suspend the operation of the penal laws—a power which the courts denied—but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offense he saw fit to charge them with if he could have selected their judges from among the mercenary creatures to whom he had given commands *in his army. But this he dared not do.* He was obliged to send the bishops to a jury and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which a few months afterward made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations on the other side of the channel to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them.—He raised an army to meet the rebellion, and he was on Hounslow Heath reviewing *the troops, organized for that purpose,* when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Temple Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shout of two hundred thousand men for the triumph of justice and law.

THE FRENCH PRACTICE.

If it were worth the time, I might detain you by showing how this subject was treated by the French Court of Cassation in Geoffroy's case, under the Constitution of 1830, when a military judgment was unhesitatingly pronounced to be void, though ordered by the King, after a proclamation declaring Paris in a state of seige. *Fas est ab hoste doceri!* we may lawfully learn something from our enemies—at all events we *should blush at the the thought of not* being equal on such a subject to the Courts of Virginia, Georgia, Mississippi and Texas, whose decisions my colleague, General Garfield, has read and commented on.

THE AUTHORITIES AGAINST US.

The truth is that no authority exists anywhere in the world for the doctrine of the Attorney General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer from Coke to Wharton is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to disgrace the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. It is true, also, that court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders among such servile creatures.—Those butchers' dogs that feed upon garbage and fatten upon the offal of the shambles, are always ready to bark at whatever interferes with the trade of their master.

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

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

What does it contain? This among other things:

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

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

This is not all: another article declares that "in all criminal prosecutions the accused shall *enjoy* the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for the witness in his favor, and to have the assistance of counsel for his defence."

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

"As broad and general as the casing air."

The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy the privilege—and NO person shall be held to answer in any other way.

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

A SPECIAL PLEA.

But we are answered that the judgment under consideration was pronounced in time of war, and it is therefore at least more excusable. There may or there may be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers they will take all these things into consideration. But what presents the political aspect of the case with which, I think, we have nothing to do here. I decline to discuss it. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. If the sanitary regulations which defend the health of a city are ever to be relaxed, it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel, and creeps lazily along the bottom, the inhabitants of the adjoining shore have no need of dykes to save them from inundation. But when the booming flood comes down from above, and swells into a volume which rises high above the plain on either side, then a crevasse in the levee, becomes a most serious thing. So in *peaceable* and quiet times, our legal rights are in little danger of being overborne; but when the wave of arbitrary power lashes itself into violence, and rages, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction. But this is a question which properly belongs to the stump and to the newspaper.

STATE NECESSITY.

There is another *quasi* political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left to them to obey the law or disobey it. The disobedience was only necessary as a means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and *false* in morals. See how it applies to this case. Here were three men whom it was desirable to remove out of this world, but there was no *proof* on which any court would take their lives; therefore it was necessary, and being necessary it was right and proper, to create an illegal tribunal which would put them to death without proof. By the same mode of reasoning you can prove it equally right to poison them in their food, or stab them in their sleep.

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

Of course, it is more absurdity to say that these relators were *necessarily* deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the very time and in the same town, where justice would have been done without sale, denial, or delay. But concede for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. The trial was a violation of law, and no necessity could be more than mere *excuse* for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not wilful. But we are now considering the legal effect of their decision, and that depends on their legal authority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them, but expressly *forbade them to exercise,* and it follows that their act is void, whatever may have been the real or supposed excuse for it.

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

Let me *illustrate still further.* Suppose you, the judges of this Court, to be surrounded in the hall where you are sitting by a body of armed insurgents, and compelled by main force to pronounce sentence of death upon the President of the United States for some act of his upon which you have no legal authority to adjudicate. There would be a valid sentence if necessity alone could create jurisdiction. But could the President be legally executed under it? No; the compulsion under which you acted would be a good defence for you against an impeachment or an indictment for the murder, but it would add nothing to the validity of a judgment which the law forbade you to give.

That a necessity of violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man of common sense is to stand up and dispute it. But there is decisive authority upon the point. In 1815, at New Orleans, Gen. Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city, corporation, and members of the State Legislature insisted on it as the only way to save the "booty and beauty" of the place from the unspeakable outrages committed at Badajos and St. Sebastain by the very same troops then marching to the attack.—Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal by the same judge who pronounced it to be necessary, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in Johnson *vs.* Duncan, decided that everything done during the siege in pursuance of martial rule, but in conflict with the law of the land, was void and of none effect, without reference to the circumstances that made it necessary. Long afterward the fine imposed upon Jackson was refunded because his friends while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have saved him from the punishment due to a wilful offender.

(Concluded next week.)

—It is reported that the President will soon issue a proclamation setting apart the 17th [illegible] as a day of fasting and prayer, in view of the anticipated visit to this country of the cholera.

—"The Hermitage," General Jackson's estate, has been offered by Tennessee to the United States, conditional upon a branch of the West Point Academy being located thereon.

—The Union dead of the Virginia battle-fields are to be interred at Arlington Cemetery.