The Lancaster Intelligencer,

PUBLISHED EVERY WEDNESDAY BY

H. G. SMITH & CO.

H. G. SMITH. A. J. STEINMAN

TERMS—Two Dollars per annum, payable all cases in advance.

OFFICE—SOUTHWEST CORNER OF CENTRE SQUARE.

All letters on business should be addressed to H. G. SMITH & Co.

Lancaster Intelligencer.

VOLUME 68. LANCASTER PA. WEDNESDAY MORNING, FEBRUARY 27, 1867 NUMBER 8.

RATES OF ADVERTISING.

BUSINESS ADVERTISEMENTS, $12 a year per square of ten lines; $6 per year for each additional square.

REAL ESTATE, PERSONAL PROPERTY, and GENERAL ADVERTISING, 7 cents a line for the first, and 4 cents for each subsequent insertion.

SPECIAL NOTICES inserted in Local Column, 15 cents per line.

SPECIAL NOTICES preceding marriages and deaths, 10 cents per line for first insertion, and 5 cents for every subsequent insertion.

BUSINESS CARDS, of ten lines or less, one year, 10

Business Cards, five lines or less, one year, 5

LEGAL AND OTHER NOTICES—

Executors' notices, 2.00

Administrators' notices, 2.00

Assignees' notices, 2.00

Auditors' notices, 1.50

Other "Notices," ten lines, or less, three times, 1.50

Poetry.

WHIP-PO-WILL.

BY MABEL ST. CLAIR.

I always loved the twilight hour,
And many times I've crept,
And, pushing back the tangled vines
From which the dewdrops wept,
Stood almost breathless with my hands
Clasped on the window sill
To listen to that strange bird,
Cry out its "whip-po-will."

I cannot tell you why it is
Such memories will awake;
Nor why this spell creeps o'er me
I have no power to break,
I only know its faintest note
My very pulse will thrill,
And happier days come back to me
At its strange "whip-po-will."

It was a night, long, long ago,
I cannot tell how long;
The future was before I know,
And heart and pulse beat strong;
She stood beside me and our hands
Were clasped upon the sill;
And we bent our heads to listen
To the strange "whip-po-will."

I'm going to traverse distant lands,
To stand where Arne flows;
To tread proud Venice's princely halls;
And Switzer's Alpine snows;
And when I come you'll be my wife?
I felt my pulses thrill,
As that bird caught her low response
And echoed back "I will."

I stood by Arne's moonlit wave
And saw proud Venice's walls,
And saw the glowing sunset flood
Italia's towers and halls,
And then I came to claim her heart,
But it was cold and still;
One mourner lingered by her grave—
That strange, strange "whip-po-will!"

I stand alone, alone to-night—
And nature is asleep;
I look upon that tombstone white,
Then bow my head and weep,
No little hand is clasped in mine
Upon the window sill;
No sound this painful silence breaks,
Save that one "whip-po-will."

Miscellaneous.

MILITARY TRIALS OF CIVILIANS.

Argument of Hon. Jeremiah S. Black, before the Supreme Court of the United States, in the Indiana Conspiracy Case.

In September, 1864, L. P. Milligan, W. A. Bowles, Stephen Horsey, and others, were arrested and brought before a military commission at Indianapolis, Indiana, charged with being members of the order of "American Knights," or "Sons of Liberty," in league with armed rebels, and with having conspired to release the rebel prisoners of war confined in the United States military prisons at Indianapolis, Chicago, and Rock Island. The three parties named, after a protracted trial, were found guilty of the charges and specifications preferred against them, and condemned to death. The findings and sentence were approved by the President and promulgated by the War Department on the 2d of May, 1865, and the 19th day of the same month was fixed for the execution. On the 10th of May, however, they applied by petition to the circuit court of the United States for the district of Indiana (Judges Davis and McDonald) for a writ of *habeas corpus*, or for an order of discharge, under the act of Congress approved March 3, 1863, entitled, "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." 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, which is pronounced by good lawyers everywhere to be one of the finest ever made before any court in the United States, 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 higher atmosphere, where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself, when I say that we have no thought to suggest which we do not suppose to be a fair element in the strictly legal judgment which you are required to make up.

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

The case before you presents but a single point, and that an exceedingly plain one. It is not 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 siege, which he is required to defend against a public enemy. This contest covers no such ground as that. The men whose acts we complain of erected themselves into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and national, were in 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 offense. If the commissioners were able to read English, they could not help but see that it was made punishable even by fine and imprisonment, only upon condition that the parties should first be convicted before a circuit or district court of the United States. The judge advocate must have meant to charge them with some offense unknown to the laws, which he chose to make capital by legislation of his own, and the commissioners were so profoundly ignorant as to think that the legal innocence of the parties made no difference in the case. I do not say what Sir James Mackintosh said of a similar proceeding: that the trial was a mere conspiracy to commit willful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with 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 simple question upon which the court below divided in opinion: Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they are accused? We answer, no; and therefore the whole proceeding, from beginning to end, was utterly null and void. On the other hand, it is absolutely necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction both of the subject-matter and of the parties, so that their judgment upon the law and 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.

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 afterwards in bar of another prosecution; if he is found guilty and sentenced, he is entitled to be relieved from the punishment. If a circuit court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the State courts, the judgment could have no effect. If a county court in the interior of a State should arrest an officer of the Federal navy, try him, and order him to be hung for some offence 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 offense which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3, 1863, which was passed with express reference to persons precisely in the situation of these men, declares that they shall be delivered up for trial to the proper civil authorities.

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

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

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

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

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

May it please your honors, you know, and I know, and everybody else knows, that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants 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 willful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that 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 towards actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of hireling spies and common delators, who make merchandise of their oaths, and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Let me say here, that nothing has occurred in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid the American bench, is embodied in this simple fact; that if the executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals, composed of men whose gross ignorance, and supple subservience could always be relied on for those base uses to which no judge would ever lend himself. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his Government. To that end they could think of no better provision than a public trial before an impartial jury.

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

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places where trial by jury did not exist, became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside and substitute military trials in its place by Lord Dunmore, in Virginia, and 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 out our revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have covered themselves all over with infamy as with a garment; for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the Federalist the universal sentiment of his time, when he said that the arbitrary power of conviction and punishment for pretended offenses had been the great engine of despotism in all ages and all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave consists only in this: that the master holds the lash in his hands and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, because the courts were open and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the State, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford, as Lord Lieutenant of Ireland, tried the Viscount Stormont before a military commission, and 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 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 predecessor taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offense he saw fit to charge them with if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which a few months afterwards made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations on the other side of the channel to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from 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.

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

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

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

I prove my right to a trial by jury just as I would prove my title to an estate if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed by the sacred name of George Washington, and by thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterwards ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in 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 life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

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

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

"As broad and general as the casing air."

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

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

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

There is another *quasi* political argument—necessity. If the law was violated because it could not be obeyed that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being 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 mere absurdity to say that these relators were *necessarily* deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the very time and in the same town, where justice would have been done without sale, denial or delay. But concede for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere *excuse* for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not 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 a criminal prosecution?

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

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man of common sense is to stand up and dispute it. But there is decisive authority upon the point. In 1815, at New Orleans, General Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State Legislature insisted on it as the only way to save the "booty and beauty" of the place from the unspeakable outrages committed at Badajoz and St. Sebastian by the very same troops then marching to attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal by the same judge who had declared it to be necessary, and he paid the penalty without a murmur. The supreme court of Louisiana, in *Johnson* 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 which made it necessary. Long afterwards the fine imposed upon Jackson was refunded because his friends, while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have saved him from the punishment due only to a willful offender.

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

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

GEN. BUTLER. We do not take that position.

MR. BLACK. Then they can take no ground at all, for nothing else is left. I do not wonder to see them recoil from their own doctrine when its nakedness is held up to their eyes. But they *must* stand upon that or give up their cause. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine—has been the doctrine of the Attorney General's office ever since the advent of the present incumbent—and is the doctrine of their brief, printed and filed in this case. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those, who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How then did the military get jurisdiction in Indiana?

All men who hold the Attorney General's opinion to be true, answer the question I have put by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed or its operation suspended in one State because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? Because, say our opponents, war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a future war, what results will follow from your decision endorsing the Attorney General's views? They are very obvious. At the instant when the war begins our whole system of legal government will tumble into ruin, and if we are not all robbed, and kidnapped, and hanged, and drawn, and quartered, we will owe our immunity, not to the Constitution and laws, but to the mere mercy or policy of those persons who may then happen to control the organized physical force of the country.

This certainly puts us in a most precarious condition; we must have war about half the time, do what we may to avoid it. The President or Congress can wantonly provoke a war whenever it suits the purpose of either to do so; and they can keep it going as long as they please, even after the actual conflict of arms is over. When peace woos them they can ignore her existence; and thus they can make the war a chronic condition of the country, and the slavery of the people perpetual. Nay we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me, this seems the wildest delusion that ever took possession of a human brain. If there be one principle of political ethics more universally acknowledge than another, it is that war, and especially civil war, can be justified only when it is undertaken to vindicate and uphold the legal and constitutional rights of the people; not to trample them down. He who carries on a system of wholesale slaughter for any other purpose, must stand without excuse before God or man. In a time of war, more than at any other time, public liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians—

"Who should against her murderers shut the door
Not bear the knife themselves."

The opposing argument, when turned into plain English, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to sneak behind it and stab it in the back.

The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a howling wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They require that every man in any kind of public employment, state or national, civil or military, should swear, without reserve or qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity, to impose upon them an oath like that, if they intended and expected it to be broken half the time. The oath of an officer to support the Constitution is as simple as that of a witness to tell the truth in a court of justice. What would you think of a witness who should attempt to justify perjury upon the ground that he had testified when civil war was raging, and he thought that by swearing to a lie he might promote some public or private object connected with the strife?

No, no, the great men who made this country what it is—the heroes who won her independence, and the statesmen who settled her institutions—had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the President of Congress when he resigned his commission—that he had always regarded the rights of the civil authority through all changes and through all disasters.—When his duty as President afterwards required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia. It would have been a dangerous experiment for an adviser of his at that time, or at any time, to propose that he should deny a citizen his right to be tried by a jury, and substitute in place of it a trial before a tribunal composed of men elected by himself from among his own creatures and dependents.

You can well imagine how that great heart would have swelled with indignation at the bare thought of such an insulting outrage upon the liberty and law of his country. In the war of 1812, the man emphatically called the Father of the Constitution was the supreme Executive Magistrate. Talk of perilous times! there was the severest trial this Union ever saw.

That was no half-organized rebellion on the one side of the conflict, to be crushed by the hostile millions and unbounded resources of the other. The existence of the nation was threatened by the most formidable military and naval power then upon the face of the earth. Every town upon the northern frontier, upon the Atlantic seaboard, and upon the Gulf coast, was in daily and hourly danger. The enemy had penetrated the heart of Ohio. New York, Pennsylvania, and Virginia were all of them threatened from the west as well as the east. This Capitol was taken, and burned, and pillaged, and every member of the Federal Administration was a fugitive before the invading army. Meanwhile party spirit was breaking out into actual treason all over New England. Four of those States refused to furnish a man or a dollar even for their own defense. Their public authorities were plotting the dismemberment of the Union, and individuals among them were burning blue lights upon the coast as a signal to the enemy's ships. But in all this storm of disaster, with foreign war in his front, and domestic treason on his flank, Madison gave out no sign that he would aid old England and New England to break up this government of laws. On the contrary he and all his supporters, though compassed round with darkness and with danger, stood faithfully between the Constitution and its enemies,

"To shield it, and save it, or perish there too."

The framers of the Constitution and all their cotemporaries died and were buried; their children succeeded them and continued on the stage of public affairs until they, too,

"Lived out their lease of life, and paid their breath
To time and mortal custom;"

and a third generation was already far on its way to the grave before this monstrous doctrine was conceived or thought of, that public officers all over the country might disregard their oaths whenever a war or a rebellion was commenced.

Our friends on the other side are quite conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. Their brief gives us notice that, while the Constitution, and the acts of Congress, and *Magna Charta*, and the common law, and all the rules of natural justice shall remain under foot, they will try American citizens according to *the law of nations!* But the law of nations takes no notice of the subject. If that system did contain a