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EDITOR & PROPRIETOR.

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The Elk Advocate.

JOHN G. HALL, Editor. *RIDGWAY, PENN'A, FEB. 24th, 1867.* J. F. MOORE, Publisher.
VOLUME 6—NUMBER 48 *TERMS—2 50 Per Year in Advance.*

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TEST OATHS.

Decision of the Supreme Court of the United States.

WASHINGTON, January 14.—In the Supreme Court of the United States today Associate Judge Fields said he had been instructed to deliver the opinion in the case of John A. Cummins, plaintiff in error, against the State of Missouri, involving the constitutionality of the test oath of that State.

The plaintiff was a Roman Catholic Priest and convicted by the courts for advising and preaching without having first taken the requirred oath, and sentenced to pay a fine of $500 and committed to jail until paid. On appeal from the Circuit Court, the Supreme Court of the State affirmed the judgment. The following is a mere outline of the opinion: The oath by the Constitution of that State imposes more than 30 distinct affirmations and tests. Some of them constitute offenses of the highest grade, to which the heaviest penalties are attached. Some of them are not recognized by statute, while others are not blameworthy. They require him not only to swear that he was not only not in hostility to the United States, but that he never manifested adherence to the cause of the enemy, or desired a triumph over the arms of the United States, or that he ever experienced sympathy for the rebels, or ever sought to promote the ends of those engaged in war against the United States authorities, or ever left the State to escape enrollment or the performance of military duties, or ever expressed this dissatisfaction with the government. Every person unable to take this oath was declared incapable of holding office of trust, honor, or emolument, or of acting as a trustee or manager of any corporation, now or hereafter to be established, or from teaching in an educational institution, or holding real estate for such religious society or congregation, etc., and every person holding any such office at the time the Constitution went into effect was required within sixty days to take the oath, in default of which his office becomes vacant.

No attorney at the bar, priest or preacher of any doctrine or order, is permitted to teach or solemnize marriage without taking the oath.

False swearing is made punishable by imprisonment in the penitentiary.

This oath is without any precedent in this country which the Court could discover. It is first retroactive, and if taken years hence would cover the intervening period. In other countries test oaths were limited to the present, and were not administered in particular instances of past misconduct.

Secondly. The oath is not only directed against individuals who opposed the acts of the government, but denounces their sympathies and desires. It makes no distinction between acts arising from malignity and acts springing from affections. If any one ever expressed sympathy for the rebellion, even if he were connected by the closest ties of blood, he is declared unable to subscribe to the oath, and is debarred from the employments specified. The Court admitted the proposition of the learned counsel of Missouri, that the State possessed all the attributes of sovereignity, and among the rights reserved to the State, was the power to determine the qualifications of office, and the conditions on which citizens may exercise their callings and pursuits within its jurisdiction; but it by no means follows, that the State can inflict punishment for acts which were not punishable when committed. It was evident from the nature of the pursuits and professions of the parties placed under disability by the Constitution of Missouri, that their acts had no possible relation to their fitness for the pursuits and professions; there was no connection between the allegation that Cummins left the State to avoid the draft and the administration of the sacraments of his church; nor can a fact of that kind, or words of sympathy for those in rebellion, show the unfitness of lawyers and professors, or teachers, or their want of ability in acting as managers of corporations. It was manifest in their simple statement of their acts that there was no such relation; the oath could not be applied as to whether the parties were qualified or not.

The oath was intended to reach persons, not their calling; not because their acts unfitted them of their calling, but because it was thought their acts were deserving of punishment, and in no way by depriving them of citizenship. The court did not agree that less than the deprivation of life, liberty and property, was no punishment at all; a disqualification from holding office as an impeachment may be a punishment; also, the preventing attorneys from practicing in the Federal courts.

By the article 9 and 10 of William III, any person speaking or writing against the Divine Spirit was liable for the first offense to be rendered incapable of holding office of trust or profit, and for the second to be sent to prison.

Statute 2, of George III, for contempt against the King's authority took away the right to receive any legacy deed, or gift, or vote at elections for Parliament, with a penalty of £500. Blackstone, says the loss of liberty consists in the loss of lands and profits of lands for life, and disabilities from holding offices of honor or emolument. Among the Romans the loss of liberty was a disability of all the privileges of members of family or citizenship. In France deprivation of civil rights and legislation for office, or of being guardian or trustee, or being employed in schools or seminaries of learning. The theory on which our institutions rest is that all men have certain inalienable rights, amongst which are life, liberty, and the pursuit of happiness. Thus all places of honor and position are open to every one, and all are protected equally under the law. Any deprivation of rights for past conduct is punishment, and cannot otherwise be defined.

The Court then proceeded to the consideration of the constitutional question.

The Constitution contains what may be deemed a bill of rights for each State. It says: "No State shall pass a bill of attainder or *ex post facto* law." A punishment without trial. If less than death, it is a bill of pains and penalties. A bill of attainder includes pains and penalties. They assume the guilt of the degree of punishment in accordance with its own idea of the offense. Justice Story says bills of this kind were mostly passed in England during the rebellion in England; or, the gross substance of them, forgetting justice and trampling on the rights of others. Such bills are generally directed against individuals by name.

By Henry VIII, it was declared that Earl Kildare and his abettors, confederates, or adherents, should stand and be attainted and convicted of high treason, as though every one of them were properly named as engaged in the fact. So the declaration in Charles II., that Earl Carolan should suffer exile.

If the second article in the Constitution of Missouri had stated in terms that Cummins was guilty of being in armed hostility to the United States, or had said he left the State to avoid being drafted, and that he was therefore deprived of his right to teach or preach in the institutions of the land, there is no question that this would be a bill of attainder, in view of the Constitution. If the clause, instead of mentioning his name, had declared all persons subject to like deprivations, the clause would be equally open to objection, and if it had declared that all such persons would be held guilty, provided that by a day specified they did not do certain acts, that would be within the constitutional inhibition.

In all these cases it would be the legislative judgment, without the form of security of citizens established by our tribunals. The question presented is one of form, and not of substance. The existing clause presumes the parties guilty from which they cannot release themselves without an expurgatory oath. It is certain the legal result is that what cannot be done directly, cannot be done indirectly.

The Constitution deals with substance and not with shadow. Itaims at things, not names. Chief Justic Marshall says an *ex post facto* law imposes punishment for an act not punishable at the time it was committed, or imposes penalties additional to to those then prescribed on different testimony. Thacker against Peck makes it an act of punishment for what was not punishable at the time the act was committed.

The act to which Judge Marshall makes reference was passed by the Legislature of Georgia, repealing a previous act, by which land had been granted. It was decided that the repealing act had the effect of an *ex post facto* law. The clause of the Missouri Constitution did not in terms define any crime or declare punishment inflicted, but presumed the same result as if the crime had been defined and the punishment prescribed. It aimed at some persons who directly or indirectly had aided the rebellion, or escaped proper responsibility of citizens in time of war, and was intended to deprive certain persons of offices of trust and emolument. Such deprivation is a punishment, nor is it a way which is opened by an expurgatory oath.

Now, some of these were not officers when the acts were committed. It was not then an offense to avoid the enrollment or the draft, how much soever it might be a matter of censure. Some of the acts at which the Constitution was directed were offenses at the time, but the clause which prescribes further penalties is within the nature of an *ex post facto* law. The clause in question subverts the presumption of innocence, and perverts the rules of evidence, which by the common law are fundamental.

It presumes the parties to be guilty, and declares their innocence can be shown only in one way, and that by expurgation.

Put the clause in a form of a legislative act, and it would read, "Be it enacted, etc., That all persons in armed hostility to the United States, shall, on conviction, not only be punished as the law provided at the time of the offense, but also rendered incapable of holding offices of trust, honor, or emolument, or exercise the office of a teacher, or a priest, etc."

No one could doubt that this third article, if thus rendered, would be *ex post facto* because it would be adding a new punishment for an old offense; for an offense not punishable at the time of the enactment, it would impose penalties without the form of judicial proceedings.

The Constitution of Missouri imposes an act which it was impossible for all to take. It was an impossible condition.

The Constitution of the United States cannot be evaded in the form by which the power of the State is exerted. If this can be accomplished by indirect means, the constitutional inhabition may be evaded at pleasure. Take the case of a man tried for treason, and if convicted, pardoned, nevertheless, the Legislature might prescribe that, unless he took an oath that he never did the act charged, he should never hold an office of honor or profit. Suppose the minority should get the control of the State government, nothing could prevent them from requiring that every person, as a condition of holding office of honor or profit, shall take an oath that he never advocated, advised or supported the imposition of the present expurgation oath. Under this provision the most flagrant violations of justice might be committed and individuals deprived of their civil rights. A question rose in New York in 1788, upon a statute of the State which involved an expurgatory oath as a means of punishment. The object was regarded as so important as to engage the attention of eminent lawyers and distinguished statesmen of the time. Alexander Hamilton demonstrated that it was in violation of the Constitution, which secured the rights and liberties of the people, as the result of revolution. It was a wise axiom that every man is believed to be innocent until he is proven guilty. The reversing of this was to hold out a bribe to perjury. It deprived the citizen of the advantage of leaving the burden of proof on his prosecutor. Let us not forget that trial by jury should remain inviolate forever, etc.

The same view was embraced by the judiciary, on analagous questions.

The Court said, in conclusion, that the judgment of the Supreme Court of the State of Missouri must be reversed, with instructions to enter judgment to reverse the judgment of the Circuit Court of Pike County, and, also, with directions to said Circuit Court to enter an order discharging the defendant from imprisonment, and permitting him to go without delay.

THE ATTORNEY'S OATH.

Associate Justice Field then said he was also instructed to deliver the opinion of the court in the matter of the petition *ex parte* of A. H. Garland.

On the 20th of July, 1862, Congress passed an act prescribing the form of an oath to be taking by officers elected under the Constitution of the United States, with the exception of the President. On the 24th of July, 1865 Congress passed a supplementary act, embracing attorneys and counselors. It provides that no person shall be admitted to the Bar of the Supreme Court of the United States, or the Court of Claims, as an attorney or counsellor, or be allowed to appear by virtue of any previous admission, of any special powers of attorney, unless he first takes and subscribes the oath prescribed in the act to prescribe an oath of office, approved July 2, 1862, which said oath, so taken and subscribed, shall be preserved among the files of such court; and that any person who shall take said oath shall be guilty of perjury, and on conviction shall be liable to the pains and penalties of perjury, and the additional pains and penalties prescribed in said oath.

At the December term, in 1860, the petitioner was admitted as an attorney of this court, and subscribed the oath required. By the rule, the attorney, as a condition of being admitted to the bar, must have practiced in the highest court of the State in which he lives, and his public and private character must be fair. In 1861, the State of Arkansas, of which Mr. Garland was a citizen, attached itself to the so-called confederate States. The petitioner followed the fortunes of that State, and was one of the representatives in the lower house and was in the Senate of the confederacy at the time of the surrender of the Confederate forces.

In July 1865, he received a full pardon of all offences committed by him.

He now produces this pardon and asks permission to continue practice as an attorney without taking the oath, which he is unable to take by reason of the office he once held in the Confederate government.

He says the act of July 1862, is unconstitutional and void, but if legal, that he is relieved by the pardon of the president.

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The Court proceeded to examine the character of the oath in question, saying, as it cannot be taken by all attorneys, it operates as a perpetual declaration of exclusion from one of the professions and avocations of life, and therefore must be regarded as a punishment.

In this exclusion is imposed a punishment for an offense which may not have been punishable at the time the offence was commited, and is thus brought into the character of an *ex post facto* law, as in the Missouri case, just decided.

The office of an attorney or counsellor is not like an office created by Congress, and which may be burdened by conditions. Attorneys are not officers of the United States. They are officers of the court, and are admitted as such by the court, on the ground of their legal learning and good private character. The admission to the bar is a sufficient endorsement. From the time of entering upon practice, they become officers of the court, and hold office during good behavior, and can be deprived of it only by the court. Their admission and exclusion is not a mere ministerial power. The court is not the register of the edicts of any other power. A counsellor, however, does not hold his office as a matter of grace and favor. To appear for suitors is something more than is revokable by a court or legislature. He can only be deprived of his office for misconduct or professional delinquency. The question is, whether Congress can fix qualifications as a measure of punishment.

It cannot be indirectly done by a state, and the reason by which that conclusion is reached applies similarly to Congress These views are further strengthened by the pardon of the President. The Constitution provides that he shall have power to grant reprieves and pardon for offenses against the United States, except in cases of impeachment. This extends to every other offense known to the laws. This power of the President is not subject to the negative control of Congress, which cannot limit its effect. The benign prerogative of mercy cannot be averted by legislative restrictions. A pardon reaches both the punishment prescribed and the offender. It blots out the consequenses of the offense, and in the eye of the law the offender stands as guiltless as if he had not committed the offense. If a pardon is granted before conviction, it does away with a trial. If granted after conviction, the subject of it is made a man. The pardon produced by the petitioner is a full pardon and subject to certain conditions, which have been complied with. The effect of the pardon is to relieve him of all disability and from the consequences of his offense during the rebellion. He is placed beyond the reach of punishment. To exclude him from his profession is not embraced in the pardon. It follows from these views that the prayer of R. H. Marr is also granted, and the amendment of the second rule, adopted unadvisedly, January 4, 1865, which requires the oath to be taken by attorneys and counsellors, must be rescinded, and it is so ordered.

The majority of the Court are Associates Wayne, Nelson, Grier, Clifford and Field.

EXTORTION BY HACKMEN.—A friend who lately visited New York writes us that he read in one of the city papers that the extortion practiced by hackmen there was such that "no man calls a carriage without having first resolved upon fighting or being robbed." But, having a lady with him, he took a carriage at the depot, and the following was his experience:

Upon reaching the hotel he alighted and asked the price for the service.

"Five dollars," said John.

Handing him a five dollar greenback the gentleman inquired quietly,

"What is your Number?"

"Four dollars," he answered gruffly.

"Here are four dollars. What is your number?"

"Three dollars," said the fellow, sulkily

"Here are three. Now, your number, sir?"

"Two dollars—little 'nuff, too," rejoined the driver.

"Two, then; here they are. What is your number?"

"One dollar, Cap'n—one dollar'll do," replied whip.

"Here is your dollar" said our friend, civilly; all you are entitled to. It's no consequence as to your number now. Good morning." And the parties separated without either fight or robbery!

The Louisville *Courier*, speaking of FORNEY'S agreement to use his influence for SEWARD, says: "It reminds us of the devil taking the Savior up into the high mountain and offering him all the nations of the earth, when the fact was that the scoundrel did not own a foot of earth under the wide canopy of heaven."

GEN. BUTLER'S impeachment plan is like his famous 'powder-boat,—he wants to see how loud a noise he can make.