In the Supreme Court of the United States

IN THE MATTER OF WILLIAM H. McCARDLE, EX PARTE, APPELLANT.

MR. FIELD'S BRIEF FOR THE APPELLANT.

The appellant, a citizen of Mississippi, was there arrested in October, 1867, and brought before a military commission, assuming to act under the authority of the United States, to be tried for publishing in a newspaper, of which he is editor, criticisms upon military officers, and advice to the electors not to vote or how to vote upon public questions. This citizen was not in the military service, nor impressed with a military character. And the question is, whether he was rightfully brought before that commission to answer for that act. In other words, according to the Constitution and laws of this country, could a military commission sitting in Mississippi, under federal authority, bring to trial and judgment a civilian of that State, for words published concerning federal military officers and the duty of the electors? The words may have been coarse and intemperate. That does not enter into the question. But it may be observed, in passing, that they were not coarser or more intemperate than other words daily uttered and published concerning the highest civil officers of the country—the President, the Judges of this Court, and Members of Congress—not only by the public press, but in public bodies which call themselves respectable.

The act of this military commission is defended in this Court by counsel deputed by the Secretary of War. The

defence rests upon certain acts of Congress, commonly known as the Military Reconstruction Acts.

There are three of them: one passed March 2, 1867; the second, a supplementary act, passed March 23, 1867, and the third, a further supplementary act, passed July 19, 1867. The first begins thus: "Whereas no legal State Governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State Governments can be legally established: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter provided;" and after providing for the assignment of an officer of the army to the command of each district, the act proceeds in the third section thus:

"*And be it further enacted,* That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property; to suppress insurrection, disorder, and violence; to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow civil tribunals to take jurisdiction of, and to try offenders; he shall have power to organize military commissions or tribunals for that purpose; and all interference under color of State authority with the exercise of military authority under this act, shall be null and void."

The supplementary act of March 23, 1867, is not material to the present inquiry.

The first, second, and tenth sections of the supplementary act of July 19, 1867, are as follows:

SECTION 1. *Be it enacted by the Senate and House of Rep-*

resentatives of the United States of America in Congress assembled, That it is hereby declared to have been the true intent and meaning of the Act of the second day of March, one thousand eight hundred and sixty-seven, entitled "An Act to provide for the more efficient government of the rebel States," and of an Act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, were not legal State governments, and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.

SEC. 2. *And be it further enacted,* That the commander of any district named in said Act shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of of said Act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding, or exercising, or professing to hold or exercise any civil or military office or duty in such district, under any power, election, appointment or authority derived from, or granted by, or claimed under any so-called State or the government thereof, or any municipal or other division thereof; and upon such suspension or removal such commander, subject to the disapproval of the General as aforesaid, shall have power to provide, from time to time, for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same, and to fill vacancies occasioned by death, resignation or otherwise.

SEC. 10. *And be it further enacted,* That no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.

The first and principal question hinges on the preamble to the original act, and the enactments which I have just quoted.

The argument against the appellant is this: The preamble is true, and the enactments are justified by the preamble. We deny both propositions. We say that the preamble is not true; but, if it were, that the conclusion does not follow.

It seems most convenient to reverse the order of the propositions, and to discuss the latter first; for if the conclusion does not follow from the premises, the Court need hardly trouble itself with them. I shall, however, not only resist the conclusion, but when I have done that, I shall dispute the premises.

Let me first ask attention to the proposition, that because "no legal State Government, or adequate protection for life or property, now exists" in the State of Mississippi, therefore that State can be placed by Congress under absolute and universal martial rule. Where is the authority of the Government of the Nation for taking upon itself the government of a State, however disordered and anarchical, and carrying on that government by the soldiery? We know that whatever power is possessed by Congress, or any other department of the Federal Government, is contained in a written Constitution. Within its few pages are comprised, either in express language or by necessary intendment, every power which it is *possible* for the Federal authorities of any kind to exercise under any circumstances. Show me, then, I say, the power to erect this military government. You cannot find it *expressed* in any one of the eighteen subdi-

visions of the eighth section of the first article—that section which contains the enumeration of the powers of Congress. If it is *implied* in any of them, tell me in which one. I cannot find it.

Turn then to the fourth section of the fourth article, that which declares that "the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature or the Executive, (when the Legislature cannot be convened,) against domestic violence."

Is a Military Government here sanctioned? Certainly it is not *expressed.* Is it *implied?* Supposing, for the sake of the argument, that the United States, uninvited by its legislative or executive, can go into a State for the purpose of repressing disorder, or violence, or of overthrowing an existing State Government on the ground that it is not republican, I deny that they can introduce a military government as the means to such an end. To avoid misapprehension, I carefully distinguish between the use of military power in aid of the civil, subordinate to it, and military government. The two systems are opposed to each other. In one case the civil power governs, in the other, the military. In one, the military power is the servant of the civil, in the other it is the master. My proposition is that a military government cannot be set up in the United States for any of the purposes mentioned, and the reason is this: *military government is prohibited by the Constitution.* Not disputing the proposition that Congress may pass all laws necessary or proper for carrying into effect any of the express powers conferred upon any department of the government, and that Congress is in general the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation: that is, that the means must not be such as are prohibited by other parts of the Constitution. A lawful end, an end expressly authorized by the Constitution, cannot be obtained by *prohibited means.*

This proposition should seem to be beyond dispute. Let us devote a few moments to its examination. The framers of the Government could not foresee all the exigences which might arise in the future, and therefore, after expressing the great ends for which the Government was formed, and the powers conferred upon it, they meant to leave the choice of the means to the discretion generally of Congress; but fearing that, in seasons of excitement and peril, measures might be adopted not compatible with civil liberty, or consistent with the rights of the States or of the people, various express prohibitions were inserted in the original instrument, and the number was greatly increased by the subsequent amendments. Thus, in the ninth section of the first article, the one immediately following the list of granted powers, is a series of prohibitions, seven in number, and among them that relating to the suspension of the privilege of habeas corpus, prohibiting it, "unless when in cases of rebellion or invasion the public safety may require it," and another relating to bills of attainder and *ex post facto* laws, prohibiting them altogether. Stopping for a moment to consider these clauses of the original instrument, before going into the amendments, we see clearly that, in the choice of means for carrying into execution any of its powers, Congress could not pass an act of attainder, or an *ex post facto* law, or, except in cases of rebellion or invasion, suspend the privilege of habeas corpus, however great might be the exigency or the peril, and though not only Congress, but the great majority of the country should think these means the most appropriate, the most sure, and the most speedy for meeting the exigency or avoiding the peril.

Passing then to the amendments, we find eleven articles, every one of which contains a prohibition of the use of particular means to obtain a permitted end. If the end was not permitted, the prohibition was unnecessary; it was only when the end was lawful and there was a choice of

means, that the prohibitions became effective. The manifest design was to prohibit the particular means enumerated in the amendments, however desirable might be the end. Among these prohibitions are the following: that Congress cannot abridge the freedom of speech or of the press; cannot infringe the right of the people to keep and bear arms; cannot subject any person not in the military service to answer for crime, but upon the previous action of a grand jury; cannot bring an accused person to trial but by a jury; and cannot deprive any person of life, liberty, or property, without due process of law. Therefore, in the choice of means for obtaining an end, however good, Congress cannot authorize the trial of any person, not impressed with a military character, for any crime whatever, except by means of a grand jury first accusing, and a trial jury afterwards deciding the accusation.

This prohibition is fatal to the military government of civilians wherever, whenever, and under whatever circumstances attempted. Such a government cannot exist without military courts, military arrests, and military trials. The military government set up in Mississippi could not exist a day without them.

Thence it follows, that even if Congress had authority to take upon itself the government of a State, this government could not be a military one; and for this reason, if there were no other, the whole scheme of these military reconstruction statutes fails, and the statutes themselves are unconstitutional and void; and if the statutes are void, all acts done under them are illegal.

It will be observed, that I have argued thus far without referring to the case of Milligan, decided by this Court more than a year ago. I might have saved myself labor by citing that case in the beginning. But, if I have stated the argument in part anew, I nevertheless rely upon the authority of that great judgment: a judgment which has given the

Court a new title to the respect of the world, and which will stand forever as one of the bulwarks of constitutional freedom. It is true that the judgment did not *in terms* embrace the rebel States, for the discussions at the bar, as well as the opinions from the bench, appear to have been carefully withdrawn from their disturbing influence; but it is nevertheless to be observed, that the principles declared are universal in their application. Among other things, it was adjudged that "the guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances;" and also that "neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus."

If, therefore, it were conceded that Congress could, in some possible circumstances, take upon itself the government of a State, it is certain that it could not govern by the army.

If it be said that Mississippi is not a State, and therefore the argument does not apply, I answer not only that Mississippi is a State, as I shall endeavor to show hereafter, but that if she be not a State, she is, neverless, within the limits of the United States, and that the prohibitions to which I have referred are as applicable and efficient in the territories, and in every part of the national domain, as in the State of New York. The guarantees of the Constitution extend over every foot of soil where the flag of the country floats, throughout all the States, and in this district, in the territories, in far-off Alaska. So it has been held in this Court. Whether, therefore, there be or be not a "legal State government or adequate protection for life or property" in Mississippi, Congress cannot intervene by the establish-

ment of a military government. The opinion of the Court in Dred Scott *vs.* Sandford, 19 How., 449, contains the following emphatic language:

"But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"A reference to a few of the provisions of the Constitution will illustrate this proposition.

"For example: no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Gov-

ernment for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory, without the consent of the owner, in time of peace; nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted; nor take private property for public use without just compensation.

"The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that owned by States. It is a total absence of power everywhere within the dominion of the United

States, and places the citizen of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government may attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local government established by its authority to violate the provisions of the Constitution."

In the dissenting opinions of Mr. Justice McLean, p. 542, and of Mr. Justice Curtis, p. 614, similar views on this point were expressed. In the opinion of Mr. Justice Nelson, no intimation was given that he dissented from these views.

This is the first part of my argument, and here, as I think, the whole argument might end; for if military government be a thing prohibited by the Constitution, we need go no further, nor trouble ourselves to enquire whether Congress has judged rightly in its reasons for intervention. It is the particular kind of intervention, that is to say, intervention by military power, that I have been objecting to; and if I have shown that to be inadmissible and unconstitutional, it matters little whether the reasons for intervention put forth in the preamble be sufficient or insufficient, or whether any other reasons have been, or could be, advanced for the interference of Congress in the government of Mississippi.

But I will now proceed a step further, and supposing, for the sake of the argument, that a military government is not a prohibited, but a rightful, constitutional means of intervention, I submit, that the preamble furnishes no reason for any kind of intervention whatever, and that, for two reasons: first, because it is not true, in a constitutional sense; and second, because, if true, it is not a constitutional reason for intervention.

It is not true in a consititutional sense. Of course, I am not going into any question of personal veracity, nor into questions of fact, except such as the court may take notice of judicially. The preamble asserts as facts, first, that there is no legal State government in Mississippi; and second, that there is no adequate protection for life or property. These two asserted facts are separable and separately stated. There may be a legal State government, though that government may not fulfil, and may not be able to fulfil, all its duties for the protection of life and property. It is most convenient to consider these assertions separately.

Was there, or was there not, on the 2d of March, 1867, a *legal State government* in Mississippi. This inquiry involves another, antecedent to everything else, which is, whether the declaration of Congress is conclusive upon this Court, or, in other words, whether you are at liberty, after this declaration, to make for yourselves inquiry on the subject, or whether you must accept the declaration as conclusive, whatever may be your own knowledge or information. This question may perhaps best be answered by supposing a case. Suppose an act of Congress passed to-morrow, with a similar preamble, concerning the State of Massachusetts, would you accept it as absolute verity? If it declared that, whereas no legal State government exists in Massachusetts, therefore it be made a military district, and subject to the military power of the United States, just as Mississippi is made subject by the act in question, and the commanding general of the district were to seize the ancient State House and Faneuil Hall, and the editors of the Boston newspapers were to be arrested and tried by military commissions for protesting against these violations, would you be obliged to hold that Massachusetts has no legal State government? Would you tell her, that though you do not see why she has not a legal State government, Congress has decided otherwise, and that is sufficient for you? I am supposing an extreme

case; but an extreme case is a good test of a universal principle. If, as a principle universal in its application, the declaration of Congress is conclusive upon the other departments of the Government, then in the case supposed of Massachusetts it would prevail. If the principle is not universal, then there are cases in which this Court could inquire for itself, notwithstanding the declaration of Congress. The true rule I apprehend to be this: the Court will take judicial notice of the fact of an existing government in every State of the Union: such a government will be presumed to be legal till it is shown to be illegal: the declaration of Congress may be one of the sources of evidence which enter into the case, but not the conclusive or the only one. If there be two rival governments in a State, Congress may have the right to decide between them, and certainly must decide which is to be represented in Congress, and that decision may be binding; but that is a very different thing from asserting that no government whatever exists, or that an existing government is *de facto*, and not *de jure*. The authority to *declare* a fact in only co-extensive with the right to *decide* it; or, in other words, the declaration has no force, except as a decision. This, therefore is the question: has Congress authority to decide, that *the existing government* of Massachusetts, or of any other State, is not a *legal* government? To this, there should seem to be but one answer. No power is given Congress to interfere with the government of the States, any more than power is given the States to interfere with the government of the United States, except in this one respect, that the United States shall guarantee to each State a republican form of government. But this preamble does not deny that Mississippi has a government, republican in form. That she has a government, is stated more that once in these Acts of Congress: it is there called an existing government; and while it is pronounced not to be *legal*, it is nowhere pronounced not to be *republican*.

Having shown, as I trust, that the declaration of Congress is not conclusive upon this Court in respect to the existence of a *legal* State government, little need be said respecting the conclusiveness of the declaration, that there is no adequate protection for life or property. It is not for Congress to decide whether New York fulfils her duty to her citizens of protection for their lives and property; and therefore the declaration of Congress on that subject, in respect to New York or Mississippi, has no force whatever.

Advancing, then, to the question of fact, as one of which this Court takes judicial notice, what do we see? We see a State government in Mississippi, established under a written Constitution, carried on by separate departments—legislative, executive and judicial—and continued in an unbroken line from her admission into the Union, until the passage of these military reconstruction acts; unbroken, I should have said, save in a single instance, when the military officers of the United States forbade the Legislature of the State to assemble, or her courts to hold their sessions. That break being caused by the federal forces, cannot be set up as a reason for federal interference. The series of statutes has been regularly continued through every year, and judicial decisions have been rendered from term to term, down to the present hour.

It is impossible to shut our eyes to the fact that, however censurable and criminal may have been the conduct of the legislatures of the rebel States during the rebellion, there were, nevertheless, established governments during all the time, carrying on their operations with regularity.

Whether there is "*adequate* protection for life and property" in the State of Mississippi I do not know, as I do not know what is meant by *adequate* protection. According to European ideas there is not "adequate protection for life or property" in some of the most loyal States of this Union. Should we, ourselves, say that there was adequate protection

for life or property in the anti-rent districts of New York for the ten years between 1840 and 1850? Is there now adequate protection for life or property in the mining districts of Pennsylvania? How is it in the new settlements? Is it meant by adequate protection that crime is punished with celerity, certainty, firmness and impartiality? If that be the measure of adequate protection, and Congress may interfere for the want of it, I fear they will have their hands full.

I have thus gone through these military statutes, and examined their provisions, together with the reasons on which they profess to be founded, and I submit that the reasons are not realities, and, if they were, that they would not justify the statutes.

But it is said that there are other reasons, not stated in the preamble, which justify them. Without stopping to inquire whether it be competent for the citizen to suggest reasons for an act of Congress, different from those which Congress itself has put forth, I will endeavor to answer all which I have heard mentioned, whether in political debates, or in the argument of the learned counsel on the other side.

Four reasons have been most insisted upon in political debate: one, that Congress is the sole judge of what is a republican form of government, and when it adjudges the government of a State not to be republican, it may force a military government upon it; the second, that the rebel States were conquered, and, being so, may be governed by the same military force which conquered them, so long as Congress sees fit to continue such government; the third, that by the rebellion the government and people of the Southern States forfeited all their rights; and the fourth, that Congress may now govern the rebel States, in the exercise of belligerent rights. Each of these reasons will be considered by itself, in the order in which I have stated them.

First. The United States are to guarantee to each State a republican form of government.

What is the true meaning of this provision? What is the guarantee of a republican form of government? Under color of this power, can the Federal authorities destroy existing State authorities? Such is not the natural import of the words. To guaranty is not to create, but to warrant the continuance of that which is already undertaken. This construction is the only one compatible with the public safety. To give the Federal Government the unlimited power of destroying any State government upon the allegation that it is not republican, is to give to the central authority a control over the local authorities greater than was ever dreamed of before, and is to make way for a consolidation fatal to the rights of the States and the liberties of the people.

The history and cotemporaneous exposition of this clause of the Constitution will show that it has no such meaning as the other side claim for it.

The subject was first brought before the Convention which framed the Constitution by Mr. Randolph, who proposed it in this form: "Resolved, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State." (2 Mad. Papers, 734.) Afterwards, "alterations having been made in the resolution, making it read: 'That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States,' the whole was agreed to, *nem. con.*" (2 Mad. Papers, 843.)

On a subsequent day, after considerable debate, Mr. Wilson moved as a better expression of the idea, "that a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence." This seeming to be well received,

Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed, *nem. con.*" (2 Mad. Papers, 1139.) The language was afterwards changed to the form which it now bears in the Constitution.

In the 43d number of the Federalist, written by Mr. Hamilton, is the following exposition: "In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to *defend the system against aristocratic or monarchical* INNOVATIONS. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other, and the greater right to insist that the forms of government, under which the compact was entered into, should be *substantially* maintained.

"But a right implies a remedy: and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. "As the Confederate Republic of Germany," says Montesquieu, "consists of free cities and petty States, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland." "Greece was undone," he adds, "as soon as the King of Macedon obtained a seat among the Amphyctions." In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State Governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general Government should not be needed, the provision for such an event will be a harmless

superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the General Government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions: a restriction which, it is presumed, will hardly be considered as a grievance."

The purpose of this guaranty of Republican Government was, therefore, to protect the States against "*aristocratic or monarchical innovations.*" Who would have thought that in less than eighty years this clause would be invoked as authority for forcing upon the States the most radical *innovations* in the opposite direction?

It is not for me in this place to say whether I think these innovations good or bad, nor is my opinion of any importance. If it depended upon me, and so far as I could constitutionally act, I would make every human being equal before the law. But I would not break the Constitution of my country for any innovations whatsoever. Without a written Constitution, republican government is impossible; and any instrument pretending to be a Constitution, is only such so far as it is inviolable. Our choice lies between maintaining against all opposers the inviolability of written Constitutions, or subsiding into monarchical governments.

It is said that Luther *agst.* Borden, 7 How., 1, sanctions the claim of a right on the part of Congress to interfere in the internal government of a State greater than I have admitted: but that is a mistake. The acts complained of in that case were done under State authority, and the contest was between two rival governments, each claiming to be the lawful government of the State. The contesting government claimed that it had been adopted by the vote of the whole people, exercising for the first time the elective franchise; the government in possession having admitted to the exercise of the franchise only a part of the people, rested upon that part for its authority; and the judges were asked to decide that the contesting government was the true one, on the ground that it had received the sanction of the whole people. The Court, by Chief Justice Taney, decided, that "the question, which of the two opposing governments was the legitimate one, viz: the charter government, or the government established by the voluntary convention, had not heretofore been regarded as a judicial one in any of the State courts;" that "the courts of Rhode Island had decided in favor of the validity of the charter government, and the Courts of the United States adopted and followed the decisions of the State courts in questions which concern merely the Constitution and laws of the State," and then went on to say:

"Moreover the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion;

and, on the application of the legislature or of the executive, (when the legislature cannot be convened,) against domestic violence.

"Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper Constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the Courts.

"So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed in the power of a Court to decide when the contingency had happened, which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely: and by the act of February 28, 1795, provided that, "in case of an insurrection in any State, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive, when the legislature

cannot be convened, to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection."

"By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress."

And again:

"No one, we believe, has ever doubted the proposition that, according to the instructions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

Second. The argument from conquest is this: we have conquered the rebel States, and we can impose on them the will of the conquerer. But is this a sound argument? How have we conquered the rebel States? We have overcome the rebel armies. Has this operated to transfer the government from the conquered to the conquerer? Or, to state

the same idea in a different form, has it worked a transfer of the sovereignty from one sovereign to another; from the conquered sovereign to the conquering sovereign? Putting the question in this form answers it. The conquered State was sovereign before, in a qualified sense; the conquering States were sovereign before, also, in a qualified sense. The suppression, by the latter, of the rebel forces of the former, was entirely consistent with the relations which previously existed between the two sovereigns: neither the war nor the victory changed the double allegiance of the citizen; one to his State and the other to his Nation.

The laws of conquest have no application to a civil war. When a rebellion is subdued, the sovereign is restored to the exercise of his ancient rights. If a county in New York is declared to be in a state of insurrection, force is applied to put the insurection down; but when this is done, the law resumes its sway. The legal relations of the county to the State are not permanently changed, though their operations may have been suspended for the time being. By the laws of war between sovereign and independent States, when one has taken possession of the other, the will of the conqueror becomes the law, because his only relations to the conquered State are those of conqueror and master. If, however, there were antecedent relations, which the war has not broken, they are resumed the moment the war is over. The only inquiry in the present case is, whether the rebellion or the war has abolished, or changed the *legal relations* of the State to the Union. Now, as we maintain that no act of the Federal Government can exclude a State from the Union, so no act of the State can withdraw it from the Union. The war found it in the Union, subject to its laws; the war left it in the Union, subject to the same laws.

In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influences of Christianity and civili-

zation, till now it is the settled public law of the Christian and civilized world, that the conquest of one nation by another makes no change i the property or the personal rights and relations of the conquered people. "The people change their allegiance," says Chief Justice Marshal, (7 Pet., 87, U. S. vs. Churchman,) "their relation to their ancient sovereign is dissolved, but their relation to each other and their rights of property remain undisturbed." One change only is effected, and that is, that one sovereign takes the place of the other. *In a civil war, sovereigns are not changed,* unless the rebellion is successful.

It is very true that the rebel States themselves renounced their allegiance to the nation, or rather they denied that they owed any such allegiance, and maintained that their relation to the Union was that merely of parties to a compact. We, however, denied their theory, and insisted that they owed allegiance which they could not renounce; and for the support of these opposite theories, each side took up arms. Now that we have won, it is not for us to deny the cause for which we fought. We are now striving to maintain the supremacy of the Constitution in the South, not so much for their sakes as for our own.

A little reflection will satisfy us that the opposite doctrine may lead to the most alarming consequences. Suppose that in Shay's rebellion the insurgents had got the better of the State government, and the troops of the United States had been brought in, and had suppressed the rebellion, would Congress, in that event, have been justified by the Constitution in imposing its own government upon Massachusetts? If the Federal Legislature may impose a government with one view, it may with another. It may impose one with a design to restrict the suffrage, as well as to extend it. Suppose hereafter a negro insurrection to occur in a Southern State, or even a peaceable change to be made in its constitution for the purpose of excluding a majority of the whites

from the government, and domestic violence and revolt thence to ensue, which results in Federal intervention and suppression, would Congress in that event be justified by the Constitution in assuming the government of the State and restricting the suffrage to the whites? Let us put this question. Suppose Mississippi, in a war between the United States and Great Britain, had been conquered by the latter, and then retaken by the United States, would this Government hold the State as conqueror or as federal sovereign under the Constitution? Most clearly the latter. The doctrine of *postliminy* rests on that foundation.

Let us look abroad and see what crimes have been committed under the plea of conquest. Ireland is a memorable example. "To the charge of arbitrary government in Ireland," says Goldwin Smith, "Strafford pleaded that the Irish were a conquered nation. They were a conquered nation, cries Pym. There cannot be a word more pregnant and fruitful in treason than that word is. There are few nations in the world that have not been conquered, and no doubt but the conqueror may give what law he pleases to those that are conquered; but if the succeeding acts and agreements do not limit and restrain that right, what people can be secure? England hath been conquered, and Wales hath been conquered, and by this reason will be in little better case than Ireland. *If the King, by the right of a conqueror, gives laws to his people, shall not the people, by the same reason, be restored to the right of the conquered, to recover their liberty if they can.*"

Hungary is another example. The House of Hapsburg was deposed by the Estates of the Kingdom. A bloody war followed, and the Estates were conquered. Then ensued a strife between the Emperor and his subjects, whether he was King of Hungary by the conquest, or King by the Constitution, and, after many years, and the terrible lesson of Sodowa, he was compelled to yield, and the Hungarians are now resting in the shelter of their ancient Constitution.

Third. A third reason given for the military government of the South is, that the rebel States and their people forfeited their rights by the rebellion. To this argument it might be answered, that our present concern is not what they deserve, but what we have a right to do. We are restrained by the Constitution which we have fought to maintain, and which we now assert for the sake of our own rights. Not confining ourselves to this answer, however, we insist that there is a fallacy in the assertion, that the rebel States and people have forfeited their rights by the rebellion. First, let us understand what act is claimed to have caused the forfeiture, the rebellion, or the war to maintain it. It can hardly be the act of throwing off their allegiance; that is, of renouncing the authority of the United States, which is supposed to cause the severance of the legal ties between the Union and the States, for the obvious reason that one party to a compact cannot disolve it by his own act, without the consent of the other. Is it then the war which is supposed to have produced these results? That can only happen because the levying of war is treason. In fact, the proposition is stated in its strongest form when it is stated that the *war* of the rebels was treason, and that traitors have no rights. But it is not true that traitors have no rights; they have all their rights until they are judicially condemned, or perhaps the better form of stating the proposition is, that they are not to be accounted traitors until they are convicted of treason. The Constitution has carefully defined treason to consist in levying war against the United States or adhering to their enemies, giving them aid and comfort, aud has declared that no person shall be convicted of crime unless on the testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason nor penalty of treason, until after conviction; and Congress has not competency to convict, however great and manifest may be the crime.

There is another answer to the argument of forfeiture, and that is, that treason is a *personal* crime. There can be no treason of a State, though there may be of all the persons who compose it. Whatever may have been the misconduct of the citizens of Mississippi, even though every one of them were guilty, the State, the corporate body, did not, because it could not, commit the crime of treason.

Fourth. As to the doctrine of belligerent rights, what countenance does that give to the present government of the South by the army? There are no longer belligerent rights, because there are no more belligerents. The moment the war ceased, the laws of war ceased also.

This should seem to be a sufficient reason, but as the argument is much insisted on, I will follow it further. The question of belligerency and belligerent rights received great attention in the prize cases, where the Court laid down certain fundamental propositions. One of them, relating to the fact of a civil war existing, was this: "The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land.'" (2 Black, 667.)

Applying this rule to the present case, it follows that civil war can no longer be recognized as existing in Mississippi, because the courts are open. Therefore, whether, during the war, the just exercise of belligerent rights would have authorized the Federal Government to take into its hands the entire government of that State, there is no warrant for any such exercise now.

Another proposition in that case was, that the courts will take judicial notice of the beginning and progress of the civil war. Of course, for the same reason, they will take judicial notice of its end.

The court says: "By the Constitution, Congress alone has the power to declare a national or foreign war. *It cannot declare war against a State,* or any number of States, by virtue of any clause in the Constitution. *The Constitution confers on the President the whole executive power.* He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. *He has no power to initiate or declare a war either against a foreign nation or a domestic State.*"

A further proposition of that case was, that by exercising belligerent rights the United States did not lose those which were sovereign. If their sovereign rights remained, their duties, as sovereign, remained also. The exercise of belligerent rights was in fact for the purpose of regaining the complete enjoyment of their sovereign rights, and for no other purpose.

The language of the Court was, "The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other."

It is also to be observed, that belligerent rights are to be exercised by the Executive, and not by Congress. In the present instance, the Executive exercises, and attempts to exercise, none against the State of Mississippi, or any of her people. Indeed, he disclaims any such authority; these military acts were passed over his veto; and if the argument from belligerency should prevail, we should have the extraordinary spectacle of the Legislature exercising an executive function, without the consent and against the protest of the Executive.

It is further to be observed, that while the war lasted,

their belligerent rights did not authorize the United States to carry on the entire government of Mississippi. What, indeed, might they do while the war was raging? They might govern their own armies and subdue the armies of the rebels. As soon as that was done, or as fast as they advanced, they could proceed to organize their own displaced government in its former estate, open the Federal Courts, run the Federal mails, collect the Federal revenue; in short, do all that they could do before. But might they not do something more? That depends upon their rights and their duties under the Constitution. This government is a limited one, and its rights and duties are defined and limited by the Constitution, and if you cannot find there the warrant for its action, it cannot act at all. If a State of this Union should fall into great disorder, so that her finances should become ruinous, her treasury bankrupt, her roads infested by robbers, property and person be insecure, with an impotent executive, a babbling legislature, and a venal judiciary, could Congress step in and take the government of that State into its own hands? I can perceive no authority for their doing so; and if authority be necessary, it must be sought by an amendment of the Constitution. It is as clear as noonday that the theory of our present Constitution is, that the States shall organize themselves, and that Congress has nothing to do with it; except that if in such organization the States should introduce aristocratic or monarchical innovations, it might then interfere to insist upon their going back to their republican forms.

But it may be asked, cannot the Federal army, which goes into a State to suppress a rebellion, govern the country as it advances into it: I answer, as a similar question was answered in Milligan's case, "*necessitas, quod cogit, defendit.*" The advancing and occupying army must govern itself by the laws of war; it must keep the peace within its own lines, and for that purpose it must govern the people within

them, so far, and so far only, as ordinary civil government is impossible. For example, when the City of New Orleans was taken by the Federal forces, all the Federal laws applicable to the port and district went again into operation; but if there were no State officers competent to administer or execute the State laws, the commanding officer of the occupying forces must, of necessity, for the safety of his own army, as well as of the society within his lines, preserve order, and might make regulations for that purpose. This, I suppose, is the rule, and the whole of it.

Even this power ceases with the necessity of its exercise. The moment the military occupation (*occupatio bellica*) ceases, that moment the right to govern even within the narrow limits which I have explained, ceases also. Is there no period, then, after the cessation of hostilities during which the military occupation may continue? No intermediate state between the state of war and the state of peace? no interval after hostilities, and before the reestablishment of civil government? To this question, as applicable to this case, I answer:

I. The occupying forces must have reasonable time to retire with their war material; and so long as they necessarily remain for that purpose, so long the reason of the rule applies, and therefore the rule itself; but they have no right to remain longer.

II. The *federal* civil government is of course capable of being put into full vigor as soon as the rebellion is suppressed. To guard the federal property, to protect the federal officers, to assist in the execution of federal process, the troops may always remain, in peace as in war.

III. If no State authorities whatever are left, and the people are absolutely without magistrates or officers of any kind, so that the withdrawal of the federal troops would be the signal of a general massacre or pillage, then the troops may remain, just as any other body of men may re-

main, in the interest of humanity, and upon principles of common or universal law, to prevent the commission of crime or violent injury to person or property. If the captain of an American frigate in a Chinese port finds a condition of anarchy and general pillage on shore, I suppose he may land the ship's company to stop the violence and rapine; but that does not imply any right in the captain to govern the town.

IV. If there be an existing State government *de facto* or *de jure*, the question cannot arise. There was such a government in Mississippi when the war closed. The retirement of the federal troops would have left the State, impoverished and exhausted no doubt, but not without a government.

If this Court is not bound by the declaration of Congress, that there are no legal State governments in the South, no more is it bound by the declaration of the President, that there were none when the war closed. Indeed, if I might venture the suggestion, which I do with great diffidence, the true course at the close of the war was to consider the governments then in existence as governments *de facto*, which could become governments *de jure* on taking the oath of fidelity to the Federal Constitution. Congress would not have felt itself obliged to admit any but loyal representatives to seats. This suggestion is not at all important to my argument, but candor obliges me to say, that I think the source of all the difficulty that has since been encountered, was in the departure from the true theory of our Government when the rebel army surrendered. Indeed, I cannot help thinking, that the general form of capitulation arranged by General Sherman, without reference to its details, was constitutional and statesmanlike.

Having thus shown that the occupation of a State by a conquering army did not affect any such change in the rights and duties of the people, as is supposed in the defendants'

argument, even if the two contending parties were regarded as independent States, and the war what is called by jurists a public war, I might add as an additional and conclusive argument of itself, that in a civil war there can be, strictly speaking, no such occupation—*occupatio bellica*. "In a civil war," says Phillimore, "there could be no *occupatio*." (3 Phill. Int. Law, 704.) "A civil war," says Grotius, "is not of the same kind, concerning which this law of nations was instituted." (Grotius L. 3, C. 8, § iv.)

Halleck, in his work on International Law, p. 806, § 29, says:

"In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists, who have commented on this transaction, agree that the debt was not legally discharged: first, because in a civil war there could be, properly speaking, no *occupation*; and second, because it was a private and not a public debt."

In a late case in North Carolina, where it was attempted to apply the principles of the "*occupatio bellica*" to the sequestration, by acts of the insurgent State, of a debt due to a citizen of a loyal State, the Court rejected the defence, and said: "These acts did not effect, *even for a moment*, the separation of North Carolina from the Union, any more than the action of an individual who commits grave offences against the State by resisting its officers and defying its authority, can separate him from the State. Such acts may subject the offender even to outlawry, but can discharge him from no duty, nor relieve him from any responsibility."

After this opinion of the Chief Justice, let me read from the opinion of Mr. Justice Sprague, in the case of the Amy Warwick, (24 Law Rep., 498.) "An objection to the prize decisions of the district courts has arisen from an apprehension of radical consequences. It has been supposed that if the Government have the rights of a belligerent, then, after

the rebellion is suppressed, it will have the rights of conquest; that a State and its inhabitants may be permanently divested of all political privileges, and treated as foreign territory acquired by arms. This is an error; a grave and dangerous error. The rights of war exist only while the war continues. Thus, if peace be concluded, a capture made immediately afterwards on the ocean, even where peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. (Wheat. Elements of International Law, 619.) Belligerent rights cannot be exercised when there are no belligerents. Titles to property or to political jurisdiction, acquired during the war by the exercise of belligerent rights, may indeed survive the war. The holder of such title may permanently exercise during peace all the rights which appertain to his title; but they must be rights only of proprietorship or sovereignty: they cannot be belligerent. Conquest of a foreign country gives absolute and unlimited sovereign rights. But no nation ever makes such a conquest of its own territory. If a hostile power, either from without or within a nation, takes possession and holds absolute dominion over any portion of its territory, and the nation by force of arms expels or overthrows the enemy and suppresses hostilities, it acquires no new title, but merely regains the possession of which it had been temporarily deprived. The nation acquires no new sovereignty, but merely maintains its previous rights. (Wheat., 616.) During the war of 1812 the British took possession of Castine, and held exclusive and unlimited control over it as conquered territory. So complete was the alienation that the Supreme Court held that goods imported into it were not brought into the United States, so as to be subject to import duties (U. S. *a.* Rice, 4 Wheat., 246.) Castine was restored to us under the treaty of peace; but it was never supposed that the United States acquired a new title by the

treaty, and could thenceforth govern it as merely ceded territory. And if, before the end of the war, the United States had, by force of arms, driven the British from Castine, and regained our rightful possession, no one would have imagined that we could thenceforth hold and govern it as conquered territory, depriving the inhabitants of all prëexisting political rights. And when, in this civil war, the United States shall have succeeded in putting down this rebellion and restoring peace in any State, it will only have vindicated its original authority, and restored itself to a condition to exercise its previous sovereign rights under the Constitution. In a civil war, the military power is called in only to maintain the Government in the execise of its legitimate civil authority. No success can extend the power of any department beyond the limits prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. The fact that the inhabitants of a State have passed such ordinances can make no difference. They are legal nullities; and it is because they are so, that war is waged to maintain the Government. The war is justified only on the ground of their total invalidity. It is hardly necessary to remark, that I do not mean that the restoration of peace will preclude the Government from enforcing any municipal law, or from punishing any offence against previous standing laws."

I am now ready to examine the terms of the particular propositions which have been stated by the other side in support of their case. There are six of them, thus expressed:

1. "That Mississippi has no State government which is entitled to be recognized by the United States as a State'

of this Union; and that this has been determined by the political departments of this Government."

2. "That the decision so made is binding and conclusive upon this Court, notwithstanding the judges may think the decision erroneous."

3. "That it is the undoubted right and duty of the United States to aid the loyal people of Mississippi in establishing a republican State government for that State, and that the United States is now engaged in the performance of that constitutional duty."

4. "That the grant of power to the United States to 'guarantee a republican form of government' to the States of the Union, not being restricted by the Constitution, as to the means which may be employed to execute the power, Congress is the exclusive judge of what means are necessary in a given case."

5. "That the act in question, with the act supplemental thereto, regarded as embodying the means adopted by Congress for this purpose, violates no provision of the Constitution of the United States."

6. "That inasmuch as Congress entered upon the prosecution of the war against the rebel States, in 1861, this Court is and will be bound judicially to recognize war as still existing, until Congress shall declare peace to be restored, or shall cease to exercise any belligerent right towards those States."

The fifth of these propositions is merely a supposed conclusion from other propositions, and need not be separately considered. The fourth is met by what I have already said about the use of prohibited means to secure an end, however constitutional and desirable that end might be. I have shown that military government is prohibited. Therefore, even if the first three and the sixth propositions were all conceded, these military reconstruction acts could not be defended.

The third proposition has already been sufficiently answered. The first two and the sixth alone remain to deserve particular attention; and even in respect to the sixth, I have already shown that belligerent rights cannot continue to be exercised unless the war can be prolonged by a fiction.

The discussion of these three propositions; that is, the first, second, and sixth, may be separated into four divisions:

1. Is Mississippi, in fact and in law, a State of the Union, having regard only to the conditions of rebellion and war, without reference to the declaration of the Legislative and Executive Departments of the Government upon the question? In other words, did the rebellion, or the war, or both, put Mississippi, *as a State*, out of the Union?

2. Is war, in fact and in law, still subsisting between the United States on one side, and the State, or State government, or people of Mississippi, on the other side, without reference to the declaration of the Legislative and Executive Departments of the Government upon the question?

3. What has been the declaration of the Legislative and Executive Departments upon these two questions?

4. What is the legal effect of such declaration?

First. Did the rebellion, or the war, or both, put Mississippi, *as a State*, out of the Union?

This raises what I may call the *metaphysical* question. Horne Tooke protested that he had been the victim of a preposition. If the Southern States are to be held by this military government, after every hostile army has been surrendered, and every unfriendly hand has been lowered, they will be the victims of metaphysics, imported into politics.

Mississippi was a State of the Union once. When did she cease to be such? Was it when she adopted the ordinance of secession, before a shot had been fired?—that is to say, did the act of renouncing her allegiance alone take her out of the Union? If so, from what principle does

this result follow? The other side give what they suppose to be the principle, and I will come to that shortly. Independent of that, there surely can be no other. The denial of one's obligations can never *legally* effect his release from them, or change his *legal* relations to the one to whom the obligations are due. And in this complex Government of ours, the effect of a change of the legal relations of the State to the Union would be a change of the legal relations of the different States to each other. Let us look at some of the consequences. The mere act of secession of Mississippi, not followed by any collision of forces, would have the effect of depriving a citizen of Wisconsin or Illinois, going there, of his equal rights in Mississippi; would render the judgments in the courts of Mississippi no longer conclusive in the courts of Wisconsin or Illinois, and so of the judgments of those States in Mississippi; would make a judgment in the highest court of Mississippi no longer examinable in this Court, however repugnant to the Federal constitution and laws; would deprive a citizen of Wisconsin or Illinois of the right of suing in the Circuit Court of the United States for the Mississippi district; in fact, would drive that Court out of Mississippi, for certainly it cannot sit there, if that State is not as such in the Union. These are but examples; the list may be increased indefinitely.

And how could this state of things be remedied? You could not send the army there; for, in the case supposed, there would be no resistance to overcome. The consequences would be then in effect the withdrawal of a State from the Union without a blow.

Would a collision of forces change the *legal* relations, so as to effect by war what was not effected by secession? That depends upon the change which war produces—that is, it depends upon the nature and effect of belligerent rights. But these I have already considered, and I have shown, as I think, that the rights of the United States, as belligerents

give Congress no constitutional authority to pass these military statutes.

Let us now recur to the supposed principle upon which the other side deduce the result, that Mississippi is no longer a State of the Union. It is this, as I take it from their own language: Mississippi is not a *State* of this Union, because she "has no *State government* which is entitled to be recognized by the United States as a 'State' of this Union." Here is a fallacy at the outset, arising from a confusion of ideas. A *State* and the *government* of a State are two different things, as much so as a corporation and its governing body, or board of directors, are two different things. The original idea of a State is a community independent of all other communities. The States of the American Union, being originally independent, became united by the surrender of a portion of their sovereignty to a Nation composed of all the States. Whether their relations to this Nation can be dissolved or impaired, depends upon the nature of the union, whether it be, or be not, indissoluble. We all agree that it is indissoluble No argument is necessary, or could be permitted on this point.

But it is asked, might the State of Mississippi send Sentors to Congress during the war? I answer, no; for the simple reason, that there was nobody competent to send them. They must be sent by legislatures, acting under the Constitution of the United States. The Senate is the judge of the election and qualification of its own members, and is not bound to receive those who come in upon contempt of their authority, or with a feigned submission. There may be a State in this Union with a disloyal State Government. This proposition answers the argument made against us.

A State does not change with a change of its government. One of the fundamental doctrines of public law is, that the State is immortal. Governments, sovereigns, dynasties ap-

pear and disappear, but the State remains. The debts contracted by France under Napoleon the First, were the debts of France under Louis the 10th, under the citizen king, and under the republic.

The proposition of the other side, which we are considering, contradicts in fact their fourth proposition; for, if Mississippi be not a State of the Union, Congress has no power under the clause authorziing it to "guarantee to *every State in the Union* a republican form of government."

Second. Is war, in fact, and in law, still subsisting between the United States and the State or State government, or people of Mississippi, leaving out of view the declaration of our Legislative and Executive Departments?

This question is put with sole reference to what the Courts judicially know. You have stated in the prize cases the test of existing war. It is this, whether the Courts of justice are open, that is, whether the Federal Courts are open. You know that they are open. Some of your members have held Courts there; you know that the District Judges are holding their Courts; you know by this very case that the Circuit Court of the United States in Mississippi is performing its appropriate functions, for you are sitting in appeal from its decision.

Third. What has been the declaration of the Legislative and Executive Departments of the Federal Government upon the two questions we have just considered.

[1.] As to the *Executive* Department. We know *that* has recognized the existence of Mississippi as a State of the Union, the existence of a legal State government there, and the termination of the war.

[2.] As to the *Legislative* Department: That, too, recognized the *State*, and has recognized it to this hour. No act of Congress has ever been passed denying it, or questioning it. The statute book is full of acts of Congress since 1861, recognizing Mississippi as a State of this Union. In reference to the great constitutional amendment abolish-

ing slavery, Congress received from the Executive Department, without dissent, information of its adoption by several of the rebel States, Mississippi among the rest.

The legislative department also recognized the State government of Mississippi down to 1867. These military reconstruction acts were the commencement of the direct attacks by Congress upon the legal validity of the State government.

It is too late for Congress, after all this, to unsay what it has said, and attempt to invalidate that which it has sanctioned.

Fourth. What is the legal effect of the declaration made by Congress in the act of March 2d, 1867, respecting the *legality* of the State government of Mississippi? I have already answered that question.

As to the necessity of a declaration by Congress that war between the United States and Mississippi, has *ceased* I have to answer—

1. That no such declaration was necessary. Congress does not declare domestic war, and has no authority to declare it. So this Court has said in the prize cases. If the war had been a foreign war, it would have been for the President, and not Congress, to make peace; and if to make it, so to declare it.

2. That there are proofs everywhere in the acts of Congress, in the journals of the two Houses, in the reports of Committees, that the rebel armies were overthrown in 1865; that there is no force anywhere now in arms against the Union. There must be either peace or war. There is no war. That is proved from the records of Congress, not less than from the pages of current history.

But we are told that this is a *political* question, which is beyond the competency of the Courts to determine. A fortnight ago this objection would have come with more force than it comes now. The experience of a few days has taught many, what was understood by thoughtful ob-

servers before, that this Court is the great peacemaker, and that nothing but its peaceful interposition can prevent collisions of force.

What is a political question? Is it one which affects the policy of parties, or is decided by partizan views? Such a question is the very one that is most likely to lead the Legislative Department into excesses, which it needs the Judicial to correct. If Congress were to pass an act of attainder, with a purely political motive, or for a purely political end, does any one suppose that this Court is not competent to pronounce it unconstitutional and void? A political question, I apprehend, is one which the political department of the Government has exclusive authority to decide.

But this question has received its final answer in the opinion of this Court, delivered by Mr. Justice Nelson, upon the bill exhibited by Georgia against the Secretary of War and others; and it would be presumptuous in me to debate now what is there decided so satisfactorily to all friends of constitutional government and so authoritatively for us all.

In conclusion, I submit that I have shown—

1. That there is no reason whatever for the proposition that Mississippi is not now a State of the American Union;

2. That not only is she a State of the Union, but her people have the rights of citizens of a State;

3. That whether she be or be not a State, or has or has not the rights of a State, the people there residing cannot be subjected to military government by the Congress of the United States; and

4. That therefore the petitioner, McCardle, is entitled to his release from the military commission which presumed to sit in judgment upon him.

DAVID DUDLEY FIELD,
Of Counsel.

APPENDIX.

I.

Extracts from the Debates in the Convention of 1787.

Resolved, That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State. (2d Mad. Papers, 734.)

The eleventh resolution, for guaranteeing republican government, territory, &c., being read, Mr. Patterson wished the point of representation could be decided before this clause should be considered, and moved to postpone it, which was not opposed, and agreed to, Connecticut and South Carolina only voting against it. (2 Mad. Papers, 794)

The eleventh resolution for guaranteeing republican government and territory to each State being considered, the words "or partition," were, on motion of Mr. Madison, added after the words "voluntary junction;" Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia; ayes—7. Connecticut, New Jersey, Delaware, Maryland; no—4.

Mr. Read disliked the idea of guaranteeing territory. It abetted the idea of distinct States, which would be a perpetual source of discord. There can be no cure for this evil but in doing away States altogether, and uniting them all into one great society.

Alterations having been made in the resolution, making it read "that a republican constitution and its existing laws ought to be guaranteed to each State by the United States," the whole was agreed to, *nem con.* (2 Mad. Papers, 843.)

Resolved, That a republican constitution and its existing laws ought to be guaranteed to each State by the United States. (2 Mad. Papers, 861.)

Much has been said of the unsettled state of the mind of the people. He believed the mind of the people of America, as elsewhere, was unsettled as to some points, but settled as to others. In two points he was sure it was well settled; first, in an attachment to republican government; secondly, in an attachment to more than one branch in the legislature. (Col. Mason's Remarks, 2 Mad. Papers, 913.)

The sixteenth resolution, "That a republican constitution and its existing laws ought to be guaranteed to each State by the United States," being considered,

Mr. Gouverneur Morris thought the resolution very objectionable. He should be very unwilling that such laws as exist in Rhode Island should be guaranteed.

Mr. Wilson. The object is merely to secure the States against dangerous commotions, insurrections and rebellions.

Col. Mason.—If the general government should have no right to suppress rebellions against particular States, it will be in a bad situation indeed. As rebellions against itself originate in and against individual States, it must remain a passive spectator of its own subversion.

Mr. Randolph.—The resolution has two objects: first, to secure a republican government; secondly, to suppress domestic commotions. He urged the necessity of both these provisions.

Mr. Madison moved to substitute "that the constitutional authority of the State shall be guaranteed to them respectively against domestic as well as foreign violence."

Doctor McClurg seconded the motion.

Mr. Houston was afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised and amended. It may also be difficult for the General Government to decide between contending parties, each of which claim the sanction of the Constitution.

Mr. L. Martin was for leaving the State to suppress rebellions themselves.

Mr. Gorham thought it strange that a rebellion should be known to exist in the empire, and the general government should be restrained from interposing to subdue it. At this rate an enterprising citizen might erect the standard of monarchy in a particular State, might gather together partisans from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness of its own destruction. With regard to different parties in a State, as long as they confine their disputes to words, they will be harmless to the general government and to each other. If they appeal to the sword, it will then be necessary for the general government, however difficult it may be, to decide on the merits of their contest, to interpose and put an end to it.

Mr. Carroll.—Some such provision is essential. Every State ought to wish for it. It has been doubted whether it is a *casus foederis* at present, and no room ought to be left for such a doubt hereafter.

Mr. Randolph moved to add, as an amendment to the motion, "and that no State be at liberty to form any other than a republican government."

Mr. Madison seconded the motion.

Mr. Rutledge thought it unnecessary to insert any guarantee. No doubt could be entertained but that Congress had the authority, if they had the means, to coöperate with any State in subduing a rebellion. It was and would be involved in the nature of the thing.

Mr. Wilson moved, as a better expression of the idea, "that a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence."

This seeming to be well received, Mr Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed *nem. con.*" (2 Mad. Pap., 1139.)

Article 18 being taken up, the word "foreign" was struck out, *nem. con.*, as superfluous, being implied in the term "invasion."

Mr. Dickinson moved to strike out, "on the application of its Legislature, against." He thought it of essential importance to the tranquillity of the United States, that they should, in all cases, suppress domestic violence, which may proceed from the State Legislature itself, or from disputes between two branches, where such exist.

Mr. Dayton mentioned the conduct of Rhode Island, as showing the necessity of giving latitude to the power of the United States on this subject. On the question,—

New Jersey, Pennsylvania, Delaware; aye—3. New Hampshire, Massachusetts, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Georgia; no—8.

On a question of striking out "domestic violence," and inserting "insurrections," it passed in the negative—

New Jersey, Virginia, North Carolina, South Carolina, Georgia; aye—5. New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland; no—6.

Mr. Dickinson moved to insert the words, "or executive," after the words, "application of its Legislature." The occasion itself, he remarked, might hinder the Legislature from meeting.

On this question—

New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina, Georgia; aye—8.

Massachusetts, Virginia; no—2:

Maryland divided.

Mr. L. Martin moved to subjoin to the last amendment the words, "in the recess of the Legislature." On which question Maryland only aye.

On the question on the last clause, as amended—

New Hampshire, Massachusetts, Connecticut, New Jersey,

Pennsylvania, Virginia, North Carolina, South Carolina, Georgia; aye—9.

Delaware, Maryland; no—2. (3 Mad. Pap., 1466.)

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive, (when the Legislature cannot be convened,) against domestic violence. (3 Mad. Papers, 1621.)

II.

Instances in which the legislative and executive departments have recognized Mississippi and other rebel States as in the Union:

§ In the apportionment of direct taxes.

Act of 5 Aug., 1861, xii U. S. Laws, 295.

Act of 7 June, 1862, xii U. S. Laws, 422.

Act of 6 Feb., 1863, xii U. S. Laws, 640.

Act of 25 June, 1864, xiii U. S. Laws, 159.

Act of 3 March, 1865, xiii U. S. Laws, 501.

Act of 20 July, 1866, xiv U. S. Laws, 331.

§ Organization or regulation of Federal courts.

Defining the circuits—Act of 15 July, 1862, xii U. S. Laws, 576, (which distributes the insurrectionary States by name.)

Act of 22 May, 1866, xiv U. S. Laws, 51.

Act of 27 July, 1866, xiv U. S. Laws, 300.

Act of 28 July, 1866, xiv U. S. Laws, 344.

Act of March 2, 1867, ch. 185, p. 545.

§ Public lands.

Act of 2 March, 1867, xiv U. S. Laws, 544.

Act of 30 June, 1864, xii U. S. Laws, 526.

Act of 21 June, 1866, xiv U. S. Laws, 66, applicable to the States of Alabama, Mississippi, Louisiana, Arkansas, and Florida, and especially recognizing the laws of the States.

§ Non-intercourse acts.

Act of 13 July, 1861, xii U. S. Laws, 255, especially secs. 5 and 6.

Act of 20 May, 1862, xii U. S. Laws, 404.

Act of 2 July, 1864, xii U. S. Laws. 376.

§ Political acts.

Joint Resolution of 8 February, 1865, xiii U. S. Laws 567, (as to electoral colleges.)

Joint Resolution of 1 February, 1865, xiii U. S. Laws, 567, (amendment of Constitution. See xiii U. S. Laws. 774.)

Joint Resolution of 16 June, 1866, xiv U. S. Laws, 355, (amendment of Constitution.)

(5) Proclamations of the President of the United States to the same effect.

Proclamation of 15 April, 1861, U. S. Laws. vol. xii, p. 1258, appendix.

Ditto 19 April, 1861, xii U. S. Laws, p. 1258, appendix.

Ditto 27 April, 1861, xii U. S. Laws, p. 1259.

Proclamation of 3 May, 1861. xii U. S. Laws, p. 1260.

Ditto 10 May, 1861, xii U. S. Laws, p. 1260.

Ditto 16 August, 1861, xii U. S. Laws, p. 1262.

Ditto 12 May, 1862, xii U. S. Laws, p. 1263.

Ditto 19 May, 1862, xii U. S. Laws, p. 1264.

Ditto 1 July, 1862, xii U. S. Laws, p. 1266.

Ditto 22 September, 1862, xii U. S. Laws, p. 1267.

Ditto 1 January, 1863, xii U. S. Laws, p. 1268.

Ditto 2 April, 1863, xiii U. S. Laws, p. 730,

Ditto 8 December, 1863 xiii U. S. Laws, p. 737.

Ditto 18 February, 1864, xiii U. S. Laws, p. 740.

Ditto 5 July, 1864, xiii U. S. Laws, p. 742.

Ditto 8 July, 1864, xiii U. S. Laws, p. 744.

Ditto 11 April, 1865, xiii U. S. Laws, p. 753.

EXAMPLES.

ACT of August 6th, 1861, to provide increased revenue.

SEC. 8. *And be further enacted*, That a direct tax of twenty millions of dollars be, and is hereby, annually laid upon the United States, and the same shall be, and is hereby. apportioned to *the States*, respectively, in manner following:

* * * * * * *

To the *State of Mississippi*, four hundred and thirteen thousand eighty four and two-third dollars.

ACT of July 16, 1862, to amend the Judiciary act.

"*Be it enacted, &c.*, That hereafter the Districts of Maryland, Delaware, *Virginia, and North Carolina*, shall constitute the fourth circuit; the Districts of *South Carolina, Georgia, Alabama, Mississippi, and Florida*, shall constitute the fifth circuit; the Districts of *Louisiana, Texas, Arkansas*, Kentucky, and Tennessee, shall constitute the sixth circuit; the Districts of Ohio and Indiana shall constitute the seventh circuit; the Districts of Michigan, Wisconsin, and Illinois, shall constitute the eighth circuit," &c.

* * * * * * *

The allotment of the Chief Justice and the Associate Justices of the said Supreme Court to the several circuits, shall be made as heretofore.

ACT of March 3d, 1863, ch. 113.

Be it enacted, &c., That in all cases wherein the District Courts of the United States, within and for the several Districts of *Texas, Florida*, Wisconsin, Minnesota, Iowa, and Kansas had rendered final judgments or decrees prior to the passage of an act entitled "An act to amend the act of the third of March, eighteen hundred and thirty seven, entitled 'An act supplementary to the act entitled an act to amend the judicial system of the United States' approved July fifteenth, eighteen hundred and sixty-two, which cases

might have been brought, and could have been originally cognizable in a Circuit Court, said District Courts shall have power to issue writs of execution or other final process, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees aforesaid," &c.

Approved March 3d, 1863.

ACT of July 13, 1861, for the Collection of Duties.

The fifth section authorizes the President, *by proclamation to declare the inhabitants* of certain States or parts of States to be *in insurrection.*

JOINT RESOLUTION of February 8, 1865, declaring certain States not entitled to representation in the Electoral College.

" Whereas the *inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee* rebelled against the Government of the United States, and were in such condition on the eighth day of November, eighteen hundred and sixty-four; that no valid election for electors of President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day: Therefore,

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the States mentioned in the preamble to this Joint Resolution are not entitled to representation in the Electoral College for the choice of President and Vice-President of the United States for the term of office commencing on the fourth day of March, eighteen hundred and sixty-five; and no electoral votes shall be received or counted from said States concerning the choice of President and Vice-President for said term of office."

Approved February 8, 1865.

No. 52, 13th U. S. Laws, 774.

"*Wm. H. Seward, Secretary of State of the United States, to all whom these presents may come, greeting:*

"Know ye that whereas the Congress of the United States, on the 1st of February last, passed a resolution which is in the words following, namely:

(Reciting the Constitutional Amendment Abolishing Slavery.)

"And whereas the whole number of States in the United States is thirty-six; and whereas the before specially named States whose Legislatures have ratified the said proposed amendment constitute three-fourths of the whole number of States in the United States:

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress approved the twentieth of April, eighteen hundred and eighteen, entitled 'An act to provide for the publication of the laws of the United States, and for other purposes,' do hereby certify that the amendment aforesaid has become valid, to all intents and purposes, as a part of the Constitution of the United States.

"In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

"Done at the City of Washington, this eighteenth day of December, in the year of our Lord one thousand
[L. S.] eight hundred and sixty-five, and of the Independence of the United States of America the ninetieth.

"WILLIAM H. SEWARD,
"*Secretary of State.*"

Proclamation of President Lincoln, April 11, 1865, demanding reciprocity in treatment of war vessels, and ending as follows: "The United States, whatever claim or pretence may have existed heretofore, *are now, at* least, *en-*

titled to claim and concede *an entire* and friendly *equality of rights* and hospitalities with all maritime nations."

JOINT RESOLUTION restoring Tennessee to her relations to the Union.

"Whereas in the year eighteen hundred and sixty-one the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State, in pursuance of an act of Congress. here declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the 21st day of February, eighteen hundred and sixty-five, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession and debts contracted under the same were declared void; and whereas a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the Thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty: Therefore,

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Tennessee is hereby restored to her former proper political relations to the Union, and is again entitled to be represented by Senators and Representatives in Congress."

Approved July 24, 1866.

A Joint Resolution, June 16, 1866, (No. 49,) making eligible to admission in the Military Academy of any person who has served honorably and faithfully not less than one year as an officer or enlisted man in the army of the United States, either as a volunteer or in the regular service, in the

late war for the suppression of the rebellion, and who possesses the other qualifications prescribed by law, shall be eligible to appointment.

(No. 46.)—JOINT RESOLUTION of March 2, 1867, prohibiting payment by any officer of the Government to any person not known to have been opposed to the Rebellion and in favor of its suppression.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until otherwise ordered, it shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the thirtieth day of April, A. D. eighteen hundred and sixty-one, in favor of any person who promoted, encouraged, or in any manner sustained the *late rebellion,* &c.

(No. 32.)—A RESOLUTION OF THANKS.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, "That it is *the duty and privilege of Congress to express the gratitude of the nation to the officers, soldiers, and seamen* of the United States, by whose valor and endurance, on the land and on the sea, *the rebellion has been crushed,* and its pride and power have been humbled, by whose fidelity to the cause of freedom the government of the people has been preserved and maintained, and by whose orderly *return from the fire and blood of civil war to the peaceful pursuits of private life,* the exalting and ennobling influence of free institutions upon a nation has been so signally manifested to the world."

Approved May 3d, 1866.

An act to change the place of holding the Circuit and District Courts of the United States in the District of West Tennessee, and for other purposes. Approved January 26, 1864.

An act to regulate the time, and fix the place for holding the Circuit Court of the United States in this District, and for other purposes. Approved May 22, 1866.

An act to fix the number of the Judges of the Supreme Court of the United States, and to change certain Judicial Circuits. Approved July 23, 1866.

An act for changing the time of holding the Circuit Court for the District of Virginia. Approved February 25, 1863.

An act to change and define the boundaries of the Eastern and Western Judicial Districts of Virginia, &c. Approved June 11, 1864.

See also Joint Resolution of 1866, 1st Sess., 39th Cong., Nos. 28, 84, 91, 93, 102, and Laws, Vol. 12, 505, and private Act of April 10, 1866, ib. 36, and the Proclamations of October 28, 1865, April 2, 1866, August 20, 1866, and October 8, 1866.

Reference made to State of Virginia, 12 U. S. Stat., 537.

Reference made to State of West Virginia, 12 U. S. Stat., 633, 634.

Existing insurrection and rebellion, 12 U. S. Stat., 281.

Present insurrection, 12 U. S. Stat., 319.

"Suppression of the rebellion and the future defence of this Government," (No. 10,) 12 U. S. Stat., 613. Feb. 22, 1862.

"Present rebellion," 12 U. S. Stat., 638, 1863.

Present rebellion, 12 U. S. Stat., 744, 1863.

Present rebellion, 12 U. S. Stat., 755, 756, 599.

"Within any of the States declared in insurrection," 12 U. S. Stat., 820.

"After the suppression of the rebellion," 12 U. S. Stat., 820.

"In suppressing insurrection," 12 U. S. Stat., 600.

Whereas an insurrection against the Government of the United States has broken out in the States of South Carolina, Georgia * * and the laws of the United States for the collection of the revenue cannot be effectually executed therein * *

And whereas a combination of persons, engaged in such insurrection, has threatened to grant pretended letters of marque * *

Procl. by President Lincoln, No. 4, April 19, 1861.

Whereas existing exigences demand immediate and adequate measures for the protection of the National Constitution and the preservation of the National Union by the suppression of the *insurrectionary combinations* * *

Procl. by President Lincoln, No. 6, May 3, 1861.

Whereas an *insurrection* exists in the State of Florida *

Procl. by President Lincoln, No. 7, May 10, 1861.

CHAP. XXVIII.—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the sum of $2,000,000 be, and the same is

hereby, appropriated out of any money in the Treasury not otherwise appropriated, to be expended, under the direction of the President of the United States, in supplying and defraying the expenses of transporting and delivering such arms and munitions of war as in his judgment may be expedient and proper to place in the hands of *any of the loyal citizens residing in any of the States of which the inhabitants are in rebellion* against the Government of the United States, or in which rebellion is or may be threatened, and likewise for defraying such expenses as may be properly incurred in organizing and sustaining, while so organized, any of said citizens into companies, battalions, regiments, or otherwise, for their own protection against domestic violence, insurrection, invasion, or rebellion.

July 31, 1861. 12 U. S. Stat., 283.

SEC. 52. *And be it further enacted*, That, *should any of the people of any of the States* or Territories of the United States or the District of Columbia *be in actual rebellion* against the authority of the Government of the United States at the time this act goes into operation, so that the laws of the United States cannot be executed therein, it shall be the duty of the President; and * * * *

12 U. S. Stat., 311. Aug. 5, 1861.

Whereas, on the 15th day of April, 1861, the President of the United States, in view of *an insurrection* against the laws, Constitution, and Government, * * did call forth the militia to *surpress said insurrection:*

* Now, therefore, I, Abraham Lincoln, President, * * do hereby declare that the inhabitants of the said States of Georgia * * are in a *state of insurrection* against the United States * * until such *insurrection* shall cease or has been surpressed. * *

Procl. by President Lincoln, No. 9, Aug. 16, 1861.

* Now, therefore, be it known that I, Abraham Lincoln, * do hereby declare and proclaim that the States of South

Carolina, Florida, Georgia, * are *now in insurrection and rebellion.* *

Proel. by President Lincoln, No. 14, July 1, 1862.

SEC. 11. *And be it further enacted,* That the President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion. * *

12 U. S. Stat., 592. July 17, 1862.

SEC. 2. *And be it further enacted,* That on or before the 1st day of July next, the President, by his proclamation, shall declare in what States and parts of States *said insurrection* exists: and thereupon * *

12 U. S. Stat., 422. June, 1862.

* do hereby proclaim to and warn all persons within the contemplation * to cease participating in aiding, countenancing, or abetting the *existing rebellion* or any rebellion against the Government of the United States. *

Proel. by President Lincoln, No. 15, July 25, 1862.

No. 11.—Whereas, Miss Clara Barton has, *during the late war of the rebellion,* expended from her own resources large sums of money. * * *

14 U. S. Stat., 350. March 10, 1866.

No. 12.—*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That *Congress hereby recognizes the transfer of the counties of Berkeley and Jefferson from the State of Virginia* to West Virginia, and *consents thereto.*

14 U. S. Stat., 350. March 10, 1866.

SEC. 3. *And be it further enacted,* That the Board of Managers shall be composed of the President * * * * together with nine other citizens of the United States, not members of Congress; no two of whom shall be residents of the same State, but who shall all be residents of States which furnished organized bodies of soldiers to aid in *the late war for the suppression of the rebellion,* (no person be-

ing ever eligible who ever gave aid or countenance to the rebellion,) to be selected by joint resolution of the Senate.

* * * * * * *

SEC. 7. *And be it further enacted,* That the following persons only shall be entitled to the benefits of the asylum, and may be admitted thereto, upon the recommendation of three of the Board of Managers, namely: All *officers and soldiers who served in the late war* for the suppression of the rebellion, and not provided for by existing laws, who have been or may be disabled by wounds received or sickness contracted in the line of their duty. * * *

Chap. XXI, Sess. 1, March 21, 1866, XXXIX Cong., Vol. XIV, Stat. at Large, p. 58.

PRESIDENT'S PROCLAMATION, April 2, 1866.

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare, that *the insurrection* which heretofore existed in the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida, *is at an end, and is henceforth to be so regarded.*"

June 8, 1866.—SEC. 2. *And be it further enacted,* That no person, who has served in any capacity in the military or naval service of the so-called Confederate States *during the late rebellion,* shall hereafter receive an appointment as a cadet at the Military or Naval Academy.

June 8, 1866, Chap. CX, Sess. 1, XXXIX Cong., Vol. XIV, Stat. at Large, p. 59.

SEC. 3. *And be it further enacted,* That said Corporation shall have power to provide a home for, and to support and educate the destitute orphans of *soldiers or sailors who have died in the late war* in behalf of the Union of these States, from whatever State or Territory they may have entered the national service, or their orphans may apply. * * *

Chap. CCXLIX, July 25, 1866. 14 U. S. Stat., 247.

CHAP. CCXLVIII. * * * Also the claim of the

State of Iowa for repayment of certain moneys paid by said State in raising, arming, equipping, paying, and subsisting certain troops of the State maintained by the State on the Southern and Northwestern borders thereof *during the late rebellion*, for the purpose of defending the State against attacks by bushwhackers and Indians. * * *

Sess. 1, July 25, 1866, XXXIX Cong., vol. XIV Stat. at Large, p. 247.

SEC. 5. *And be it further enacted,* That the appointment to be made from among volunteer officers and soldiers under the provisions of this act shall be distributed among the States, Territories, and District of Columbia, in proportion to the number of troops furnished by them respectively to the service of the United States *during the late war*, reduced to an average of three years' term of service: Provided * * *

Vol. XIV, U. S. Stat., 332. July 28, 1866.

SEC. 21. * * * Shall be selected from volunteer officers or soldiers who have performed meritorious *service in the army* of the United States *during the late rebellion.*

14 U. S. Stat., p. 335. July 28, 1866.

SEC. 28. *And be it further enacted,* That nothing in this act shall be construed to authorize or permit the appointment to any position or office in the army of the United States of any person who has served in any capacity in the military, naval, or civil service of the so-called Confederate States, or of *either of the States in insurrection during the late rebellion:* but any such appointment shall be illegal and void.

14 U. S. Stat., p. 336. July 28, 1866.

SEC. 3. *And be it further enacted,* That the proper accounting officers of the treasury be, and they are hereby, authorized, in the settlement of the accounts of the disbursing officers of the navy and marine corps, to allow, subject to the approval of the Secretary of the Navy, such credits for

losses of property and funds as have *occurred during the late rebellion*, and as shall occur hereafter, and * * *

14 U. S. Stat., p. 345. July 28, 1866.

(No. 102) * *; and whereas *since the surrender of the insurrectionary armies, and the disbanding and return of the Federal soldiers to their homes*, said tax is being, with manifest hardships, assessed and collected of them in many parts of the country: therefore * * * * * *

14 U. S. Stat., 371. July 28, 1866.

PRESIDENT'S PROCLAMATION, AUGUST 20, 1866.

"Now, therefore, I, Andrew Johnson, President of the United States, do hereby proclaim and declare that *the insurrection* which heretofore existed in the State of Texas *is at an end.*"

OCT. 8, 1866.—National Thanksgiving Proclamation.

* * * * * * * *

The *civil war* that *so recently closed* among us has not been anywhere re-opened. * * * * *

JAN. 8, 1867, p. 375.—Chap. VI., Sess. II, 39th Congress.—AN ACT to regulate the elective franchise in the District of Columbia.

* * * * * each and every male person, excepting paupers and persons under guardianship, of the age of twenty-one years and upwards, who has not been convicted of any infamous crime or offence, and *excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, &c.* * * * *

MARCH 2, 1867, p. 571.—39th Congress, Sess. 2, Resolution 46.— * * * * "It shall be unlawful for any officer of the United States Government to pay any account, claim, or demand against said Government, which accrued or existed prior to the thirteenth day of April, A. D. 1861, in favor of *any person who promoted* or encouraged, or in any manner sustained *the late rebellion.*"

MARCH 2, 1867.—39th Congress, Sess. 2, Chap. 170, sec. 5.—"That it shall be the duty of the officers of the army and

navy and of the Freedmen's Bureau to prohibit and prevent whipping or maiming of the person as a punishment for any crime, misdemeanor, or offence, by any pretended civil or military authority *in any State lately in rebellion*, until the civil government of such State shall have been restored and shall have been recognized by the Congress of the United States."

March 2, 1867, p. 422.—Chap. CXLV.—AN ACT to provide for a temporary increase of the pay of officers in the army of the United States, and for other purposes.

SEC. 2. *And be it further enacted*, That section 1 of the act entitled "An act to increase the pay of soldiers in the United States Army, and for other purposes," approved June twenty, eighteen hundred and sixty four, be ,and the same is hereby, continued in full force and effect for three years from and after *the close of the rebellion, as announced by the President of the United States by proclamation bearing date the twentieth day of August, eighteen hundred and sixty-six.*

March 2, 1867.—Chap. CLV, p. 432.—An act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders, in the suppression of the late rebellion against the United States.

Be it enacted, &c., That *all* acts, *proclamations*, and orders *of the President of the United States*, or acts done by his authority, or approved *after the fourth day of March*, (*A. D.* 1861,) *and before the first day of July*, (*A. D.* 1866,) *respecting martial law, military trials by Court martial or military commissions*, or the arrest, imprisonment, or trial of persons charged with participation in the *late rebellion* against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice * * * * * are hereby approved in all respects, &c., &c.

MEM.—The foregoing pages, from 53 to 59, are to be added to the Appendix of Mr. Field's Brief in Ex Parte McCardle.