Supreme Court of the United States.

DECEMBER TERM, 1868.

No. 223.

Ex-parte,

WILLIAM H. McCARDLE,

Appellant.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR RESPONDENTS.

In November, 1867, the appellant filed his petition in the Circuit Court, for the Southern District of Mississippi, alleging that he was illegally restrained of his liberty, by Gen. Gillem or Gen. Ord, or both; and prayed for a writ of *habeas corpus*, to be directed to the said officers. The writ was accordingly issued, and, in pursuance thereof, the appellant was produced in Court, and a full return made, setting forth the cause of the imprisonment. The Court decided, that the return was sufficient in law, and ordered that the prisoner be remanded to custody. From this judgment, an appeal was taken to this Court, under the provisions of the act of February 5, 1867. The appeal came on to be heard, and was argued by counsel, on the 2d, 3d, 4th and 9th days of March, 1868. But no judgment was rendered in the cause.

On the 27th day of March, 1868, an act of Congress was finally passed, and became a law, repealing so much of the act of February 5, 1867, as authorized appeals in cases of this character. The second section of said act is in the words following:

"SEC. 2. *And be it further enacted*, That so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An act to amend an act to establish the Judicial Courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine, as authorizes an appeal from the judgment of the Circuit Court, to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals, which have been or may hereafter be taken, be and the same is hereby repealed."

The question arising now, for consideration, is, whether or not, this Court has legal authority to determine the said appeal, notwithstanding the said act of Congress.

The appellate jurisdiction of this Court is qualified. It can exercise no appellate jurisdiction in any case, unless such jurisdiction is conferred upon it, by an act of Congress; and a rule is prescribed, to regulate the proceedings therein.—(*Wiscart v. Dauchy*, 3 Dal., 327; *Barry v. Marcien*, 5 How., 118.)

The Constitution of the United States, gives to Congress the power to "except" any or all of the cases, mentioned in the jurisdictional clause of that instrument, from the appellate jurisdiction of the Supreme Court.—(Art. III, sec. 2.) It was clearly the intention of Congress, by this act, to so "except" all cases of this kind, whether pending, or thereafter to be brought.

This Court never had appellate jurisdiction in such cases, until such jurisdiction was authorized by the act of 5th February, 1867. That act, so far as it confers authority to determine appeals, either pending then, or to be brought subsequently, has been repealed. When an act of Congress is repealed, it must be considered the same as if it had never been passed, except such parts as

are saved by the repealing statute.—(*Surtees v. Ellison*, 9 Barn. & Cress., 730; *Butler v. Palmer*, 1 Hill, 324.)

When the jurisdiction of a Court to determine a case, or a class of cases, depends upon a statute, and the statute is repealed, the jurisdiction ceases obsolutely. If any cause be pending at the time of such repeal, it falls.—(*Rex v. Justices of London*, 3 Burrow, 1456; *Norris v. Crocker*, 13 How., 429; *Ins. Co., v. Ritchie*, 5 Wallace, 541; *Gale v. Wells*, 7 How., Pr. Reps., N. Y. Court of Appeals; *Hollinsworth v. Virginia*, 3 Dal., 378.)

ENOCH TOTTEN,
Counsel for Respondents.