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ART. I.—*Sixth Biennial Report of the Superintendent of Public Instruction of the State of Illinois.* 1865–1866.

The question between a religious and a secular education, so long and so much discussed in Great Britain, has been little considered in the United States. It is there a matter of dispute, whether or not, in a course of education which derives its support from the State, the received truths of Christianity, shall be recognised as a science, and be impressed upon the youthful mind along with the other elements of human knowledge. The subject is still one of lively controversy. It has involved and delayed the establishment of a system of common schools in the kingdom, to the necessity for which all have long since agreed. One party resists provisions for instruction at the public expense, unless the Christian religion is made specially one of its objects, while the other side insists at once upon the schools, and that they shall not be religious in their direct teachings or tendencies. Secular education is one of the demands made upon the government by the somewhat discordant party now calling itself *Liberal*, and led by John Bright.

It is obvious that questions upon the general subject arising here are not likely to be identical with those in Great Britain. For there it is, whether or not the child shall be educated in the faith of the Established Church, as the only depository of religious truth: here it must be, if in the public school he shall be educated to any faith in Christianity. It must here take the form

ART. III.— *The Congressional Globe from* 1860 *to* 1868. Washington City.

The reconstruction of the Union among the States of this Union and the restoration of the Constitution to vital operation over them, is the subject of absorbing interest to the people of this country, and engages attention among the political and commercial classes of Europe. In the report of the anti-slavery society of Massachusetts for the year 1852, it is said, 'the abolition of slavery presupposes a revolution. For it will radically overthrow and reconstruct the institutions of the nation. It may be a revolution fought out on Marston Moors, or Bunker Hill, or its victories may be won on the logomachic fields of parliamentary debate and decided by aye and no, and not by bayonet and sabre. . . . . But come in what shape it may, it will be a revolution.' Prophets at divers times and places have spoken under a real or fancied inspiration from supernatural authority, and others have prophesied events of which they had predetermined to accomplish the fulfilment.

The Massachusetts school of abolitionists belong to the latter class of prophets. This society was organized in 1832 with a constitution 'to effect the abolition of slavery in the United States; to improve the character and condition of free people of color; to inform and correct public opinion in relation to their situation and rights, and to obtain for them equal civil and political rights and privileges with the whites.' This was the revolution they proposed, and eminent men of their school declared at a later day, 'let it come—if in blood, let it come.' They did not disguise the fact that their purpose was to make a revolution, and their method of proceeding adapted to that purpose with studied care. 'It is the men', they said, 'who first discern the abuses, who fan the discontents, who foment the dissatisfactions, and not those who become prominent when it first takes to itself form and proportion, who are the true movers of the revolution.'

It is precisely this necessary part in the late revolution, which the abolitionists of the American Anti-Slavery Society performed. Their method of proceeding may be described by the single word,

agitation. Recognising the fact, that plausible theories, however shallow, usually become, by incessant agitation, popular passions, their grand object was to agitate, and agitate, till the Constitution should be shattered, and the institutions of the South it was designed to protect should be overthrown. At an early day, they saw that 'everything the Southern members of Congress said only confirmed us in the persuasion that we must persist until we get the subject fully before Congress. No measure will be more effectual to diffuse information and enkindle feeling and thought throughout the land.' Again, they said, 'we think that the occasional election of a representative or senator of consequence, not for anything they can do for the overthrow of slavery, in Congress, but because of the agitation of the subject which the strifes attending their elections, or their faint and ineffectual struggles on the floor create in the country.' They comprehended that their success was attainable only by an overthrow of the Constitution of the United States. They denounced the Constitution as 'a pro-slavery compact.' They exposed, with elaborate care, the nature, extent, and power of the guaranties that the Constitution afforded to slavery, and employed this argument, as a motive for overturning it and destroying the bonds which united the people of one section of the Union to those of the other. Nay, they denounced the Constitution 'as a league with death and an agreement with Hell.' 'They saw', as they declared, 'that they could not execute the pro-slavery commands of the Constitution, and as honest men they could not swear to perform them with the deliberate purpose of breaking their oaths. And what they might not do themselves, they clearly could not appoint others to do for them. The only political action that lay open to them was to labor outside of the Constitution and not within it, for its overthrow. . . . . 'To convince the people that their form of government was the greatest enemy of their safety, their prosperity and their honor: that all their material prosperity and local advantages were in spite, not because of their confederate union; and to persuade them, openly, to repudiate the compromise by which they had delivered themselves up bound in political servitude to the tender mercies of their enemies, and to erect a new government free from the disturbing and disgraceful element

of slavery, in which the experiment of self-government can be fairly tried.' In their mouths, the words 'Constitution and Union' were 'an execration, a hissing, a taunt, an astonishment, a reproach.' . . . . 'We have disenchanted the mind of the people in a great measure, of the divinity of their parchment idol. We have taught men to calculate the value of the Union. The idea that loyalty and obedience are due to it is fast becoming ridiculous and contemptible. It is beginning to be looked upon as a matter of business — a partnership in trade.'

All their practical duties consisted 'in disclaiming all connection with a constitution of government instituted and used mainly for the perpetuation of slavery; of demanding an instant dissolution of the Union which binds freedom to slavery in the bonds of an unhallowed marriage; of proclaiming as one grand principle of civil and religious fellowship and communion,—"no Union with slaveholders."' The pulpit, the press, the literature of the Northern States, in the progress of the agitation were combined, more or less intimately, with these agitators. The republican party was formed on the basis of the anti-slavery dogmas; and churches, political and ecclesiastical bodies, occasional meetings for political consultations, and social circles, became involved in the vortex of this tumultuous agitation. The nomination of Mr. Lincoln on his exposition at the Cooper Institute; the adhesion of Gov. Seward to the Massachusetts school; the Wide-awake processions, the political tracts circulated by millions in the political campaign of 1860, replete with the doctrines of this party; the open rejection of the Constitution by the liberty bills in a portion of the States; created a widely diffused opinion in the Southern States that they could enjoy no honorable fellowship in the existing Union; that their self-respect, their domestic tranquillity, their security in the enjoyment of self-government, alike demanded that they should remain no longer members of a Union in which they were abhorred, and their Constitutional rights treated with contempt.

There was also a widely diffused opposition to this sentiment, and to the political action which it proposed. There was no doubt in the minds of thoughtful and considerate men, whether there was sufficient evidence of the implacable hostility of a majority

of the people of the Northern States, to the existing Constitution and Union, and whether they were prepared to radically overthrow them, for the desperate chances of a reconstruction; whether it was certainly true that the machinery of the government would be perverted to the destruction of its members over which the government presided. These were sincerely anxious for an adjustment. Well directed efforts were made to stay the plague, but all were in vain. Secession ordinances were passed in six States in the winter of 1860–61 and flagrant war immediately followed.

It is not perhaps too early to consider of the nature, operation and results of such an agitation as we have described. J. S. Mill, in one of his publications, states as a condition of permanent political society, the existence in some form or other of the feeling of allegiance or loyalty. This feeling may vary in its objects, and is not confined to any particular form of government: but whether in a democracy, or in a monarchy, its essence is always the same, viz., that there be in the constitution of the state *something* which is settled, something permanent, and not to be called in question; something which by general agreement has a right to be when it is; and to be secure against disturbance whatever else may change. This feeling may attach itself, as among the Jews (and indeed in most of the commonwealths of antiquity), to a common god or gods; the protectors and guardians of the State. Or it may attach itself to certain persons, who are deemed to be, whether by divine appointment or by long prescription, or by the general recognition of their superior capacity and worthiness, the rightful guides and guardians of the rest; or it may attach itself to laws, or to ancient liberties or ordinances; to the whole or some part of the political, or even the domestic, institutions of the State. But in all societies which have had a durable existence, there has been some fixed point; something which men agreed in holding sacred; which it might or might not be lawful to contest in theory, but which no one could hope or fear to see shaken in practice; which, in short, (except during some temporary crisis,) was in the common estimation placed above discussion. A State never is, nor until mankind are really improved, can hope to be, for

any long time exempt from internal dissension; for there neither is, nor has ever been any state of society in which collisions did not occur between the immediate interests and passions of powerful sections. What enables it, therefore, to weather these storms, and to pass through turbulent times, without any permanent weakening of the ties that hold it together? It is this: that however important the interests about which men fall out, the conflict does not affect the fundamental principles of social union, which happen to exist; nor threaten large portions of the community with the subversion of that on which they build their calculations, and with which their hopes and aims have become identified. But when the questioning of these fundamental principles is, not an occasional disease, but the habitual condition of the body politic; and when all the violent animosities are called forth which spring naturally from such a situation, the State is virtually in a position of civil war; and can never long remain from it in act and fact. This was manifest in the changes made in the constitutions of Athens and Rome; in the intestine commotions that ended in the overthrow of the Stuarts in England; in the revolution in France and in the English colonies in America. The Constitution of the United States embodied the conditions of political union among the States, and gave them a nationality. Their social and domestic institutions were reserved for State control, and were independent of the federal management. Its provisions are the result of the accumulated experience of the mother country and the colonial, revolutionary and confederate existence of the States themselves. Their wisest statesmen participated in making it. The peoples of the respective States adopted it. It had been administered with wisdom and forecast, and prosperity had followed from that administration. Upon its permanence, the submission of all the people and States to it, the calculations and aims of the peoples were founded.

When this Constitution became the object of incendiary and revolutionary attack; when communities disobeyed its mandates, repudiated its conditions, denied the binding force of its compacts, disputed its authority, legislated to defeat the laws made under it, and perverted its form and spirit for sectional and party

purposes; it was obvious that the animosities engendered would lead to civil war.

We see that the authors of this agitation contemplated revolution. The people of the whole Union seem to have become aroused to the danger in which their institutions are placed. The conqueror scarcely feels more rest than the conquered. There is a sense of insecurity, a sentiment of public danger, a dread of the future, a gloomy and sorrowful retrospect of the past, a craving desire for the replacing of ancient landmarks, that betoken something more than an apprehension that their institutions have been radically overthrown, and that reconstruction does not promise the ancient order, tranquillity, and concord. The civil war in act and fact commenced with the attack on Fort Sumter. It has appeared that the expedition for the supply of that fort was designed to provoke a collision, supposed to be inevitable. The purpose was to invite the first blow. The information of the calamitous issue was received in Washington City the morning of Sunday, 14th April, 1861. It covered the population with gloom and a boding sense of aggravated evils. There was only one consoling fact: no lives had been lost. The able, eloquent, and estimable minister who officiated at the church where the President attended—the same who, that day four years after, attended his dying bed, and performed the last offices of his church at his grave—spoke of this with almost an inspired power. He deprecated an appeal to the sword. God, in His merciful providence, had afforded another opportunity for counsel, for pause, for appeal to Him for assistance, before letting loose upon the land the direst scourge which He permits to visit a people—civil war. He prayed that the counsels might be sanctified and blessed. The following morning, at the same hour that the information was given of the death of the murdered President, four years after, the proclamation of the President calling for troops 'to redress wrongs long enough endured' was spread over the land. At short intervals, proclamations for the blockade of the ports from the Potomac to the Rio Grande, the enlistment of forces in the army and navy, and orders for the enforcement of martial law and the suspension of *Habeas Corpus*, in some places, were issued.

These acts were a declaration of war. The foremost lawyer of the nation—the highest in official station—and whose learning, purity, long experience, and great moral and intellectual worth, imparted additional dignity and honor to his high office, expressed that opinion to an associate. The jurists of Great Britain and France held the same opinion, and the Government acted upon it. It is our purpose to review some of the measures of administration and legislation during the war, and the corresponding measures of reconstruction. With the passions that led to the war we had no participation. We regarded peace as the great and indispensable condition to the enjoyment of any other blessing. The Constitution of the country was dear to us, and any Union under it, and according to it, we regard as an invaluable boon.

The first of these measures which cannot have too much notice, are those that relate to the liberty of the citizen as impaired by the suspension of the writ of *Habeas Corpus*, and the proclamations or maintenance of martial law. The privilege of habeas corpus is a personal privilege. It is a remedy to which every citizen is entitled in time of peace, as an absolute right, and in time of war, or insurrection, except when its suspension is regarded as necessary to the public safety. The allowance of the writ is a judicial act, and the judgment to be made upon the return to the writ is a judgment to be made by a judicial officer. The judicial power is in the hands of Congress to be vested in courts, and not elsewhere, as enacted by the Constitution, or under its authority by Congress. That branch of judicial power, which consists in the allowance of this writ, cannot be withheld, nor can its exercise be suspended, unless in a temporary crisis affecting the public safety. It follows, almost irresistibly, from a statement of the conditions, that Congress alone can allow the suspension of a law. The power to make war belongs to Congress; and also the power to pass rules for the government of the army and navy. The judicial power, except in a few instances, is distributed by legislation. The authority of the courts emanates from law. The President must take care to see them faithfully executed. The courts are not the courts of the President. He cannot direct a single order or proceeding in

them, nor remove a single officer belonging to them. They are independent. They are in no case permitted to look to him for authority, or guidance, in the exercise of authority. The Constitution and the laws are the groundwork of every order, proceeding, and rule, of the courts. The King of Great Britain did not claim a power to arrest the operation of this writ, or the judgment of the court upon its return. His claim was of a power to arrest through the warrant of his Privy Council, and, under the privy seal, persons without specifying a charge in the warrant and without information on oath, and that the courts at Westminster could not inquire for a cause, or withdraw the prisoner from the operation of the warrant. The Crown writers contended, 'that the law of England had always an extraordinary and expeditious court to conserve the peace of the realm, as well as an ordinary form of prosecution when the bleeding State required not a speedy remedy; and that he exerted this extraordinary jurisdiction in that court by privy seal or subpœna and proceeding thereon in the ancient form.' They said, 'that the King, who is the fountain of justice, must necessarily by the law have power to execute justice himself, which he doth most properly in this court.' This was the claim as stated by Charles I. in his letter to the Lords, pending the discussions on the Petition of Right in the British Parliament, in what relates to the liberty of the subject. He says, 'we find it still insisted on that in no case whatsoever, should it never so nearly concern matters of state and government, we or our privy council have no power to commit any man without cause shewed. Whereas it often happens that should the cause be showed the service itself would thereby be destroyed and defeated, and the alleged cause must be such as may be determined by our judges at Westminster in a legal and ordinary way of justice; whereas the court may be such whereof the judges have no capacity of judicature, nor rules of law to direct and guide their judgment in cases of that transcendent nature; which happens so often, the very intermitting the constant rule of government for so many ages within this realm, would soon dissolve the very foundation and frame of our monarchy. Wherefore as to our Commons we have made fair propositions, which might equally preserve

the just liberty of the subject. So, my Lords, we have thought good to let you know that without the overthrow of Sovereignty, we cannot suffer this power to be impeached. The substance of this claim is that there are cases for the arrest and detention of persons which cannot be brought with any rule of law, nor be supported by the evidence that the law prescribes. The jurisdiction in such cases resides in the King sitting in his court of privy council. The acts of that court in such cases cannot be revised or considered of by the courts of law.'

What was the answer? — By Magna Charta and a series of great statutes for the protection of the liberty of the subject, it is declared that the liberty and property of all the subjects of the realm of England shall be protected from invasion, except in due course of legal proceeding. These statutes are universal and have no exceptions. The claim made by your majesty is not admissible. The arrests made and the failure of the courts to release the parties on *Habeas Corpus* are contrary to the law of England, and we pray of your majesty 'that he should declare that the awards, doings, and proceedings to the prejudice of the people, shall not be drawn hereafter into consequence or example.' The sequel is well known. The King dissolved the parliament, and undertook for twelve years to carry on government without one. One was at last assembled; and among its earliest acts it established these extraordinary courts of Privy Council and High Commission, and forbid the erection of any court with any such jurisdiction as they had exercised. These measures form the basis of the Constitution of the United States. The Convention that formed the Constitution, did not propose a Bill of Rights. The guaranty of the privilege of *Habeas Corpus* is one of the very few the original instrument contains. This was designed as a guaranty to personal liberty, and as a protection against the government of the United States in all of its departments, in respect to personal liberty, except in the extreme case of danger to the public safety. But the people refused to receive the Constitution in that form.

It was adopted with the positive understanding, that the guaranties contained in the amendments should be adopted in that form. These provided against arbitrary seizures and searches;

for accusation by a grand jury and speedy and public trial before a jury of the vicinage; and that life, liberty, and property were under the protection of law, and could not be affected but by the process it prescribed.

We are unable to find the least sanction for the claim of the President to suspend the jurisdiction of the courts, or the privileges of the citizen, by his order to arrest. The suspension of the privilege is claimed to be an executive power. It is admitted that the British analogies oppose this. The contests relative to the liberty of the subject show that the King's claim was repudiated. The first article of the bill of rights, adopted in the time of William and Mary, declares 'that the pretended power of suspending of laws, or the execution of laws by regal authority, without consent of parliament, is illegal.'

The great statutes of the parliament of England and Great Britain were claimed by our ancestors as their heritage. It was for a violation of these rights by the king, that they rebelled and established their independence. The rights, as declared by those statutes, are on the frontispiece of every State constitution. They are embodied in the Federal Constitution. To appeal to any other analogy for the interpretation of these instruments would be fallacious, and in most instances simply frivolous. How stands the matter in France? The civilians affirm that arbitrary arrests were forbidden by the constitution of that monarchy, as is attested by the monuments of its legislature. But that these liberties were not preserved, and in the time of Louis XV., —when prostitutes were ministers—scandalous abuses occurred. Agents of government, in the darkness of night snatched citizens from their homes and families, and removed them to some remote fortress or prison, secluded from intercourse, concealed from observation, where they were frequently detained till the memory of them was lost. But the sovereign courts and parliaments exclaimed against the tyranny and injustice of such acts. The manly expostulation of the President Judge Lamoignon de Malesherbes to the King, is not inapplicable, in view of the principles and practice we are considering.

The legality and propriety of the *lettres de cachet* were defended upon exactly the same grounds as Charles I. de-

fended his arrests through the Privy Council, and the arrests during the war were defended by the State and the War departments. Of the necessity of the case and the danger of exposing State secrets, Lamoignon said, 'If those who secure such orders from your majesty can escape the legitimate actions of the oppressed by such subterfuges, under what law shall we live when such orders have so multiplied and have been granted for so many different reasons, and personal considerations?'

'At one time they were granted for reasons of State; then for reasons affecting the honor of great families, apprehensive of discredit from one of its members; afterwards as punishment for insults to the nobility, and for indiscreet speeches of which there was no proof except from a delator, always a suspected witness. Without noticing all the cases, it is notorious that they have been employed in the concerns of private persons, of obscure condition, and having no reference to the public order. That such orders could be procured by subordinate officers and were under the control of their clerks. It results, sire, that no citizen in your kingdom has assurance that his liberty will not be sacrificed to private vengeance. For no person is so great as to be sheltered from the hatred of a minister, nor so obscure as not to be worthy of the anger of a clerk to a farmer-general.'

'The Constitutional Assembly of France, in 1791, declared in their Constitution, 'that arrests shall not be made except in the cases provided by law and in the manner it prescribes.' This clause is repeated in several of the constitutions that succeeded, and in the charters of the kings. Laws exist for the punishment of arbitrary arrests and prolonged detention without accusation, as penal offences. An eloquent writer of France says, 'The violence of the conquest, the darkness of barbarism, the vexations of the feudal régime, the caprices of royalty, the pretexts for the public safety, have in turns stifled in France individual rights. But we have all the time seen by the side of despotism the spirit of liberty, and enlightened courage in a struggle with brutal oppression. Thanks to the jurisconsults, to philosophers, and dearly-bought experience, our century proclaims as the end and condition of public order, the appreciation of laws and institutions.' Under the French laws and consti-

tutions, personal liberty is not held at the will of Executive power, but under the dominion of law. Until now, in this land, personal liberty was deemed to be under the protection of Constitutional law, supreme and unalterable, except by the concurrence of the popular will as manifested in amendments to that instrument. Congress by their acts of the 3d March, 1863, and the 11th May, 1866, gave to an order of the President, Secretary of War, Military commander of departments, districts or places, where it operated, whether verbal or written, general or special, an absolute effect in justifying in any court, or in any prosecution, a seizure, secret arrest, and imprisonment — and the doing of the act by an officer was *prima facie* evidence of the existence of an order. The principles emanating from the War department show to what extent this mania for absolutism was carried. In a work entitled *War Powers of the Government*, issued by the commissary of legal ideas for the department (solicitor,) we find the following rations of law and logic issued under authority: 'The true principle is this: The military commander has the power in time of war to arrest and detain all persons, who, being at large, he has reasonable cause to believe will impede or endanger the military operations of the country.' The true test of liability to arrest is therefore not alone the guilt or innocence of the party; not alone the neighborhood or distance from the places when battles are impending; not alone whether he is engaged in active hostilities; but whether his being at large will tend to impede or embarrass the *bona fide* military operations in creating, organizing, and most effectually using, the military forces of the country.' 'Under these circumstances, the safety of civil liberty must rest in the honesty, integrity, and responsibility of those clothed with the high powers of administering the government.' The power to try and to punish has also been claimed and exercised. The Constitution itself, says this author, authorises court martials. These courts punish for offences different from those provided for by any criminal statute. Therefore it follows that crimes not against statute laws may be punished by law according to the Constitution, and also that arrests may be necessary to bring offenders before that tribunal.

The misfortune is, that these extravagant and unconstitutional

doctrines and assertions of power were adopted in the Bureau of Military Justice; and that 'new-minted judicatures' were invested with commissions to try citizens by what Prynne terms 'an arbitrary, summary, illegal and martial proceeding diametrically contrary to the fundamental laws, customs, great charters, and statutes, and the inherent liberty of the subject,' before which there was a course of proceeding offensive to the most lax ideas of judicial proceeding; and at variance with the rights the Constitution of the country secures to all persons accused, without any exception, who do not belong to the army or the navy. The Earl of Strafford, as minister of Charles I., undertook to carry through the scheme known in his correspondence as *Thorough*, by the employment of military commissions for the trial of crimes of a civil nature. In the Petition of Right, these are condemned in the sternest language of rebuke. Strafford was himself attainted and beheaded. One of the principal articles of impeachment against him, was the trial and condemnation of Lord Mount Morris in Ireland by the judgment of a court martial.

No use has ever been made of such a court in England, and a case we shall presently state will show the fate they met with in Ireland. The aversion to them has long been felt in France. Montaigne, grand master of the household of Charles VI., was tried, tortured and executed by commissioners. He was buried in the church of the Celestines, and when Francis I. came to see his tomb, the King said, 'this Montaigne was condemned by justice.' 'No sire,' replied the monk who guided the King, 'he was condemned by a commission.' The constitution of France, in 1848, declared: 'No man shall be removed from his rightful judges; no commissions or extraordinary tribunals can be created under any pretext, or by any denomination whatsoever.' The proceedings in the case of Theobald Wolfe Tone in Ireland, 1798, before the King's bench, are detailed in the life of Curran, prepared by Phillips. He says: 'On the morning of the 12th November, 1798, the moment the court opened, Curran advanced, leading Tone's aged father by the hand, who produced an affidavit that his son had been brought before a bench of officers, and sentenced to death. The scene at this moment passes all description — the breathless crowd — the

heart-broken old man — and, above all, the voluntary and unrivalled advocate — the real friend — misfortune's friend, who, while others held aloof, stood forward to hold the ægis of law between injustice and its victim—to be appreciated must be seen. "I do not pretend", began Curran, "that Mr. Tone is not guilty of the charge of which he is accused. I presume that the officers were honorable men. But it is stated, in this affidavit, as a solemn fact, that Mr. Tone had no commission from his majesty, and therefore no court martial could have cognisance of any crime imputed to him; while the court of King's Bench sat in the capacity of the great criminal court of the land. In times when war is raging, when man is opposed to man in the field, courts-martial might be endured. But every law authority is with me, while I stand upon the immutable foundation of the constitution that martial law and civil law are incompatible, and that the former must cease with the existence of the latter. This is not the time for arguing this question. My client must appear in court. He is cast for death this day. He may be ordered to execution while I address you. I call upon the court to support the law, and move for a *Habeas Corpus* to be directed to the Provost-Marshal of the barracks and Major Sandys to bring up the body of Tone."

Lord Chief Justice.—"Have a writ immediately prepared."

Curran.—"My client may die while the writ is preparing."

Lord Chief Justice.—"Mr. Sheriff, proceed to the barracks and acquaint the Provost Marshal, that a writ is preparing, and and to suspend the execution of Mr. Tone."

'In a short time, the Sheriff returned and thus addressed the court: "My Lord, I have been to the barracks in pursuance with your order. The Provost Marshal says he must obey Major Sandys. Major Sandys says he must obey Lord Cornwallis." At this time, Curran announced the return of Tone's father, with a message that General Craig refused to obey the writ of *Habeas Corpus.*

Lord Chief Justice.—"Mr. Sheriff, take the body of Mr. Tone into custody. Take the Provost Marshal and Major Sandys into custody, and show the order of the court to General Craig."'

It was now universally believed, that the military authorities

who had presumed to trifle with the powers of the court, would have executed Tone on the spot. Lord Kilwarden, a great constitutional Judge, was very much affected. His agitation, said Curran, was magnificent. It soon appeared that Tone, indignant at the menaced degradation, had, with a small penknife which he had managed to conceal, inflicted such a wound on his throat that he had little to fear from this world's jurisdiction. The Chief Justice, however, as a matter of precaution, ordered a writ suspending the execution. Sir John Moore, who was on duty in Ireland at the time, writes: 'This is so far fortunate as it is to stop all trials by courts martial for civil offences; and things are to revert to their former and usual channel.' This scene forcibly recals two which will fill an important place in the annals of American jurisprudence, and that reflect discredit on executive administration. The one occurred at Baltimore, in 1861, when the late illustrious and venerable Chief Justice, bending under the weight of years, but never so strong in the performance of arduous duty, presided in the case of John Merryman, in which the Constitution of the United States was openly defied by military power. This scene illustrates the grandeur that a great magistrate may display in vindicating the majesty of the Constitution and the laws, in a tribunal of justice. The other occurred in the city of Washington, when Mrs. Surratt, on the morning of her execution, applied for a *Habeas Corpus*, under circumstances in some respects similar to the case of Tone. Judicial magistracy has seldom appeared at such disadvantage. The Supreme Court of the United States, at its last session, in the opinion of the majority of the court, asserted the supremacy of the Constitution, maintained the liberties of the citizen, and fulfilled the hope and expectation of the country. Congress, however, immediately passed an act affirming the validity of these illegal and unconstitutional military tribunals, and prohibited inquiry into their operation, and now employ them as a part of regular administration in ten States of the Union; States in which the Circuit and District Courts, the courts of general jurisdiction in criminal and civil causes under the laws, have their regular sessions.

It may not be uninteresting to state the legislation and admin-

istration in the Confederate States, during this epoch, under an identical Constitution. The President of those States never assumed to suspend the issue of the writ of *Habeas Corpus* without consent of Congress. Their first act in February, 1862, allowed him, 'during the present invasion to suspend the writ of *Habeas Corpus*, in such cities, towns, and military districts, as shall in his judgment, be in such danger of attack as to require the declaration of martial law.'

In April, 1862, and October, 1862, this act was continued in operation till thirty days after the next session of Congress; was limited to arrests made by Confederate authorities for offences against the same; and he was required to cause proper officers to investigate the cases of all persons so arrested, in order that they might be discharged if improperly arrested, unless they could be tried by due course of law. It expired without renewal until February, 1864. Congress then declared that the sole power of suspending that writ was vested in that body, and defined the cases for its employment, and limited its operation till ninety days after the next session. It then expired, and was not renewed. The very last day, perhaps at the last hour of the session of that body, they rejected a bill for the suspension of that writ.

The experience of those States was, that it was not a potent instrument in the hand of the Executive authority under all the conditions of invasion by superior forces, and with resources on their part inadequate for defence.

The President in no single instance that we are aware of, ordered the arrest of any citizen for a political offence. Nor did the War Department. The Department did not interpose the statute in any case of that kind in court. It was only useful in protecting the officers of the army from the necessity of attending courts to make returns to writs procured on behalf of those desirous of eluding military service.

In no case was it interposed without inquiry into the merits of the case, and a clear judgment that the application for the writ had no meritorious foundation. The instructions to the officers appointed to examine into arrests by the military authorities, are among the captured archives. We know their contents. We

confidently assert they show a solicitude that the liberty of the citizen should not be illegally invaded; and that prompt relief should be given to those affected by the irregularities incident to military operations. The power to suspend the writ was not delegated. In some cases, it was exercised without authority by the commanders. This was reproved in general orders in August, 1862, that declared, 'military commanders have no authority to suspend the writ of *Habeas Corpus*.' Nor did the Confederate States try citizens before military tribunals. One case arose of that kind, and after investigation, it was decided that no such power existed; and the punishment awarded by the court was never carried into execution. We speak of this matter, as it came before the authorities at Richmond.

A thorough review of the administrative and legislative action of the Congress of the United States, during the war and since, in their relations to the Constitution, would require a notice of the test oaths to civil officers, members of Congress and jurors; the mutilation of the Supreme Court and of its jurisdiction in cases of personal liberty, the conditions for appearance in the courts, the Tenure of Office Act; the requirement of the consent of the Senate to a presidential order to the general of the army to perform duty elsewhere than in Washington City without his own consent. But the object of this paper is limited. Our purpose is to examine the constitutional questions that arose during the war, and which are connected with the measures of reconstruction since that event. We have referred to the fundamental principles upon which the anti-slavery agitation was commenced, and the methods of its proceeding. We are not able to determine the moral aspects of this vertigo of the country. Was it the product of the individual and solitary ambition of men discarding the Constitution of the country, and despising its institutions, its duties, its obligations, and its power, and devoting themselves to the radical overthrow of all without reference to consequences or crimes? Nor are we able to conclude that these doctrines were confined to the small circle of the Massachusetts Anti-Slavery Society, which, under a frenzied enthusiasm and tormented with a vanity bordering on madness, registered from year to year the progress of the movement and

claimed it as the result of their own action. All the Northern States, and the Western States that received their impulse from Massachusetts, submitted to it, adopted it, and communicated it to the Republican party. They cannot resist the responsibility for submitting to things which they ought to have resisted in the interests of the country and of the order of the Confederate Union. The records of this society are sad enough. They represent John Quincy Adams, Daniel Webster, and others, as tremulous and affrighted, asking for support from home for demonstrations that jeoparded the peace of the country. This agitation was a new thing in the country. There was a decay in the principles of the Constitution. Mechanical improvements had made a mighty development of material prosperity; immigration, such as the world never saw before, adulterated the ideas of the population. The press, a most potent power, became a distinct power in the State. Europe was in a condition of revolution, and the chimerical theories of socialism, communism, equality, rights of labor, necessity for new constitutions, and the rejection of old constitutions, old tribunals, old systems, old men, became current and predominant. The system of slavery was open to attack, and it was attacked. The stable order, solid constitutional ideas, conservatism, and material prosperity of the Southern States, invited assault, and they were assaulted and radically overthrown.

Slavery has not been abolished, as it was in Europe after twelve centuries of existence, during the Christian epoch, by a change in the ideas, manners, condition, wants, and misery (no feeble cause) of the States in which it existed. Nor has it been abolished after a short interval — too short an interval — of preparation, as in the British West Indies, and as proposed by the government of France under Louis Philippe in the French Antilles, with indemnity to the masters. Nor, as in Hayti, by a civil war in which the slaves became dominant; nor, as in South America, where the slaves were equal to the mass of native population.

The abolition has resulted, as a violent and abrupt consummation of a war produced by the repugnancy of the ideas, conditions, and wants of the Southern States, to the ideas, passions,

policy and resentments of a portion of the Northern society, that in the mutations of politics acquired political ascendancy. We were present in 1861 in a distinguished company, at a time when this subject oppressed all minds, and when the most prominent of all the political leaders of the anti-slavery agitation gave as a sentiment, 'Away with all parties — all platforms — all previous committals — and whatever else shall stand in the way of a restoration of the American Union.' We are not able, therefore, to say that the abolition of slavery rests merely in a tenderness of the consciences of those who most ably and effectually sustained it.

But the fact is accomplished, and the serious problem for statesmen is, to perform the task they have undertaken in producing this result.

There are in these Southern communities two distinct populations, different in race, in complexion, in degree of education, intelligence, and diversity of wants and condition.

One of these are the founders of these communities. They are descended from men who came to America as colonists, and are identified with the entire history of the country. They have contributed statesmen who have shared in the counsels of the revolution, confederation, and Union, and soldiers who have been conspicuous in its battles, and in the diplomacy that has expanded the bounds of the Union. There is not a family of any lustre in the Southern States that had not its representatives in the Confederate armies. Their institutions and principles came to them by inheritance, and they fought for them. They were aggrieved, and no candid and honorable man will say there was no cause for complaint. These States determined to secede from a Union in which they were exposed to insult, and were denied fellowship. The Southern States were defeated in the war that followed, but there was no dishonor in their defeat. A large portion of the population exhibited qualities such as entitle them to rank with the heroic populations of the earth in their most exalted state of patriotic virtue.

The other population was brought among them as slaves, and, in conformity to recognised ideas, at a time when they were of the lowest grade of humanity. They had not reached in their

own land the civilisation which asks the covering of a fig-leaf. In their domestic relations with their masters they have improved in numbers and condition. Their improvement exceeds that of the same race in Hayti, Jamaica, South America, the Isles of Spain or Denmark, or elsewhere. More of them have been emancipated by the voluntary act of masters than in all the world beside. It is said that these slaves are fit for freedom, civil and political rights; they hold offices, sit on juries, and administer penal and civil law. If this were proper — or suitable, then all the anti-slavery agitation and assertions of agitators have proceeded on a falsehood — a lie. They described them as 'the heathen of the country.' If they were suitable for what is claimed for them, the anti-slavery men are confounded. For such ability cannot be claimed for any other population that exists, except our own and the higher and educated classes of Europe; and their capacity is due exclusively to the ameliorating and benignant influence of their relations as slaves. They have had no instruction, no education, but what was acquired under that condition. But the claim for them, and the argument against their masters, are equally untrue. They are still children, entitled to kindness and care, but proper only for pupilage, control, guidance, support and instruction. To deprive them of these is to expose them to want, idleness, and crime. They have yet to learn the conditions of existence in civil society as independent members. The permanent relations of husband and wife, and of parent and child, and the duties they entail, they have yet to learn. They would not be good members of the Oneida Creek Society; for Mormonism, without the work that Gov. Young exacts, they might answer. They know nothing of the rights of property, or the obligation of contracts. Of political duties they know nothing. How should they have learned these? They have been instructed in just such things as befitted their simple, and, in general, secluded condition. The master of the plantation provided for them in health and sickness, and for the poor, the helpless, the impotent and feeble. Poor-houses, hospitals, medicines, care and attention depended upon his interest or benevolence. He was their only magistrate, and he dispensed rewards and punishments. The relation was in gene-

ral, a kindly one. Some masters, under this experience, became legislators and statesmen. Others were remiss, and the community suffered. But we are dealing with practical affairs, and facts must be stated as they exist.

Emancipation has borne hardly upon the great mass. Deprived of their accustomed relations, under delusive hopes and expectations, they have sought others. A vast number have perished in the change. We have no personal knowledge, but an admirable friend — the owner of five plantations, and a model man in all the relations of life—tells us, that more of his former slaves have died in eighteen months than in twenty-five years of their plantation life. The children generally die within a few months. Strange diseases have come among them, and unnatural practices exist. The best among them experience want. The time is not prosperous, and there is difficulty in procuring work and remuneration for work. Many of them look back with regret at their change of position. They desire freedom, but with that a home, old associations, dependence, and consideration. What, then, is the work of American statesmen? It is to continue these two populations under the same republican form of government, so that the essential conditions of social order, obedience to laws, the security of persons, respect for property, the conservation and remuneration of work, the regularity of civil transactions, and the performance of confederate obligations, in the Union of the States, can be reasonably attained. Moses, under divine inspiration, and after forty years of effort and travail, carried a nation of slaves to the promised land, as freemen. Solon composed the dissensions of Athens and established order among discordant classes. Numa Pompilius did this for the infant city of Rome. In the Roman Republic, it was a problem for two centuries, and was slowly and gradually worked out. In modern Europe, it is still unsettled. Great Britain has been working at it since the Roman invasion. In France its solution has occasioned wars that have appalled the human family. It occupies, at this time, the best intellect of the empire.

We have not seen any statement of the problem to our Congress. Its mind seems to have rushed to a single conclusion.

If these States can be reconstructed so as to vote for the re-

publican candidates for President and Vice-President at the next election, behold, the problem of reconstruction is solved.

Under this impulse, the task has been committed to Sheridan, Mower, Pope, Sickles, and Schofield, not one of whom any intelligent man in Congress would have selected to be guardian to one of his children. and some of them he would not have introduced to his family.

On the day of the evacuation of Richmond (2d April, 1865), an English gentleman of rank, who had been in Parliament, applied at the War Office for a passport to cross the lines of the Potomac. The paper was written and handed to him. He hesitated, and then asked, 'Have you any hope?' The answer was, 'Not the slightest.' 'Why, B. tells me, he does not give up yet.' To the answer, 'that that opinion did not affect the matter', he said, with emotion and sympathy, 'My God! what will become of you?' The reply was, 'That depends upon the statesmanship of the United States.' His rejoinder was (and late events has recalled it sadly to mind), 'I despair of ever seeing statesmanship in America.'

Slavery was then virtually abolished, and restoration was not possible. The repudiation of the war debts was a necessity. There were no resources for payment, and the formal act of repudiation only taught an unwholesome lesson. Proscription and additional guarantees were not required for any federal interest. Nor do we believe that any guarantees have been sought for, except against the democratic party at the North. The Southern States exhausted, impoverished, with all their conditions of social and industrial order uprooted, suffering under the bereavements, afflictions, privations, and scourges of a war, in which the tactics of Tamerlane and Gengis Khan were practiced against them, fettered by test oaths, and with troops encamped among them that were sowing disorder, had work to do, that made the contests of party a matter of supreme indifference.

They complied with every demand that the President made. They elected their best citizens to the Senate. Graham, Perry, Parsons, Sharkey, Hunt, and Burnett, were men of whom no man could feel distrust, and who were favorably known as trustworthy and conservative. But in place of receiving them, they

were not allowed to appear, and another scheme of reconstruction was concocted. A portion of this scheme consisted in amendments to the Constitution. The great statesman and jurist, Somers, has said: 'Every design of changing the Constitution ought to be most warily observed and timely opposed.' Nor is it only in the interest of the people that such fundamentals should be duly guarded, but of the King, too, for whom those pretend to act who would subvert them. The proposed changes affected the relations of citizens to the State and the Union, provided for an oversight of State legislation in all that concerns life, liberty, prosperity, privilege, immunity, and protection, under the law. They altered the basis of representation, and made it dependent upon suffrage, as granted in the State for the choice of executive and judicial officers. They created an *ex post facto* law of punishment for a crime not known to the penal code of the United States or the States, selected the victims, affixed the penalty, and provided for its being carried out by legislation, without trial or conviction. We have never seen any exposition or enlarged discussion of these clauses. Mr. Stevens, in a late discussion of the first, declares that it converts into constitutional law what the Declaration of Independence asserts to be natural rights. Under these articles we do not know what Congress may not do — community of property, rights of labor, universal uniformity; mechanical regularity of individual movements; general abstinence; a permanent system of education in the essence of justice and natural order; women's rights; children's rights; rights of manhood and womanhood to suffrage; the rights of Africans and Indians, Chinese, Monguls, and Malays; of Mormonism and Oneida Creek associations; fœticide, and whatever else the socialist red republican, or communist, or infidel, or strong-minded woman may suggest, may become the subject of Congressional interposition and enactments.

The disfranchising clause invaded the great principle incorporated in the Constitution of the Union, that no *ex post facto* law should be passed by any Congress or Legislature in this land — a principle sanctioned by statesmen, jurists, and moralists. It called upon States to deprive themselves of the service

of nearly all the men who had ever obtained trusts in them, because they had been faithful to the States. It required them to perform an act that would place their own dishonor and degradation on the Constitution of the country.

After Alexander of Macedon had destroyed the city of Thebes, he wrote to the city of Athens, demanding the surrender of ten of the principal citizens, who were to be put to death for their support of the anti-Macedonian policy. The letter was read to the assembly of the people, and timid orators proposed the acceptance of the demand. They were in no condition to resist them. Demosthenes insisted that the fate of the citizens generally could not be severed from that of specific victims, and recounted in his speech the old fable of the wolf requiring the sheep to make over to him their protecting dogs as a condition of peace—and then devouring the unprotected sheep forthwith. Athens indignantly rejected the demand. The historian, more than two thousand years after, describes this as 'resolute patriotism highly honorable at this trying juncture.' It has been cited as an evidence of the magnanimity and courage that a people may attain by the exercise of the power of self-government, ever since the event took place.

These proposed amendments were not spurned. They were treated with no contempt. There was no expression of disdain. They were proposed, or ought to have been proposed, to the States, for their free deliberation, and for the exercise of candid judgment. It was a violation of the Constitution to employ any acts of coercion or menace.

The Legislatures were acting for themselves, for their posterity, and also for the other States of the Union. They would have been recreant to their trust if they had consented to them, otherwise than upon the dictate of an honest and conscientious judgment.

Congress then adopted the most reckless, arbitrary, revolting revolutionary measures for coercion and intimidation. They annulled the Constitutions of all these States; degraded them into military districts; declared martial law; placed them under the domination of subalterns in the army; rendered those subalterns, in a great degree, irresponsible to the commander-in-

chief of the army, or the general commanding. They qualified voters who had never voted before, and disqualified others who were entitled to vote under the Constitution and laws of the States. In a word, they 'radically overturned' the institutions of the nation: for the Constitution, 'the supreme law of the land', was thrown down as an idol of Dagon — mutilated, dismembered, a worthless and lifeless thing. The Garrison statue was erected, and all men were called to worship, with the proclamation,—This is your God, O Israel! and this only shall you worship.

Dr. Johnson has said, 'That the greatest of political evils is the necessity of ruling by immediate force.' Professor Lieber amends this; he says: 'There is, however, a greater evil still, the ruling by immediate force when it is not necessary, or against the people.'

The execution of these acts has been in a spirit corresponding to that which passed them. The exposition of the acts by the Attorney General — an able, learned, honest, conscientious, and eminent jurist — one of the first in professional reputation — was rejected by Congress, and a *carte blanche* given to the Brigadiers; and precisely in the inverse order of intelligence, capacity, personal honor, dignity, sobriety and decency, have their administrations been approved. The last have been placed first. Beggars on horseback have ridden furiously over these Southern States, trampling on Constitutions, laws, judiciary organizations, public and private rights, with unbridled license. The functions of government have been placed in incompetent hands, and offices, it is firmly believed, have been the subject of bargain and sale. It is reported that one of these Brigadiers declared that the dregs of the population should be made rulers, and the event demonstrates the purpose.

The democratic institutions of Athens perished after a century of splendor and renown, and reconstruction took place in the interests of an oligarchic faction under the lead of Antiphon. 'Antiphon,' says the historian, 'about to employ this anti-popular force for the accomplishment of a predetermined purpose, keeps still within the same ostensible constitutional limits. He raises no mutiny; he maintains inviolate the cardi-

nal point of Athenian political morality, respect for the decision of the Senate and political assembly, as well as constitutional maxims. But he knows that the value of these meetings depends upon entire freedom of speech; and that if that freedom be suppressed, the assembly becomes a nullity,—or rather, an instrument of positive mischief. Accordingly, he causes all the popular orators to be successively assassinated, so that no man dares to open his mouth on that side; while, on the other hand, the anti-popular speakers are all loud and confident, cheering one another on, and seeming to represent all the feeling of the persons present. By thus silencing each individual leader, and intimidating every opponent from standing forward as spokesman, he extorts the formal sanction of the assembly and the Senate, which the large majority of the citizens detest. That majority, however, are bound by their own constitutional forms; and when the decision of these, by whatever means obtained, is against them, they have neither the inclination nor the courage to resist. In no part of the world has this sentiment of constitutional duty, and submission to the vote of a legal majority, been more keenly and universally felt, than it was among the citizens of democratic Athens. Antiphon thus finds means to employ the constitutional sentiment of Athens as a means of killing the Constitution. The mere empty form, after its vital and protective efficiency has been abstracted, remains simply as a cheat to paralyse individual patriotism.'

Antiphon was dealing in a free city, where all the powers resided in a popular assembly. A constitutional government where the depositories of political power are separate and largely independent, opposed in this country impediments to such atrocious schemes. Congress could not hope to engage all of these in this plan. They therefore adopted the anti-slavery counsel of Massachusetts, viz., 'There is a radical overthrow of the institutions of the nation.' Constitutions and States are non-existent under such conditions. Martial law alone prevails. States and Constitutions were placed under martial law. But some forms of the Constitution must be observed. The registration of votes and the ballot-box in martial hands, afford sly, stealthy, covert, secretive modes of operation. The disfranchisement of all

individual leaders, all those whose power, influence, intelligence and patriotism are proved, are disfranchised — politically assassinated. The Brigadier can arrest and try them as impediments to reconstruction. Registrars may be appointed who are supple instruments. They know whom to register and whom to reject as voters. Negroes have but few acquaintances and few marks of identity. Many of them have not selected names. Names can be given to them, and they may register in a number of different names. Money is needed. Have not the Freedman's Bureau money? Our friends will furnish money. The ballot-box may be stuffed: if a registered voter has not voted, we know how he ought to vote, and we will vote for him. To preclude anything like inquiry, all the functionaries of the State are made to feel that the Brigadier is *Imperator* — all are dependent upon him. His word is law.

We conclude this article with a quotation from a speech of Thomas Addis Emmett in the Court of Chancery, of New York, in 1824: 'We are accused of seeking to work on State pride; but to talk of State pride is to undervalue what we contend for. It is upon State rights we stand and State rights are State liberty. They are more; they are in this land the bulwarks of personal and individual liberty; they are the outposts of the constitution. While they are preserved entire, our federative system will stand against the shocks of time and the approaches of despotism; but let them be broken down, or suffered to moulder away, and a consolidated power must succeed in governing this mighty empire. Consolidation will be the euthanasia of the constitution. Make that consolidated government as democratic and free as you please, make its base as broad and its principles as liberal as philanthropy or philosophy can devise; it will be a single government over a vast extent of territory; it will follow, it will surely and speedily follow, the course of all the governments of ancient times and modern Europe, which began with elective rights and free institutions, but have silently sunk into despotism.' How signally, and how sadly, has this prediction been fulfilled!