THE EVENING NEWS. GROEGE Q. CANNON. SINTOR AND PUBLINSIES. Thursday, - - September 7, 1871

Preliminary Examination Warden Rockwood and Marshal McAllister.

property of the United States; and, in exemining Marshal Patrick, the only faots glioffed being that the latter made a deafand on Warden Rockwood, and latterly upon Mr. McAllister, for the the prisoner Klilfoyle, the former refusing of the Territory, to take and keep the to accede to the demand without an or-der of Court, and the latter rafusing that prisons, under an agreement en-until an order of Wardan Rock wood tered into between the government, or was presented, for whom he held the

142, Liaws of 2nd Session; and section 98, page 58, Laws of Utah.

The Court adjourned at 12 and me again at two o'clock, when the argument was opened by

Judge Morgan—I will say, by way of preliminary, that as an attorney I have been balled on in this case to see that the laws are vindicated, a duty devolv-ing upon me as an officer of court; and not only to see that the individuals in the cated by Congress conflicting with the law of a Tarritory, the isw of a Tarritory at once gives way and the law of Congress is immediately in force. Bo, then, this is the executive officer of the Terri-tory, who e business It is to see that the are the duties of an attorney whenever called upon to act in a case as I am in superior; but whenever a law is passed Judge Morgan-I will say, by way of called upon to act in a case as I am in this one express law. The Warden could not

bolds, and such I believe to be the pro-per construction to be given to the law, and to the extent of the power and su-thority acquired upder the general gov. ermment. This being the case, the legislature of this Territory has at hempted to exercise an authority that is not conferred upon it; it is without is without is an order of court could it is not conferred upon it; it is an other is an order it of Court of the is a conferred upon it; it is is an order is an order of court could it is a conferred upon it; it is an other is a conferred upon it is a conferred upon it is a conferred upon it is

aw and without justification. If your Honor please, when the im-Another point: Suppose that this portance of the questions that will be floor (the Territorial Warden) had presented to you in this case are conbeen regularly nominated, and had en- sidered, it is matter of regret to the tered upon the duties of his office; that counsel that circumstances have not is w, and had compiled with every re- and the examination of anthorities. I be should also ask for an order of the count o to appoint him was actually possessed upon such brief examination as I have tody of the United States Marshal, by the Legislature, and in the exercise been able to give I have found many make now for that which he should have

The prosecution tell us they proceed under several laws. It has been usual according to the evidence, that he had possession of it some time in August. He is further instructed to make arrangements, if any are necessary, with that all the statutes cited tend to on-United States authorities, the Attorend and refer to one offence. The first ^a duties shall be. Nothing is said in the iaw with reference to this change. Nothing of the kind was anticipated by the legislature. But there is a change, created by the superior power of the United States Government. And it will not be contended, I apprehend, that the inferior power can control the superior; but whenever the the superior; but whe they rely, and is the one against which this party has offended, if he has offendthe United States in the absence of any glected, by the by, to refer to the law of the United States in the absence of any Utah, which is also relied upon. It

act of Congress, an order of court could have been obtained at no greater cost or trouble than this prosecution; and it seems that he will need the order of court after all, for the counsel who ppened the case for the prosecution stated to your honor that in the solicited before, and which, had he obtained

for the faithful performance of those duties and the discharge of those responsibilities. It is but little to ask, when he is called upon to divest himself of these responsibil-ities and to come to perform those duties, that he should do it on some demand more formal and some decision more binding than the construction of an soi of Congress made by the United States Marshal — the United States Marshal — the reding to the evidence, that he had under several laws. It has been usual to the and to cease to perform those duties, is some time in August. Is further instructed to make argements, if any are necessary, with Gevenuer, or proper authorities to conviction for some particular made by the United States Marshal - the offences. I have never heard of an in- United States Marshal, who is not respondictment being found charging murder, sible to the people of this Territory or the robbery and larceny in one count. It is Legislature of this Territory, and whose perhaps assumed by the prosecution construction would not avail the Warden that all the statutes cited tend to one. ance if parchance he should be charged with was presented, for whom he held the prisoner, all of which was conceded by the defense. Judge Morgan alluded to the follow-ing antihorities, as the basis for a con-Judge Morgan alluded to the follow-ing suthorities, as the basis for a con-viction: The soit of Congress of January 10th, 1371; soit of Congress, March 2nd, 1381, then 29, section 2, vol. 4, U. 8; Statutes at Large, page 458; act of Con-gress, Mary 31st, 1870, section 11, page 142, Leave of 2nd Semion: and section 2, vol. 4, U. 8; Statutes at Large, page 458; act of Con-gress, Mary 31st, 1870, section 11, page 142, Leave of 2nd Semion: and section 2, vol. 4, U. 8; Statutes at Large, page 458; act of Con-gress, Mary 31st, 1870, section 11, page

would have knocked the City Hall and City

Jall down. Mr. Baskin.-I would that. Mr. Fitch.-The acting law officer of the would United States informs us that he would have "let loose the dogs of war," had his advice been followed and his wishes consulted. And why were they not? Where was all the power which with all the pomp and parade of war once interfered to prevent by arms a peaceful parade of Ameri-can citizens on the Fourth of July? Was it asleep? ashamed? or afraid? Wasit

lord

surrendered to the custody of the United States Marshal. That officer is required by the instructions of the Attorney General as the instructions of the Attorney General as well as by the set of Congress to collect from the Territory the compensation of a dollar and a half per day for each convict, which sum is fixed by the Attorney Gen-eral as the rate at which the United States will subsist Territorial prisoners.

As stated in yesterday's Naws, the prelimination as a clussify present they had put the classe and in the state and in the state of the process. If the power they had put the classe and in the state of the process. The U.S. Marshal is consistent which are according to the prison are they had put the classe and in the state of the prison are they had put the classe and the prison are they had put the classe and the prison are they had put they the prison are they had put they have a commanding hit to are prison are they had put they had put they have a commanding hit to are prison are they had put they have a command are the prison are they had put they have a command are the prison are they had put they have a command are they had put they have a command are they had put they have a command are the prison are they had put they have a command are the prison are they had put they have a command are they had put they had

collected? Will your honor issue a mand-amus to the Territorial Legislature com-manding them to enact a law to appropri-ate so much money out of the Territorial treasury to the United States Marshal? apprehend there is no Court in any English speaking nation that would issue any such order, and that there is no lawyer anywhere who will contend that such a man-date could be issued. If the act of Congress means not that the Territorial prisoners may but that they must be taken charge of by the U.S. Marshal at the cost of the Territory, nd the Territory says through its legislative power that it has made no con-tract with the U. S. Marshal, nor empowered any one to make any contract with him and that it will not pay for a contract it did not authorize and does not want, where then, I ask, is the power to enforce payment? Is it a reasonable construction of the act of Congress of Jan. 1871 to assume that the Federal legislature intended to enact a law that could not be enforced? The next proposition is this: could the Marshal be required by Congress to subsist

these Territorial prisoners without pay? Court.-Suppose, Mr. Fitch, that the Board f Supervisors of a county should refuse to execute or levy a tax to pay the bonds of ounty, could they be collected?

Mr. Fileh.-Certainly they could because Court could command the Supervisors to evy a tax for the purpose of paying the bonds, and punish the Supervisors for con-tempt for refusing-that is, if there was a law authorizing the issuance of the bonds, and usually in such cases there is a law enacted by State authority pro-viding that the Board of Supervisors of a cousty may meet, etc., on the first Monday of such a month, etc., to levy an assessment for certain purposes, etc. But a Board of Supervisors is neither a State nor a Territorial Legislature. A Board of Supervisors has certain limited local legislative powers and is also charged with certain executive duties. The levying of an assessment is with them in such cases an executive function required by law, and

Now, I call the attention of the court not only to the laws of the United but also to the laws of the United by defined by law; and among his

 York "whenever a power is given by statute the end in view is implied." Stief vs Hart 1st N. Y. p. 20.
Consider now, the language of this statute to imprisonment, to be confined therein."
Densider now, the language of this statute to imprisonment, to be confined therein."
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Densider now, the language of this statute to imprisonment in the mext says. "and inform the proper Territorial muthorities that you will receive there and to the same effect I refer your there and conditions as may be prescribed at a sentenced for the violation of Territory? They are defined in a section of the termis and conditions as may be prescribed dist." These are the instructions of the by the Attorney General be received, etc., fin the Territorial penitentiary, etc. Now suppose that under this sot of Congress the last Territorial prisoner shall be reluctantly surrendered to the custody of the United States Marshal.
Court. What is the effect of the context of the contex United States convicts who have been or can bind the government by contract on

tract with Governor Woods?

Utah, shall be commander-in-chief of the dc., shall be commander-in-chief of the militia thereof"-that is one of his functions "shall perform the duties and receive tract with Governor Woods? Mr. Fitch. I will come to that present-iv. I will conclude this branch of my iv. I will conclude this branch of my argument by mying that the intent of the act, from the rules and regulations the sot, from the rules and regulations presented by the Attorney General, and the surrounding circumstances, is simply this: First, that the prison owned by the officer of the United States; second, that the prisoners of the United States; and third, that officer of the United States; and third, that officer of the United States; and third, that the United States having a proper place for side to refer me to it. He has no more power to make the people, he tax payers of the Territory, pay a dollar than I have to compel the British Parliament to make an compel the pay pensions to make an the United States having a proper place for keeping its own prisoners, and having facilities for keeping other convicts, will

facilities for keeping other convicts, will for convenience sake permit the Territory at its discretion and option to have the Territorial prisoners conflued therein, at rates and charges and under rules and regulations prescribed by the Attorney General. It says, in effect, here is our prison, these are our officers, such are our rules and prizes, and you may board your convicts with us at those prices if you like. But suppose that the Territorial authori-ties do not choose to svail themselves of this offer? Is not the option given them to so-cept it of not? The Attorney General has the right to prescribe the terms on which he will receive the prisoners, has not the Territory a like right to accept or reject these terms? Suppose, for illustration, that the Attorney General abould prescribe a hundred dollars per day each, as the terms a hundred dollars per day each, as the terms upon which he would receive prisoners, and he probably has the same right to pre-scribe that sum as he has to prescribe one dollar and a half a day, though it is not possible he would do anything so it is not possible he would do anything to the legislation of the resolution into the letter of absurd and unreasonable. But suppose he should prescribe ten dollars per day. He might prescribe that amount in some Territories, and the officer in charge would n° make much money by the operation But suppose the Attorney General pre-scribes a rate of subsistence with which the proper Territorial authorities are not satis-fied, or suppose that the Territorial author-ities are not satisities-fearing that the President of the United States, through the mis information of interested advisers, might at some time displace the present popular and efficient Marshal of Utah Territory with some per-son who might perchance take bribes, or corruptly permit prisoners to escape, or some person who would not discharge his duty as our Marshal does? Suppose "the proper Territorial authorities" decline to trust any officer in whose selection they have no voice and over whose actions they have no voice and over whose actors they have no control, who is under no bonds to them for the faithful performance of his duties? or suppose that, for any reason, wise or unwise, they choose to exercise the option given them and do not accept the offer with regard to boarding the Territorial prisoners, are they compelled by this law to accept it whether or no? and if compelled what does the word "may" mean in the law and what does the Attorney Genthe law and what does the Attorney Gen-eral mean by saying to the Marshal, "You will inform the proper authorities," etc? One more illustration. If Congress has power to pass this law, according to the construction placed upon it by the oppos-tion connect why can not Congress, next ing counsel, why can not Congress, next winter, pass an act providing that a build-ing site shall be purchased in Salt Lake Oity; that a building shall be erected there-on under the supervision of the United States Marshal, for United States courts, post office and custom house, and we cer-tainly need such a building, although per-haps we do not need to have it erected un-der the supervision of the United States Marshal; and suppose that in the construc-tion of this building more room is provided than is necessary for United States pur-poses, and Congress should ensot that the Marshal; and suppose that in the construc-tion of this building more room is provided than is necessary for United States pur-poses, and Congress should enact that the Territorial legislature, the probate courts, justices of the peace, the city council, the county clerk, treasurer and other county officers "may" hold their offices in that building at rents to be fixed by the Attor-ney General of the United States, and that officer should then send a letter of instruc-tion to the United States Marshal, saying, tion to the United States Marshal, saying, "You will charge so much a month for this room and so much for that room," making an aggregate of four or five thousand dol-lars a month for rent? Then, according to the construction claimed for the act in rela-tion to boarding Territorial prisoners in U.S. prisons, the legislative, judicial and ministerial officers of Utah would be com-nalled to account these rooms and if they pelled to occupy these rooms, and if they should decline to occupy these rooms, and if they should decline to occupy them voluntarily, along comes the United States Marshal with a posse commitatus, or a brigade of infantry, as the case may be, and forces them to their desks, and then if the Territorial Legisla ture should refuse to appropriate money to pay the rent—what then? Well, I do to bay the rent-what then? Well, I do not know what would be done; perhaps arrest and punish the contumacious Councillors and Representatives for trea-son; I say if your Honor pleases that a construction of the act of Congress to the effect that the Territorial convicts must be kept in the United States prison at the cost of the Territory, whether the Territorial authorities wish it or not, would be a shameless violation of every principle of representative Republican government. representative Republican government, every rule of logic, and every doctrine of public policy. To suppose that the United States courts will sustain such a doctrine is to doubt their intelligence; to suppose that the Congress of the United States intended such a doctrine would be to suspect this would indeed be a dangerous extension of such a doctrine would be to suspect this government of monstrous tyranny and in-justice. If your honor please, our govern-ment can never have aught but respectful and loyal words from me. It is a great, a free, a magnanimous government, although sometimes represented by small, mean, contemptible men; and in saying this I disclaim avy reference to any of the officers of this Territory. The next question is, if there be a dis-cretion left with the Territory by the Act of

tution. Let us see it it is in conflict with the Organic act. (Read sec. 7 Organic act.) I suppose it will be contended the Warden is neither a township, district nor county officer, and that therefore he should have been nominated by the Governor and con-firmed by the Legislature. Now without discussing the question as to the power of the legislature to deviate from the legislature of the legislature to deviste from the letter of Executive to select, and the Legislatureif satisfied-to confirm, and if not satisfied. to reject. But the same result is reached when the Legislature selects and the Go when the Legentative Belester and the Go-vernor confirms their selection, as he does confirm it when be approves the law creat-ing the office and electing the officer, and without his approval the law of course can. without his approval the law of course can-not pass. In any event Warden Bockwood is the Warden de facto, he presents a com-mission signed by the Acting Governor, his title de jure cannot be attacked col-laterally in this proceeding, for the ques-tion here is not, "Was Bockwood legally chosen?" but, "Is Patrick entitled to the custody of Killfoylet" The Territorial law also provides for a board of Prison Directors and a anteraction

board of Prison Directors and a subsequent act on the next page provides, "That the Warden is anthorized to advertize for pro-posals for keeping prisoners; that the Warden may hire out the convicts; that the

tory; and whenever a law is violated by an officer, by any one holding a posttion of authority in which he should be an example before the people, it is worse toan if he had been a more hum-ble individual. In this case, if there has been any violation of the law, and the testimony shows that these parties charged have been guilty of this viola-tion, then it becomes the duty of the court to administer the law, however unplement it may be and no matter who are the parties coming before your house. Here is the law which I will read in the statutes of this Territory, and if it is found that these men have violated that law they are amenable to it as if they had violated any other law or any law of the United States. (Counsol read section 93, page 53, Laws of Utanj. Gent emen, no doubt, will take the position that this officer resisted here is a United States officer in the exaction of his duties as a United States officer, and that they are not amenable; but he is an officer of Court, a Turritorial as well as a United States officer; and if any person shall resist him as an officer of court, in the execution of any duty imposed upon him, then they are amenable to the law. (Counsel read from the law of April 30, 790 with regard to reaisting officers. G-ntlemen may complain because we refer to several statutes, and do not con-fine surseives particularly to any one of them. I will say to the gentlemen that a party may be guilty of offences against the laws of a State and against the laws of the United States. As for Instance: A man may be guilty of robbing the mail, when his offence is not only one against the laws of the United States, but scainst the State law, for larceny In taking money that may be in the mall. Or in the case of a municipal porporation, a person may be amenable both to a State and a municipality under the license law and be guilty of two Mances in the same act, either of which may be charged against him and he be punished for either or both. After reading the law again, counsel said: It will be contended probably that we have not shown sufficient authority in this person—the plaintiff—to entitle him to what the law would esteem a protection ; in other words, to make these parties amenable to the law for torial officers and the powers of the obstructing him. It is admitted by the Government officers. The former claim courses for the defendants that he is the Marshal for this Territory. We find there was a Warden appointed under and by virtue of the law of this Territory, by the act of the Legislature in direct violation of the Organic Act which specifies that all officers of that grade are, by and with the consent of the Legislature, to be appointed by the Govaruor and to receive their commisdon. Here a legislature has taken the villignors part of the anthority of the Unitad States, and exercise this power within ourselves. They refuse to re-cognize the Executive, or at least his nominating power, and they proceed to nominate a man in violation of the Organic Act. Now the question is, is that man, under any diroumstances an officer to have control of the prison? taine, and having within himself prisoners, and when they feluse to de power to aliminister and to see that the is we of the Territory are administered, side and beyond the law, and beace are amenable to II. The testimony would not the power exercised by him be paramount? I contend that it would; weight not the power exercised by him be paramount? I contend that its would are ameniable to if. The festimoly and that fibere the legislature understate control conserve and if the legislature understate to control to violate dr go against the Organic Act, they undertake to over-ride the Govern meats of the United States, bate also to the formation of the proper period to have the formation of the United States in a Territory, where we are unity in a condition of intelage. If they conserve that may make the formation of the states in the second to or measable for the intel for the interview or measable for the organic and demanded them, for an the formation of the proper period to have the formation of the Dendition of the legislature. If is the formation of the proper period to have the formation of the period they not the proper period to have the formation of the period they not the period the formation of the period to the formation or measable for the organic and the formation of the period to the formation of the second they or measable for the second the formation of the second the formation of the period the period to the formation of the second the formation of the period the period to the formation of the second the formation of the period the period to the formation of the second the formation of the period the period the formation of the second the formation of the period the second the formation of the second the formation of the period the second the formation of the period the second the formation of the second the formation of the period the second the formation of the second the formation of the period the second the formation of the s here shows, to my mind, that the Marprevented, according to the in the law, but aided and abe who did, and refused to delle prisoner to the Marshal of a States; having done the t Now here are certain powers confer-red upon the people of this Territory, which the United States government say may be exercised; but in nothing in doufflot with the laws of the United States, or the Organic Act which con-face these powers upon the people. Now, if there be a reserved power in a r, if there be a reserved power in Cours that if it shall be the judgment of the Ast, then the people of in a month in the Court is of opin Territory cannot exercise that they be bound over is another tribusial for the west

have referred to. Certainly it cannot be the directors of the prison who have the power to do it. Where is this, power lodged if not in the Governor? He is the only person that can cootract He is the only person that can cootract with the government of the United States, and it is his duty to do it. We find the Marshal in possession of the prison by direction of the United citates government, and he contracts with the Governor to keep Territorial with the Governor to keep Territorial with the Governor to keep Territorial He offence prescribed has been re-stating any writ, process or order of Court. Now what does the evidence show in this case? Why, simply that the United States Marshal, without seeking to obtain any order of court, demand-ed of the Territorial Marshal and of the the offence prescribed has been reconviols there, in what manner they are to be kept, and at what expense fo the Territory; and we find that the Governor is the only officer who has the power to make this contrast and enforce the law. What shall the Marshal do? He has authority to set, not coming from the inferior but directly from the superior power. There is a law here, your honor, that I will read, showing that if he did not do certain things what the penalty would be. (Codmeel read from Act of Congress June 21, 1860, vol. 12, page 69.) That is for an offence of omission as well as commission. It will be said that he had no right in his po-sition to act as he did. Let us see When an officer is required to do a certain thing, and an order of court has once gone out which has been de-livered to him or to his predecassor, it matters not whether that order be lost or in the hands of any third person, if must be steented, for its vi-tality and power coalinne. I believe the gentlemen will not restrovert that position. Now, have in a Marshal in the poissession of a pr.-ou; here has been a warrant of communuent which is before your houdr; that warrant of committment was in the hands of a party who perhaps was properly there, at any rate he was there, exercising the power and functions of an officer, now if the law supersedes that person conferring upon sublier man the pow-ers with which he was clothed, that that man must perform the duties of the office thus conferred upon him. He i-clothed with the power and authority of the other and must exercise them, or he is amenable to the law for any omission he is guilty of. We flad this man, Mr. Rock wood, claiming to have been the Warden of the prison and we come to a point where there is a conflict between the powers of the Terri-Government officers. The former claim we by the Legislature they are pro-this the prisouers. If they misapprehead ture the law, and offend spainst the law, it hat is no excuse. The law presumes that that every man shall understand it; and if Mr. Rockwost every man shall understand it; and if Mr. Bockwood was warden, and the they take a position in conflict with the law and violate it, whatever their in-tention may be it is none the less a crime; and all people should under-stand that whenever there is a oriminal statute, ignorance of that statute is no statute, ignorance of that statute is no defense. Nevertheless, there can be no question as to the intent if the ease. There is no excuse set up on the part of the defendants' counsel that they have acted ignorantly or unintentionally; but they have acted with a full understanding that if they are wrong they are amenable to the law, and with the positive belief that they are right. Thi-being the case they have certainly by

Ferritor fleer of this Territory. Your honor will notice that in all the acts cited, with the exception of that of 1830, which merely refers to contempt,

this case? Why, simply that the United States Marshal, without seeking to obtain any order of court, demanded of the Territorial Marshal and of the Warden of the Penitentiary, the ;custody of the convict Kilfoyle; and, as the United States Marshal himself testifics, gated or nowithout exhibiting any writ, order or process of court or claiming to have any such writ, order or process. How can the prosecution logically claim that these defendants should be held to answer for resisting and obstructing a United States officer in the execution of process, when there was no process? when the officer himself declares that he had no process and attempted to pro-curs no process? Under the common tions involved. iaw, in order to convict a person charg-ed with the crime of "resisting an offi-tion of the act of Congress, January, 1871 ed with the crime of "resisting an offi-cer," it is necessary to prove that the officer resisted was armed with legal process. In support of this position I process. In support of this position I iaw, volume 1, page 60, (counsel here read the suthority) and in speaking of the first section of the act of 1790, under which this prosecution is brought, Justice Curtis, of the U B Counsel here the custody of Territorial Wardens the efer your honor to Chitty's Criminal Justice Curtis, of the U. S. Circuit

Court, says: "To constitute an offence under this law, therefore, the obstruction must have been of legal process; and what-ever may have been the form of pur-pose of the process, it is not legal pro-cess, within the meaning of this act, unless it emanated from, and was is-sued by, some tribunal, judge or magin-trate, authorized by the laws of the United States to issue such process." -2nd Curtis, C. C. Rep., page 155. Now, if your honor please, it seems to me that this last suthority disposes of this case so far as the guilt of the law, therefore, the obstruction must

of this case so far as the guilt of the Warden is concerned, and without considering those other and perhaps more important questions which are involved herein. The act of Congress which we are charged with violating—as constru-ed by Judge Curtis in the decision. which I have just cited-says that in order to constitute an offence under this act there must have been resistance to some or ler or process, and an order or process is only such legally when it emanates from some court of competent

The Court-Mr. Fitch, suppose that Mr. Rockwood was Warden, and the does not the warrant follow the officer instead of the law the officer, and is not that the warrant in the hands of McAllister?

Mr. Fitch.-Yes, Sir, if McAllister is appointed by Rockwood in his place The Court.-No, if Mr. McAllister is ave its Territorial convicts imprison of in the United States penitentiary refer here to the well known rul and any income any income any income any income and of the prison of the prison although not confirmed by the Ger-ermor abound demand possession of the Ger-ermor abound the Council, who would have the legal right to take possession of that property? Could the Legislative power is or stoud the Executive power is greatest in this Territory, be being an ermonal? If the Executive power is officer of the Scenaria vite the fact of the Marshal, is being the availed by the Marshal, is being the the the the take of the Marshal, is being the construction is actually in the bands of the Marshal, is being the proper person to have the count of the Scenaria of the Count of the count of the count of the second the status of files of the second to the count of the Scenaria vite the status of the Marshal, is being the the bands of the Marshal, is being the proper person to have the count of the c Mr. Baskin .- We shall contend that the functions of the office of Warden are in the U. S. Marshal.

with a discretion Mr. Fitch - I am assured by the Erecu-tive of the Territory of Utah, who honors us with his sudience and encourages the compelled by mandate to exercise their discretion in a particular way, for if they could there would be no discretion.

The case supposed by your Honor is in no wise parallel with the case at the bar, for prosecution with approving smiles, that my surmises are incorrect. The Executive no wise parallel with the case at the bar, for the Territory perhaps agrees with the opinion once expressed by the present President of the United States, that the Justices of the Supreme Court are "mem-bers of the Governor's staff," and who de-time possibly to give to your Honor, as his inf officer, the benefit of his protecting presence, while at the same time he stands ready to answer questions of defendants' coursel whether he be the party interro-gated or no-The Court.—This discussion is becoming exciting and I shall not permit further reor the Territory perhaps agrees with the opinion once expressed by the present President of the United States, that the Justices of the Supreme Court are "members of the Governor's staff," and who de-tions possibly to give to your Honor, as his staff officer, the benefit of his protecting presence, while at the same time he stands ready to answer questions of defendants' counsel whether he be the party interro-

exciting and I shall not permit further re-marks outside of the case. Mr. Fitch.—I beg your Honor's pardon, but I have not traveled out of the proper line of argument, except to comment upon intervention, made intervention. line of argument, except to comment upon interruptions made irregularly by Mr. Baskin and improperly by Governor Woods, Since then we are to be tried be-fore being punished, I will now proceed to the consideration of the important quesits own act, but it cannot compel Utah law-makers to legislate. The Congress of the United States has no power to pass an act appropriating money out of the Territorial treasury. The Legislature of the Territory Mr. Fitch .- The first question involved

of Giah alone can appropriate money from the treasury of the Territory. Congress can properly enact no law to take money out of the Territorial treasury? I apprehend that if an act of such a character were passed by Congress it would be promptly decided unconstitutional. I insist upon this proposition for the purpose of demon strating that it cannot be possible that cited by counsel on the other side. I will tions, but will call your attention particularity to the language of the third section. The first section provides for taking from the custody of Territorial Wardens the penitentiaries which are rightfully the property of the United States. The second section provides that it should be the duty of the Attorney General to provide fegulations for these provisions being carried into effect; and it further provides that the section provides that it should be the duty of the Attorney General to provide fegulations for these provisions being carried into effect; and it further provides that the should pay out of his own provides that the first should pay out of his own provides that the first should pay out of his own provides that the should pay out of his own provides that the first should pay out of his own provides that the first should pay out of his own provides that the first provides that the prov refuse, nor did it intend that the Marshal should pay out of his own pocket. The letter of the Attorney General to the U.S. Marshal says, "You will cause all the United States convicts who have been and hereafter may be convicted to be confined therein; and inform the proper territorial autorities that you will receive therein any or all persons that have been convict-ed and sentenced under Territorial laws, etc. You will keep an account of the cost of keeping the prisoners, and deduct the amount paid you by the Territory for keeping Territorial prisoners, &c.;" eviinto effect; and it further provides that the United States prisoners shall be in the cus-tody of the United States Marshal in the tody of the United States Marshal in the United States penitentiary; "and still fur-ther provides that persons convicted of of-fences against the laws of the Territory may, at the cost of said Territory," &c., be confined in the penitentiary, etc., under rule 3 to be presented by the Attorney General, etc. The first thing to consider is what does the word "may" as it is used in this 3rd section mean. Does it mean "may" or "must?" Is it mandatory or "may" or "must?" Is it mandatory or directory? And in the consideration of that question involves the inquiry whether Congress has the power under the Consti-tution of the United States to make laws directly or indirectly appropriating money from a local treasury. Has Congress the power under the Constitution of the United States to draw money from the treasury of the Territory of Utah or from the treas ury of the city of New York, or the treas-ury of the city of New York, or the treas-tor place where the money is derived from local taxation? The third question is if there be a discretion left with the Ter-ritory in regard to contracting with the keeping Territorial prisoners, &c.;" evi-dently "contemplating that the proper Territorial authorities", satisfied of the benefits to be derived from having Territorial convicts placed under such efficient guards, being so well cared for, supplied with medical attendance, &c., at a reason-able price, would make haste to avail itself of these advantages. But the letter of the Attorney General certainly left to the Ter-

ritory the option of doing so. There are a few propositions here which seem to me evident The first is, that by the language of this act and the instruc-tions of the Attorney General, thereun-der, the United States of America does not ritory in regard to contracting with the United States for the care and custody of Territorial prisoners, then in what officer der, the United States of America does not intend to pay the board of Territorial con-victs; the second proposition is, that the United States Marshal is not compelled to keep them without pay, and the next is, that no power can compel the Legis'sture to make an appropriation to pay for them. What follows? Why if the word may is construed to mean must, and the Terri-torial Legislature declines to make an ap-propriation, there will be a general jail delivery. Can it be supposed that Congress designed to make a Territory board its prisoners at, the United States boarding house, or else produce a condition of affairs that would result in turning the convicts loose? Such a construction vio-lates reason. Yon cannot suppose that the or officers of the Territory is that discre tion vested ? Is it vested in the Governor? in the War-den? in the Board of Directors? or has it been vested in any officer of the Territory, whatever? I claim, if your honor please that the word "may" means "may"-jus what it eave; that by the act of Congress of January, 1871, there is an option given to the Territory as to whether it will or will no lates reason. You cannot suppose that the Congress of the United States intended to do something that it had no power to do-

do something that it had no power to do-take money out of a treasury over which it had no control. You cannot suppose that Congress intended to pass an act the effect of which would be to release all the Terri-torial prisoners. Upon this question of the power of Congress to pass laws of the character I have suggested. I refer your honor to 19th Howard 393, 2d Curtis con-

cretion left with the Territory by the Act of Jan., 1871, then who is to exercise it? Sup-pose that the United States Marshal thinks that the Governor is the proper person, and the Governor is evidently of the same opin-ion. But let us see what the United States Attorney-General says: "You will make such rules and regulations, etc.," and, "You will inform the proper Territorial authori-ties that you will receive therein all persons who have been so convicted," etc.," "You will inform the proper Territorial authori-ties." The Attorney-General did not at-tempt to assert who the proper Territorial authori-ties are. He says in one part of his letter of instructions, "You will keep an account of the cost of keeping the prisonretion left with the Territory by the Act of

other suthority can be shown—that the Governor is the pary who is charged by law with the proper keeping of the Territo-rial convicts. I do not apprehend that it will be contended that the casual observa-tion in the letter of the Attorney-General, respecting the Governor of the Territory, gives the Governor any authority, coupled as that observation is with the words "or other proper offices." The Attorney-Gen-eral or identity does not claim to know who can be inwfully contracted with on behalf of the Territory. He says, "Tou will in-form the proper Territorial authorities;"

character 1 have suggested. I refer your bonor to 19th Howard 393, 24 Curtis con-densed reports 506 8th Ib 480, 12th Ib 684. Is there any place in the United States where Congress has such power, even in the District of Columbia, which is under the exclusive control of Congress? Is fifth the power of Congress to pass an actto have a sewer laid down is the streets of the City of Washington, or to have a park made there, and the requiring money for the cost thereof to come out of the treasury of the District of Columbia? And if it is not in the prover of Coegress to do that directly, it cannot do it indirectly, and if would be just as reasonable for it to pass and that the cost of the streets to be kept by the United States Marshal in the United States prison, and that the cost of the prison one to compet Therri-torial convicts to be kept by the United States Marshal in the United States prison, and that the cost of the prison paid by the Territory. "May means must only when the pub-ho interest and rights are involved." "What are the public rights? The public for the states and rights are involved." "What are the public rights? The public for the states for a sci park on the public have the fight to have a prison and the states on to compet the public the states sci parks are accounted to the fight to have a prison and the states and rights are involved." "What are the public rights? The public have the fight to have prisoners confined in the powers of the states prisoners confined in the powers of the states prisoners confined to the fight to have prisoners confined to the fight to have prisoners confined in the states of his office, the duties of his office, the function, such as and rights are involved." "May means must only when the pub-tio at are involved." "May means fight to have prisoners confined in the states of the science of his office, the function, such as are involved." "May means must only when the public have the fight to have prisoners confined in the termine which the mare the public the

ist? Does it rest with the Warden or Di-rectors?" I say no. I say it does not ret any where; neither is it floating around loose, to be sizeed upon by the first officer, exe-cutive or ministerial, who may take the op-portunity of locating a claim upon it. It is a power withheld, it is not granted to any-body. The Territorial Legislature never contemplated the present contingency. Congress passed the act of Jan. 1871 since there has been a session of the Utah Legis-lature. The Legislature of Utah did not vest in anybody the power to make a con-tract with the Government of the United States to beard Territorial convicts. If then there he no power in the Warden and Directors to make a contract, I ask the Directors to make a contract, I ask the counsel on the other side to tell me where does the Governor get the power to make such a contract? I call upon the counsel now to cite me to one line of authority, one word of a statute conferring upon the Gov-ernor any such authority. It is not in the acts of the Congress of the United States; it is not to be found in the Territorial stat-not to be found in the Territorial statutes; and I venture to say that no decision to empower anybody to make a contract with the United States Government in its

behalf for the keeping of convicts, is it therefore to be presumed that such power, since it ought to exist somewhere, must therefore exist in the Governor That shal that he was merely Executive of the

this way, -- the Atterney General, presum-ing that the Territory would desire to make the arrangement, makes regulations under which the United States would consent it receive prisoners; and then directs the Marshal to confer with the proper autor-ities of the Territory. The Attorney Gene ral does not designate the Governor as the proper authority. He says, "The Governor or other proper authorities," he does not know who the proper authorities, that is for the United States Marshal to find out.

which gives by intendment power governor of a territory to bind the people of a territory for the payment of money. If there be none, and I hear no answer, therefore I presume none is to be disd-then if your happer please, that paper sign ed by his Excellency, Governor Woods by which he agross that the Territory of Utah shall pay a certain sum of money to the United states Marshal, is entirely work-be united states Marshal, is entirely workthe United States Marshal, is entirely worth-less for the purpose of binding the Turi-tory of Utah, and makes as little impre-sion on her treasury as the sere leaves of the locust make when they fall upon the stony street. Then if the Turifory has an option, and that option is yet unexarched, and there is no power vested in any one to exercise it it must measured in any one to exercise it

the Warden of the ble pentite officer? what will be downish the pentite officer? collingts that there is so that officer? If "In a multitude of counsellors there is a lift the sound there have accepted by the biology of the source of the source TINING

these propositions, which will I apprehen scarcely be disputed, for they are element ary dootrines. I refer your honor to the following authorities, 1st Hl. Rep. 410. 3d Ill. 255, 6th Ill 655, 26th Hl. 107, 4th N. Y. 144, 6th N. Y., 13, 1st Fickering (Mass.) 256, 4 Combing (Mass.) 316, I Kent's Com.

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paid by the Territory. "May means must only when the pub-lic interests and rights are involved." What are the public rights? The public have the fight to have prisoners confined for the term for which they are sentenced, and kept in a safe place, so that they may not be turned locse upon sodiety; but the public has no right to prescribe the particu-ier place or mode of confinement, or to designate the particular officer in whose custody they shall be confined; and the plaintiff in this case—the United States Marshall-has clearly so right to not as host or guardian of Territorial convicts unless the Territory through "its proper anthor-

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of his office are prescribed by a Judge of a court of original ju-

ication, but is confined to the letter of the lication, but is confined to the letter of the latone creating his office. In 5 Mason's ironit Court Reports, 441, Justice Strong