## UNITED STATES SUPREME COURT.

[CONCLUDED.]

If any minister or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole population; all orders of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bocman and socman, master and thrall, copyholder and villain, would have risen in one mass and burned the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors; but the evil resulted from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors and the Stuarts, and which ended finally in the revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II. closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with shame and sorrow that the execution of Lancaster was a mere murder, because the courts were open and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the State, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford as Lord-lieutenant of Ireland, tried the Viscount Stormont before a military commission, and cut off his head. When impeached for it, he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the King himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I. issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded it; for there was scarcely a spot in his kingdom, from sea to sea, where the authority was not disputed by somebody. Yet the Parliament demanded in their petition of right, and the King was obliged to concede, that all his commissions were illegal. James II. claimed the right to suspend the operation of the penal laws—a power which the courts denied—but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offense he saw fit to charge them with, if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which a few months afterwards made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations on the other side of the channel to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Temple Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shouts of two hundred thousand men for the triumph of justice and law.

If it were worth the time, I might detain you by showing how this subject was treated by the French Court of Cassation in Geoffrie's case, under the constitution of 1830, when a military judgment was unhesitatingly pronounced to be void, though ordered by the King after a proclamation declaring Paris in a state of seige. *Fas est ab hoste doceri;* we may lawfully learn something from our enemies—at all events we should blush at the thought of not being equal on such a subject to the courts of Virginia, Georgia, Mississippi and Texas, whose decisions my colleague, General Garfield, has read and commented on.

The truth is, that no authority exists, anywhere in the world, for the doctrine of the Attorney-general. No judge or jurist, no statesman or parliamentary orator, on this side or the other side of the water sustains him. Every elementary writer from Coke to Wharton is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to disgrace the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. It is true, also, that court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders among such servile creatures. Those butchers' dogs that feed upon garbage and fatten upon the offal of the shambles are always ready to bark at whatever interferes with the trade of their masters.

But this case does not depend upon authority. It is rather a question of fact than of law.

I prove my right to a trial by jury just as I would prove my title to an estate if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed by the sacred name of George Washington, and by thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and and each State afterward ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in the country, from that time to this, has taken an oath that he would support and sustain it through good report and through evil. The Attorney-general himself became a party to the instrument when he laid his hand upon the gospel of God and solemnly swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain? This among other things:

"The trial of all crimes except in cases of impeachment shall be by jury."

Again: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

This is not all; another article declares that in "all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for the witnesses in his favor, and to have the assistance of counsel for his defense."

Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words or what collection of words in the English language would have that effect? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-general, or the Judge-advocate, or the head of a department. Shall this inestimable privilege, be extended only to men whom the Administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offenses as those for which Sydney and Russel were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burnt alive, and John Bunyan was imprisoned fourteen years, and Baxter was whipped at the cart's tail, and Prynn had his ears cut off? No; the words of the Constitution are all-embracing—

"As broad and general as the casing air"

The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege—and NO person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions. Here is no attempt to enumerate the particular cases in which men charged with criminal offenses shall be entitled to jury trial. It is simply declared that *all* shall have it. But that is coupled with a statement of two specific exceptions: cases of impeachment; and cases arising in the land or naval forces. The exeeptions strengthen the application of the general rule to all other caees. Where the law-giver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons, and make different exceptions. To exceptions, the maxim is always applicable, that *expressio unius exclusio est alterius.*

But we are answered that the judgment under consideration was pronounced in time of war, and it is therefore at least morally excusable. There may or there may not be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which, I trust, we have nothing to do here. I decline to discuss it. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. If the sanitary regulations which defend the health of a city are ever to be relaxed, it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel, and creeps lazily along the bottom, the inhabitants of the adjoining shore have no need of a dyke to save them from inundation. But when the booming flood comes down from above, and swells into a volume which rises high above the plain on either side, then a crevasse in the levee becomes a most serious thing. So in peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of arbitrary power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction. But this is a question which properly belongs to the jurisdiction of the stump and the newspaper.

There is another *quasi* political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at the most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable, and now they assert though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals. See how it applies to this case. Here were three men whom it was desirable to remove out of this world, but there was no proof on which any court would stake their lives; therefore it was necessary, and being necessary it was right and proper, to create an illegal tribunal which would put them to death without proof. By the same mode of reasoning you can prove it equally right to poison them in their sleep.

Nothing that the worst men ever pro-pounded has produced so much oppression, misgovernment and suffering as this pretense of State necessity. A great authority calls it "the tyrant's devilish plea;" and the common honesty of all mankind has branded it with everlasting infamy.

Of course it is mere absurdity to say that these relators were *necessarily* deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the same time and in the same town, where justice would have been done without sale, denial or delay. But concede for the argument's sake that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did, would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere *excuse* for those who committed it. If the commissioners were on trial for murder, or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or any thing else, to show that their guilt was not willful. But we are now considering the legal effect of their decision, and that depends on their legal authority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them, but expressly forbade them to exercise, and it follows that their act is void, whatever may have been their real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the relators, had attempted to deprive them of their property by a sentence of confiscation, would any Court in Christendom declare that such a sentence divested the title? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution?

Let me illustrate still further. Suppose you, the Judges of this Court, to be surrounded in the hall where you are sitting by a body of armed insurgents, and compelled by main force to pronounce sentence of death upon the President of the United States for some act of his upon which you have no legal authority to adjudicate. There would be a valid sentence if necessity alone could create jurisdiction. But could the President be legally executed under it? No; the compulsion under which you acted would be a good defense for you against an impeachment or an indictment for murder, but it would add nothing to the validity of a judgment which the law forbade you to give.

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man of common sense is to stand up and dispute it. But there is decisive authority upon the point. In 1815, at New Orleans, Gen. Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State Legislature insisted on it as the only way to save the "booty and beauty" of the place from the unspeakable outrages committed at Badajoz and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal by the same judge who had declared it to be necessary, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in *Johnson vs. Duncan*, decided that everything done during the siege in pursuance of martial rule, but in conflict with the law of the land, was void and of noneffect, without reference to the circumstances which made it necessary. Long afterward the fine imposed upon Jackson was refunded, because his friends, while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have

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