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. This being the case they have certainly by the evidence, put themselves in direct violation to the law of the United States as well as to the laws of the Territory. And I call your attention once more to this fact, that the process of law under consideration is actually in the hands of the Marshal, he being the proper person to have the custody of all such papers as well as the custody of prisoners, and when they refuse to deliver them up they put themselves outside and beyond the law, and hence are amenable to it. The testimony here shows, to my mind, that the Marshal was the proper person not only to have the keeping of the prison as the property of the United States, but also the proper person to have the custody of the prisoners; and when he went to Mr. Rockwood and demanded them, it was the duty of the defendants to deliver that prisoner to the Marshal; and when they refused they must have known that they were either justifiable by or amenable to the law. It is for your honor to determine from the evidence whether they were justifiable or not; whether the warrant of committment in the hands of the Warden was sufficient for him to detain that prisoner against the demand of the Marshal. They do not deny that they resisted; on the contrary they not only resisted and prevented, according to the language of the law, but aided and abetted those who did, and refused to deliver up the prisoner to the Marshal of the United States; having done this they, as a matter of course, made themselves amenable to the law; and in addition to that, if it shall be the judgment of the Court that these men have violated the law, and the Court is of opinion that they be bound over to answer before another tribunal for this violation, there is still another thing that we shall ask of the Court, and that is an order that this prisoner shall be delivered up.

With these remarks I leave my associate to close the case.

Hon. Thomas Fitch followed for the defence:

If your Honor please, when the importance of the questions that will be presented to you in this case are considered, it is matter of regret to the counsel that circumstances have not permitted more time for preparation and the examination of authorities. I was called into this case yesterday, and upon such brief examination as I have been able to give I have found many authorities bearing upon the propositions involved here, and I think if more time had been allowed I could have found authorities more directly in point. It seems to me that if it had been honestly desired by the prosecution to test the right of the United States Marshal under the act of Congress and the instructions of the Attorney General of the United States, to obtain and hold possession of the convict Kilfoyle, such test could have been made better by proceeding on the writ of habeas corpus, alleging that the Warden of the penitentiary held him illegally; and your honor could have examined the same questions involved now, and given your decision without this unnecessary criminal prosecution of the Warden of the Penitentiary.

The prosecution tell us they proceed under several laws. It has been usual in most criminal cases that I have attended for the prosecution to select some one statute upon which it would claim a conviction for some particular offence. I have never heard of an indictment being found charging murder, robbery and larceny in one count. It is perhaps assumed by the prosecution that all the statutes cited tend to one end and refer to one offence. The first congressional statute relied upon is the act of 1790. I propose to call your Honor's particular attention to the language of this act: "If any person or persons, etc., shall obstruct, etc., any United States officer in serving, etc., any process or warrant, or any rule or order of any of the Courts of the United States or any other legal or judicial writ or process whatsoever he shall be guilty of resisting an officer." The act of 1831, next cited by counsel, has no application to the case at bar, because it is a law providing for the punishment of contempts of court and for corruptly resisting the officers of the Court in the *presence* of the Court. (Counsel read the extract.) The act of 1790, the one first cited by counsel on the other side, is really the one upon which I presume they rely, and is the one against which this party has offended, if he has offended at all. The act of 1870, cited by the other side, section 11, is part of the civil rights bill; and that says that any person who shall knowingly obstruct, etc., and the language following is a copy of the act of 1790 in so far as it requires the United States officer to be armed with some writ or process, etc., etc. I neglected, by the by, to refer to the law of Utah, which is also relied upon. It reads: "If any person shall, knowingly or wilfully, resist any officer of this Territory." The Marshal is not an officer 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, the offence prescribed has been resisting 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, 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 testifies, without 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 procure no process? Under the common law, in order to convict a person charged with the crime of "resisting an officer," it is necessary to prove that the officer resisted was armed with legal process. In support of this position I refer your honor to Chitty's Criminal law, volume 1, page 60, (counsel here read the authority) and in speaking of the 22nd section of the act of 1790, under which this prosecution is brought, 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 whatever may have been the form of purpose of the process, it is not legal process, within the meaning of this act, unless it emanated from, and was issued by, some tribunal, judge or magistrate, 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 authority disposes 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 construed 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 order or process, and an order or process is only such legally when it emanates from some court of competent jurisdiction.

The Court—Mr. Fitch, suppose that Mr. Rockwood was Warden, and the Territorial Legislature or whatever legal appointing power there might be, should elect John D. T. McAllister Warden, and he should come in as Warden, and here is a warrant of commitment to the penitentiary for a crime, 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 appointed by the Territory to succeed a former Warden.

Mr. Fitch.—If there is a change in the office, of course, the process or order of the court goes with the office and does not remain with the retiring officer; but am I to understand your honor to indicate that you consider that the office of Warden of the penitentiary has descended by an appointment, or has become vested by virtue of any process whatever in Mr. Patrick?

The Court.—That was not the case I supposed.

Mr. Baskin.—We shall contend that the functions of the office of Warden are in the U. S. Marshal.

Mr. Fitch.—A little while ago in the opening of the case, it was urged by Judge Morgan that the Warden of the penitentiary was no officer whatever; that no power existed in the Territorial Legislature to create the office of Warden of the penitentiary, and that there was, therefore, no such officer at all; but now we are told that the prosecution intend to insist that the United States Marshal succeeded in the functions of this officer, who it is claimed has no existence at all! Upon which of these conflicting propositions do the prosecution insist? If Mr. Baskin shall maintain hereafter that the United States Marshal succeeded to the functions of the Warden of the penitentiary, then what will he do with the position of his colleague that there is no such officer? If "in a multitude of counsellors there is wisdom," there may sometimes be also confusion. Referring here to the suggestion advanced a few minutes ago, that, if the Marshal of the United States, deeming himself, under the law, entitled to the custody of this prisoner, had applied to your honor for a writ of habeas corpus, to test the legal questions involved, and your honor had upon such proceeding decided that the Marshal was entitled to his custody, then such decision would have been "an order of court," within the meaning of the act of 1790, and on a refusal to comply with that order the Territorial officer would have been liable under the laws of the United States that have been cited here. But it seems that the Marshal determined to proceed without a process of court. Why he came to this conclusion I do not know. If he was right in his construction of the 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 opened the case for the prosecution stated to your honor that in the event of the commitment of this defendant he should also ask for an order of the court that the prisoner be turned over to the custody of the United States Marshal. He asks now for that which he should have solicited before, and which, had he obtained it, would have superseded the necessity of this proceeding. If there had been a successful application for the custody of Kilfoyle by habeas corpus, or if there had been any kind of an order of this court issued and directed to the Warden of the Penitentiary, commanding him to surrender Kilfoyle to the U. S. Marshal, he would at once have surrendered the prisoner, and there would have been no cause for argument in his defence upon this criminal charge. All that the defendant asked, as appears from the testimony, was an order of court. In his written protest he says, "I will surrender this convict on the order of some court of competent jurisdiction." He deems himself invested by the Legislature of the Territory with certain duties and responsibilities; he has given bonds 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 responsibilities and to cease to perform those duties, that he should do it on some demand more formal and some decision more binding than the construction of an act of Congress made by the United States Marshal—the United States Marshal, who is not responsible to the people of this Territory or the Legislature of this Territory, and whose construction would not avail the Warden as an excuse or defence for official malfeasance if perchance he should be charged with such for thus relinquishing his trust. Habeas corpus would, it seems to me, have been the better way to test this question; but being less calculated to make turbulence and create ill-feeling than the method of procedure which has been pursued it may, by some, be thought a matter of congratulation that it was not invoked. However, we have perhaps cause to congratulate ourselves that the services of your Honor have been invoked at all; the defendant in this case has perhaps reason to be thankful that force and violence have not been resorted to. Perhaps we may congratulate ourselves that the guns of the fort have not been turned on the city, and the City Hall surrounded with cavalry, infantry and artillery, and the Warden compelled, at the point of the bayonet, to surrender his prisoner.

Mr. Baskin.—That would have been my way to do it.

Mr. Fitch.—I presume that Mr. Baskin would have knocked the City Hall and City Jail down.

Mr. Baskin.—I would that.

Mr. Fitch.—The acting law officer of the 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 American citizens on the Fourth of July? Was it asleep? ashamed? or afraid?

Governor Woods.—(who was seated on the right hand of Judge Hawley) Neither, my lord!

Mr. Fitch.—I am assured by the Executive of the Territory of Utah, who honors us with his audience and encourages the prosecution with approving smiles, that my surmises are incorrect. The Executive of 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 designs 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 interrogated or no—

The Court.—This discussion is becoming exciting and I shall not permit further remarks 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 interruptions made irregularly by Mr. Baskin and improperly by Governor Woods. Since then we are to be tried before being punished, I will now proceed to the consideration of the important questions involved.

The first question involved in this proceeding is the proper construction of the act of Congress, January, 1871, the act upon which the other side rely for the right of the United States Marshal to the custody of Kilfoyle. This act was cited by counsel on the other side. I will not repeat the recital of the first two sections, but will call your attention particularly 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, having been paid for by the United States. The second section provides that it should be the duty of the Attorney General to provide regulations for these provisions being carried into effect; and it further provides that the United States prisoners shall be in the custody of the United States Marshal in the United States penitentiary; "and still further provides that persons convicted of offences 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 directory? And in the consideration of that question involves the inquiry whether Congress has the power under the Constitution 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 treasury of the city of New York, or the treasury of the city of Washington or any other place where the money is derived from local taxation? The third question is; if there be a discretion left with the Territory in regard to contracting with the United States for the care and custody of Territorial prisoners, then in what officer or officers of the Territory is that discretion vested?

Is it vested in the Governor? in the Warden? 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"—just what it says; that by the act of Congress of January, 1871, there is an option given to the Territory as to whether it will or will not have its Territorial convicts imprisoned in the United States penitentiary. I refer here to the well known rule of construction of legislative acts—laws must be construed according to the intent of the legislature. In arriving at that intent courts are not restricted to the letter of the statute. They must consult the whole law, they may consider the title of the act, they can refer to other statutes, they may even disregard the letter of the law altogether and collect the construction from the cause or necessity for making the law, or from the condition of the country, or from other circumstances. In support of these propositions, which will I apprehend scarcely be disputed, for they are elementary doctrines. I refer your honor to the following authorities: 1st Ill. Rep. 410. 3d Ill. 225, 6th Ill. 688, 24th Ill. 107, 4th N. Y. 144, 6th N. Y., 13, 1st Pickering (Mass.) 250, 4 Cushing (Mass.) 316, 1 Kent's Com., 510, 2 Kentucky 796, 2 Cranch 33, 3 Dall 365, 1 Peters 46, 3 Howard 556, 565.

The doctrine with reference to the construction of the word "may" in public statutes is laid down tersely and clearly in a decision rendered by Chief Justice Nelson in 3d Hill's Reports, page 615. He says: "Where a statute directs the doing of a thing for the sake of justice or for the public good, the word may is the same as the word shall." "Where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty though the phraseology of the statute be permissive merely and not peremptory."

Other cases in which this rule is illustrated and commented upon may be found in 5th Cowen's Rep. p 193, 5th Johnson's chancery Rep. III, 1 Kent's Com., 518, 1 Baldwin 303, 12 Wheaton 64, 1 Peters 46, 4 Wallace 435.

Let us—if the Court please—apply these rules of construction to the Act of January 1871.

It is a principle of law, which has passed into an axiom, that laws which impose a duty, confer of necessity the authority to perform that duty; that in the language of the court of appeals of the State of New York "whenever a power is given by statute everything necessary to make it effectual or requisite to attain the end in view is implied." Stief vs Hart 1st N. Y. p. 20.

Consider now, the language of this statute: "And be it further enacted that any person convicted," &c., in a Territory, etc., *may at the cost of such Territory*, on such terms and conditions as may be prescribed by the Attorney General be received, etc., in the Territorial penitentiary, etc. Now suppose that under this act of Congress the last Territorial prisoner shall be reluctantly surrendered to the custody of the United States Marshal. That officer is required by the instructions of the Attorney General a s