

well as by the act 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 General as the rate at which the United States will subsidize Territorial prisoners.

The U. S. Marshal is required by the Attorney General's instructions—which are in evidence here—to deduct from his quarterly accounts against the United States the sum paid him by the Territory for keeping its prisoners. But suppose the U. S. Marshal should not be able to deduct anything from his bills against the United States because of there being no officer in charge of the Territorial funds empowered to pay him for keeping Territorial prisoners, or because of there being no funds in the Territorial treasury; or suppose the Territorial Legislature should neglect or refuse to pass an appropriation bill to pay the United States Marshal for taking charge of the Territorial prisoners at all, what is to be done about it? Where is the remedy of the Marshal? How are the bills to be collected? Will your honor issue a mandamus to the Territorial Legislature commanding them to enact a law to appropriate so much money out of the Territorial treasury to the United States Marshal? I 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 mandamus 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, and the Territory says through its legislative power that it has made no contract 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 subsidize these Territorial prisoners without pay?

Court.—Suppose, Mr. Fitch, that the Board of Supervisors of a county should refuse to execute or levy a tax to pay the bonds of a county, could they be collected?

Mr. Fitch.—Certainly they could, because a Court could command the Supervisors to levy a tax for the purpose of paying the bonds, and punish the Supervisors for contempt 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 providing that the Board of Supervisors of a county 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 not a legislative discretion conferred by law. If a Board of Supervisors is vested with a discretion, its members cannot be 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 the act of Congress does not say that the Territorial Legislature shall meet on such a day, and levy a tax for the purpose of sustaining the territorial prisoners under the control of the government officers. Nor would it be in the power of Congress to enact such law. That Congress may deny to the people of a Territory the right of local self-government, that it may neglect or refuse to provide for a Territorial legislature at all, I do not question here, but if it create a Territorial Legislature and if it cannot control the rightful discretion of that legislature. If a local law be needed for Utah, and the Territorial Legislature refuse to enact such law, Congress may legislate for the Territory by its own act, but it cannot compel Utah lawmakers 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 of Utah alone can appropriate money from the treasury of the Territory. Congress cannot 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 demonstrating that it cannot be possible that Congress should have intended to do anything so unconstitutional and absurd as it has done, if the language of the act of January 1871 is construed to mean "must" instead of "may". Congress intended exactly what the law says, that Territorial convicts shall be kept "at the cost of the Territory"; it did not intend that the United States would pay if the Territory should refuse, nor did it intend that the Marshal should pay out of his own pocket.

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 authorities that you will receive therein any or all persons that have been convicted 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.," evidently "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 reasonable price, would make haste to avail itself of these advantages. But the letter of the Attorney General certainly left to the Territory 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 instructions of the Attorney General, thereunder, the United States of America does not intend to pay the board of Territorial convicts; 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 Legislature to make an appropriation to pay for them. What follows? Why if the word may is construed to mean must, and the Territorial Legislature declines to make an appropriation, 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 violates reason. You cannot suppose that the Congress of the United States intended to 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 Territorial 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 condensed reports 566 8th 1b 480, 12th 1b 636.

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 it in the power of Congress to pass an act to have a sewer laid down in 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 power of Congress to do that directly, it cannot do it indirectly, and it would be just as reasonable for it to pass such an act as to pass one to compel Territorial convicts to be kept by the United States Marshal in the United States prison, and that the cost of keeping them must be paid by the Territory.

"May means must only when the public interests and rights are involved."

What are the public rights? The public have the right 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 loose upon society; but the public has no right to prescribe the particular 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 Marshal—has clearly no right to act as host or guardian of Territorial convicts unless the Territory through "its proper authorities" agree to it. I call your honor's attention again to the language of this letter. The Attorney General cites the first and second sections of the act, and then says to the U. S. Marshal that he will "cause all United States convicts who have been or may be hereafter convicted and sentenced to imprisonment, to be confined therein." He next says, "and inform the proper Territorial authorities that you will receive therein all persons who have been convicted and sentenced for the violation of Territorial laws; and maintain them therein at the rate of one dollar and a half per day." These are the instructions of the Attorney General of the U. S. to the United States Marshal.

Court. What is the effect of the contract with Governor Woods?

Mr. Fitch. I will come to that presently. I will conclude this branch of my argument by saying that the intent of Congress, as gathered from the language of the act, from the rules and regulations presented by the Attorney General, and the surrounding circumstances, is simply this: First, that the prison owned by the United States shall be in the custody of an officer of the United States; second, that the prisoners of the United States—those convicted of offences against the laws of the United States, shall be in the custody of an officer of the United States; and third, that the United States having a proper place for keeping its own prisoners, and having facilities for keeping other convicts, will for convenience sake permit the Territory at its discretion and option to have the Territorial prisoners confined 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 prices, and you may board your convicts with us at those prices if you like.

But suppose that the Territorial authorities do not choose to avail themselves of this offer? Is not the option given them to accept it or 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 should prescribe a hundred dollars per day each, as the terms

upon which he would receive prisoners, and he probably has the same right to prescribe that sum as he has to prescribe one dollar and a half a day, though it is not possible he would do anything so 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 not make much money by the operation. But suppose the Attorney General prescribes a rate of subsistence with which the proper Territorial authorities are not satisfied, or suppose that the Territorial authorities—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 person 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 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 General 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 opposing counsel, why can not Congress, next winter, pass an act providing that a building site shall be purchased in Salt Lake City; that a building shall be erected thereon under the supervision of the United States Marshal, for United States courts, post office and custom-house, and we certainly need such a building, although perhaps we do not need to have it erected under the supervision of the United States Marshal; and suppose that in the construction of this building more room is provided than is necessary for United States purposes, 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 Attorney General of the United States, and that officer should then send a letter of instruction 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 dollars a month for rent? Then, according to the construction claimed for the act in relation to boarding Territorial prisoners in U. S. prisons, the legislative, judicial and ministerial officers of Utah would be compelled to occupy these rooms, and if they should decline to occupy them voluntarily, along comes the United States Marshal with a posse committatus, or a brigade of infantry, as the case may be, and forces them to their desks, and then if the Territorial Legislature should refuse to appropriate money to pay the rent—what then? Well, I do not know what would be done; perhaps arrest and punish the contumacious Councilors and Representatives for treason; 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 shameful violation of every principle of 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 government of monstrous tyranny and injustice. If your honor please, our government 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 any reference to any of the officers of this Territory.

The next question is, if there be a discretion left with the Territory by the Act of Jan., 1871, then who is to exercise it? Suppose that the United States Marshal thinks that the Governor is the proper person, and the Governor is evidently of the same opinion. 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 authorities that you will receive therein all persons who have been so convicted," etc., "You will inform the proper Territorial authorities." The Attorney-General did not attempt to assert who the proper Territorial authorities are. He says in one part of his letter of instructions, "You will keep an account of the cost of keeping the prisoners, etc., and deduct the amount paid by the Territory for keeping their prisoners. And you will make a contract in writing, on behalf of the United States, with the Governor or other proper official, for keeping the Territorial convicts," etc. I do not see how it can be contended—unless some other authority can be shown—that the Governor is the party who is charged by law with the proper keeping of the Territorial 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 officer." The Attorney-General evidently does not claim to know who can be lawfully contracted with on behalf of the Territory. He says, "You will inform the proper Territorial authorities;" and he says, "A contract in writing should be entered into with the Governor or other proper authority."

Even if the Attorney-General should give it as his opinion that the Governor is the only proper authority, that would not bind the Territory, or be a rule of decision for a Court; but he does not give such an opinion.

Unless there be some law of this Territory authorizing and empowering the Governor to contract for and in its behalf—he is not the "proper authority" desired by the Attorney-General, and his contract, attempting to bind this people to pay money to the United States, is utterly worthless.

The Executive of this Territory, outside of the powers conferred upon him by statute, is as powerless as the humblest citizen of the Republic; the powers of his office, the duties of his office, the functions of his office are prescribed by law; unlike a Judge of a court of original jurisdiction, he takes no powers by intendment or implication, but is confined to the letter of the statute creating his office. In 5 Mason's Circuit Court Reports, 441, Justice Strong says:

"I hold it most clear, that the acts of a public officer beyond the scope of his powers, etc., are utterly void. A different doctrine would lead to the most alarming and mischievous consequences and unsettle some of the best established principles of the law of agency."

In the 9th volume of Opinions of the Attorney Generals of the United States, page 18, the following doctrine is asserted:

"The head of an Executive Department can bind the government by contract only when expressly authorized by law, or when an appropriation is made to be expended by such head for a specific purpose." And to the same effect I refer your honor to 1st Mason 482 and 2 Gallin 515. What are the powers of the Governor of this Territory? They are defined in a section of the Organic Act of Utah, "And be it further enacted: That the Executive power and authority in and over said Territory of Utah, shall be vested in a Governor, who, &c., shall be commander-in-chief of the militia thereof"—that is one of his functions—"shall perform the duties and receive the emoluments of superintendent of Indian affairs"—which I believe is dispensed with now—"and shall approve all laws, &c., &c.," and shall take care that the laws be faithfully executed." There are all the duties enjoined upon and all the powers conferred upon the Governor of this Territory; and outside of these he has no power. Then where is the law of Utah or the statute of the United States that empowers the Governor to bind the people of the Territory of Utah to pay one dollar? I ask counsel on the other side to refer me to it. He has no more power to make the people, the tax payers of the Territory, pay a dollar than I have to compel the British Parliament to make an appropriation to pay pensions to the descendants of William Penn.

Now I come to the law which Mr. Baskin has avowed his purpose of citing. Let us see by the law who is entrusted with the charge of the Territorial convicts. (Read the act relative to Warden, Laws of Utah.) Counsel upon the other side advances the proposition that under the Organic law this Territorial act creating the office of Warden is unconstitutional; that no power is conferred upon the Legislature to elect a Warden. Let us refer to the Organic act; (Read Sec. 6 and 7 Organic act.) I confess I can not see how the election of a Warden of the penitentiary is in conflict with the Constitution. Let us see if 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 confirmed by the Legislature. Now without discussing the question as to the power of the legislature to deviate from the letter of the Organic act in providing for the selection of public officers, I suppose it will not be denied that the Governor may waive his prerogative so far as to change places with the Legislature and confirm instead of appointing. The object of the Organic act is clearly that both the Executive and the Legislature shall agree in the selection of the officer. The usual mode is, for the Executive to select, and the Legislature—if satisfied—to confirm, and if not satisfied, to reject. But the same result is reached when the Legislature selects and the Governor confirms their selection, as he does confirm it when he approves the law creating the office and electing the officer, and without his approval the law of course cannot pass. In any event Warden Rockwood is the Warden de facto, he presents a commission signed by the Acting Governor, his title de jure cannot be attacked collaterally in this proceeding, for the question here is not, "Was Rockwood legally chosen?" but, "Is Patrick entitled to the custody of Killfoyle?"

The Territorial law also provides for a board of Prison Directors and a subsequent act on the next page provides, "That the Warden is authorized to advertise for pro-

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