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THE AUTHORITY OF THE "PROVISIONAL COURT"
OF LOUISIANA.

In the early part of this Volume (p. 66), a statement was given of the recent organization of a Provisional Court for the state of Louisiana, by authority of the President of the United States. The extent of the jurisdiction thus created, and the validity of the decrees pronounced by Judge PEABODY, under his commission, present questions of novelty as well as interest. Has a judicial or simply a military tribunal been created? Are its judgments of permanent or temporary force? Are they conclusive upon the rights of parties, or re-examinable by other courts?

As Commander-in-Chief of the Army and Navy of the United States, the President has the right to declare the existence of martial law over territory disputed by armed opposition to the national authority, when and where he deems it necessary. And he has equally the right to delegate to any subordinate the power of expounding that law, which the Duke of Wellington defined as the will of the military commander.

This will is ordinarily expressed only as acting upon the rights of persons, unless where property is taken for public use, and it is doubtful if more than this is to be included under the term *Martial Law*, as understood in constitutional governments. During its continuance, however, this will of the military commander may evidently extend itself, at his pleasure, to cover and

determine all rights of private property and civil controversies, for he represents the force of the state unfettered by its laws.

But when the exigency has passed, and the civil authority resumes its sway, these private rights would be decided, in general, without regard to prior military adjudications. Martial law, when pushed to this extent, is the law of the moment and the bayonet. Its stability is limited by the one; its authority by the other.

By a military order of the President of the United States, certified by the Secretary of War under the seal of that department, the Hon. Charles A. Peabody, of New York, was commissioned to hold "a Provisional Court, which shall be a court of record for the state of Louisiana, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana—his judgment to be final and conclusive."

Thus, by a paper dashed off in a few hurried moments (for its tautology and inaccuracy of construction show that it was drawn up with little deliberation), one man, acting on powers given him, at most, only by implication, confers on another all the judicial authority over an extensive territory which could be granted by the sovereign power of a state.

The criminal jurisdiction granted would seem to be authorized, and the sentences pronounced under it conclusive, for every breach of the peace is an offence against the military, here the governing power; and the offender, therefore, is justly liable to punishment by its officers.

The civil jurisdiction exercised, however, whether terminating in judgments *in rem* or *in personam*, seems not entitled to the same protection. If two men differ about the title to a horse or a farm, the necessity of the case does not call upon the military commander to intervene. So long as their difference does not lead them to break the peace, the military power can only interfere as a matter of temporary policy. If the legislative power does not see fit to give such complainants a mode of remedy, it is because it thinks it best, in such times, that they should remain remediless; and the executive cannot make permanent laws, or

give permanent effect to his own temporary law, under a constitution, defining and separating, as does ours, the Executive, Legislative, and Judicial Departments.

An instructive case upon this point is that of *Jecker et al. vs. Montgomery*, 13 How. 498. During the Mexican War, it was inconvenient to send home for adjudication the prizes captured by our naval cruisers on the Pacific coast. At the request of the naval commander on that station, the President of the United States erected a Prize Court at Monterey, a port of the enemy in our possession, and appointed a chaplain from one of the ships of war to act as judge, and exercise admiralty jurisdiction in cases of capture, reporting his proceedings to and holding all prize-moneys for distribution upon the order of the Secretary of the Navy.

A captured vessel having been condemned and sold under proceedings before this court, the owners of the cargo brought their action to recover its value, against the commander of the ship making the seizure, before a District Court of the United States. In giving the opinion of the Supreme Court, before which the case came on appeal, TANEY, C. J., remarks: "Under the Constitution of the United States, the judicial power of the General Government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States; and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

"The courts established or sanctioned in Mexico during the war, by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or on prize; and the sentence of condemnation in the court of Monterey is a nullity, and can have no effect upon the rights of any party."

An equally unanswerable argument against the judicial character of the Provisional Court is drawn from the tenure of office of the judge who holds it. See the opinion of MARSHALL, C. J., in *Am. Insurance Co. vs. Canter*, 1 Pet. 546.

The doctrine of these cases applies to the civil adjudications of Judge PEABODY with a double force. In the state of Louisiana, Congress had actually established what it deemed proper and sufficient judicial tribunals. The presiding justice of that circuit (Judge CATRON) was, when this Provisional Court was established, in the active performance of his judicial duties at the seat of government. The places of the district judges, if they had become forfeited, could easily have been filled upon proper proceedings; yet, by a stroke of the pen, these established courts are either ousted of their jurisdiction, or forced to share it with a tribunal unknown to the laws, and at least one case (that of *The Bark Grapeshot*) is in fact transferred from the Circuit Court, to which it had come on appeal from the District Court for the Eastern District of Louisiana, to this Provisional Court, and there brought to final judgment.

What is this, if considered a judicial proceeding, but the substitution of a court of the Executive for a court of the Constitution? and what is that but the substitution of arbitrary power for constitutional limitations?

The Constitution, we may admit, allows the President under certain circumstances to silence all law in a given district and rule it by his military will. But surely it does not allow him to withdraw causes from courts whose legal existence and present authority he recognises by the withdrawal, to be decided by himself or his agents, and claim for such decision the sanctions of permanent judicial determinations.

There is less doubt about the remaining civil jurisdiction bestowed upon the Provisional Court, that of causes properly cognisable in the state courts. This, not even Congress, and much less the President, could permanently vest in other tribunals, since the authority granted to the United States does not embrace it. When conferred upon this military officer, it was as a temporary measure of military policy, the better to preserve the order and contentment of the community. The attachment to the forms and sanctions of judicial tribunals, as De Tocqueville has remarked, is a deep-fixed sentiment of the American people. If, during a temporary disorganization of civil

government, justice must be declared by the voice of military command, our people like better to have it uttered by one bearing the appellation of judge and acting by a marshal, clerk, and district attorney—names of familiar authority—than by an officer in uniform with a file of soldiers to enforce his decisions. And so, from a similar policy, in many of our detached military posts, the commanders have created provost-marshal's courts (as, for example, "The Provost-Marshal's Court for the District of Newbern"), to which writs in ordinary form are returned by an officer styled "Constable of the Court."

If these views are correct, it would follow that the civil rights of parties, upon the cessation of military government, are to be regarded as unaffected by decisions of the Provisional Courts. As was said by Chief Justice MARSHALL in *Rose vs. Himely*, 4 Cranch 241, in reviewing a judgment *in rem* pronounced by a prize court in San Domingo, "a sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognisance of the subject it had decided, could have no legal effect whatever. The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions which it professes to decide must be considered."

The principle which protects adjudications by the courts of a *de facto* government (as, in England, the judgments of the courts of Cromwell's Protectorate were respected upon the Restoration), will not apply in the case in hand, since we have to deal not with a judicial but with a military tribunal. Judge PEABODY'S court would probably be entitled to less regard than a court-martial of the ordinary character. Neither would be protected if acting without its legal jurisdiction.

"To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and of the subject-matter, and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose:" *Borden vs. Fitch*, 15 Johns. 141; *Dynes vs. Hoover*, 20 How. 83.

The reorganization of the state and national courts for Louis-

iana, recently effected, has superseded the functions of Judge PEABODY, by the terms of his commission, and he descends from the bench to take the place of United States District Attorney. We shall look with interest to see whether the equity of the judgments of the Provisional Court and their apparent necessity will induce his successors to respect and uphold them, or whether the rule will be followed, which is indicated in *Jecker vs. Montgomery*, and the gates of litigation thrown open anew. B.

New Haven, Conn., February, 1865.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of New Hampshire.

TOWN OF NEW MARKET vs. ROBERT SMART.

In a grant "to the inhabitants of a town, to be held by them as a body politic and corporate, and to their successors for ever," the title vests in the town as a corporation.

In the case of such grant made in 1803, to the use of the minister then settled in the town of New Market, as long as he should be the settled Congregational minister there; and then to be and remain for the use of the minister of that persuasion that shall be settled in that town, the title rests in the town in its parochial, and not in its municipal character.

Where the voluntary religious society which existed at the time of this grant, and over which the minister referred to was settled, was afterwards under the statute of July 3, 1827, organized and became a body corporate and politic, capable of taking and holding real and personal estate for the use of the society; and the town was no longer charged with any parochial duties in relation to such society; *held*, that the legal, as well as beneficial, estate in the lands so granted, passed to, and were vested in, that society, as the successor to the parochial rights and duties formerly belonging to the town.

Where the *cestui que trust* in possession disavows the trust, and claims to hold the land by a title hostile to that of the trustee; and this, by some clear and unequivocal act, is distinctly brought to the knowledge of the trustee; the possession will from that time be deemed to be adverse.

In such a case it is not essential that the *cestui que trust* should claim an absolute fee simple or freehold in himself, but it is sufficient if the title claimed be in trust for the use of the ministry in a certain religious society for ever.

This is an action of trespass *quare clausum fregit*. The *locus in quo* is in South New Market, and is known as the Parsonage. The plaintiff claims under one Pike and others, who being seised