CONFEDERATE STATES

vs.

JOHN H. GILMER.

CONFEDERATE STATES

VS.

JOHN H. GILMER.

SUBSTANCE

OF THE

OPENING ARGUMENT

OF

JOHN H. GILMER,

WITH AUTHORITIES;

AND

THE OPINION

OF

JUDGE HALYBURTON

CONSTRUING

THE SEQUESTRATION ACT, &c.

RICHMOND, VA.:
WEST & JOHNSTON,
145 MAIN STREET.
1862.

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CONFEDERATE STATES vs. JOHN H. GILMER.

May it please the court. Early in September last, I informed the Receiver of this court, in writing, of all the property or interest, of every kind, which I held in my hands, or was under my control, belonging to alien enemies, as designated in the Sequestration Bill. I, at the same time, informed the Receiver that I should deny and contest his right to take possession of the property so in my hands. To test the questions arising under my objections, the writ of garnishment, with the accompanying interrogatories, has been regularly served on me; and in answer to that process, I now appear before this honorable court.

I shall endeavor to sustain the three following propositions:

I.

The Provisional Congress had no constitutional power to pass the Sequestration Bill.

II.

The bill itself is in violation of the Provisional and Confederate Constitutions, in derogation of the common law, and utterly subversive of international polity.

III.

The instructions and interrogatories prepared and propounded by the Attorney General, are in violation of the spirit of constitutional freedom; subversive of individual vested rights; regardless of professional integrity, and against the positive and well established rules of civilization, sound morality and wholesome governmental action.

I shall endeavor to maintain these propositions. They are of paramount importance, and challenge the most deliberate consideration. The first proposition denies to the Provisional Congress the constitutional power to pass this bill.

I ask the judgment of this court on the enquiry, "What is the Provisional Constitution? When, under what circumstances, was it adopted?"

The answer to these enquiries will control, in part, the judgment of this court, on the first proposition. The provisional constitution was adopted on the 8th day of February 1861, in the city of Montgomery, in the State of Alabama, by "deputies of the sovereign and independent States of South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana." It was the child of a new revolution. It sprang as the first bud of the tree of liberty, newly planted on a more congenial soil. Its framers had, in immediate prospect, a bloody war and a severe struggle. There was a dark and portentous cloud overhanging the immediate destinies of the slaveholding States. Energy, promptness, decision and concert of action, were required for the existing condition of things; there was no time to look far or minutely into the future. This constitution was therefore necessarily merely *provisional* in its purposes, temporary in its scope, and contemplated a different and more permanent "successor:" one that should rest securely and deeply *in the hearts of the people*, as it was to spring directly from the *States*, each voting for itself.

It would have been well, I apprehend, for posterity, at least, if the framers of the Provisional Constitution, "had rested after their labors." But in hot haste and immatured judgments, they precipitated upon the States a permanent constitution. This important paper was adopted by the Provisional Congress, on the 11th day of March 1861. It is the work of the same hands which framed the Provisional Constitution.

This constitution is the one which is to control our future destinies. It is the solemn act of "the people of the Confederate States—each State acting in its sovereign and independent cha-

racter." Here, then, are two constitutions passed by the same body, under similar circumstances; but adopted and ratified, sanctioned and endowed by *different sources of constitutional power*. The first, the offspring of "deputies" for specific purposes and limited objects. The second, though enacted by the same body, speaks by the authority of the States, through the people of each State. It is permanent and fixed, beyond the control of the enactors, and is a check on their power as derived, or sought to be derived, under the Provisional Constitution.

Virginia ratified the provisional Constitution, in convention, on the 25th day of April 1861. The Confederate Constitution was ratified in convention on the 19th day of June 1861. Here, then, are two distinct contracts, or *compacts*, between the State of Virginia and the Confederate States. I maintain that the compact of the 19th of June is the one by which this court is to be guided in its judgment in this case. Not merely because it is the last, but upon the higher constitutional ground, that it is the only compact to which the people look for their protection, even in the existing crisis. It was, by them, in their sovereign capacity, sanctioned, adopted and ratified, as *the compact* by which they would hold *the Confederate States bound*, in all future interstate relations. This is placed beyond doubt, by the compact itself. It is in the following words:

"We, the delegates of the people of Virginia, in convention assembled, do, in their name and behalf, assent to, ratify and ordain the Constitution of the Confederate States of America, adopted by the Congress of the Confederate States of America, on the eleventh day of March, eighteen hundred and sixty-one: *and we do hereby make known to all whom it may concern, that the said Constitution is binding upon the people of this Commonwealth.* But this Constitution is ratified and adopted by Virginia, with the distinct understanding on her part, that she expressly reserves to herself the right, through a convention representing her people, in their sovereign character, to repeal and annul this ordinance, and to resume all the powers hereby granted to the Confederate Government, whenever

they shall, in her judgment, have been perverted to her injury or oppression."

Under which of these constitutions was the Sequestration Bill passed? This is a grave inquiry. It presents for adjudication this vital issue; do the enumerations or limitations of power, in the Confederate Constitution, lie in abeyance until the *Confederate Government* goes into operation, on the 22d February 1862. Is this second compact by Virginia on the 19th June 1861, inoperative, a *nudum pactum,* until the 22d of next February? A graver question could not be presented. Is there no limitation upon the *powers* of the Provisional Congress in this permanent constitution? Does it deny to a Congress composed of a Senate and House of Representatives, certain powers, by express inhibition, and yet leave the "deputies" in the Provisional Congress free to disregard those inhibitions? Can the *Provisional* Congress exercise legislative powers, *expressly denied and refused the permanent Congress?* In one word, can the sovereign will of the contracting States, as embodied in this compact, be kept in a dormant, inert, non-existent state, and subordinate to the Provisional compact?

If Virginia were to repeal the ordinance of the 19th June, would it leave the ordinance of the 25th April in full effect? Were some dangerous and palpable infraction of the Confederate Constitution *now* to be made, which Virginia deemed a violation of *her* compact of the 19th June, would she, under the provisions and conditions of that ordinance be remitted, under the ordinance of the 25th April, to the provisions of the Provisional Constitution? Has she no power, under her reserved rights, in the ordinance of the 19th June, to act until the 22d of February 1862? If the Provisional Government violates her sovereignty, and seeks to disregard her high and just claims in any given contingency, *is she a helpless instrument in the hands of arbitrary power?*

Sir, this is no idle question. I look to *Virginia* and her destiny, in this fearful crisis. I owe no allegiance to the Confederate States. My allegiance is *due to Virginia,* as the deepest and most sacred emotions of my soul are wrapt up in her destiny.

The question again recurs. Under which of these Constitutions was this bill passed? If it was passed by and under the authority of the Provisional Constitution—where was its power in any grant? I concede the *full power*, in the Provisional Congress, under the Provisional Constitution, to *confiscate* the contraband property of alien enemies, in the territory and under the jurisdiction of the Confederate States. But I utterly deny its power to *sequestrate*—and by a complex system of legislative adjudication, to throw the people of the Confederate States into chancery for the next half century, should free government last so long. The legal distinction between confiscation and sequestration is here all important. To confiscate, and seize the property of the enemy for the good of the whole people and government, is a national and valid act; and would be opposed by no good citizen. But to *sequestrate* and by complex litigation, seek to protect and remunerate a *select class*, is as unconstitutional as it is unjust.

This law, in its results, *weakens* and cripples the resources of the Confederate Government. It destroys commercial credit, and assails vested rights, and by divesting them, weakens the "sinews of war." How is this I will be asked? A case stated will test the operation of the bill, in its practical results. Take the most extensive and strongest commercial house in this city, or New Orleans. It has a capital of $500,000 in active operation. It has a partner, resident in New York, who ownes *one fourth of the entire interest*, this is $125,000. The bill takes this from the firm, and *locks it up in the treasury*, after deducting 10 per cent. for the benevolent and innocent operation. Now the firm happened to have borrowed $100,000 from Boston friends. This is also seized, and, with a like *charge* for the seizure, is *locked up in* the treasury to await future action, and ultimate distribution among unnamed citizens. This is but *one* of the many highly beneficial results of this *patriotic war measure.* $225,000 of $500,000 abstracted from active commercial business, and locked up, to be litigated hereafter?

With the policy of this law, the court has nothing to do, but

I cite this example as an illustration of the effects of *sequestration. Were this sum abstracted, and put into war funds by confiscation, the government assuming the ultimate responsibility, no one would support the law more cordially than myself.* But such a law as this, meets my cordial distrust and candid opposition.

The Provisional Government is an agency—limited in the duration of its existence: limited to the exercise of specific powers, specifically granted, for limited and specific purposes. It is a war government, and only a war power can be claimed to be exercised—precisely as enumerated and granted. When the permanent Constitution was enacted, the powers granted and inhibited, were limitations and restrictions, placed over the "legislative power," over and above the enumerations and specifications contained in the Provisional Constitution. It certainly never could have been designed to limit the power of permanent government, by a clause in a subsequent fundamental law, and not at the same time intended by the same limitation, to qualify and restrict a power bestowed by a previous grant of powers, created and bestowed by a *previous* fundamental law. All the authorities concur in establishing this principle, that the last law, or compact, when it supercedes, limits or qualifies a grant contained in a previous law or compact, prevails over the former grant; and where the last law or compact, recalls a power or franchise bestowed under the first, this is a total abnegation of the former power or franchise.

It is in contravention of every settled rule of law and right, that two contradictory and conflicting fundamental laws can coexist and be of equal legal force. Where a conflict occurs, the uniform rule, everywhere is, that the last compact or law, takes precedence of the former.

On this point I refer the court to Sedgewick on Statutes, (note,) 284, 86, 90, (where Domat and Lieber are cited.) Vattel 271, 74.

The rules here given are very explicit, and sustain to the fullest extent this position. I also refer to Fletcher vs. Peck,

6 Cranch 128, and Martin vs. Hunter's lessee, 1 Wheat, 305.

With these authorities, allow me to refer the court to the sixth section and clause fourth of the Provisional Constitution Article 1st. It is in these words: "Congress shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the Confederacy." These are the exact words used on the same subject, in the old Federal Constitution. Now, sir, examine the eighth section and fourth clause, of article first of the Confederate Constitution, on the same subject. The same words are there used—with this important addition: "*But no law of Congress shall discharge any debt contracted before the passage of the same.*" Here is an important, significant, fatal *inhibition of power*. What does it mean? To what does it apply? To whom is the inhibition directed? literally, it may be said to apply to *the* Congress as created and constituted by *this* constitution. But can it be successfully contended that it does not apply, in spirit, intent and effect, to the Provisional Congress? If not, then a greater *legislative power in the scale of permanent legislation is allowed by implication to a temporary legislative body, than can be exercised by the permanent Congress.* If this is the policy and principle of the Provisional Government, I ask what becomes of the doctrine of strict construction, prescribed limitations of power and rigid adherence to the specific grant of power?

These are critical times. Revolutionary experiments in the form of permanent legislation, are indeed dangerous implements in untried hands. For one, I am unwilling to trust any such dangerous "implements of power" in any hands, at any time, or under any circumstances. The plea of necessity, is the tyrant's plea, and oftener flimsy and facticious, than solid and substantial. In this case there was no pretence of such necessity. It was as vagrant as the power exercised was arbitrary; and never should have been claimed or exercised.

Where then was any power vested in the Provisional Congress to *sequestrate?* They clearly have the power and certainly should have *confiscated for the benefit of the government*, leaving all

questions of ulterior action and legislative distribution to the permanent government. This is the grand error. They have grasped at more power even than they *granted to themselves*, and seek indemnity, under the war plea. This will not avail. Would that they had profited by the example of the *English* revolutionists, in 1640 and 1688 ?

I now proceed to consider my second proposition. Conceding the power to legislate on this subject, in the Provisional Congress, the result of the exercise of that power, as evidenced in this bill, is, in my opinion, clearly unconstitutional ; is in derogation of the common law, and violative of international polity.

In the first place it is *extra-territorial.* The *proviso* embraces persons and assumes dominion over things not under the legislative or military power of the Confederate States. It excludes from the operation of the duties and penalties of the bill, all citizens of Delaware, Maryland, the District of Columbia, Kentucky, Missouri, and certain named territories : provided they are not in actual hostility to the Confederate States. Where is the *power* to discriminate, in this way. Are not such exclusions in direct conflict with the purview of the act? Where is the power in the Provisional Congress to legislate for the benefit of the citizens of Delaware, or the City of Washington? What does *that* proviso import? Why not embrace the citizens and property of Pennsylvania? Where rests this discretionary power for the Provisional Congress to *protect* an alien friend in Delaware, and punish an alien friend in Pennsylvania? where the power to punish an alien enemy in Delaware, and protect an alien friend in the City of Washington? Under this *proviso*, who is an alien enemy? Does local residence constitute a true friend an alien enemy, and at the same time convert a real enemy into an alien friend ? Who is to discriminate? Is this proviso a mere fiction, and a delusion? What is state sovereignty? Is that too, a mere fiction, to be created or destroyed at the will of foreign governments? Are *we* safe, if the power to legislate over our persons and property is to be exercised by the Federal Government, as this bill exer-

cises it over the citizens of Delaware, Washington, &c? If we seek to control property and vested rights, in States not belonging to the Confederacy, how shall we deny the same right to the Federal Government?

These objections apply with equal force to the *directions* of the Attorney General, as to *alien enemies.* His views are as ultra as they are, to my mind, untenable. He brings property owned by, or money due, a citizen of Baltimore, Washington, Wilmington, (Delaware,) &c., under the immediate protection of this *proviso;* while property owned by or money due to a citizen or subject of England, France, Germany, or any other *foreign* country, if he resides in Baltimore, Washington, Wilmington, &c., is not protected. This is a discrimination, which to my mind, seems to be directly in the teeth of every authority, of every nation, and people and tongue. Residence in the enemy's country, (territory,) in one instance, constitutes a man an alien *friend,* (*as in Delaware.*) But if he resides a few yards further North, and is a citizen of Pennsylvania, presto, change? he is an alien *enemy.* Here is a discrimination, without a difference, and a limitation without a resulting power.

On this subject of extra territorial legislation, I refer the court to the following authorities. Sedgewick on Statutes, 70. Story on con. law, §§ 7, 18, 21, 22, 23, 25, 32, 35, 38. Commonwealth of Kentucky vs. Bassford, 6 Hill 527. Bank of Augusta vs. Earle, 13 Peter's Rep. 519. 2 Peter's Rep. 586, 2 do. 688. 2 Wash. Rep. 283. 12 Peter's Rep. 32, 657, and Vattel, 166, 67, 68, 69, 70.

The *duties* imposed in the second section of this bill, are as obnoxious as the *penalties* inflicted in the third section. In the second section it is made the duty of every citizen of the Confederate States, to become a common informer, and patriotic Paul Pry? In the third section, "attorneys, agents, trustees, &c., are specifically designated as the chosen vessels of social infamy, and if they, or any one "fail" in this betrayal of the trusts confided to them, they are to be fined not more than five thousand dollars, and imprisoned not longer than six months, and be

subject to suit, at the relation of the Confederate States, for double the value of the property they refuse to yield up. This is indeed a novel mode of rewarding fidelity, and inculcating proper moral lessons to a free and honest people.

These sections divest the most sacred rights, and repel the most honorable injunctions; as the *proviso* violates the letter and spirit of the purview of the entire act. See Sedgewick on Stat., 60 to 63. 1 Kent Com. 463. Plowden 564. Dwarris on Stat. 513. Also Sedgewick on Stat. 159, 60, 681, 2, 3. 2 Peters Rep. 27. Wheat, L. Na. 187, 208, 209.

They are also in direct conflict with the Art. 1, § 8, C. 4, and § 9, C. 15, and 19 of Confederate Constitution. They *discharge debts existing at the date of the passage of the law.* This I hold cannot be done, by a law or any law, passed by the Provisional Congress, any more than by a law passed by the Confederate Congress. *Thus is the law written.* It is a fundamental organic law, and admits of no qualification or variation. If it is, under any circumstances, or for any purpose, allowable to violate this distinct inhibition, the negation of power as a principle of action, will in all cases be an idle prohibition.

This bill violates the social compact, inasmuch as it denudes every citizen of his existing obligations, of moral responsibility.

It strikes at the very root of individual responsibility, and proposes to *punish* those who prefer an honorable compliance with the high dictates of conscientious convictions, to the low offices of a common informer, and thus rests its patriotic pretensions upon the assumed treachery of its self-condemned victims.

In addition to all this, it is *retroactive*, and *retrospective.* It divests rights, legally vested, and recalls acts and violates contracts, valid in themselves, *until rendered, or sought to be rendered, null by this bill.* It thus takes by surprise our own people, and *punishes them* for acts, innocent, proper and allowable, by the law which existed as only in force at the date of the acts. This is against all law and sound legislation. See Sedgewick on Statutes, 188, 406, 479, 484, 680, 696. Dash v. Vanklooh, 7 Johnson's Rep. 477.

And this brings me to the consideration of my third proposition. I rest most of my argument on this branch of the case, on the very able and learned arguments, recently delivered in the Confederate court in Charleston, by the distinguished gentlemen, who there entered their protests against this bill and these interrogatories. It is true the court in those cases overruled the demurrers. It will be seen, however, that I have placed my objections to the bill on different grounds from those occupied by these gentlemen. I refer this court to those arguments as splendid specimens of a high order of genius, eloquence and forensic pleading. I cannot hope to cope with such ability, but I nevertheless bestow the feeble light of my poor contribution, as an honest offering on the altar of constitutional liberty. Such as it is, it burns with the fire kindled by our revolutionary fathers, and seeks no screen from every responsibility which legitimately belongs to its manifestation.

I hold in my hand a court copy of these interrogatories, which has been served on me, as an attorney, practising in the courts of Virginia. The court is doubtless familiar with this *quasi* bill of indictment—the forerunner of another and more summary process, unless I bend the knee and bow the head to this legal satrap. I have thought (but it seems to have been—

"All but a dream at the best—")

that I had some few vested rights as a practising lawyer. It was my habit, until these latter days of *new lights* and *inquisitorial precepts*, to FEEL that my conscience was in my own keeping; that it was my own peculiar trust, amenable only to the God who endowed it. But this precept of Confederate power bids me treat it as "a scoff, a jest, a by-word through the world." A thing to be impaled, tortured, sported with, at the discretion of the chief law officer of the Confederate States.

Sir, where do I stand? Before what tribunal am I now, by the process of this court, compelled to resist or succumb to these *orders*, which, in so many words, say," "*You are hereby commanded, in the name of the President of the Confederate States, to violate every previous promise; to expose every secret confided*

to you; to open your bosom as the channel to concealed treasures, that my agents may enter, search for, and take possession of the trust confided to you?"

I again ask, where do I stand? In what age do I live? Am I a *Virginian*, or the mere pliant subject of the Confederate States? Who and what is the Attorney General, that he feels himself at liberty to frame a bill of discovery at large, and on it issue a general search warrant against my conscience? Whence this vast power? The President of the Confederate States, by his precept, placed in the hands of the marshal of this court, *commands* me to open wide the guards to my conscience, that he may levy on property entrusted to me, as a man of honor, by those who were entitled so to do, by all laws then existing.

Be it so. I am here in open court to enter my solemn protest, and by every legitimate means at my disposal, to resist this abominable *writ of ravishment*. Sir, I hold it to be a legal maxim, both under the Confederate Constitution, the Bill of Rights and Constitution of Virginia, that no process of any court, can issue against me, in the form of a penal command, until the proper foundation has been laid, by a responsible person, in the way of suit, petition or information. No officer of any grade, or of either government, can enter a private residence, to search for property under a *general search warrant*. His death would be the consequence if he met the proper resistance, and his slayer would stand justified before God and man. And yet I am now under moral duress, to answer a general search warrant levied on my conscience, in the absence of any suit, allegation or complaint. And for sooth, when I have answered, and thus placed myself in the clutches of this novel machine of moral torture if I do not happen to meet the views of the Receiver, he is empowered to draw yet closer the screws, and tighten the chords of this instrument of inquisitorial search.

If I fail in this my determined opposition to this precept, I am a prisoner at the discretion of this honorable court, and liable to a heavy fine. Sir, this is no exaggeration. It is a mel-

ancholy truth. And is this the boasted freedom vouchsafed in the spirit and genius of our revolution? Tell me not that there is no *duress* here. It is a duress more significant in its scope and terrible in its consequences than any mere physical torture. You may rack the frame—reduce the body—flay the skin—intensify the most excruciating suffering, and the *brave, honorable, high-spirited freeman* will, so long as you leave pure and unclouded his *conscience*, denounce the tyrant, and look to God and posterity as he sinks under the cruel infliction.

The peculiar object of assault by these interrogatories is the *conscience.* They sport with it as a worthless thing. With a ruthless cruelty they invade and violate every trust; they absolve or seek to absolve from every existing contract in the way of this remorseless search after gain; they repudiate all social confidence, and prostitute every implied or express promise; they seek to expose to the "miser's view" the "golden secrets of the heart;" they aim to extract "the jewel of honor" that they may grasp the "hidden treasure" encased in the soul; they assail every trust; they violate every rule of sound practice, and assail every sentiment of personal honor; they penetrate, without authority, and against all law, the consecrated secrets of professional privacy, and require attorneys, agents, factors, trustees to do that, which, if they had done *one year ago, they would have been denounced and shunned by all honorable men;* they, with the bill, threaten punishment for the observance of the most sacred promises, and repudiate as worthless, that personal responsibility on which the corner stone of society and religion rest; they rest as a basis, on the assumed dishonor and guilty inaction of fiduciaries, to corrupt whom is to sap the foundation stone of the social compact; *they seek to deaden the conscience and immure the soul under a load of accumulated infamy, and offer bold impunity to a shameless disregard of professional secresy;* yea, more, they aim to bring every lawyer, trustee and agent a prisoner before the courts, and seek to punish, for a refusal to surrender their trusts and expose their principal's secrets.

And I here assert that all this is sought to be accomplished by the Attorney General without authority, and against the powers (great as they are) confided to his keeping, by the sixteenth section of the bill. The language of that section is as follows: "The Attorney General shall prescribe *such uniform rules of proceeding under this law*, not herein otherwise provided for, as shall meet the necessities of the case." From this authority these interrogatories have been framed. It cannot be that the law allows, or "the necessities of the case" require such a proceeding as this.

I deny the power, validity or authority of this precept. It is for this court to judge between me and the government. The issue is fairly presented. Be the judgment of this court, the one way or the other, I have, to the best of my poor abilities, discharged the duty I owe to my country, my profession and myself. The issue, with its weighty responsibilities, will pass out of my hands, and rest with the court at the conclusion of the argument.

If in the wisdom of the court it shall be adjudged that this precept is correct, and must be sustained, I shall at least, hereafter, realize the proud consciousness that I have here, in open court, entered my solemn protest. With this assurance, I have no vain glorious protestations to make of loyalty and devotion to the government. I do not belong to that class of men, thank God, who seek favor by pandering, on the one hand, to the "powers that be," or on the other, catering to popular prejudices.—I am a devotee to *constitutional liberty* and institutional freedom. I regard this bill and these interrogatories as adverse to both, and have therefore opposed both, with a clear conscience and a fearless heart. I have no faith in any law, no confidence in any government, and no regard for any system of administration which is in violation of the original compact, on which all sound legislation must rest. With these views, I am assured in my own conscience, that I have, in this argument, as everywhere, used my best efforts to sustain the Confederate Government: and above all, to maintain my own self-respect, and to

discharge my duties to those who have confided their interests to my keeping. If, sir, there has been error, it rests in the head, not in the heart. I have not been guided by "the crooked chords of discretion, but rather by the golden met wands of the law."

I have experienced, in the argument of this cause, many painful reminiscences. The last time it was my privilege to address your honor under the Federal Government, there sat by your side the venerable form of the Chief Justice: full of years as he was ripe in wisdom, and crowned with honors; the last *judicial* account we had of that eminent jurist and fearless patriot, he was in his official capacity, in the City of Baltimore, holding up the constitutional charter of our fathers, as the shield against the strong arm of arbitrary power, wielded in a ruthless hand, to destroy all the remaining vestiges of individual liberty. The violation of the *writ of habeas corpus* by the Lincoln Government was not, in my opinion, a more fatal blow to individual rights, and personal freedom than *this precept and these interrogations.* I can but hope that *here* I, feeble as I am, may be more successful than Judge Taney, whose memory will be honored and cherished to the latest generations, as long as constitutional liberty has a votary left.

OPINION

OF

JUDGE HALYBURTON.

The Confederate States v. *John H. Gilmer:*

In this case a writ of garnishment, without any previous proceeding in court, was issued against the defendant, under the eighth section of the Sequestration Act, passed by Congress and approved by the President on the 30th of August 1861.

Two questions present themselves for the decision of the Court.

The first is, whether Congress has authority to pass the aforesaid act; and the second is, whether the writ is in conformity with the provisions of the statute.

The defendant endeavoured to show, by a most elaborate argument, that the powers of the Provisional Congress, since the adoption of the permanent Constitution, are controlled by the enumeration and definition of powers in the eighth section of the first article of that Constitution; and that as the 4th clause of that section provides, that "no law of Congress shall discharge any debt contracted before the passage of the same," the Sequestration Act is void, as discharging debts due to alien enemies before the passage of it.

I am of a very different opinion.

The Provisional Constitution which was adopted and ratified by the Virginia Convention on the 25th of April 1861, declares that it is "to continue one year from the inauguration of the President; or until a permanent Constitution or confederation between the States shall be *put in operation*, whichsoever shall first occur.

As a year has not elapsed since the inauguration of the President, and a permanent Constitution has not yet been put in operation, the Provisional Government is not at an end by the limitation contained in that clause.

I say it has not been put in operation, because a President, chosen in pursuance of its provisions, has not yet been inaugurated, nor have Senators been appointed, nor have the members of Congress elected under it taken their seats.

The first section of the sixth article of the permanent Constitution declares that "the Government established by this Constitution is the successor of the Provisional Government of the Confederate States of America," that is to say that it is to succeed, not to supersede, the Provisional Government; and the same article goes on to provide that all the laws passed by the latter shall *continue* in force until the same shall be repealed or modified."

The second section of the seventh article of the same Constitution provides that "the Congress, under the *Provisional* Constitution, shall prescribe the time for holding the *first election* of members of Congress under this Constitution, and the time for assembling the same;" and that, "until the assembling of *such* Congress, the Congress, *under the Provisional Constitution*, shall *continue* to exercise the legislative powers *granted them*, not extending beyond the time limited by the Constitution of the Provisional Government."

By this last clause of the permanent Constitution, tho Congress, "*under the Provisional* Constitution," are to *continue* to exercise the powers *granted them.* Granted them how or when? By the Provisional Constitution, of course. That is the only charter by which *that* Congress holds its rights and privileges, and which defines its powers. No power is granted it by any other instrument, except the power to prescribe the time for holding certain elections, and for the meeting of the Electoral College, and for counting the votes, and inaugurating the President; granted, as has been said, by the second clause of the seventh article of the permanent Constitution.

As the Congress, under the permanent Constitution, has never yet assembled, it is plain that the Provisional Government is not yet at an end, and that the Congress which passed the Sequestration Act derived its powers from the *Provisional*, and not the *permanent*, Constitution.

If it were otherwise, it would not at all affect my opinion as to the case before the Court; because among other reasons, the Constitution was made for citizens and friends, and not for the benefit of aliens and enemies, and the clause in question is not applicable to them.

Had then Congress, under the Provisional Constitution, by virtue of the authority therein granted, the power and the right to pass the Sequestration Act?

That Constitution grants to Congress the power to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" and some other powers, from all which the power to *carry on* war results, by unavoidable implication.

It also gives Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers expressly delegated by this Constitution to the Provisional Government."

The term "war" in the Constitution is not qualified or restricted by any other word or expression to be found in the instrument. The power to make war is conferred in the broadest acceptation of the term; war of any kind and in any shape which the discretion of Congress may dictate; war in its sternest aspect, accompanied with all its horrors; or in its mildest form, attended by all the comities and courtesies compatible with such a state. Is, then, when war exists between two nations, the confiscation or sequestration, by one of them, of the property of the other belligerent, an act of war? It seems to me to be clearly so.

To seize the property of the enemy in time of war is as much an exercise of the powers of war, or, in other words, an act of war, as the capture of the enemy himself would be; or as the killing of the enemy or the destruction of his property would be.

It is certainly a hostile act; and it has never been doubted that the seizure of the ships, or other tangible property of the enemy, was an exercise of the war-making power.

Judge Marshall, in arguing the case of Ware vs. Hylton, in 3d Dallas, 210, remarks that Virginia, "being engaged in war,

necessarily possessed the powers of war, and that confiscation is one of those powers; weakening the party against whom it is employed; and strengthening the party that employs it."

This, I think, is entirely true. It is not merely a means of making war, but it is an actual exercise of the powers of war. It is one mode of carrying on war.

That the makers of the Constitution so regarded it appears from the fact that they granted, in express words, the power "to make rules concerning captures on land and water."

They did not say the power "to make captures," because they regarded that power as already given in the grant of power to make war.

In Brown vs. The United States, 8 Cranch. 122, Chief Justice Marshall said "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found, is conceded;" and Story, Justice, says, "the power to declare war, in my opinion, includes all the powers incident to war, and necessary to carry it into effect. If the Constitution had been silent as to letters of marque and captures, it would not have narrowed the authority of Congress. The authority to grant letters of marque and reprisal, to regulate captures, are ordinary and necessary incidents to the power of *declaring* war. It would be utterly ineffectual without them. The expression, therefore, of that which is implied in the *very nature of the grant*, cannot weaken the force of the grant itself. The words are merely explanatory, and introduced *ex abundanti cautela.*"

It is maintained, however, by some distinguished jurists that although the Congress might, under the war-making power, have confiscated lands and other property in possession; yet that the confiscation of private debts is contrary to the law of nations; therefore Congress had no such power.

Those who take this ground do not, I presume, mean to assert that the law of nations could annul or modify a positive and express grant of power in the Constitution; but only that we should refer to the rules of international law to illustrate the provisions of the Constitution, and to ascertain its meaning.

They do not, of course, mean to say that the judges of the Confederate States, who are solemnly sworn to support the Constitution, are to disregard it, or disobey its plain behests, because they may be opposed to some rule of international law; but only that we are to regard the grant of power, in the Constitution, to make war, as an authority to conduct it in the way sanctioned by the law of nations; and therefore that we should look to that law to understand the extent of the constitutional power. If this argument were valid, which it is not, in my opinion, to what conclusion would it lead us in the present inquiry? Authorities upon the other side of the Atlantic are not unanimous upon the question, whether, when two nations are at war with each other, one of them may lawfully confiscate private debts due from its citizens or subjects to those of the other. The preponderance of authority, however, seems to be in favor of the right to do so. Phillimore, a writer of great ability and learning and reputation—a very late, if not the very latest writer we have on international law—says, that "the right of confiscating the debts of the enemy is a corollary to the right of confiscating his property. The strict right—the *summum jus*—remains unquestioned." We have, in my opinion, sufficient grounds for saying that, by the law of nations, even as it is understood in Europe, one belligerent power has the right to confiscate the debts due from subjects of another with which it is at war.

I do not, however, pursue this inquiry further, because whatever may be the rule there, the law, as understood in America, seems to be settled in favor of the right; and if we are to suppose that those who made and adopted our Constitution had reference to the law of nations in granting the war-making power, and intended that the grant should be modified by that law, we must presume that they looked to the law as generally understood here, and as interpreted by our own Courts and writers upon the suject.

Wheaton is of opinion that the right to confiscate debts stands upon the same basis with the right to confiscate other property. He remarks that "it had been justly observed that between debts contracted under the faith of laws, and property acquired

on the faith of the same laws, reason shows no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations by which the judgment of the sovereign may be guided." (Elements of International Law, page 381.)

Chancellor Kent, in his Commentaries, observes that "however strong the current of authority in favour of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitely settled in favor of the ancient and sterner rule by the Supreme Court of the United States;" and the opinions of the Judges in Ware vs. Hylton, 3d Dallas, 199, and Brown vs. the United States, in 8th Cranch, are in favour of the right.

The position, therefore, that the power to confiscate debts due to an enemy is denied to Congress by the Constitution of the Confederate States, because it is contrary to the law of nations, is untenable.

But if I were in error as to the general rule of international law, either in Europe or in this country, it would not vary the conclusion at which I should arrive as to the constitutionality of the Sequestration Act.

Whatever may be the general rule, it must be admitted that there are important exceptions to it.

When nations are at war, the obligation to observe the law must be mutual.

If one of the belligerents deliberately and intentionally disregards and disobeys it, the other may do so likewise.

If one nation were to torture or put to death the prisoners taken in war from another, it will not be denied that the other would have the right to retaliate.

Now, the Sequestration Act recites that "the Government and people of the United States have departed from the usages of civilized warfare in confiscating and destroying the property

of the people of the Confederate States of *all kinds*, whether used for military purposes or not," and that "our only protection against such wrongs is to be found in such measures of retaliation as will ultimately indemnify our own citizens for their losses, and restrain the wonton excesses of our enemies."

This recital it would be the duty of the Courts of the Confederacy to receive as true, even if it were not so, and they were disposed to controvert it.

But it is known to us all that the Government of the United States denies our distinct and separate nationality, and will not even recognize us as a belligerent people; and, as a necessary consequence, denies our right to the privileges and protection of the law of nations and refuses to observe that law in its intercourse with us.

It refuses to exchange prisoners with us; our privateersmen are arrested and tried as pirates; and in other respects it has departed from the usages and laws of civilized warfare.

Under circumstances such as these, it is impossible for me to entertain the shadow of a doubt as to the right and power of Congress to sequestrate and to confiscate debts due the citizens of the United States.

We have now to enquire whether the writ and interrogatories annexed to it be in conformity with the provisions of the act of Congress in question.

It is said that a writ of garnishment is merely ancillary process, never used but in aid of a suit or proceeding previously commenced, and that the words in the act are to be understood only in the sense in which they have been heretofore used.

It is true that "no instance has been mentioned at the bar, nor does any occur to me, in which such a writ has been issued to begin a suit. In England and in this country, so far as is known to me, it has always been used merely as auxiliary to an action or proceeding already instituted; but the term garnishment does not necessarily, and *ex vi termini*, mean that. It does not, in fact, in its true acceptation, refer to any such proceeding at all.

To garnish means, in its primary and in its legal sense, merely to *warn* or to *summon.*

A person in whose hands effects are attached, "is styled a garnishee, says Drake, because of his being *warned* not to pay the money or deliver the property of the defendant in his hands to him, but to appear in Court and answer the plaintiff's suit;" and any person having the property of another in his hands, upon which some third person may have a claim, upon being warned by process not to deliver such property to the owner, and summoned to answer the demand of such third person, may be termed a garnishee with as strict propriety of speech as if he had been required to appear and answer in a separate suit.

Is there, then, any sufficient reason for supposing that Congress meant that the writ of garnishment might be issued as an original writ and a distinct proceeding ? In my opinion there is.

If it had been intended merely as process to support the petition which may be filed by a receiver, it would naturally and probably have been mentioned in the sixth section of the act *where the notice is directed to issue*, and not in a distinct section.

Secondly, it is directed by the act of Congress that the receiver who files a petition shall state in it *the name* of the party having possession of property supposed to belong to an alien enemy, and *set forth*, "*as best he can*, the estate, property, right, or thing sought to be recovered;" and process which was intended merely to render effectual such a suit, would call upon the party only to answer as to the property *mentioned in the petition.*

Writs of garnishment, on the other hand, which the clerk is directed to issue, at the request of the receiver, and command those to whom they are directed to answer under oath, what property of *any alien enemy* they may have or may have had in their possession at the time of the service of the writ, or at any time since, without describing or setting forth any property or referring to any particular alien enemy; and seems to have been intended to enforce a compliance with the second and third sec-

tions of the act, which make it the duty of every citizen of the Confederate States, and of every attorney, agent, former partner, trustee or other person holding or controlling property of or for any alien enemy, to inform the receiver thereof.

The act does not, in terms, provide that such writs shall issue in any particular suit, or against any *defendant in a suit;* but "from time to time" against *any person* whatever, as the receiver may require.

When the writ has been returned, and the person on whom it is served has appeared and answered, the Court may condemn the property according to answer, and to make such rules and orders as to it shall seem proper for the bringing in of those persons claiming an interest or disclosed by the answer to have an interest in the litigation.

There would seem then to be no reason for requiring that a petition should be filed before the issuing of the writ; as complete justice may be done without it, and it would in these cases be only a useless and cumbrous piece of machinery.

A further objection, however, is taken to the writ upon the ground that a compliance with the requisitions of it would be a breach of professional confidence, so far as attorneys at law are concerned. That it is a rule of the common law, which has existed for centuries, founded on principles of immutable justice, that a "counsel, solicitor or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence," and that it would be wrong so to interpret the act of Congress as to violate this rule.

As this is a rule of statute or common law, and not of constitutional law, I suppose no one will affirm that the legislative power, which enacts or adopts it, may not repeal or annul it if it pleases. The privilege is not one of those great, inalienable, indefeasible and inprescriptible rights of man, which no government can take away, nor any legislature impair, but simply a rule of law, resting upon convenience and policy, and the only inquiry we have to make is whether the legislative power intended to abridge it or not?

A sufficient answer was given to the objection we are consid-

ering by the learned District Attorney for the Confederate States, at the bar, when he said that the privilege of which we are speaking was the privilege of the *client*, and not of the attorney, in any case, and that where the client cannot avail himself of it the attorney cannot. If authority were wanting, all the writers upon evidence, of whom we know anything, agree upon this point; and they are fully sustained by the cases to which they refer, and as an alien enemy has no day in Court; no *persona standi in judicio*," to borrow a phrase from the civil law, cannot appear in Court or be heard if he were to appear; there is no one who can plead or take advantage of the privilege, and the rule of law does not apply to his case.

That it was not adopted from any tender regard for the conscientious scruples of an advocate, or to avoid wounding his sense of honour, is plain from the fact that it extends to no persons but to counsel, solicitors, and attorneys.

Physicians, surgeons, clergymen, and the most familiar bosom friends of a party to a suit are required, and may be compelled to reveal matters confided to them under the most solemn promises of secresy; yet their sense of honour and their feelings ought as much to be respected and regarded as those of counsel, and would be, if the rule reposed upon any such foundation.

But if this rule extended, in its generality, to aliens as well as others, it would avail nothing in the case before the Court; because, in my opinion, it would be contrary to the language and meaning of the Sequestration Act.

That the act was meant to be far more comprehensive than the ordinary rules of evidence is obvious, from the fact that every citizen, whether summoned in a cause or not, whether called into Court or not, and whether interested in the subject matter or not, is required to give information of all property and credits held by or for any alien enemy; and the third section of the act, as I understand it, expressly and by name embraced attorneys at law.

The third section of the act declares "that it shall be the duty of every *attorney*, *agent*, former partner, trustee or other

person holding or controlling any such lands, tenements, &c.," to inform the receiver of the same, and make an account thereof.

Now what is meant by the term "attorney" here? The act does not say "attorney in fact," any more than "attorney at law." Why then should we include the one and exclude the other? or why should we exclude the attorney at law and include the attorney in fact?

There is much greater reason for excluding the attorney in fact, and including the attorney at law; and this last is probably the true construction.

Every attorney in fact is an agent, and is not only so described in all books on agency, but is usually so called in common parlance, and it would hardly have been thought necessary to introduce into the act the word "attorney," in order to embrace attorneys in fact alone; but attorneys at law are seldom or never called agents except in law books, and therefore it was prudent and proper to use that word if it were intended that the act should apply to them; and although it would have given more perspicuity and precision to the language of the law if it had gone further; it was not necessary to have done so.

Then, let us look further into the spirit of the law. It has been shown that the plea of privilege is not given to the attorney, but to the client; and is there anything in the Sequestration Act to induce us to believe that the Legislature meant to allow any particular privileges to an alien enemy? To grant any peculiar favours to those men who are invading our country and seeking to desolate and desecrate our homes? I think not.

This objection to the writ, then, must be overruled like the others.

The eighth section of the Sequestration Act, however, directs that writs may issue commanding the persons on whom they may be served "to answer, under oath, what property or effects he had *at the service* of the process, *or since has had* under his possession or control, belonging to, or held for, any alien enemy;" and the writ requires such person to answer, not only what sums he had at the time of the service of the writ or since, but what sums he had on the 21st of May 1861, or since; and

not only what sums he himself had, but whether he *knows* of "any land or lands, tenement or tenements, hereditament or hereditaments, right or rights, credit or credits, within the Confederate States of America, or any right or interest held, owned, possessed or enjoyed, directly or indirectly by, or for, one or more alien enemies since the 21st day of May 1861, or in or to which any one or more alien enemies had, since that time, any claim, title or interest, direct or indirect."

In these respects the writ, as it seems to me, goes beyond the law, and is to that extent void.

The letter of the law on this point is so distinct and explicit that, it seems to me, to put a different construction upon it from that which its express language requires, would be to go beyond the province of the Judge, and to make the law, and not expound it.

It may be said that the act means to sequestrate all property which belonged to an alien enemy on the 21st day of May 1861, and, therefore, there could be no reason for confining the writ within narrower limits; but it is very possible, and not improbable, that, although Congress may have intended to sequestrate all debts due to *an alien enemy*, as well as other property belonging to such enemy on the 21st of May 1861, and since, if the fact of such indebtedness could be established by other proof; yet that the temptation to perjury would be too great if a party were called on to state on oath what debts he owed and might have paid to such enemy before the service of the writ, and in utter ignorance of the law.

It may be thought, too, that unless the writ of garnishment should extend back to the 21st day of May there would be no way of reaching such debts, even when a petition might be filed particularly describing them; but the proof might not be quite satisfactory without the oath of the party. I think, however, that the provision in the eighth section, which declares that "*in all cases of litigation*" under *the act* (not under the particular section only) the Receiver may propound interrogatories "touching any matter involved in the litigation," and requires answers on oath from the defendant, would apply to such a case.

Whether, however, we may be able to discover the reason for it or not, I think the language of the eighth section, on the point we have been discussing, too explicit to be evaded.

I will not, however, quash the writ, as there is no statute nor any rule of practice applicable to this case, so far as I know, which binds me to do so; and such a course would not in any way promote justice or the ends of the law; but, on the contrary, might enable a party to avoid, if disposed to do so, (which the defendant here, I am sure, is not) the payment of debts which the law designs to sequestrate.

The Sequestration Act itself allows me to establish such rules of procedure as I may think proper under it, not inconsistent with the act or other laws of the Confederate States.

Following the analogies of the law, I may either direct the writ to be amended, or without doing so, order the party to answer such interrogatories as he is bound by law to answer.

I shall pursue the latter course as most convenient.