PROCEEDINGS

IN THE

RHODE-ISLAND LEGISLATURE,

ON SUNDRY RESOLUTIONS OF

THE STATE OF MAINE.

PROVIDENCE:
PRINTED BY KNOWLES AND VOSE.
1845.

STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS.

In General Assembly, June Session, 1845.

The Select Committee to whom, at the session of this General Assembly in May last, were referred sundry resolutions of the State of Maine, respectfully

REPORT:

That they have attended to the duty confided to them by the House of Representatives, and that they recommend the adoption, by this Legislature, of the accompanying preamble and resolutions. Your committee have deemed it quite unnecessary to attempt any vindication of the Supreme Court of this State from the grossly calumnious charge of the Legislature of Maine; but in the progress of their enquiry upon the matter committed to them, they have had recourse to sundry opinions delivered by said court during the trial of Thomas W. Dorr, for the crime of treason. These opinions, copies of which are herewith submitted to the House, are not wanted to place far beyond the reach of injury, by the poor demagogues of the day, the reputation of that court for learning and impartiality, and for the intrepid discharge of high constitutional functions, at a season of popular excitement unparalleled in the previous history of this State.

For the Committee,

JOHN H. CLARKE,
WILLIAM G. GODDARD.

Whereas the Legislature of the State of Maine has passed sundry resolutions reprobating, in terms the most offensive, the government and people of Rhode-Island, for their efforts, during the late insurrection, to maintain the supremacy of the Constitution and the laws, protesting against the imprisonment of Thomas W. Dorr, as "unjust, illegal, malignant, and tyrannical," and invoking the interposition of the General Government to procure "his immediate release;" and whereas these Resolutions have been transmitted to His Excellency the Governor, and by him have been communicated to this General Assembly, therefore

Resolved, That this General Assembly does hereby enter its *solemn* PROTEST against the interference of the State of Maine with the internal affairs of Rhode-Island, as an interference which can plead no constitutional sanction, and which deserves to be rebuked as a dangerous invasion of the most sacred rights of the Government and people of this State.

Resolved, That the obligations of truth, no less than that comity which it is the duty and the interest of sister States to preserve in their intercourse with one another, ought to have restrained the Legislature of Maine from levelling coarse denunciations against the Supreme Court of Rhode-Island, for the manner in which, at a memorable crisis in our history, that upright and enlightened tribunal discharged an imperative but painful duty.

Resolved, That the attempt, on the part of the Legislature of Maine, to intermeddle with the administration of criminal justice in this State; to invoke the popular vengeance against the ministers of the law, and to render odious its righteous penalties, furnishes a melancholy illustration of that mad party spirit, which, to accomplish a temporary and selfish purpose, tramples upon all the safeguards of constitutional freedom, and disregards the most impressive admonitions of history.

Resolved, That the appeal which the State of Maine has seen fit to make to the General Government, in behalf of Thomas W. Dorr, by whatsoever plausibilities of language that appeal is sought to be sheltered from reprobation, can be regarded in no other light than as an alarming attempt to concentrate upon a small but sovereign State, the vindictive energies of a government, armed with the whole power of the Union.

Resolved, That the State of Rhode-Island, while she faith-

fully discharges all her Constitutional obligations to her sister States, and to the Government of the Union, can never so far forget her past history—her early struggles in the cause of religious freedom—her toils, and sufferings, and sacrifices, in the war of the Revolution, and her jealous determination, at all times, to secure to the people of Rhode-Island the exclusive right to manage their own affairs in their own way, as not to repel, with indignation, every attempt, come when and whence it may, to deprive her of those constitutional safeguards which the fathers of the Republic established, in order to preserve the peace, union and liberty of these confederate States.

Resolved, That his Excellency the Governor be requested to cause a copy of these Resolutions to be transmitted to the President of the United States, to the Governors of the several States, and to each of our Senators and Representatives in Congress.

House of Representatives, June 28th, 1845,—Voted, &c.
By order T. A. JENCKES, Clerk.

In Senate, read the same day and concurred.
By order HENRY BOWEN, Secretary.

OFFICE OF SECRETARY OF STATE,
Providence, July 7, 1845.

I certify that the above is a true copy of record.
HENRY BOWEN,
Secretary of State.

OPINIONS OF THE SUPREME COURT.

The following extracts from the decisions of the Court, in the case of Joseph Joslin and of Thomas Wilson Dorr, were presented to the House, by the committee who reported upon the resolutions from the State of Maine. They contain the ruling of the Court upon the questions raised by the respondent in the first case, under the act of April, 1842, relative to offences against the Sovereign Power of the State, and in the latter case, the charge to the jury upon the crime of treason, as defined by the act of 1838, together with the decision of the Court overruling the motions for a new trial, and in arrest of judgment, made by Mr. Dorr after his conviction.

The extracts were ordered to be printed by the House of Representatives, in connection with the resolutions in reply to those of the State of Maine.

Extract from the opinion of the Court in the case of Joseph Joslin.

Since the argument of the questions touching the Indictment of the State against Joseph Joslin, the engagements of the Court have been such as to give no time for the preparation of an extended written opinion thereon, which would do justice, either to the importance of the questions themselves, or to the research and ability manifested in the argument of them. I can, therefore, do little more than state in a very brief and general manner, and, perhaps without all their necessary qualifications, the principal reasons for the conclusions to which I have been led.

By agreement, two points made by the counsel for the accused have been fully argued.

First—That the act of April last, "In relation to offences against the Sovereign Power of the State," was, so far as it changed the place of finding the indictment, one which the General Assembly had no right to pass, inasmuch as it was directly against the right of the citizen, the fundamental principles of the Government, and therefore void.

Second—That if the Legislature had the power to authorize the finding of the Indictment in another county than in that in which the offence was committed, upon a strict construc-

tion of the act, they have not authorized a *trial* in any other county, without, on cause shown, a removal to that county for trial ; and that, upon no doubtful construction would the Court invade the common right of the citizen.

As to the first point.

The act authorises the finding of the Indictment in a county other than the one in which the offence was committed; and this, it is said, is a provision which violates that inestimable right conferred by *Magna Charta*, which protected every Englishman in the free enjoyment of his life, liberty and property, unless declared to be forfeited by the judgment of his peers, or the law of the land.

This is a personal right, and there is no doubt but that every such right belonged to our ancestors here, as it did before they left England. But in speaking of such a right, we must be careful not to confound the accidents of time, place and circumstance, with the right itself, and make them one and identical with it. Those accidents change with change of relations, social and political. They often subsist in those relations only ; and when our ancestors left England, where there were various gradations of hereditary rank, from the sovereign down through all the order of nobility, to the humblest class of subjects—where all were not their peer, they came to a country where there were no such gradations, but where every man was the peer of every other man, and their sovereign, considered as ideally present in magistrates of their own creation, their only Lord. Equality in rank, or condition, therefore, may be necessary ; but we cannot attach the idea of locality, whether it be of a barony or a county, as essential to that of a peer. If we do, our ancestors on this side the Atlantic were no longer peers ; for they found no baronies or counties here.

This State was originally a Colony, without a county, and even to this day, that very large portion of its jurisdiction, extending over the waters of Narragansett Bay, south of Field's Point, falls within no particular county ; and all indictments for any crime or misdemeanor committed on said waters, are triable in any county of this State, at the discretion of the Attorney General. But in process of time, our ancestors created counties, and they created them by law, by laws passed by their Legislature, and undoubtedly that power which

makes, can repeal or modify any law which it makes. If it declare that a county shall consist of certain towns, and invest certain tribunals and magistrates, within such county, with certain jurisdictional power, it can be no infringement of *Magna Charta*, or the bill of rights, to alter or change such laws in any manner that the public good requires. No fundamental principle of the government is thereby disturbed—no right of the citizen is infringed—provided the law be not *ex post facto*, and does but enlarge the jurisdictional limits of court or magistrate, and when the Legislature of this State does but declare by the act in question, that all indictments under it, and also all indictments for treason against the State, may be preferred and found in any county of the State, without regard to the county in which the offence was committed, it does nothing more than modify laws which it previously enacted.

Were the counties limited, and the jurisdiction of the several tribunals established by a constitution or like fundamental law, the act might be well said to be in violation of the first principles of the government and an infringement of the rights of the citizen, but the counties are not so limited nor their jurisdictions so established ; and whatever the act may be in other respects, it is certainly not unconstitutional in this particular. The Legislature had power so to legislate, and in doing so they did but modify a structure of their own creation.

But it may be said that an offence committed under one jurisdiction is, by such modification, brought to be acted upon under another. This objection would certainly be fatal to the act if the counties were distinct petty sovereignties, or lordships, like the ancient baronies, or like the several States of this Union. Then, undoubtedly, an offence committed within and against the laws of any county, would be an offence indictable only in the county where it was committed. But this is not the case. The counties make no laws. They have none of the attributes of sovereignty—they are not even corporations. They are only distinct districts of the State set apart to enable the sovereign power of the State to administer justice through its courts, and to carry into effect its laws, in a manner the most expeditious, and with the least inconvenience to the citizen. Whatever offence is committed in any county is not an offence against the county, but an offence

against the sovereign power of the State, which is no other than the people of the State considered as *one legally organized whole.* This is the sovereign power which makes the laws through its Legislature, and this is the sovereign power against which the offence is committed.

There is nothing in the nature of the offence charged in the indictment to give it a county locality. The overt act may indeed have its locality, and the general statute and common law may identify the offence with the act, but the wound which is inflicted is felt everywhere throughout the jurisdictional limits of the sovereignty. It is a blow aimed at an entirety, which subsists everywhere as an entirety throughout its whole territorial jurisdiction. There is nothing, therefore, in the *nature* of the offence, or the constitutional organization of the sovereignty against which it is committed, that can render it unconstitutional to provide by law for the finding of a bill of indictment in a county other than that in which the offence was committed.

Is there anything in the manner of finding or trying the indictment that requires that it should be found only in the county where the offence is charged to have been committed? Were it a fundamental law that none should be tried for the offence charged, but those who had some knowledge of the act, or the events which led to it, or of the character of the party charged, then, indeed, would the very mode of proceeding create an absolute necessity that the jury should be drawn from the county, or rather from the vicinage—the very neighborhood in which the act is charged to have been done, and doubtless in some such necessity the usage requiring the jury to be drawn from the vicinage originated.

But the usage could be fundamental to the trial by peers, or a jury, no longer than the necessity continued. It originated, not in a law, but in a necessity which has long since disappeared. The witness, for centuries, has been separated from the juror; and he can now acquit or convict, only upon facts which pass to him in open court from a witness under oath. Indeed it would be a violation of the letter of his oath, were he to return a verdict founded on his own private knowledge or on the secret communications of his fellow jurors, and it would be even a more palpable violation of sworn duty to re-

turn a verdict without regard to evidence and in mere accordance with his feelings, whether for or against the accused. A juror is not to understand that the oath which he takes is repugnant to *Magna Charta*, or the bill of rights, and, when he has sworn well and truly to try, and true deliverance to make, between the State and the prisoner at the bar according *to law* and *the evidence given him*, that he has a right to make deliverance according to neighborhood, sympathy or hate. The same common personal rights, and the same duty of allegiance due to the immediate sovereign of both, constitute the only ground for a legitimate sympathy between the juror and the accused.

It is not a provision of *Magna Charta*, that the peers of the accused should be drawn from the vicinage or county, neither is it a requirement of our bill of rights, which contains a full exposition of the right which *Magna Charta* is supposed to have secured. It recognises in the accused a right to a speedy and public trial by an impartial jury, but not necessarily a jury from the vicinage or county. And so it has been construed both by the General Assembly and the courts of this State. It is not always that an impartial jury can be drawn from the vicinage, and it has often occurred, that on application of the accused, the legislature has removed the cause for trial to another county. Certainly no legislature ever refused the application on the ground that a fundamental law forbade its removal, and no court ever refused to take cognizance of an indictment, so removed, on the ground that a fundamental law had been violated. The removals have been made in obedience to the requirements of the bill of rights, to give the accused a speedy trial by an impartial jury, and not in the mere exercise of any power conferred by the petition: for such a petition could not create peers in a county where they were not before to be found, or invest the General Assembly of this State with power to authorise an indictment to be tried by any other than a jury impanneled from the peers of the accused.

Such, too, has been the construction placed on this provision of *Magna Charta* by Parliament, in the numerous acts authorising the finding and trial of indictments out of the county in which the offence was committed; and such must have been the construction of the English courts in the nu-

merous trials that must have taken place under those acts. Such also must have been the construction of the Legislature of Massachusetts, on a clause in their bill of rights nearly if not in the very words of *Magna Charta*, when, on the occasion of Shay's rebellion, they passed an act authorising the finding and trial of indictments out of the county in which the offence was committed. And such too, for aught that appears, must have been the construction of the Supreme Court of that State on the trials that took place under the same act.

I am therefore clearly of opinion that there is no fundamental law violated by the act in authorising the finding of the indictment by jurors of a county other than that in which the offence is alledged to have been committed ; and as to the act of 1838, which requires that every person accused should be proceeded against in the county where the offence is charged to have been committed, it is necessarily superseded by the special provisions of the act of April, 1842, in relation to the offences which it names, and most of which it creates, by the express authority therein given for the finding of indictments for the same in any county of the State.

I have thus, without having it in my power to follow counsel, in their learned researches and ingenious arguments, very briefly and imperfectly presented my views in relation to the first point made by the counsel for the accused: and on this point the court has but one opinion, and that is that the act of April, 1842, does, by changing the place of finding the indictment, violate no fundamental principle of the government of this State.

I now proceed to represent the views of a majority of the court as to the second point made by the counsel for the accused. And that point is, that if the legislature had power to authorise the finding of this indictment in this county, yet it has not expressly authorised a trial here, without a removal, and that upon no doubtful construction will the court invade the common right of the citizen. The fourth section of this act provides that all offences committed against it "shall be triable before the Supreme Judicial Court only." The power of this Court, therefore, to try the accused for the offence with which he stands charged, cannot be doubted ; and the only question is, as to how and where he shall be tried.

The crime charged is treason, and the manner of proceeding on the indictment is regulated partly by statute and partly by the common law. But there is no question now before us as to the manner in which the trial shall be conducted, but as to the place or county in which it shall be had.

The act provides that all indictments under it, and also for treason against the State, may be preferred and found in any county in this State, without regard to the county in which the offence was committed; and that the Supreme Judicial Court shall have full power, for good cause, from time to time, to remove for trial any indictment which may be found under this act, or for treason against the State, to such county of the State as they shall deem the best, for the purpose of ensuring a fair trial of the same.

Now it is understood, that although this indictment may be well found here, it is contended, that inasmuch as the act does not expressly authorize the court here now to proceed with the trial, it cannot proceed with it at all; unless the Court, for good cause shown, shall first have removed, for trial, said indictment from the county of Providence, in which the offence charged is alledged to have been committed, to this county. In other words, this indictment must be first removed from this county to the county of Providence, and thence back to this county, before it can be legally tried here.

This, as a general rule applicable to all indictments here found, or that may be found under this act, goes much too far. It would compel us to remove all such indictments without discrimination, and, in order to fulfil the letter of the act, we should be compelled to violate the letter of the act. It leaves the court no discretion as to the cause of removal, or the county to which it is to be removed. It divests the defendant himself of rights which no court is allowed to touch.

It recognizes the act as operative so far forth as to find the indictment here, and then, under certain circumstances, deprives the accused of that speedy trial by an impartial jury, which is guaranteed to him by the bill of rights. It is a rule which would defeat its own object, by fixing the indictment here and rendering it impossible to remove or to try it; and that for no other reason than because it ought to be tried here where it now is.

Such a result would be a perfect anomaly, but I will en-

deavor to show that it would be the necessary consequence of the adoption of this rule.

This Court has no power to remove this indictment or any other, but in virtue of the provisions of the act which we are considering, and the power, therein given, is applicable only to the indictments in said act specified, and is to be exercised only for the cause and to the end therein mentioned. Without this, a removal of an indictment would be the exercise of a power without authority. We have no common law power, no statute power of removal, other than that here given, and the power here given is to remove the indictment for good cause shown, to such county as the court shall deem best for the purpose of ensuring a fair trial. Now, until this cause be shown, we cannot exercise this power, and the indictment must remain here.

What, then, is the good cause which the act contemplates will justify the exercise of this power ?

It is not to be found in any paramount controlling law, constitutional, statutory or common, requiring the trial to be only in the county where the offence was committed ; for it is admitted that a trial may be had here. And, indeed, if there were such law, then all such indictments found out of the county of Providence must, without discrimination, be removed to that county for trial, and those found there could not be removed; and this removal must be made, even though the court should be of opinion that said county was not the best for the purpose of a fair trial ; thus clearly and conclusively showing, that the power of removal, in such case, would not be a power exercised under the only act which gives a power of removal. The good cause, intended in the act, cannot therefore be found in any such paramount and general law. But if it cannot be found in law, it can be found only in something extraneous to it—in circumstances independent of existing laws, but still having a bearing upon that fair and speedy trial which it is the object of the act itself, as well as the bill of rights, to secure to the accused.

But if this be so, then must that good cause be shown in the peculiar state or condition of the county in which the indictment is pending, or to which it is to be removed ; or in the individual relations of the accused to those who are to be his triers. And then, if no such cause can be found to justify

the exercise of this power of removal, it cannot be exercised, and the indictment must remain in the county in which it was found.

The presumption of this court must be, until the contrary appear, that that county in which the indictment is found, is, of all others, the best county wherein to try it.

We, as a court, have no right to suppose the existence of any cause for removal. Such cause must, in some way, be brought to our notice and knowledge as a court, and until it is, we must regard this, as of all others, the most suitable county within which this indictment can be tried. But if it be true, as contended, that it cannot be tried until it is removed, and if it cannot be removed until good cause be shown, and none within the meaning of the act can be shown, then the accused must continue under recognizance or in jail, and the indictment remain in this county untried. And the reason why the accused must continue in custody and the indictment remain here untried, is because this county, of all others, is that in which it can be best tried. It cannot be removed, because it ought to be tried here, and it cannot be tried here because it ought first to be removed. Can this be that sensible, that reasonable construction which courts of law are required to give to a criminal statute? We ought not, certainly, by any construction, to make the act at once to defeat its own object, and to violate the bill of rights. To give it the construction contended for would be to violate those fundamental rules for construing criminal, as well as other statutes, which are, at once, the dictates of the common law and the common reason of mankind. "No statute ought to be so construed as to defeat its own end, nor so as to operate against reason; nor so as to punish or damnify the innocent; nor so as to delay justice." Each and all of these rules, such a construction seems to me to violate.

But what is the correct view of the statute in this particular? I apprehend it to be this: The finding of the indictment, the trial thereon, and the judgment or sentence, are but distinct parts of one proceeding, whereof, if any one part be given in any county to a court of general jurisdiction, especially to one declared to be the only court competent to try the offence, the whole necessarily follows by force of the common law; unless, in the act giving it, or some subsequent leg-

islation, there be a special provision to the contrary. I see not how, without a special provision to that end, a part of such proceeding can be given and not the whole.

Neither the general statute nor the common law begins such a proceeding in one county and finishes it in another,—neither the one nor the other accepts it by parts, in different counties. Each, where it requires any thing, requires the whole, and there can be a deviation only by force of special legislation; so that, where a proceeding of this kind is begun, there it must terminate, unless, by force of some authoritative act, the ordinary course of judicial proceeding be changed or modified. And this process is from a sort of legal necessity; for, where a court acts as a common law court, and any matter be brought within its jurisdiction, it has no choice—it can do no otherwise than carry it through all the forms of trial to a final adjudication. The court is but an instrument of the law, which acts because it must act, and acts in a prescribed mode because it must act in such mode and none other, upon whatever becomes the subject of its action. Thus if, in this case, it has been made to appear that this indictment cannot be removed for any cause yet shown, it is now rightfully pending in this court, and being so pending, this court cannot do otherwise than call upon the accused to answer to it. And it may be here remarked, that this very first step goes beyond the letter of the statute, but it is a call which the court cannot do otherwise than make, and one which the accused cannot do otherwise than answer. Where the statute leaves the process there the common law necessarily receives it, and carries it forward.

If, on being called, he plead to the jurisdiction of the court, or move to quash the indictment, he must do so at the time and in the manner prescribed by the common law; and the court, by the rules of the same law, must decide on his plea or motion. If he plead not guilty, unless some motion intervene, the jury must be called, and, if there be not a sufficient number, then, under the powers with which this court is invested, a venire must issue, and the case must thus necessarily be carried forward, step after step, each new step imposing the necessity of another, to the final disposition or adjudication thereof; and this is done not by force of special enactment, but by reason of the constitution and organization of the court itself, and its necessary mode of action.

If this view of the question be correct, the court takes nothing from the statutes of April 1842, by implication or construction. It is unnecessary for it so to do. The indictment is here, and rightfully and necessarily here,—the record of the proceeding thus far upon it is here—the record of the judgment now to be pronounced on this plea will, of legal necessity, be here, and said indictment being thus here, it must be disposed of either pursuant to the provisions of the statute which brought it here, or pursuant to the statute power of the court, and the rules of the common law for the trial of like indictments, or of any motions touching them.

The statute of April, authorises this Court, upon good cause shown, to remove the indictment to another county.

In the appropriate stage of proceeding, this cause may be shown as well by the party accused, as by the State; and for such cause, this Court will as readily remove it for the one as for the other; but in the present state of the pleadings, it cannot do otherwise than require the defendant to answer over.

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Extract from the charge to the Jury in the case of Thomas W. Dorr.

What is the crime set forth in the indictment? It is treason against the State—the highest crime known to the law; in this State, punishable with imprisonment for life; in all others where it is named, punished with death; and if we pass from our own to foreign lands, and particularly to that country whence we derive all our political and legal institutions, punished with death, inflicted under circumstances calculated to strike the greatest terror, and to fix on the memory of the criminal the most lasting infamy. I mention this, not forgetting that many noble hearts have fallen victims to the accusation of treason under arbitrary governments, but simply that you may estimate the universal sentiment of abhorrence with which this crime is regarded, and that you might, while you thus estimate it, feel that it is your duty to require the most satisfactory evidence that it has been committed, and that the defendant is guilty, before you return a verdict against him on the one hand, and that you may feel, on the

other, the necessity of discharging with firmness and fidelity, that duty which every juror owes to his country under the oath which he has taken; to return a verdict of guilty on legal proof of guilt. It is no less the duty of the jury than of the Court to secure the peace of the State, by aiding in the firm and impartial administration of the laws.

Now, the first question is, can this crime be committed against one of the States of this Union? This question can be considered wholly irrespective of this indictment, wholly irrespective of the guilt or innocence of the prisoner. It involves no fact *in pais*. It is a question of mere constitutional law, and for the Court alone to decide. And as the organ of the Court, I say to you, gentlemen, that wherever allegiance is due, there treason may be committed. Allegiance is due to a State, and treason may be committed against a State, of this Union. The defendant and his counsel have gone into an argument to show where the sovereign power is, and that it is in the people of the United States, considered in their primary or natural capacity, and that it is that people which is sovereign in the State of Rhode-Island, and not the organized people of the State itself. In answer to this it is sufficient to say, that we know of no people of the United States, save that which the constitution of the Union has organized and formed, and they are sovereign only to the extent and in the qualified sense which that instrument expressly grants and defines. Against the natural people the *primary capacity* people (I wish I could command a better phrase) no crime whatever can be committed, save that, which, in the violation of the laws of God, one man may perpetrate on another. It is against an organized people only, that any crime, and especially the crime of treason, can be committed. We cannot enter into those speculative enquiries as to the origin of government. Sufficient for the Court and jury is it, that government exists; they must take it as it is, and where the plain letter of the law prescribes to them their course, that course they are bound to pursue, no less from a sense of duty, than by the requirements of the oath of God which is upon them. The constitution of the United States itself, an instrument in which it is hardly to be sought for, recognises the fact, that treason may be committed against a State, by an implication too strong to be resisted. It expressly provides, that a person

accused of treason in any State, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

The result of the debate in the convention that formed the constitution of the United States, in reference to the article defining treason, is in accordance with this view. The decision of all the courts of these States, that have had occasion to touch the question, the opinions of all our commentators on constitutional law, recognize the same fact. The circuit judge of the United States who presides in this district, Justice Story, in his recent charge delivered in this district, in contemplation of the then unsettled disturbances in this State, repeating almost verbatim the language of the Virginian commentator on Blackstone, distinguishes between treason against a State and treason against the United States.

As I understand his views, treason against the State and treason against the United States are to be distinguished the one from the other by the immediate objects and designs of the conspirators. If the blow be aimed only at the internal and municipal regulations and institutions of a State, without any design to disturb it in the discharge of any of its functions under the Constitution of the United States, it is treason against the State only; though, if the object be to prevent it from discharging those functions, as the election of senators or electors of President and the like, it becomes treason against the United States. If any further judicial opinions, delivered with reference to our recent troubles, were wanting, in order to confirm these views, we have them in the opinion of the same court and the same judge, deciding on the sovereign authority of this State to proclaim martial law.

Can it be doubted, that the power which, of its own constitutional authority, can proclaim martial law, is sovereign or a delegated sovereignty, and that it may define and proclaim what treason is? If any further authority were requisite on this point, we have it, in the fact shown in the argument of the question to the court, that eleven out of twenty-six States of our Union have inserted an article in their constitutions, defining the crime and providing for its punishment, and that two others have made the same provision in their statute laws.

The statutes of no other of the States have been referred to, nor have they been examined by the counsel.

The probability is, that, if they were examined, we should find, not that thirteen only of the States, but that the whole twenty-six have defined this crime, and made provision for the punishment of it.

The power to provide for the punishment of this crime the Legislature derives not from the United States, or the people thereof, but from our own people, from the organized sovereign people of the State. That legislature, exercising this power, has declared, that treason against this State shall consist only in levying war against the same; or in adhering to the enemies thereof, giving them aid and comfort. This law, we now say to you, is *constitutional* and binding on all, and that the sovereign authority of this State is such, that treason can be committed against it.

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NEWPORT, sc. Clerk's Office, Supreme Court.

I hereby certify that I have compared the annexed copies of the ruling of the supreme Court in the indictment State vs. Joseph Joslin, and the copy of part of the charge of the court to the jury, in the indictment State vs. Thomas W. Dorr, and found the same to be true copies of the originals in this office.

In witness whereof, I, William Gilpin, Clerk of the Supreme Court within and for the county of Newport, have hereunto set my hand and the seal of said court, this twenty-fourth day of June, A. D. 1845.

WILLIAM GILPIN, Clerk.

Opinion of the Court upon the motion for a New Trial.

NEWPORT. SUPREME COURT,

MARCH TERM, 1844.

INDICTMENT.

The State vs. *Thomas Wilson Dorr.*

And now, on the 19th day of the Term, after a full hearing of the said Thomas W. Dorr, and his counsel on his motion filed on the 14th day of the Term to set aside the verdict against him, and that no judgment be rendered thereon, and that a new trial of said indictment may be awarded to him, the Court order and decree, that the said motion be overruled for the insufficiency of the reasons set forth on said motion.

The prisoner has assigned various reasons for setting aside the verdict in this cause. Six of which relate to, and are objections to the jury. These will be considered in the close.

The prisoner's fifth reason is, that he was not furnished with copies of the four last panels of jurors in this cause two full days before they were called and sworn

It has never been the practice of this Court to order copies to be furnished two full days before the jurors are called, because they have never understood, nor do they now understand, that there is any law in this State requiring it to be so furnished.

The Court have in all cases given what they deemed a reasonable time; and have extended the time when necessary or proper so to do. On the venire returned at 9 o'clock, A. M. of the 27th of April, the prisoner was allowed until 3 o'clock, P. M., at which time he made no suggestion that he was not fully prepared to proceed, or that he desired more time to examine the list; nor does it now appear that the time allowed was not reasonable and sufficient for the proper defence of the prisoner, or that he would have challenged for cause or otherwise any of the jurors on that venire, than those whom he then challenged.

Another reason for setting aside the verdict, (assigned by the prisoner as his 7th,) is that he was not furnished with a list of all the government witnesses two full days before the trial commenced.

The prisoner at most could demand, and that only, *ex gratia*, the names of the witnesses on whose testimony the indictment was found; with these he was furnished, and with most of the other witnesses for the government. No objection was made at the trial on this account, nor does it appear that the prisoner has lost any thing, or been in any way prejudiced; nor is it suggested.

The 8th and 9th reasons are objections to the admission of testimony. Objection was made at the trial to the introduction of any evidence on the part of the Government as to the treasonable intent, until they had first proved the overt act.

This was a mere question as to the order in which the evidence should be introduced, and the Court are still of opinion, that it was properly left to the discretion of the prosecuting officer, and this opinion is supported by that of Chief Justice Marshall on the trial of Burr.

The other objection to the admission of evidence is, that the prosecution was permitted to prove the acts of others in aggravation of the charges in the indictment.

This objection was made at the trial to the testimony of Shelly, as its object was understood by the prisoner's counsel.

The evidence, however, was not offered nor admitted in aggravation, but in order to shew the warlike and treasonable character of the assemblage at Chepachet, of which the prisoner assumed the military command, and as introductory to the proof of the prisoner's connexion with them, and of his joining in the conspiracy, and as such was competent and proper evidence.

In his 10th, 11th and 12th reasons the prisoner objects that certain evidence offered by him was rejected.

The prisoner on the trial offered to prove the adoption of a Constitution called the People's Constitution, in December, 1841, by a majority of the adult male citizens of the U. States resident in this State.

First, by the testimony of John S. Harris, a witness produced on the stand, and secondly by offering to the jury the votes given for said Constitution.

This evidence was properly ruled out as being an offer to prove the existence of a law of this State.

The Court are bound to take notice judicially, without resort to a jury, of the existence of all public statutes, which it is their duty to administer; and of the Constitution, written or unwritten, under which they act, and which they are sworn to support, and they know of no rule of law, whereby they can permit parol evidence to pass to the jury of the existence of any law of the State, either constitutional or statute; neither do they know of any rule of law by which a jury can be permitted to receive and count votes either to determine an election of Governor, the adoption of a Constitution, or the passage of a statute.

The Court are also bound to take notice who was, and who is the Governor of the State under the Constitution and laws thereof.

The other matter offered to the jury and ruled out was the copy of said Constitution.

This was properly ruled out as immaterial, and not tending either to prove or disprove either the treasonable intent or the overt act.

The 13th reason assigning by the prisoner for a new trial is, that he was not permitted to argue certain matters of law to the jury.

It is the duty of this Court and of every court to determine all matters of law, and whenever the matter of law can be conveniently separated from matters of fact, solely to determine them; this is the general tenor of the authorities cited as well by the prisoner as by the Attorney General. And by the Constitution and laws of this State, this Court are required in all trials to instruct the jury in the law.

The two first questions of law proposed by the prisoner's counsel to be argued to the jury were questions of pure law. The prisoner and his counsel were therefore properly required to address the Court upon them as the tribunal which must and ought to decide upon them.

And as to the last question proposed to be argued to the jury, viz: "That in law the defendant acted justifiably as Governor of the State, under a valid Constitution rightfully adopted, which he was sworn to support."

The prisoner's counsel proposed to justify the acts of the prisoner by the fact that he was Governor of the State. As to this fact no evidence had passed to the jury, nor had any legal evidence been offered for that purpose; and the question of law involved was a fact of Constitutional law, in whether the People's Constitution, (so called,) was the supreme law of this State, stood alone and should have been argued to the Court.

In the 15th reason assigned by the prisoner, he objects that the Court refused to hear at that time any argument upon the 2d and 3d matters mentioned in his 13th reason, and in his 16th reason objects that the Court refused to hear at that time any argument on the question mentioned in that reason.

It is the practice of all Courts to consider some points of law as settled, and not open to discussion in every trial that takes place, and it has been the practice of this Court to consider such questions as have been elaborately and fully argued by counsel and deliberately determined by the Court itself, although in another case as settled and the question closed, not to be re-argued in the progress of a jury trial.

Such were the questions before referred to. They have been thus settled and determined by this Court.

As to the point which the prisoner's counsel propose to argue to the Court, viz: "That in law the prisoner acted justifiably as Governor of the State under a valid Constitution, rightfully adopted, which he was sworn to support." The only question of law involved in it, and the only one as the Court understood, which the counsel proposed to argue, was whether the People's Constitution, (so called,) was the law

of the land or not. And this question had been by the Court deliberately determined in a previous case on solemn argument. And the point of law could arise only upon the fact that the prisoner was Governor, as to which there was no legal proof in the cause.

The Court, notwithstanding they considered these points fully settled and closed, stated to the prisoner that they would hear the prisoner or his counsel on these points if it should become desirable, after verdict.

The prisoner, as further reason for a new trial in the cause, objects that the Court misdirected the jury in certain points of law.

First. In charging the jury, "That treason may be committed against a State."

In this direction the Court see no error. This point was argued at length on the trial, and again on this motion, and the Court think the charge on this point fully sustained by the authorities referred to in the charge.

Second. That the Court erred in directing the jury; that they were not the judges of the law and of the facts in this case, but were bound by their oaths to take the law as laid down by the Court, and were no further judges of it than simply in applying it, as given to them by the Court, to the facts which they deemed proved in the case.

The Court in this case, as they have in all other criminal cases, where the question has been raised, charged the jury that it was the duty of the Court to decide what should pass to the jury as law, and what should not pass, they being the tribunal to decide what the law was touching the charge in the indictment. That it was the duty of the jury to scan the evidence before them and ascertain what the facts were, and having ascertained the facts, they were to apply the law which had been given to them to the facts, thus ascertaining and then acting as judges, both of the law and the evidence, return a verdict as to them,—deciding under their oaths what might appear to be right, and in this the Court see no error.

Third. That the Court misdirected the jury in charging them "That the only question of intention on the part of the prisoner which they could consider was, whether the prisoner, at the times laid in the indictment, intended to commit the acts charged against him in the same."

The direction of the Court was in substance that the treason charged was by levying war against the State, and then in substance charged the jury what acts would constitute a levying of war against the State, and that if there were an assemblage of armed men arrayed in a military manner, provided with implements of war, and thus arrayed with a design forcibly of overturning the government of the State, and of setting up a new government, or of taking possession, by force,

of the public property of the State, or possession of the force of the State, it would be a levying of war against the State, and if the prisoner was leagued with the assemblage and performed a part with them, he would partake of the guilt of such assemblage. But they did not otherwise charge the jury as to the intent of the prisoner in committing the acts charged against him.

The jury were left to inquire with what intent the men were arrayed, and whether the prisoner entered into their designs.

Fourth. That the Court erred in charging the jury that the prisoner could not have been justified by any evidence offered by him in acting as Governor, and the Court charged the jury that the fact that the prisoner believed himself to have been Governor would not justify his acting as such, and though it might extenuate the offence, it could not take away the legal guilt.

They also charged the jury that the People's Constitution, (so called,) was not the law of the land, and that acting judicially, they could not recognize it as such.

The prisoner urges certain objections to the jury and to the manner of impannelling it as reasons for a new trial in this cause.

The 2d and 3d reasons are to this point, and are similar. The one is, that Abner Tallman, who was called for a juror, was set aside upon insufficient testimony; the other is, that Samuel Westcott, another person called for a juror was not set aside upon the evidence produced in support of the prisoner's challenge for cause.

The court are not now satisfied that they did not at the time give to the evidence produced in each of those cases its due weight.

Another objection to the manner of impannelling the jury as set forth in the 6th reason is, that the Court refused to permit the defendant to recall his peremptory challenges to six of the persons examined for jurors and set aside and to challenge said persons for cause, upon proof to be produced of their incompetency, though the prisoner moved the Court to do so before the jury were sworn.

The Court pursued their usual course in discharging jurors, challenged and set aside, and had discharged all the jurors who had been challenged and set aside, including the said six jurors, no suggestion at the time being made that the prisoner objected to or would object to such discharge. They could not legally be recalled, and the prisoner's motion was necessarily denied. The propriety of discharging jurors under such circumstances the Court do not doubt.

Had the prisoner made his motion before the discharge of the jurors, it would have been entertained by the Court, but the Court are not prepared to say that the prisoner had the right contended for.

Two other reasons were urged to the Court for a new trial, both of

which were disposed of during the pendency of the motion incidentally.

The first was as follows: "Because Joseph Paddock, jr., the foreman of the jury, and also William L. Melville, jr., one of the jury, before the jury were impannelled had each of them formed opinions of the guilt of the defendant, and had expressed such opinions, and in terms of prejudice and crimination toward the defendant personally, thereby manifesting toward him feelings of vindictiveness and hostility that disqualified them to act as impartial jurors."

Upon the opening of the motion for a new trial, the Attorney General objected to the introduction of any evidence to establish the facts set out in it, on the ground that the whole motion being addressed to the discretion of the Court, and the verdict being rendered in accordance with the law and the evidence, the Court ought not to set the verdict aside and grant a new trial, it appearing from the circumstances that the jurors could not have been biassed in the verdict given, by the opinions or expressions attributed to them.

After a full hearing of the prisoner and his counsel, and a full examination of the authorities adduced, the Court sustained the objection of the Attorney General.

They do not doubt their power to grant a new trial in a capital case on motion of a prisoner after conviction. The statute confers full power, limited only by the discretion of the Court. Every motion of the kind is therefore addressed to their discretion and it is their duty, on every such motion, to examine the whole case as it was presented to the jury. Upon such examination the case in question appeared to be one of a very singular nature and character, and in exercising their discretion they could not be aided by precedent.

During the trial the prisoner offered evidence to establish the facts, the overt acts charged against him, without proof of which he must have been acquitted, and in his argument to the jury explicitly admitted that he did the acts charged.

He says in his argument, "I have labored to bring out all the facts of all that was done at Acoaxet, Fort Pod and Fall. I deny nothing." Again—"I believed [illegible] was no government at all; my power and duty was to take possession of the public property, and the issue of [illegible]." Again, in reference to the [illegible] he says, "The officers and soldiers of the command were [illegible] Again, in reference to the occurrences at Federal Hill and the Arsenal, on the 17th and 18th of May, he says, "[illegible] a strong feeling manifested in favor of taking possession of the property of the State. The military force of the State was offered me, and I

resolved to make the attempt. I resolved to possess myself of the Arsenal, as that would have been a decisive step, and one which would have placed in the hands of my party the power of the State. I gave the order to attack and to fire upon the building." Again—"through want of discipline our men fell off and the whole force was dissolved." "I left town, but if there had been a favorable turn of affairs I should have returned." Again—as to the transaction at Chepachet, he says —"the meeting at Chepachet was premature. I had previously written to the military officers requesting them to hold a council, and not act prematurely." Again—"the fortifications on the hill were very slight, and did not surround the hill; the hill itself was untenable, being commanded by several other heights. I was now there and a movement was made. It became necessary to maintain our position. On Saturday afternoon I ordered a return to be made of the number of men on the hill." Again—"persons were continually coming and going; but on Monday all who took arms were compelled to stay. Mr. Knight was taken as a spy and brought before me."

In fact, at the trial, the prisoner denied no material fact, but based his defence upon the want of proof of the treasonable and malicious intent alleged in the indictment.

The intent which the prisoner then avowed was to set up the People's Constitution, (so called,) and to carry into effect the government under it, and not to pull down the Charter Government which he contended had been dissolved by the Constitution referred to.

The Court in the exercise of what they then believed and still believe an imperative duty, refused to pass to the jury any evidence as to the existence of that constitution, and charged the jury in substance, that acting judicially, the Court could not recognize it as the law of the land, and that no evidence has passed to them of its adoption, and of the election of the prisoner as Governor under it. And that they could only find their verdict upon the evidence which has passed to them.

With these facts admitted before them, and these rules of law laid down to them by the court as the general principles of law applicable to the case on trial, it is difficult to see how any jury could have returned any other verdict than that of guilty.

In relation to the facts there was no controversy at the trial, nor is there now any pretended. The prisoner now here upon the trial of the motion does not pretend that any evidence would, under the rulings of the Court, alter the facts. He admits the facts as they were then proved.

The prisoner admitted, as he now admits, his intent to have been to effect an object which the Court charged the jury was treasonable.

The jury, therefore, to have returned any other verdict, must have

doubted facts admitted by both parties to be true, or assumed to overrule the opinions of a Court on naked principles of law, and to establish as law what the Court did not then, nor do they now believe to be law. The effect of granting a new trial would therefore be of no avail to the prisoner unless he could induce a second jury to disregard their plain duty and return a verdict against their oaths.

Under these circumstances the evidence offered by the prisoner in support of this reason was ruled out as immaterial.

The other reason urged by the prisoner and disposed of, incidentally related to the challenge of the array in the course of impannelling the jury.

The challenge was made on the ground generally that the jurors were summoned and returned at the nomination of a third person, assumed to be unfriendly to the prisoner.

Upon this point the prisoner offered testimony, upon examination of which the Court decided that the challenge should be overruled, the facts not being established by the witnesses produced.

The prisoner now moves for a new trial for the error then made by the Court in overruling the challenge, and now offers further evidence in support of the facts upon which the challenge was made.

When stating the matter expected to be proved, the evidence appeared to be cumulative only, and which if taken in connexion with the evidence formerly offered to the same point would not furnish sufficient ground from which to draw a legal inference that the jurors were summoned and returned at the nomination of any person other than the officer charged with the service of the venire.

The Court regret that in the reasons for a new trial before referred to, several inaccuracies occur as to the rulings and charge of the Court. A part of these are corrected in the opinions here given, and the charge itself is annexed, that no further mistakes may be made in relation to it.

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NEWPORT, sc. Clerk's Office, Supreme Court.

I hereby certify that I have compared the foregoing with the original papers filed in this office, and found the same to be a true and correct copy thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, this twelfth day of July, in the year one thousand eight hundred and forty-five. WILLIAM GILPIN, Clerk.