OPINION OF JUDGE ELMORE

THE PROVISIONAL COURT OF LOUISIANA

Its Warrant in Law and Jurisdiction,

UNITED STATES vs. AUGUSTE REITER—UNITED STATES vs. JOHN LOUIS

These cases were tried on the indictments against the accused before Judge Peabody and a jury, and were severally convicted, Reiter of murder, and Louis of arson. After the convictions a motion was made in each case in arrest of judgment.

The motions were heard together for the sake of convenience, and at the request of the counsel for the accused.

Ex Judge Whittaker, Counsel for Reiter.

Messrs Durant & Horner, Counsel for Louis.

Mr. Geo. D Lemont, Prosecuting Attorney of the Court, Counsel for the Government.

Opinion.

These two cases may, without inconvenience or danger of confusion, be considered together, although they have in fact no connection with each other. The same objection to the proceeding of the Court to pronounce sentence upon the accused and to arrest of judgment, is made by both the defendants, and each is now before the Court on a motion in arrest of judgment, and in each case the arrest is urged on the ground that this Court is not authorized in law and has no jurisdiction to try the case.

The counsel for Reiter claimed that the Court, in its constitution and creation, had not originally the warrant of law to try the accused.

The counsel for Louis concede that the Court had authority originally to entertain and try such a case, but insist that for causes occurring since, its authority has ceased; that certain steps taken in the progress toward the re-establishment of a civil government have superceded the jurisdiction of the Court, and that it is now without jurisdiction or power. The offences of which the defendants stand convicted, by the laws of Louisiana are punishable with death, and nothing would be more agreeable to the Court than to proceed with the utmost caution in considering these objections to its jurisdiction.

The accused have been indicted, tried and convicted under and pursuant to the law of the State of Louisiana.

The *first question* to be considered is whether the Court has ever had, from the nature of its origin and constitution, authority to try cases like these, and if the question shall be decided in the affirmative it will remain to examine

The *second question*, namely, whether the power to try or the jurisdiction over such a case, once possessed by this Court, has been withdrawn or lost, whether the Court in fact has been in any way deprived of it by subsequent events.

It must be conceded that the Court, in its origin and structure, is quite out of the usual course and usual. It has not its origin or foundation in any constitutional or legislative enactment, is not the creature of any regularly organized constitutional or legislative body. Ordinarily the judicial tribunals of the land are the creations of the legislative departments either of the State or Federal Government, and for the regularity of their creation and the character and extent of their powers depend on the action of the executive branch of the one or the other of these powers. In such cases, the first thing to be done in ascertaining the legality or powers of a Court, is to consult the constitution and legislation of the Government from which it claims to hold commission, and in the letter of these is found the act of its creation and the extent and limit of its powers.

Not so with the Provisional Court, which depends for its existence on the law of nations and on that part of the law of nations relating to war—the law by which parties and neutrals are guided in their treatment of each other in a state of war, and that portion of it which relates to and determines the rights and duties of a belligerent, a conqueror in the territory of an enemy, and hostile it in arms for the time. On that law must depend the decision of the question presented by the motion, of the validity of law and the powers of the Court.

On that law alone must the Court rely for the power and jurisdiction it has exercised for a considerable time, in a large number of cases involving amounts usually very large.

It was on that law that the President of the United States, prompted by the urgent wants of the community here, found the warrant for the establishment of this Court in the midst of the country of an enemy held by him *pure belli* in armed belligerent occupation.

The authority of this Court is derived from the President of the United States, the Chief Executive of the nation, and Commander-in-Chief of its forces, military and naval. It is conferred by an order, of which the following is a copy

EXECUTIVE ORDER,

Establishing a Provisional Court in Louisiana.

EXECUTIVE MANSION,
Washington, October 20, 1862.

The insurrection which has for some time prevailed in several of the States of the Union, including Louisiana, having temporarily subverted and swept away the civil institution of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation, and it being indispensably necessary that there should be some judicial tribunal exercising there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a Court of Record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be Provisional Judge to hold said Court, with authority to hear, try and determine, all causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming its proceedings, so far as possible, to the course of proceedings and practice which has been customary in the Courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said Judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said Court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said Judge.

These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department compensation as follows.

* * *

Such compensations to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:
WM. H. SEWARD, Sec'y of State.

WAR DEPARTMENT.
Washington, October 23, 1862.

I hereby certify that the foregoing is a true copy, duly examined and compared with the original of the Executive order of the President of the United States, constituting a Provisional Court for the State of Louisiana.

Witness my hand and the seal of the War Department.

EDWIN M. STANTON, Sec'y of War.

Attest: JOHN POTTS, Chief Clerk.

This order, by its terms, no doubt embraces cases like these under consideration, as indeed it does, perhaps, all others which can occur in life, or become the subject of judicial investigation.

The language of the order "to hear, try and determine all causes, civil and criminal, including causes in law equity, revenue and admiralty," is clear and unquestionable, and embraces this class of cases, with all others of every description.

The President then sought to give power to this Court to try and determine cases of this kind, and having made an order to that effect, has given it that power, if he himself had the authority to confer it. The only question remaining to be answered on this point is, whether the President had authority to confer such powers and jurisdiction.

The authority of the President of the United States to create this Court, and invest it with powers which should embrace these cases, depends, to some extent at least, on the Constitution of the United States, which creates the offices exercised by him, and determines its functions. The Constitution, article 2, section 1, paragraph 1, declares as follows:

"The executive power shall be vested in a President of the United States of America."

It also provides, article 2, section 2, paragraph 1:

"The President shall be Commander-in Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States."

As President, Chief Executive, and Commander-in-Chief of the army and navy, he would certainly have power to establish tribunals for the determination of questions civil and criminal, arising in civil life. Was there anything in the condition of affairs existing at the time the order was made which could give him the power to establish them and if so, what was there in the condition of affairs then existing to give him power in this respect not ordinarily possessed by him as one of the attributes of his office?

Between the Government of the United States and a people inhabiting a portion of country lying on the Atlantic Ocean and on the Gulf of Mexico, and extending with beyond the northern boundary of the territory in question, and embracing within its borders that portion of territory therefore known, and still most conveniently designated as the State of Louisiana, a war had for some time been waged. This fact is notorious, and moreover, it is conclusively settled by the President, the ultimate arbiter of the fact, by his proclamation to that effect. As to its existence, therefore, as well as the existence of some other facts to which I shall have occasion to refer, equally well known, no time will be consumed in attempting to prove them, but they will be assumed.

It is a matter of public knowledge and notoriety that this war had been pending, and that the country over which the jurisdiction of this Court is in question, and heretore known, and in the order establishing this Court described as the State of Louisiana, had been for many months held and occupied by those people and not by the courts, military and naval. That it had for a long time previous to, and also since the commencement of this war, inhabited, cultivated and owned by the same people who had entered into and carried on war with the Government of the United States, and that it was still so inhabited by a people whose relations with the Government of the United States had been and were still those of enmity. That it had, in the course of the war, been by force of the arms of the United States, wrested from the enemy, and was at the time the order establishing this Court was made, held by the forces of the United States in armed belligerent occupation. That the armed belligerent forces of this enemy of the United States had been, by force of arms of the United States, expelled from this country, and that they were at the time held out of it by the armed forces of the United States, and that war was still waged between these belligerents.

The civil institutions of the country thus held, including the tribunals for the administration of justice, had been formed and established by the enemy of the conquering power and were by it administered at the time of the conquest.

These institutions having been formed, established, and administered by the Government existing previous to and at the time of the conquest confessedly hostile to the Government of the United States, were the only institutions found there at the time the military authority of the United States was by force of its arms established there.

By the conquest of the country, in this connection is other, the previously existing government and the power by which it was administered and the people thereby subverted and swept away, and those of the conquering power were substituted in their places. This is the necessary consequence of a conquest of a country—a transfer of the control, government, and sovereignty of it from one party to another.

The old power is conquered and extinguished and the new one of the conqueror is instituted in its place. The old institutions, if not abandoned and extinguished, are at least suspended in their action.

They may be transferred to and adopted by the new governing power and may be used and operated by it, just as an old machine, detached from the power that has usually moved it, and abandoned for use as a whole, may furnish isolated pieces of machinery which can profitably be introduced into a new machine having different qualities, moved by a new and wholly another power, and used to accomplish on the whole, perhaps purposes quite different. However, there may be retained in use by the new governing power some of the features or institutions of the government which has been supplanted, it is nevertheless wholly another government, and derives its life and all its vitality relations from a new source—the new sovereignty installed by the conquest. A conquest necessarily operates the extinguishment of the power of the party conquered in the country which is the subject of conquest, and the establishment there of the power of the conqueror. Without this there is no conquest of a country, and there can be none.

When the power previously dominant in a country has been extinguished by that of another party, and a rival and rend-red incapable of governing it further, and if new one has been established in its stead, it is both the right and the duty of the party thus coming into power to see to it that a government wholesome and salutary shall be established and administered, and as in such a case there is only one power, that of the new party succeeding, capable of giving and administering the government, it follows that it is the duty as well as the right of that power to do it.

No country can exist without a government of some kind. The rights of the inhabitants must be protected—crime must be restrained and punished—the virtuous must be protected against the vicious—the weak against the strong—order must be preserved, and security to persons and estate secured. The party dominant for the time being has the power to do it, and no one else has the power, and it follows from the necessity of the case, that he must exercise it.

So the Government of the United States having conquered and expelled from the territory of country, therefore known as the State of Louisiana, the power by which the government of it had been heretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft, a government in the place and stead of the one deposed or overthrown, such as one as should reasonably secure the safety and welfare of the people thus reduced to subjection, in some manner, not inconsistent, to be sure, with the proper interest of the governing power, and the maintenance of it in the supremacy there.

The power established there was the military power of the United States, and the President of the United States, as we have seen, the Commander-in-chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed.

He acted in obedience to his duty, and in accordance with the right, when he attempted to establish there a judicial tribunal capable of deciding controversies and administering justice.

But how does this question stand on the authority of adjudged cases.

In the case of Cross *et al.* vs. Harrison, in the Supreme Court of the United States, in 1853, reported in 16 Howard, at page 164, the Court held that a civil government formed in California, under the direction of the President of the United States, as Commander-in-chief of the army and navy, shortly after the conquest of the country, and while it was held in military occupation by the forces under him, was an act warranted by the laws of nations, and that the formation of such a civil government was the rightful exercise of a belligerent right over a conquered country.

It appeared that the port of San Francisco had been conquered by the arms of the United States in 1846, and that shortly afterwards the United States holding military possession of all Upper California, the President authorized the commander of the forces of the United States there, to exercise the belligerent rights of a conqueror, and form a civil government for the conquered territory, with power to impose duties on imports and tonnage, for the support of the government and of the army which held the country as a conquest in possession.

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