U. S. Supreme Court,

For the Territory of Oregon.

Amos H. Short, } In error from
vs. } Clackamas Co.
F. Ermatinger. } District Court.

A. R. Watt, Att'y. for Plaintiff.
[illegible] Chapman, Att'y. for Defendant.

[illegible] question as to the proper place [illegible] present term of the Supreme Court, the Court decided as follows:

Judge Wilkins Strong's Opinion.

[illegible] before the court, is one of [illegible] importance. The decision upon the constitutionality of an important legislative act, by a court of supreme jurisdiction, is a serious matter; and the court will at all times approach the investigation of a case involving the necessity of such a decision, with great caution. Yet it is a duty from which they are compelled by the obligations of their oaths, not to shrink, when it is legitimately brought before them in a case between parties litigant.

This case is also important from the fact, to which the court cannot close their eyes, that the question involved, is one of absorbing interest to the entire population of the territory. And well may it be so considered, for, upon its proper determination by the court, and the peaceful acquiescence of the people at this time in such determination, depends, in a great degree, the destiny of this new and rapidly growing territory. If in our action as a people on this question, we exhibit a disposition to be governed by those principles of law which lie at the foundation of all our civil rights, and be governed in our action by the decision of that tribunal which has been constituted to decide upon them, all will be well. If on the contrary, misled by partizan feeling, passion, prejudice, sectional or local interests, we trample law and order under foot, the consequences at this early period in our attempt at self-government as a territory, may, and certainly must, be such as good men will look forward to with fearful apprehensions. It is only in times of great popular excitement, that the people are liable to forget, and tempted to overstep those great fundamental principles in our government by which the power of the people is distributed and apportioned to the different departments—Legislative, Executive, and Judicial; and if we wish to preserve the free institutions, under which as a people we have long been so highly prospered, it is at such times that we should be extremely cautious not to be led into rash and inconsiderate action. Our past history has shown that when the excitement is over, the people are sure to return to the good old ways of their fathers which they have tried so long and love so well,—but vastly more desirable is it to continue in the right path, than having gone astray to return, though, to forsake an error when discovered and correct our course, is an attribute characteristic of Americans and of which we may well be proud.

Had not objections been made in the cause now on trial before the court, which compel us to decide this point, that our decision, if the parties are not satisfied, may be made the subject of review by the appropriate tribunal, the court would have remained silent,—our actual sitting and transacting business as a court at Oregon City, being of itself a virtual decision,—but the party requiring the decision upon this point and being entitled to receive it, it is made. It is, however, in the view of the case that I have before presented, that I have felt called upon to give the subject my most serious attention, much more so than I would have deemed necessary had it been a matter involving simply dollars and cents, in amount however large.—I have given it such consideration, and it is a source of satisfaction to feel that the decision to which we have come, is clear both upon principle and authority; so clear, it seems to me, as to leave no cause for a reasonable doubt in the mind of any man who has his ordinary allowance of common sense and the disposition to use it fairly and honestly.—Although purely a question of law, yet it is so plain to the comprehension of any man who examines it, that it requires a considerable effort of legal ingenuity to so far mystify, as to raise the shadow of a doubt.

An objection is made to proceeding in the cause before the court, on the ground that we are not met at the proper place, or in other words at the Seat of Government. The simple question, then, presented to us at this time for our decision in this cause is, where is the Seat of Government for the territory of Oregon? Is it at Oregon City?

The first proposition to be determined, is what does the term "Seat of Government" mean? A concise but sufficiently comprehensive definition of the term is, that it is the place where the law making power can legally assemble for the purpose of enacting laws. If the Legislature can assemble at any place within the territory and there make legal and binding statutes, and that for this purpose, one place is as good as another, then there is no Seat of Government; for there would be nothing settled about the place, and the term implies stability or something [illegible]. It must then mean some place, [illegible] permanent or temporary, where, [illegible] place the members of the Legislative Assembly can meet and act in a [illegible] capacity. And where is that, [illegible]

[illegible] inquiry which would suggest [illegible] mind, or, indeed, to the [illegible] making investigation, [illegible] propounded to him, [illegible] the Legislature [illegible] is bound to [illegible] of the public acts [illegible] find that the [illegible]

ernment met at the Halls of the Willamette, at what is now Oregon City; and this they were required to do by an act passed June 27, 1844.

So far, then, as the Provisional Government is concerned, there can be no doubt where the "Seat of Government" was; it was fixed by law. This act had all the force of law which an act of the Provisional Government could have, until the passage of the Organic Act by Congress, Aug. 14, 1848. By the fourteenth section of that act, validity is given to all the laws of the Provisional Government then in force in Oregon territory, excepting such as might be incompatible with the Constitution of the United States, and the principles and provisions of the Organic Act. The law of the Provisional Government, then, fixing the *Seat* of Government, unless changed by some provision in the Organic Act, still continued in force after the territory became organized under the law of Congress. The only provisions in the Organic Act affecting this question, are that by the fifteenth section the Governor is authorized to name the place where the Legislative Assembly should hold its first session; thus conferring an authority upon the Governor to make a temporary Seat of Government, which should be a legal place for the transaction of Legislative business during that session. The Governor in the exercise of this power, saw fit to name the place where the *Seat* of Government had legally existed, and did legally exist until some new place was named by him. After the first session of the Legislative Assembly terminated, the power of the Governor over that matter was at an end. It ended with the Legislative Assembly themselves. They adjourned at their first session without attempting to pass any act on this subject. What then was the condition of the territory after such an adjournment? Had it no Seat of Government? Was there no place where the law-making power could legally assemble? If there was not, then the the government was disorganized. The Governor had no power to make a *Seat* of Government, and the law making power could not act without first assembling at some lawful place. It would therefore have required an act of Congress to have again set the wheels of the territorial government in motion. But such a state of things could not and did not follow. Oregon City, or the Halls of the Willamette, had once been established the lawful *Seat* of Government and had never been legally changed; and by well-established principles of law, it continues the lawful Seat of Government until it is lawfully changed. To hold any other doctrine, would be to hold that the last Legislative Assembly did not meet at any proper place, and, consequently, that they did not meet at all, and that all laws passed by them at their last session, are but the idle resolutions and doings of a set of men, met together without legal authority, trying their hands at law making by way of pastime; and we are thrown back upon Congress for a new start.—Such is not my opinion of the law. I must hold Oregon Co. to be the legal Seat of Government up to the meeting of the Legislative Assembly, or all is anarchy and confusion. We now progress a step farther, and examine whether by any law which was passed at that session the Seat of Government was removed to any other place.

The power of locating and establishing the Seat of Government, as well as of removing it when established, remains in the Legislative Assembly; and how may they do this? In the same manner that a Legislative body may do any lawful act, that is, by the passage of a law. Did the Legislative Assembly at that session pass any *law* upon this subject? We find upon looking at the statute book, what purports to be "An act to provide for the selection of places for location and erection of the public buildings of the territory of Oregon," which provides, &c. (See General Laws, O. T., page 272.) In order to know whether this is a *law* and therefore of *binding force*, or *not* law and therefore of *no* force, it is necessary to examine the power of the Legislative Assembly; for unless it be the act of a body having the power to make it, it cannot have the force and effect of a law, though it might be written on every page of the statute book.

Our Legislative Assemblies are not, like the parliament of Great Britain, Supreme. We have no Supreme power, save that which is vested in the people. In each of the States, the people have seen fit to adopt a Constitution or fundamental law by which they establish three different departments of government,—the Legislative, Executive, and Judicial,—and assign to them their respective powers, fixing limits over which none are to pass, and usually limiting the power which may be exercised by the body of the people as a mass, to a revision of that fundamental law under certain prescribed forms. The officers being the agents of the people, are authorized to exercise those powers, only, which are conferred upon them in the constitution. If the Legislature, the Executive, or the Judiciary, act within their power, their acts are the acts of the people who have authorized them, and therefore valid. If they step beyond their powers, their acts are void, because the people have not so authorized them to act, and have not so agreed to be bound. The Constitution, then, is the touch stone by which every act must be tried.—Still farther, and over and above all, is the Constitution of the United States. Within the limits of it provisions, it is the expressed will of the people of all the States, and so far as it extends, it and all laws enacted in accordance with its provisions are the supreme law of the land, because it is the will of the entire people, expressed in a manner agreed upon and prescribed by the entire people; and when we speak of the acts of Congress, we merely use a short form to speak of the acts of the entire people, comprising all the citizens of the United States whether residing in States or Territories. The subject of territorial government has been the subject of much discussion; and it has become the settled doctrine, that until they possess a sufficient population to assume a State government, they are under the protection and government of the people of all the States, through their regularly constituted agents in Congress assembled. Acting upon these principles from 1787 down to the present time, Congress has directed the government of the several territories generally to the satisfaction of all the people, and about half of the present States of the Union have gone into the Union from territories.—I allude to this peculiar position of our territorial government, for the purpose of showing that it is not a new thing, and that it is not an arbitrary and tyrannical species of government as some seem to suppose, while we are subjects instead of citizens. We are here by our own consent, with a full knowledge of the usual mode in which territories are governed, and therefore while we remain to enjoy the protection of Congress, or of the whole people of the Union, and the benefits of a territorial form of government, we owe as willing an obedience to the Organic Act and the laws prescribed by Congress, as we could possibly owe to the Constitution of any State in which we might choose to take our residence.

The people of Oregon, hitherto, under the Provisional Government and since the organization of the territory under the law of Congress, have shown a disposition to abide by the laws of their country under circumstances the most trying, which I trust will continue to be manifested to the end of time.

The act of Congress organizing the territory of Oregon, is our Constitution. It is the fundamental law by which the different departments of government are created, and by which their powers are defined and limited, and must so remain until we become a State, or the power that made it shall change its provisions. The Legislative Assembly is made such by that Act, and their duties are presented by its provisions, and with those provisions we compare its acts to determine their validity.

Let us apply this test to the Act in question, and if it stands the test, it is good, and will come out the brighter for having been tried. If it fails, it is not *the law* and never has been.

The Organic Law, Sec. 6, provides, "that every law shall embrace but one object, and that shall be expressed in the title;" and in the same sentence it gives the reason for its enactment, which is to [illegible] any one. Action by a court may declare it so, but it was just as lifeless and inoperative before the declaration by the court as after. It is a well established principle of law, as well as common sense, that you cannot kill a dead thing, so as to render it more lifeless.

If this doctrine of presumptive validity is correct, and every man is bound to act upon a law as valid until it is decided invalid by a court, suppose a Legislature having jurisdiction of the subject matter of crimes and punishments should pass a law making the killing of a hog punishable by death, and commanding every man who saw the offence committed, to shoot down the offender without judge or jury; the subject matter of crimes is within the jurisdiction of the Legislature, and they have a right to punish hog killing with death. To be sure there is a little informality in the mode of execution, and depriving an American citizen of the right of trial by jury; but what of that, the law is presumptively valid—no court has said it was not so, and it must be obeyed. What would be the effect if the law obeying citizen was brought up charged with murder, and tried by a court where justice was administered according to law? I opine that such an excuse would only avail on the plea of insanity.

But the case in question shows the utter absurdity of this doctrine of presumptive validity, about as clearly as any case that we can suppose. Had the members of the court gone to Salem entertaining their present opinion of the law, they must have pronounced that the law was void and never had any force or validity. The question would then rise in the mind of every one, is the law so unreasonable and absurd as to require the judges to come so far from the place where the law compelled them to assemble, merely for the purpose of declaring that they were in the wrong place, which they knew very well before? Such a construction cannot be correct.

The last argument I shall notice—if argument it may be called—is rather an affectionate appeal to the sympathy of the court. It is said that very many members of the Legislature have been besieged by the law, on their road to the *Seat* of Government, and are huddled together in some improper place where they have made up their minds to remain unless the Supreme Court shall go to that place and Officially and Judicially shed light upon their pathway, which will enable them to see their way clear to the *Seat* of Government, and that we ought to go there by way to compromise, and enable those who have come to such a determination to retreat with honor. An act like this on the part of the members of the court would be a void act, not having the force of a legal decision, and would in effect be placing upon the records the fact that the Judges knew that they were not acting according to law. Personally, I should very much desire to gratify the feelings of any such, if any there are, but the obligations of an official oath to act according to law, forbids a court to be governed by mere questions of feeling or expediency, and we must do our duty, leaving to others to act as they shall answer to the people whose agents we all are.

The entire want of time to refer particularly to all the authorities which go to support the position I have taken, compel me to omit that branch of the case which I do cheerfully, knowing that his Honor the Chief Justice is entirely competent to show that our decision is as clear upon authority as I deem it on principle.

I have said thus much and said it plainly, because upon a question of this importance I desire not to be misunderstood, and I deemed it my duty.

It is my opinion that Oregon City is at this time the legal *Seat* of Government, and the only place where the *Supreme* Court can legally convene, and that therefore, the application to suspend proceedings in this cause must be refused.

Chief Justice Nelson's Opinion.

The Supreme Court of Oregon Territory is required to hold a term on the first Monday of December, in each year, at the seat of government, and the question is now raised—where is the seat of government?

Under the act of Congress organizing the territory the Governor appointed Oregon city as the place where the Legislative Assembly was required to hold its first session. By the 15th section of that act, the Assembly at its first session, *or as soon thereafter as it should deem expedient*, was empowered to locate and establish the seat of government for the territory, at such place as it should deem eligible.

The Assembly, at its first session, adjourned without fixing any time or place for its next session. Shortly afterwards, an extra session of the Legislature was held at Oregon City, pursuant to a call of the Governor. In May, 1850, this body passed a joint resolution in these words:

"*Resolved*, That the Legislative Assembly will meet on the first Monday of December next."

The last Legislature assembled on the first Monday of December, 1849, at Oregon City. A short time previous to its adjournment, and on the 7th day of February, 1851, a resolution passed both houses in these words:

"*Resolved by the Council, the house concurring therein*, That the Legislative Assembly of Oregon territory, will meet annually, on the first Monday of December in each year, at the seat of government."

Now the seat of government is the place where the Legislative body may lawfully assemble and enact its laws. I am of the opinion, therefore, that a fair construction of the language used by Congress, in the 15th section of the act referred to, joined to the action of the Legislature itself, requires us, in the absence of any proper legislation by the territory, to regard the seat of government as continuing at Oregon City. The language used by Congress is by no means explicit, but any other interpretation of it would leave the Legislature without any place fixed by law for holding its session, unless resort should be had to the law of the Provisional Government on the subject. The 14th section of the act of Congress, organizing the territory, contains a provision in these words: "And the existing laws now in force in the territory of Oregon, under the authority of the Provisional Government, established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the Constitution of the United States and the principles and provisions of this act, 'subject, &c.'" By the law of the Provisional Government, the Legislative body was required to meet at the Willamette falls, now Oregon City. So that whether we fall back upon the law of the Provisional Government, or repose upon the act of Congress, and the course of action pursued by the territorial Legislature, under the same, Oregon City must be considered as the seat of government, unless by some legal enactment it has been fixed at some other place.

The Legislative Assembly, at its last session, passed "an act to provide for the selection of places for location and erection of the public buildings of the territory of Oregon."

This act is composed of ten sections, the first of which locates and establishes the seat of government at Salem—the second locates and establishes the penitentiary at Portland, and the third locates and establishes the university at Marysville, and declares that the property granted to the territory for the establishment of a university, shall be applied to the erection of suitable buildings at that place. The other sections of the act relate to the appointment of commissioners to superintend the erection of the buildings at Salem and Portland—regulate their official duties, and provide for vacancies occurring in their offices.

If this enactment has been rightfully made, then the Assembly, in pursuance of the power conferred upon them by Congress, has changed the seat of government from Oregon City to Salem. But the validity of this act is questioned, as being repugnant to the act of Congress establishing the territorial government. Was this act then passed by the assembly in the legitimate exercise of the powers granted to it, and in the mode prescribed by congress?

In order to answer this question, we must refer to the law of Congress, passed on the 14th day of August, 1848, establishing the territorial government of Oregon. This is the fundamental law of the territory. By it the different departments of the government—Executive, Legislative, and Judicial are created, and their respective powers limited and defined. It holds, substantially, the same place in the regulation of affairs of the territory, that a constitution does in a State. Neither of the departments can assume greater powers, nor exercise the e powers in any other way than the supreme law, either in terms, or by necessary implication allows. Any attempt to do so, would be an act of usurpation. If we should hold otherwise, we should be saying in effect that the agent is superior to the principal, and the right to destroy the foundation on which his own power rests. A course of action, in accordance with such views would be revolution.

The Organic act gives to the Assembly the right to legislate upon all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, in the mode, subject to the conditions, and with the exceptions provided for in section 6th. That section is in the following words:

"*And be it further enacted*, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect: *Provided*, That nothing in this act shall be construed to give power to incorporate a bank, or any institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, either directly or indirectly. No charter granting any privilege of making, issuing, or putting into circulation any notes or bills in the likeness of bank notes, or any bonds, scrip, drafts, bills of exchange or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, script, or evidence of debt by said Territory, in any mode or manner whatever, except certificates for services to said Territory; and all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void; and all taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property but the assessments shall be according to the value thereof. To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title."

It will be perceived from this section, that there are certain subjects upon which the territorial legislature is expressly forbidden to act. The consequence of doing so, is declared in the act itself. "Any law or laws, inconsistent with the provisions of this act, shall be utterly null and void."

Again, all legislation must be in conformity with the rule which requires every act to embrace but one object, and that to be expressed in the title—otherwise it would be inconsistent with the law—and, therefore, according to the declared will of Congress, utterly null and void. Even if the Legislative Assembly should pass a law in relation to a subject over which they have jurisdiction, or should in their action, observe every direction prescribed by Congress, it is still subject to be disapproved of by Congress, in which event it would become null and void from the time it was disapproved of. But an act of the territorial Legislature, either in relation to a subject over which Congress has given it no power to legislate, or passed without an observance of the rules prescribed in the act, requires no disapproval of Congress to strike it with death. It can never, owing to its repugnance to the superior law, have any vitality. It is, if I may so speak, repealed beforehand. It is entitled to no more obedience nor respect, than is an act of the Legislative Assembly, rightfully passed, after it is disapproved of by Congress.

Chief Justice Marshall, in the 4th vol. of Com. Rep. of Sup. Co., of the United States remarks—"when repugnancy exists, the authority which is supreme must control, and not yield to that over which it is supreme. A law, absolutely repugnant to another, as entirely repeals that other, as if express terms of repeal were used."

In each case, the act becomes null and void, or of no effect. Void things, are no things. Null, means, of no binding force or validity. An act that is null and void, is, in its legal signification, precisely the same as if it had never been passed, and is of no more obligation than if all traces of it were expunged from the records of the body that passed it, than if it were a blank upon the statute book.

Does the act of the Legislative Assembly contravene the law of Congress, as contained in the section before quoted?

It is at all times a delicate task for the judiciary to call in question the validity of the acts of one of the co-ordinate powers of government. It is, however, their duty to declare what the law is, when the quest on fairly arises, from which, neither their ease, nor their regard for the true interests of the people, will permit them to shrink. If the question is doubtful, every presumption is to be indulged in favor of the virtue or validity of the act, but if it be made clearly to appear that the Legislature has transgressed its powers, or has failed to observe the requisites of a paramount law, no alternative is left to the court but to decide its acts to be void. Entertaining the most unfeigned respect for the body that passed this act, I am constrained to say, that in my judgment, the act was passed in violation of the law of Congress, and therefore has no force, and is entitled to no observance. Without noticing other objections, the act clearly embraces at least three different objects, viz: The seat of government, the penitentiary and the university. It is equally within the letter and within the mischief of the law of Congress, sought to be prevented.

The whole act is, therefore, a nullity.

It has been stated, however, that every act of the Legislature should be observed and obeyed, until it is set aside by the court. How an act that has no more force than so much blank paper, can require any observance, it is difficult to comprehend. But the court has no power to *set aside* any law. That is a Legislative function. It is the province of the court, simply to declare what the law is. If a question arises as to the validity of an act of the Legislature, the power to settle it is lodged in the judiciary; and if that body should hold it to be void any thing done under it would be void—not because the court sets aside, but because, according to the decision of the tribunal appointed to determine the question, it never had any binding force as a law. A void act is none the more void because the court has so judicially determined. The court does not make the law void; it only settles the question, and removes the uncertainty.

But let us see to what consequences this novel and extraordinary doctrine—that a void act deserves obedience until set aside by the court—will lead us. If it deserves respect and obedience, it is just as much a violation of duty to resist it through the channels of the courts, as it is to resist it in any other way. That is one mode, only, of opposing it—and all opposition to it, according to this theory, is wrong, until the courts have made an adjudication. In such a case, how will the court ever be called upon to decide the question? It never adjudicates upon the validity of a Legislative act, unless in some suit, or judicial proceeding, it is sought to be enforced on the one side, and resisted on the other. Obey the illegal statute, say the advocates of this doctrine, in effect, until the court adjudge it to be void, and yet the course recommended will forever prevent an adjudication from being made. If this principle be correct, the consequences will inevitably ensue, that unauthorized enactments will always have the effect of unquestionable laws, and the Legislature becomes omnipotent. What security exists, then, for the liberty of the citizen, when all power is consolidated in one body?

But if the court should arrogate to itself the right of sitting in review upon the proceedings of the Legislature, and should assume, without any question arising before it, to pronounce upon the legality or illegality of its proceedings, the evil of the doctrine would not be obviated. The property of the citizen might be stripped from him by an unconstitutional act, and scattered to the four quarters of the globe, before the time arrives for the court to assemble. His life even, before a term could be held, might be taken away, under the direction of an act, in palpable violation of the supreme law, and yet it is his duty, if this doctrine be correct, to yield up the sacrifice. Obedience to the law, until it is set aside by the court, is the dogma. Such a position, I apprehend, is utterly indefensible upon any sound view of law, or upon any principle of common sense. Where there is no right on the part of a Legislature to pass a law, there can exist no duty on the citizen's part to observe it—otherwise he is bound to respect usurpation.

The authorities to sustain these positions, if any are necessary in a case so palpable to the reason, are numerous, and most explicit. In the case of Charles Riv. Bridge, vs. War. Bridge—7 Pick. Rep.—484—Morton, judge, says:

"Legislation act by delegated authority, and only as the agents of the people. The constitution contains the grant of their power. If they exercise any, not contained in this instrument, it is usurpation. Any such acts are void for the want of authority to make or pass them."

Again, on page 488-9, he says:

"The supreme law of the land expressly and peremptorily interdicts the Legislatures of the several States, from passing any law, impairing the obligation of contracts. Any Legislative act, assuming the form of law, having this effect, is a nullity, and a blank upon the statute book."

And further, or in the same case he observes to respect to the act then under discussion:

"Upon its constitutionality, we are bound to decide. If it clearly contravenes any constitutional provision, our duty is plain; the act is a nullity."

In the case of Kimberly, vs. Ely, which arose in Mass.—Parker, ch'f just., he remarks:

"It has been urged that the proceedings are not void, but voidable, and, therefore, may become valid by the consent or ratification of the party whose interests are affected. But an act of the Legislature which it had no constitutional right or power to pass, is a nullity, and said proceedings under it are void."

In 3d McLean's Rep.—page 107, it is laid down that an unconstitutional law can afford a justification to no one. In the case of Rice, vs. Foster—4th Harrington Reports—page 503, judge Harrington, in speaking of an act of the Legislature obnoxious to the Constitution says: "The delegation of such power is unauthorized and invalid, and the execution of it is not a act of Legislation, but of usurpation, which the citizen is not obliged, and the other departments of government are not at liberty to obey." In the same case—page 506, the Chancellor of Maryland observes: "In like manner, the action of the Legislative powers when exercised in order to produce a valid law, must be in accordance with the mode of action prescribed in the constitution, otherwise the result cannot be pursuant to the agreement as contained in the social compact, and therefore, not obligatory on the citizen." In the case of Baily, vs. Railroad Co.—4th Harr.—page 414—Houston, judge, says: "No one will contend, I presume, that if the Legislature should pass an unconstitutional act, the people of the State would be bound to obey it. The case of Prigg, vs the Com. of Penn.—16th Peters' S. Court Rep., U. S.—page 539—bears with direct application on this matter. After an attentive examination of that case, I cannot conceive how any further room is left to doubt, as to the matter in question. The supremacy of the tribunal that decided it, joined to the exalted character of the judges, and the profound consideration given to the case by the Court, entitles its doctrines to instant and cordial acquiescence. The case was thus: Prigg, a citizen of Maryland, was indicted in a criminal court in Penn., for having forcibly taken, and carried away from that State, contrary to the statues of Penn., a negro slave, who had escaped from Maryland, and who, by the laws of Maryland, belonged to a citizen of Maryland—who had duly appointed Prigg agent, to recover the slave. The acts and doings of Prigg, were in plain open violation of the statutes of Penn; but he utterly disregarded them, on the ground that they conflicted with the Constitution of the United States. The State Courts gave judgment against Prigg, and he carried the matter to the Sup. Court of the U. S. for review. That august tribunal, after most thorough searching, and eloquent arguments of distinguished counsel, unanimously reversed the judgment of the State Courts, and thus in effect decided that Prigg's open disobedience and disregard of a plain statute of the Pennsylvanian Legislature was right and legal, because the statute was void. Chief Justice Taney, in that case, in speaking of the right of the master to arrest his fugitive slave, remarks: "He has a right peaceably, to take possession of him, and carry him away, without any certificate or warrant, from the judge of the district or circuit court of the United States; and whoever resists or obstructs him, is a wrong doer, and" (mark the words,) "every state law which proposes directly or indirectly, to authorize such resistance or obstruction is null and void, and affords no justification to the individual or officer of the State who acts under it."

Judge McLean, in the opinion given by him in the case, observes, "If the master may lawfully seize and remove the fugitive out of the State where he may be found without an exhibition of his claim, he may lawfully resist any force, physical or legal, which the State or citizens of the State may interpose. To hold that he must exhibit his claim in case of resistance, is to abandon the ground assumed.