

No. XV.

JOHN SMITH v. THE REPUBLIC.

Appeal from Liberty County.

JACK, JUSTICE.—The appellant, John Smith, was at the fall term of the District Court for Liberty County indicted and tried for the murder of James West. Upon the trial in the district court the defendant's counsel moved the court to instruct the jury "that the indictment was, as it was framed, an indictment for manslaughter only and not for murder," which instruction the court refused, and charged the jury "that it was an indictment for murder, and that upon the bill the defendant might be convicted of murder." To this opinion of the court the defendant by his counsel excepted.

The only question which we deem it necessary to determine in this case is, was this indictment for murder or manslaughter?

The second section of the act punishing crimes and misdemeanors provides "that every person of sound mind and discretion, who shall willfully and maliciously kill any person, shall be deemed guilty of murder," etc.

The indictment before us was framed under this statute, and containing the usual requisites, concludes with these words, "and so the jurors aforesaid upon their oath aforesaid do say, that the said John Smith, him the said James West in the manner and by the means aforesaid, feloniously, willfully and maliciously, did kill and murder."

It was well settled that an indictment under a statute must follow and conform to the statute in stating the offense.

The indictment before us we think is strictly in accordance with the provisions of the statute before alluded to. It is an indictment for murder, and the judge did not err in his charge to the jury. The judgment of the district court is therefore affirmed.

Affirmed.

No. XVI.

STOCKTON v. MONTGOMERY.

(See Note 40.)

Appeal from Colorado County.

HUTCHINSON, JUSTICE.—The main question, whether the Act of January 19, 1841, constituting the territory of Ward, conforms to the Constitution, is plainly, directly and formally presented for our determination. If we hold it to be a valid act, the territory of Ward will

interlocutory order of lower court refusing to proceed with the cause, and correct errors by mandamus. Kleiber v. McManus, 66 T., 48; Schultze v. McLeary, 73 T., 92; Grigsby v. Bowles, 79 T., 138; Fannin County v. High-

have passed through all the prescribed ordeals, and its future course as a civil division of the nation may not be disturbed on the question now to be adjudicated. If a majority of this court can not validate the act, or a majority shall decide that it is in conflict with the constitutive law, then we are to solve a secondary proposition, whether an act passed by the senate and house of representatives, carrying out a civil division of the Republic, is a political act that is final, conclusive, and not receivable by the judiciary.

1. I will consider if the act be constitutional. Dismissing all prelude about the importance of the subject and the consequences of its judicial solution, and desiring to bring into the investigation a mind directed honestly, anxiously and exclusively to the question, unawed by present or future extraneous considerations, I will speak frankly, respectfully and courteously of the legislative and executive branches of the government, but always in the spirit of the maxim, "Veritas nihil veretur, nisi abscondi."

Opening the Constitution and grouping the sections concerning counties and the representatives and functionaries of counties, we may more clearly discern how they harmonize, what they establish, what they forbid. "The house of representatives shall not consist of less than twenty-four nor more than forty members, until the population shall amount to one hundred thousand souls; after which time the whole number of representatives shall not be less than forty nor more than one hundred; provided, however, that each county shall be entitled to at least one representative." Const., art. 1, sec. 5.

"The clerks of the district courts shall be elected by the qualified voters for members of Congress in the county where the courts are established." Id., art. 4, sec. 6.

"There shall be in each county a county court, and such justices' courts as the Congress may from time to time establish." Id., sec. 10.

"The Republic shall be divided into convenient counties, but no new county shall be established, unless it be done on the petition of one hundred free male inhabitants of the territory sought to be laid off and established, and unless said territory shall contain nine hundred square miles." Id., sec. 11.

"There shall be appointed for each county a convenient number of justices of the peace, one sheriff, one coroner, and a sufficient number of constables," etc. Id., sec. 12.

"The Republic of Texas shall be divided into convenient judicial districts, not less than three nor more than eight; there shall be appointed for each district a judge, who shall reside in the same, and hold the courts at such times and places as Congress may by law direct." Id., sec. 2.

tower, 9 T. C. A., 293; Schintz v. Morris, 13 T. C. A., 530. After final judgment, interlocutory may be revised on appeal. Gross v. McClaran, 8 T., 341; Stewart v. Jones, 9 T., 469; Stewart v. State, 42 T., 242; Holek v. Varona, 63 T., 65; O'Neal v. Bank, 64 T., 644; Fort Worth Ry. v. Rosedale Ry., 68 T., 163. Act of November 1, 1871 (Gammel's Laws of Texas, vol. 7, p. 17),

"Until the first enumeration shall be made, as directed by this Constitution, the precinct of Austin shall be entitled to one representative, etc. Id., art. 7, sec. 6.

The framers of the Constitution must be understood to have employed words in their natural sense, and to have *intended what they said*; and to ascertain the powers granted or objects declared, the only rule is to consider the language of the charter granting or defining them. All will agree to this. It is the first process suggested to every intelligent and pure mind; it is a natural impulse; and it is a rule of judicial action declared in the great case, *Gibbons v. Ogden*, 9 Wheaton, 1, 5 Cond. Rep., 562. Another rule coeval with jurisprudence is that the written positive law shall be so construed as to be rendered operative; and that that and all the provisions on the same subject shall be considered together and made to harmonize, if reasonably and justly they may; and moreover, that the utmost reasonable, just and practicable effect and scope shall be given to each. This no one can controvert. Now all the sections quoted are exceedingly plain. It seems to me that no one can misunderstand them. There is no obscurity on which to ponder and doubt. There is no ambiguity to be explained; nor is there *now* any perceivable conflict. There was in the formation of the instrument an accidental incongruity, but it ceased with the adoption of the instrument, and it is now wholly unimportant; it is this: the minimum of representatives in the house according to the first clause is twenty-four, and by the last it is thirty-two. But as the last is couched in terms of limitation as well as the first, and is moreover more specific than the first, we should regard the last as declarative of the true minimum; and this, too, because it was favorable to a more numerous representation. If the Convention contemplated a period when Congress might reduce the number to twenty-four, it precluded that result by giving to the territory then embraced by the existing precincts thirty-two, until the enumeration should be made as directed by the Constitution—an enumeration nowhere indicated, unless by the first clause in order to the ascertainment of the 100,000 souls. The minimum of twenty-four, therefore, was superseded by that of thirty-two by the instrument itself.

In every other particular the sections quoted harmonized, and each can be rendered fully operative. The second section of the fourth article could be enforced until the population should become so immense, and the eight districts, as the highest number of judicial districts, so crowded with people and consequent litigation as to render the maximum of eight for such districts incompatible with the term *convenient*,

authorizing appeals from interlocutory judgments, held void. *Ward v. Ward*, 37 T., 389; *City of Paris v. Mason*, 37 T., 447; *Dial v. Collins*, 40 T., 367. Nor from an order overruling motion for new trial, nor until after final conviction. *Shannon v. State*, 7 T., 492; *Lawrence v. State*, 14 T., 432; *Burrell v. State*, 16 T., 147; *O'Connell v. State*, 18 T., 343; *Calvin v. State*, 23 T., 577; *Nathan v. State*, 28 T., 326; *Dooly v. State*, 33 T., 712; *Murray v. State*, 35 T., 472; *Fulcher v. State*, 38 T., 505 (overruling *Nelson v. State*, 32 T., 71; *Hoppe v. State*, 32 T., 388); *Mayfield v. State*, 40 T., 289; *Anschnicks v. State*, 43 T., 587; *Young v. State*, 1 T. App., 65; *Smith v. State*, 1 T. App., 408; *Butler v. State*, 1 T. App., 638; *Choate v. State*, 2 T. App., 302; *Butler*

and to require an amendment of the Constitution in order to the execution of the laws and the administration of justice. So the sixth section of that article is not only enforceable, but expressly explodes as impossible the assumption that there can be a county without a representative; for if the clerk of a district court is to be elected by the qualified voters of the member of Congress in the county where his court is established, it follows that his county must have a member in Congress, thus plainly showing what the Convention clearly expressed in the first section in review, that in all cases—as a continuous limitation and essential element in the structure of counties—"each county shall be entitled to at least one representative." The tenth section of the fourth article can operate harmoniously with the first section in giving a county court and justices' courts as the third and fourth elements of a regular county; and so of the twelfth section of the fourth article in giving other county officers as a fifth element—a sheriff, a coroner, justices and constables. Coming to the eleventh section of the fourth article, we find the sixth and seventh components of a county,—it must have at least 100 free male inhabitants, and must contain at least 900 square miles in area; these are the minima in relation to its population and territory. Now as in mathematical demonstration and physical science we say of a given space that is divisible, or of a body composed of parts, that any number of the fractions or components of the whole is not the entirety, so in constitutional law, it is an axiom that though six out of seven of the elements required to constitute an institution be given, if the seventh be denied, the institution is not created, but the attempt to form it a nullity. The act denies to the territory of Ward a separate representative, the first, the highest and the most important right of a county.

I have thus assumed as the natural sense and plain meaning of the fifth section of the first article, that each county at each period mentioned, at all times during the subsistence of the Constitution, must have at least one representative. Look again at that section. It is but one sentence. The idea it expresses is distinct and clearly the same to every intelligent reader at the first perusal. It fixes the minima and maxima of representatives during two epocha: the first, that *before* the population shall amount to 100,000, and the second, that *after* that event or attainment, and concludes with a limitation alike applicable to both; the number shall be so and so until that event, after which it shall be specified—"provided, however, that each county shall have a representative." No philologist could express the same idea or train of ideas in simpler or clearer phrase. If the limitation of the county right is to be

v. State, 2 T. App., 529; Robinson v. State, 3 T. App., 47; Lablaite v. State, 4 T. App., 169; Pennington v. State, 11 T. App., 281; Darnell v. State, 24 T. App., 6. In the following instances, judgments are not final and can not be appealed from: (a) Only for costs. Hanks v. Thompson, 5 T., 6; Warren v. Shuman, 5 T., 441; Scott v. Benton, 6 T., 322; Hancock v. Metz, 7 T., 177; Bradshaw v. Davis, 8 T., 344; Fitzgerald v. Fitzgerald, 21 T., 415; Martin v. Wade, 22 T., 224; Holt v. Wood, 23 T., 474; Green v. Banks, 24 T., 522; Neyland v. White, 25 T., 319; Patterson v. Hall, 30 T., 464; I. & G. N. Ry Co. v. Smith County, 58 T., 74; Eastham v. Sallis, 60 T., 576; American, etc., Co. v. City of Crockett (T. C. A.), U. R. C., 1899. (b) Overruling motion to

understood as applying to both epocha, as is the natural and obvious import of the words and the structure of the whole sentence, there is no need of any other word or words to be introduced by implication, for the meaning is perfect from the words used; and we have seen that according to one of the highest authorities we must adopt the natural sense of the provision. We have seen, too, that by taking the section to mean what it manifestly declares, it can operate effectually and in harmony with every other section and clause of the Constitution.

If we assume that the concluding limitative clause of the fifth section of the first article applies only to the second epocha, what follows? First, to do so, we depart from the rule of right reason declared in *Gibbons v. Ogden*. Secondly, we are constrained to add words to a sentence already perfect, and radically change its natural import; and that, too, to produce discord instead of harmony, for if the Convention intended the limitation to refer to the clause giving the second epoch, and to that alone, the concluding words would have been "provided that in the latter case," and not "provided, however, etc.," or some equivalent qualifying word or phrase. Thirdly, on that violent interpretation the sixth section of the fourth article would have been rendered inoperative during the first epoch; for until the population should amount to 100,000, as counties might be formed without representation, so district clerks for such counties would have to be elected by voters not entitled to elect a representative. Fourthly, as only eight judicial districts and a judge for each could be had, the judicial counties could be so multiplied as to render the official duties of the judges too oppressive to be performed, and thus under a mere coloring of the Constitution the Legislature could subvert the judiciary, when the grand object of the Constitution was to organize and perpetuate a government of three co-ordinate but independent branches. Thus the number of counties could have been extended to 104, or thirteen to each judge; and giving one week's court twice a year to each county, he would have been put in the stirrup six months each year to hold the district courts alone. But the counties could have been increased indefinitely until a national assembly should have been found sole occupants of the citadel, to make, expound and execute the law! The Convention did not open this door to encroachment. Fifthly, to show that it was intended that at all times each county should be separately represented, at the commencement no precinct was left unrepresented. Sixthly, there are four civil divisions of the Republic named, three of which are for judicial and other purposes: first, senatorial districts, one of which may consist of two or more counties, the district of a representative being only

quash writs of certiorari and attachment. *Messner v. Lewis*, 17 T., 519; *Hamman v. Lewis*, 34 T., 474; *Holek v. Varona*, 63 T., 65. (c) Quashing writ of sequestration. *Little v. Morris*, 10 T., 263. (d) Quashing indictment. *State v. Paschal*, 22 T., 584; *State v. Thornton*, 32 T., 104. (e) Order granting change of venue and order remanding case to court granting it. *Wygall v. Treasurer*, 33 T., 328; *Vance v. Hogue*, 35 T., 432. (f) Refusal to enter final judgment on verdict. *Lane v. Ellinger*, 32 T., 369. (g) Order of justice of peace dismissing suit for want of prosecution. *Morgan v. John-*

one county; then the judicial districts, to be composed of counties; then counties; and lastly company beats, or justices' precincts. So far as divisions are expressly required, none others for the same purposes can be established—for *expressio unius est exclusio alterius*. Those required must be organized and kept, each as nearly equal to one another as practicable, and all alike for the same purpose. Now look at the confusion of such a county as Ward. It is invested, we may assume, with a full machinery of judicial administration and internal economy and police, for so from the words of the act it would at first seem; but when its citizens assemble as electors of a representative to Congress, its own officers do not order and conduct the election, for here in one quarter of Colorado and in another Matagorda takes the power and sends her sheriff, judges and clerks of election; Ward being subjected to two extraneous powers and civil platoons of officers, and her people separated into squads, voting not for one but for two members of Congress from different counties. If such a judicial county were formed on the point of intersection of four regular counties, the confusion would be duplicated. Were these confusion and conflict of lines, powers and rights intended by the Constitution? That it was intended in fact by the Convention is perfectly incredible. But how are rights affected? Has James S. Montgomery the same privileges and benefits, arising from and protected by the Constitution and laws, that are enjoyed by any citizen of Colorado? Can he exercise and enjoy all of his constitutional and civil rights in the same degree—under equal circumstances? Plainly and certainly not. He approaches the ark of liberty—the ballot box—not in community with his compeers, with whom he actually is associated in the performance of all his other municipal and domestic relations, but in a corner and in conjunction with strangers and under a distant and separated surveillance. Not so the man of Colorado. The inequality is marked. Again, are his advantages in a county not separately represented by a member bound to utter and vindicate in the national hall the distinct interests and instructions of himself and compeers equal to those he might enjoy under such separate representation? Plainly and certainly not.

Then *all* his municipal and social rights are impaired. He is sued in Ward territory. He says he is a citizen resident in Colorado County, a civil division duly made and fully represented; but that his domicile has been unlawfully separated from it, and though he occupies the same locality, it is disfranchised. Is not this true? And what is the true name and nature of the right thus violated? It is evidently a municipal

son, 4 T., 117. (h) Order dismissing petition of intervention. *Stewart v. State*, 42 T., 242. (i) Order granting motion to remove cause to Federal Court. Appeal lies from refusal of motion. *Rosenfield v. Condict*, 44 T., 464; *Durham v. Southern L. I. Co.*, 46 T., 182; *Walker v. Howard*, 10 T. C. A., 611. (j) Judgment against sureties alone on bail bond, and refusal of judgment on. *Moore v. Schooner Anna Maria*, 11 T., 655; *Cox v. State*, 34 T. Cr., 94. (k) Order allowing continuance. *Dow v. Hotchkiss*, 2 T., 471; *Tinsley v. Trimble*, 35 T., 425; *Taylor v. Fore*, 42 T., 256. (l) Granting new trial. *Stewart v. Jones*, 9 T., 469; *Huston v. Starr*, 12 T., 424; *Goss v. McClaran*, 17 T., 107; *Dial v. Collins*, 40 T., 367; *Long v. Garnett*, 45 T., 400;

right. The statute required his creditor to sue him in his own county. That county is Colorado, not diminished in extent by the void act in review. Hence we perceive that Ward territory is not his true civil division, not his forum, not even a constitutional entity. It is admitted by all the learned counsel who have argued the question arising that though one hundred competent men residing within the proper area concur in the voluntary abandonment of the rights and immunities resulting from an integral and fully represented county in order to enjoy them in restricted degree and different circumstances, it can not affect another man residing in the same space; and that if the act thus obtained does so affect him, this alone determines its invalidity.

For these six reasons, with others that might be offered, I feel constrained to declare my utter inability to entertain for a moment the argument, that the concluding clause of the first provision in review qualifies only the case or epoch of the section. I can not hesitate as to the entire meaning of the section and its full scope, nor can I perceive how a doubt can be held about it. But in making this conscientious declaration, I feel the most unfeigned conviction that not only a doubt may arise in another's mind with equal conscientiousness, but a different conclusion attained. I forget not the established principle of construction of a constitutional provision, that upon a reasonable doubt whether the legislation under it accords, the latter is to be supported as being compatible with the former; a principle resting on the respectful confidence to be reposed in the probity and wisdom of a co-ordinate branch of the government acting under the same solemn sanctions. But when the conviction is clear, as is mine, the duty to condemn the unwarranted legislation is imperious. The obligation of allegiance is to support the constitutive law; and that obligation is rendered eminently imperative upon this court, the last and special depository of the charter of the nation's conventional will, and its peculiar guardian against all infraction.

2. I now come to the question whether the statute before us is such an exertion of the *political* power of the legislative as excludes the judicial scrutiny and authority of the government. The immediate etymon of *political* is *politics*, which is the art and science of government; the regulation of man in his relations to the State; the theory and practice of obtaining the ends of civil society as perfectly as possible. In common speech and sense we mean by the politics of a country the course of its government in its internal and external relations, more especially the external or international; so that in its comprehensive acceptation it embraces every subject of positive law. In this last sense the act

Morehead v. I. & G. N. Ry. Co., 46 T., 178; G. C. & S. F. Ry. Co. v. James, 73 T., 12; Hamilton v. Prescott, 73 T., 565; Schintz v. Morris, 13 T. C. A., 580; Hume v. Schintz, 16 T. C. A., 512; Lay v. Bellinger, 1 App. C., sec. 23. (m) Setting aside order discharging guardian. Lehman v. Gajusky, 75 Texas, 566. But may appeal from denial of motion to set aside appointment. Arthur v. Read, 26 T. C. A., 574. Adoption of the common law by the Act of January 20, 1840 (Gammel's Laws of Texas, vol. 2, p. 177), brought with it the writ of error. Bailey v. Haddy, Dal., 376; Moore v. Harris, 1 T., 36. With us it is not the institution of a new suit but only a mode of appeal. Creek v. Rogers, 1 T., 440; Smith v. Gerlach, 2 T., 424; Luckett v. Townsend, 3 T., 119; Lacey v. (479)

before us is a political act, as is every other act of the Legislature either with or without the concurrence of the executive, and every act of the executive in the view of what is the course of the government. But when we proceed to ascertain the essential nature of a legislative act and its concord with the Constitution, it is quite plain that this *cognovit* can afford no possible criterion—none conceivable! Names that represent things truly become their proper representatives and there is substance in them. Names that do not import the nature and essence of things exactly are ever delusive. They may be false simply when not producing vicious effects, fraudulently false when fraught with mischief, and in the worst degree, criminally false. In every way they are unfit for human use. "Call a spade a spade."

What is the Constitution? It is the basis on which the government rests—the authority for all law—and is the commission under which the Legislature, the executive, and the judiciary act. It is permanent and not influenced by the temper of the times. Whatever the collisions of opposite interests, the virulence of parties and the conspiracies of corruption, public robbery and treason, it continues like the Himalaya or the Andes, amidst and above the storm,—the nation's destiny dependent upon its subsistence. If a legislative act impugn its principles, the act must yield; and whenever it is brought before the court it must be declared void. Nay, the act is inherently nothing. 2 Dall., 304; 1 Cran., 175.

Its grand objects were to establish, organize and sustain a government of three co-ordinate, independent branches, each acting within a defined and fixed sphere; but the exertion of their respective powers, whether on one and the same or separate subjects, always to concentrate to the beneficial ends of national security and civil liberty; the first branch to legislate, the second to approve, and as chief magistrate to execute in general the acts of the first branch and conduct the government during its recesses; and the third in the last resort to expound and enforce the laws in every detail and particular of violated public and private right. And the Constitution, like the sun in the center of the solar system, was to hold all the planets within their orbits, sustain and vivify them, and shine equally on the inhabitants of each. This general principle may be found in *Fairfax v. Hunter*, Wheat., 304. In *Wilkinson v. Leland* it was asserted to an attentive world that no government could be scarcely deemed free when the rights of the people were left solely dependent on the will of the legislative body without any restraint. 2 Pet., 657. I am fully warranted, from these and other numerous expositions of a Constitution from which ours is mainly copied,

Ashe, 21 T., 394; *Rodgers v. Alexander*, 35 T., 116; *Hart v. Mills*, 38 T., 513; *Magee v. Chadoin*, 44 T., 488; *Harle v. Langdon*, 60 T., 555; *Moore v. Moore*, 67 T., 293; *T. T. Ry. Co. v. Jackson*, 85 T., 605; *G. H. & W. Ry. Co. v. Lacy*, 7 T. C. A., 63; *Hart v. State*, 13 T. App., 555.

Note 23.—*O'Connor v. Van Homme*, p. 429.

Plaintiff can not recover on quantum meruit when suit is upon a contract. *San Antonio v. Lewis*, 9 T., 69; *Gammage v. Alexander*, 14 T., 414; (480)

to declare that the judiciary is not only a co-ordinate branch of the government, but a check interposed to keep the other branches, not indeed within the limits of a sound and safe policy or of any policy at all, for that we shall see is exclusively intrusted to the other branches, but to constrain them to keep within the letter and spirit, the requisitions, the limitations, and landmarks of the immutable constitutive law; that the exertion of this great and paramount duty is essential to the existence and transmission of freedom; and that this court is the last resort in which the rights of the people are protected, the Constitution vindicated, and the government preserved. Among the powers granted to each house of Congress are the power to judge of the election, qualification and return of its members; to adopt its rule of proceeding; to punish internal disorders; to expel a member; and to imprison persons, not members, for disrespect. In the argument these have been called *political powers*; but it is plainly a misapplication of terms. They are *exclusively constitutional powers*. Neither the executive nor the judiciary can have any possible control over either house in its execution of any one of such powers, nor directly arrest, suspend, or supervise the action or decision, *so as to coerce a different result*. How far it might be competent for the judiciary in a case presented for the writ of liberty or in one inter partes, based on the alleged violation of the constitutional and absolute right of the citizen by such decision or action, to interpose, need not be mooted before it arises; but it may be assumed that the house whose decision or action should be impugned could never be impleaded. Such is the power given to the house of representatives to prefer impeachments; and in the trial of impeachments the senate is the court of original and final jurisdiction—at once the *primary and dernier resort*; and who would dream of calling these *political powers*, and who could suppose that the exercise of them could be controlled by a co-ordinate branch of the government by asserting, suspending or supervising the result?

Coming to the powers of Congress enumerated in the second article of the Constitution, they are the prominent powers of a legislative character intrusted to be subjected to the veto of the executive or his approval. They, too, may be called exclusive. Among them, the power to declare war and grant letters of marque may be considered an exclusive political power. In another sense all legislation may be regarded as political. It is in this, that if it do not conflict with the Constitution, its policy or expediency is intangible by the judiciary; for in that case, however wild or ruinous it may be, the courts are bound implicitly to observe and enforce it. When both houses of Congress act apart from

Devoe v. Stewart, 32 T., 712; Bellew v. Casey, 60 T., 573; Jones v. Brazile, 1 App. C., sec. 299; Stubbs v. City of Galveston, 3 App. C., sec. 143; Kocher v. Mayberry, 15 T. C. A., 342. If the contract is only partly performed, recovery may be had on quantum meruit. Gonzales College v. McHugh, 21 T., 256; Carroll v. Welch, 26 T., 147; Hollis v. Chapman, 36 T., 1; Weis v. Devlin, 67 T., 507; Childress v. Smith, 90 T., 610; Sulzbacher v. Wilkinson, 1 App. C., sec. 994. Contract void under statute of frauds is basis for quantum meruit. Capers v. Stewart, 3 App. C., sec. 291.

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the President, as an elective college, this is in the exertion of an exclusive constitutional power and there is nothing strictly political in the power or action. But, for example, should Congress, with or without the executive sanction, pass a revenue law taxing one section of the Republic by express provision upon a higher ratio than another; or should prescribe paper money as a tender; should require a soldiery to be quartered upon the citizens at the will of military commanders to consume their substance without remuneration, could not the judiciary interpose? I can not here do more than notice the powers of the legislative branch, and observe that by perusing the second article and glancing over the Constitution, it will be seen how very vast are those powers and how greatly they exceed those intrusted to the other branches; and when we remember that upon all matters of policy and expediency, that branch by a vote of two-thirds over the veto may be supreme, the judiciary being bound to observe and execute the legislative will, we are astounded at the contemplation, and find relief in the reflection that the people by a change of representation can remove abuses. And yet though the proportions of the powers are thus unequal, I decided at Gonzales, and continue to believe, that the scope of legislative power is still more extended. I may repeat a portion of my own opinion:

"This is a national government; and at the outset it is very important to ascertain to what degree it is limited, and to distinguish it from a federative government over independent states. To the extents, in the modes, and upon the subjects on which the Constitution speaks, it is imperious, supreme, and paramount. Thus the powers imparted to one branch are not to be exerted or usurped by another branch. The duties devolved on Congress must be performed; the restrictions upon legislation that are expressed can not be transcended, and any act, whether elective or legislative, done or passed by that body that is in conflict with any direction, prohibition or barrier interposed by that instrument, is either void or voidable according to its nature, or in the view of the necessary conservative principles that must be invoked in testing or applying it. The executive and judiciary must move alike within the orbits assigned them. Thus far it is not only safe but demonstrable, that the charter of liberty must be ever followed. But here the parallel between it and the Constitution of the United States ceases. That creates a government of conceded and limited powers; it vests in a national government not all, but only a portion of sovereignty or the general powers that pertain to government; whilst the residue of sovereignty is reserved equally to the States and the people, by whom the

Note 24.—Hall v. Allcorn, p. 433.

Retrospective laws prohibited by Constitution are such as give rights, or impair vested rights, by relation back. Sutherland v. De Leon, 1 T., 250; De Cordova v. Galveston, 4 T., 470; Paschal v. Perez, 7 T., 348; Hamilton v. Flinn, 21 T., 713; Sherwood v. Fleming, 25 T. Supp., 408; Bender v. Crawford, 33 T., 745; Moore v. Letchford, 35 T., 185; Chalk v. Darden, 47 T., 438; White v. Martin, 66 T., 340; Mellinger v. Houston, 68 T., 37; Maynard v. Freeman (T. C. A.), U. R. C., 1900; Calder v. Bull, 3 Dal., 386; Cummings v. Mo., 4 Wall., 277; Campbell v. Holt, 115 U. S., 630. Providing a remedy

Constitution itself was formed. But the government which our Constitution creates is, to all extents, in every degree, and for all purposes, a national and not federative government. The powers and rights not enumerated and declared are reserved to the people; and the only sensible, practicable and appreciable import of the reservation must be, that in regard to such powers and rights they are to be exerted by the people, *either in convention or through their senators and representatives in Congress*; and until their will, in reference to any matter or ground not occupied by the Constitution, shall be uttered in convention, it *can be expressed in legislation*. Let no one be alarmed at this proposition. If the fundamental law be overleaped, undermined, or even rudely approached, the Legislature will be held in check by the judiciary; or if hurtful or onerous measures or institutions be enacted, the people by a change of representatives can have them removed." I might have added, for certainty to every intent, that the reserved rights of the people can never be exerted in mobs, in Jacobin clubs, in local associations; and that nullification in Texas can only be revolt against the Constitution and government.

The conjunctive, exclusive powers vested in the President and senate to make treaties and to appoint ministers abroad and certain officers at home, you may call *political*, if you choose, on the maxim of the remarkable man, who asserted constantly with a solemn asseveration, "*there is policy in everything!*" Here, too, no one could pretend any controlling, restraining or revising power of the judiciary to arrest or suspend the action of the President and senate or to abrogate a treaty. But if a conflict between a treaty and a constitutional, vested, absolute right of a citizen should be properly brought before the proper court; or should the quo warranto be resorted to, to divest the franchise of an officer unconstitutionally obtruded on the country by the exertion of the appointive power, can it be supposed that the court could not or would not interfere, on the flimsy pretext that the President and senate had exerted a political power? It could and would interfere, not on a principle of paramount authority, but on the transcending principle that the judiciary is the guardian of the Constitution in the last resort.

It is not in any respect necessary to mention specially the powers of the executive that are constitutionally exclusive. In *Foster and Elam v. Nulson*, 2 Peters, 253, the controversy arose on the treaty of San Ildefonso, of October 1, 1800, by which Spain ceded Louisiana to France, and the treaty of Paris of April 30, 1803, ceding it to the United States. The United States, under these, claimed the country between the Iberville and Perdido. Spain repelled the claim. *Foster and Elam*

for existing rights, or changing remedy, is not a retrospective law prohibited. *De Cordova v. Galveston*, 4 T., 470; *Paschal v. Perez*, 7 T., 348; *Treasurer v. Wygall*, 46 T., 147; *Worsham v. Stevens*, 66 T., 89; *Parker v. Buckner*, 67 T., 20; *Odom v. Garner*, 86 T., 374; *Association v. Newman*, 86 T., 380; *Fristoe v. Blum*, 92 T., 76; *Standifer v. Wilson*, 93 T., 232; *Capps v. Garvey* (T. C. A.), U. R. C., 1897; *Maynard v. Freeman* (T. C. A.), U. R. C., 1900. Statutes are never construed to operate retrospectively unless their plain language requires it. *Taylor v. Duncan*, Dal., 514; *Linn v. Scott*, 3 T., 67;

claimed land in the disputed country under a grant from Spain between the dates of those treaties, relying on the sovereignty of Spain and her interpretation of the treaty of San Ildefonso; thus virtually calling on the court to settle a contested boundary between nations. Consequently, the court held that, "In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government."

"There being *no common tribunal to decide between them*, each determines for itself its own rights, and if they can not adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government to which the assertion of its interests as against foreign powers is confided; and its duty *commonly* is to decide upon individual rights, according to those principles which the political departments of the nation have established." It was further held, "that a treaty is in its nature a contract between two nations and not a legislative act. In other nations it is carried into operation by the sovereign; but in the United States it is made a law of the land. When its performance by either party is to be coerced, the political power of each State is invoked; but the courts compel obedience on the part of the citizens of the United States, as to a legislative act, after the political power has adopted it." All the principles recognized in this authority are sufficiently satisfactory.

It is not for the courts to settle boundaries between independent nations, nor to make treaties; but if the treaty be consummated and become the law of the land, it will be observed and enforced by the courts as another law. And why not? Do not the admiralty courts enforce the laws of nations as well as treaties, which are special international laws? Is, however, the treaty-making power the same as the legislative power of dividing the country into counties and districts, according to the limitations of the Constitution, for internal police and municipal administration? The latter is only an ordinary case of legislation, and like every other act of that sort, it must comport with the Constitution, else it is nothing. To the treaty-making power may be referred together the arguments alluding to the acquisition of Louisiana by the United States; the admission of Michigan into the North American Union; the extreme cases put by the learned counsel in argument from those political events; and all the instances from every treaty in ancient and modern times.

I intended a review of the important decisions of the Supreme Court of the United States cited in the argument; but this opinion is already

Martin v. State, 24 T., 61; Orr v. Rhine, 45 T., 345; Insurance Co. v. Ray, 50 T., 511; Grigsby v. Peak, 57 T., 142; Johnson v. Taylor, 60 T., 360; Melinger v. Houston, 68 T., 37; Rockwall County v. Kaufman County, 69 T., 172; McGregor v. Goldammer, 2 U. C., 49; Murray v. Gibson, 15 How., 421; Harvey v. Tyler, 2 Wall., 329; Chewheong v. United States, 112 U. S., 536; Shreveport v. Cole, 129 U. S., 36.

too much extended, nor is it in the least degree necessary. *Craig v. Missouri*, 4 Pet., 410; *Worcester v. Georgia*, 6 Pet., 515; *Rhode Island v. Massachusetts*, 12 Pet., 627; *Calder v. Bull*, 3 Dal., 386; *Marbury v. Madison*, 1 Cran., 137; *Providence Bank v. Billings*, 4 Pet., 514; *Martin v. Hunter*, 1 Wheat., 304; *Terrett v. Taylor*, 9 Cran., 43; *Briscoe v. Bank of Commonwealth of Kentucky*, and many other cases that might be consulted, will show with what tenacity and firmness the Supreme Court of the United States has illustrated, vindicated and enforced its own great and essential conservative power of testing the acts of the federative Congress and those of the several States by the principles, the limitations, and standards fixed by the national Constitution. In the last case, *Rhode Island v. Massachusetts*, it went perhaps further than in any of those that preceded to disregard the position assumed that it was called upon to exert political power in establishing a line between those States; for it was held that controversies between the States were referred by the national compact contained in the Constitution to its decision.

I will not refer specifically to the case in which, in a vague and improvident expression, a definition was essayed of judicial as contradistinguished from political power; nor to that, some fourteen years afterward, declaring that the court had during the interim been departing step by step from the definition, and that it might be regarded as overruled. Indeed, in conclusion, it appears manifest to me, that the act of our Congress creating the territory of Ward, passed by both houses and sanctioned by the former President, is simply a common legislative act; that its validity comes in question before us more directly than any other statutory provision invoked as a criterion of right or rule of decision; and that if under any name or pretext it can be shown that we have no authority to review it in reference to its conformity or conflict with the Constitution, it follows irresistibly that we have not any authority whatever to declare any conceivable act of the Legislature unconstitutional and void. Texas is not yet prepared for such an abandonment of a high trust reposed, though it be vested in the last, the feeblest, and the most dependent branch of the government. Nor will it be yielded whilst the shadow of the name of civil liberty can be discerned. If the effect of the decision of this case should be to repudiate, as unconstitutional, the county of Ward, I am prepared to say, from a principle of necessity, consonant with sound practical sense and distributive justice, however variant from an exquisite chain of sophistries that might be elaborated, that all the judicial and ministerial action, had in

Note 25.—*Austin v. White & Co.*, p. 434.

The Legislature may regulate the remedy, both as to pre-existing and subsequent rights, as to them may seem proper; and a statute changing or modifying it is not unconstitutional and does not impair obligation of contracts, unless it fails to provide an adequate remedy. *Austin v. Andrews*, Dal., 447; *Selkirk v. Betts*, Dal., 471; *Catlin v. Munger*, 1 T., 598; *Gautier v. Franklin*, 1 T., 732; *De Cordova v. Galveston*, 4 T., 470; *Paschal v. Perez*, 7 T., 348; *Grassmeyer v. Beeson*, 13 T., 524, 529; *Bender v. Crawford*, 33 T., 745, 752; *Moore v. Letchford*, 35 T., 185, 214; *Bentinck v. Franklin*, 38 T., 458; (485)

the territory under the seeming sanction of the Constitution and the forms of law, is precisely as valid de facto as if it could have received and had actually received full and separate representation in Congress.

On both grounds, in my opinion, the judgment below ought to be affirmed.

Affirmed.

No. XVII.

FORBES, BROOKS & CO. v. WILLIAM G. HILL.

(See Note 41.)

Appeal from Brazoria County.

MORRIS, JUSTICE.—An execution in favor of Forbes, Brooks & Co. for \$839.50 was levied on certain slaves of Hill, who obtained an injunction thereto, alleging that he had "pointed out property" to the sheriff to make levy on; but that the sheriff, with the advice of the plaintiffs in execution, or some one of them, and with the intention of harassing and oppressing the said Hill, failed to levy on the property so designated and proceeded to levy on his slaves.

The answer of Brooks, one of the defendants in the injunction and a partner in the firm of Forbes, Brooks & Co., denies that he gave any instructions to the sheriff, except to levy on property to which Hill had a title, and that he does not believe any other instructions were given by the other partners, one whom has never resided in the Republic, nor had any management of the partnership affairs; and that the other partner is now absent from the country. The sheriff denies all oppressive action or intention on his part in the levy of the execution, and for further answer denies that Hill ever designated or offered to designate any lands belonging to himself to be levied on. The cause came on to be tried at the March term of the District Court for the county of Brazoria, and was submitted to the court; the injunction perpetuated; but "liberty granted (to use the words of the court) to the plaintiff in execution to sue out another execution, having due regard to the grounds upon which this injunction is perpetuated." An appeal is taken to this court.

The fifth section of an act of the Fourth Congress, concerning executions, prescribes: "That all executions shall be made returnable to the next term of the court, and the defendant or his agent in all cases shall have the right to designate the property; and if the defendant shall fail or refuse to designate the same, then the levy shall be made on personal

Wood v. Welder, 42 T., 396; Treasurer v. Wygall, 46 T., 447; McLane v. Paschal, 62 T., 102; Ward v. Hubbard, 62 T., 559; Collins v. Warren, 63 T., 311; Parker v. Buckner, 67 T., 20; Boone v. Chambers, 82 T., 480; Odum v. Garner, 86 T., 374; B. and L. Assn. v. Newman, 86 T., 380; Standifer v. Willson, 93 T., 232; League v. State, 93 T., 553; State v. Williams, 10 T. C. A., 346; Insurance Co. v. Shearman, 17 T. C. A., 456; T. M. Ry. Co. v. Telegraph Co., 24 T. C. A., 198; Etter v. M. P. Ry. Co., 2 App. C., sec. 61; Moore v. State, 20 T. App., 280; Maynard v. Freeman (T. C. A.), U. R. C., 1900; Williams v. Bradley (T. C. A.), U. R. C., 1902. Where a statute gives a new remedy,