WEEKLY SENTINEL.

MONDAY, - - - - - - - - - FEB. 1.

The Eligibility Question.

The Constitution provides for the election of Governor only once in four years. In case of the resignation, death, or other disability of the Governor to perform the duties of the office, it also provides for a succession without the necessity of an election by the people. If the elected Governor is from any cause unable to discharge the duties of the position, the Constitution says the office shall devolve upon the Lieutenant-Governor, and in case of his disability it shall then devolve upon such officer of State, elected by the people, as the Legislature may elect. By law the Legislature has provided that in case of the disability of the Governor and Lieutenant-Governor to discharge the executive power of the State that it shall be vested in the Secretary of State. Even in the case of the incompetency of the Lieutenant Governor and the Secretary of State, from any cause, to discharge the duties of Governor, if the executive power of the State should happen to devolve upon either, the Constitution provides that the Legislature shall then declare what officer shall act as Governor; and such officer shall act accordingly, until the disability be removed, or a Governor be elected.

The Constitution does not provide for the election of Governor but once in four years, and at the same time it declares that "the executive power of the State shall be vested in a Governor." It provides, however, for a successor or incumbent, in case of the disability of the person elected by the people without the necessity of an election, or an expression of the popular will. The framers of the Constitution provided for every contingency that they anticipated might occur in the discharge of the executive power of the State without the necessity of an election by the people except once in four years. There is no provision made for the election of a Governor by the people if the duties of the office should devolve upon the Lieutenant Governor, and none even if both the elected Governor and Lieutenant Governor should become disabled to discharge the executive power of the State. Is it not clear then, as any proposition can be, that whoever the Constitution designates shall be vested with the executive power of the State, if the Governor elected by the people should be disqualified, or the Legislature should select for that position under the provisions of the organic law of the State, is just as much Governor as though he was elected by the people as such? It seems to us that there cannot be the shadow of a doubt as to the correctness of this proposition. If this conclusion be admitted, and it cannot be successfully denied, then it follows that OLIVER P. MORTON has been vested with the executive power of the State since the 17th day of January, 1861. The Constitution says the Governor "shall hold his office during four years, and *shall not* be eligible more than four years in any period of eight years." We make no personal war upon Governor MORTON. It makes to the Democracy but little difference who the Republican candidate for Governor may be. But if the people of the State propose to adhere to the Constitution and respect its provisions as the organic law of the State, there can be no doubt but Governor MORTON is ineligible for an election to the office of Governor, which he now holds and has held since the 17th day of January, 1861, at the ensuing October election.

For the State Sentinel.

Morton's Eligibility.

The Constitution provides that the Governor "shall hold his office during four years, and shall not be eligible more than four years in any period of eight years." It also provides that "in case of the removal of the Governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the Lieutenant Governor."

At the last election Lane was elected Governor and Morton Lieutenant Governor. Suppose that Lane was serving out his full term of office as Governor, and Morton his full term as Lieutenant Governor, Lane would not of course be eligible to election as Governor at the next election, but he would be eligible to election as Lieutenant Governor; and suppose that at the next election they would be so elected—Morton Governor and Lane Lieutenant Governor; and suppose that after such election Morton should resign; upon whom would devolve the duties of the office of Governor? Of course upon Lane, the Lieutenant Governor—the person designated by the Constitution to discharge the duties of the office in such a case. So that it seems plain that though Lane, in consequence of having been elected Governor at the last election, would not be eligible to re election at the next election, yet that he might, after having served during the last four years by virtue of his election, be yet the proper person to discharge the duties of the office during the next succeeding four years, by virtue of the constitutional provision devolving the duties upon him in case of the resignation of the Governor.

A person, though not eligible to hold the office of Governor by virtue of election for more than four years out of any period of eight years, may yet be the proper person to discharge the duties of the office for more than four years out of any period of eight years. J. T. M.

The foregoing was written by a prominent Republican and we give it by request, as making a strong case in favor of the eligibility of MORTON to hold the office of Governor eight consecutive years or two consecutive terms. The contingency which our correspondent states has not occurred, or is it likely to occur, hence its discussion has no practical value. There is no doubt that a person who has held the office of Governor for four years, is not eligible to election as Lieutenant Governor for a succeeding term by reason of constitutional disability. The Constitution provides that the Governor "shall not be eligible more than four years in any period of eight years," hence a person who has held the office of Governor for four years would be disabled from discharging the duties which the organic law of the State devolves upon the Lieutenant Governor, and that would disqualify him for the position.

If an election should occur, as stated by our correspondent, and the officer so elected should be inaugurated, the Constitution provides the remedy in case of the resignation or other disability of the Governor. Art. 5, Sec. 10 contains the following provision: "The General Assembly shall, by law, provide for the case of removal from office, death, resignation or inability both of the Governor and Lieutenant Governor, declaring what officer shall then act accordingly, until the disability be removed, or a Governor can be elected."

The construction that J. T. M places upon the Constitution is untenable. If a person, after having held the office of Governor for four years, should be elected Lieutenant Governor for the succeeding term, and then, by the resignation of the Governor elected to discharge the executive power of the State should assume its duties, he could by the same process hold the office for several terms, and thus defeat the plain intent of the Constitution, which is, that the Governor "shall not be eligible more than four years in any period of eight years." And this prohibition of the Constitution is evidently intended to apply to those who hold the office, whether it has devolved upon them by election or succession.

A WINDFALL FOR TRINITY SCHOOL.—It is stated that Trinity School, a well known Protestant Episcopal Educational Institution in New York, has, through the fortunate termination of a lawsuit, come into the possession of property, real estate and funded, to the value of $3,000,000. The suit has been a long contested one, extending through a period of some thirty years.

The Fugitive Slave Law.

We have been furnished, by a member of the school, with the following lecture, delivered by Judge PERKINS, to the law class of our University, in the spring of 1860, before the election of Mr. LINCOLN and the commencement of the war, with a request that we publish it. As it is public property we suppose we have a right to comply with the request; and, as it was delivered before the war broke out, it may be supposed to present the question, as it then stood, between the North and the South, on this point, with reasonable accuracy:

LECTURE BY JUDGE PERKINS TO THE LAW CLASS OF THE NORTHWESTERN CHRISTIAN UNIVERSITY, ON THE FUGITIVE SLAVE LAW, MARCH 1860.

It is my settled practice to avoid introducing into my lectures, as far as possible, topics having a political bearing. This should be the course pursued by all our public educators, as well as by our public religious teachers. The truth of this proposition is easily demonstrated—it may be said to be almost, if not quite self evident. Hence, I have abstained, thus far in our course, from remarking upon the fugitive slave law; but in so doing I am satisfied, upon reflection, that I have failed to discharge my duty to you; for the question arising upon that law is a *constitutional*, not a political question. I have acted upon an erroneous assumption of fact.

A question asked by one of you, a day or two ago, led me to undeceive myself on this point. The question was, whether the fugitive slave law had ever been decided to be constitutional. It would have been a lasting reproach to me to have permitted you to graduate at this law school, ignorant of the correct answer to that inquiry. And I avail myself of this, the last meeting of the class before your commencement examination, to set you right on this disturbing and much mystified subject; yet one, the right understanding of which is of vital necessity to the proper discharge of your duties as citizens of this great republic.

Mr. Gardner, in his Institutes, observes that "it is a little remarkable that the African republic of Liberia has introduced into its Constitution the same principle which belongs to the Constitution of the United States, only in reverse form. Our Constitution rests on the doctrine that it was made by free white ... for themselves and their posterity, and that the Caucasian race of Americans are the governing power. That of the African republic vests Liberian citizenship in the African race exclusively, and disqualifies any but Liberian African republicans from holding real estate in the African commonwealth. The wisdom of each Constitution is apparent." Gard. Inst., p. 478.

That you may not be misled by this extract from Mr. Gardner, it is proper for me to observe that our Federal Constitution does not contain an express provision excluding negroes from citizenship. The proposition asserted by Mr. Gardner mainly rests upon two facts, viz: that the only clauses in the Constitution which point directly to the African race treat it as composed of persons who may be enslaved, and the historical deduction that the Constitution was formed by, and to create a government belonging to, the white race; that the negroes, not being regarded as citizens when it was formed, were intended never to be made such. The privileges and immunities of citizenship were not, at its formation, and were intended never to be conferred on them. The exclusion of the negro, therefore, from equality of rights and the promiscuous holding of offices with the whites, in our Government, depends upon the people keeping the Government in the hands of men who will adhere to its intent and spirit, historically deduced, rather than upon any expression contained in the Constitution.

But notwithstanding our Government is based upon the just principle of the separation of incongruous races, and was formed to be participated in by the white race exclusively; still, before, and at its formation, there were, in the territory over which its jurisdiction was to extend, a large number of individuals of the black or African race, most of whom were owned as property and held as slaves by the whites.

This slave population had, mostly sectional location. It was mainly found in the Southern Colonies. African slavery may properly be called their peculiar institution.

But it was an institution, however, repugnant to the moral sense of the North it might be, which they had a political right as against all other governments, to maintain and perpetuate, on becoming sovereign States, as they did upon the acknowledgement of their and our independence by Great Britain, whose colonies all had been. This is an established doctrine of international law. Even the trade in Africans, as slaves, is recognized as legal by that law. Says Chancellor Kent (Comm. vol. 1. p. 199,); "It [the African slave trade] is, therefore, not a criminal traffic by the law of nations; and every nation, independent of treaty, retained a legal right to carry it on. No one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other States; or to procure eminent good by means that were unlawful; or to press forward to a great principle, by breaking through other great principles that stood in the way." So, Chief Justice Marshall, in the case of the Antelope. 10 Wheat. 66.

After the colonies had, by a voluntary concert of action during the Revolutionary war, achieved their several independence, they became severally independent, sovereign nations, each with its own peculiar institutions, and might have so remained independent nations to this day, had it been their choice to do so. See the Federalist, 2 Ed., p. 6. But wise men among them proposed that these nations should form a Union on such terms as they should be able to agree upon for their common defense and their general welfare; and a meeting, a convention was held for the purpose; and then came up the question, what shall be the terms of our Union compact? We have severally, they said, different institutions now, and we are sovereign States, and have severally the power to protect our peculiar institutions which we wish to maintain; what security shall we have that they will not be destroyed or interfered with, if we relinquish a part of our sovereign power by entering into the proposed Union? The States having a large slave population asked this question. The answer was given in the provisions of the Constitution that was framed. It was agreed unanimously by all the States, that if the Union should be formed, each State should be secured in its undisturbed possession and enjoyment of its peculiar institutions by articles inserted into the compact of Union, and it was done.

One of the articles inserted in the compact for the protection of the slave holding States, being the last clause of the second section of the fourth article was this:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

To satisfy you that I am not mistaken as to the object of this section, I quote from the opinions of Judges Story and McLean in the great case of Prigg vs. Pennsylvania, 16 Peter, Supreme Court, Rep 539; a case that ought to be published in pamphlet, and placed in the hands of every citizen of the United States. Judge McLean said: "At an early period of our history, slavery existed in all the colonies; and fugitives from labor were claimed and delivered up under a spirit of comity or conventional law among the colonies. The articles of confederation contained no provision on the subject, and there can be no doubt that the provision introduced into the Constitution was the result of experience and manifest necessity. A matter so delicate, important, and exciting was very properly introduced into the organic law."

He says the provision "was designed to protect the rights of the master."

"Under the Confederation, the master had no legal means of enforcing his rights in a State opposed to slavery. A disregard of rights thus asserted was deeply felt in the South. It produced great excitement, and would have led to results destructive to the Union. To avoid this, the constitutional guarantee was essential."

Thus far from Judge McLean.

Judge Story said: "Historically, it is well known, that the object of this clause was to secure to the citizens of the slave holding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union would not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves."

Here, then, we find the real substantial fugitive slave law. It is a provision of the Constitution of the Confederacy in which we live. I repeat, the real fugitive slave law is a provision of the Constitution of our Government. It is a permanent, perpetual law, one as enduring as that Constitution, perhaps as this glorious Union of whose organic laws it forms a part. And it is an efficient fugitive slave law. It is capable of being executed without the aid of any legislation. This has been solemnly decided. We quote again from the opinion of the Court, in the case above cited, as delivered by Judge Story, one of the purest men and most learned and able Judges that ever graced the Bench—a New Englander, Massachusetts man. He proceeds:

"We have said that the clause [in the Constitution] contains a positive and unqualified recognition of the rights of the owner in the slave, unaffected by any State law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed, and cannot be fairly implied. Especially are we stopped from so doing, when the clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also.

"The owner must, therefore have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recapture is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the common law applicable to this very subject. Mr Justice Blackstone (3 Bl. Com. 4) lays it down as unquestionable doctrine. Recapture or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattles personal, or wrongfully detains one's wife, child or servant, in which case the owner of the goods, and the husband, parent or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. Upon this ground we have not the slightest hesitation in holding that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent, this clause of the Constitution may properly be said to execute itself, and to require no aid from Legislation, State or National."

The return of fugitive slaves being thus accomplished in virtue of the Constitution, it follows that he who obstructs such return violates the Constitution and impugns the wisdom and patriotism of its framers. It is but right that I should here state to you that the point decided in the above quotation, from the opinion of Judge Story, was not necessarily involved in the case then before the court; but still the decision has the force of law. It is the usual practice with most appellate courts to decide points presented in a cause, though not necessarily involved, in order that the people, by an early knowledge of the law, may be relieved of further difficulty on account of its uncertainty. The Constitution of Indiana expressly requires this course to be pursued by the Supreme Court of this State. Chief Justice Marshall carried the usage to an extreme length in Marbury vs. Madison 1st, Cranch 137, and in other cases; Judge Story, as we have seen above, adopted the same course and the customary line of practice was followed by Chief Justice Taney in the Dred Scott case.

That I am right in saying that the proposition laid down by Judge Story, which I have incorporated into this lecture, is settled law, I refer you to Norris vs. Newton, 5, McLean Rep p 92. Judge McLean there uses this language: "By the decision in the case of Prigg vs Pennsylvania, the master has a right to seize his slave in any State where he may be found, if he can do so without a breach of the peace; and, without any exhibition of claim or authority, take him back to the State from whence he absconded." And he says that by that decision he (Judge McLean) is "fully bound."

If such is the right of the master under the Constitution, you may well ask, what need of any statutory fugitive slave law? If a man's property strays away from him, he does not ordinarily need a special law to enable him, on finding it, to take it back; nor does he if it is stolen from him. Then why does the master need such a law to enable him to reclaim his slave, who may have run away or been stolen from him? It is because the people in the States into which slaves may escape, or be carried by those who may entice them away, will not let them be taken back in obedience to the Constitution of the country; but will, by violence and riotous proceedings, endeavor to prevent their return. A statute law is demanded, therefore, prescribing and regulating the mode and manner in which, and designating the officers by which, the constitutional provision shall be executed. Such a law is likewise demanded as a security to free negroes against being kidnapped into slavery.

The propriety and constitutionality of such a law, no jurist or man of intelligence, who respected the constitution of his country and was willing to conform to it, ever doubted. The only point of difficulty has been, among those whose opinions are entitled to respect, whether the fugitive slave law should be enacted by the State governments severally, or by the Government of the United States. But it is now settled beyond further controversy, that it is the right and duty of the Federal Government to provide the ways and means for the enforcement of this provision of the federal compact, and the securing of the rights of the people of the States under it; and that the fugitive slave law last enacted by Congress, and now in force, is constitutional in every particular. See Prigg v. Pennsylvania, *supra*; Miller v. McQuesney, 5 McLean's Rep., 469; Norris v. Cracker, 13 Howard's Rep., 429; Ableman v. Booth, 21, Id. 506; Weisner v. Sloan, 6 McLean, 259. It should be observed that States may, also, under their laws, punish the harboring of slaves. Moore v. Illinois, 19 Howard 13. It will naturally occur to your mind at this point, that it would be a most injudicious act to repeal the fugitive slave law, as its repeal would at once remit the slaveholders back to their individual rights of executing the constitutional provisions, attended, as it would be, by riots, and expose every citizen who interfered and prevented the taking back of their slaves by them, to a suit and judgment for the value of those rescued.

In conclusion, I am pained to be compelled to add that the clause in the Constitution, which we have been considering, has, of late years, been habitually violated; disregarded by the Northern States and people. A portion of our citizens have habitually libelled and villified the institutions and public men of the Southern States, thereby, by their meddlesome interference, irritating their feelings, and disturbing their quiet. They have sent among them incendiary documents, inciting sedition. They have stolen from them their slaves, and have prevented or obstructed the return of such as escaped; they have not sent back Onesimus; and, finally they have, under John Brown, invaded their territory, and sought to overturn their institutions by civil and servile war. Had any treaty between this and any foreign government been half so wantonly and frequently broken as has been our constitutional compact with the South, the civilized world would pronounce that government that did not vindicate her honor by war, no other means of redress being left her, on account of such breach of faith, as too pusillanimous to be treated otherwise than with contempt. But the peaceful remedies afforded by our constitution render a resort to war unnecessary and unjustifiable, though they do not forbid complaint. Yet, if the South, under these continual taunts and constitutional wrongs, dares to hint that she may be compelled to attempt to withdraw from the Union (which the North has violated,) to preserve her institutions and self respect, she is denounced as disloyal; but, let me ask, if a wife should leave the house of her husband, and sue for and obtain a divorce on account of his ill treatment, who would in law be held responsible for the dissolution of the matrimonial union?

I do not wish, in this lecture, to overlook the fact, and I ought not to omit a notice of it, that African slavery is repugnant to the feelings of the people of the North; but this fact will not excuse them in refusing to fulfill constitutional obligations. On this point, I prefer, in place of anything I could originate, to quote to you the language of Judge McLean, in the case of Jones v. Vanzandt, 2 McLean's Reports, commencing on page 615. He says:

"I was not prepared to hear, in a Court of Justice, the broad ground assumed, as was assumed in this case before the jury, that a man, in the exercise of what he conceives to be a conscientious duty, may violate the laws of the land. That no human laws can justly restrain the acts of men, who are impelled by a sense of duty to God and their fellow creature. We are not here to deal with abstractions. We cannot theorize upon the principles of our Government, or of slavery. The law is our only guide.

If convictions, honest convictions they may be, of what is right or wrong, are to be substituted as a rule of action in disregard of the law, we shall soon be without law and without protection. The pretext for violating the rights of those who may become obnoxious to censure, can easily be assumed and maintained. And the same plea of the rights of conscience, and the high motive of duty, will be asserted, however absurd, every where, in justification of wrongs. What one man, or association of men, may assume as the basis of action, may be assumed by all others. And in this way society may resolve into original elements, and then the governing principle must be force. Every approximation to this state is at war with the social compact. If the law be wrong in principle, or oppressive in its exactions, it should be changed in a constitutional mode. If the organization of our Government be essentially wrong, in any of its great principles, change it. Change it in the mode provided. But the law, until changed or abrogated, should be respected and obeyed. Any departure from this inflicts a deep wound on society, and is extremely demoralizing in its effects. No good man, exercise of his sober judgment, can either feel or act in violation of this rule."

It is idle, it is sheer hypocrisy in us to pretend to be friends of the Union, while we habitually violate the compact of Union; and it would be far more manly in us to avow, at once, that it was a compact which we would not fulfill, and that the South might act accordingly. If we are, in heart, the real friends of the Union, we must evince the fact by living up to the letter and spirit of it; by strictly maintaining to each section its guaranteed rights; by faithfully fulfilling, in short, all the requirements of the Constitution which, upon admission to the bar, you will be, as I have been, solemnly sworn to support.

The War Power of the President of the United States—An Important Decision by the Supreme Court of Indiana.

Griffin v. Wilcox. } Appeal from the Marion C. P.

PERKINS, J.—The following general order was issued:

"HEADQUARTERS DISTRICT OF INDIANA AND MICHIGAN, INDIANAPOLIS, June 8, 1863.

Capt. Wilcox, Provost Marshal, Indianapolis:

CAPTAIN: You will at once issue an order prohibiting the sale of liquor, by any party, to enlisted men. This order must be rigidly enforced. Any one violating it will be severely punished. I have noticed, with surprise, many intoxicated soldiers in our streets. This evil should and must be stopped.

Very respectfully,
Your ob't servant,
G. COLLINS LYON,
Major, and Chief Provost Marshal,
District of Indiana and Michigan."

Capt. Wilcox thereupon issued the following notice:

"OFFICE OF PROVOST MARSHAL, INDIANAPOLIS, June 8, 1863

All persons engaged in the traffic and sale of spirituous and intoxicating liquors within this city are notified that they are strictly prohibited, from and after this date, from selling the same to any enlisted soldier. A violation of this order, by any person whomsoever, will be visited with severe punishment.

By order of
FRANK WILCOX,
Captain, and Provost Marshal."

Joseph Griffin was arrested and imprisoned by Capt. Wilcox for an alleged violation of the foregoing military order and notice. After his release he commenced this suit in the Marion Common Pleas, against the Captain for false imprisonment. Griffin was licensed to retail to everybody except minors, intoxicated persons, &c., both by the State and Federal government. Capt. Wilcox answered the complaint of Griffin by justifying his arrest and imprisonment under the order and notice above set out; and the court held the justification sufficient, and a bar to Griffin's suit for damages. Griffin appealed to this court.

Legal authority is a justification to a person in making an arrest. Authority appearing on its face to be illegal, is not a justification, and will be no protection for making an arrest.

This case, it may be remarked, does not involve the question of the right, in any person, or body of men, to suspend the writ of *habeas corpus*. Griffin did not apply for that writ in order to effect his discharge from imprisonment. He submitted to that, and then sued for damages for the imprisonment. And, it may be here observed, that the suspension of the writ of *habeas corpus* does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution.

The real question, lying at the bottom of this case, involves the *war power* of the President of the United States, that is, his power to act upon martial law without its having been first declared by the sovereign power of the state—an authority claimed by some to be a "mysterious power, undefined by law, unknown to the subject; which we must not approach without awe, nor speak of without reverence; which no man may question, and to which all men must submit;" but a power which we think exists only within limits capable of being defined with reasonable certainty. The question is one that we would gladly have avoided deciding; but from which, when legally brought before us, we have no right to shrink. It is one, too, the importance of which demands for it a careful examination before it is decided. And it may be further observed, in passing, that when martial law supersedes the civil, or is exercised concurrently with it, the civil being permitted by mere military sufferance, or as a matter of convenience, where it does not interfere with, or is subservient to the war power, the military assume the government of the citizens to just the extent they please. The assuming to prohibit the sale of liquor to soldiers in Indianapolis was upon this theory. So were the military orders prohibiting the sale of arms and ammunition to citizens in contravention of their constitutional right to procure and keep them. So were the arbitrary arrests for pretended disloyal opinions, in violation of the constitutional right of freedom of thought and opinion. These, and other acts in disregard of constitutional and legal rights all rest upon the same principle. If the military could legally arrest and punish Griffin for selling a glass of liquor to a soldier, they could legally arrest and punish him for expressing what they might assume to style a disloyal opinion. If they could not legally punish him for the one, they could not for the other. Could they do either? is the question.

This question we propose fully and fairly to examine, simply for the purpose of ascertaining the law. If we can come to the conclusion that the military possess this power, we will promptly concede it to them. We would not rob them of an iota that they possess, and they will not seek an iota that is not theirs. Knowing, as we do, personally, Capt. Wilcox, we feel warranted in saying that he has no wish, in the premises, but to legally discharge his duty.

Griffin was not arrested and imprisoned under the civil law of this State, nor of the United States, for he had violated no such law. There is no act of Congress, nor of the State Legislature, prohibiting the sale of liquor to an enlisted soldier. The only law in this State, containing such prohibition, when Griffin made his sale to a soldier, was that enacted by the military order of Major Lyon. Griffin was arrested, then, by military authority. Could he be legally arrested, for the cause alleged for his arrest, by that authority, in the place, and at the time it was so made?

Griffin was not connected with the military or public service, was not a spy from the enemy, and was not within military lines. He was a citizen of the State, pursuing, lawfully, his lawful avocation, in the civil walks of life. Had he been a soldier, in the service, he would have been subject to the well defined code of military law, which requires obedience by soldiers to the orders of their officers and subjects them to punishment, by such officers, in prescribed modes, for disobedience to these orders. In this case, had Major Lyon addressed his order to the soldiers subject to his command, forbidding them to drink intoxicating liquor, or to leave the lines to go where it could be obtained, and the soldiers, subject to his jurisdiction, had disobeyed his order, he might, perhaps, though the point is not now before us for decision, have caused them to be punished by military law. Military men, in the service, are subject to the code of military law, enacted for their government, and to be enforced, in prescribed modes, by military officers. So, legislative bodies administer the *lex parliamentaria*, the law governing legislatures. It is a special law for such bodies. But, as a general proposition, *the citizen*, in the civil walks of life, is not subject to military orders, nor to the *lex parliamentaria*, nor to punishment by military or parliamentary law. He is governed by the law of the land, administered in the courts of justice. He may, sometimes, be subject to *martial law*, executed by military officers, as the agents of the king, president, or governor, as the case may be. When the citizen is governed by the military power, he is not governed by the soldier's code of military law, but he is said to be governed by *martial law*; and this law is perfectly distinct and entirely different from military law to which soldiers are subject. When the military commander, as the agent of the king, president, or governor, governs the citizens, he does not rule them by the code of military law, enacted for the soldiers, as has been said, and for disobedience to which they are punished, but he governs the citizens by arbitrary will. See the "Articles of War" for the government of soldiers, enacted by Congress, in Brightly's Dig. p. 73. We may further illustrate the distinction between governing and punishing those subject to the military code by military tribunals, and governing the citizen by martial law, which is, in fact, no law, but arbitrary will, by extracting a couple of sections from the act of Congress of March 3, 1863. Section 30, of that act, reads thus:

"That in times of war, insurrection, or rebellion; murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting, or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit a rape and larceny, shall be punishable by the sentence of a general court-martial or military commission, *when committed by persons who are in the military service of the United States, and subject to the Articles of War;* and the punishments for which offenses shall never be less than those inflicted by the laws of the State, Territory or District in which they may have been committed."

Section 38, of the same act, is as follows:

"That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial, or military commission, and shall, upon conviction, suffer death."

Such is *military law*. What is called martial law, we again repeat, is applied to the citizen, by subjecting him to the government of the military, in certain exigencies. "Martial law is the law of war, that depends on the just but arbitrary power and pleasure of the king, for, though he doth not make any laws but by the common consent in parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power; so that his word is law. However opposed to other authorities, this expresses what is distinctly meant, both in England and in this country, by martial law." New Am. Cyclop., tit. Martial Law. The question now arises, when and where can the citizen be subjected to martial law? He cannot, certainly, without an act of Congress, be subjected to that law except upon *necessity*—occasioned by force, actually existing or immediately threatened, at the time and place where martial law is exercised. Whether, by act of Congress, martial law could be declared throughout the United States, we need not inquire. See De Hart, Mil. L., p. 17.

Martial law is the law of force, and is employed under two general conditions:

1. In a part, or the whole, of a foreign country, when, being at war with such country, our army may invade it, and expel the governing power from a part or the whole of it.

2. When force may expel the civil authority from a part or the whole of our own territory; or, perhaps, it may be said, martial law is exercised in our country, the military being on the spot to execute it, where no civil authority exists. But where the civil authority exists, the Constitution is imperative that it shall be paramount to the military. The right to govern by martial law does not grow out of the mere fact that we have an army; for we have that at all times, in peace as well as in war. The right to govern Indianapolis by martial law does not arise upon the mere fact that soldiers are stationed in the city, or are often marched through it; for soldiers are stationed at different points, and marched from place to place in the country at all times, in peace as well as in war. Yet, in ordinary times, surely the officers commanding them do not claim to govern the citizens, not connected with the army, by martial law.

The right, in the military officer, to govern by martial law, as we have said, arises upon the fact of existing, or immediately impending force, at a given place, and time, against legal authority, which the civil authority is incompetent to overcome; and it is exercised precisely upon the principle on which self-defense justifies the use of force by individuals. Robbers and burglars, and, in some cases, rioters may be resisted and even slain, in self-defense, by private individuals. That is, there are cases where force must be resisted by force, instead of waiting for the civil authorities. This is the doctrine of Rutherforth, in his Institutes of Natural Law. See Book 1, chap. 19; Book 2, chap. 9. This is the doctrine expressed by the maxim, "*inter arma silent leges.*" This maxim was first applied under such circumstances. It was first laid down by Cicero, so far as we have been able to ascertain, in his oration for Milo. The facts of that case are thus stated: Milo was on his way to Lanuvium. Clodius met him on the road. Milo was in his carriage with his wife, and was accompanied by a numerous retinue, among whom were some gladiators. Clodius was on horseback, with about thirty armed men. The followers of each began to fight, and when the tumult had become general, Clodius was slain, probably by Milo himself. Milo was prosecuted for murder. Cicero prepared an oration in his defense, in which he asserts that the right of self-defense, when we are attacked by force, is a principle and necessity of nature—that we cannot, in such cases, incur the hazard of waiting for the law to protect us—that in such circumstances it may be laid down as a maxim, "*inter arma silent leges;*" that is, that in the midst of actual force, for *arma* is used as meaning force, the law is silent. Rutherforth uses the word force as signifying arms. He says contention by *force*, whether by individuals or governments, is war. *See ubi Supra.* But because Milo had a right to defend himself when and where he was attacked, without invoking law; in short, because the laws were silent for an hour in the midst of the combat between Milo and Clodius, it was not contended that all law was suspended throughout the Roman Empire during the pleasure of the Executive power.

This corresponds with Lord Coke's idea of Cicero's maxim. He says:

"When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma*, then it is said to be time of war." Coke upon Littleton, as quoted in Law. Wheat. Int. Law, p. 525.

There is another maxim sometimes quoted in connection with the above from Cicero, which deserves a moment's notice. *Salus populi suprema lex*—the good of the individual must yield to that of the public. This maxim, also, is acted upon only locally and temporarily. Broom says of it: "Hence there are many cases in which individuals sustain an injury for which the law gives no action; as when private houses are pulled down, or bulwarks raised on private property, for the preservation and defense of the kingdom against the king's enemies. The civil law writers indeed say, that those who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house or raised the bulwark, and the reason is that a man may justify committing the private injury for the public good, as for instance, the pulling down of a house, *if necessary*, in order to arrest the progress of a fire." Broom's Maxims, p. 1. See the subject of this maxim well discussed in 2 Kent, 338, et seq.

These two maxims, and their application, illustrate and define martial law, under absolute governments; and, for the purposes of the case at bar, we shall concede the right to exercise that law, as thus defined and applied, under our government, limited, as all its departments are, by a constitution. It is the law of force, applied to govern persons and places where the civil law is expelled; its officers rendered unable to execute it, by forcible resistance. This right, thus temporarily and locally to exercise martial law, in case of necessity, is the war power of the Governor of a State and of the President of the United States, and it is all the war power that either possesses by virtue of which he can assume to govern independently of the civil law; and this war power, each executive usually exerts through his subordinate military officers.

This may be further illustrated by examples. During the administration of Governor Wright, as the Executive of this State, it was alleged that a rebellion existed in Clay county—that the officers of the civil law were overpowered by force. Governor Wright, as commander-in-chief of the military power of the State, sent a military force to the county, the commander of which, as the representative of the Executive, would, if necessary, govern that locality by the war power, till the civil law could resume its sway; but because there was forcible resistance to law in Clay county, did that fact authorize Governor Wright to overthrow the civil authorities in the whole State, and assume unlimited arbitrary power, to be exercised through military officers?

During the administration of Washington, as President of the United States, a rebellion occurred in Western Pennsylvania, on account of the excise law; the civil power was overcome, in that portion of the State. General Washington sent thither a military force, and, within the limits of the territory from which the rebels had expelled the civil power, and for just the time necessary to restore the ascendancy of that power, Washington, by his Generals, might have found it necessary to govern by the war power. So Washington understood this question, and he instructed his officers accordingly. His instructions to them were:

"That every officer and soldier will constantly bear in mind that he comes to support the laws, and that it would be peculiarly unbecoming in him to be, in any way, the infractor of them: that the essential principles of a free government confine the province of the military, when called forth on such occasions, to two objects: first, to combat and subdue all who may be found in arms in opposition to the national will and authority; secondly, to aid and support the civil magistrates in bringing offenders to justice. The dispensation of this justice belongs to the civil magistrates; and let it ever be our pride and our glory to leave the sacred deposite there inviolate."—[Irving's Life of Washington, vol. 5, ch. 25.]

Rhode Island presents a different example, but strictly within the same principle; an example where the rebellion was not local, but throughout the entire State, and called into exercise the war power of a Governor of the State. Rhode Island is a very small State. Its territory does not exceed that of the three largest counties in Indiana. It was governed upon a royal charter granted by King Charles the Second, under which only freeholders to a certain amount and their eldest sons were entitled to vote. The people petitioned for a convention to form a new and more democratic constitution. The legislature, year after year, denied the petition. The people finally took the subject into their own hands, called a convention, formed a new constitution, and were proceeding, a great majority of the people engaging in the undertaking, in 1842, to overthrow, entirely to extinguish the old government and put the new one into operation in its place. Force was resorted to on both sides. The contest was not local, but extended to every foot of territory in the State. The legislature of the old government passed an act authorizing the Governor of that government to enforce martial law; he thereupon announced it by proclamation, and then exercised it to the extent of forcible resistance to the old government, which was throughout the whole State. New Am. Cyclop., tit. Dorr; Burke and Causin's Reports to House Rep. in Congress in 1844; Luther v. Borden, 7 How. (U. S.) Rep 1. The charter Governor, King, also called on the President of the United States for aid to put down the rebellion; the President tendered it, and the people of Rhode Island were crushed by military power.

The right, then, of the President to temporarily govern localities, through his military officers, he derives solely from the fact that he is the commander-in-chief of the army, and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war, a commanding general in the army of the United States could do it. Where the laws are, or may be, executed without the interference of the President, by his military, he has no right thus to interfere.

The President does not derive his war power from his oath to support, protect and defend the Constitution. That simply obliges him to obey the Constitution himself, and to use the power which that instrument confers upon him, and none else, to cause others to obey it. He does not derive his war power from the right to suspend the writ of *habeas corpus*. We do not think he possesses that right, under the Constitution. We think that is an act of legislative power which can only be performed by Congress; and, even when rightly suspended, it does not justify an exercise of the war power beyond the necessities of the case, but simply takes away the means of obtaining liberty when illegally deprived of it. Simply because the *habeas corpus* is suspended, is it right to destroy every man's liberty and property? The right, in a case of emergency, to exercise the war power, temporarily and locally, supposing that power to exist at all, under the Constitution, does not depend upon the fact of the *habeas corpus* being suspended, or not suspended.

The war power of the President, then, may be stated thus: He has a right to govern, through his military officers, by martial law when and where the civil power of the United States is suspended by force. In all other times and places the civil excludes martial law—excludes government by the war power. Where force prevails, martial law may be exercised. But in all parts of the country where the courts are open and the civil power is not expelled by force, the Constitution and laws rule, the President is but President, and no citizen, not connected with the army, can be punished by the military power of the United States, nor is he amenable to military orders. See Skeen v. Monkmier, at this term. If, in such parts of the country, men commit crimes defined by law, they must be punished, according to the Constitution and the law, in the civil courts. If, in such parts of the country, men have not perpetrated acts constituting, in law, crimes, their arrest, trial, and punishment by military courts is but a mode of applying Lynch law; is, in short, mob violence. This is so, unless the old English tory doctrine of government is secretly included in our Constitution. That doctrine, as expressed by Filmer, is that "a man is bound to obey the king's command against law; nay, in some cases, against divine laws."—May's Const. Hist., vol. 2, p. 21, note.

Having ascertained the principle by which the legality of cases of military arrest and punishment is to be tested, we are now prepared to proceed to the application of the principle to the case at bar.

The existing rebellion in the United States, vast as is its extent, is not general, but local. It is confined to the Southern States. It is a sectional rebellion. The theatre of force where the civil tribunals are closed is sectional, bounded by geographic lines. It is limited to the slave States. This has been unanimously decided by the Supreme Court of the United States in the Prize cases. 2 Black's Rep., p. 635.

There are those by whom it is thought that great provocations have been given to the people of the Northern States, or portions of them, calculated to irritate them into joining in the rebellion; but, under all persecutions and grievances, the people of the Northern States, thanks to their patriotism, have remained true and devoted to the Government of the United States.

The rebellion itself did not originate in an attempt, as we have read its history, to overthrow the Government of the United States, and is not now ostensibly prosecuted for that purpose. The rebellion consists in an attempt, if we have read aright, to withdraw a certain portion of people and territory from under the jurisdiction of the Government of the United States—*to divide the Union*, leaving the North under the existing government, and placing the South under a newly created government. It is true that the rebel armies would, if they could, invade the territory of the Northern States, in order to relieve the rebel States from the desolation of war, without changing the object for which the war is prosecuted on their side, viz: their independence of the Union, or, perhaps, guarantees for rights in it. And, if our army was withdrawn, or greatly weakened before terms of peace were agreed on, the rebels would seize upon their independence, if they did not invade us. Hence, the imperative necessity, felt by all, of continuing to keep up the army, to prevent this greatest of evils, whatever ultimate purpose the administration may indirectly seek to accomplish by it, which could not be approved.

No one of the Northern States, constituting as they together do, a decided majority of all the States, desires to overthrow the Constitution of the United States, or to withdraw from under its operation; nor do any considerable portion, perhaps not any, of the people of such States manifest any desire to resist the legal execution of the Constitution and laws. Resistance to illegal arrests and mob violence is not necessarily resistance to the government. The courts, in all the Northern States, are and have been open. But the Southern States are attempting, by violence, to sever the Union, and the Government of the United States and the people of the Northern States are attempting, as they assert, to prevent the severance of the Union of these heretofore united States. Such is the object, on both sides, of the war; not to maintain or overthrow the old legal Government of the United States, but, on one side, to continue the existence of, and on the other to sever, the *territorial unity of the nation.* And the opposition to the Administration, (not the Government,) in the quiet, law-abiding States of the North is not forcible, but a peaceful difference, and conflict of opinion and argument as to the cause of the rebellion, and the measures which should be pursued as best calculated to restore territorial unity, under the government of our fathers, with the least destruction of property, the least sacrifice of life and constitutional liberty, and in the shortest possible time. And the question now is, does such peaceful conflict of opinion and argument justify the Administration in subjecting those who differ with it to the military power? For the case at bar, though perhaps not of that description in its facts, yet rests entirely upon the principle, as we remarked at the outset, of governing by martial law; as it would not be pretended that the military could make such arrest of the citizen as that involved in this case, in time of peace. We have found no legal principle that will justify such a course. *We know of no precedent for such an exercise of the war power as that above propounded*, viz: of subjecting opponents, simply in political opinions, to martial law for expressing those opinions; for such opinions are not force, nor is the expressing of them force, nor is it a crime by any law of the land.

There is one precedent upon this question to which we think it instructive to refer. When, in 1776, the American Colonies rebelled against Great Britain, not to overthrow the British Government—that still stands—but to sever the British Union, to take the colonies out from under the jurisdiction of the British Government, King George the Third determined to go to great lengths in attempting to consolidate British public sentiment in support of his particular policy against the colonies. He laid down the two propositions, that the British Union should never be dissolved, and that the colonies should be subjugated by the sword to the sovereign will, uninfluenced by any reasonable or fair terms to be offered to invite submission. He went great lengths in attempting to unite the English people at home upon the idea of enforcing his platform by war alone. He used the patronage of the government, in the shape of contracts and appointments, to corrupt; he spent enormous amounts in actual bribery, and resorted to various means of intimidation to produce a united English sentiment corresponding with his own. May's Const. Hist., vol. 1, pp. 30, 48; 2 *ib.*, 31. On page 52 of volume one are extracts of letters from the King to Lord North. On the 4th of February, 1779, he wrote: "You may sound Lord Howe; but before I name him to preside at the Admiralty Board, I must expect an explicit declaration that he will zealously concur in prosecuting the war in all quarters of the globe." Again, on the 22d of June, 1779, he wrote: "Before I will hear of any man's readiness to come into office, I will expect to see it signed under his own hand and seal, that he has resolved to keep the empire entire, and that no troops shall consequently be drawn from thence, [i. e. America,] nor independence ever allowed."

But the King could not produce unity of sentiment in his exclusive war policy. Chatham, Fox, Burke, Barre and other true Britons, far-seeing statesmen and illustrious patriots, were for compromise, conciliation along with war; they warned the King that his policy was less humane, less Christian than theirs, and was calculated to prolong and increase the expenses of the war; that it involved the overthrow of liberty in England itself, and might even subject him, at last, in the dispensations of Providence, to the loss of the brightest jewel of his crown. These sentiments were boldly and earnestly uttered; they were read by the army and the rebel colonists; and, though it was attempted by a few narrow-minded bigots to throw discredit upon the patriotism of those great statesmen, we have never learned that the King, even claimed that their course gave him a right to arrest them by virtue of martial law. See Buckle's Hist. Civ., p. 355. If the speakers thought King George and his ministers advocated erroneous doctrines, the intelligence of the soldiers rendered the army capable of discerning it and avoiding being influenced by them; or, at all events, the fact did not justify the violation of the constitutional rights of the citizen to suppress them. And the proposition would certainly be a monstrous one, that all utterances of opinion may be prohibited for fear an erroneous one might be expressed; and we have in this country no legal censor, outside of the law, who has a right to set up his own opinions as a test by which the correctness of all others is to be determined. The foregoing is the precedent from Great Britain. We should be reluctant to seek others in Spain, Austria, Russia, Turkey, Naples, Mexico, or the so-called Confederate States.

We feel constrained, then, to come to the conclusion that the war power of the President is limited to the simple right of exercising martial law, simply as a military chief, locally and temporarily, where actual or immediately impending force renders it a military necessity. No other doctrine can be reconciled with the Constitution of the United States, or is compatible with the liberties of the people.

The next question that arises is, how is the existence of the fact that the civil power is superseded by illegal, forcible resistance, to be ascertained? Is it a fact to be proved on the trial, or decided by the Court upon judicial knowledge? If the former, there is no averment in the answer of the existence of such fact, and it was bad for that reason. If the latter, we are able to state, with a feeling of complete assurance, that there has at no time been any forcible resistance on the part of the people to the civil power, in the city of Indianapolis, which the officers of the law were not easily able to overcome, when disposed to do their duty. The courts have at all times been open, and there are a sufficiency of them here, including those of the City, State and United States, to meet the public necessities. And, extending our observation from the city to all parts of our commonwealth, we are proud and happy in being able to say, in honor of the people and State of Indiana, that all the citizens of the State, with scarcely an exception, if indeed there is one, are, and always have been, eminently true and patriotic, and remarkably patient. Judge Leavitt, in the Vallandigham case, we regret to say, assuming to speak by judicial knowledge, but beyond question upon false and slanderous information, of the people of this State, charges that a portion of them are affected with the rankest disloyalty. Our judicial knowledge is thorough to the contrary. The people of Indiana are all for the Constitution, the Union as formed by it, and the laws enacted pursuant to it. No one is opposed to the Government, (using that word in its proper sense, and not as meaning the Administration,) but only where opposition is expressed to any proceeding, to acts believed to be illegal and tyrannical, as perpetrated by individuals. The people of the State, in the language of an illustrious statesman now no more, are for LIBERTY and UNION, *one and inseparable, now and forever.* They are, as we said above, and again repeat, devoted to the *Constitution*, the *Union*, and the *laws*, and with one accord, unite in the invocation—*Santo perpetuo.*

The judgment below is reversed with costs, remanded, &c.

A Military Republic.

The frequency and earnestness with which Mr. Webster discussed the probabilities of a war between the North and South, suggests that none of our statesmen had a more correct apprehension of the future than he. His readiness to compromise, when the sections were solidly opposed to each other, and the solemnity with which he impressed constitutional obligations, seem to have been prompted by fear of such a contest as is now convulsing the nation. In his oration delivered June 17, 1843, upon the completion of the Bunker Hill Monument, he said:

"A military republic, a government founded on mock elections, and supported only by the sword, is a movement, indeed, but a retrograde and disastrous movement, from the regular and old fashioned monarchical system. If men would enjoy the blessings of republican government, they must govern themselves by reason, by mutual counsel and consultation, by a sense and feeling of general interest, and by the acquiescence of the minority in the will of the majority properly expressed; and above all the military must be kept, according to the language of our bill of rights, in strict subordination to the civil authority. Wherever this lesson is not both learned and practiced, there can be no political freedom. Absurd, preposterous is it a scoff and a satire on free forms of constitutional liberty, for forms of government to be prescribed by military leaders, and the right of suffrage to be exercised at the point of the sword."

If he was alive to day his successor in the Senate of the United States would request an order for his banishment or imprisonment, and the President would grant the request. Such an intellectual giant as he, advocating such general principles of duty and policy as he ever sustained, would frighten the Administration as an earthquake alarms the inhabitants beneath whom it rolls.—[Chicago Times.

The New York Ledger on Lincoln.

The New York Ledger, speaking of the movement now on foot to place ABRAHAM LINCOLN again on the course as a candidate for the Presidency, says:

It is generally understood that Abraham Lincoln is quite anxious to serve another term in the White House, and that his friends are working late and early to secure him the nomination of his party. We hope he won't get it. We have nothing against Mr. Lincoln personally, but a President who can quietly sit and crack his jokes in the White House while he permits an old fossil like Secretary Welles to manage the Navy Department, is not the sort of a man we admire. The mere fact that Mr. Lincoln has kept old Mr. Welles in office while our commerce is being ruined by rebel privateers, will cost him thousands of votes if he ever comes before the people again as a candidate for the Presidency.

—The Washington correspondent of the Cincinnati Enquirer says:

It is stated that the Republicans of the Indiana delegation lately waited upon Mr. Stanton, to ask that the great Milroy should have command in the field, and they were flatly refused. Upon this an application was made to the President to remove the Secretary, but he objected, saying Stanton will not steal.