GEN. WM. F. SMITH'S CASE.

THE ARGUMENT YESTERDAY UPON THE WRIT OF CERTIORARI.

Counsel Move for Judgment Reversing the Mayor's Proceeding in Removing Gen. Smith from the Office of Commissioner.

The case of Gen. William F. Smith came before Mr. Justice Daniels, in Supreme Court, Chambers, yesterday, on a motion for judgment reversing the Mayor's proceedings for his removal as Police Commissioner. Mr. Willard Bartlett and ex-Senator Ecclesine appeared for Gen. Smith and Mr. F. N. Bangs (representing the Corporation Counsel) for the Mayor.

Mr. Bartlett said this was a motion for judgment on the return to the writ of certiorari. It was properly noticed for hearing at Chambers. The Court of Appeals so held of a like motion in the People ex rel. the Mayor agt. Nichols. Under Rule 38 of Courts of Record, as there interpreted, it could properly be brought on nowhere else.

The respondent had noticed a counter motion to supersede the writ for laches. That motion should be denied. The Justice of the Supreme Court who ordered the writ to issue must have been satisfied there was no lachee or he would not have allowed the writ. This fact would be taken into consideration by the Justice now sitting. He would certainly examine the affidavit upon which the writ was granted in order to see what appeared before Mr. Justice Lawrence. By that affidavit it appeared that it was not until the 4th day of August last that the Governor signified his approval of the removal of the relator. By the records of Court it also appeared that at that time, and thereafter, up to the 27th day January, 1880, the question whether the Mayor's proceedings for the removal of a Police Commissioner could be reviewed by certiorari was constantly in litigation. The remittitur in the prohibition case of the People ex rel. the Mayor agt. Nichols, showed that this question was not finally settled by the Court of Appeals until the date above given. On the sixth day thereafter the writ of certiorari in this case was sued out, Feb. 2, 1880. Under these circumstances it was preposterous to allege that there had been any laches on the part of the relator. While the right to the writ was being bitterly contested by the Mayor in a proceeding begun long before the Governor had acted upon the removal of this relator, it was manifestly proper to await the determination of the courts on that point. But this relator was not chargeable with laches in any view of the case.

There is no fixed time within which a writ of certiorari must be sued out. This is expressly held in the People ex rel. Davis agt. Hill, 53 N. Y., 547.

A period of two years is the limitation which has been most generally approved by the courts. The case of the People ex rel. Van Allen agt. Ferry, 16 Hun, 461, is a recent and authoritative General Term decision on the subject.

If there may be circumstances which justify a shorter limit, as was recently held at Special Term by Judge Van Brunt, his opinion to that effect shows that the conclusion he reached has no application to the present writ. He expressly excludes cases where the right to the writ has been in dispute.

In the case of the People ex rel. Nichols agt. Cooper, counsel for the respondent urged five reasons, in addition to laches, why the writ of certiorari ought to be quashed. As these were all held to be insufficient by Mr. Justice Lawrence, and as the facts here are substantially the same as those before him in that case, it is supposed that any of the five grounds then relied upon will be regarded as equally untenable now. The case as to all these five reasons is res adjudicata.

A few observations might be made, however, upon some of these points. Whether the Mayor's proceedings and order of removal were interlocutory or not, they are reviewable by certiorari. The decision of the Court of Appeals has settled that. In the return in this case the Mayor states that the only record made or kept by him of the removal proceedings was incorporated in the communication which he transmitted to the Governor of his reasons for removing the relator from office, and he adds that he cannot certify the same because it has not been returned to him. The Mayor, however, certifies and sends to the Court a copy thereof, so far as it contained his action, decision, and judgment in the premises of the removal of the relator.

The mere fact that the Mayor has unwarrantably taken the original record cannot be allowed to deprive the relator of his right to review it. There is no requirement of law that it should be transmitted to the Governor. The following passage from Bacon's Abridgement, title certiorari, shows that the return of a copy of the record is amply sufficient to give the court to which it is made jurisdiction to review the proceedings thereby disclosed: "In the return of a certiorari, the record itself, or the tenor of it, is to be certified. Where there is technically no record, the written proceedings and orders, or a history of the proceedings and the written orders which are in the nature of records, are to be certified." This is the law of New York.

In those cases which question the right to the writ because the respondents no longer have control of the record, it will be found either: (1) That to give jurisdiction of the record by compliance with some positive provision of law; or (2) that the object of the certiorari proceeding has not been merely to reverse or annul a judgment, but to make a physical change in some part of the record, as, for example, to alter figures on an assessment roll.

This case does not belong to either class, and both on principle and authority it is perfectly competent for the Court to render judgment upon the return as it is.

The relator's motion for judgment on the return should be granted, and the Mayor's judgment of removal should be reversed, annulled, and in all things held for naught.

The proper method of exercising the power of removal vested in the Mayor has been set forth in the clearest terms by the Court of Appeals in the Nichols case.

That court says: "The proceeding must be instituted on specific charges sufficient in their nature to warrant the removal."

The proceeding was in fact instituted on the general and indefinite statements contained in the Mayor's letter, without a single particular as to time, place, or circumstance.

"Unless these charges are admitted they must be proven to be true."

The Mayor's assertions, notwithstanding their vagueness, were emphatically denied. No proof whatever was offered in respect to any of them.

"The defendant might also cross-examine the witnesses produced to support the charges."

There was not a witness produced.

"He might call witnesses in his defence."

This he could not do in the absence of testimony against him. He stated, however, that if confronted with the proof to sustain the Mayor's assertions, he could overthrow it by counter proof.

"And in these and other steps in the proceeding he might be represented by counsel."

This right was denied, to an extent and in a manner which can only be appreciated by reading the transcript of the stenographer's minutes which forms the last paper in the return.

"In no other way could the person sought to be removed have a due hearing or an opportunity to be heard, and this condition must be complied with before the power of removal is exercised."

It follows conclusively that the relator was deprived of the opportunity to be heard, which is a condition precedent to removal.

The Mayor's judgment of removal was not only unlawful, but absolutely void.

The language of Mr. Justice Field, in delivering the opinion of the Supreme Court of the United States in the case of McVeigh (3 Otto, on p. 277), leaves no doubt on this point:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the Court has no jurisdiction in any case to proceed to judgment, whatever authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to society, 'Appear and you shall be heard,' and when he has appeared, saying, 'Your appearance shall not be recognized and you shall not be heard.' In the present case the District Court not only in effect said this, but immediately added a decree of condemnation by declaring that the default of all persons had been duly entered. It is difficult to think of a decree more flagrantly ill-considered; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

That case shows that even a departure from the established modes of proceeding will often suffice to render a judgment void; and jurisdiction is expressly defined by the Supreme Court as "the right to hear and determine; not to determine without hearing."

Applying the principles therein laid down to the proceedings set out in the return to this writ of certiorari, it is plain that the Court should not only reverse the Mayor's judgment of removal, but declare it absolutely void.

Mr. Bangs said that the Court of Appeals in the Nichols case had decided some questions which were not argued before it, and had left undecided some questions which were argued before it. The latter have lately been presented to the courts for adjudication upon the argument before the General Term on the appeal from Judge Lawrence's decision in favor of Mr. Nichols. That they were decided by the General Term, he submitted that Judge Daniels ought not to decide this case.

Upon the question of laches, he contended that the relator ought not to have been prevented from moving by reason of his (counsel's) efforts to convince the courts that a writ of certiorari would not lie to review the Mayor's removal proceedings.

Mr. Ecclesine then replied briefly to Mr. Bangs, and the Judge took the papers, reserving his decision.

YOUNG MR. ACKLEN'S CASE.

The House Judiciary Committee not Convinced of His Innocent Motives.

WASHINGTON, March 18.—The case of Representative Acklen, charged with legislative forgery in having presented to the House a report purporting to have been agreed to by the Committee on Foreign Affairs, is being investigated by the House Judiciary Committee. The Committee on Foreign Affairs investigated the charges several weeks ago, and reported to the House the facts of the case without any recommendation. The first investigation conclusively proved that Mr. Acklen had been guilty of an attempt to foist upon the House a report made by himself purporting to have been agreed to by the Foreign Affairs Committee, of which he is not a member; that the committee had really refused to act favorably upon the document which Mr. Acklen presented as a favorable report; that Mr. Acklen made his false report in such a manner as to cause the Journal Clerk of the House to believe that the report was being made for Mr. King of Louisiana, who was then absent from the House. Mr. Acklen said in his defence that the fraudulent report was not intended to be a report at all, but was simply a document which he desired to have reprinted; that the bare facts of the case should not be considered in rendering judgment, but that the question of motive should also be taken into consideration. Mr. Acklen was confident that he could convince the House that there could not possibly have been a motive on his part for the commission of such a dishonorable act. The case was referred to the Judiciary Committee, with instructions to inquire especially into the question of motive. Meetings were held yesterday and to-day, and the facts thus far developed have not tended to acquit Mr. Acklen.

Mr. King, when he heard that Mr. Acklen had presented the report to the House, was greatly angered. He felt that Mr. Acklen's conduct had placed him in a false position toward the Committee on Foreign Affairs, of which he is a member. The two gentlemen met in the Speaker's room at the Capitol, and there Mr. King taxed Mr. Acklen with having acted dishonestly. It is said that the dispute waxed so warm as nearly to lead to blows. Mr. Acklen agreed to make an explanation to the House which would be satisfactory to his colleagues. Mr. King said that he could not trust Mr. Acklen to make such an explanation of his own accord, and he insisted upon writing a statement which Mr. Acklen should read to the House. Mr. Acklen promised to do this. While Mr. King was engaged in the room of the Committee on Foreign Affairs, Mr. Acklen rose and made a personal explanation which was entirely unsatisfactory to Mr. King. The latter, therefore, wrote a statement, gave it to Mr. Acklen, and the latter requested the *Record* reporters to substitute it for the statement he had made publicly to the House. The committee to-day had before it the stenographic report of the language actually used by Mr. Acklen, and compared it with the statement which appeared in the *Record*. The differences between the statement made by Mr. Acklen of his own volition and the statement he was compelled by Mr. King to publish in the *Record* were so great as to induce members of the committee to believe that Mr. Acklen's motives were not so innocent as he has represented. The committee will continue its investigation next Monday.

MR. S. S. COX SPEAKS OUT

In Righteous Indignation Against the Partisan United States Supreme Court.

WASHINGTON, March 18.—The debate on the Deficiency Appropriation bill in the House to-day was in the main of a political nature, although several important amendments relative to the pensions were proposed.

Mr. Cox (Dem., N. Y.) expressed himself as opposed to every form of recognition of special deputy marshals. He had opposed the bill originally by which they had been placed around the polls. Referring to the election in Philadelphia, he declared that there had been 20,000 fraudulent registered voters. In Philadelphia all was rottenness. He declared again that he was opposed to recognizing Federal supervision of elections. He had voted against the original bill because he knew that it was unconstitutional. [Derisive laughter on the Republican side.] "Smile on," said Mr. Cox; "crackle your thorns under the pot. The Supreme Court had said that there was no such thing as a Federal election. For one, I will not place the Supreme Court, as now packed, a partisan, demoralized, above the popular branch of the legislature of the country." [Applause on the Democratic side.]

Mr. Keifer (Rep., Ohio) said that the lives of the Supreme Court Judges gave the lie to such a charge as that.

Mr. Finley (Dem., Ohio) called attention to the fact that at the last election there had been 11,652 special deputy marshals appointed, of which 10,874 had been placed in Democratic districts. These special deputies had been used for political purposes.

Mr. Springer (Dem., Ill.) declared that the Democratic party was in favor of the free and fair expression of the opinion of the people at the polls. If it was asserted that the Democratic party desired to commit fraud or allow fraud to be committed, that was stated which was not true, and not supported by facts. Every one said he desired a fair and free election. Then it must be understood that it was not fair to surround polls with an unlimited number of partisans, to carry the election in favor of a particular party.

The amendment finally adopted appropriates $7,600 for special deputy marshals, provided that hereafter special deputy marshals shall receive $2 a day, as full compensation for performing duties in regard to any election, and all appointments of such special deputy marshals shall be made by the Judge of the United States Circuit Court for the district in which such marshals are to perform their duties, or by the District Court, in the absence of the Circuit Court, and no less than two or more than three appointments shall be made for any voting precinct. The persons so appointed shall be of different political parties, of good character, able to read and write the English language, and be well-known residents of the voting precinct. When there are three or more political parties, having separate tickets to be voted for, three deputy marshals shall be appointed, no two of whom shall belong to the same political party.

NO ICE FAMINE THERE.

Nearly 1,000,000 Tons Harvested on Lake Champlain and Ready for Market.

WHITEHALL, March 17.—The Knickerbocker Ice Company and several other companies from New York and places along the Hudson River have large numbers of men engaged on South Bay cutting ice. It is estimated that there is now secreted between here and Ticonderoga about 800,000 tons, and if the weather should continue favorable for a few days longer there will be over a million tons harvested. There are one thousand men between here and Fort Ticonderoga at work night and day cutting and piling ice. In addition to companies from New York, Albany, and Troy, many of our citizens are cutting and stacking ice for speculation. Among them are the Hon. H. G. Burleigh, A. P. Cooke, H. R. Wait, Waters & McFerren, Eddy Brothers, A. Gilligan, J. H. Sullivan, Wetherby & Co., Bartholomew Brothers, Hurlbut's & Co., and Skeels Brothers. At Chilipman's point the Skeels Brothers have an immense pile ready for shipment. In fact, in this town and for twenty-five miles north of here, on both sides of the lake, the people are wild on the ice question. All of the ice harvested near here is piled on docks where it can be readily transferred to canal boats sailing down to New York city in a very few days. If the people of New York suffer for ice next summer, it will not be because there was not enough harvested, though, of course, it will cost the companies considerable more to secure it. Advices from localities further north on Lake Champlain, and also on Lake George, are that everywhere large quantities of ice have been gathered with the hope of selling it in the New York market.

Diphtheria in a Public School.

At a meeting of the Board of Health of New Lots, yesterday, an order was issued commanding the highway Commissioners of the town to take proper action at once in regard to suppressing the nuisance existing at Cypress Hills by the stagnation of a pool of stagnant water near the cemetery. For the past month or more diphtheria has prevailed to a severe extent in that neighborhood, which is believed to have originated from this pond. The disease has been almost epidemic among the public school children, more than the five classes having been stricken down and fifteen have died. The trustees talk of closing the school until the disease abates.

Court Calendars This Day.

SUPREME COURT—CHAMBERS.—Nos. 223, 226, 231, 12, 19, 30, 40, 49, 56, 61, 65, 71, 73, 80, 84, 98, 108, 116, 122, 127, 135, 137, 152, 153, 172, 178, 182, 186, 187, 189, 210, 211, 214, 222, 224, 227, 229. GENERAL TERM.—3, 4, 5, 6, 10, 11, 12, 16, 19, 24, 25, 29, 31, 34, 36, 37, 39, 40, 42, 43, 47, 48, 52, 54, 57, 58, 60, 61, 66, 68, 69, 70, 72, 74, 76, 77, 78, 79, 80, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125,