

government of the United States, created by the constitution and possessing no vitality or power not directly drawn from that instrument, can only exist and legislate where the constitution is in force, and that every tract of territory that comes under the sovereignty of the United States comes necessarily under that constitution which alone gives life to that sovereignty, and beyond which the sovereignty must cease." *Ex parte Ortiz*, 100 F. 961.

The first ten amendments to the constitution of the United States have been called the Federal Bill of Rights. *Robertson v. Baldwin*, 165 U. S. 275. And it is well understood that none of these amendments were adopted to announce new principles or to declare and define new rights, but were intended to carry forward and reaffirm the rights and privileges of freemen, well known and understood by the people who adopted them and whose ancestors had, at great sacrifice, forced their acknowledgment from the hand of unlimited power.

"The Bill of Rights is historically considered the most interesting part of these constitutions, for it is the legitimate child and representative of Magna Charta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary Session 2, by which the liberties of Englishmen have been secured. Most of the thirteen colonies, when they asserted their independence and framed their constitution, inserted a declaration of the fundamental rights of the people, and the example then set has been followed by the newer states and indeed by the states generally in their most recent constitutions."

* * * "A reason may be found in the remarkable constitutional conservatism of the Americans, and their fondness for the enunciation of the general maxims of political freedom." * *

* * * "They are therefore, it is held, still safeguards against tyranny and they serve the purpose of solemnly reminding a state legislature and its officers of those fundamental principles which they ought never to overstep." Bryce, *The Amer. Com.* (2nd Ed. 1891) vol. 1, pp. 422-3.

Mr. Justice Cooley says: "The truth is the Bill of Rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory, and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law and thus secured against violation." *Weimer v. Bunbury*, 30 Mich. 214.

Mr. Justice Matthews, speaking for the Court, said: "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their Governments, and the provisions of Magna Charta were incorporated into Bills of Rights.

These were limitations upon all the powers of Government, legislative, as well as executive and judicial." *Hurtado v. California*, 110 U. S. pp. 531-2.

Hon. George F. Edmunds, who is justly regarded as one of the greatest living expounders of the constitution, said: "But the constitution as such, I suppose all admit, is not subject to the control of Congress, either to enlarge or to diminish, extend or contract, or to be applied to or withdrawn from any people or place. It is not a movable thing like the Ark of the covenant of the Israelites, to be set up and moved here or there as the tribes might wander. It is the actual event and condition and not the legislative or executive will, that must, in the nature of things, determine the status of a man or a country under it.

"The instances in which Congress has declared in statutes organizing territories that the constitution and laws should be in force there are no evidence that the constitution and laws were not already there, for Congress and all legislative bodies have often made enactments that in effect merely declared existing law. In such cases they declare a pre-existing truth to ease the doubts of casuists."

Letter to Senator Proctor, dated March 21st, 1900, and published in Congressional Record, March 30th, 1900, p. 3737.

We cannot assent to the doctrine that the operation of the constitution in the territories belonging to the United States depends upon the will or action of Congress extending it there. This doctrine necessarily carries with it the admission that what one Congress can give, the same or a succeeding Congress can take away; that although Congress by the Organic Act, organizing the Territory of Hawaii, extended the constitution and laws of the United States to this Territory, the next Congress might repeal that part of the Organic Act, and that then the people of this Territory would have none of the guarantees of life, liberty and property provided in the constitution and might thereafter be governed as a province, a Crown colony, or in any manner that Congress in its wisdom, or unwisdom, might provide; that a tariff might be levied on the products of the islands going into the states and citizens of this territory might be denied the rights and privileges of citizens of the United States residing in other parts of its imperial domain.

From the above citation of authorities we reach the conclusion that those negative provisions of the constitution, adopted to declare and protect the life, liberty and property of the citizens were in force in the Hawaiian Islands as soon as the same became a part of the United States territory and subject to the "sovereign dominion thereof." It is not necessary in order to decide the case at bar to express an opinion as to whether the constitution *ex proprio vigore*, and as a whole, extends to and is in force in all territory subject to the sovereignty of the United States. It is clear and well settled, that some of the provisions of the constitution do not apply to the territories whether there is an Act of Congress expressly extending them there, or not, for the reason that they are totally inapplicable to the conditions existing in the territories. However, the ablest and most earnest advocates of the unlimited power of Congress to legislate for the territories, unrestricted by the provisions of the constitution, frankly admit that those negative provisions of the constitution inserted to protect the life and property of the citizen are in force in the territories and are so far a limitation on the power of Congress in legislating for the territories.

"It may be admitted," says Townsend, U. S. District Judge of Southern District of New York, "that the constitutional guarantees of civil rights would apply to the territory under the sovereignty, but not a part of the United States. Certain civil rights which we believe belong to every one are crystallized into the negative provisions of our constitution in order to prevent any wrongful and improper use of our power, and these may be held to control our power wherever it reaches. These considerations may be found to limit us in governing any territory." *Goetze v. United States*, 103, Fed. Rep. p. 85.

That some of those "negative provisions" are contained in the Fifth and Sixth Amendments to the constitution no one will deny, and it is equally clear to us that these were in force in the Hawaiian Islands on the 16th day of August, 1898, at the time of the trial and conviction of the petitioner.

Was the petitioner then denied any of the rights and privileges guaranteed thereby? That he was tried and convicted of an "infamous crime" no citation of authorities will be necessary to establish.

The question is not whether an indictment found by the Cir-

cuit Judge as provided by the laws of the Republic of Hawaii, is as good a protection to the life and liberty of the citizen as one presented by a grand jury, but it is whether or not the Fifth amendment requires or guarantees to the citizen that he shall not be placed on trial for an infamous crime without an indictment by a grand jury.

Mr. Justice Gray said, "But if the crime of which the petitioner was accused was an infamous crime, within the meaning of the Fifth amendment of the constitution, no court of the United States had jurisdiction to try to punish him, except upon presentment or indictment by a grand jury." *Ex parte Wilson*, 110 U. S. 422.

The reason why a person so accused cannot be tried or punished in any "Court of the United States" and may be in a state court, is that the Federal Bill of Rights, or first ten amendments to the constitution, do not apply to the people of the states in making their state constitutions nor to the state legislatures in legislating for the states. But it is well settled that Congress in legislating for the territories is bound by these amendments. It cannot be seriously contended that Congress intended by the Joint Resolution of annexation, or did it in fact authorize the courts of the Hawaiian Islands to do what the courts of no other territory of the United States could do. After annexation the courts of the Hawaiian Islands exercised all their power and authority under the Joint Resolution and by direction of the President of the United States, and we may observe in this connection that the judges of the courts were required and did in fact take an oath to support the constitution of the United States.

Mr. Justice Gray further said in case last cited, "That no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put on trial, except upon the accusation of a grand jury." * * * "But the constitution, protecting every one from being prosecuted without the intervention of a grand jury for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard." *Ex parte Wilson*, 110 U. S. p. 426.

Mr. Justice Hanlan in *Thompson v. Utah*, 170 U. S. 346, says: "That the provisions of the constitution of the United States relating to the right of trial by jury in suits at common law apply to the territories of the United States is no longer an open question."

Citing *Webster v. Reid*, 11 How. 437, 460; *Am. Pub. Co. v. Fisher*, 166 U. S. 464, 468; *Springville v. Thomas*, 166 U. S. 70-7.

"In the last named case it was claimed that the territorial legislature of Utah was empowered by the Organic Act of the territory of Sept. 9th, 1850, 9 U. S. St. Lt. 453, c. 57, par. 6, to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict. That court said: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so. It is equally beyond question that the provisions of the national constitution relating to trial by jury for crimes and to criminal prosecutions apply to the territories of the United States, 170 U. S. pp. 346, 347.

"Assuming that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and the Sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more or less. 2 Hale's P. C. 161; 1 Chitty's Cr. Law, 505. This question must be answered in the affirmative." *Thompson v. Utah*, 170 U. S. p. 349.

It will be remembered that Thompson was placed upon trial, after the admission of Utah as a state, for a felony, committed when Utah was a territory, and under the state constitution eight persons composed a lawful trial jury, and such a jury tried and found Thompson guilty. In the opinion last cited the court further says: "Was it then competent for the state of Utah, upon its admission to the Union to do in respect to Thompson's crime what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons? We are of opinion that the state did not acquire upon its admission into the Union the power to provide in respect to felonies committed within its limits while it was a territory, that they should be tried otherwise than by a jury such as is provided by the constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the state not only to do what the United States in respect to Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed." *Thompson v. Utah*, 170 U. S. pp. 350-1.

"It follows that all the provisions of the constitution in respect to personal and property rights, including the right to trial by jury in criminal prosecutions, became at once, when the session was completed, a part of the supreme law of the land. The character of an offense and the measure of its punishment would be determined by the law in force when and where the act was committed, the laws of that character remain in force after the session until changed; but the manner of the trial must depend on the law in force when the trial is had, even though the establishment and organization of courts must be awaited before the trial can be had." *Ex parte Ortiz*, 100 Fed. p. 962.

Does this construction of the law mean, as has been so earnestly contended, that criminals should, of necessity, go unpunished and that there was no protection to life and property on the Hawaiian Islands between the 7th day of July, 1898, the date of signing the Joint Resolution, and the 14th day of June, 1900, the date the Organic Act went into effect? Certainly not. During all of this period there was organized Government here; there were officers and courts, legally constituted, continued in office and existence by the order of President McKinley, under the authority given in the Joint Resolution. There was the

great body of the municipal laws of the late republic "not inconsistent with the resolution, not contrary to the constitution of the United States," continued in force until Congress should otherwise direct. There was provision for a trial jury of twelve and that part of the statute authorizing nine jurors to return a verdict could have been controlled by a simple direction, or instruction of the trial court, that there must be a unanimous verdict to convict, and those additional safeguards to the life, liberty and property of the citizen prescribed by the constitution of the United States, were here in full force and vigor.

Among the municipal laws of the Republic of Hawaii continued in force was Sec. 1109 of the Civil Laws, which provide that the common law of England, as ascertained by English and American decisions, is declared to be the common law of the Hawaiian Islands, except when changed by decision, usage or law. The Circuit Court of the First Circuit was a Court of Record and of common law jurisdiction, and on August 16th, 1898, had the undoubted power to issue an open venire and summons and empanel a grand jury in the manner provided by the rules of the common law.

As Justice Cooley said: "They assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law and thus secured against violation." *Weimer v. Bunbury*, Mich. 214.

Chief Justice Marshall, speaking of the authority of Courts to issue an open venire, in the absence of any statute authorizing it, and of the law at that time, said: "It has been justly observed that no act of Congress directs grand juries, or defines their powers. By what authority then, are they summoned, and whence do they derive their powers.

The answer is, that the laws of the United States have erected Courts which are vested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indisputable implication.

But how far is this implication necessary and indisputable? The answer is obvious. Its necessity is co-extensive with the jurisdiction to which it is essential." *United States v. Hill*, 1 Brock. 159.

In *Clawson v. United States*, 114 U. S. 486, in approving the action of the Supreme Court of Utah, whose opinion sustained the action of a District Court of the territory in issuing an open venire for jurors and who based its judgment not on any statute authorizing it, but the fact that such "power was inherent in the Court and was not forbidden by any statute in force in Utah," said, "We concur in this view, so far as the resort to the open venire, after the exhaustion of the two hundred names, is concerned."

The following authorities also support this proposition: 1 Chitty, *Crim. Law*, 518; 2 Hale, P. C. 265; *Mackay v. People*, 2 Cal. 13; *Wilburn v. State*, 21 Ark. 198, 201; *Goodwin v. United States*, 54 Pac. 432.

Deciding only the questions presented by the case at bar, we hold that the Hawaiian Islands were a part of the United States on the 16th day of August, A. D. 1898; that the Fifth and Sixth Amendments to the Constitution of the United States were in force here at that time; that the petitioner having been put to his trial on the 16th day of August, A. D. 1898, upon an "indictment" found by a circuit judge, charging him with an infamous crime, and thereof convicted by a verdict of ten jurors, was thereby deprived of his constitutional rights, and his detention is illegal.

Let the writ issue and the petitioner be discharged.

Davis and Gear, attorneys for the petitioner.

Hon. E. P. Dole, Attorney-General, opposing.

DISSENTING OPINION OF FREAR, C. J.

The questions now raised on *habeas corpus* were raised on exceptions by the same prisoner and decided by the unanimous judgment of the court on a rehearing adversely to him in *Republic v. Edwards*, 12 Haw. 55. I see no reason for changing my opinion as expressed in that case and in the case of *Peacock & Co. v. Republic*, 12 Haw. 27. In the *Peacock* case it was held that the provision of the Constitution which in terms requires that duties shall be uniform throughout the United States did not apply to the Hawaiian Islands during the transition period between the date of the annexation of these islands to the United States and the date of the establishment of a territorial government here by Congress; and in the *Edwards* case it was held, on the reasoning in the *Peacock* case, that the provisions of the Constitution requiring grand juries and unanimous verdicts of petit juries in certain cases did not apply here *ex proprio vigore* during that period, and further that they were not intended by Congress to be extended here by the terms of the Joint Resolution of Annexation.

There are two questions involved. First, a question of construction. Assuming that these provisions of the Constitution did not extend or apply here of their own force under the circumstances, did Congress intend by the Joint Resolution to extend them here? Upon this question of construction I shall add nothing to what is set forth in the decision in the *Edwards* case referred to, so far as the particular intention of Congress is concerned as determined by a consideration of particular clauses in the Joint Resolution. And as to the general intention of Congress, as shown by the Joint Resolution as a whole, that the laws of Hawaii as respects internal relations should continue unchanged, except in certain particulars, until further action by Congress, and that these islands, although subject to the sovereignty of the United States, were still to be regarded as, to some extent, foreign territory, I will merely quote portions of opinions of the Attorney-General of the United States. In 23 Op. 150, he says:

"The resolution of Congress which, with the corresponding action of the Republic of Hawaii, annexed the Hawaiian Islands to the United States, operated for international purposes to make those islands part of the territory of the United States. But when territory is acquired by treaty or conquest, or otherwise, its relations to the nation acquiring it depend upon the laws of that nation unless controlled by the instrument of cession. It may for certain purposes remain foreign temporarily or permanently, and is not presumed to be at once put upon the same footing as all other territory of the nation, but rather the contrary.