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Conflict between Executive and Judiciary — Powers of Constitutional Convention — Quo Warranto.

The last four years of civil conflict have produced many new and important questions of a legal nature, to which, for the information of the profession, it is our duty as journalists to allude.

These questions partake sometimes of a political character, and are therefore interesting to statesmen as well as to lawyers and jurists. They but too frequently are made to assume a partisan character; and when they do, we cannot too carefully guard ourselves against the bias which may arise from this source.

The recent conflict between the Executive of the state of Missouri (Governor FLETCHER) and two of the late judges of the Supreme Court of that state (Judges BAY and DRYDEN), while its occurrence is to be regretted, is now a matter of legal and general history, and presents two or three questions of absorbing professional and public interest.

On the 14th day of June 1865, these judges, claiming to be the legal members of the court and to act as such, were forcibly removed by the governor. That act has been much applauded by some as a firm and fearless exercise of an undoubted executive duty, and by others denounced as illegal, revolutionary, and despotic.

The controversy brings into view the powers of the convention

of the people which assembled to amend the constitution of the state, and also the propriety and legality of the course pursued by the executive, in ejecting by force the late judges from the bench. Before pronouncing any opinion, or offering any observations on these questions, it is essential to ascertain the precise facts of the case.

In 1863–4 the General Assembly of Missouri, pursuant, as we suppose, to provisions in the existing constitution, passed an Act for submitting the question of calling a convention to amend the constitution to a vote of the people, and for an election of delegates to the convention if the people voted in favor of calling one. The preamble to that Act (see Laws of Missouri, 1863–4) is as follows: "Whereas, in the opinion of the General Assembly, the condition of affairs in the state demands that a convention of the people be called to take such action as *the interest and welfare thereof may require;*" therefore, be it enacted, &c.

The *duties* of the convention are thus set forth in section 5 of the Act, the only one relating to the powers and duties of the convention when it assembles:—

"SEC. 5. The delegates elected under the provisions of this Act shall assemble at St. Louis on the 6th day of January 1865, and organize themselves into a convention by the election of a president and such other officers as they may deem necessary, and shall proceed to consider, first, such amendments to the constitution of the state as may be by them deemed necessary for the emancipation of slaves; second, such amendments to the constitution of the state as may be by them deemed necessary to preserve in purity the elective franchise to loyal citizens; *and such other amendments as may be by them deemed essential to the promotion of the public good.*"

Section 10 provides that the question "for a convention, or against a convention," shall be submitted to the people, and if a majority of the qualified voters were in favor of a convention, the delegates should meet as directed.

A majority being in favor of the convention, and delegates being elected pursuant to section 5 above quoted, the convention in due form assembled at the prescribed time and place; and, among other doings, passed, March 17th, an "*ordinance*" by which it was declared "*that the offices of the judges of the Supreme Court*, of all Circuit Courts, and of all courts of record, &c., *shall be vacated on the first day of May, A. D.* 1865."

Among the members of the state convention which passed this ordinance was the Hon. CHARLES D. DRAKE, author of the well-known work on Attachments. Some of his fellow-citizens requested his views on the questions involved, to which he replied in a lengthy and very elaborate letter, in which the facts of the case seem to be fairly stated.

According to Mr. DRAKE, the facts, so far as he has been able to ascertain them, are as follows:—

"In the year 1861, WILLIAM SCOTT, WILLIAM B. NAPTON, and EPHRAIM B. EWING were the judges of the Supreme Court of this state, and their term of office was to expire in the year 1863.

"On the 16th of October, 1861, the state convention elected by the people in the previous month of February, adopted an ordinance, which, among other things, required each civil officer in this state, within sixty days thereafter, to take and subscribe a certain oath; failing in which, their offices were then to become vacant. Judges SCOTT, NAPTON, and EWING failed to take the required oath, and their offices were consequently vacated on the 17th of December 1861, and BARTON BATES, WILLIAM V. N. BAY, and JOHN D. S. DRYDEN were, by Governor Gamble, appointed judges of the court for the unexpired portion of the official term, that is, until an election should be held in 1863. In November of that year an election was held, and Messrs. BATES, BAY, and DRYDEN were declared elected, and composed the court until February last, when Judge BATES resigned his office; Judges BAY and DRYDEN retaining their positions.

"On the 17th of March last, the constitutional convention of this state, elected in November, 1864, adopted an ordinance declaring that on the first day of May 1865, sundry judicial and ministerial offices should be vacated, and be filled for the remainder of their respective terms by appointment by the governor. *The offices of the judges of the Supreme Court were among those so vacated.*

"*The governor was by the same ordinance authorized to fill any vacancy existing at the date of its adoption, in any of the offices therein named.* In pursuance of this authority, the governor appointed DAVID WAGNER to fill the vacancy created by the resignation of Judge BATES; and afterwards appointed WALTER L. LOVELACE and NATHANIEL HOLMES, to fill the vacancies created by the operation of the ordinance in vacating the seats of Judges BAY and DRYDEN.

"On the 29th of April, Mr. Andrew W. Mead, the clerk of the Supreme Court, whose office, like those of the judges, had been vacated, and who sought and received a re-appointment, presented to the court, composed of Judges BAY and DRYDEN, his commission as clerk from Governor Fletcher, with his oath of office and his official bond, and the court thereupon made an order of record in the following words:—

"'Andrew W. Mead presents to the court his commission as clerk of the Supreme Court of the state of Missouri, held at St. Louis, issued by the governor of the state of Missouri, in conformity with the provisions of an ordinance of the Missouri State Convention, entitled '*An Ordinance providing for the vacating of certain civil offices in the state, filling the same anew, and protecting the citizens from injury and harassment*,' passed the 17th day of March 1865; with his oath of office indorsed thereon; he also presents to the court his official bond, conditioned according to law, with himself as principal and A. J. P. Garesche and John Lewis as securities, which bond is APPROVED BY THE COURT.'

"In reference to this record entry, I suppose there is not anywhere a sound and fair-minded jurist, who would not say that it was a direct and clear admission by the court of the legality of Mr. Mead's appointment. If the court considered the ordinance of March 17th a nullity, it was bound not to have taken any more notice of his new commission than if it had been issued by a justice of the peace. Mr. Mead was first appointed by the court itself, under the then existing law, for a term of years not yet expired; and yet the court on its record admits that his official term *had been* cut short, and that he had been rightfully appointed clerk by another power than itself; and it sanctioned that appointment, by approving his bond, and admitting that he had been appointed under that ordinance.

"On that 29th of April, the only other business transacted by the court was to enter one judgment in a pending case, and to audit the accounts of the clerk, the marshal, and others for services, &c., as is always done on the *last* day of the term. This was on Saturday, and on the following Monday, May 1st, the vacating ordinance was to take effect. The court was adjourned to the 5th of May; at which time Judges BAY and DRYDEN did not appear; nor did they appear during any of the three following days; and, in conformity with the law, the court was thereby adjourned till the next regular term in October. Ordinarily, for

ten years past, that court has continued in session, at its March term, until some time in June, and once till the 3d of July. During that period (except in the year 1861, when the term was suddenly cut short, in April, by the outbreak of the rebellion), that term has not ended earlier than the 11th of June. When, therefore, Judges BAY and DRYDEN failed to resume their seats on the 5th of May, or within three days thereafter, the court was adjourned from five to eight weeks earlier than the usual time; and that, though there were on its docket about two hundred and thirty cases awaiting a hearing. Without knowing the reasons for their suffering the term to lapse, I think it no injustice to them to infer that when they adjourned the court on the 29th of April, they considered their functions at an end, and did not intend to attempt to resume their seats as judges. Otherwise they were guilty of a manifest and causeless failure in the duty of resuming the sessions of the court on the 5th of May.

"On the 27th of May, Judges WAGNER and LOVELACE made a written order, calling a special term of the Supreme Court, to be held on the 12th of June, and delivered it to Mr. Mead, the clerk of the court, who filed it in his office, where it is now to be seen.

"On the 31st of May, in the Daily Missouri Democrat, the clerk, as required by law, published a notice that the special term would be held, 'in pursuance of an order made by the judges of the Supreme Court.' This notice bore the date of May 30th.

"By an entry made of record on the 12th of June, when Messrs. BAY and DRYDEN assumed to hold the court, it appears that they then opened the special term in pursuance of an order purporting to have been made *by them*, and set forth in the record, and dated the 30th of May; but I am informed by the present clerk that the original of that order cannot be found in his office. Whether this order was made on the day of its date, I am not informed, and have no means of ascertaining.

"On the 12th of June, at the hour of *nine* o'clock A. M., Messrs. BAY and DRYDEN took the bench, in the Supreme Court room, and, attended by the clerk and the marshal of the court, proceeded to act as the Supreme Court, calling cases and hearing arguments; and, when requested by Judges WAGNER and LOVELACE, refusing to yield their positions. The stated hour for opening the court had for many years been *ten* o'clock A. M.; but on this occasion it was opened an hour in advance of that time.

"Those gentlemen held court on the 12th and 13th without interruption; but on the 14th, while on the bench, they were waited upon by Brigadier-General D. C. Coleman, of the Missouri militia, who presented to each of them a letter from Governor Fletcher, in the following terms:—

"EXECUTIVE DEPARTMENT, Mo., June 13th 1865.

"SIR: By the ordinance of the State Convention, vacating certain offices, the offices of the judges of the Supreme Court became vacant on the 1st day of May last. By virtue of the authority conferred on me by that ordinance, as governor of the state of Missouri, I have caused commissions to be issued in legal form to Hon. David Wagner, Hon. Walter Lovelace, and Hon. Nathaniel Holmes, as judges of the Supreme Court, and who have qualified as such judges.

"The ordinance referred to is the supreme law on that subject, and it is my imperative duty to enforce it, which duty I shall pursue the most summary course in performing, and will treat as they deserve any acts on your part done in furtherance of a design to intrude yourself into and usurp the powers of the office of a judge of the Supreme Court.

"Respectfully yours,

"THOS. C. FLETCHER,

"Governor of Missouri."

"Messrs. BAY and DRYDEN declined to leave the bench in compliance with the letter of Governor FLETCHER; whereupon General COLEMAN produced the following Special Order, issued by the Governor as Commander-in-Chief of the Militia:

"HEADQUARTERS, STATE OF Mo., June 14th 1865.

"*Special Order.*

"I. The usurping judges of the Supreme Court will be compelled to submit to the ordinance of the State Convention vacating certain offices.

"II. David Wagner, Walter S. Lovelace, and Nathaniel Holmes will be put in possession of the Supreme Court room, in the court-house, at St. Louis, with all the records, seals, furniture, books, and papers of the office of clerk of the Supreme Court.

"III. Brig.-Gen. D. C. Coleman is charged with the execution of the order, and will employ such force for that purpose as he may deem necessary, and arrest all persons who may oppose him.

"THOS. C. FLETCHER,

"Governor and Commander-in-Chief."

"General Coleman also produced the following letter from Governor Fletcher to him:—

"HEADQUARTERS, STATE OF Mo., June 14th 1865.

"GENERAL: Herewith please find special order directing you to enforce the ordinance of the State Convention vacating certain offices, by putting the

recently-appointed judges of the Supreme Court into the possession of the court-room, records, &c., of that court.

"You will proceed to the court-house, and on the arrival of Messrs. Dryden and Bay, deliver to each of them the sealed notes addressed to them respectively. An officer of the city police will accompany you, and will have a force of the city police at hand.

"If, after delivering the notes, the said Bay and Dryden do any act to disturb Messrs. Lovelace and Wagner in entering on said discharge of their duties as judges, you will direct the policemen to arrest them, and take them before the city recorder, and at once inform me of that fact.

"In case Messrs. Bay and Dryden do not come to the court-house at nine o'clock or soon thereafter, you will cause the note referred to, to be delivered to them at their rooms.

"In putting the judges into possession of the court-room and clerk's office, you will, as far as convenient in your judgment, avoid the use of violent means; but if in your judgment necessary, do not hesitate to employ all the force it may require.

"THOS. C. FLETCHER."

"To Gen. David C. Coleman."

"Messrs. BAY and DRYDEN still refusing to leave the bench, General COLEMAN called in policemen, who, with no unnecessary exhibition of force, removed them from the court-room to the police office, and placed Judges WAGNER and LOVELACE in possession of the court-room and the records, papers, and seal of the court; and they, with their associate, Judge HOLMES, have since remained in possession thereof, and exercised the functions of the court.

"In giving this history of the case, I believe I have stated *all* the facts which have any bearing upon the question. If any material fact has been omitted, it is because it has not come to my knowledge, or has been inadvertently and unintentionally overlooked."[1]

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[1] The *manner* in which the removal of the judges was effected is thus stated in an "Address to the People of Missouri," signed by Messrs. Gantt, Glover, Broadhead, and others, in which the arguments against the validity of the vacating ordinance and the legality of the Executive's course are ably and exhaustively stated. It being our purpose not to present a garbled or unfair account, we subjoin the following extract from the "Address." After stating that Judges DRYDEN and BAY informed General Coleman that they would not retire from the bench, and would yield to nothing short of overpowering force, the "Address" proceeds:

"General Coleman thereupon left the room, and presently returned, followed by a squad of Metropolitan Police of the city of St. Louis. He interrupted an argument which a member of the bar was making to the court, and ordered the

Personally we know nothing of the facts. Our discussion will assume that they are stated with substantial accuracy, although some of the circumstances detailed do not seem to be material to the principles upon which any decision of the case would turn.

That Messrs. BAY and DRYDEN were the legal judges of the court down to the 1st of May is not, by any one, disputed; whether they continued so after that date depends upon the validity of the Ordinance vacating their offices. There can be

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judges to leave their seats. They refused. General Coleman, turning to his policemen, who were armed with clubs and pistols, ordered them to remove the judges from their chairs. The policemen advanced and laid their hands on Judges BAY and DRYDEN for that purpose, and they, rising from their seats, and protesting against the indignity offered in their persons to the whole judicial department, left their place.

"They were about to retire from this shameful scene, when General Coleman stated that he had further orders to arrest their persons. This was too much. They demanded a sight of his warrant, and he produced the special order already set forth.

"Judges DRYDEN and BAY informed General Coleman that his order did not profess to give him any authority to arrest them, and that they would not allow themselves to be seized on any such pretence. General Coleman then produced his letter of instructions, but the Judges told him that this was equally defective General Coleman then directed the policemen not to allow the Judges to leave the room, and went out himself. He returned in half an hour, and then informed the judges that they were arrested for a breach of the peace, upon a complaint made before the Recorder. The policemen in attendance thereupon, by order of General Coleman, took charge of Judges DRYDEN and BAY, and required them to go to the police office, and give bail to answer the charge. They were accordingly conducted on foot, to the police office, through a large crowd drawn together by the rumor of the outrage. Arriving at the office, they demanded to know the charge against them. The following paper was shown to them by way of answer:

"*To the Judge of the Recorder's Court of St. Louis County:*

"I complain of Wm. V. N. Bay and John S. Dryden for disturbing the peace by interference with the Supreme Court. Please summons as witnesses,

"DAVID WAGNER,
"WALTER L. LOVELACE,
"THOS. C. FLETCHER,
"D. C. COLEMAN,
"—— BOMEN.

"Very respectfully,

"THOS. C. FLETCHER."

No complaint under oath was ever filed, and the charge was never prosecuted, and was dismissed on the 15th day of June.

no doubt that a constitutional convention, unless the delegates are limited by the people, would, as representing the sovereignty of the people, have the power to pass such an ordinance: *Conner* vs. *City of New York*, 2 Sandf. 355, 1849; *State* vs. *McBride*, 4 Mo. R. 303, 1836; *Matter of Oliver Lee's Bank*, 21 N. Y. 9, 12 (1860), per DENIO, J.

Respecting the question whether there was such a limitation, conflicting views are entertained. On the one hand it is maintained that the powers of the Convention are limited to the purposes specified in the Act of the Legislature (see section 5, *supra*), under which delegates were elected and the convention held. On the other hand it is contended that the legislature can only provide the machinery for the election of delegates; that it is illogical to maintain that an inferior body can restrain a superior; that the delegates when assembled embody the sovereignty of the people, and (to use the language of the late judge, subsequently Governor GAMBLE, in discussing a similar question in 1861) have "all the power that the people would have if they had all assembled in one vast plain, unless there has been some limitation upon the power. They are *almighty* as far as the people themselves would be almighty in respect to their own government, if they were gathered in one great plain."

But the question here is, whether there was any limitation by the people upon the power of the convention? The circumstances of the present controversy do not call for an examination of the question whether a state constitution may be formed or amended, without the consent and action of the existing government, by the spontaneous or voluntary action of the people. This question was much discussed by counsel in the great case of *Luther* vs. *Borden*, 7 How. (U. S. Rep.) 1, 20, 24, growing out of the *Dorr Rebellion*, so-called. This case presented the question whether the people's government, established by the voluntary action of the people without the consent of the existing (charter) government, had displaced and annulled the latter. It was contended by the counsel, who maintained the validity of the Dorr Constitution, that the sovereignty of the people is supreme, "and may act in forming governments without the assent of the existing government: that in the United States no definite, uniform mode has ever been established for either instituting or changing a form of government, and that when an existing con-

stitution points out a mode of change the *people* are not bound, and may, if they please, adopt another mode." These propositions were all denied by Mr. WEBSTER, who argued the cause for the defendants, and whose revised argument, unsurpassed for condensed, logical force, beauty of illustration, and purity of language, will be found in Little & Brown's edition of his works, vol. 6, p. 217.

The Supreme Court of the United States did not directly pass upon these questions, holding that the question which of the two rival or opposing governments was the legal one was, so far as the United States was concerned, political, and not judicial in its nature (7 How. Rep. 1).

Our opinion is (and it was so judicially held by the Supreme Court of Rhode Island in the conviction of DORR for treason), that attempts even by the *people*, if these attempts are unauthorized by law or the constitution, and are made against the consent of the existing government, to form a new constitution and erect a new state organization, are *legally* revolutionary in their character, though politically considered they may or may not be justifiable, according to circumstances.[1]

But a constitution may be amended or changed, without revolution, with the consent of the existing government, or in pursuance of provisions therein contained, authorizing such amendment or change. This was the character of the amendment sought to be made in Missouri in the case under consideration. The following well-established and fundamental principles of our American system of government are applicable: The people are

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[1] In the constitution of some of the states it is expressly declared in substance that "the people have at all times, an unalterable and indefeasible right to alter, reform, or abolish their government in *such a manner as they may think proper.*"

Section 2 of the Bill of Rights of the Constitution of Missouri, in force previous to the new one, adopted June 6th 1865, contained the following provision in relation to the alteration thereof, viz.: "The people of this state have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of *altering* and *abolishing* their constitution and form of government whenever it may be necessary to their safety and happiness."

It also contained a provision (Art. 12), authorizing the General Assembly to propose amendments, two-thirds of each house concurring, which shall be published and take effect, if ratified by two-thirds of each house, after the next general election.

the source of all political power; but this power may be, and indeed generally is, conferred upon delegates or representatives. In electing delegates to a state convention the people may confer plenary or unrestricted power, and will be taken to do so, unless there is a clear limitation. The people may limit their delegates to a consideration of specified amendments, and if they do, the delegates cannot exceed their power. The legislature cannot, by *law*, operating *as a law*, impose restraints upon the people, or upon their delegates; but if *under and by virtue* of such a law the people vote in favor of a convention *specifically to revise particular parts* of the constitution and no more, this *evinces the intention of the people to confer upon their delegates power to this limited extent only.* This view has the sanction of high judicial authority.

The judges of the Supreme Judicial Court of Massachusetts, in 1833, in answer to questions submitted to them by the House of Representatives, were of the opinion that *under* the constitution (laying out of view the natural right of the people in cases of great emergency to change their fundamental law) there was no authority to make particular or specific amendments of the constitution except in the manner prescribed in the constitution itself.

And they furthermore were of the opinion that if the legislature should submit to the people the expediency of calling a convention of delegates for the purpose of revising or altering the constitution in *any specified parts* of the same, and the *people* should, by the terms of their vote, decide to call a convention to consider the expediency of altering the constitution in some *particular part or parts*, the delegates would derive their whole authority from such vote, and would have no right, under the same, to act upon, and propose amendments in other parts of the constitution not so specified. (Supplement to 6 Cush. Rep. 573, 1833). But if other amendments were proposed and subsequently ratified and adopted by the people, we see no reason to doubt their validity and binding force.

Mr. DRAKE'S opinion, cited in the note, is to the same effect as that expressed by the Supreme Court of Massachusetts.[1] The

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1 "You will agree with me," says Mr. DRAKE, "that Judge GAMBLE'S views as to the powers of a convention of the people are as broad as any supporter of

next inquiry is, was there, under this view, any limitation on the power of the convention restraining it from passing the vacating ordinance.

By recurring to section 5 of the Act of the Legislature under which the delegates were elected, it will be seen that in addition to considering amendments in relation to "the emancipation of slaves," and "to preserve in purity the elective franchise to loyal citizens," it was provided that the convention should consider "*such* OTHER *amendments as may be by* THEM *deemed essential to the promotion of the public good.*"

Here is no restraining language. Any amendment deemed by the convention essential to the public good may be made.

But it may be claimed that the vacating ordinance is not an "*amendment*" to the constitution, but an arbitrary edict—ukase—decree—sentence—judgment.

This view, we are inclined to think, makes the matter turn upon form rather than substance. The convention, as we have seen, had the power it exercised, and it is surely an immaterial consideration whether the instrument which embodies the sovereign will is called an "ordinance" or an "amendment" to the constitution.

It has been held in Texas (*Stewart* vs. *Crosby*, 15 Texas Rep. 546, 1855) that an *ordinance* appended by the constitutional convention to the constitution of the state is binding upon the

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Governor FLETCHER'S late action could wish. They maintain the simple, broad, and perfectly intelligible proposition, in which I must fully concur, that such a Convention is as almighty as the whole assembled people could be, unless in the law authorizing the election of the convention there be found words *limiting* or *restraining* the powers of the body. And if such words be found there, they do not, by their own force as law, limit or restrain the convention; for the legislature, being a subordinate body, has no power to do that; *but they indicate the purpose of the people in electing the convention, and the measure of power which they, by such election, confer upon the body.* For instance, should a law be passed authorizing the election of a convention, simply to revise and amend a state constitution, the whole power of the people over that matter would, by the election, be vested in the convention. But if the law should provide that the convention, in revising and amending the constitution, should have no power to adopt any provision establishing or recognising the institution of negro slavery, that would be a limitation; not imposed *as law* by the legislature, but signified by the people in the act of electing the convention under that law. This I take to be the precise definition of the relation of the law under which a convention is elected, to the powers of the body when assembled."

executive, legislative, and judicial departments of the government equally as if it had been incorporated into and formed a component part of the constitution.

These views lead to the conclusion that the appointees of the Governor, and not Messrs. BAY and DRYDEN, were *de jure* the judges of the court in June 1865, for legally there could not be two sets of judges at the same time for the same court.[1] (See

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[1] In expressing the view that the vacating ordinance was valid, I wish to add that my mind does not repose upon the correctness of this opinion with that certainty and positiveness that are always desirable, though, unfortunately, not always attainable. Looking at section 5 of the Act of the Assembly, before quoted, it is difficult to see that it imposes any limitations on the power of the convention. It refers specifically to two amendments, one in relation to slavery, and one in relation to the elective franchise, which were, doubtless, the leading and primary objects of the contemplated convention, and then confers plenary power over all other subjects. The word "amendment" is not, it seems to me, the material one. Instead of *amending* the "old," could not the convention, as they did, *make* a new constitution? But that the opposite view may be seen, and our readers judge for themselves, we state some facts not alluded to by Mr. DRAKE. The convention met and organized January 6th 1865. On the 11th day of that month they passed an "ordinance" for the immediate abolition of slavery in Missouri. This was never submitted to the people. On the 17th day of March, the vacating ordinance was adopted. This was never submitted to a popular vote. These were adopted in convention *before* the new constitution was completed. When the constitution was completed, it provided that it should be submitted to the people on the 6th day of June, but this did not include the ordinances above named. These ordinances, if valid, went into effect before the election on the 6th of June; and would have been operative had the new constitution been rejected. Many who deny the validity of the vacating ordinance, admit the validity of the ordinance of emancipation, on the ground that it was an alteration of the organic law, and was therefore an "amendment." Mr. GLOVER, Cols. GANTT and BROADHEAD, and others, in the "Address" before alluded to, take this view, or, at least, do not controvert its correctness. Their argument against the validity of the vacating ordinance may be thus condensed:—

The convention could only "amend" the constitution. The constitution (Webster's Dict.) is "a system of fundamental rules, principles, and ordinances for the government of a state." Nothing is an amendment which does not leave its impress upon the organic law, and which does not remain established as a part of it. The vacating ordinance does not possess these attributes, and would have been invalid, even if it had been inserted in the body of the constitution.

On the other hand, it is maintained that the constitution is a law—a rule—and subject to amendment by the people. By it, unless amended, Judges BAY and DRYDEN were entitled to hold for six years. The convention ordained that instead of holding six years their terms should expire May 1st, and the residue of the term be filled in another manner, viz., by executive appointment. This was a *change* in the law or rule laid down in the constitution, and therefore strictly and literally an amendment.

Hildreth vs. *McIntire*, 1 J. J. Marsh. (Ky.) 206 (1829) growing out of the "Old" and "New" court controversy in Kentucky: see decisions of "New" Court, reported in 2 T. B. Monroe Reports, and the history of this judicial struggle, in Judge Robertson's Law and Politics, Men and Times, p. 49 et seq., and in his Sketch of the Court of Appeals, in Collin's History of Kentucky).

With respect to the action of the Governor in the forcible

The authors of the "Address" before referred to, signed by some of the acutest and ablest lawyers in the state, lay down six propositions as the groundwork of their argument. These are neatly, clearly, and forcibly expressed. We subjoin them, that both sides of the case may be exhibited. They are as follows:—

"1st. That an assembly of any number of citizens less than the whole number of the legal voters of the state, however respectable for character, talents, and integrity, has no right to speak for or represent the people of the state, except in virtue of delegated authority.

"2d. That in order to the delegation of any such authority there must be regular action on the part of the lawfully constituted organs of popular will and power, and the intention to delegate the power claimed must be clearly expressed.

"3d. That when there is such a delegation of powers, the ordinary, well-understood rules governing the relation of principal and agent apply with even greater strictness to the political agents of the people. Such power as the people have conferred on their agents, they have, and all other power is withheld, or reserved to the people themselves.

"4th. If the agents of the people thus authorized do those acts only to which their delegated powers extend, what they do is the act of the people, and if not in contravention of 'the supreme law of the land,' is binding on all citizens of the state; but if the agents of the people transcend their power, and attempt to do something which the people have not authorized them to do, then they are, as to such unauthorized act, entirely without warrant, and their action is null and void.

"5th. That the ousting ordinance was in no sense 'an amendment of the constitution of the state' of Missouri; that it does not alter the organic law, but it is a mere sentence against certain designated officials, inflicting upon them, without charge or trial, a deprivation of office; and said ousting ordinance being beyond the powers of the convention (as defined in the Act of Feb. 13th 1864, and ratified by the vote of the people in Nov. 1864), is therefore a usurpation of power, and void.

"6th. A political agent, or agent of the state, may, like an agent of an individual, transcend his powers by doing something not within the scope of his authority. In this case his act may be ratified and confirmed by his constituents upon a direct reference of it to them, and, in that case, ratification of the act takes the place of an original authority to do it. But nothing of this nature can be pretended in aid of the act of the late convention, called the Ousting Ordinance, for that ordinance never was submitted to the people for ratification, and if it ever took effect at all, was effectual on the 1st of May 1865."

removal of the judges, different opinions may be and are entertained. We freely confess our dislike to the arbitrament of judicial questions and controversies by the bayonet. The bayonet may "think," but we like the thoughts of judges better. Our history and jurisprudence alike show that our practice, our ideas, even our instincts, are in favor of the peaceable solution of all such questions.

As a consequence of this and of our system of government by which its powers are distributed into departments, and each department, instead of being supreme, is only an agent of the people, we have given a broader scope to the remedy by *quo warranto* or to proceedings in that nature, than is to be found in the jurisprudence of any other country.

In England *quo warranto* does not lie to test the right to offices of a political nature derived from the crown, these being thereby invested with a sort of sovereignty. But in this country the title to *all public offices*, from highest to lowest, may be tried in this proceeding.

In *Commonwealth* vs. *Fowler*, 10 Mass. 290, 301, an early case (A. D. 1813), it was claimed that an information in the nature of *quo warranto* did not lie against an officer appointed and commissioned by the Executive; that as the Executive has the exclusive right of appointing, so *he* has the exclusive right of determining when a vacancy in an office exists, the filling of which appertains to that branch of the government, the Executive being a branch of the government of the state, equally independent with the judiciary. But the Supreme Court of Massachusetts, not assenting to this reasoning, held that the validity of the appointment was judicially examinable. The same principle is very strongly asserted in *The State* vs. *Deliessline*, 1 McCord (S. C.) 52 (1821), and in the cases there cited; the Court (1 McCord 59) observing: "The Constitution is the supreme law of the land, equally obligatory upon representatives and individuals, and if a person is inducted into office by an unconstitutional law, this court will declare it inoperative and void." (*Dorr's Case*, 3 R. I. 299). In the celebrated case of *Bashford* vs. *Barstow* (4 Wisconsin R. 567, 1856, approved in Monthly Law Reporter, May 1856) the Supreme Court of that state decided, and we think properly, that where an incumbent of the office of governor of the state held a certificate of re-elec-

tion from the board of canvassers, that it had the jurisdiction and power to inquire into the legal right of the person thus holding the certificate, and to oust him if not legally entitled. Such a power by the judiciary over the incumbent of the *executive* office was stoutly denied by the respondent's counsel, but firmly asserted by the court, by whose judgment the respondent was ousted, and the relator established in the office to which the people had elected him.

Ordinarily, *quo warranto* lies and is available to test the right to a *judicial office: State* vs. *McBride*, 4 Mo. Rep. 303, 1836; *Clark* vs. *Commonwealth*, 29 Pa. State Rep. 129, 1858; *Ex parte Davis*, 41 Me. 38; *The People* vs. *Cowles*, 13 N. Y. (3 Kern.) 350 (determining right to office of supreme judge); *State* vs. *Moffit*, 5 Ohio Rep. 359, 1832 (contest for judgeship of the Common Pleas): and see generally *The People* vs. *Draper*, 15 N. Y. 532; approved *The People* vs. *Carpenter*, 24 N. Y. 86, 88; *The People* vs. *Pease*, 27 N. Y. 45; *Cook* vs. *Welch* (contest as to state treasurer's office), 14 Barb. 259, s. c. affirmed 4 Seld. 67; *The People* vs. *Van Slyck*, 4 Cow. 297; *The People* vs. *Vail*, 20 Wend. 12; *The People* vs. *Seaman*, 5 Denio 409. But we do not see how the validity of the vacating ordinance could be judicially determined by *quo warranto* or other direct proceedings in the peculiar exigency of the present case. Every circuit judge in the state was ousted, and therefore interested in the question. The supreme judges were directly interested. Neither the old or new judges could sit in the proceedings by *quo warranto*, if they had been instituted. The question involved, viz., the validity of the vacating ordinance, was, as we think, though there is ground for a contrary opinion, *judicial* in its nature; but, unfortunately, there was, as far as we can see, no competent judicial tribunal to try it.[1]

It is analogous to the illustration put by C. J. TANEY, in

[1] The Courts claim the right, in appropriate cases, to determine the validity and existence of constitutional amendments. Thus it is held that a state constitution can only be changed by the people in general convention, or in the mode prescribed in the instrument itself by submitting proposed amendments to the people; and if, in the latter method, every requisition of the constitution must be observed, and whether observed, will be *judicially examined and decided: Collier* vs. *Ferguson*, 24 Ala. 100, 1854; *State* vs. *McBride*, 4 Mo. 303, 1836; *Pratt* vs. *Allen*, 13 Conn. 109, 1839; *Opinion of Supreme Court*, 6 Cush. 573; *People* vs. *Auditor*, 3 Am. Law Reg. N. S. 332, 343, where the question how far the action of the Executive is the subject of judicial cognizance is somewhat discussed. And see also *State* vs. *Moffit*, 5 Ohio R. 362.

Luther vs. *Borden*, before referred to, as to the validity of the rival governments of Rhode Island. Without quoting, see 7 How. 39, 40.

So here, if Judges BAY and DRYDEN should come to the conclusion upon the trial that the vacating ordinance was valid, "they would cease to be judges, and be incapable of pronouncing a judicial decision upon the question they undertook to try." They cannot decide as a court at all unless they first affirm the invalidity of the vacating ordinance. And so, the new judges could not decide it without necessarily affirming its binding force.

What is the remedy? Where is the forum to decide? It seems clear that impeachment would not be applicable to the old judges if they held on, because if the vacating ordinance was valid, they had the legal right to continue in office; if not valid, they would not be judges at all, and hence impeachment or address would not lie. Again we inquire, *Who* is to decide? The matter is urgent. Infinite confusion and embarrassment if not strife and judicial anarchy are the result of having two sets of judges, only one of which, it is certain, has the legal right! *Hildreth* vs. *McIntire*, 1 J. J. Marsh. 206.

In the course of the argument of the celebrated *quo-warranto* case above referred to of *Bashford* vs. *Barstow*, to determine the right to the office of governor of Wisconsin, the chief justice put to the counsel for the respondent the following question:—

"CHIEF JUSTICE WHITON.—Suppose, Mr. Carpenter (Hon. Mat. H. Carpenter, of Milwaukie), we should return from dinner to-day and find three members of the bar in our seats, who threaten to remain by force, could not the governor displace them?

"MR. CARPENTER.—Certainly not. The court, I should suppose, would not concede such a power to the governor. If the governor may come here and establish the right claimants, then he must have the right to decide who the right claimants are. If he can decide that you are entitled to the bench, and establish you there, then he can also decide that the three usurpers are the rightful judges, and put them there. You should assemble elsewhere, punish by fine, send the sheriff to call the militia to arrest your rivals. But if the sheriff and the governor adhered to those and not to you, then you would be powerless, except by an appeal to the people:" 4 Wis. R. 567, 616; also, p. 65 of the printed trial, published by order of the legislature.

If, in the present case, the appointees of the governor had assembled elsewhere, and, following the advice of Mr. Carpenter, had issued warrants for the arrest of their rivals, the latter would

or could pursue the same course. Each court would have its adherents, and a civil conflict would be a natural if not necessary result.

Even if there should be no breach of the public peace, the embarrassment and confusion arising from two courts, or from the doubts which would exist respecting the title of the different judges, would be almost intolerable. It is perhaps true that the course pursued by the governor conduced to the peace and quiet of the state. Still, it is a dangerous power to allow the executive of a state to exercise. It may be that, in this case, his decision was legally right: but the next time it may be wrong. The only circumstance which relieves the act, or which restrains us from an unqualified condemnation of it, is its apparent, if not real, necessity. It was an exigency without a precedent. It is not within our province to pass a judgment upon its expediency or necessity. We only observe that it must find its mitigation or justification, in whichever light regarded, if it finds it at all, in the extraordinary and special circumstances of a case without a parallel.

We are concerned with the case in its juristical, not in its political, or, if it has them, its partisan aspects. The court struggle in Kentucky shows the necessity of such action on the part of the executive as will prevent strife and a subversion of justice.[1] J. F. D.

[1] An outline of this famous controversy, which came near plunging the state into civil war, may be thus given: In 1820 Kentucky was a state of debtors, and passed a series of "relief laws;" chartering the "Bank of the Commonwealth" with a deficient capital, whose issues soon depreciated, and prolonging from three months to two years the right of replevying judgments and decrees, unless the creditor would agree to accept at par the paper of that bank. In 1823 the Court of Appeals (Judges Boyle, Owsley, and Mills) in *Blair* vs. *Williams*, and *Lapsley* vs. *Brashears*, 4 Littell Rep., decided that this act was unconstitutional as to past contracts, as "impairing the obligation of contracts." The decision was unpopular. At the first meeting of the legislature after the decision (1823–4) a *majority* condemned the decision, but the requisite *two-thirds* vote could not be had to impeach or remove the judges. At the next session, as the legislature could not abolish the office (being a constitutional office) or remove the judges, they sought by indirection to do the same thing by an Act to "*reorganize*" the Court of Appeals. Under this Act the Governor, Desha, appointed four judges—Barry, Haggin, Trimble, and Davidge, who constituted the "New Court," so called, with whom the Governor sympathized and acted. The new judges for a while did business and rendered decisions (2 T. B. Monroe's Rep.), but after a while ceased to do so. F. P. Blair was their clerk, and by their order forcibly removed the records from the office of A. Sneed, the