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Precedents for the Judicial Power: Holmes v. Walton and Brattle v. Hinckley

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PRECEDENTS FOR THE JUDICIAL POWER: HOLMES V. WALTON AND BRATTLE V. HINCKLEY

THE decision in the last of the Legal Tender Cases,[1] holding that the power of Congress to make paper money legal tender is unlimited, aroused the usual controversies which have always attended all important decisions of the United States Supreme Court on constitutional questions, including that of the power of the judiciary to declare legislation unconstitutional. But unlike previous cases, the raising of this question in this instance had the effect of creating a permanent literature. One year after the handing down of the decision by the United States Supreme Court there appeared a very serious essay in the American Law Review,[2] which was the starting point of the modern literature of our subject, that is to say, the only literature we have on the subject, since what was written before that was sporadic in character and could hardly be said to have formed a literature. This essay was unlike anything that was previously written on the subject, in that it was not of the usual controversial character, but attempted to treat the subject from the point of view of historical scholarship.[3] This thesis may be briefly summar-

[1] Juilliard vs. Greenman, 110 U. S. 421 (March 3, 1884).

[2] Meigs, *The Relation of the Judiciary to the Constitution* (March-April, 1885), 19 American Law Review 175.

[3] Strictly speaking, it is of course impossible to write on the Judicial Power in a non-controversial way. Every subject involving a political doctrine is necessarily a controversial subject. Every work defending or attacking a political doctrine is therefore necessarily in the nature of special pleading. But special pleading may nevertheless use scientific methods which will lift it from the plane of ordinary political controversy. It is in this sense that Mr. Meigs' essay may be said to be non-controversial. It is also in this sense that the present essay is intended to be non-controversial.

ized thus: the Judicial Power as we know it, that is to say, the power of the courts to declare laws enacted by the legislative department of the same government, unconstitutional, is of strictly American origin. It did not, however, have its inception in the United States Constitution, but was exercised by the state courts during the period intervening between Independence and the adoption of the United States Constitution. In speaking of its novelty, the author, Mr. Meigs says:

> "Whatever its origin, it was emphatically a new departure in governmental science. English law reports and English history would be searched in vain for any parallel to it, nor are we aware that the history of any country can have furnished its basis. * * *
>
> "We may, therefore, safely assume that the American doctrine was new and original, and that the credit or discredit belongs exclusively to us."

Mr. Meigs then proceeds to express his surprise at the fact that so little attention had hitherto been paid to the history of this great institution, saying:

> "Believing it, as we do, to rest on the soundest basis of reason, and despite its aberrations to have been on the whole eminently beneficial, it has always been a matter of wonder to us that its history and development have not been the subject of frequent and thorough investigation. * * * Yet, despite all this, we know of no history of its growth and development."

He then states that neither Story nor Cooley, in their works on the Constitution, found it at all necessary to examine into the history of this institution, and follows with a critical reference to the brief sketch of our subject contained in Kent's Commentaries, saying:

> "He (Kent) says, for example, that it first received judicial construction in 1792, while, as a matter of fact the power of the judiciary had by that time been several times exercised, was very widely claimed

> and recognized, and was far on the way to being an established principle."

The author then proceeds to elaborate upon the real subject of his thesis, namely, his contention that the judicial power had been exercised by the state courts before the adoption of the United States Constitution. According to him there were seven decisions by state courts during the period intervening between Independence and the adoption of the United States Constitution in which this power was either asserted or exercised by state courts, the earliest of these being the case of Commonwealth v. Caton.[4] There follows a discussion of this case and four others,[5] making a total of five in all. With respect to the remaining two cases on his list, both of which he claims to have happened about the same time, about 1786, one in New Jersey and one in Massachusetts, he makes the following comments:[6]

> "Probably the next in point of time * * * was an obscure one in New Jersey, Holmes v. Walton, which is said to have decided that a provision in one of the seizure acts for the trial of certain cases by a jury of six was unconstitutional; but further than this we have been able to discover nothing."

As to the *Massachusetts* case:[7]

> "It appears also that the Supreme Court of Massachusetts had somewhere about this time held an act unconstitutional; but further than the mere mention of the case in a letter from J. B. Cutting to Jefferson, dated July 11, 1788, we have been unable to discover anything."

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[4] Decided in Virginia in 1782.

[5] The other four cases discussed by Mr. Meigs are: The case of Josiah Phillips, Virginia, 1778; Rutgers v. Waddington, New York, 1784; Trevett vs. Weedon, Rhode Island, 1786; Bayard v. Singleton, North Carolina, 1787. Mr. Meigs does not, however, think much of the *Phillips* case, so that Com. v. Caton is the first real case in his opinion.

[6] *Infra* note 2 at 180.

[7] 19 American Law Review 182.

Since the appearance of Mr. Meigs' essay some forty-four years ago there has been a flood of books and articles on our subject, although we are still waiting for the history of the growth and development of the Judicial Power. But there have been investigations, more or less thorough, on the subject of American precedents, with the result that the list has grown considerably beyond the seven cases mentioned by Mr. Meigs; and these investigations produced, among other things, articles purporting to give a detailed account of the two cases of which he could find no trace, which articles are supposed to have definitely established the position of these two cases on the roster of American precedents. The history of the *Holmes* case was unearthed and written by Professor Austin Scott,[8] and that of the lost *Massachusetts* case was treated at some length by Mr. A. C. Goodell, Jr.,[9] both of them writing in the 1890's. As a result, these two precedents have been part of our historiography during the past thirty years, although more careful historians still remain unconvinced as to the *Massachusetts* case. The profession generally, and the students of the subject, however, accepted both cases as genuine precedents, so that Massachusetts is considered as rightfully entitled to its place of honor among the states whose judiciary exercised the right prior to the adoption of the United States Constitution, and considerably prior to the assertion of the power by John Marshall in his opinion in Marbury v. Madison.[10] Professor Scott even

[8] Holmes v. Walton, 4 American Historical Review 456 (1899). In a footnote Professor Scott gives the following history of this article, which shows that this article was the restatement of a paper originally written in 1883. The statement in the text that this, as well as Mr. Goodell's article, were written in the 1890's refers therefore to the final form in which this article was published. Says Mr. Scott: "The following pages include portions of a paper prepared about fifteen years ago and read successively before a private literary club, 'The Fortnightly,' of Newark, N. J., in 1883, before the Rutgers College chapter of the Phi Beta Kappa in 1884, and before the American Historical Association, April 26, 1886. The paper was never printed in full, though an abstract of it appears in the *Papers* of the Historical Association, Vol. II, no. 1, page 45. The original paper was a study of the growth of the power of the judiciary to pronounce upon the constitutionality of laws, but the propriety of publishing any other part of it than the one here presented has been entirely obviated by the careful treatment of the subject in later years by several authors, and especially in the exhaustive work of Brinton Coxe of Philadelphia, *Judicial Power and Unconstitutional Legislation.*

[9] 7 Harvard Law Review 415 (1894).

[10] 1 Cranch 137, 2 L. ed. 60 (1803).

claimed on behalf of New Jersey, the honor to the right of first discovery in this field, in that the *Holmes* case was decided in 1780, and if it be true that it was a genuine precedent, it was undoubtedly the first recorded instance in America of a court declaring an act of its own legislature unconstitutional.[11]

Following this claim of Professor Scott on behalf of the state of New Jersey, the *Holmes* case has usually been accepted as the first American precedent, except by some historians who believe that there is an even earlier precedent in the so-called *Josiah Phillips* case, decided in Virginia in 1778. But the existence of the *Josiah Phillips* case as a precedent is of such doubtful character [12] that it can hardly be said to have affected the position of Holmes v. Walton, as the first precedent in the opinion of conservative historians.

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[11]Professor Austin Scott complains bitterly of the fact that both Meigs and Coxe failed to recognize the priority rights of Holmes v. Walton; and if the meaning of Holmes v. Walton as given by him be its true meaning, then his complaint is undoubtedly justified. In the footnote referred to above, Professor Scott says, after referring to Coxe's *Judicial Power and Unconstitutional Legislation:*

> "In that work, however, on page 222, the author, accepting the conjecture of Mr. William M. Meigs, is inclined to assign the New Jersey case of Holmes v. Walton to a date no earlier than 1786, whereas the constitutional question was raised before the Court as early as November, 1779, and decided on the seventh day of September, 1780, the case thus taking precedence in time of the other cases of like sort in which the principle was clearly acted upon.
>
> "Furthermore, Mr. Meigs, and Mr. Coxe following him, being without materials for an adequate knowledge of the case, passed it over with slight consideration of its possible influence in serving to widen the scope of judicial power in our federal system. This meagre treatment in a work speaking with all but final authority on its subject-matter, as well as numerous letters of inquiry concerning the case, which the present writer has received, lead him to give its history, in the hope that the following pages will call general attention to this early action of New Jersey and secure recognition of its value in determining forces which in the Constitution of the United States 'establish justice.'"

And in another footnote at the end of his article, Mr. Scott says:

> "The decision in the case of Trevett v. Weedon, in Rhode Island, 1786, and of Bayard v. Singleton, in North Carolina, 1787, both involving more or less the constitutional right of trial by jury, may have found some support in the New Jersey case of Holmes v. Walton, of 1780. A desire to compliment the authors of those decisions by imputing to them the possession of information sufficient to include a knowledge of this case in a sister state would perhaps warrant such an assumption. Lack of historical proof alone prevents the present writer from showing this courtesy to their memory."

[12] Coxe, *Judicial Power and Unconstitutional Legislation,* 220.

As to the position of Brattle v. Hinckley in this roll of honor, it is sufficient to say that it was accepted by a Special Committee appointed by the New York State Bar Association in 1914 for the purpose of inquiring into our subject, which Committee made three elaborate and very learned reports to the New York State Bar Association.[13] In its first report the Committee say:[14]

> "Massachusetts. 1786. In Brattle v. Hinckley and in Brattle v. Putnam, 7 Harvard Law Review, 415-7, 419-20; 2 Bancroft's History of the Constitution, 473, (letter Cutting to Jefferson), the Supreme Court of Massachusetts declared void statutes providing that in suits brought by absentees during the Revolutionary War to recover debts, judgment for all interest accruing during the war should be suspended until further act of the Legislature."

We have elsewhere[15] discussed, at some length, the five cases reviewed in the American Law Review article, and have come to the conclusion that they were not in any sense real precedents for the Judicial Power as we know it today. We have come to a similar conclusion with reference to the two cases here particularly under consideration. In fact, we believe that these cases did not deal with any constitutional problems, and that certainly no constitutional point was ever decided in either of them. And it is the purpose of this essay to re-examine the subject, setting forth the facts upon which the claims on behalf of these cases as precedents are based, as well as our reasons for rejecting the same, and which have led us to a contrary conclusion.

As already stated, the claims on behalf of these two cases have been set forth in two magazine articles. These will be further considered. But the claim of the *Holmes* case is somewhat different from the claim of the *Brattle* case, in that the former was originally asserted in a judicial decision, or what

[13] New York State Bar Association Year Book, 1915, at 230-365; 1916, at 163-219; 1917, at 195-274.

[14] *Ibid.* (1915) at 283.

[15] The reference here is to an earlier portion of a work now in preparation by the author, of which the present article forms a chapter.

purports to be a judicial decision. While the latter (or some Massachusetts decision of that period) was, as we have seen, first put forward in a letter from J. B. Cutting to Thomas Jefferson. The first claim with respect to the *Holmes* case was made in what, at first glance, appears to be an official and authentic court decision, namely in a case known as State v. Parkhurst.[16] In that case Mr. Chief Justice Kirkpatrick, who presided for many years over the New Jersey Supreme Court, is supposed to have written an opinion in which he said, *inter alia:*

> "At an early period of our government, while the minds of men were yet unbiased by party prejudices, this question was brought forward, in the case of Holmes v. Walton, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six-man jury, was repealed, and a constitutional jury of twelve men substituted in its place. This, then, is not only a constitutional decision, but a decision recognized and acquiesced in by the legislative body of the state."

This would seem to be testimony of the highest character; and one is rather surprised at Mr. Meigs' doubts on the subject. But upon further investigation we find that his doubts were not due to any unwillingness to accept evidence in support of early precedents. On the contrary, his bias was in favor, rather than against them. And if he refused to accept the statement, just quoted above, at its face value, it was due to the fact that the report in which the quotation appears is not really a report in our sense of the word. In this connection it must be remembered that Holmes v. Walton itself is not reported anywhere, as there were no official court reports at that time. The knowledge which Mr. Chief Justice

[16] 4 Halsted (9 New Jersey Law) 427, 443 (1802).

Kirkpatrick had of the case must therefore have been based either on the manuscript record of the case itself or on tradition. Mr. Meigs' researches evidently failed to discover any manuscript record of the case, and tradition was a rather unsatisfactory source of information at best, especially when we consider that there is no reference to this case in contemporary literature or other historical documents. Doubt would therefore be justified even if the evidence as to the authenticity of Mr. Chief Justice Kirkpatrick's opinion itself were beyond question. But that is not the case, as a glance at the volume known as 4 Halsted's Reports will show. Such examination discloses the fact that it was published in 1828, twenty-six years after the alleged decision in State v. Parkhurst and forty-eight years after the alleged decision in Holmes v. Walton. And the circumstances under which the *Parkhurst* case was reported long after its alleged occurrence, are not at all resassuring to the historical student.

To begin with, the year 1828 was a year in which political passions ran high, and one of the subjects of great political controversy at the time was this very question of the Judicial Power. It will be recalled that that was the year when Andrew Jackson was elected President of the United States under circumstances which aroused great passion and great concern on the part of all conservatives, particularly those who believed in the Judicial Power. The electoral campaign of 1828 came after a period of turmoil lasting some seven or eight years in which the judiciary, and its constitutional powers, was one of the political storm-centres, so that the advent of Jacksonian Democracy was considered an assault upon the courts. The supporters of the Judicial Power therefore considered it their duty to use all means at their disposal, including their historical knowledge, or supposed historical knowledge, in this battle for the right, which led to a curious outcropping of alleged reports of old cases, in which the principle of Judicial Power had been asserted or upheld.[17] Indeed, the fact that this case,

[17] The case of Commonwealth v. Caton already mentioned was, curiously enough, reported just one year before the publication of the report of State v. Parkhurst, although the case is supposed to have been decided as far back as 1782, and the circumstances under which it appeared make its genuineness extremely doubtful. The appearance so close upon the heels of each other of

which is supposed to have occurred in 1802, should have been reported in 1828 as an appendix to a volume of reports on current cases, is not without suspicion in itself, bringing into question if not the authenticity of the report itself, at least the motives which led to its publication. And on the subject of authenticity it must be remembered that not only was this case not reported until years after the alleged decision and after Holmes v. Walton, but that everybody connected with both of these cases, including Chief Justice Kirkpatrick himself, was dead at that time. To which should be added the important fact that the reporter himself did not claim to base his reports on any official documents which are part of any court records. He acknowledges himself "indebted to the politeness of the late Chief Justice Kirkpatrick for the following opinion delivered by him in the case of the State v. Jabez Parkhurst in the year 1802."

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two such cases, under such peculiar circumstances, is itself a matter of considerable significance from the point of view of historiography. And upon close inspection the curious circumstance of their almost simultaneous publication is accentuated by a certain affinity of style employed by the two judges whose respective opinions are reported, although one of the judges is supposed to have written in 1782 in Virginia, while the other wrote twenty years later in New Jersey, without having seen the opinion of his forerunner. In Commonwealth v. Caton, the opinion in which is supposed to have been delivered in 1782, Mr. Justice Wythe is reported to have said:

> "I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the Crown, and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine to protect one branch of the legislature, and consequently, the whole community, against the usurpation of the other; and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. Whenever traitors shall be fairly convicted by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from sentence of the law, I shall not hesitate, sitting in this place, to say to the General Court, *Fiat justitia, ruat coelum.*"

And in State v. Parkhurst, supposed to have been decided in 1802, Mr. Chief Justice Kirkpatrick is reported to have said:

> "I believe the time has not yet come in New Jersey, and I humbly trust in God it never will come, when a Court * * * will have anything to fear, either from legislative or executive interference on the one hand, or from the resentments or persecutions of party on the other. * * * But even were it otherwise, we are bound by an oath to administer justice according to the Constitution and laws of the state; and in so doing we shall at all times be able to adopt the maxim of our ancestors, and say, *Fiat justitia, ruat coelum.*"

He does not say when Mr. Chief Justice Kirkpatrick gave him this copy of an alleged opinion made in 1802, nor does he give any explanation why it was not published until 1828. And an examination of Mr. Chief Justice Kirkpatrick's alleged opinion raises some further doubt. Its whole tenor shows that it was written not for the purpose of deciding a pending case but for the purpose of bolstering up the Judicial Power. In this connection it is well to bear in mind that the year 1802 was also a period of great controversy over the Judicial Power.

Under this concatenation of suspicious circumstances one might well pause before accepting the passage quoted above as sufficient evidence in itself of the constitutional import of Holmes v. Walton. To begin with, there is at least a possibility that Mr. Halsted had either written or at least edited Mr. Chief Justice Kirkpatrick's opinion. And there is a very great probability that Mr. Chief Justice Kirkpatrick, who died shortly before the publication of this opinion by Halsted, wrote this opinion not in 1802 but shortly before his death, in the midst of the turmoil of controversy over the Judicial Power, and perhaps with a view to the impending great struggle attending the presidential campaign of 1828. Under these circumstances it is more than likely that the old man imagined many things to have happened in 1802 which in reality did not happen. An examination of the entire case of State v. Parkhurst and of the real issues therein involved makes it at least doubtful that the constitutional issue supposed to have been involved in Holmes v. Walton should have been drawn into question in the case in which Mr. Chief Justice Kirkpatrick is supposed to have written his opinion.[18]

[18] State v. Parkhurst was a proceeding in the nature of *quo warranto* to test the right of Jabez Parkhurst to the office of Clerk of the Inferior Courts of the County of Essex, brought by the Attorney-General, on the relation of Aaron Ogden who claimed to be himself entitled to that office. The facts and circumstances of the case were as follows: The Constitution of New Jersey provided that the office in question should be filled by the Council and Assembly in joint session. On October 30, 1800, Aaron Ogden was elected Clerk in accordance with this constitutional provision. In February, 1801, Ogden was elected United States Senator, and took his seat in the United States Senate on March 4, 1801. On December 1, 1801, the Legislature of New Jersey enacted that no one should hold a state office while serving as a member of the United States Senate or House. This was a re-enactment of a law passed in 1795, which seems to have fallen into desuetude because there was no means provided in the law for its enforcement. The law of 1801 provided that if one

But even if we should assume that the opinion was actually written in 1802, which is extremely unlikely, there is still the possibility that the Chief Justice not only went out of his way to drag in the constitutional issue which was not necessary to the decision, but that under the stress of the struggle of 1802 he was willing to accept some rumor as to the import of the decision in Holmes v. Walton without critical examina-

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holding such offices together, having been elected or appointed to either since the law of 1795 went into effect, should not resign within twenty days from the passage of the Act, his state office should be considered vacated. The Legislature adjourned on December 3rd. Ogden did not resign within twenty days from the passage of the Act. Thereupon, on December 23, 1801, the Governor appointed Jabez Parkhurst to the office, on the theory that the office had become vacant because of Ogden's failure to resign his seat in the Senate within twenty days. But Parkhurst happened to be a member of the Legislature which had just adjourned, and the New Jersey Constitution contained a provision that a member of the Legislature could not hold any other state office. The situation was clearly a very complicated one, and the answer as to whether or not Mr. Parkhurst was entitled to the office of Clerk involved quite a number of interesting legal constitutional questions. Mr. Chief Justice Kirkpatrick states that the answer to that question depended on the following points:

> "(1) On the construction and operation of the Act of December 1, 1801.
> "(2) On the operation of the commission granted to the defendant by the Governor of the state.
> "(3) And on the capacity of the defendant to take, in the situation in which he then stood."

The majority of the court decided against Mr. Parkhurst. Mr. Chief Justice Kirkpatrick dissented from this decision. Neither the arguments of counsel nor the opinion of the majority of the court are extant. Mr. Chief Justice Kirkpatrick does not hold the Act of 1801 unconstitutional. He nowhere says that the majority of the court did. There seems to have been no valid ground for such action, and his opinion shows that there *were* other reasons upon which the majority of the court have decided against Parkhurst. One was that Mr. Parkhurst was ineligible because of his membership in the Legislature. Another was that the Governor did not have the power of appointment. But in any event, even on the assumption that the majority of the court decided against Mr. Parkhurst because *they* held the Act of December 1, 1801, *un*constitutional, there clearly was no occasion for Mr. Chief Justice Kirkpatrick to become excited in the assertion of the power to declare a law unconstitutional. He was not announcing a principle on behalf of the court which needed defense or affirmation; nor was he opposing any principle announced by the court. On this assumption he and the court were in perfect agreement on this point. Clearly, this portion of the opinion, if written by Mr. Justice Kirkpatrick, could not have been written because of the necessities of the case before him, but with an eye to some political situation outside of the court. And in this respect, also, this case has a curious resemblance to Commonwealth v. Caton, for in that case, too, the excitement of Mr. Justice Wythe was altogether uncalled for, as the branch of the Legislature of which he speaks had never intended to usurp anything, as an examination of the case will clearly demonstrate. The two passages quoted above, if not the two entire opinions, were evidently written *ad hoc* for some political purpose and in view of some political exigency.

tion as to the true condition of affairs. This would not at all surprise anyone familiar with the history of the period, as will be shown in later discussion of the so-called lost Massachusetts precedent.

We are hardly left to conjecture as to the period when this opinion was written, or rather, as to when it was not written. A careful examination of the paragraph immediately preceding the one quoted above referring to Holmes v. Walton, and the two paragraphs immediately following it, demonstrate beyond question that this opinion, or at least these passages, could not have been written in 1802. The paragraph immediately preceding the one referring to Holmes v. Walton is as follows:

> "This (i.e., the question of the power of the judiciary to declare laws unconstitutional) is a question which of late years has been considerably agitated in these United States. It has enlisted many champions on both sides. * * * We may freely avail ourselves, therefore, not only of the sentiments and decisions which have prevailed in our own state upon the subject, but also of those which have prevailed in our sister states and in the United States."

And the two paragraphs immediately following the one referring to Holmes v. Walton read:

> "In later days, in the case of Taylor v. Reading, a certain act of the legislature, passed March 1795, upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie, was by the court held to be an *ex post facto* law, and as such unconstitutional, and in that case inoperative.
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> And with this decision before them (for the act was made pending upon the suit), and as I humbly conceive, fully acquiescing therein as a matter of principle, the legislature afterwards, in January, 1797, passed another act for the relief of the same defendant, Reading, in another way. These two cases in

> New Jersey, determined upon full consideration, the former in the time of Chief Justice Brearley and the latter in the time of Chief Justice Kinsey, both afterwards brought into the notice, and acquiesced in, and, if I may say so, sanctioned by the legislature, would be sufficient to rule the question. But the force of these cases is greatly increased by the uniform course of decision in other states, particularly Virginia and Pennsylvania, and above all by reported decisions involving the same question in the Supreme Court of the United States of America."

To those familiar with the history of our subject it will be news that the question of the power of the judiciary to declare laws unconstitutional had been "considerably agitated" in the years preceding 1802. It is true that the question of the powers of the federal judiciary had been agitated for several years prior to 1802, particularly in connection with the Alien and Sedition laws. But the powers of the state judiciaries were certainly not the subject of any agitation; and even as far as the federal judiciary is concerned the subject of the power of the courts to declare laws unconstitutional was not part of the agitation,—for the simple reason that the federal courts had never, up to Marbury v. Madison, declared any law unconstitutional, nor even formally asserted the power to do so. There were, it is true, occasional *discussions* on the subject, such as the one between Justice Chase and Justice Iredell in Calder v. Bull.[19] But the general public was hardly aware of these discussions, and there certainly was no agitation on the subject which "has enlisted many champions on both sides."

Therefore, the first paragraph just above quoted could hardly have been written in 1802. And this may be said, with even greater emphasis, of the last sentence quoted above. How, it may well be asked, could anyone writing in 1802 speak of "the uniform course of decisions in other states" upholding the power of the judiciary to declare laws unconstitutional? And how could anyone writing in 1802 say that the power was supported "above all by the reported decisions

[19] 3 Dall. 386, 1 L. ed. 648 (1798).

in the Supreme Court of the United States of America"? It should be remembered that we are speaking of a period antedating Marbury v. Madison, that is to say, of a period before the first decision on the subject in the United States Supreme Court. There can, therefore, be no question of the fact that this opinion was not written in 1802, when the case is supposed to have been decided. And for the reasons already stated it is apparent that this opinion was composed very shortly before its publication in 1828. In 1828 it could be truthfully said that the question of the power of the judiciary to declare laws unconstitutional had been of late years "considerably agitated in these United States," and that the subject had during those "late years" "enlisted many champions on both sides." And in 1828 it could be said with but a little stretch of the imagination that the power was supported by decisions in some states, and in the Supreme Court of the United States, although even then it could hardly be truthfully said that the force of the two cases supposed to have been decided in New Jersey was "greatly increased by the uniform course of decision in other states, particularly Virginia and Pennsylvania, and above all, by reported decisions in the Supreme Court of the United States of America."

This brings us to another question in connection with this opinion,—the question of the care which which the writer of it, whoever he was, handled his facts. Anyone familiar with the subject knows that there was no such "uniform course of decision" in states other than New Jersey as is suggested in the passage quoted above. It may also be added that in so far as the state of Pennsylvania is concerned, which is particularly referred to in this passage, there was not a single decision upholding the power until 1825.[20] But even more interesting is his reference to adjudications in New Jersey, since it is this reference which is, so far, our sole authority for the assertion that this point had been decided in the *Holmes* case. In this connection the reference to a case entitled Taylor v. Reading is of the greatest importance.

[20] In Eakin v. Raub (12 Sergeant & Rawle 330) decided in 1825 by the Supreme Court of Pennsylvania, Mr. Justice Gibson said: "But, although this power has all along been claimed by the state judiciary, it has never been exercised."

It will be noted that according to Mr. Chief Justice Kirkpatrick (assuming that he wrote the opinion referred to herein), there were two cases in New Jersey in which laws were declared unconstitutional, prior to 1802. One of them was the *Holmes* case, the other, Taylor v. Reading, the latter decided somewhere between March, 1795 and January, 1797. Now it so happens that we have fairly full reports of the cases decided in New Jersey since the adoption of the United States Constitution in 1789.[21] But one searches in vain for

[21] It is important to note in this connection that we have a series of New Jersey reports purporting to be based on official documents, covering practically the entire period since 1789, although none seem to have appeared contemporaneously until 1806. The first of these volumes, edited by Richard S. Coxe, known as 1 Coxe, and also as 1 N. J. L., seems to have been published in 1816, and contains cases decided in the Supreme Court from April term 1790 to November term 1795; and as an appendix certain cases decided in the Supreme Court commencing with April term of 1789, together with some *nisi prius* during the same period. The second volume of these reports, edited by William S. Pennington (one of the judges of the Supreme Court) contains reports of cases in the Supreme Court from February term 1805 to February, 1808 (known as 1 Pennington and also as 2 N. J. L.). The third volume, edited by the same reporter, and known as 2 Pennington and also as 3 N. J. L., contains reports of cases in the Supreme Court from May term 1808 to September term 1813. The fourth volume was edited by Samuel L. Southard, who seems to have been the first official reporter acting under a commission from the state. His first volume (known as 1 Southard and also as 4 N. J. L.) contains decisions of the Supreme Court from February term 1818 to November term 1818, which seem to have been reported by him in pursuance of his commission of official reporter, and in addition thereto a section designated as "Additional Cases" covering decisions of the Supreme Court from February term 1816 to September term 1817, which he says in a note were cases "determined subsequent to the publication of the last state reports," and evidently designed to fill the gap between the reports contained in 2 Pennington and the cases reported by Southard under his official appointment, which occurred on February 13, 1818. The next volume in the series, known as 2 Southard and also as 5 N. J. L., contains cases decided in the Supreme Court from the February term of 1819 to May term, 1820. The Sixth volume in the series was edited by our friend Mr. Halsted (William Halsted, Jr.), who seems to have succeeded Mr. Southard as official reporter. It covers cases decided in the Supreme Court from November term, 1821, to November term, 1822, and in addition thereto a series of cases supposed to have been determined from April term, 1796 to September term, 1799. The Seventh volume in this series, known as 2 Halsted and also as 7 N. J. L., covers cases decided in the Supreme Court from November term, 1822, to May term, 1824; and in addition a separate section containing decisions of the same court from November, 1799 to May term, 1804. This part of the volume is entitled, "Cases decided in the time of Chief Justice Kinsey," and has the following note by the reporter:

> "The reporter is indebted to the politeness of Richard S. Coxe, Esq., for the following reports of cases decided in the time of Chief Justice Kinsey."

The Eighth volume in this series, which was edited by the same reporter, known as 3 Halsted and also as 8 N. J. L., contains cases in the Supreme Court from September, 1824, to November term, 1826. The next volume in

a report of the case of Taylor v. Reading, which must have been a great case if Mr. Chief Justice Kirkpatrick's report of it be true,—that is to say, if it had actually declared an act of the legislature unconstitutional. Such cases are considered a matter of importance even in our own day, when the holding of laws unconstitutional is a matter of frequent occurrence. It certainly must have been a matter of tremendous importance in 1795. Yet no such case is reported in the various collections of reports, and no searchers for precedents have ever been able to discover any record of this case. We must therefore assume that there was no such decision, and that the author of this opinion took some vague rumor for an authenticated fact. And if that could have happened with reference to a case supposed to have been decided in 1795 or 1796, we may be pardoned if we consider the report in 4 Halsted, worthless as evidence with reference to a case supposed to have occurred in 1780.[22]

We may now turn to Professor Austin Scott's article, our only other source of information with respect to the *Holmes* case. In general, he substantiates the story outlined in the opinion attributed to Chief Justice Kirkpatrick, to the

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the series, known as 4 Halsted and also as 9 N. J. L., is the volume in which State v. Parkhurst is reported. It contains reports of cases from February term, 1827 to February term, 1828, and, as an appendix, the case of State v. Parkhurst. It will thus be seen that there is a practically complete series of reports of at least the more important cases from 1789. It will also be noted that Mr. Halsted reported in his first two volumes all the old cases which he considered of importance, in so far as they had already not been reported in 1 Coxe.

[22] What we have said above with reference to the doubt cast upon the existence of Taylor v. Reading by the fact that it is not included in any of the collections in the reports of cases applies, of course, with equal force to State v. Parkhurst itself. 2 Halsted presumably contains all the cases occurring between 1799 and 1804, which Mr. Coxe had collected and which Mr. Halsted considered important enough to merit publication. It is also a fact worthy of note in this connection that Mr. Chief Justice Kirkpatrick remained Chief Justice until October 29, 1824, so that Mr. Halsted was official reporter for a period of about three years during Mr. Kirkpatrick's incumbency of the Chief Justiceship. During that period Mr. Halsted had shown his interest in old cases by publishing a series of old reports covering a period from 1796 to 1804, but for some unaccountable reason Chief Justice Kirkpatrick failed to communicate to him his opinion in State v. Parkhurst. This circumstance is accentuated by the fact that notwithstanding Mr. Halsted's evident interest in old cases, and his close association with Mr. Chief Justice Kirkpatrick, this opinion was not communicated by the Chief Justice to Mr. Halsted for the two-year period intervening between the last of the old cases reported by Mr. Halsted in his volume 2 and his volume 4, which appeared in 1828, leaving volume 3 to appear in the meantime without any old cases.

effect that in this case an act of the Legislature of the state of New Jersey providing for a trial by a jury of six in certain cases was declared unconstitutional. But Prof. Scott fills in the bare outline indicated in the opinion printed in 4 Halsted, by giving certain details, which he claims are based upon an examination of the docket of the Supreme Court of the state of New Jersey, certain manuscript records of the case still preserved in the archives of the New Jersey Supreme Court, and certain statutes passed during the period were here under consideration. The full story, as he tells it is as follows:

> "On October 8, 1778, the New Jersey legislature passed an act designed to prevent commercial intercourse with the British forces who were then encamped on Staten Island, adjacent to New Jersey. This Act was the first of a series known as 'seizure laws,' and made it lawful 'for any person or persons whomsoever to seize and secure provisions, goods, wares or merchandize, attempted to be carried or conveyed, into or brought from within, the lines or encampments, or any place in the possession of the subjects or territories of the king of Great Britain.'"

Under these laws, any person who suspected that another person was carrying goods into or from the British lines could seize the same, bring them before a Justice of the Peace, before whom the case was then heard, and if the goods were found to have been contraband of war, they were forfeited to the seizer, or in certain proportions to the state and the seizer. All the seizure laws provided that either party might demand a jury trial. The one in question herein does not specifically provide for the number of persons of which the jury should consist, but it contains the provision that upon the demand being made for a jury, "the said justice is hereby required to grant the same, and to proceed in all *other* respects as in the like case in the act entitled," etc.,—the reference being to a law passed on February 11, 1775, *before* the Colony of New Jersey had declared its independence and become the state of New Jersey, commonly known as the Six Pound Act. The Six Pound Act provided for a jury of six in certain cases.

Elisha Walton, the defendant in Holmes v. Walton, was a major of militia of the state of New Jersey, and some time during the summer of 1779 he seized certain goods in the possession of John Holmes and Solomon Ketcham of the value of about twenty-seven thousand dollars which he claimed they were carrying from the British lines. He brought them before a Justice of the Peace of Monmouth County, where a trial was had before a jury of six, and the goods adjudged to be contraband, and therefore declared forfeited in accordance with the provisions of the Seizure Law in question. Thereupon, Holmes and Ketcham sued out a writ of error from the Supreme Court against Walton, the case thus acquiring the title of Holmes and ano. v. Walton, under which it has become famous. The case was argued in the Supreme Court in November, 1779 and decided in September, 1780,—the decision being a reversal of the judgment obtained before the Justice of the Peace. Afterwards a new trial was directed.

According to our historians, the point raised by the plaintiffs in error was that the seizure law of October 8, 1778, was unconstitutional because it provided for a jury of six, instead of a jury of twelve; and the reversal was upon the constitutional ground. Subsequently, the seizure law was amended by the Legislature so as to provide for a jury of twelve. "This, then," Mr. Chief Justice Kirkpatrick is reported to have said in State v. Parkhurst, "is not only a constitutional decision, but a decision recognized and acquiesced in by the legislative body of the state." And Prof. Austin Scott not only fully agrees, but adds certain embellishments of his own, the sum and substance of which is that the course of legislation shows a struggle between the legislature and the courts, which ended in the legislature's finally surrendering unconditionally to the courts and providing unqualifiedly for a jury of twelve whenever a jury is demanded. The final act of surrender, according to Prof. Scott, took place on December 22, 1780, when the Legislature of New Jersey passed a law *requiring* the Justice of the Peace to grant a jury of twelve in such cases. Previously, and between the time when the case was argued in the Supreme Court and the actual decision by the court, to wit, on Christmas Day, 1779,

the Legislature had passed an act *authorizing* the Justice of the Peace to call a jury of twelve. This, says Mr. Scott, was done because of the constitutional point raised in the argument of the *Holmes* case, and in order to placate the Court and prevent an adverse decision. But, as is usual in the stories of this heroic age, the court was firm, with the inevitable result of an unconditional surrender by the Legislature, as witness the Act of December 22, 1780.

In order that the reader may be able to judge how much of all of this assertion is justified, it will be necessary to look into the Constitution of the state of New Jersey adopted on July 2, 1776; the actual argument in the case of Holmes v. Walton; and the course of legislation referred to by Prof. Scott, as well as some legislation not referred to by him. But before we proceed to this examination, some further observations should be made upon the condition of the "record" in the case of Holmes v. Walton in the Supreme Court of New Jersey. Referring to this record, Prof. Scott says:

> "Persistent search has failed to discover the opinion of Chief Justice Brearley delivered in this case. It was probably an oral opinion and never written. Happily, however, there exists uncontrovertible proof of its import."

Two things must be observed in connection with this statement: In the first place, there is not the slightest vestige of evidence that Mr. Chief Justice Brearley ever delivered an opinion in this case. The court before whom this case was heard consisted of three judges, of whom Mr. Chief Justice Brearley was one; and there is no indication anywhere as to which of the judges, if any, ever delivered an opinion. The fastening of an opinion in this case on Chief Justice Brearley is just one of those little details which are sometimes added by this class of historians in order "to give verisimilitude to a bald and unconvincing narrative." This, however, is of no particular importance. But the question of the existence, and particularly of the import, of such an opinion is quite another matter. As to this, it is important to note that this is not a case where the papers have been lost. On the contrary, the files of the Supreme Court of New Jersey contain

two packages of papers in connection with this case,—one of them quite a voluminous one,—containing all sorts of unimportant matter, such as depositions, etc., *but no opinion.* Nor is there any indication anywhere, either among these papers or in the docket of the Supreme Court, which has also been preserved, indicating that an opinion was ever written. To anyone really interested in discovering the truth of the matter, this alone should be sufficient proof that there was no such opinion. It should be remembered that if the claims advanced on behalf of the *Holmes* case be true it was the first instance of a state court, which means *any* court, declaring an act of legislation unconstitutional. Clearly, therefore, no court would have made such a decision without writing an opinion; and no opinion of this kind, if written, could have been lost, when all the papers in the case, including a lot of unimportant documents, have been carefully preserved, for nearly one hundred and fifty years.

But if no such opinion was given, either orally or in writing, why was the case reversed? Our answer is that the decision was not at all on constitutional grounds, and was not considered important enough for any opinion to be written therein. And we shall put forward the bold claim that the examination which we are about to make conclusively proves that the decision *could not* have been on constitutional grounds. So that this is not merely a case in which there is no proof for the assertion of a constitutional decision, but a complete demonstration that there was no constitutional decision.

We have already stated that the law of October 8, 1778, did not provide for a jury of six, but simply that upon the demand for a jury the Justice was required to grant the same, and "to proceed in all other respects as in the like case" provided in the Six Pound Act. The Constitution of New Jersey, adopted July 2, 1776, provided that all laws "lately published by Mr. Allinson" and all others not "repugnant" to the Constitution should be continued in force.[23]

[23] "*Article XXI.* That all the Laws of this Province, contained in the Edition lately published by Mr. Allinson, shall be and remain in full Force, until altered by the Legislature of this Colony (such only excepted as are incompatible with this Charter) and shall be, according as heretofore, regarded

The Six Pound Act hereinbefore referred to was one of the laws contained "in the Edition lately published by Mr. Allinson." It was thus continued in force by the Constitution, but only in so far as it was not "repugnant to the Rights and Privileges contained in this Charter," of which rights, trial by jury was a fundamental one. It is the theory of Mr. Chief Justice Kirkpatrick, as reported in 4 Halsted, and of Prof. Austin Scott, as well as all others who point to the *Holmes* case as a "precedent," that the provision in the Constitution of New Jersey for trial by jury guaranteed a jury of twelve. And their assertion is that the point raised by counsel for Holmes and Ketcham was that the act of October 8, 1778, was unconstitutional in that it provided for a jury of six only. The latter assertion is utterly unfounded, and would in fact have been incorrect if made. For as we have already pointed out, the seizure law of October 8, 1778, did not provide for a jury of six, but only for *a jury,* and that the justice was to "proceed in all *other* respects" than those specifically provided for in the Seizure Law in accordance with the Six Pound Act of February 11, 1775. If, therefore, the contention were true that the constitutional provision for trial by jury meant trial by a jury of twelve, then clearly the provision for a jury contained in the Act of October 8, 1778, which was in the identical language of the Constitution must

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in all Respects by all civil Officers, and others, the good People of this Province.

"*Article XXII.* That the Common Law of England, as well as so much of the Statute Law, as have been heretofore practiced in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature, such Parts only accepted as are repugnant to the Rights and Privileges contained in this Charter; and that the inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony, without Repeal for-ever.

"*Article XXIII.* That every person, who shall be elected as aforesaid to be a Member of the Legislative-Council or House of Assembly, shall, previous to his taking his Seat in Council or Assembly, take the following Oath of Affirmation, viz. I, A. B. do solemnly declare, that, as a Member of the Legislative-Council (or) Assembly (as the Case may be) of the Colony of New-Jersey, I will not assent to any Law, Vote or Proceeding, which shall appear to me injurious to the public Welfare of said Colony; nor that shall annul or repeal that Part of the third Section in the Charter of this Colony, which establishes that the Elections of Members of the Legislative-Council and Assembly shall be annual; nor that Part of the twenty-second Section in said Charter respecting the Trial by Jury; nor that shall annul, repeal, or alter any Part or Parts of the eighteenth or nineteenth Sections of the same. And any Person or Persons, who shall be elected as aforesaid, is hereby empowered to administer to the said Members the said Oath or Affirmation."

have meant trial by a jury of twelve; and any Court would have so construed it even if the provision for a jury had not been followed by the phrase "in all *other* respects," clearly excluding the question of jury from the purview of the Six Pound Act. If "a jury" meant a jury of twelve in the Constitution it meant the same thing in the Seizure Law. Also, the Six Pound Act was only preserved by the Constitution in so far as it was not repugnant to the Constitution. If, therefore, a jury of six was considered repugnant to the constitutional provision in question, the Six Pound Act of February 11, 1775, clearly stood repealed to that extent. The provision of the seizure law of October 8, 1778, for a jury must have meant a jury such as is provided by the Constitution and nothing else.

This was, in fact, the argument made by counsel for Holmes and Ketcham, in so far as that argument can be gathered from the Bill of Exceptions filed by them.

This brings us down to another interesting phase of the case, not as it actually occurred, but as it appears in retrospect to the eye of the beholder of "precedents." Anyone reading the now current literature of the subject would imagine not only that the constitutional question was squarely raised, but also that it was *the only* question raised, —so that a reversal would necessarily imply a sustaining of the constitutional objection. As a matter of fact, the so-called "constitutional" point was one of eight points noted in the Bill of Exceptions, being the *seventh* in order, and *following* a point to the effect that "the said Elisha Walton did at his own expense, and without the consent of said John and Solomon, treat with strong liquors the jury sworn to try this cause after they were impanelled and appeared, and before they gave their verdict in the said cause." This in itself is sufficient to indicate the importance attached to this alleged constitutional point by the counsel who made it. But of even greater interest is the wording of the so-called constitutional point itself. It is worded as follows:

> "Because the jury sworn and who tried the above cause, and on whose verdict judgment was entered, consisted of six men only, when by the laws of the land it should have consisted of twelve men."

It will be noticed that no reference whatever is made here to any constitution, but merely to the laws of the land. Nor is there any claim made that any law was unconstitutional. Evidently the point counsel intended to raise was that the law of October 8, 1778, itself provided for a jury of twelve. *This was undoubtedly a correct interpretation of that act, assuming that the constitutional provision for trial by jury meant by a jury of twelve.* It is true that subsequently counsel for the plaintiffs in error, evidently as an after-thought, filed "Additional Reasons" for the reversal of the judgment,—the "Reasons" being the substitute for our Bill of Exceptions,—and in these additional reasons reference to the Constitution is made in the following words:

> "For that the said Justice had not Jurisdiction of the said cause or plaint but the same was *coram non judice.*
>
> For that the Jury who tried the said plaint before the said Justice consisted of six men only contrary to law.
>
> For that the Jury who tried the said plaint before the said Justice consisted of six men only contrary to the Constitution of New Jersey.
>
> For that the proceedings and trial in the said plaint in the court below, and the judgment thereon given were had and given contrary to the Constitution, practices and laws of the land."

Two things are to be noted about these "Additional Reasons": In the first place, there is still a separate reason, that the jury of six is not according to "law," as distinct from the point that it is not according to the Constitution, and this point is put foremost. Secondly, that even in this document there is no reference to the unconstitutionality of any law, but merely that the jury before whom the defendants were actually tried was not in accordance with the Constitution. The meaning of this document, particularly when taken in connection with the original "Reasons," is quite evident: Counsel for Holmes and Ketcham were, in so far as this particular question of the jury of six is concerned, making the point, first and principally, that under the law

of October 8, 1778, they were entitled to a trial by a jury of twelve men, and then, that if the law of October 8, 1778, does not specifically provide for it then the Constitution does. The point, however, was never raised, and clearly was never intended to be raised, that the law of October, 1778, was unconstitutional,—the argument of counsel for plaintiffs in error clearly being that if the law of October 8, 1778, does not expressly provide for a jury of twelve by merely saying "a jury" then it is silent on the subject, and the constitutional provision comes into play by guaranteeing a jury, which means a jury of twelve, according to the "practice and laws of the land."

So much for the argument: Now as to the decision. There being no opinion, it is of course impossible to say on what ground the reversal was had. It might just as well have been because of the strong liquor with which Major Walton plied the jury, or on any one of the other six grounds enumerated in the original "Reasons." One thing is certain, however, and that is that the reversal *was not* on the seventh ground mentioned in the original "Reasons" and enlarged upon in the "Additional Reasons," *i.e.*, that the reversal was not on constitutional grounds. We have already mentioned the absence of any opinion, which, we believe, is in itself sufficient proof of the fact that this was not an important constitutional decision. It is easy to understand why no opinion should be written when a judgment is reversed because the plaintiff plied the jury with strong liquor, or because of insufficiency of evidence, which was among the other points mentioned in the "Reasons"; but it is utterly inexplicable if the reversal were on constitutional grounds. But there is more than this negative reason. The subsequent course of legislation in the state of New Jersey, to which Prof. Scott points with so much assurance as bearing out his theory, in fact completely demolishes it and proves to a mathematical certainty that this was not a constitutional case.

As already suggested, in order to get the real import of this course of legislation, more than what Prof. Scott mentions in his article must be considered. We shall begin, however, with that, to which he, himself refers. The first piece of legislation which he considers in this connection is the Act

passed on Christmas Day, 1779, which *authorized* the Justice of the Peace to summon a jury of twelve. The preamble to this Act specifically says that the change, *empowering* the Justice to call a jury of twelve, was due to the fact that "Causes of Considerable Value may, by Virtue of this or the before cited Acts, be prosecuted before a Justice of the Peace, wherein it may be prudent to have the judgment of a greater Number than six jurors." Prof. Scott in effect says that this statement by the New Jersey Legislature was a subterfuge. That the real reason why the Justice was empowered to call a jury of twelve was not because it might, in the opinion of the Legislature, be prudent to do so in some of the cases, because of the size of the amount involved; but that the real reason was the argument made the previous November in the Supreme Court by counsel for Holmes and Ketcham. We know of no reason to suspect the Legislature of New Jersey of dissimulation in this matter, and the subsequent course of New Jersey legislation on this subject proves to our minds, at least, that the Legislature meant exactly what it said.

The next enactment of the New Jersey Legislature in this connection is the Act of December 22, 1780, already referred to,—which in Prof. Scott's opinion marked the unconditional surrender by the Legislature to the courts. Without going into detailed discussion at this point we desire to note that the difference between the two acts in so far as the jury is concerned is only the logical outgrowth of the Act of December 25, 1779. That act, as we have seen, empowered the Justice to summon a jury of twelve, because the magnitude of the amounts involved in these cases sometimes made it prudent to have trial by a jury of more than six. But if that be so, it was only fair and just that the question of the size of the jury should not be left to the discretion of the Justice of the Peace, but should be a matter of right to the parties litigant themselves, whose interests were at stake. Hence the provision of the later enactment *requiring* the Justice of the Peace to summon a jury of twelve whenever either of the parties demanded *such* a jury. Indeed, there is some doubt as to whether the second Act was intended to be a

change of the law of December 25, 1779, and not an explanation of the same.

The Act of December 22, 1780,—which was in the nature of a supplemental act to the original seizure law,—was followed by a more comprehensive enactment in the nature of a substitute for all preceding seizure laws, passed on June 24, 1782. The preamble to this act reads as follows:

> "Whereas sundry Acts have been passed at different Periods since the Commencement of the present War with Great Britain, for preventing the Subjects of this State from trading with the Enemy, and from going into or coming out of their Lines without lawful Permissions or Passports; and as several of those Laws have been at different Times in Part repealed and altered in such Manner as to render them difficult in some instances to be clearly understood; for Remedy whereof, etc."

Then follow various enactments, including a provision that whenever a jury is demanded, a jury of twelve shall be summoned, irrespective of whether or not the demand was for a jury of twelve, and also creating special tribunals consisting of three Justices instead of one, before whom such cases were to be tried when no jury was demanded by either side.

In order that we may understand the bearing of this last-mentioned enactment on the question of a six or twelve-man jury, it must be borne in mind that there is no claim that the Act of December 22, 1780, was not sufficient to meet the so-called constitutional requirements. On the contrary, Professor Scott points to that enactment as the final surrender by the legislature to the courts. He, therefore, fails to refer altogether to the act of June 24, 1782, as if the Act of December 22, 1780, were the end of the development of law on the subject. But it certainly was not, and such omission was entirely unjustified, for this last enactment throws light upon the two preceding ones. It shows that the Legislature was doing exactly what it professed to do, namely, trying to evolve a proper body of laws, both substantive as well as procedural, concerning trading with the

enemy, quite irrespective of any decisions by courts, or imaginary constitutional questions. It also shows that the original acts had been drawn carelessly, and that their administration raised various questions as to their meaning, questions that had nothing to do with constitutional problems but very much so with the administration of justice.

But the *Holmes* case and the so-called constitutional question raised thereby, cannot be finally disposed of by a consideration of the seizure laws alone, nor even if we include the Act of June 24, 1782. The final answer to its pretensions is given by an examination not of the seizure laws, but of the general laws with respect to jury trials then prevailing in the state of New Jersey, a matter which Prof. Scott, for some unaccountable reason, failed entirely to consider.

Our point of departure must be the so-called Six Pound Act of February 11, 1775, which was itself a re-enactment of a similar earlier law. This law provided that cases involving property up to six pounds in value (except certain cases specifically excepted from the operation of the act) were to be tried before a Justice of the Peace, and that each party to the suit was to have the right to demand a jury trial, in which event the case was to be tried by a jury of *six* men. This act further provided that where a jury was demanded by the plaintiff, and his recovery was for forty shillings or less, then he was to pay the costs of the suit, thus practically imposing a penalty for demanding a jury trial in small cases. Such was the law at the time of the enactment of the first seizure law, on October 8, 1778, and such it *continued* to be until June, 1782. It seems that in June, 1782, a general revision of the laws took place. We have already seen that on June 24, 1782, a comprehensive seizure law was enacted to take the place of the seizure laws which had been passed previously, and to bring order out of the chaos which existed in connection with the administration of those laws owing to the careless manner in which the original law and various amendments and supplements thereto had been drawn. But before the enactment of this new Seizure Law, and on June 5, 1782, the Legislature also enacted a new Six Pound Act, now become the Twelve Pound Act. This act was a comprehensive revision of the Six Pound Act of February 11, 1775, the prin-

cipal change being an enlargement of the jurisdiction of the inferior courts from six to twelve pounds.[24]

Taking its provisions in connection with what we know of the Six Pound Act which it replaced, we have the following situation: (1) Under the provisions of this act the six-man jury was *continued* in all cases tried in these inferior courts, except where the amount involved was over six pounds; (2) Where the amount involved was over six pounds and a jury of twelve was demanded, but the recovery was over forty shillings and not exceeding six pounds, the plaintiff was punished by having to pay half the costs of the jury; (3) Where the amount sued for was over six pounds and a jury of twelve men demanded, but the recovery was for forty shillings or less, the plaintiff was punished to the extent of the entire costs of the jury.

It will thus be seen that the six-man jury was continued by the act of June 5, 1782, notwithstanding the alleged decision of the Supreme Court in the *Holmes* case, holding such a jury unconstitutional. This raises the very interesting question: What *was* the law in New Jersey with respect to six-man juries in cases other than seizure laws, during all the time from the adoption of the Constitution on July 2, 1776, and until the passage of the Twelve Pound Act of June 5, 1782? This is not only an interesting question in itself, but a question which the learned historians should have inquired into very carefully before they decided on the "import" of the alleged opinion of Chief Justice Brearley, or on the meaning of the decision in that case. Clearly if six-man juries became unconstitutional upon the adoption of the Constitution of July 2, 1776, all citizens were entitled to twelve-man juries. How does it happen, then, that this question was

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[24] 1. The jurisdiction of the Justices' courts was enlarged from six pounds to twelve pounds,—the Justices being empowered generally to proceed in all respects in accordance with the provisions of the old Six Pound Act except as specifically modified by this Act.

2. When a jury shall be demanded in any suit brought before a Justice of the Peace in consequence of the Directions of this Act for any Sum *exceeding* six Pounds, *such* jury shall consist of twelve Men.

3. Where the Plaintiff in any case shall sue or prosecute before a Justice of the peace for any sum above six pounds and shall demand a Jury of twelve Men, and the verdict be in favor of the said Plaintiff for a sum above forty shillings and not exceeding six pounds, the costs of the Jury shall be paid equally by the Plaintiff and the Defendant.

never raised until Holmes v. Walton? Furthermore, if it be true that that case decided that six-man juries were unconstitutional, and the Legislature recognized this decision and surrendered to the courts, as claimed on behalf of Chief Justice Kirkpatrick and by Prof. Austin Scott, by repealing that part of the seizure law of 1778 which provided for a six-man jury, how is it that the Six Pound Act, which affected everybody and not only smugglers, remained unamended during all of the time from the rendition of the decision in Holmes v. Walton on September 7, 1780, to June 5, 1782, when the Twelve Pound Act was enacted? And finally,—*how is it that the last-mentioned Act continued the six-man jury in the face of Holmes v. Walton?*

The answer is simple: The supposed constitutional decision in Holmes v. Walton is the figment of an overheated imagination, caused, first by party passion and then by mistaken "patriotic" zeal.

But we are not at the end of this interesting story yet. For the proof of the wholly mythical character of the great case of Holmes v. Walton is proclaimed by the reports of authentic cases adjudicated in the courts of New Jersey. For an examination of the adjudicated cases, reports of which have reached us, discloses the fact that the six-man jury had been a permanent institution of the judicial system of New Jersey continuously from colonial times at least until the adoption of the Constitution of 1844, undisturbed by any adverse decision of the courts touching its constitutionality.

In this connection it must be remembered that the New Jersey Constitution of 1776 remained in force until the adoption of the Constitution in 1844, and that if a six-man jury was declared unconstitutional in 1780 it must have continued unconstitutional at least until the Constitution of 1844 went into effect. But the reports of actual cases adjudicated by the Supreme Court of New Jersey as collected in what is now the official series of reports, shows that six-man juries were a part of the legal machinery of New Jersey during all of that period.

The first case reported in which this question was involved is that of Falkenburgh v. Cramer.[25] That was a case decided under the Twelve Pound Act of 1782 above referred to. The demand in this case was for £11 19s. 11d. A venire was issued for twelve men, in accordance with the provisions of the Twelve Pound Act, but only six men appeared, whereupon the parties consented to try their case before a six-man jury. The trial resulted in a verdict for the plaintiff for £8 11s., and judgment was entered accordingly. The defendant thereupn appealed, on the ground that the Twelve Pound Act of 1782 specifically provided for a jury of twelve men where the demand was for more than six pounds,—the contention of the defendant being that consent of the parties was of no avail to make a trial by a six-man jury permissible, in face of the express provision of the statute. The Supreme Court upheld that contention, and reversed the judgment in a *per curiam* opinion reading as follows:

> "Per Curiam: Reverse the judgment; the consent of parties cannot avail against *the express words of the act of the Legislature.*" (Italics ours.)

The next case involving this question was that of Parker v. Munday.[26] This case, like its predecessor, involved a trial before a jury of six *by consent of the parties* in a matter involving *more* than six pounds. Again the defendant appealed, claiming that the consent did not validate the use of such a jury, and again the Supreme Court upheld that contention. The opinion in this case reads:

> "Per Curiam: By the Act of Assembly of June 5, 1782, a demand *above* £6. is to be tried by a jury of twelve men. This proceeding is therefore contrary to the express provisions of the law, and consent cannot cure the want of jurisdiction *or supersede the express words of the Act of Assembly.* Reverse judgment." (Italics ours.)

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[25] 1 N. J. L. 31 (1790).

[26] 1 N. J. L. 70 (1791).

Here we have as authoritative a statement by the New Jersey Supreme Court itself as could possibly be desired, that the only reason a six-man jury was improper in cases above £6. in 1791 was the Act of Assembly of 1782. That under that Act a jury of six men is still proper in cases involving less than £6. And that had that Act so provided, a jury of six would have been constitutional no matter what the amount.

The next case involving this subject of which we have a record is Ashcroft v. Clark.[27] Here the opinion of the court was written by Mr. Chief Justice Kirkpatrick, whose alleged dissenting opinion in the apocryphal case of State v. Parkhurst gave the *Holmes* case its first start on the road to fame. After giving a long list of reasons why the judgment for the plaintiff in the case here under consideration should be reversed, the Chief Justice adds:

> "Besides all this, the demand is for fifty dollars, and the trial is by a jury of six men. For all these reasons, let the judgment be reversed."

It will be noted that the only reason a jury of six was considered improper in this case was that the demand was for fifty dollars, which was evidently not in accordance with the statute. It should be noted here that at some time between the decision in Parker v. Munday and Ashcroft v. Clark the Twelve Pound Act had been amended by the Legislature so as to make the point of division between a six-man jury and a twelve-man jury sixteen dollars.

This appears from the next case to be considered here,—the case of Jones v. Oliver.[28] It should be noted that this case, too, was decided under Judge Kirkpatrick's Chief Justiceship. In this case the summons was issued for forty-five dollars. On the return day the plaintiff filed a demand for six dollars. The defendant counter-claimed for thirty-three dollars. The plaintiff then demanded a jury. The case was tried before a jury of twelve. The jury gave a verdict for the plaintiff for six dollars, for which amount judg-

[27] 5 N. J. L. 577 (1819).
[28] 7 N. J. L. 123 (1823).

ment was entered in his favor. Thereupon, the defendant appealed, *on the ground that a trial by a jury of twelve was improper, since the recovery was only for six dollars, and the statute provided that cases under sixteen dollars should be tried before a jury of six men only.* There was no opinion written by the Court in this case, but the arguments of counsel are illuminating. The argument of counsel for the defendant is given in the official report as follows:

> "*Halsey,* now moved to reverse the judgment; because the trial was had before a jury of twelve men instead of six, and cited the nineteenth section of the small causes act, (Rev. Laws 634) and the supplement thereto, (sec. 4, p. 772) which enact, 'that in every action which shall be brought before any Justice of the Peace by virtue of this act, it shall and may be lawful for either of the parties, after the defendant has appeared, or put in his plea to such an action, and before the said Justice has proceeded to inquire into the merits of the cause, to demand a trial by jury, which the said Justice is required to grant: and thereupon a *venire* shall be issued to summon a jury of six men, and no more, if the debt or demand do not exceed the sum of sixteen dollars, or a jury of twelve men, and not less, if the debt of demand exceed the sum or value of sixteen dollars.' "

Vroom, for the plaintiff, did not even attempt to argue that under the New Jersey Constitution *all* cases ought to be tried before juries of twelve, and merely contented himself with the argument that the true meaning of the statute is that if *either* party demanded more than sixteen dollars the case should be tried before a jury of twelve men, and that, since in this case the defendant's demand was for thirty-three dollars the case was properly tried before a jury of twelve.

The plaintiff's contention as to the true meaning of the statute was upheld by the Supreme Court. It is interesting to note in this connection that the court came to this conclusion only *"after taking time to consider."* In other words, the court were evidently at first impressed by the argument

of the counsel for the defendant in this case that the case had to be tried before a jury of six only, *and that a jury of twelve was improper,* because the true meaning of the Act of Assembly required a jury of six instead of a jury of twelve in such cases.

All of which, of course, stamps as utterly absurd the contention that the *Holmes* case decided that under the New Jersey Constitution of 1776 a jury of six was unconstitutional. And even more so the contention that the Legislature acquiesced in this construction of the Constitution and repealed the offending provision to the contrary in the Seizure Law of 1778. The true situation as shown by the authentic records of courts and Legislature was exactly the reverse: *in a series of enactments covering this entire period, the Legislature steadily adhered to the six-man jury in certain cases, and the courts as steadily not only upheld, but never even questioned the power of the Legislature to do so.* Exit the great "precedent" of Holmes v. Walton.

And its passing involves also the passing of Taylor v. Reading and of State v. Parkhurst as constitutional decisions. It also raises the very interesting question: *Is it at all possible* that Chief Justice Kirkpatrick wrote the opinion attributed to him in 4 Halsted?

* * * * *

The so-called "lost" Massachusetts "precedent" is in a somewhat different category. For one thing—its certificate of naturalization is still under a cloud even among historians whose "loyalty" to the Judicial Power is above suspicion. One would not think so from the categorical language of the paragraph which we have quoted from the report of the Special Committee of the New York State Bar Association. But then, that Committee seems to have been composed of particularly uncritical people,—notwithstanding the eminence at the Bar of some of its members. More critical students of the subject have been rather cold to this particular "precedent." Even so zealous a precedent-seeker as Professor Haines voices serious doubts as to this particular case. In his, *The American Doctrine of Judicial Supremacy,* which appeared before the report of the learned Committee of the New York State Bar Association, and with which work that

Committee were undoubtedly familiar when they made their report, Professor Haines says on this subject:

> "On the basis of a thorough examination of the evidence it is claimed that no case can be found at this time in which the legislature on the suggestion of the Supreme Court repealed a statute because of unconstitutionality. The absolute supremacy of the legislature after the renunciation of allegiance to the British Crown makes it unlikely that such a decision could have been rendered relative to a law contrary to the state constitution."

This throws an interesting light on the *mores* of the historiographers of our subject. It is safe to say that in no other field of historical inquiry would it be possible for a responsible committee of a responsible professional associatin to make such an unqualified statement as that made by the Special Committee of the New York State Bar Association with respect to Brattle v. Hinckley in face of the statement just above quoted from Professor Haines' work. In this connection it should be remembered that Professor Haines' book was the latest work on the subject at the time the New York Committee made their report, and that the Committee could not have made any independent investigation of its own which could have led it to a different conclusion. The fact is that Professor Haines and the Special Committee relied upon the same source of information,—Mr. A. C. Goodell's article in the Harvard Law Review already referred to. How is it, then, that the Committee came to the opposite conclusion from Professor Haines? The answer is simple. The years 1910-1915 were a period of political storm and stress, with the judiciary as the main storm-centre, like the period 1820-1828, which brought forth the great case of Holmes v. Walton; and the Special Committee of the Bar Association of the State of New York was battling for the Lord. It therefore conceived its duty to be not a critical examination of the historical facts with a view to ascertaining the truth but the forging of weapons wherewith to smite the infidel. And a donkey's jaw-bone was a good enough weapon when nothing better could be found.

The intervening years since the appearance of the Special Committee's report have not been exactly years of calm composure, but there seems to be no immediate danger threatening our cherished institution. We may therefore be now ready to examine the question of the "lost" Massachusetts "precedent" with a finer critical instrument than that used by the Special Committee.

To begin with, George Bancroft, in an appendix to his historical work, gives an extract from a letter written by J. B. Cutting to Thomas Jefferson, dated July 11, 1778, in which Cutting says:[29]

> "I have also enclosed * * * the manly proceeding of a Virginia Court of Appeals. Without knowing the particular merits of the cause, I may venture to applaud the integrity of judges who thus fulfil their oaths and their duties. I am proud of such characters. They exalt themselves and their country, while they maintain the principles of the Constitution of Virginia and manifest the unspotted probity of its judiciary department. I hope you will not think me too local or statically envious when I mention that a similar instance has occurred in Massachusetts, where, when the Legislature unintentionally trespassed upon a barrier of the Constitution, the judges of the Supreme Court solemnly determined that the particular statute was unconstitutional. In the very next session there was a formal and unanimous repeal of the law, which, perhaps, was unnecessary."

It is a rather curious circumstance,—perhaps not entirely devoid of significance,—that our first source of information with reference to this "lost" case should be a writer who "ventures to applaud," "without knowing the particular merits of the cause." Evidently Mr. Cutting was an early battler for the Lord,—and so did not trouble about giving the particulars of the *Massachusetts* case any more than he cared about finding out the merits of the Virginia cause which he

[29] Bancroft, History of the United States.

was applauding. As a result we are still vainly searching for the case and its facts one hundred and forty years afterwards. Or, rather, to be exact, we *have been* searching,—for the search was given up thirty-five years ago upon the appearance of Mr. Goodell's article in the Harvard Law Review. For Mr. Goodell conclusively proved that there was no such case,—although he thought it his "patriotic" duty to soften the blow to the profession by suggesting that there may have been "a couple of other fellows."

Mr. A. C. Goodell, Jr., was the editor of the Acts and Resolves of the Province of Massachusetts Bay, and a great authority on early Massachusetts history in its various legal aspects. It was therefore natural that when our judicial history became a matter of keen interest after the appearance of Mr. Meigs' article with its collection of precedents, that Mr. Goodell should be appealed to for assistance in the rediscovery of the *Cutting* case briefly referred to by Mr. Meigs. Mr. Goodell thereupon went over the ground carefully and thoroughly, and the result of his exhaustive examination of the original records were stated by him in a long letter to a friend,—really an article some four or five thousand words long,—published in the Harvard Law Review in February 1894.

The substance of Mr. Goodell's article is to the effect that *there was no case in the Massachusetts courts during the period in question in which the courts declared any statute enacted by the Massachusetts Legislature void because of alleged repugnancy to the Massachusetts Constitution.* Nor has he been able to discover any instance in which the Legislature of Massachusetts had repealed a statute at the direction or suggestion of the courts. Mr. Goodell goes even further and states his conviction to be that during the period in question the Legislature was recognized as supreme in Massachusetts, and that the setting aside of any law as void for "unconstitutionality" in our sense was, therefore, quite out of the question. In this connection Mr. Goodell says:

> "I had occasion to discuss this pre-constitutional subordination of the judiciary in some remarks I made at the meeting in May last of the Massachusetts

> Historical Association, upon Judge Samuel Sewall's refusal of a writ of habeas corpus to a prisoner committed by authority of a special Act of Legislature. The views I advanced were rather earnestly questioned at the meeting. But since then Mr. Senator Hoar, who took part in the debate, has called my attention to a speech by Roger Sherman reprinted in Paul Ford's recent publication of contemporary essays on the Constitution, in which the same opinion is expressed. In a more recent letter, the Senator frankly says: 'I have no doubt (of the correctness of) your statement as to the unlimited power of our Legislature before the Constitution, subject always, as you limit it, to the royal prerogative.' "

Thus is Mr. Cutting's "lost case" definitely disposed of. But, curiously enough, in thus laying to rest the ghost of Cutting's "lost precedent" Mr. Goodell created, or rather, furnished the excuse for the creation by others of another imaginary precedent,—to wit: Brattle v. Hinckley. The story of the creation of Brattle v. Hinckley is not only curious but instructive as well. We shall therefore state it in some detail.

Mr. Goodell rightfully assumed that Cutting must have had some peg on which to hang his story: In other words that there must have been some case which might to a careless man and zealous partisan look like the case he would, perhaps, like to have happened. And in going over the lists of cases he came to the conclusion that the case of Brattle v. Hinckley, which happened about this time, came nearest to that description, and he therefore concluded that that was the case Cutting had in mind. But in trying to find an excuse for Cutting's egregious error, he permitted himself to indulge in some wholly unwarranted speculations of his own. As a result, the next crop of zealot-partisans turned his entire structure upside down. So that instead of proving that there was no "Massachusetts precedent,"—which was the evident purpose of his article—he gave that "precedent" a name under which to parade.

We are not particularly interested, however, in apportioning the credit or discredit for the erection of Brattle v.

Hinckley into a "precedent" between Mr. Goodell and the Special Committee of the New York State Bar Association, but rather in showing how small, and utterly shadowy, are the acorns out of which the great oaks of our "precedents" usually grow. We shall, therefore, tell the story, and let the reader judge for himself. Here are the facts as reported by Mr. Goodell:

On August 15, 1785, Thomas Brattle brought two actions in debt on two bonds executed by the defendants in the two cases (Hinckley and Putnam) to his intestate, in 1770 and 1771, respectively. The defendants appeared, admitted the original obligation, and pleaded, in bar, that the intestate, being an inhabitant of Boston, on the twentieth day of April, 1776, joined with the fleet and army of the King of Great Britain, then warring with the Colonies, and became an absentee and remained such ever after, until his death, within the dominions of, and subject of said King, and that, therefore the court, in rendering judgment ought not to compute interest on the sum mentioned in the bond between April 19, 1775 and January 20, 1783, in conformity with the Resolve of the Massachusetts Legislature of November 10, 1784, which had been revived and continued by the Resolve of February 7, 1785, which provided that in suits brought by absentees judgment for all interest accruing between the aforesaid dates, that is, during the war, should be suspended until further action by the Legislature. The plaintiff demurred to this plea in bar, but judgment was awarded on the demurrer to the defendants.

The plaintiff thereupon appealed from this judgment to the Supreme Court,—the original action having been brought and the judgment rendered in the Inferior Court of Common Pleas. In the Supreme Court the plaintiff waived his demurrer and pleaded, by way of replication, that William Brattle, plaintiff's intestate, died at Halifax, October 16, 1776, "and that his estate descended and vested to Thomas Brattle and to Katherine Wendell, his children and heirs, who, at the time of commencement of this action, were, and ever since have been, citizens of this Commonwealth, and not aliens nor absentees." The defendants-appellees demurred, in turn, to this replication; and on the issue thus joined the

following judgment was given by the Supreme Judicial Court:

> "And after a full hearing of said parties upon the said pleas, the Court are of opinion that Appellee's plea is insufficient to bar the appellant of the interest during the war."

Such are the facts and judgment in this case. And now as to their legal implications.

That this case had nothing to do with the Constitution of the state of Massachusetts is clear, and Mr. Goodell expressly so states. It therefore *could* have had nothing to do with any right, or claimed right, of the courts of Massachusetts to declare legislation unconstitutional on the ground that it is repugnant to the state Constitution; and as we have already seen, Mr. Goodell is firmly of the opinion that no such right existed or was claimed at the time. But Mr. Goodell is also satisfied that J. B. Cutting had this case and no other in mind. According to Mr. Goodell, Cutting could have had no other case in mind for the simple reason that no other case existed upon which such an implication could be fastened,—the *Brattle* cases being the only ones even remotely resembling the case referred to by Cutting. And here is Mr. Goodell's explanation as to how Cutting came to have made the statement contained in his letter to Jefferson about the *Brattle* cases. During this period, says Mr. Goodell, people sometimes referred to our obligations under the Treaty of Peace as the "constitution." And it is his opinion that the decision of the Supreme Court overruling the defendant's demurrer to the plaintiffs' plea in replication was based upon the fact that the Resolves pleaded by the defendants were contrary to the provisions of the Treaty of Peace with Great Britain, under which the British creditors were not to be hindered in the collection of their just claims, which would include interest.

Before considering the relevancy of all of this to the question of the Judicial Power, we should note here the following additional facts which bear on this topic, and which help identify the case of Brattle v. Hinckley as the case which

Cutting had in mind when writing to Jefferson. The Congress of the United States on March 21, 1787, adopted resolutions which declared, first, that the Legislatures of the several states cannot of right pass any acts for construing, limiting, or impeding the operation of any national treaty; second, that all such acts repugnant to any such treaty ought to be forthwith repealed; and thirdly, that it be recommended to the several states to make such repeal rather by describing and by reciting the objectionable Acts than by declaring their repeal in general terms. The passage of these resolutions was followed by the issue of a circular letter to all the states, embodying the resolutions and fully declaring and explaining the principles involved. This letter was approved by a vote of Congress April 13, 1787; and on the thirtieth of April, 1787, the Legislature of Massachusetts passed an Act in the very words prescribed in the congressional resolutions. It is Mr. Goodell's opinion that Cutting must have had in mind this act of the Massachusetts Legislature of April 30, 1787, when he said in his letter to Jefferson that the Legislature repealed the Act which the courts had declared void.

It will be noted that even if all of these surmises as to the relation of the *Brattle* case to the Peace Treaty, the "Resolves" of the Massachusetts Legislature pleaded by the defendants, and the act of the Massachusetts Legislature of April 30, 1787, be correct, the case still has absolutely nothing to do with the question of Judicial Power. For there is not the remotest connection between the right of a court to disregard a legislative act of an inferior political government because it is in conflict with the commands of the superior political government, and the right of the courts to disregard a law of their own Legislature because of alleged repugnancy to the Constitution of their own government. And concededly, the repugnancy surmised by Mr. Goodell was between the action of an inferior government and the commands of a superior government, for in so far as our foreign relations were concerned the states were inferior governments to that of the United States,—these being the very principles involved and explained in the circular letter of Congress to the states, of April 13, 1787.

But as a matter of fact there is no basis for Mr. Goodell's surmises as to the real meaning of the decision of the Supreme Judicial Court of Massachusetts; although he is probably right in assuming that Mr. Cutting had the *Brattle* cases in mind when he wrote to Jefferson. This only proves how utterly unworthy even contemporary testimony of this kind is when it comes from such partisans as J. B. Cutting evidently was. It also shows that even such careful research workers as Mr. Goodell are willing to "stretch a point" in order to give at least an excuse for the claim of a precedent, when they have determined that there really is no precedent.

The incorrectness of Mr. Goodell's surmise as to the real meaning of the decision of the Supreme Judicial Court of Massachusetts in the *Brattle* cases is proven by two facts: The first is, *the change of position by the plaintiff* from that which he took in the lower court to that which he took in the superior court. It will be recalled that in the lower court the plaintiff demurred to the plea of the defendants, who relied on the Resolves of the Massachusetts Legislature of November 10, 1784, and February 7, 1785. This demurrer challenged the *legal efficacy* of these Resolves as a plea, and we may assume, for the purpose of this discussion, that the challenge was on the ground of their repugnancy to the Treaty of Peace. But after the plaintiff was defeated in the lower court, he evidently changed his mind on the advisability of resting his case on a challenge to the Resolves of the Legislature. In the Supreme Court, he therefore withdrew his demurrer, and in place thereof pleaded by way of replication certain *facts*. The legal meaning of this change was that he withdrew his *legal* challenge to the efficacy of the action of the Legislature and attempted to avoid the force of this action by pleading certain facts which he believed took his cases out of the purview of these "Resolves." The facts which the plaintiff pleaded in his replication were, that William Brattle, the absentee, is dead, and therefore out of the picture, and that his heirs were good and loyal citizens of the Commonwealth and not aliens or absentees. And the Supreme Judicial Court, by its decision, held nothing further than that the *facts* thus alleged in the replication were sufficient to take the case out of the purview of the Resolves of

the Legislature pleaded by the defendants. The so-called "constitutional question," even in the sense surmised by Mr. Goodell, was therefore out of the case when the case came up for adjudication by the Supreme Court. There is, therefore, not the slightest ground for the assertion that the Supreme Court passed upon any such question. In fact we cannot see how the Supreme Court could have done so on the issues as framed by the parties.

That the Supreme Judicial Court could not possibly have held the "Resolves" in question void is also proven by another fact mentioned by Mr. Goodell. He states that at the very term at which the *Brattle* cases were decided by the Supreme Judicial Court, that court gave a decision *for the defendants* in a case which was exactly similar to the *Brattle* cases, except that the original absentee himself sued, instead of his heirs who were good American citizens, as in the *Brattle* cases. In speaking of the meaning of the decision in the *Brattle* cases, Mr. Goodell says:

> "The precise significance of the decision of these cases, however, is not apparent on the record, and is rendered still more doubtful by a directly opposite decision at the same term, upon an issue raised by pleadings which failed to show clearly that they differed essentially from Brattle's in the ground of the action or in the nature of the defense. This was an action (likewise of debt, and in which the pleas was similar) brought by the Rev. Dr. Henry Caner, of London, previously rector of King's Chapel, Boston, against Houghton, et al., to recover the principal and interest on a bond given to him by the defendants before the Revolution."

This is putting it rather oddly. For there can be no doubt at all of the fact that the *Brattle* case has no constitutional significance whatever. And when the *Brattle* case and the *Caner* case are taken together, it is quite clear *what* the difference between the two cases was, and therefore what the ground of decision in the *Brattle* case really was. In the *Caner* case the efficacy of the legislative Resolves was evi-

dently challenged, *and the decision went in favor of the validity of the Resolves.* Of this there can be no question on Mr. Goodell's own showing. In the *Brattle* cases, on the other hand, the attack upon the efficacy of the Resolves *was withdrawn,* and their force was avoided by the plea in replication which stated facts which took them out of the purview of these Resolves, and the decision *therefore* went for the plaintiff.

It only remains to be noted in conclusion that the facts recited by Mr. Goodell also clearly demonstrate that the so-called "repeal" had no more to do with the decision of the court than the decision itself had anything to do with constitutional "precedents." It is clear beyond the peradventure of a doubt that the Act of April 30, 1787, was the direct result of the circular letter of Congress of April 13, 1787, and had nothing whatever to do with any previous decision of the Supreme Judicial Court or any other court. Except, of course, in so far as the Legislature of Massachusetts may have been moved to act promptly *because the courts of Massachusetts considered themselves bound to follow its Resolves rather than the Treaty of Peace.*

As a "precedent" for the right of the courts to declare void, laws enacted by the legislative department of their own government, Brattle v. Hinckley may, therefore, be safely relegated to the realm of fiction, along with Holmes v. Walton. And we may repeat here what we have said at the conclusion of our investigation into that celebrated case:

> "The supposed constitutional decisions in both Holmes v. Walton and Brattle v. Hinckley are the figments of an overheated imagination,—caused first by party passion and then by mistaken 'patriotic' zeal."[30]

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[30] It is certainly a curious sort of "loyalty" to the Judiciary which would make the Massachusetts Supreme Court decide a very important constitutional question both ways at the same term, in order to create the basis for a questionable "precedent" for the power to declare laws unconstitutional.