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Indemnity Act of 1863 a Study in the War-Time Immunity of Governmental Officers

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THE INDEMNITY ACT OF 1863: A STUDY IN THE WAR-TIME IMMUNITY OF GOVERNMENTAL OFFICERS

I

ONE of the familiar measures of the Union administration during the Civil War was the suspension of the *habeas corpus* privilege and the consequent subjection of civilians to military authority. The essential irregularity of such a situation in American law is especially conspicuous when one considers its inevitable sequel—namely, the protection of military and civil officers from such prosecution as would normally follow invasion of private rights and actual injury of persons and property. Such protection was supplied by a bill of indemnity passed in 1863, and this law, with its amendment of 1866, forms a significant chapter in the legal history of the period.

In order to understand this sweeping grant of official immunity, one should bear in mind the trying circumstances which surrounded the officers of the federal government in the exercise of their unwonted authority. The suspension order was that of the President, not the Congress. There was no body of laws to cover the situation and it was out of the question to expect a complete and comprehensive system of legislation to be passed within the limits of the Constitution that would supply a sanction for the numerous arrests, seizures and imprisonments to which officers in discharge of their proper functions were forced to resort. Orders and proclamations of the President afforded a basis for most of the acts involved, but, without some further support, even these orders might prove a flimsy protection where trespasses were committed, in view of the well-known principle that no legal justification can be derived from the command of a superior wrong-doer. Officers were placed in the unfortunate position where their highest duty demanded that they should do many things without waiting for the slow, uncertain and obstructive course of the law.

The fact that the courts were "still open" in communities where military officers were in command does not signify that the courts could effectively control the situation. Where disloyal practices were indulged in by large numbers of the citizens the ordinary

workings of justice might easily have permitted disaster to befall the government in its struggle for preservation. Something more than the mere *existence* of the courts was necessary: their effectiveness for the emergency was the essential point. Unless one assumes that the administration's policy was altogether arbitrary, the fact that a military officer was clothed with extraordinary powers suggests that the situation was sufficiently abnormal to be beyond the control of the judicial authorities.

By the ordinary application of the principles of American administrative law, officers guilty of trespasses (such as false imprisonment and unwarranted seizures) would stand unprotected, though the trespasses might consist only of the absence of ordinary judicial sanction and might be in strict keeping with executive orders. It is a well-known principle of our law that governmental officers (with the possible exception of judges who are removable by impeachment and otherwise independent) are liable in damages for official conduct which results in private injuries, and are subject to prosecution in case such conduct bears a criminal character.[1] In this respect the principles of American and English law differ radically from the administrative law of Europe. The essence of the continental system is to give personal immunity to officers acting under authority, and to accord distinct and separate treatment to official cases in special "administrative courts." Under American and other Anglo-Saxon jurisdictions, however, any governmental officer who injures private rights, either by omission or commission, is, with but a few qualifications, subject to civil or criminal action precisely as an ordinary citizen would be.[2] This liability of gov-

[1] "Every officer, from the highest to the lowest, in our government, is amenable to the laws for an injury done to individuals. * * * It is a fundamental principle in our government that no individual, whether in or out of office, is above the law. * * * There are three grounds on which a public officer may be held responsible to an injured party. (1) Where he refuses to do a ministerial act over which he can exercise no discretion. (2) Where he does an act which is clearly not within his jurisdiction. (3) Where he acts wilfully, maliciously and unjustly * * * within his jurisdiction." Kendall v. Stokes et al., 44 U. S. 792, 794.

[2] For an instance in which the President himself was subjected to an action for damages, one may turn to the case of Livingston v. Jefferson. In 1811 an action for trespass was brought before the circuit court of Virginia against "Thomas Jefferson, a citizen of Virginia." The fact that

ernmental agents is but one phase of the Anglo-Saxon principle that governments are not above law, and that an officer of the government is not given a privileged character superior to that of the common man. All this would mean that, unless some special protection were provided for cases arising during the war many officers would be sued or prosecuted for acts which in the large sense were not theirs at all, but those of the government.

For these reasons it has long been customary in England to follow up a proclamation of martial law, or a suspension of the *habeas corpus* privilege, with an act of indemnity with retroactive effect, affording judicial protection to those agents of the government who, though acting in good faith, were guilty of breaches of private rights. Following the suspension of the Habeas Corpus Act in 1793, Parliament passed in 1801 an act indemnifying and shielding all who had made summary arrests for treason, and relieving them of the responsibility that would usually have followed such arrests.[3] Another bill of indemnity was passed in 1817 to protect officers who had arrested on suspicion and who had made seizures without legal process.

Before the Civil War had proceeded far in the United States it became evident that federal officers, even of cabinet rank, were being attacked in state courts for acts done in the performance of duty. One of the earliest cases of this sort was that of Pierce Butler, of Philadelphia, against Simon Cameron, Secretary of War. Butler was arrested by order of Cameron in August, 1861, on suspicion of having received a commission from the Confederacy, and was confined for about a month in Fort Lafayette, after which he was released by order of Secretary Seward on giving a pledge of loyalty. On Butler's petition the supreme court of Pennsylvania issued a writ which was served upon Cameron when he was about to sail as minister to Russia, the plea being assault and battery and

Jefferson had been President was not considered a bar to the suit (which pertained to an official act while in the Presidency), though on other grounds the court declined to take jurisdiction. FEDERAL CASES, No. 8,411; BEVERIDGE, LIFE OF JOHN MARSHALL, vol. 4, p. 102.

[3] These English bills of indemnity offered protection only for *bona fide* acts, done of necessity, and not for excesses of authority. In re the petition of D. F. Marais. EDINBURGH REVIEW, vol. 195, p. 79 (see especially p. 90); MAY, CONSTITUTIONAL HISTORY OF ENGLAND, vol. 2, pp. 256-258.

false imprisonment. The official concern occasioned by this suit may be judged by the fact that the President adopted the act of the Secretary of War as his own, and directed that the suit "should be fully defended as a matter which deeply concerns the public welfare as well as the safety of the individual officers of the government." To this end the United States district attorney at Philadelphia was instructed to give particular attention to the defense of Cameron. As a result the case was dropped in its preliminary stages.[4]

In 1863 Secretary Seward was subjected to a similar action for false imprisonment in a New York court by G. W. Jones, former minister to Bogota, who was arrested in a New York hotel and kept prisoner at Fort Lafayette for four months.[5] The effort of Governor Seymour and the judicial authorities of New York to prosecute General Dix for his suppression of the *New York World* is an example of the same disposition on the part of local courts to enforce judicial remedies at the expense of highly placed officials.[6] Secretary Stanton is said to have remarked that if such prosecutions held he would be imprisoned a thousand years at least.[7] These instances will suffice to show that the need of protection for federal officers was real.

To supply such protection was the purpose of the act of March 3, 1863, which was at once a bill of indemnity and an authorization to suspend the *habeas corpus* privilege.[8] It is only the fourth and subsequent sections that carry the indemnifying feature.

The circumstances of the passage of this act were extraordinary. It was considered during the last hours of a crowded session, amid a hectic atmosphere. Its opponents claimed that it was railroaded through, that various attempts to lay it on the table or delay its

[4] OFFICIAL RECORDS, WAR OF THE REBELLION, second series, vol. 2, pp. 507-508; ANNUAL CYCLOPEDIA, 1862, 511-512.

[5] 40 Barb. (N. Y.) 563; 41 Barb. (N. Y.) 269; 3 Grant (Pa.) 431.

[6] AMERICAN HISTORICAL REVIEW, vol. 23, pp. 320-321.

[7] DIARY OF GIDEON WELLES, vol. 2, p. 206.

[8] In using the name "Indemnity Act" to designate the law of March 3, 1863, contemporary usage has been followed. Senator Trumbull and others referred to the measure while under debate as the "Indemnity Bill," and the same designation appeared in the headings of the record as well as in many other places. CONG. GLOBE, 37 Cong., 3 sess., pp. 1459, 1479.

passage were roughly overridden, that it was passed within an hour of its first introduction, without having been printed, without reference to any committee, and without opportunity for consideration or discussion. It is true that at first there was practically no debate in the lower house and that the measure was rushed to its passage within an hour. But later the question was reopened by a senate amendment, whereupon a long and animated debate followed. This discussion, however, shot wide of the mark and was hardly more than a general debate on the war and on party policy.

In each chamber there was a lively filibuster against the measure. In the House it took the form of continuous excuses for absence in the case of various members on the ground of "sickness," being "unwell," being "indisposed," and the like. Mr. Colfax, of Indiana, rose to a question of order, and his point was objected to on the ground that it had been decided that he was absent! To judge by the record, the House was in great hilarity when these proceedings were in progress, and the sergeant-at-arms was appealed to in playful mood at various points, but at the same time it was evident that there was a real contest and that the supporters of the bill were displeased at the filibustering tactics of the opposition.[9]

In the Senate a truly remarkable struggle was enacted. A vigorous minority was working desperately to postpone the measure and prevent a vote, while Senator Trumbull and other administration leaders were equally determined, by sharp practice if necessary, to outwit these opponents and put the measure through before the session should close. It was agreed that the conference report on the bill, harmonizing the differences between the House and the Senate, should be taken up at seven o'clock of the same day that the first printed copies of the report were distributed. The parliamentary encounter (which could not be deemed a discussion) proceeded throughout the night and early morning of March 2-3, Senators Powell, Bayard and others holding the floor with endless speeches, in which the Magna Charta, Shakespeare, Cowper, Moliere, Marshall, Webster, and other authorities and poets were quoted,

[9] The filibuster in the lower house appears in CONG. GLOBE, 37 Cong., 3d sess., pp. 1357 ff. The bill passed the House March 2, the vote being 99 to 44. *Ibid.*, p. 1479.

while the friends of the bill used all their powers to keep a quorum, prevent adjournment, and acquire the floor for a motion to concur in the conference report. During this "debate" the yeas and nays on adjournment were taken five times.

Finally, at about five o'clock in the morning, the presiding officer unexpectedly put a *viva voce* vote, announced that the bill was passed, denied the floor to opposing senators who insisted that the measure had not passed, refused to entertain a motion to reconsider, and, against the protest of the filibusterers, declared the Senate adjourned.[10]

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[10] The record reads as follows:

The Presiding Officer (*Mr. Pomeroy*). The question is on concurring in the report of the committee of conference. Those in favor of concurring in the report will say "ay"; those opposed "no." The ayes have it. It is a vote. The report is concurred in.

Mr. Trumbull. I move that the Senate now proceed to the consideration of House Bill No. 599.

Mr. Powell. I hope the Senate will proceed with this indemnity bill.

The motion of Mr. Trumbull was agreed to.

Mr. Trumbull. It is a bill relating to deeds * * * in the City of Washington.

Mr. Powell. What has become of the other bill?

Mr. Grimes. It has passed.

Mr. Powell. No, it has not passed. I want the yeas and nays on its passage. It is not passed at all.

Mr. Trumbull. I believe I am entitled to the floor.

The Presiding Officer. The Senator from Illinois is entitled to the floor.

Mr. Trumbull. Did the motion prevail to take up House Bill No. 599?

The Presiding Officer. The motion prevailed.

Mr. Trumbull. I ask the Senate to proceed to the consideration of that bill.

Mr. Powell. I should like to know—

The Presiding Officer. Does the Senator from Illinois yield the floor?

Mr. Trumbull. No, sir.

* * * * * * * * *

Mr. Powell. Do I understand the Chair to say that this indemnity bill has passed?

The Presiding Officer. It has passed.

Mr. Powell. By that kind of jockeying?

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Mr. Trumbull. I believe I am entitled to the floor; and the rule of the Senate is positive that a Senator is not to be interrupted by another Senator while he is entitled to the floor.

* * * * * * * * *

The measure so passed was not designed, as Stevens explained, to indemnify everybody who, at the time of the suspension of constitutional guarantees, had committed trespasses in the name of the government, but it "indemnified the President, Cabinet, and all who in pursuance of their authority (had) made arrests during the period of the suspension."[11] The fourth section of the act reads as follows:

> "Any order of the President, or under his authority, made at any time during the * * * present rebellion shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment * * * under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea or under the general issue."[12]

Mr. Powell. I desire to ask the Chair—

Mr. Trumbull. If I am entitled to the floor, I do not permit the Senator from Kentucky to interrupt me for any purpose, or to ask the Chair any question.

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Mr. Richardson. I move to reconsider the vote by which the conference report on (the indemnity bill) was concurred in, or is claimed to have been concurred in.

The Presiding Officer. There is a motion to adjourn pending, which takes precedence.

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The Presiding Officer. The question is on the motion to adjourn.

The motion was agreed to.

The Presiding Officer. The Senate stands adjourned.

Mr. Powell. The Chair is mistaken. * * * CONG. GLOBE, 37 Cong., 3d sess., p. 1477.

[11] CONG. GLOBE, 37 Cong., 3d sess., p. 22.

[12] 12 STAT. AT L. 756. This section is taken from the Senate bill which differed materially from that of the lower house in its mode of protecting federal officers. In the House bill all proceedings against officers were declared null and void, while in the Senate substitute, the orders of the President, or under his authority, were declared to be a defense in such proceedings. As Senator Trumbull explained: "We do not propose to say that a suit shall be dismissed, that a proceeding is null and void, but we propose that certain facts shall be a defense to an action." CONG. GLOBE, 37 Cong., 3d sess., p. 1436.

In the remaining sections provision is made for the removal of suits of this nature from state to federal courts (except where judgment is in favor of the defendant) and for imposing a two-year limitation, after which no such prosecution or litigation could be begun.[13]

It is significant that Stevens, the author of the indemnifying feature of the House bill, was not one of those who held, with the Attorney General, that the President had the right to suspend the *habeas corpus* privilege. According to the Attorney General's argument that the President had the full power to suspend,[14] and to delegate such authority to subordinates, it would follow that no wrongs had been committed, and in that case no indemnification was necessary. Therefore the very basis of the bill of indemnity (at least in the minds of many who voted for it) was an assumption that the President did not constitutionally have this power, or at least a doubt as to the legality of this presidential suspension and a desire to clear up the matter once for all.

The act was vigorously denounced in a protest signed by thirty-seven representatives, including Voorhees, Vallandigham, and other anti-administration leaders. These men pointed out that the acts over which the bill cast protection were illegal trespasses against which redress might admittedly be had under the ordinary administration of the law; that the distinction was not made between the zealous officer and the miscreant; that all offenses were condoned and all redress for injuries taken away, and that the measure would encourage lawless violence.[15]

II

When the Indemnity Act came to be applied in the courts, various defects in the measure came to light, and in many quarters serious difficulties arose because of intense opposition to the act on the part of the state courts. As the military pressure was lifted at

[13] The first three sections, whose treatment falls outside the scope of this paper, have to do with the suspension of the habeas corpus privilege and the discharge of political prisoners against whom indictments were not lodged.

[14] For the argument of Attorney General Bates, see OFFICIAL RECORDS, second series, vol. 2, pp. 20-30. (July 5, 1861.)

[15] CONG. GLOBE, 37 Cong., 3d sess., p. 165.

the close of the war thousands of suits against Union officers were brought in state tribunals and prosecuted by state judges in defiance of the act.[16] In Kentucky, particularly, as the Federal troops withdrew and Confederate soldiers returned, an intense feeling developed between the Union and anti-Union elements. The latter soon gained ascendancy, and as a result there were as many as three thousand suits pending against Union officers by September, 1865.[17] Very high damages were claimed in these suits, and numerous criminal actions were instituted, so that men who acted to uphold the government were in many instances facing complete ruin. This, of course, was the very thing which the Indemnity Act sought to prevent.

It was alleged that these Kentucky cases grew out of a disposition to use the courts as instruments for the prosecution of Union officials at the hands of outraged secessionists. Confederates were permitted to plead superior orders as defense, while such pleas were denied to Union men. The people were instructed by the leaders that the filing of such suits was a patriotic duty, and were urged to bring as many of them as possible.[18]

Many of these suits, in Kentucky and elsewhere, were civil actions to recover damages for false imprisonment. A citizen of Boston, for instance, having been arrested and confined at Fort Lafayette for eight days, brought suit against the United States marshal making the arrest.[19] A Confederate sympathizer in California who had used grossly abusive language regarding President Lincoln and had expressed approval of his assassination, and who,

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[16] The fact that there should be, during and after the war, proceedings in the ordinary courts against United States officers for trespass on account of acts done in their official capacity is eloquent proof of the lack of congeniality between summary methods and the American legal genius. Had such methods been congenial to the American mind, then a definite system would long ago have been evolved to take care of such cases.

[17] CONG. GLOBE, 39 Cong., 1st sess., pp. 1983, 2021, 2054, 2065; FRANKFORT (Ky.) COMMONWEALTH, Oct. 24 and Oct. 27, 1865.

[18] CONG. GLOBE, 39 Cong., 1st sess., pp. 1425, 1526, 1527. The files of the FRANKFORT (Ky.) COMMONWEALTH, 1865-66, contain many references to suits against Union officers, and the editorial comment is in strong disapprobation of such suits.

[19] Sturtevant v. Allen, in Supreme Court of Massachusetts. See CHICAGO TRIBUNE, Dec. 18, 1865, p. 1.

in consequence, was confined for six days at Fort Alcatraz, sued General McDowell, Commander of the Department of the Pacific, on the ground of false imprisonment.[20] In far-away Vermont a man of supposed disloyal tendencies was arrested without sworn indictment or warrant and kept in prison seven months on the charge of enticing soldiers to desert. After release he brought an action for damages against the United States provost marshal making the arrest.[21] In such actions the juries would fix the damages, though, of course, for errors of law the verdicts could be set aside.

In addition to these civil actions, a number of criminal indictments were brought by grand juries against Union officers and often prosecuted to conviction in entire disregard of the protection and the federal jurisdiction provided by the Indemnity Act. Such, for the most part, were the Kentucky cases, which attracted chief attention at this time. A Federal officer in that state, who pressed horses into service in pursuit of a guerrilla band, was indicted for horse stealing,[22] while the taking of horses for the public use of the Confederate army, "however wrongful in fact," was declared excusable as a lawful exercise of belligerent right.[23] Officers who, under federal military authority gave passes to negroes were indicted for assisting the escape of slaves.[24] For firing on guerrillas under arrest, in order to prevent their escape, a provost marshal's force was indicted for murder.[25] Election troubles intensified the bitterness, and a number of Union officers were fined four thou-

[20] McCall v. McDowell et al. Cir. Ct. of Cal., Apr. 25, 1867. FED. CASES, No. 8673.

[21] Bean v. Beckwith, 18 Wallace, 510.

[22] FRANKFORT (Ky.) COMMONWEALTH, Oct. 27, 1865.

[23] The case was a seizure by one of Morgan's men. Price v. Poynter, 1 Bush (Ky.) 387. See also Commonwealth v. Holland, 1 Duvall (Ky.) 182.

[24] 2 Bush (Ky.) 570.

[25] Statement of Representative McKee of Kentucky. CONG. GLOBE, 39 Cong., 1st sess., p. 1529. In a similar case a Union soldier, whose company had been ordered to exterminate all bushwhackers, killed an escaping bushwhacker, who had been a Confederate captain. He was convicted for murder in a Tennessee court and imprisoned on a fifteen-year sentence in the state penitentiary. On a *habeas corpus* petition to the federal district court it was held that the killing was not cognizable by the state court, and a release was ordered. In re Hurst, U. S. Dist. Ct., M. D. Tenn., 1879. FED. CASES, No. 6926.

sand dollars apiece for executing a military order which required certain men to be kept away from the polls. In one county, as reported by Representative Smith in Congress, "the grand jury indicted every Union judge, sheriff, and clerk of election, though not a single indictment was made on the basis of evidence brought in by Union men."[26] As a result of these election difficulties, Governor Bramlette himself, a man of Union sympathies, was placed under indictment,[27] and several prosecutions were directed against General Palmer, the Federal commander at Louisville.[28]

Officers who were convicted in such cases were subjected to heavy fines and in many instances they were placed in the penitentiary. If they pleaded the Indemnity Act as a defense and pointed to their official capacity as agents of the federal government, they were met with the answer that the act was unconstitutional (as many judges, of course, sincerely believed) and that no matter who issued the order, even the President, no legal protection was afforded. If they then sought a transfer to federal jurisdiction, this was denied on the ground that no federal question was involved. Thus deprived of judicial protection, former federal officers sought military aid, and orders were accordingly issued to the various division and department commanders to use troops if necessary in order to protect those who had been in the military service of the United States "from illegal arrest and imprisonment."[29]

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[26] Representative Smith of Kentucky, in CONG. GLOBE, 39 Cong., 1st sess., p. 1527.

[27] FRANKFORT (Ky.) COMMONWEALTH, Sept. 19, 1865.

[28] Criminal indictments were brought against General Palmer for aiding the escape of slaves (by giving passes to negroes), this being a felony under Kentucky law. In addition; suits for damages were lodged against him by private parties seeking to recover the value of slaves who had escaped. In Commonwealth v. John M. Palmer, 2 Bush 570, the highest Kentucky court held that the federal government had no constitutional power to abolish slavery in Kentucky and that General Palmer could not protect himself by pleading an order of the Secretary of War. After the adoption of the Thirteenth Amendment, however, the indictment in this case was quashed. In his memoirs Palmer mentions a number of suits and prosecutions against him, which were defended without expense to the government, the costs being paid from the General's pocket. He adds, however, that the government later took charge of the suits and indemnified him against the costs. PERSONAL MEMOIRS OF J. M. PALMER, pp. 264-266.

[29] "In consequence of the many and repeated applications made to these

To back up the state courts and to promote these suits and prosecutions against Unionists, a particularly defiant act was passed by the Kentucky legislature. By the terms of this measure, enacted February 5, 1866, to take effect at once, it was made unlawful "for any judicial officer in this Commonwealth to dismiss any civil action * * * for the reason that the alleged wrongs or injuries were committed during the existence of martial law or the suspension of the writ of *habeas corpus*."[30] In a later statute it was provided that an appeal might be taken from the decision of any court which authorized the transfer of a case from a state to a federal tribunal.[31] The plain intention of this law, as its opponents charged, was to override the jurisdiction of the courts of the United States by means of a state legislative enactment.

It will thus be seen that the Indemnity Act was failing of its purpose, and that the protection which it sought to apply by judicial process was proving inadequate. The problem of making the act really effective was in part, of course, merely a matter of asserting federal authority where it was being defied, but, in addition, a strengthening of the statute itself was necessary, and for this reason the act was substantially amended by Congress in 1866. Under the original law, as interpreted by the state courts, an order of the President himself had to be produced in court in order to make available the benefits of the act as a defense. This was a serious limitation, for many of the acts complained of had been committed on the authority of department commanders, provost marshals, and other subordinate officials. In the amendment it was therefore provided

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headquarters for protection against unjust and illegal arrest and imprisonment of citizens * * * who have been in the military service of the United States * * * Department and District commanders will most strictly prohibit and prevent all such action on the part of the civil authority." Command of Maj. Gen. Thomas, Hdqrs. Mil. Div. of Tenn., to Gen. J. M. Palmer, Louisville. FRANKFORT (Ky.) COMMONWEALTH, Oct. 3, 1865.

[30] LAWS OF KENTUCKY, 1866, chap. 372.

[31] Either party to any suit in any court of this Commonwealth * * * shall have the right of appeal * * * from the order of any such court transferring * * * a cause to any court of the United States, or staying proceedings * * * with a view of transferring a cause to any court of the United States. Approved Feb. 16, 1866. LAWS OF KENTUCKY, 1866, chap. 690.

> "That any search, seizure, arrest or imprisonment made, * * * by any officer or person * * * by virtue of any order, written or verbal, general or specific, issued by the President or Secretary of War, or by any military officer of the United States holding * * * command of the * * * place within which such seizure * * * or imprisonment was made, either by the person or officer to whom the order was addressed * * * or by any other person aiding or assisting him therein, shall be held to come within the purview of the (Indemnity) act * * * for all the purposes of defense, transfer, appeal, error, or limitation provided therein." (In case the original order or telegram could not be produced, then "secondary evidence" was made admissible.)[32]

This sweeping provision would correct one of the defects of the measure by covering cases where authority for the act in question might not be traceable directly to the President, and would even apply to indirect or verbal orders.

Another feature of the act requiring reinforcement was that relating to the transfer of cases from state to federal courts. Though the original measure was seemingly complete and explicit on this point, it had not in fact served the purpose of actually asserting and maintaining federal jurisdiction in the face of strong opposition on the part of judicial officers of the states. The amendment, therefore, was equipped with "teeth." After conferring the full right of removal from state courts to circuit courts of the United States it provided that if a state court should proceed further with a case after such removal, damages and double costs should be enforceable against the judges and other officers involved, and in addition such proceedings should be void.[33]

III

In its actual operation, thus reinforced, the Indemnity Act presented a number of difficult points. One of the grounds of criticism was the extremely wide reach of federal jurisdiction which the act provided. From various quarters the argument was advanced that the jurisdiction conferred upon federal courts was

[32] 14 STAT. AT L., p. 46, § 1.

[33] Act of May 11, 1866, 14 STAT. AT L., p. 46, § 4.

excessive, covering, as it did, even a case of trespass between two citizens within a state. In a New York decision the dissenting judge called it an extraordinary statute that would "give federal jurisdiction in a case where an act, no matter how appalling, was claimed to have been done under color of authority derived from the President, no matter how frivolous the claim." The judge further complained that in this manner the person, not the subject matter, was made the criterion of jurisdiction, while in reality the case in point did not present an issue "rising to the dignity and stature of a federal question," but involved an unwarranted incarceration by one citizen of another who was not subject to military law.[34]

Federal jurisdiction was similarly resisted in *Short* v. *Wilson,* a case arising in Kentucky in 1866.[35] A federal captain was being sued for the seizure of a horse, and it was claimed that he had resigned his commission and was a private citizen when the seizure was made. The court held that the seizure was "an unauthorized, wrongful spoliation without any * * * legal excuse, a mere trespass exclusively cognizable by the state court." Congress, it was maintained, could neither enlarge nor curtail the constitutional sphere of federal jurisdiction. Beyond the constitutional boundary, said the court, even the President's act "will be as void as the ultra constitutional acts of congress * * * and an action resulting from it is not a case 'arising under the constitution or laws of the United States.'" The Indemnity Act was held to be law "so far as it applies to cases over which the Constitution confers jurisdiction on the federal judiciary," but it could not be justly applied beyond this limit. A lower Kentucky court had ordered the case to be removed, in keeping with the Indemnity Act, to the United States circuit court at Louisville, but the state Court of Appeals reversed this decision, holding that the case was not legally transferable to the federal court.[36]

The answer to be made to such complaints is that in any case a right reasonably claimed under a federal act may be made the

[34] Jones v. Seward, 41 Barb. (N. Y.) 269.

[35] 1 Bush (Ky.) 350.

[36] In so deciding, the Court of Appeals applied the Kentucky statute of Feb. 16, 1866, elsewhere treated in this article.

occasion of a transfer to federal jurisdiction, and that even though the act may eventually be found void, yet the question of its validity, as well as that of the claim presented, may be lawfully deferred to the national courts.[37] The intention was to apply the Indemnity Act, with its reinforcing amendment, only over such subject-matter as was truly federal, and if it were found that a mere wanton trespass had been committed, or that the defendant did not have the character of a federal official, or that his authority for the specific act was defective, then it would be the duty of the federal court to remand the case and let the state court handle it. The question as to whether federal jurisdiction exists is itself a federal question, and the United States courts could be properly criticised, not for entertaining the question, but for deciding it wrongly, or for taking over a case on the basis of a flimsy pleading which failed to present the necessary jurisdictional facts.[38] Only in the latter case would they be trenching upon state jurisdiction. As a matter of fact, these courts seem to have taken due care to avoid applying the Indemnity Act as a shield for a wanton trespass of the sort of which the state courts alone could take cognizance.

Another point raised against the act was its retroactive feature. Since the measure extended protection for orders given and acts committed (or omitted) in the past, Senator Edmunds referred to the act as *"ex post facto"* and held that its benefits could not apply where martial law did not exist. He ventured the assertion that no decision of a civilized court could be found upholding an *ex post facto* law declaring that a past transaction should be guilty or guiltless except as fortifying martial law where civil law had broken down.[39] Without dwelling on this point, it may be sufficient to note that the term *"ex post facto"* properly applies to retroactive measures having to do with crimes, such as those which define new

[37] For a treatment of the removal of cases from state to federal courts where federal questions are involved, see STANDARD ENCYCL. OF PROCEDURE, vol. 22, p. 788.

[38] Where a transfer from state to federal jurisdiction is sought, the plaintiff's pleading must show the necessary jurisdictional facts, and if a plaintiff puts in a federal question which has not even a color of merit, the court will dismiss the petition. HUGHES ON FEDERAL PROCEDURE, §§ 236, 237, 309.

[39] CONG. GLOBE, Apr. 18, 1866, 39 Cong., 1st sess., p. 2019.

offenses or increase the punishment for existing offenses. In laws that are truly *ex post facto* the retroactive effect is harmful, while in the Indemnity Act it was beneficial. In accepted legal usage, and in the intention of the Constitution makers, such a law as the Indemnity Act would therefore not have been regarded as *ex post facto* legislation.[39a] Had the act involved a retroactive delegation of legislative authority to the President this would have been a different matter and the objection would then have rested not on the retroactive—or, as inaccurately called, the "*ex post facto*"—feature, but upon the unconstitutional delegation of power.

A very objectionable feature of the Indemnity Act as amended was a clause which provided for the virtual coercion of state judges. After requiring the transfer to federal courts of all cases in which presidential or congressional authority could be claimed as protection for wrongs committed, the act continued:

> "If the state court shall * * * proceed further in said cause or prosecution * * * all such further proceedings shall be void * * * and all * * * judges * * * and other persons * * * proceeding thereunder * * * shall be liable in damages * * * by action in a court of the state having * * * jurisdiction, or in a circuit court of the United States * * * and upon a recovery of damages in either court, the party plaintiff shall be entitled to double costs."[40]

This punishment of state judges for acts done in a judicial capacity was attacked during the congressional debate as a violation of those well-known principles of jurisprudence which give to the judge an independent, impartial character and protect him from personal consequences as a result of the performance of judicial functions.[41] Here, in the very measure which was intended to exempt federal officers from liability before the state courts, we find a clause subjecting state judges to damages for official acts, and permitting the use of federal courts to enforce such liability.

[39a] *Editor's note.* See "EX POST FACTO IN THE CONSTITUTION," 20 MICH. L. REV. 315.

[40] 14 STAT. AT L., p. 46, § 4.

[41] For the debate on this subject, see CONG. GLOBE, 39 Cong., 1st sess., pp. 2054-2063.

The few precedents for such a course are of doubtful character. A New York statute then in force subjected a judge to a penalty of $1,000 for refusing to issue a writ of *habeas corpus* legally applied for, but this law was unusually drastic. The corresponding English statute penalized the judge only for such a refusal during vacation time, and Kent, the learned commentator, remarked that this law of his own state presented the first instance in the history of the English law in which judges of the highest common law tribunal were made responsible, in actions by private suitors, for the exercise of their discretion in term time.[42]

That the United States Supreme Court opposed such a treatment of judges is shown in the case of *Bradley* v. *Fisher*,[43] in which it was declared to be a principle of the highest importance that a judicial officer, in exercising the authority vested in him, should be free to act upon his own convictions without apprehension of personal consequences. In that case the court declared: "The principle which exempts judges of courts of general or superior authority from liability in a civil action for acts done * * * in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence." The court added that such liability would not apply even in case of malicious or corrupt action, and that for such misconduct impeachment was the appropriate remedy.

Such a clear challenge, however, had been presented to the federal government by the defiant attitude of some of the state courts that the provision was retained. It was justified by its supporters on the ground that a judge who, with all the removal papers before him, should refuse to stay proceedings would be remiss in the performance of a merely ministerial act, and would be going beyond the limit of judicial discretion.[44] In cases of this sort American law recognizes the principle that judges may be held liable.[45]

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[42] KENT, COMMENTARIES ON AMERICAN LAW (Ed. 14, Boston, 1896), vol. 2, pp. 29-30.

[43] 13 Wallace 335. See also Yates v. Lansing, 5 Johnson (N. Y.) 283; and Randall v. Brigham, 7 Wallace 523.

[44] Howard in U. S. Senate, CONG. GLOBE, 39 Cong., 1st sess., p. 2060.

[45] This whole subject of the liability of judges in American law is summarized in LAWYERS' REPORTS ANNOTATED (old series), vol. 14, p. 138. Judges of superior courts are not personally liable for anything done in a

Perhaps the most serious objection to the Indemnity Act was its interference with existing judicial remedies for private wrongs. Suits were obstructed for the purpose of protecting federal officers without any provision being made for the relief of those who had been despoiled. This failure to preserve remedies for the individual was frequently referred to by the opponents of the act.[46] As one Senator expressed it, "It is not for * * * Congress to declare by one sweeping act that nothing done in the suppression of the rebellion under authority and by virtue of orders shall give to the injured an action for damages."[47] A different course might well have been taken, for the injured party could have been permitted to recover damages, and then the damages could have been assumed by the United States. Thus the officers could have been protected (that is, they could have been "indemnified" in the true sense instead of immunized) and at the same time the aggrieved citizen would not have been deprived of the means of judicial relief. Such assumption of damages by the government would have been broadly analogous to the compensation of owners for goods seized by military authorities while in occupation of enemy territory or to the principle of compensation in connection with the law of eminent domain.

judicial capacity, and no action may lie against them for misconduct, however gross, in performance of judicial duties. But many cases are cited in which judges have been held liable, as for unlawful commitment, refusing to perform ministerial duties, or in cases where judges of inferior authority have exceeded their jurisdiction. In Ex parte Virginia, 100 U. S. 339, a state judge was indicted in a federal court for excluding certain citizens as jurors on account of color in violation of a law of Congress passed in 1875. The Supreme Court here upheld as constitutional an act of Congress which punished state judges for such action, making the distinction that the selection of jurors is a ministerial, not a judicial, function, and that in excluding colored men because they were colored the judge departed from the proper limits of his discretion. It would, of course, be consistent with this decision to contend that, for strictly judicial acts, Congress may not inflict punishment or impose liability upon state judges.

[46] At first sight it might seem that the provision in section 7 of the Indemnity Act, prohibiting suits after a period of two years, implied that within the two years private remedies would exist. Such a supposition would be erroneous. The limitation prevented suits from being brought after the specified two years, while within that period the act itself would serve as an adequate defense against the recovery of damages.

[47] Senator Cowan in CONG. GLOBE, 39 Cong., 1st sess., pp. 2020-2021.

The analogy would lie in the recognition of public ends that were served by the spoliation of the citizen and the consequent duty of public compensation.

A provision of this sort seemed the more necessary in view of the general principle that in case of an act of spoliation constituting a trespass on the part of an officer, no liability for compensation would attach to the United States.[48] In cases of this sort, where the United States government did not see fit to adopt the officer's acts as its own, it was customary to hold that the officer alone would be liable, but this sole remaining liability was extinguished by the Indemnity Act.

This proposition of having the United States assume damages was, in fact, considered in Congress and an amendment offered to that effect.[49] It was pointed out that the adoption of this amendment would have been in keeping with the congressional practice of passing special private acts to indemnify such officers as have been subjected to damages while in faithful discharge of duty. When the matter came up for discussion, however, numerous practical objections were raised. It was urged that the plan was too expensive, that juries would commonly grant larger damages in judgments against the United States than in actions against individuals, and that collusion between parties to the suit would result in a lukewarm defense and a pre-arranged sharing of the amount awarded between the defendant and the plaintiff.[50] For these reasons nothing was done to correct that portion of the act which was widely regarded as its most substantial defect.

IV

It remains to consider the broad question of the constitutional validity of this statute of indemnity. The objections above noted were, of course, used as arguments against the constitutionality of the act. The excessive federal jurisdiction conferred, the denial of private remedies, the invasion of the proper field of the state judiciary in connection with trespass cases, the grant of immunity for "wrongs"

[48] Wiggins v. U. S., 3 Ct. of Cl., 412; Mitchell v. Harmony, 13 Howard (U. S.) 115.

[49] CONG. GLOBE, 39 Cong., 1st sess., pp. 2063, 2065.

[50] CONG. GLOBE, 39 Cong., 1st sess., pp. 2063-2064.

committed in districts not under martial law, the interference with the enforcement of contracts, and the retroactive feature—all these points were developed to support the frequent contention that the act was unconstitutional.

One of the emphatic decisions denouncing the act was that of *Griffin* v. *Wilcox*,[51] an Indiana case arising shortly after the act was passed. Wilcox, a provost marshal at Indianapolis, had arrested a civilian, Griffin, for violation of a military order prohibiting the sale of liquor to enlisted men. Out of such a petty case the judge spun an elaborate argument regarding martial law, war powers, free speech, the purpose of the war, and the methods of the government at Washington. Throughout this decision there ran an undertone of opposition to the Lincoln administration. The immunity feature was denounced as depriving the citizen of all redress for illegal arrests and imprisonments, for it was pointed out that no additional protection was needed for such acts as were legal. There was no forcible resistance to authority by the people of Indianapolis such as would justify establishing military control over civilians, and the use of martial law methods without such justifying cause was held to be in excess of the war powers. Not even the President, it was maintained, could have properly conferred such authority, and the Indemnity Act could not justify such usurpation.

In spite of many judicial utterances in the same tenor, the act was sustained in its essential features by various decisions of the highest tribunal. The leading case for the constitutionality of the act was that of *Mitchell* v. *Clark*.[52] General Schofield had ordered a general seizure of intangibles at St. Louis, and as a result certain rents were seized and appropriated by the United States, thus preventing the fulfillment of the contractual obligations of a lease between two citizens of Missouri. From one aspect, therefore, the case involved the enforcement of an ordinary contract, and this, of course, was subject-matter proper to a state court. The fact that the seizure had been made by a federal officer, however, opened the way for federal jurisdiction under the Indemnity Act.

[51] 21 Indiana 370 (1863).
[52] 110 U. S. 647.

Because of a special feature in this case, the court did not undertake to decide whether General Schofield had the authority to seize the debt or whether the payment to him was a legal discharge of the obligation. The controlling fact, according to the court's interpretation, was that the suit had not been brought within two years, and was therefore barred by the statute of limitations,[53] which was a part of the Act of Indemnity. The position adopted by the court was that "wherever a suit can be removed into United States courts, Congress can prescribe for it the law of limitations not only for these courts, but for all courts." It was therefore held that a federal statute of limitations was good in a state court, and in this way the jurisdiction of the Missouri court was not only defeated but this was done without any inquiry into the legal justification for the original seizure.

In considering the question of the constitutionality of the Indemnity Act the court dwelt upon the purpose of the law, pointing out that federal military officers often had to perform delicate duties among people who, though citizens, might be intensely hostile to the government, and that acts might be done for which there was no adequate basis at the time. Then the court proceeded to say: "That an act passed after the event which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority, is valid, so far as Congress could have conferred such authority before, admits of no reasonable doubt. These are ordinary acts of indemnity passed by all governments when the occasion requires it." The court then reaffirmed a former case which sustained that feature of the Indemnity Act which authorized the removal to federal courts. The reasoning of the court could be summarized about as follows: (1) the Indemnity Act is constitutional; (2) that act authorizes the removal of cases involving acts done by federal officers to the federal courts; (3) this is such a case; (4) Congress has the right to estab-

[53] "No suit or prosecution * * * shall be maintained for any arrest or imprisonment made, or other * * * wrongs done * * * or act omitted to be done * * * by virtue of * * * authority derived from * * * the President * * * or * * * any act of Congress, unless the same shall have been commenced within two years * * * after such arrest," etc. (The limitation, however, was not to commence until the passage of the act.) 12 STAT. AT L., p. 757.

lish the period of limitation for such suits and has in fact done so; (5) consequently, since this case was not brought within the prescribed two years the plaintiff cannot recover (or even prosecute the claim) in the state court.

Justice Field emphatically dissented to this opinion. He knew of no law to justify a military officer in obstructing the payment of a debt due from one loyal citizen to another, neither of them being in the military service, nor in an "insurrectionary" state where the courts were inoperative. Civil war in one part of the country did not, in his opinion, suspend constitutional guarantees in other parts. "Our system of civil polity," he said, "is not such a rickety and ill-jointed structure that when one part is disturbed the whole is thrown into confusion and jostled to its foundation." Referring to the suspension of the privilege of *habeas corpus,* he urged that the Constitution does not forbid, during such suspension or by reason of it, the institution of suits for such claims or authorize Congress to forbid it. Though admitting that Congress may indemnify those who, in great emergencies, acting under pressing necessities for the public welfare, are unable to avoid invading private rights in support of the government, he held that "between acts of indemnity in such cases and the attempt to deprive the citizen of his right to compensation for wrongs committed against him or his property, or to enforce contract obligations, there is a wide difference which cannot be disregarded without a plain violation of the Constitution." Neither the act of 1863 nor the amendment of 1866, he held, could properly be construed to apply to actions for breach of contract between citizens in loyal states, since such contracts were under state jurisdiction. If such a construction were possible, then he maintained that the legislation would be unconstitutional.

It should be noted that the principal ground of objection to the court's position in *Mitchell* v. *Clark* was the extreme application of the Indemnity Act (or, more specifically, the statute of limitations included in the act) so that it defeated a private remedy and prevented the enforcement of an ordinary contract such as would normally lie entirely within state jurisdiction. Both the court and the dissenting opinion upheld the validity of the act so far as the protection of federal officers was concerned, but Field considered

the order of General Schofield unwarranted and would not admit the force of the statute of limitations as a bar in the case, while he also insisted that individual rights should have been better protected. Had Congress provided the desired official immunity by some method that would have preserved private remedies, the chief basis of criticism would have been removed.

It will thus be seen that the essential provisions of the Indemnity Act were sustained by the highest tribunal. There was, however, one feature of the act which did not stand the test of constitutionality. This was the provision for a trial *de novo* of the facts as well as the law in a federal court after a jury had rendered its verdict in a state court.

The Seventh Amendment of the Constitution provides as follows: "In suits at common law * * * no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This amendment has been interpreted in a number of judicial decisions. It has been held that the "common law" here alluded to is the common law of England, "the grand reservoir of all our jurisprudence," and that according to its principles the facts once tried by a jury are not to be re-examined, unless a new trial is granted in the discretion of the court before which the suit may be pending, or unless the judgment of such court is reversed by a superior tribunal on writ of error and a *venire facias de novo* is awarded. In either case the new trial would be conducted in the same court in which the former defective trial occurred. On this matter the courts have spoken decisively, and it has been referred to as the "invariable usage settled by the decisions of ages."[54]

But the fifth section of the Indemnity Act contained the following clause:

> "It shall be competent for either party * * * after the rendition of a judgment in any such case (*i. e.*, in prosecutions

[54] U. S. v. Wonson, 1 Gallison 5; FED. CASES, No. 16, 750. Judge Story in delivering this opinion (in the federal circuit court for Massachusetts) wrote: "We should search in vain in the common law for an instance of an appellate court retrying the cause by a jury while the former verdict and judgment remained in full force." See also Capital Traction Company v. Hof, 174 U. S. 1.

> against officers acting under authority of the President) * * * to remove the same (from the state court) to the circuit court of the United States * * * and the said circuit court shall thereupon proceed to try and determine the facts and the law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding."[55]

The only other instance in which Congress has undertaken to authorize a second trial by a jury in a federal court while a former jury's verdict in the same case had not been set aside was during the War of 1812. An "act to prohibit intercourse with the enemy," passed on February 4, 1815,[56] had a provision identical with that above quoted from the Indemnity Act.[57] In fact, the Indemnity Act was modeled upon the law of 1815 in this respect. Though the act of 1815 had been denounced as unconstitutional by a federal circuit court in Massachusetts, this provision was repeated in the acts of 1863 and 1866, in spite of the opposition of senators who called attention to the matter in debate.[58]

It became the duty of the Supreme Court to pass upon this feature of the Indemnity Act in the case of *The Justices* v. *Murray*, which came up from New York in 1869.[59] An action for false imprisonment was brought in the state court against Murray, the marshal of the federal district court for southern New York. Murray's defense was an alleged order of the President, which under the Indemnity Act would have served as a protection, but the jury found no evidence in support of this defense, and a verdict for the plaintiff was therefore rendered. When steps were later taken for a complete retrial in the federal circuit court, the state authorities resisted on the ground that the Indemnity Act (in this respect) was unconstitutional.

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[55] 12 STAT. AT L., p. 757. (This section was retained in the amending act of 1866.)

[56] Ratifications of the treaty of Ghent were exchanged at Washington February 17, 1815.

[57] 3 STAT. AT L., p. 195, § 8. (There are many points of similarity between this measure and the Indemnity Act.)

[58] Senators Bayard and Browning dealt with these points. CONG. GLOBE, 37 Cong., 3d sess., pp. 538-539.

[59] 9 Wallace 274.

The chief point to which the Supreme Court directed its attention was whether the Seventh Amendment applied to a cause tried by a jury in a state court. On this point the court said: "There is nothing in the history of the amendment indicating that it was intended to be confined to cases coming up for revision from the inferior federal courts, but much is there found to the contrary. Our conclusion is that so much of the fifth section of the (Indemnity) Act as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the circuit court of the United States for a retrial of the facts and law, is not in pursuance of the Constitution and is void."

In keeping with this decision the federal control of cases under the Indemnity Act would have to be exercised through removal while the case was pending or through review by the Supreme Court of the United States on writ of error, and not by a trial *de novo* in an inferior federal court after the state tribunal had pronounced judgment on the basis of a jury's verdict. But such removal and review have, throughout our history, proved to be adequate instruments for the maintenance of federal judicial supremacy.

In its many unusual features the Indemnity Act bears the unmistakable stamp of war legislation. The wide range of federal jurisdiction which it afforded, the extraordinary methods of acquiring such jurisdiction, the denial of private remedies for admitted "wrongs," the subjection of state judges to personal damages, the application of a federal statute of limitations to state causes, and the unconstitutional provision for a re-examination of facts once tried by a jury,—all these elements of the law are the abnormal product of war conditions. The law must be judged in the light of the fact that it was originally passed in the very midst of a desperate war, and was amended in the face of state defiance by the same Congress which enacted the drastic reconstruction measures. Extreme legislation was characteristic of the period, and this unique measure was only typical of the sort of irregularity that creeps into the law during war or other times of great disturbance.

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