

THE
AMERICAN LAW REGISTER.

DECEMBER, 1864.

UNITED STATES PROVISIONAL COURT FOR THE
STATE OF LOUISIANA.

This court has now been in operation for nearly two years, and some account of it and its operation cannot fail to be interesting to professional readers, and those feeling an interest in the action of our Government in reference to territory of the enemy conquered and held by it. One of the necessities of a conquest of territory of the enemy in this manner, is the government of it by the conqueror, while it shall be held by him. This duty is imposed by the laws of nations, and is quite as plainly the dictate of humanity as of that law to which the civilized nations of the world, with common consent, yield respectful obedience, while they each in turn, by their own course of action, and the precedents they make, contribute to the formation and establishment of it. By the law of nations, the conqueror of a country is not allowed to disregard the interests or necessities of the people of a country conquered and held by him, whether they be members of the civil or military branch of society. If they are combatants, they are entitled at least to the consideration of prisoners of war—if non-combatants, their rights are still greater, and just as well defined by the same law. The conqueror of the territory of an enemy may not abandon it to the violence of the conquering force, or even to the unrestrained license of its inhabitants among themselves, the rights of the weaker to be disre-

garded, and they themselves perhaps trampled upon by the stronger and unprincipled. Having brought such territory into subjection to himself, he has duties as well as rights imposed on him in respect to it—duties to the people placed by conquest under his authority. For the time being, his is the only power in the land, and while he may govern very much as he will, and as his own necessities and the interests of his service may require, within certain reasonable limits, still he is responsible to the sense of propriety and justice of mankind, and this law may not, more than any other, be violated with impunity. He must govern the country he holds, and he must do it in a manner consistent with the moral sense of the world. He cannot be permitted even by inaction to abandon it to anarchy and self-destruction by intestine strife. Peace must be preserved—wrongs must be redressed—the weak must be protected against the strong—controversies must be decided, and the rights of property respected.

After the capture of New Orleans, and some adjacent territory of Louisiana, it became necessary to provide a system of government for the district held by the Federal arms; and among the earliest wants was that of a judicial tribunal, by which rights should be adjudicated and controversies terminated; the lawless and vicious punished, and crime repressed. When society, by conquest, has become disintegrated and reduced to its elements, hardly any want is more frequently felt than that of a tribunal, by which conflicting claims may be determined and justice ascertained. This want was felt with peculiar force in New Orleans not only by reason of the extent of its population, business, and wealth, but with greater force and delicacy by the governing power, because of the foreign nationality and allegiance of a large part of its citizens and men of business, whose rights were frequently subjects of controversy. This class of citizens were slow to submit to the decision of mere military men, hearing and deciding without the usual formalities of courts of justice; and accordingly when decisions of this character were adverse to them, they flew to their respective consuls, their national representatives, and laying their grievances before them, besought their interposition with the Government of the United States. After the consuls had exhausted their influence with the officers of government on the spot, without success, the matters were forwarded to their respective ministers resident at Washington,

who in turn urged the cases on the Government and the Departments there, at the fountain head. Thus the matter became the subject of diplomatic intercourse between the representatives of the two nations, and was at once invested with the importance and interest which always attend the discussion of questions which may affect the relations between governments and the question whether they shall be peaceful or otherwise.

A very large proportion of the citizens, resident and doing business there, were persons of foreign origin, and unlike the foreign residents of the North, very few of them ever sought to be naturalized, or to take upon themselves the duties of allegiance to the Government of the United States, and equally few had even renounced their allegiance to the governments of their nativity. Many of them were English and French, and nearly all the rest were from the south of Europe, Italy, Spain, Portugal, Sicily, and other islands of the Mediterranean, and not a few were from Mexico, and the various countries of Central and South America.

It will be recollected that many of these controversies with the subjects of foreign governments arose within the first few months after the occupation of Louisiana by the Federal army, and during the administration of General Butler. Not a few of them were of such magnitude and interest as to become the subject of public discussion in the newspapers of the day (though these were a very small part of the whole), and some were the subjects of special missions from our Government to New Orleans, for the purpose of investigation there. The Hon. Reverdy Johnson, of Maryland, now of the Senate of the United States, it will be recollected, was sent by the Government to New Orleans, at an early day after the occupation of that city by our forces, to investigate the right to a large amount of money claimed by subjects of the Empire of France. His mission was to examine and report the result of his investigations to our Government for its information, to be used by it in coming to a decision. The magnitude and frequency of these questions, as well as the very serious consequences liable to follow from a disposition of them to which the claimants and their governments were not willing to submit, called for the establishment of a tribunal capable of examining and deciding such controversies, to which resort could at all times be had, and whose decisions should determine the rights of such litigants, and command the respect at once of

them and their governments. This necessity, and the relief of the Government at Washington from an immense amount of labor, thrown upon it by these frequent appeals, much more than the want of such a court for any other purpose, led to the establishment of the court which forms the subject of this article.

The Provisional Court for the State of Louisiana, was accordingly created by the following order of the President, the chief Executive, and Commander-in-Chief of the forces, military and naval, of the United States.

EXECUTIVE ORDER

ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,

Washington, October 20th, 1862.

The insurrection which has for some time prevailed in several of the states of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the state in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there, capable of administering justice, I have therefore thought it proper to appoint, and I do hereby constitute, a Provisional Court, which shall be a court of record for the state of Louisiana, and I do hereby appoint CHARLES A. PEABODY, of New York, to be a Provisional Judge to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana—his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city, and in the state of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensation as follows: * * * * Such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, Secretary of State.

EXECUTIVE DEPARTMENT,
Washington, 23d October, 1862.

I hereby certify that the foregoing is a true copy, duly examined and compared with the original, of the Executive Order of the President of the United States, constituting a Provisional Court for the State of Louisiana.

Witness my hand and the seal of the War Department.

EDWIN M. STANTON, Secretary of War.

Attest: JOHN BATTIS, Chief Clerk.

The powers conferred on Judge PEABODY by this order were certainly adequate to the end designed, and to any end that could be designed, for they embrace every department of judicature, and every case which could possibly become the subject of judicial action. "Authority to hear, try, and determine all causes, civil and criminal, including cases in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States," seems to embrace every power which can be called judicial in its character, and it is apparent that the President intended, by this order, to confer on him all the power, judicial in its nature, which sovereignty itself possessed or could confer.

The power conferred by this order is not merely that of a court of original jurisdiction, but is also that of an appellate tribunal, and Judge PEABODY would have power, therefore, to decide not only cases originating in his court, but to entertain appeals from other courts, and on appeal to decide cases brought thither from other courts.

Nor were the powers as an appellate court limited to cases in the courts of the state. They applied as well to cases in the Federal Courts in the state of Louisiana. From these courts causes were transferred to the Provisional Court by order of that court, and there heard and decided. From the Circuit Court of the United States causes pending there on appeal from the District Court of the United States were transferred to this court. The case of "The Barque Grapeshot," George Law, claimant, was of this kind. That was a libel on a bottomry bond made in Rio Janeiro. It had been tried before the rebellion in the District Court of the United States for the Eastern District of Louisiana, and had been carried on appeal to the Circuit Court of the United States, where it was pending when the rebellion broke out, and when the Provisional Court was established. This case was transferred to the Provisional Court, and there further

proofs were ordered to be taken in Rio Janeiro, and on the coming in of these proofs, and after hearing very elaborate argument, by Mr. John W. Ashmead, of New York, on behalf of the appellant, Mr. Law, and by Messrs. Durant and Horner, of New Orleans, on behalf of the appellees and libellants, was there decided finally on appeal.¹

The decisions of the Provisional Court in all cases coming there, civil or criminal, whether there originally or by appeal, were final, and not subject to review by any other tribunal. The language of the executive order on this point is clear: "His judgments" (meaning the judgments of Judge PEABODY) "to be final and conclusive," and leaves no doubt of the intention of the President or the powers of the court in this respect.

Without the provision that the judgments of Judge PEABODY should be final and conclusive, there is no doubt that an appeal would lie from this court to the Government, or to the President himself, and to any tribunal of review that should be duly instituted by him. He has, however, by this clause of the order, in effect said that no such appeal will be entertained or permitted. He has not ordered that no judgments of this court should be reviewed by the court itself—on the contrary, Judge PEABODY is

¹ This barque Grapeshot had a few years before been very famous, and her name very familiar to the ear of the reading public, and particularly of Judge PEABODY, in connection with the very notorious case of *The State of New York vs. Lewis Baker*, indicted for the murder of Bill Poole in 1856. Poole was a political bravo among the "Native Americans," or "Know-Nothings," as they were called, and Baker, who was a man of foreign birth, and being a member of the hostile or foreign faction, and a natural enemy to the Know-Nothings, and to Poole, as a noted leader of their Roughs, killed him by a shot from a pistol in a bar-room, in the city of New York, known as Stanwix Hall, in one of the most sanguinary and desperate bar-room fights that ever occurred. Baker, aided by his friends, at once fled from the officers of justice, and after being hunted for days by large bands of men in the forests and marshes of New Jersey, took passage clandestinely in a small vessel bound for one of the Canary Islands. This having been ascertained, and the "Know-Nothings" being fierce for his punishment, the barque Grapeshot (esteemed a very fast vessel) was dispatched in pursuit, and arrived at the Canaries at about the same time with the other vessel. Baker was seized before he landed, and carried on board the Grapeshot, and brought back to New York, where he was twice tried in the Supreme Court of the state of New York, the last time, by a singular coincidence, before the same Judge PEABODY, now holding the Provisional Court for the state of Louisiana, and hearing the case of the barque Grapeshot, he having been at that time one of the justices of the Supreme Court of the state of New York.

at liberty to reconsider his own decisions, and finally to make such judgments and decisions in affirmance or reversal of them as he, on mature consideration, may think correct, and only the decisions finally arrived at by him are made conclusive of the rights of the parties. These must so be held. The President might, no doubt, make any case or any number of cases exceptions to this rule, and order them to be heard on appeal by another tribunal, just as he might revoke and do away with that provision of the order altogether, but he has said that it should not be done, and that saying must be considered the law of the court until it is revoked.

The powers conferred on this court seem to make it the Alpha and Omega, the beginning and end of justice in Louisiana.

The introduction of the court was announced by a Proclamation of the Military Governor in the following language:—

A PROCLAMATION.

STATE OF LOUISIANA, EXECUTIVE DEPARTMENT.
New Orleans, December 29th, 1862.

By an executive order, dated on the twentieth day of October, A. D. 1862, Abraham Lincoln, President of the United States, has constituted an "*United States Provisional Court for the State of Louisiana*," and appointed the Hon. CHARLES A. PEABODY to be a Provisional Judge to hold said court.

By the terms of this order he is invested "with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly to exercise all such powers and jurisdiction as belong to the District and Circuit Courts, conforming his proceedings, as far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana. His judgments to be final and conclusive."

The said judge is further authorized and empowered to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court.

In the exercise of the authority conferred by this order, the said judge has appointed George D. Lamont, Prosecuting Attorney, Augustus De B. Hughes, Clerk of said court, and Isaac Edward Clark, Marshal.

Official notice is hereby given of the organization of said court, and of the appointment of the said CHARLES A. PEABODY, as judge, and of the officers of the court by him appointed.

All judgments, decisions, and decrees of said court, and all acts of said officers, by them done under the authority of said order, are to be respected and obeyed accordingly.

GEORGE F. SHEPLEY,
Military Governor of Louisiana.

The court entered upon business in January, at the close of the Christmas holidays, and was immediately filled with business of the first magnitude. Suits growing out of the agricultural pursuits of the country were of frequent occurrence. Some of them related to the sale or disposition of the products, and in cases of this kind the title or value of the whole crop of the year was often in question, and the amount in controversy was very large. In other cases, questions between the planter and his factor or commission merchant were presented. By the system of business in use there, the factor received from the planter and sold for him his crop, for which service he was paid a commission on the amount; he also furnished the planter supplies for his plantation, furnishing them from his own store if he had them there, and if not, then buying them for him and sending them to him, and for either of these services he received another commission; and by the laws of Louisiana, he had a lien on the crops of the current year for his reimbursement. In many of these cases the sums in controversy were very large. There were also many cases of great novelty and interest growing out of the very extraordinary state of things that had existed; the breaking out of the rebellion; the government under rebel rule, its own acts and the acts of its courts and officers, and those of individuals caused by it; the transition from Federal to rebel, and from rebel back again to Federal rule; and among others, questions arising out of the action of our own courts and officers, just after the occupation of the country, and before courts were established or in general operation, or while their powers and jurisdiction were only imperfectly understood.

In the decision of questions between man and man, the court adopted as its guide the laws of Louisiana as far as they were applicable to the state of things existing there, and were not altered by orders of the Government, and under those laws heard and decided the cases brought before it. Motions for review or new trial being held to be of right and of course were of frequent occurrence, and reviews or new trials were esteemed matters of strict right, and were granted wherever errors affecting the merits and such as would warrant the granting of new trials appeared to have been committed. In this manner cases were heard originally and in review by Judge PEABODY, and the parties had always the benefit of a re-examination of their cases before him, although no appeal to another court was afforded them. It

was only the decision of Judge PEABODY, after hearing and re-hearing—hearing originally and in review—that was made by him practically final and conclusive of the rights of parties.

In cases properly cognisable by the courts of the Federal Government, however, the Provisional Court administered the same law that the Federal Courts would have been bound to administer; so that in its administration of justice, this court, whether exercising the jurisdiction of a Federal or of a State Court, applied the same law which would, in times of peace, have been administered by the established constitutional tribunals of the land.

All orders of the Government or its representative the commanding general were of course obligatory and of paramount authority as law with this court, as they must be in every court in a country under martial law.

In criminal cases also, of which only the highest grades were ever tried in this court, the laws of Louisiana were the rule of the court. Complaints were presented to a grand jury, and after indictment was found, each case was tried before a petit jury with all usual formalities of trial by jury.

In both civil and criminal cases all the proceedings of the court were free from everything having the appearance of a military or summary administration of justice, and were conducted in accordance with the forms and habits of civil courts of justice, and with as much deliberation as in times of peace before the ordinary constitutional tribunals of the land.

In cases of maritime prize the court decided that the order of the President could not give it jurisdiction, and that it had not authority to act; and in cases of confiscation it doubted its authority, and was relieved of the necessity of making a decision on the point while the question was being agitated before it by the organization of the Federal courts there, which had unquestioned jurisdiction in both those classes of cases.

It may be supposed that this court, in an enemy's country, and as a measure of the Government dispensing justice among a people generally hostile to the authority from which it proceeded, would not have been acceptable to them, and that the officers of it would have been met, if not with resistance, at least with unwilling and sullen obedience; but such was not the case. Of course no thought of resistance to its process could for a moment be entertained, for it had the military and naval force of the Gov-