THE

AMERICAN LAW REGISTER.

MARCH, 1865.

PROVISIONAL JUDICIARY OF LOUISIANA.

After the conquest of a country, next to the preparation for guarding against a reconquest of it, and, indeed, as one of the measures for that very preparation, comes the subject of provision for governing it. It is less prominent and therefore less observed than the measures more purely military, but it is not less indispensable than these in its character. The system of provisional government in places of little importance, and where it is likely to be of short duration, is often very simple and imperfect; but where a district of territory like that taken in Louisiana, embracing, in addition to large agricultural and other interests, the commercial emporium of half a continent, comes into the possession of a conqueror, and continues in his occupation for years, a system of government more elaborate and carefully considered becomes necessary; and accordingly in Louisiana, measures provisional in their nature were made on a scale wholly different from what seemed necessary or expedient in any other part of the country wrested by the Federal arms from the control of the rebel government.

In such a case no post or department of government is needed sooner or more urgently than the Judicial. Controversies of various kinds are of constant occurrence, and must be decided

promptly. Indeed, the very confusion that attends the change of power from one party to another multiplies them incalculably, and intensifies very greatly the feelings with which they are waged. From the rude poor man, who unintentionally breaks the leg of the pet of his neighbor, or does him other trifling damage, as they in a common scramble attempt to fly a threatened evil, to the banker or wealthy depositary of the means of his patron who declines to respond to his calls for thousands to enable him to transmit to more stable places of deposit or investment, all is claim and denial, dispute and controversy. If the functions of government, and especially the judicial, be suspended, A., without color of right, ejecting his weaker neighbor, may ensconce himself in the *recherché* and luxurious apartments of B., or seizing his child, or anything else most prized by him, within his grasp, may hold it as a hostage for any contribution he may choose to levy or demand he may choose to make. Such a state of things, while it is plainly intolerable to the inhabitants of the country, reacts with disastrous effect on the governing power, increasing almost incalculably the difficulties and dangers of his position, and hence it is the dictate of policy as well as of duty to provide adequately and promptly for the efficient administration of justice, preventive and remedial.

Accordingly, one of the earliest necessities of the Federal Government, after the conquest of New Orleans and adjacent parts of Louisiana, was the establishment of tribunals for the administration of justice there.

All the functions of the previously existing disloyal government of Louisiana having been suspended, and among others the judicial, a new one for the time being embracing these powers must be organized and introduced in its place. At first, as questions arose, they were, the most important of them, decided by the Major-General commanding. Some were by him, from time to time, referred to other persons for examination and decision, to varicus members of his staff, to other officers and military men under his command, and sometimes to civilians. The decisions of these gentlemen were required to be respected and obeyed, and the justice obtained in this manner, uncertain as it was, without system and in a great degree accidental, depending much on first impressions of the gentlemen to whom reference was made, and the opportunity for investigation or the want of it, was still immeasurably better than none, and was in fact a prime necessity.

Soon, however, institutions in the nature of courts were established by the General commanding, and an officer was detailed to hear and decide controversies of a particular character. Soldiers were detailed to execute his commands, to bring the accused before him for trial, and to see that the judgments pronounced were executed.

Such a court had in fact no legal name, but was known by the name of the officer who held it. It had no full formal records, although some one of the men detailed kept a list of the persons in favor of and against whom judgments were rendered and some brief memorandum of the judgments themselves, the amount of recovery if any, or the amount of the fine, or the extent of the imprisonment imposed, and this person shortly came to be called clerk, if indeed he was not originally so christened.

About June, 1862, and five or six weeks after the occupation of the city by the Federal forces, a court was established called the Provost Court of the Army of the United States for the city of New Orleans, having at first, as its name imports, power only to decide questions relating to the army, officers, or soldiers, and the laws and rules military in their character.

From time to time other questions, not connected with the army, were by the General commanding referred to this court, and particularly such as related to matters of police and the punishment of crimes generally, and the jurisdiction of this court over cases of this kind, from frequent repetition of the references of them to it, became habitual.

Before the first summer after the conquest had passed away, this court exercised unquestioned jurisdiction of all criminal cases arising in the city of New Orleans. Shortly after this acquisition of jurisdiction, civil matters, in the absence of courts formally endowed for that purpose, were referred from time to time to this court for decision.

For a short time another court of general criminal jurisdiction of offences committed within the parish of Orleans, styled the First District Court of the Parish of Orleans, having been established by the Commanding-General, administered justice there, but it was soon abolished, leaving but little trace of its acts.

The Major-General commanding the department, and his staff under him, being in possession of the power, were of course appealed to by those wronged or in distress. This was done naturally without reflecting further than to see that they seemed to

have the power of government, and to restrain and redress wrong. They had it, and they alone had it, and of course they had the right and the duty to exercise it. The right and duty in such cases come directly from the possession of the power and the necessity for its exercise, and this is very manifest when the case is presented in a practical light. They follow so necessarily and naturally that they are never questioned. Where society, by conquest and the suspension of its civil institutions, has lost its organization and is reduced to its elements, nothing is plainer than that it is the duty of those who have the power, however obtained or held, to protect the weak against the strong, and to maintain order and the rights of citizens among themselves. This right and duty in such a state of wants and means are as apparent as is in the simplest case the relation between cause and effect.

Things remained much in this condition until August, 1862, the Provost Court being the only one continuously in operation, and that exercising jurisdiction acquired as above stated in cases of almost every character, making orders in the nature of injunctions, decreeing divorces, administering estates of deceased persons, appointing guardians of infants and administering their estates, appointing, removing, and directing trustees of former trusts.

In August following the conquest of the city, General Shepley, then recently appointed Military Governor of Louisiana, set about providing a system of courts which should be better suited and more adequate to the wants of the state. Most of the judges and other officers of the courts that had been in operation were disloyal, and having fled the country on the capture of it, were still absentees in the Confederacy, so called, and being disloyal, could not have been continued in power even if they had been willing to remain, and in their way perform the duties of their respective offices. The governor had, therefore, substantially to erect new courts.

In providing a judiciary for the state, the governor found it easier and more natural to establish courts like those which had been in use there before than to devise and set up new ones with which they had not before been acquainted, and availing himself of the habits of the country in the past, he established courts corresponding in all respects with those which had previously been in use there. This was easily done, for he had only to

direct that a certain court theretofore known there, and whose functions and duties were already well understood, should be opened for business, and for this purpose to appoint some competent person a judge, to hold it and in the same manner to supply it with a clerk and other officers and attendants, and he had at once in existence and ready for business a court having the same powers and characteristics with the one theretofore known by the same name: a court moreover the exact character, extent, and limit of whose powers and functions were well understood there, and had been ascertained and settled by a course of legal adjudications running through the years in which its predecessor and namesake had been in existence and operation.

Accordingly he appointed John S. Whittaker, Esq., Judge of the Second District Court of the Parish of Orleans. The old Second District Court, under the constitution of the state, had been a court of probate and successions, in addition to possessing the ordinary powers of a local court in civil matters. This action seemed like setting in motion that old court under the new motive power of the Federal Government, or breathing into it the breath of a new life. It was in fact, perhaps, more properly speaking, the establishment of a new court by the Executive of the Federal Government, with the jurisdiction and powers theretofore pertaining to the court previously bearing that name.

This court, therefore, had all the powers pertaining and belonging to the old court of that name, among which were those of a court of probate of wills, and the administration of the estates of deceased persons. It had also power to hear and decide civil cases generally, where the defendant resided in the parish of Orleans, or was a non-resident of the state. Where a defendant resided in the state, however, and not in the parish of Orleans, this court could not entertain a suit against him, that not having been within the jurisdiction of the constitutional state court of that name, after which this court was modelled, and to whose jurisdiction it had been appointed to succeed.

The Sixth District Court of the Parish of Orleans was also put in motion shortly after the capture of the city. The Honorable Rufus K. Howell, the incumbent of that bench, had always been a loyal man, and having, at the earliest opportunity after the capture of the city, taken the oath of allegiance to the Federal Government, was allowed to resume his functions and continue his court under the government of the Federal arms. He

continued under his old commission which he had received from the state of Louisiana before her attempted secession, and had held and acted under after the act of secession and during the Confederate rule. Here was one commission that had been held from the state of Louisiana while she was yet loyal and free from the debauchery of secession, continued through the day and rule of the Confederacy into the time of the conquest and government of the state by the Federal army, and still held and its functions exercised by that same firm and worthy man and upright judge under Federal rule.

This court, like the one last mentioned, retaining and exercising all the powers it had possessed as originally constituted under the state government, had general jurisdiction in civil cases where the defendant was a resident of the parish of Orleans, or was a non-resident of the state, and was served with process or had property within it.

The Fourth District Court of the Parish of Orleans was also established, and Judge E. Hiestand was appointed to its bench. This court, in addition to the general jurisdiction in civil cases possessed by the other district courts of the parish of Orleans, entertained appeals from justices' courts, the hearing of which constituted a large part of its business. Justices' courts, with jurisdiction in civil cases, were established in sufficient numbers in the same manner as others by the military governor.

These three civil courts, constituted as above stated, entered upon the discharge of their duties about the 1st of November, that being the time when the courts in New Orleans, from usage immemorial, resume their session after the vacation of summer. These were the only courts of civil jurisdiction in the state, and their jurisdiction was limited as against defendants residents of the state to citizens of the parish of Orleans. As to the residents of the state outside of the parish of Orleans, there was no court in which they could be sued. The Federal army held several counties in this condition.

The Provost Court, under Judge Joseph W. Bell, constituted for the city of New Orleans, was the only criminal court in the state, and administered the entire criminal justice of the state in all its various departments, and previously to the establishment of the civil courts had occasionally exercised jurisdiction in a variety of civil cases, as above stated.

This was the condition of things when in December, 1862, the

officers of the United States Provisional Court for the state of Louisiana arrived in New Orleans from New York.

The United States Provisional Court for the state of Louisiana was constituted by the President of the United States by the following order, which, as it shows the powers and purposes of the court more briefly and perfectly than they can be stated in other language, and is remarkable as being the only charter of the kind known to the world, deserves to be given entire:—

EXECUTIVE ORDER,

ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,
Washington, October 20, 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.

WAR 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 BOTTS, Chief Clerk.

Under this order Judge Peabody made up the corps for his court by appointing the officers therein authorized, and the court thus constituted was composed of the following persons:—

CHARLES A. PEABODY, *Judge.*
AUGUSTUS DE B. HUGHES, *Clerk.*
ISAAC EDWARDS CLARKE, *Marshal.*
GEORGE D. LAMONT, *Prosecuting Attorney.*

This court, made up as to its personnel in the North, and sent, constituted and organized for immediate business, to Louisiana, attracted much attention, as well for the novelty of its constitution as for the character and extent of its jurisdiction and powers, which are only limited by the limit of human acts and transactions capable of becoming the subjects of judicial investigation. They embrace "*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." This court, embracing within its jurisdiction everything in the state of Louisiana, and having jurisdiction in certain cases concurrently with some other courts, had also an extensive field of labor unoccupied by any other court. The parts of the state held by our arms outside the parish of Orleans, had no courts, civil or criminal, and no process from the courts in the parish of Orleans went thither. No local courts could well be created there, for our tenure of the country was not always permanent, but fluctuated from time to time. At one time, and for months together, a large and wealthy tract of country, embracing several counties, would be in possession of and held by the Federal army, and at another time another part of the state of equal extent would be so held, and these districts, one after the other, by the retirement of the Federal army from them, returned to the occupation and control of the Rebel army. This has been the case, at different times, to such an extent that

perhaps no part of the state except the city of New Orleans has been uniformly held by the Federal arms since its first capture by them.

A central court, therefore, with powers to bring litigants to itself wherever held, and whose operations practically would expand and contract with the flow and ebb of our army, and the government administered by it, was a great desideratum and almost indispensable to the administration of justice in those parts of the state. The wants of the state, not only as to matters formerly within the cognisance of state courts, but also as to those within the cognisance of the Federal courts throughout the state, embracing the Eastern and Western Judicial Districts of Louisiana, the Provisional Court was well calculated to supply. No review of the judgments of this court by any other was allowed, and cases originating there were heard and determined there in the first instance, and then in review; and in all cases, as well those originating there as those brought there on appeal from other courts, the rights of parties were finally settled there, "his judgments to be final and conclusive," says the Executive Order, meaning the judgments of Judge Peabody.

The power to hear and determine finally all cases, involves the power to hear and determine finally cases originating in other courts as well as those originating in the court in question, and accordingly cases were brought to this court on appeal from other courts, and were there determined finally. From the United States Circuit, cases pending there on appeal from the District Court of the United States, were transferred by order to this court, and there heard and decided. Other courts of the kind may have been created by generals in command of armies of occupation, but no account of any bearing any comparison with this in the fulness and completeness of its powers and organization is to be found.

For further particulars of the Provisional Court, see "U. S. Provisional Court for Louisiana," ante, p. 65.

The District Courts of the several parishes had been a part only of the old system of judiciary for the state. That system had embraced also a court of review known as the Supreme Court of Louisiana. The Supreme Court had had only appellate jurisdiction. It had, however, exercised that, and powers of review over all the courts of record of the state, and had been the court of last resort in the state in all cases civil and criminal. From all the local courts of the state, and the Second, Fourth, and Sixth

District Courts of the parish of Orleans, above referred to among others, appeals had lain in former times to the Supreme Court of the state above mentioned. Accordingly, the Second, Fourth, and Sixth District Courts of the Parish of Orleans, as now constituted, considering that court as still a part of their system, held that their decisions were subject to be reviewed by the Supreme Court, and appeals being taken in accordance with the practice theretofore existing they treated them as regular, and stayed proceedings on the judgments appealed from until decision by the appellate court.

In this manner many of the judgments rendered in the District Courts above mentioned, of the parish of Orleans, were stayed and rendered practically ineffective. The Supreme Court had not, nor had any court in its stead, been organized or set in motion since the establishment of the Federal authority there. Two of the former judges had actually fled with the Confederates on the capture of the city, and the other had not acted from inability to hold the court without them. In this condition of things the beneficent influence of the District Courts was very much limited. All the judgments rendered by them, which were of moment to induce the unsuccessful party to delay or defeat their execution, were at his pleasure carried by appeal to the Supreme Court, a court at that time having an ideal rather than a real existence, and proceedings in them being stayed until a hearing and decision, such a stay would, under the then present condition of things, become perpetual. The necessity for a court which should have power to review these cases, and the appeals accumulated from former years, led to the organization and appointment of judges of the Supreme Court of Louisiana, and accordingly in April, 1863, the following judges were appointed:—

CHARLES A. PEABODY, *Chief Justice.*
JOHN S. WHITTAKER and JAMES L. COLE, *Associate Justices.*

Throughout nearly the entire year 1863, the courts above mentioned constituted the judiciary establishment of Louisiana, a state, in times of peace, of very large products and commercial transactions and numerous and large litigations, and having in those times in the parish of Orleans alone eight or ten courts, and in each of the other parishes in the state, of which there were forty-five (only ten or fifteen of them usually within our lines, however), at least one local court of record of general jurisdiction.

The Provost Court, which had been presided over from its institution by Major Joseph M. Bell, of Boston, a member of General Butler's staff, on his retirement with General Butler in December, 1862, to relieve an urgent want at the time, was taken charge of by Judge Peabody of the Provisional Court, who for several months held both courts—in one dispensing justice, original and final, in civil matters of the first magnitude, and in the other the entire criminal justice of the state. He was succeeded in the Provost Court by Augustus De B. Hughes, Esq., who continued to hold that court until some time in August, 1863, when that court was discontinued, and a new one with the same name, but powers different, was instituted, at the head of which, as judge for nine months, was A. A. Atocha, Esq., a native of New Orleans, but until recently a citizen of New York.

In November, 1863, Hon. E. Hiestand, then judge of the Third District Court, was appointed to the First District Court of the Parish of Orleans, a court of general criminal jurisdiction, and that court was opened and the trials of criminal cases arising in the parish from that time were chiefly there. Two Recorder's Courts, performing the duties of police and committing-magistrates, and trying for petty offences, were organized in September by the Military Governor. The city in times of peace had had four. These courts relieved the Provost Court of much of its business, and left that to the legitimate duties of a Provost Court of the army. Parish Courts of general jurisdiction, like the old constitutional courts of the same name, were also established in the parishes of St. Bernard, Jefferson, East Baton Rouge, and a few others, in the latter part of the year 1863. In some instances the same judge was authorized to hold several of those courts. Late in the year 1863, the Second District Court of the Parish of Orleans (a Probate Court) was authorized by the Governor to perform the duties of a Probate Court for other parishes of the state in which there was no court at that time, the necessity of such a provision becoming very urgent, and it being not expedient to erect new courts for that purpose.

Such was substantially the condition of the Provisional Judiciary of Louisiana at the end of the year 1863, twenty months after the capture of the city of New Orleans. All of the few courts there except the United States Provisional Court under Judge Peabody, were creations of the Military Governor, bearing the name and having the jurisdiction and attributes of old con-

stitutional courts of the state in former times (with some few modifications by way of enlargement and curtailment of powers made by the Military Governor of the state), and no material change beyond the substitution of men as judges, from time to time, has been made in them to the present date.

These courts required no written constitution or orders defining their powers. They had the powers theretofore belonging to the courts whose names they bore, which had been well known and understood in the community. The appointment of a judge and other officers to a certain court, was in effect the establishment of a court having the powers theretofore belonging to the court named, and the investment of the judge with the powers, rights, and privileges theretofore under the state government pertaining to the officer of the same name, and this even to the extent of determining his salary and the emoluments of the office, which it was always held, as well in relation to the judges of these courts as to all other officers for the government, were the same as those provided by law for the officer of the same name and powers under the state constitution. These courts, well adapted to the wants of such a community in times of peace, perhaps, were not so well suited to times of war, when industrial and commercial pursuits are in a great measure suspended, and resorts to courts are much less frequent and for causes very different, when the amount of judicial force required is much less, but the flexibility and power of adaptation called for is much greater.

The Provisional Court on the contrary had a written charter, prepared with reference to the occasion, and was eminently adapted to the wants of the locality in the then condition of things. Its powers to hold its session in the state whenever in the condition of the country it could hold them most conveniently, and of changing its place from time to time—of calling to itself whenever sitting, litigants, whether plaintiffs or defendants—of expansion to cover whatever of the state was held by our arms, and of contracting its operations territorially, as the territory held by our arms should be contracted—the comprehensiveness of its jurisdiction, both territorially and as to subject-matters and parties—and the conclusiveness of its decisions, in each case terminating the litigation,—were features most of them peculiar to it, and giving it immense powers for good.

These courts were all of them ever guided by the laws of Lou-