possible to predict. But this we must be prepared to expect, and to meet, that the dread of centralization will cause the national courts and Congress to hesitate and temporize upon those points which most seriously and most obviously demand a firm hold and unflinching action at their hands, and which are really justified upon the most obvious and the most indubitable grounds, while the advance is constantly being pushed in the same direction by insidious and covert movements, without purpose and without observation, but through the silent pressure of popular will and the irresistible progression of growth and development. It will thus happen, as it always does, that the courts and the legislature will not take the initiative in the most essential and imperiously demanded reforms, so far as truth and justice is concerned, until the barriers of precedent and custom are undermined by other and more popular movements, which are not supported by any such array of argument. But that it will come, in the end, there can be no question. But not, perhaps, until after the common schools and the insurance companies have all become national, and many other present state institutions, in regard to which there is not one tithe of the need, and none of the reason, for making national, that there is the railway traffic. But the public can wait, and it must wait, but with the comfortable assurance that, at the worst, it is but a question of time. I. F. R.

LEGAL NOTES.

RECENT ACTS OF CONGRESS.—Mr. B. V. Abbott, one of the commissioners to revise the United States statutes, at Washington, furnishes us a condensed statement of the more important acts passed by the session of Congress just closed, from which we select the following:—

An act to amend an act, approved May 31st 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." Approved February 28th 1871.

This act contains provisions of increased stringency, protecting the elective franchise.

It makes the fraudulent evasion or violation of the registry laws of the states and territories, in the election of representatives and delegates to Congress, a crime.

The judge of the United States Circuit Court for the circuit in which a town or city of above twenty thousand inhabitants is situated, may, upon application, appoint two supervisors of election; and also appoint a chief supervisor of election from among the Circuit Court commissioners of that circuit; and the duties of each are defined. Deputy marshals are to be appointed by the United States marshals, upon application.

Jurisdiction, in all cases arising under this act, is conferred upon the United States Circuit Courts, and a provision is made for the removal of such causes, when commenced in a state court, to the Circuit Court.

Hereafter all votes for representatives in Congress shall be by written or printed ballot.

An act prescribing an oath of office to be taken by persons who participated in the late rebellion, but who are not disqualified from holding office by the Fourteenth Amendment to the Constitution of the United States.

This act declares that when any person, who is not rendered ineligible to office by the provisions of the Fourteenth Amendment to the Constitution shall be elected or appointed to any office of honor or trust under the government of the United States, and shall not be able, on account of his participation in the late rebellion, to take the oath prescribed in the Act of Congress of July 2d 1862, he shall, in lieu of said oath, before entering upon the duties of said office, take and subscribe the oath prescribed in the Act of July 11th 1868.

Joint resolution for the protection and preservation of the food fishes of the coast of the United States. Approved February 9th 1871.

This resolution recites in a preamble, that the valuable food fishes of the coast and lakes of the United States are diminishing in number, to the public injury. And it authorizes the President to appoint, from among the civil officers or employees of the government, one person of proved scientific and practical acquaintance with the fishes of the coast, to be commissioner of fish and fisheries, to serve without additional salary. His duties are, to prosecute investigations and inquiries on the subject, with the view of ascertaining whether any and what diminution in the number of the food fishes of the coast and the lakes of the United States has taken place; if so, to what cause the same is due; and also whether any and what protective, prohibitory, or precautionary measures should be adopted in the premises; and to report upon the same to Congress. The heads of the executive departments are directed to aid the commissioner in the prosecution of these investigations and inquiries. And he may take or cause to be taken, at all times, in the waters of the seacoast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may, in his judgment, from time to time, be needful or proper for the conduct of his duties notwithstanding any law, custom, or usage of any state to the contrary.

An act to provide for taking testimony, to be used before the departments. Approved February 14th 1871.

By this act any head of a department or bureau, in which a claim against the United States is properly pending, may apply to any judge or clerk of any United States court to issue a subpœna, requiring any witness, within the jurisdiction of such court, to appear before any officer authorized to take depositions in United States courts, for examination upon the subject of such claims. Refusal to appear, or false swearing, on such examination, is made punishable.

Joint resolution providing for publishing specifications and drawings of patent office. Approved January 10th 1871.

This resolution directs that the publication of abstracts of specifications and of engravings, which heretofore has accompanied the annual report of the commissioner of patents, shall be discontinued.

In lieu thereof, the commissioner is authorized to have printed, for gratuitous distribution, not to exceed one hundred and fifty copies of the complete specifications and drawings of each patent subsequently issued, together with suitable indexes, to be issued from time to time, one copy

to be placed for free public inspection in each capitol of every state and territory, one for the like purpose in the clerk's office of the District Court of each judicial district of the United States, except when such offices are located in state or territorial capitols, and one in the Library of Congress. These copies shall be certified under the hand of the commissioner and seal of patent office, and shall be received in all courts as evidence, and they shall not be taken from the depositories named for any other purpose than to be used as evidence.

The commissioner of patents is also authorized and directed to have printed such additional numbers of copies of specifications and drawings, at cost, for sale, as may be warranted by the actual demand. He is also authorized to furnish a complete set of such specifications and drawings to any public library which will pay for binding the same into volumes to correspond with those in the patent office, and for the transportation of the same, with convenient access for the public thereto, under such regulations as the commissioner shall deem reasonable.

LOCAL TAXATION IN AID OF RAILROADS AND OTHER IMPROVEMENTS.—LIMITS OF THE POWER OF COURTS TO DECLARE ACTS OF THE LEGISLATURE UNCONSTITUTIONAL.—Whether we regard the amounts involved, the connection with matters of state policy and material prosperity, or the ability brought into the discussion, no question of the day (treating the legal tender question as settled) has more interest or importance than the right of the states, under their constitutions, to authorize or compel cities and counties to subscribe and levy taxes in aid of railroad and other similar enterprises. Public attention was especially drawn to it last year by the two cases of *Whiting* v. *Sheboygan Railroad Co.*, 9 Am. Law Reg. 156, and *People* v. *Township Board of Salem*, Id. 487, in which the Supreme Courts of Wisconsin and Michigan set themselves powerfully against the previous current of decisions and held that taxation for building railroads is not for *public use* in such sense as will support legislation for that purpose. In our issue for November 1870 (p. 649), will be found also two able and elaborate articles in opposition to the views propounded by Judges DIXON and COOLEY.

In this discussion the state of Iowa has borne a foremost part from the decision of *Dubuque Co.* v. *Dubuque & Pacific Railroad Co.*, 4 G. Greene 1 (1853), down to the present time. In *Gelpcke* v. *Dubuque*, 1 Wall. 175, the Supreme Court of the United States, passing over the then latest decision of the Supreme Court of Iowa (*State of Iowa* v. *Wapello County*, 13 Iowa 388), declared the validity of county bonds issued in aid of railroads, and over this decision, both as to its intrinsic soundness and the train of momentous consequences which it has at times appeared to involve, a contest has swayed to and fro with extraordinary vigor and earnestness both at the bar and on the bench. The Supreme Court of Iowa maintaining its right to the ultimate decision of all questions arising under the state constitution, reaffirmed *State* v. *Wapello County* in the most emphatic terms in *Hanson* v. *Vernon*, 27 Iowa 28 (1869).

The next year, however, the legislature having re-enacted substantially the same act that had been declared unconstitutional in *Hanson* v. *Vernon*, the same question again came up at the fall term of 1870 in

Stewart v. *Board of Supervisors of Polk County*, in which *Hanson* v. *Vernon* and all the late Iowa cases are overruled.

The case arose on a bill in equity by a property owner against the county supervisors for an injunction to restrain the levy of a tax voted by the electors of certain townships under the Act of 1870 to enable townships, &c., to aid in the construction of railroads. The District Court refused the injunction, and thereupon plaintiff appealed to the Supreme Court. The opinions of the court and of BECK, J., dissenting, are too long for us even to give a synopsis, but we extract the following paragraphs from the opinion of the court by W. E. MILLER, J., which state very clearly and concisely the results at which the court arrives.

"The 2d section of the 'bill of rights' declares: '*All political power is inherent in the people.*' Political power consists of the three great attributes of sovereignty, namely: *legislative*, *executive*, and *judicial* authority. This is *all inherent* in the people. These powers then are supreme in the people in the first instance. *All the legislative* as well as the executive and judicial power is inherent in them. By section 1, of article 3, of the Constitution, we find that '*the legislative authority* of this state shall be vested in a General Assembly,' &c.

"The people then have vested *the legislative authority, inherent in them*, in the General Assembly. The people were the original possessors of *all* the legislative authority in the state. By this section they vest it *all* in the General Assembly. Subsequently, in the same instrument, they withdraw some portions of this authority, and impose certain restrictions upon the exercise of the authority granted. It follows, therefore, as a logical sequence, that, within these limitations and restrictions, the legislative power of the General Assembly is supreme; that it is bounded only by the limitations *written* in the Constitution. * * * * Thus it seems clear, by logical deduction and upon the most abundant authority, that this court has no authority to annul an act of the legislature unless it is found to be in *clear*, *palpable*, *and direct conflict with the written Constitution.*"

The opinion then proceeds to apply this principle to the case in hand. Starting with the proposition that the right of the legislature to take private property by eminent domain for the use of railroads, is settled and closed, it comes to the conclusion that "upon principle and reason there is the same authority for the exercise of the sovereign power of taxation in aid of the construction of railroads that there is for the exercise of the right of eminent domain, and that this view is sustained by an overwhelming weight of authority."

BECK, J., dissented, setting forth very strongly the series of decisions ending with *Hanson* v. *Vernon*, and citing with approbation the Wisconsin and Michigan cases in 9 Am. Law Reg., already referred to.

CONFEDERATE STATES—AUTHORITY OF STATE COURTS OF THE CONFEDERACY.—In *Ex parte Benajah S. Bibb et al.*, and *Ex parte Norton and Shields*, the Supreme Court of Alabama (1870) has held that the state courts held in Alabama under the rebel state government, were tribunals without lawful authority, and their judgments are void. By Ordinance 39 of the Alabama Convention of 1867, it was provided that "in all cases where judgments or decrees have been rendered since the 11th day of January 1861, to this date (December 6th 1867), the

party against whom such judgment or decrees have been obtained shall be entitled to a new trial upon affidavit showing a meritorious defence: *Provided*, the court shall be satisfied from all the facts that may be submitted by both parties that a good and meritorious defence exists:" Pamph. Acts, 1868, pp. 186, 187. The Act of October 10th 1868 extends the time of opening such judgments, for new trial as above said, to the 26th day of June 1869, and directs that the application for the new trial may be made in vacation, and that it shall be "sustained by affidavit showing probable cause for a meritorious defence:" Pamph. Acts, 1868, p. 269.

The opinions of the court, delivered in both cases by PETERS, J., hold: 1. That the Ordinance and Act of Assembly are constitutional. The granting of new trials is part of the remedy, and is within the province of the legislative power; citing *Calder* v. *Bull*, 3 Dall. 386; *Crawford* v. *Br. Bank*, 7 How. 279; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Balt. & S. Railroad Co.* v. *Nesbit*, 10 How. 395.

2. That the court will take judicial notice of the facts which make up the history of the state in regard to the government that may at any time exercise control within its boundaries, whether it be legal or illegal: *Bank of Augusta* v. *Earle*, 13 Pet. 519, 590; *Taylor* v. *Barclay*, 2 Sim. 221; 1 Greenl. Ev. ch. 2, § 5.

3. The court rendering the judgment in question "was not that of a state of the Union, and the government of which it formed a part was not that of a state of the Union. The judge who presided in it was not a judicial officer recognised in this court, or by the rightful government: *Chisholm* v. *Coleman*, 43 Ala. 204. The government and the court in which this judgment is presumed to have been rendered was a foreign affair: *Scott* v. *Jones*, 5 How. 343, 377. No such foreign court could be rightfully set up in this state. There was no law or treaty to authorize it. No citizen of this state was bound in law to answer to its summons or plead to its process. For the reason above shown, it was wholly destitute of any authority as a legal court: *Glass* v. *Schooner Betsey*, 3 Dall. 6; Bac. Abr. 374, *verb. void;* 3 Bl. Com. 24, 25. The whole proceeding was utterly void, as though it had never taken place, unless validity is given to it as a decree of a court of a government illegally and unconstitutionally erected in a state of the Union. To give legality without legislative assistance to such a tribunal, is to give legality to the insurrection itself. * * * * The attempt to incorporate and engraft into our law the European system of *de facto* governments, and the consequences which flow from them, has been wisely and emphatically repudiated by the venerable head of this tribunal in his very learned and unanswerable opinion, delivered at the first session of this court under its present organization, in the case of *Chisholm* v. *Coleman*, in which, as I think, that doctrine was properly denied acceptance here, and repelled as inapplicable to our system of governments, and to the peace of the country. It is the offspring of insurrection, and calculated to encourage them. There can be no doubt about the power of the legislative departments of the government of the Union, and the rightful and legal government of the state to validate by law of their own enactment whatever it may be wise and proper to make good after the suppression of a rebellion against the sovereignty in the states, or within the territories of the Union. The law-making power is wisely

lodged with them alone. And it is by the laws of their enactment that the land must be governed. Laws can neither be enacted nor imported by the courts, however strong their suppositions of their necessity may proclaim their want. I therefore think that to enable any government, erected in a state of this Union, to enact valid laws, or its courts to render valid judgments, it must be a legal state government, and must be acknowledged by the Congress of the United States as such; otherwise, all its acts and the acts of all its courts are utterly void, and they can only become valid by the affirmance and ratification of the rightful legal government in its restoration to power, or by the rightful government of the nation, as the question may be one of domestic or national import. In this state necessity may be pleaded to excuse an individual act otherwise unlawful, but it cannot be pleaded to validate a law or a judgment of an incompetent authority."

4. That the Ordinance and Act of Assembly were legislative recognitions of the judgments in dispute, so far as to make them lawful foundations for new trials between the parties.

5. In the latter case (*Ex parte Norton & Shields*) the court further held, that a contract for sale and warranty of soundness of a slave, made after the emancipation by the President, January 1st 1863, was wholly void, having been entered into after the person sold had been set free; citing *Morgan* v. *Nelson*, 43 Ala. 586, and *Texas* v. *White*, 7 Wall. 728. In this last point PECK, C. J., did not concur.

ACTION FOR DAMAGES FOR ASSASSINATION.—*Gunter* v. *Dale County*, in the Supreme Court of Alabama (June Term, 1870), was an action under the Act of December 28th 1868, by which the widow or next of kin of any person "assassinated or murdered by any outlaw or persons in disguise, or mob, *or for* past or present party affiliation or political opinion," is entitled to recover from the county in which such murder occurred, the sum of five thousand dollars. The defendant demurred to the declaration on the ground that it did not aver that the killing of the plaintiff's husband was on account of political opinion, but the court held that the words of the act were disjunctive, and that the action could be sustained if the killing was alleged either to have been by an outlaw (as in the present case), *or* on account of political opinion. The opinion by PETERS, J., very appositely refers to the old common-law responsibility of hundreds and tythings for crimes committed within their limits, and to the stat. 9 Geo. 1, c. 22, commonly called the Waltham Black Act: 4 Blacks. Com. 245.

INDIAN'S RIGHT TO TRAVEL THROUGH THE STATES—FALSE IMPRISONMENT—VINDICTIVE DAMAGES.—*Keokuk* v. *Wiley*, in the Supreme Court of Kansas (1870), was an action for false imprisonment. It appeared in evidence that Wiley was the agent for the Sacs and Foxes, of which tribe Keokuk was chief. Commissioner Mix had directed that no delegations from any of the tribes should visit Washington, as there was no appropriation to pay their expenses. This was told by Wiley to Keokuk and others on November 16th 1868, when Keokuk said he should go, as he had money, and would pay his own expenses. Keokuk and four others of the tribe started for Washington, without license so to do. They were overtaken by Wiley at Lawrence the next day, when

Wiley went before a United States commissioner for the district of Kansas, and made a complaint in writing, under oath, charging that Keokuk, a Sac and Fox Indian, of the Sac and Fox reserve, in the county of Franklin, in the district and state of Kansas, did, on the 23d day of November 1868, leave said reserve, and did disobey the orders of the United States Commissioner of Indian Affairs, and the order of other agents of the United States, to him given, and asking that Keokuk be apprehended and dealt with according to law. On this affidavit a warrant was issued, and Keokuk was arrested by the United States marshal and brought before the commissioner. Wiley employed counsel and testified in the case, and thereupon the commissioner decided that Keokuk should give bail for his appearance at the next term of the United States Court for the district of Kansas, and directed the marshal to take him into custody. Keokuk refused to give bail, and was taken to jail and kept there till he was released the next day upon habeas corpus. For this imprisonment he sued Wiley, and the jury gave him a verdict for $1000, whereupon the defendant took a writ of error. The Supreme Court affirmed the judgment, holding, 1. That the affidavit and the commitment did not charge any offence known to the law. 2. That the order of Commissioner Mix was no justification of the acts proved; for he had not ordered such an arrest, even if it were conceded that he had authority to do so. 3. That it was a proper case for exemplary damages, and that the verdict was clearly within the province of the jury. On the extent of the authority of the commissioner over the plaintiff as an Indian, the court did not find it necessary to decide; but the language of KINGMAN, C. J., strongly indicates their opinion: "Another reason urged why the verdict should have been set aside is, that 'the plaintiff below was an Indian, and as such was subject to the power and right of the United States to make such regulations for his government as the President of the United States should deem proper, and for the interest of the tribe to which he belonged; or, in other words, Keokuk was then a ward of the government, and if the government should think it for the interest of Keokuk or his tribe to restrain him from going to Washington, it had a clear right so to do.' We are not prepared to give our sanction to the doctrine above set forth, but might well do so and not disturb the action of the court below, for we are nowhere shown any law of the United States, or any regulation of the President, that makes it a punishable offence for an Indian to go to Washington at his own expense; nor does the letter of the commissioner or superintendent. But we suppose that nothing but a law would avail as a justification for arresting and imprisoning a man. Nor does it make any difference that the party injured is an Indian, whether he be regarded as a 'ward of government,' or as belonging to a 'domestic dependent nation,' or a 'distinct independent political community, retaining all their original natural rights,' to each of which classes they have at times been assigned by the language of the Supreme Court of the United States. In any view, while keeping the peace, and disobeying no law, he cannot be the subject of arrest and imprisonment by any one, except at the peril of the offender."

CIVIL ACTION FOR ASSAULT.—DAMAGES.—PROVOCATION BY PARTY ASSAILED.—*Samuel Allen* v. *Henry Bull*, in the Circuit Court of the

United States, District of Rhode Island (Nov. 1870), was an action for damages for assault and battery. Defendant having made default the court assessed the damages, and from the judgment of KNOWLES, D. J., we extract the following excellent remarks:—

"The plaintiff, believing (with or without reason is immaterial) that he had just cause of complaint against the defendant, instead of calling upon him at his residence or his place of business, obtrudes himself upon him while he is riding in a public street with a young lady under his charge, and abruptly commences a conversation, which he was bound to foresee would probably lead at least to an angry altercation; and the result is, that before three sentences are interchanged, 'That's not so!' is uttered by the plaintiff—an angry altercation does ensue—and the defendant, using a light switch, after three defiant challenges, inflicts upon the plaintiff three blows, only one of which left a mark, or was, in fact, felt as a blow by the plaintiff.

"Now were this the whole of the case submitted to me, I should, without hesitation, say that only to the minimum damages of six and a quarter cents is the plaintiff entitled. He, under that judgment, would receive all he could in law, justice, or conscience claim. He who defiantly challenges and dares another to commit a breach of the peace, really provokes and invites aggression, and were our statute law what it should be, would be held liable to the same penalty imposed upon the party whom he might successfully tempt and incite. Our legislators have wisely ordained that he who challenges another to a duel with deadly weapons, as well as he who accepts such challenge, shall be punished by fine and imprisonment, even though no duel ensue; and not less wise, in my judgment, were an enactment that the challenger to a contest with nature's weapons, or weapons of any sort, should be deemed an offender against the public peace, equally with him who, thus challenged, obeys the unerring instincts of the 'natural man,' and on the spot punishes his tempter. One of the benefits which would follow such a modification of the law would be that thereafter, certainly, an action for damages would never be brought by a challenger, or, if brought, would not long be entertained by any court that regarded the maxim *in pari delicto*, &c."

There being evidence, however, that plaintiff had been unfitted for business for several days by nervous excitement and obliged to consult a physician, the court entered judgment for fifty dollars.

AUTOGRAPH OF WASHINGTON.—It is not often that autographs form the subject of litigation, but in *The First Troop Philadelphia City Cavalry* v. *Morris*, the Supreme Court of Pennsylvania (March 1871) have been called upon to decide upon the title to an autograph of General Washington. The case arose on a bill in equity for possession of the following document:—

"The Philadelphia Troop of Light Horse, under the command of Captain Morris, having performed their tour of duty, are discharged for the present.

"I take this opportunity of returning my most sincere thanks, to the Captain and to the gentlemen who compose the Troop, for the many essential services which they have rendered to their country, and to me personally, during the course of this severe campaign.

"Tho' composed of gentlemen of fortune, they have shown a noble example of discipline and subordination, and in several actions have shown a spirit of Bravery which will ever do Honor to them, and be gratefully remembered by me.

"Given at Head Quarters, at Morris Town, this 23d Jany. 1777.

"Go. Washington."

Plaintiffs claimed that as the corporate successors of the original organization to which this order referred, they were entitled to its possession. Defendant held it as grandson and heir of Captain Samuel Morris, the captain under whom the troop had served in the revolution. Some time between the death of Washington and 1812, Captain Morris, who was then in possession of the paper (but by what title did not appear), received a letter (without date, but bearing intrinsic evidence of having been written between 1799 and 1812,) from Captain John Dunlap, his successor in command of the troop, accompanying a present of a miniature of Washington set in a handsome silver frame, having a recess in the back for the reception of the autograph order. The plaintiffs claimed that Captain Morris had held the order in trust for the troop, but it was conclusively proved that in 1823, *while some of the original members of the troop were still alive*, a committee of the troop had had a conference with Captain Morris's son, then the possessor of the order, with reference to the ownership of it, and that Mr. Morris had then asserted his own title, which was acquiesced in by the committee and so reported to the troop. Claim was, however, again made from time to time by the troop, but always denied by the Morris family, and finally this bill was filed to have a trust declared and the order delivered to the possession of the troop.

The court, per Sharswood, J., held that whoever might have had the title to the paper when first received, the action of Mr. Morris and the troop in 1823 had settled the rights of these parties. The report of the committee adopted by the troop was a clear relinquishment of any title they might have had prior to that time, and even if that were not so, the distinct assertion of title by Mr. Morris put an end to the idea of a trust so far as to allow the Statute of Limitations to begin to run.

Naturalization—Right of Courts to examine Applicants for—Moral Character—Polygamy.—In the *Matter of J. C. Sandberg* and *William Horsley* (September 1870) and *Matter of Richard Douglas* (January 1871), the Supreme Court of Utah had occasion to consider the rights of the court and the parties on an application for naturalization.

In the first-named case the court having interrogated the applicants as to their views of the duties of American citizens, and whether or not they believed the Acts of Congress in relation to polygamy to be binding upon them, *Sandberg* answered in substance, that he regarded it as in accordance with the laws of God for a man to have more than one wife at the same time; and that if the laws of the country forbade it, he regarded it as his duty to obey the laws of God rather than the laws of man. *Horsley* refused to answer. McKean, C. J., rejected the applications, saying: "Before admitting the alien to citizenship, it shall further appear 'to the satisfaction of the court,' that during the

five years of his residence within the United States 'he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same:' 2 Stat. at Large 153–4. Article 6 of the Constitution provides that 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land,' &c. Therefore he who swears to support the Constitution of the United States, swears at the same time to support the laws of the United States which shall be made in pursuance thereof." By Act of Congress, approved July 1st 1862, polygamy in any of the territories of the United States was made unlawful and punishable by fine and imprisonment.

"Now, suppose an applicant for naturalization should state to the court that he objected to some provisions of the Constitution, and would not obey and support them; or, suppose he should state that he would not absolutely renounce his allegiance to his native country, and that in the event of a war between that and this country, he would fight for his native land. Shall the judge who presides in the court violate his own oath by admitting such a man to citizenship? Or suppose the applicant, in a spirit of defiance, refuses to answer in regard to these things, how can the court possibly 'be satisfied' that such a man 'is attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same?' In either supposed case it would be a solemn mockery to administer the final oath of naturalization to such an alien."

In the case of *Douglas* it appeared that the applicant had been married to two wives before the passage of the Act of Congress of 1862, but as he continued to live with both, the court held that the same rule must apply as in the former case, and refused the application.

ACTION FOR DAMAGES FOR WILFUL INJURY TO PROPERTY—JUSTIFICATION UNDER VOID PROCESS.—In *Englebrecht* v. *McAllister et al.*, in the District Court of Utah (September 1870), plaintiff brought his action under sect. 102 of the code, which gives triple damages for the wilful or malicious injury or destruction of goods, &c. Defendant McAllister set up in answer that he was City Marshal of Salt Lake City, and had destroyed the property in question (liquors), by virtue of a judgment and warrant from an alderman of said city. The other defendants justified as a *posse comitatus* under said warrant. Plaintiff demurred to the answers, that the alderman had no jurisdiction, and his judgment was void. MCKEAN, C. J., overruled the demurrer, saying, that although the judgment and warrant were void for want of jurisdiction, yet the action being for triple damages under the code for wilful and malicious injury, the warrant was admissible as evidence on the question of the *intent* of defendants, and they were entitled to a jury trial Had the action been under the common law for trespass to recover the value of the goods destroyed, the intention of the defendants would have been immaterial, and a void judgment and warrant no defence.

FEDERAL AND STATE JURISDICTION—HABEAS CORPUS—DISCHARGE OF MINORS FROM MILITARY SERVICE.—In the *Matter of Thomas H. Niell*, in the United States District Court, Southern District of New

York (January 1871), the facts were that one Casey having presented a petition to Judge McCunn, of the Superior Court of the city of New York, setting forth that he was restrained of his liberty at Fort Columbus, in New York harbor, that he was a minor under the age of twenty-one years, and that the pretence of his restraint was, that while still a minor he had enlisted in the United States army without the consent of his parents, Judge McCunn issued a *habeas corpus*, commanding General Niell to produce Casey. To this General Niell made return in writing but not sworn to, that said Casey was regularly enlisted in accordance with the laws and regulations of the army, and was held by virtue of such enlistment, and that under the instructions of the War Department and the law as interpreted by the Judge Advocate General, it was not his duty to produce the body of said Casey. On this return Judge McCunn issued a warrant of attachment, setting forth the writ of *habeas corpus*, the return, and the refusal to produce the body of Casey. Under this warrant the sheriff of New York took General Niell into custody, and thereupon a writ of *habeas corpus* was sued out in the United States District Court. The sheriff in obedience to this writ produced General Niell, and made return that he was held by virtue of the said warrant. Blatchford, J., discharged the relator, holding, 1. That the sole power to discharge minors from enlistment was vested in the Secretary of War. 2. That the return was good and sufficient both as to substance and form. General Niell was already a sworn public officer within the meaning of the laws of New York, and therefore his return did not require to be sworn to even if in any case a military officer in such circumstances was obliged to make return under oath. 3. That the *habeas corpus* was issued by Judge McCunn without jurisdiction; the want of jurisdiction appeared on the face of Casey's original petition, and if it was imperative on Judge McCunn by the laws of New York to issue the writ, the return showed conclusively that it should be quashed. 4. That General Niell was not bound to produce the body of Casey. 5. That the warrant of attachment was without jurisdiction and should have been resisted by force. 6. That the United States Court had power to discharge the relator from custody. The opinion in full will be found in the Int. Rev. Record for January 28th 1871.

Hon. Byron Paine, one of the justices of the Supreme Court of Wisconsin, died January 13th 1871. Judge Paine first came prominently before the public in connection with the Fugitive Slave Cases in 1854, as counsel for the petitioner in *Ex parte Booth*, 3 Wis. 145, (which led to the subsequently famous case of *Ableman* v. *Booth*, 21 How. 506). In 1857 he was elected to the Supreme Court, and retained the office until the war, when he entered the army as Colonel of the 43d Wisconsin Regiment. At the close of the war he resumed the practice of the law, but was soon re-elected to the Supreme Court.

The proportion of lawyers who entered the army on both sides during the late war was very great, and many of them performed distinguished military service, but we are not aware of any other instance in which a judge of the Supreme Court of his state left the bench for the field. Of Judge Paine it might be written, as on the epitaph of one of the greatest of English equity judges, Sir William Grant, after the enumeration of his judicial virtues, "*Et militavit non sine gloria.*"