RECONSTRUCTION.

SPEECH

OF

HON. S. SHELLABARGER, OF OHIO,

DELIVERED IN THE HOUSE OF REPRESENTATIVES, JANUARY 8, 1866.

The House being in the Committee of the Whole on the state of the Union—

Mr. SHELLABARGER said:

Mr. CHAIRMAN: I shall inquire whether the Constitution deals with States. I shall discuss the question whether an organized rebellion against a Government is an organized "State" in that Government; whether that which cannot *become* a "State" until all its officers have sworn to support the Constitution, *remains* a State after they have all sworn to overthrow that Constitution; and if I find it does continue to be a State after that, then I shall strive to ascertain whether it will so continue to be a government, a State, after, by means of universal treason, it has ceased to have any constitution, laws, Legislature, courts, or citizens in it.

If in debating these questions I debate axioms, my apology is that there are no other questions to debate in "reconstruction." If in the discussion I make self-evident things obscure or incomprehensible, my defense shall be that I am conforming to the usages of Congress.

I will not inquire whether any subject of this Government, by reason of the revolt, passed from under its sovereignty or ceased to owe it allegiance, nor whether any territory passed from under that jurisdiction, because I know of no one who thinks that any of these things did occur. I shall not consider whether, by the rebellion, any State lost its territorial character or defined boundaries or subdivisions, for I know of no one who would obliterate these geographical qualities of the States.

These questions, however much discussed, are in no practical sense before Congress.

WHAT IS BEFORE CONGRESS.

What is before this Congress—by far the most momentous constitutional question ever here considered—I at once condense and affirm in a single sentence.

It is under our Constitution possible to, and the late rebellion did in fact so, overthrow and usurp in the insurrectionary States the loyal State governments as that, during such usurpation, such States and their people ceased to have any of the rights or powers of government as States of this Union; and this loss of the rights and powers of government was such that the United States may and ought to assume and exercise local powers of the lost State governments, and may control the readmission of such States to their powers of government in this Union, subject to and in accordance with the obligation to "guaranty to each State a republican form of government."

This great question I proceed to consider.

WHAT, BY THE LAW OF NATIONS, IS A STATE?

At the very foundation of this discussion lies the question, what make up the necessary elements of every State in this Union? What properties are they which, if any one be lost by a State, it ceases to be entitled to exercise the powers and demand the rights of a political and governing member of that Union?

The argument I now derive from "public law" is really identical with the one I shall next adduce, and shall base upon the express terms of the Constitution. In this argument—assuming, as I do, two axioms of our law; first, that the law of nations is part of your Constitution, (Const., art. 1, sec. 8, clause 10,) and second, that such Constitution is to *its* States, at least, as much "supreme law" as the international code is law to the civilized States which are under its sway—I here only show that these law-defying communities in rebellion cannot be "States," unless our Union has lowered and debased the world's "legal idea" of a "State."

What, then, is required to constitute a State by the law of nations?

We answer:

1. "A fixed abode and definite territory belonging to the people who occupy it." (Wheaton, 33.)

2. "A society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength." (*Ib.* 32.)

3. "The legal idea of a State, necessarily implies that of habitual obedience of its members to those in whom the superiority is vested." (*Ib.* 33.)

This third necessary element of a State is the only important one in this discussion. Hence, I add the following high authorities:

Grotius, (book 3, chapter 3, section 2,) says:

"The law, especially that of nations, is in the State as the soul is in that of the human body, *for that being taken away it ceases to be a State.*"

Sir, let me entreat the Representatives of the people to appropriate to the purposes of the hour this light which comes to us from him whose intellect has lighted, for centuries, the pathway of all civilized nations, and who is the Father of the Public Law.

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Burlamaqui, (volume 2, page 25,) in defining a State says:

"It is a multitude of people united together by a common interest and common laws, *to which they submit with one accord.*"

I might add to these all the writers on public law for centuries, in confirmation of what is self-evident without proof, that there can be no State where the people do not habitually obey the laws. For four hundred years the unanimous conscience and common sense of the civilized world has refused to recognize the existence of a people who were habitually disobedient to their own laws, or the law of nations. Such a people is blotted out.

Now, surely, if habitual obedience to law "was necessary to the legal idea of a State," even under the vague and general precepts of the international code, it will not be insisted that habitual, persistent, and universal disobedience will be tolerated by the well-defined, express, and rigorous provisions of the American Constitution in the citizens of one of its States.

Shall that position be tolerated which admits that the law of nations will expel from its union and blot from existence an habitually lawless people, and yet the law of our Union permit such a State to govern it? Shall a Union, whose Constitution and laws in every single great attribute of national sovereignty are the supreme law of these States and their people, recognize and be ruled by a people who unanimously, habitually, persistently, and for years disobey and defy these laws?

Can it be that for four centuries the united conscience and judgment of the civilized world shall prohibit the existence upon the earth of such a monster as a State whose people are habitually lawless, and then shall it be left for our "more perfect Union" to establish "States" which, although they cannot *commence* their existence until every officer and minister of that State shall swear to support the Constitution of the United States, as the supreme law of the land, yet shall *continue* to be States after every officer of such State had discarded such oath, and every inhabitant had, for years, defied and discarded these "supreme laws?"

In the lights of the public law of the world let this Congress answer the startling question, whether an organized rebellion has come to be an organized "State;" whether "habitual" treason has come to be "habitual obedience to law;" and whether the legal "idea of a State" has come to be a synonym for chaos, in which are commingled, in unalleviated political ruin, the absolute overthrow of all its "supreme laws," the wreck of all loyal constitutions, laws, and forms of government, and the death or exile of every inhabitant who admitted the existence of such loyal State!

Surely, Mr. Chairman, it is not too much to say that even under the settled precepts of public law those eleven districts, called "confederate States," ceased to be States. In them, during so many dark years, there was no obedience to law except the law which compelled the defiance of all "supreme laws;" there was no government except that one which consisted in enforcing disloyalty to Government; there was no observance of the "law of nations," unless that is to be found in indiscriminate and remorseless assassination or murder of every loyal man whom their treason could reach either by means of the dagger, the torpedo, the poisoned food, the bandit, the violations of truce, or the systematized destruction of prisoners of war. Their body-politic was one gigantic treason, made up of eleven organized rebellions, combined into one by the force of a relentless military despotism.

But, sir, the unexampled magnitude of these interests involved impel me on to what are, if possible, more conclusive arguments. I go from the public law to the Constitution.

WHAT IS A STATE OF THIS UNION?

Now we proceed to inquire what, if anything more, is required to make a State of this Union than is requisite to constitute a State under the law of nations. Brazil is a State, but is not a State of this Union. That which is required to be added to the properties which belong to every State, in the sense of the international law, in order to constitute a State of our Union, is—

1. Its citizens must owe, acknowledge, and render supreme and habitual allegiance and obedience to the Constitution, laws, and treaties of the United States in all Federal matters, these being the supreme laws to the States and their citizens. (Constitution, article 6.)

2. All "the members of the State Legislatures, and its executive and judicial officers, shall be bound by oath or affirmation to support the Constitution" of the United States. (Article 6.)

3. That the United States shall have so "admitted it into this Union" (article 5, section 3) as to have assumed "to guaranty to it a republican form of government, and to protect it against invasion, and," on application, "against domestic violence."

4. And by such recognition and "admission into this Union" to have secured to it, as a body-politic, or "State," certain rights of participation in the control of the Federal Government; which rights I shall name hereafter. (See also 1 Bishop on Criminal Law, sections 128 to 137, inclusive.)

No one who can read the Constitution will deny that each State in this Union must have every one of these properties before it can *commence* to exist in the Union; because the Constitution so declares. Now the question I consider is, whether it shall *continue* to be a State, in the sense that it holds the powers and rights of a State, after it has lost every property which it must have before it could *commence* to exist in the Union.

DOES THE CONSTITUTION DEAL WITH STATES?

The gentleman from New York [Mr. RAYMOND] says:

"The Constitution does not deal with States except in one or two instances, as the election of members of Congress and the election of electors of President and Vice President."

This statement involves an error both of fact and law which, considering its high intelligent

and patriotic source, is amazing. Now, sir, reading English will correct this error. Turn to the Constitution. It deals with States, in the way of imposing restraints and obligations upon them as States, in the following matters: regulating commerce among the States; requiring Representatives, also United States Senators, to reside in their respective States; prohibiting States from entering into any treaty, alliance, or confederation, coining money, emitting bills of credit, making anything but gold and silver coin a tender for debt; passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; from taxing imports or exports without consent of Congress; from laying tonnage duty; from keeping troops or ships of war in time of peace; from entering into any compact with another State or foreign Power; from engaging in war unless invaded or in imminent danger thereof; from refusing to give full faith to records, &c., of other States; from refusing to surrender fugitives from justice or labor; in requiring States to be tried in the courts of the United States; requiring all their officers to take an oath to support the Constitution; requiring them to pay State's proportion of direct taxes; in prohibiting "either" State from conferring any other emolument upon the President than his salary; in requiring them to furnish, at command of the President, their militia; and in subordinating their "judges," "constitutions," and "laws" to the Constitution, laws, and treaties of the United States as "the supreme law of the land."

It secures rights and confers powers upon the States as States in each of the following respects. It secures to each the right to elect at least one Representative, to elect two Senators, to cast one vote in ratifying constitutional amendments, and in calling a convention to make such amendments; to cast one vote in electing a President in the House, to appoint in such manner as the Legislature thereof may direct electors to elect a President and Vice President, to fill by appointment vacancies in Congress, to demand that "in the regulation of commerce no preference shall be given to the ports of one State over those of another," in securing equal immunities to their respective citizens, in having guarantied to them republican governments, in being protected against insurrection and domestic violence, in securing them from being divided, &c., and in enabling them to define the qualification of electors for United States officers by fixing that of the most numerous branch of the State Legislatures.

My object, Mr. Chairman, in reciting these fifty or more supremely important provisions of the Constitution, in every one of which it is evident, both by the nature and express terms of the provisions themselves, and by the innumerable adjudications of the courts, that the Constitution "deals with" the States, as such, was not the frivolous one of showing that there were more than "one or two" of these. My purpose was the higher one of showing how baseless that argument was which was based upon the assertion that the Constitution did not deal with States but individuals only, and that, therefore, not the States, but only individuals could lose their rights under such Constitution. I wanted not only to show the argument baseless but that its precise opposite is the exact truth. I wanted to show that the very body, soul, life, and essence of the Constitution is penetrated, pervaded, and characterized by and with this recognition of the States, and of their high powers as such. I wanted to bring into view the momentous and controlling fact which disposes of this high constitutional question, that the States are not only "dealt with" by the Constitution, but that their powers as States in our Government are absolutely vital. And I *separated* the obligations and restraints imposed upon the States and their officers from the conferments of rights and powers upon them, that it might appear to all men and to the very children who can read their Constitution, that, in this marvelous great scheme of Government, as in every other wise human Government, as well as in God's, the enforcements of obligation are coupled with and inseparable from the enjoyment of rights; that prescribed qualifications for the attainment of power must be possessed and proceed, and are inseparable, from the exercise of power. I wanted to show that there could be, under the Constitution, none of the rights or powers of a State where there were recognized none of the obligations or duties of a State.

Sir, how long may this nation survive with a Senate elected by rebel Legislatures; or with treaties made by Senators chosen by rebel States; or with a President selected by electors chosen by the Legislature of South Carolina; or with a President elected in a House of Representatives where each rebel State casts one vote; or with a House of Representatives elected by electors whom a rebel legislature would authorize to vote; or with officers over United States forces appointed by rebel governors; or with such constitutional amendments as would be ratified by rebel legislatures; or with a traitor for President whom you could only remove by the impeachment of a Senate elected by rebel legislatures; or with such foreign ministers and other officers of the United States as such a Senate would confirm; or with a prohibition upon your closing the ports of the eleven rebel States to a commerce supplying them with all the supplies of war, unless you also closed all the ports of the other States?

Sir, if the recital of these powers which the States, as such, hold in governing this Union, does not prove that a State in rebellion, and whose government and people are in actual hostility to the United States, is not a component part of this Union, during the continuance of such rebellion, for the purpose of exercising *any* power, then such recital does prove other things. It proves that "Independence Hall" was a mad-house from the 14th of May to the 17th of September, 1787; and that the madmen there succeeded in devising a framework of Government embodying in it a larger number of separate and fatal instruments of self-slaughter than was ever combined in a Government before, or than was ever dreamed by men who make Utopias, or by them who form governments in Bedlam.

CONGRESS HAS ASSUMED THAT REBEL STATES HAD NO RIGHTS AS STATES.

I admit that the action of this Government was not, at all times during the war, harmonious nor consistent upon the matter of according rights to rebel districts. It would have been strange, indeed, if all such action, done, as it was, in the midst of the awful events of such wars, revolutions, and breakings up of the systems of governments, had been consistent upon any subject. Besides, as mere measures of war, there was constant temptation to err, if at all, in the direction of according to loyalty in the insurrectionary districts every possible protection and power, to the end that it might be developed into support of a Government staggering to its fall under the blows of treason.

But still the most solemn and deliberate action of your Government in all its departments, and recently all its actions, proceeds upon the assumption that these rebel States had lost all the rights of States.

Among these acts may be mentioned those of July 13, 1861, and 30th of same month. These have been held to be acts "regulating commerce," (11 American Law Register, 419,) and they close the ports of the rebel States to all commerce and capture their ships upon the seas. And yet if these southern ports were ports of States having the rights of States, you could not only not close them "in regulating commerce," but you could give no port any preference over them. Again, in every revenue and tariff act which you passed in regulating commerce and the revenue since the war began, you have not only "given preferences" against the southern ports, but you have provided for their being totally shut to all commerce. Could you provide in a tariff bill that the ports of New York shall be open, and those of Massachusetts closed?

These are only examples.

POSITION OF THE PRESIDENT.

The President has assumed that the rebel States ceased to be States in the sense I am considering.

Jefferson Davis was captured May 9, 1865; and the last army of the rebellion was surrendered by Kirby Smith to General Canby, 26th of May, 1865. Then the military power of the rebellion was extinct, and actual war was ended, and the necessity for resort to mere war powers and expedients ceased. Then, too, the laws and constitutions and powers of State governments of these States sprang into life and force if they were only put into abeyance by the war and could all come back into life and force when the war was gone.

On the 29th of May, 1865, these old State constitutions had either come to be in force or they had not. If they were in force at all, then all their provisions were in force and binding, just as much as New York's constitution was; and could only be changed in the mode prescribed by themselves. Is it competent for the United States to order New York to call a convention and change her constitution? Is it competent for the United States to order it changed in a way in total disregard to the modes of amendment which it prescribes as the only ones by which it can be amended?

Now what has happened in these rebel States? Take one example as a specimen of all. On the 29th of May, 1865, President Johnson issued a proclamation appointing Holden provisional governor of North Carolina, and ordered him, under prescribed rules, to call a convention for "altering or amending the constitution of North Carolina," &c. But then that constitution of North Carolina prescribes how alone it can be altered. This mode is by bill read three times and voted for by three fifths of the members of each branch of the Legislature; then this bill must be published for six months before the election of the next Legislature; then the next Legislature, by a two-thirds vote in both Houses, must again approve the amendment; and then it must be approved by a majority of the voters of the State; and then it is part of the constitution. The convention ordered by the President is wholly unknown to and in violation of the old constitution; and if it was in force at all on the 29th of May, it could no more be altered in that way than the constitution of England could. He ordered a convention, he directed who should vote, who should be eligible to sit in the convention, and what oath they should take; every one of which orders would have been in flagrant disregard of the constitution and laws of North Carolina, if, on that day, she had any.

Precisely the same thing, in principle, has occurred in every rebel State except, perhaps, three. By presidential proclamations new governments have been professedly called into existence since the war was ended, and since the old constitutions and laws were revived out of abeyance, if they did revive. In every one the new constitutions and governments have been formed in almost total disregard of the provisions of the constitutions which they profess to amend. Now, it is exactly impossible to comprehend the action of the Executive except upon the assumption that these State constitutions and their governments had not revived *so as to control the methods of their own amendment.*

No, no, Mr. Chairman, the President himself tells the country, in the notable words of his proclamation, where it is that *he* deems that he gets this power to order States into existence. His words are, "Whereas the fourth section of the fourth article of the Constitution of the United States declares that the United States shall guaranty to every State in the Union a republican form of government, I, Andrew Johnson, President and Commander-in-Chief," &c. Sir, here is an unmistakable avowal of the source of his power and of the cause that called that power forth. If the old government and constitution of North Carolina had in fact come back to her out of the suspended animation which the rebellion had caused, then she on this 29th day of May already *had* a republican constitution, and it needed no alterations to make it republican nor to guaranty one to her.

Sir, let me not be misunderstood. I am not pointing to these acts of the President as wrong,

but to show that the President has dealt with this great question precisely in the view I maintain, to wit, that these old State governments were so effectually overthrown that they do not come into force at the end of the war so as to furnish the basis of republican governments to these States; and that it has become the business of the United States to guaranty such governments to them. *They* attack the President who hold that in these acts of the Executive, in creating new constitutions, he did so in violation and disregard of living constitutions and republican governments already there. I do not attack him. If, indeed, these old State constitutions had, on the 29th of May, 1865, resumed their sway over these States, as the new champions of the President in this House allege, then indeed has the man they champion, in disregarding and superseding these constitutions, become usurper. Well may the patriotic executive head of this nation repeat once more the chronic prayer which, in all ages, weak adulation has extorted from men in power, "Deliver me from my friends."

SUPREME COURT'S POSITION.

But I go on. I now show that the third or judicial branch of the Government is, by solemn and unanimous judgments, twice repeated, committed, in principle, to the same exact conclusions.

But in presenting these high arguments—the judgments of the Supreme Court—let me make them at once serve the double end of making utterly conclusive and complete the position that a State may cease to have the governing rights of States by reason of rebellion, and of also answering what is urged so much as to the logical and practical consequences of that position.

An able statement of these objections has been laid on our table. Their effect is—

1. That it admits that a State may secede.

2. That, as a consequence of this, Jefferson Davis cannot be punished for treason any more than the Governor of Canada could be.

3. That if we admit the rebels "were to be regarded as belligerents," then when we take them back we become liable for their debts.

4. That individuals and not the States forfeit their rights by treason.

In enforcing these objections my friend from New York [Mr. RAYMOND] says:

"If they were out of the Union, when did they become so? They were once States in the Union. If they went out of the Union it was at some specific time and by some specific act."

Before the Supreme Court shall be made to answer, as it will, each one of these objections, permit me, Mr. Chairman, to allude to them; and first to this question about the "specific act," which the gentleman from New York [Mr. RAYMOND] asks. In respectfully answering his let me ask and answer some questions of similar legal aspect.

I ask when and by what specific act does "tumult" become "war" in law? I answer, in the language of Chief Justice Marshall, when it, in fact, assumes "warlike array and strength." What in a civil war is the specific act and time which changes, in law, an "insurrectionary party" into a "belligerent?" I answer, in the language of the Supreme Court, when in fact "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open." When, in law, does a revolt become civil war? I answer, in the language of Wheaton, when "the insurrection becomes, in fact, so strong as no longer to obey the sovereign, and to be able by war to make head against him." When, in law, and by what specific act, did the entire population of Virginia, including the loyal men, cease to be "friends," and become "enemies of the United States?" I answer, when, in fact, they became "belligerents."

If these answers by the highest authorities in the world do not still answer what "specific act" deprived South Carolina of every right and power of a State, then I further answer him that it was that specific act which turned her citizens into traitors, took from her the loyal courts, statutes, Constitution, tribunals, officers, and Legislature, and which filled their places with treason and kept it there. And if the gentleman still desires to know the specific time when this happened, it will answer all the purposes of my argument to reply that it happened about four years before the time when he has told us it did, to wit, before she "surrendered." The destruction and supersedure of all loyal government and law in South Carolina was a *fact*, not a law. It was this fearful "fact" which made her cease to be a State governing this Union, and not any ordinance of secession.

The distinguished gentleman to whom I have alluded states the fourth objection which I have named in these words:

"The people of a State may, by treason, forfeit their rights, but in a legal point of view they have no power to affect the condition of a State in the Union."

That is, turned out of metaphysics into English, every inhabitant of a State may, by treason, come to have *no* political rights or powers whatever as individuals except the right to be hung; but the same individuals, put into a bundle and called a body-politic or State, have *all* political rights and powers, and can govern this Union! Now, a plain man would have difficulty in being able to see a living, acting, ruling State where there was no constitution, court, or law, and where there were no inhabitants, all these having been hung for treason. Such a man would be dull enough to conclude that if you hung for treason all the people required to make up the body-politic called a State the State would at least be in affliction.

But, Mr. Chairman, it was unfortunate for this distinction between the political State and its people that it has repeatedly encountered the ordeal of the Supreme Court and has been utterly discarded by it.

In 3 Dallas, 93, that court says:

"A distinction is taken at bar between a State and the people of a State. It is a distinction I am not capable of comprehending. By a State forming a republic, (speaking of it as a moral person,) I do not mean the Legislature of the State, the Executive of the State, or the judiciary, but all the citizens which compose the State, and are, if I may so express myself, integral parts of it, all together forming a body-politic."

The same repudiation of a distinction between a body-politic and its individual members is in the "Prize Cases" hereafter cited.

Two years before the objections I have quoted were so ably uttered, they had been pressed, with learning, zeal, and ability equal to his, upon the consideration of the Supreme Court in these "Prize Cases," (2 Black, 635,) and had been discarded unanimously by that court, nine judges sitting, including Taney. I say it was unanimous because all the court agree that after the passage of the act of Congress of 13th July, 1861, recognizing the existence of the war, every inhabitant of the rebel States became "enemies" of the United States and "belligerents."

I affirm that the reasoning and judgment of this case settle and establish each one of the following propositions:

1. From the seventh paragraph of the Syllabus (page 636) I quote and affirm that the late "civil war between the United States and the so-called confederate States," had "such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a foreign war."

2. From the ninth paragraph of the same Syllabus I quote and affirm that "*all* persons residing within the territory occupied by the hostile (rebel) party in this contest were liable to be *treated as enemies though not foreigners.*"

3. I affirm again, quoting from the opinion of the court (page 673) that "it is a proposition never doubted that the belligerent party who claims to be sovereign *may exercise* BOTH *belligerent and sovereign rights.*"

4. I affirm that precisely the same objection was urged in this case as those I have quoted; and were stated by the court in these words, "that insurrection is the act of individuals and not of the government or sovereignty," and "that the individuals engaged are the subjects of law," and "that secession ordinances are nullities and ineffectual to release any citizen from his allegiance."

To these objections the Supreme Court replies:

"This argument rests on the assumption of two propositions, each of which is without foundation upon the established law of nations. It assumes that where a civil war exists the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, though the revolutionary party may."

Again the court replies to those objections in the following words, the court italicising the words:

"In organizing this rebellion they have *acted as States* claiming to be sovereign over all persons and property."

In December, 1865, the ten judges (2 Wallace, 404) unanimously decided the same thing; that all the inhabitants, guilty and innocent, became belligerents and "enemies" of these United States.

The results of these two decisions are that these rebel States,

1. Acted *as States* in organizing the rebellion.

2. That *all* their citizens, innocent and guilty, were thereby made "*enemies* of the United States."

3. That though they became "enemies" *that* did not make them "foreign" States so as that when we take them back we must pay their debts.

4. That, as the court decides that the United States may exercise over these people *both* "belligerent" and "sovereign" rights, therefore we may, as sovereign, try Davis for treason, although we did treat and hold these States as an "enemy's" country.

5. As these States became "enemies'" territory, and all persons residing within it became "enemies of the United States," they cannot at the same time have been a people having any political rights to govern in this Union, unless indeed this Union can be governed by a body of people every one of whom are held by its law to be the "public enemies of the United States."

Mr. DEMING. I would respectfully ask my friend from Ohio if he has any authorities on his minutes for the purpose of vindicating the position that the sovereign in a civil war may exercise both sovereign and belligerent rights?

Mr. SHELLABARGER. If I understand the exact legal purport of the question asked by the distinguished gentleman, (and in reference to pure legal questions he knows as a lawyer right well that he who speaks on legal questions must talk well or not talk at all,) I answer that I find authority in the prize cases to which I allude, that a sovereign may exercise both belligerent and sovereign rights.

Mr. DEMING. I recognize the force of the decisions in the prize cases, but I appeal to my friend for the purpose of ascertaining whether he has fortified that opinion which he expresses, that in a civil war the sovereign may exercise sovereign as well as belligerent rights, outside of the authorities quoted in the prize cases.

Mr. SHELLABARGER. I now apprehend the question of the gentleman, and I thank him for asking it, for it furnishes me an opportunity of saying that I have looked through the authorities on this subject, and in the modern and respectable authorities of the world I find no dissenting voice. The doctrine will be found not only in the text and notes of Wheaton, but in Vattel, in Ward, in Halleck, and Bello.

Mr. DEMING. I would ask my friend if he has looked over the notes in Lawrenee's Wheaton for the purpose of seeing the conflicting authorities which Lawrenee there quotes on this specific point; that is to say, in a civil war it is incompetent for the sovereign to exercise both civil and belligerent rights.

Mr. SHELLABARGER. I answer the gentleman that I have looked through those notes carefully and thoroughly, and that while, if my memory is not now at fault, I find some unimportant conflict of authority, I do not find any conflict that at all impairs the force of settled law as established in the prize cases.

Sir, it is a weak and inadequate statement of the truth to say that he mocks the law, offends the loyal sense of the people, and insults their common sense who affirms that that people or those States had any rights of government in this Union, every man, woman, and child of whom have been pronounced by two unanimous judgments of the Supreme Court of the Republic to be, in contemplation of the supreme law

of that Republic and of the law of nations, the public enemies of the United States.

Does the gentleman yet ask for "the specific act" that deprived these States of all the rights of States, and made them "enemies?" I once more answer him in the words of the Supreme Court that the specific acts were, they causelessly waged against their own Government a "war which all the world acknowledge to have been the greatest civil war known in the history of the human race." That war was waged by these people "as States," and it went through long, dreary years. In it they threw off and defied the authority of your Constitution, laws, and Government; they obliterated from their State constitutions and laws every vestige of recognition of your Government; they discarded all official oaths, and took in their places oaths to support your enemy's government. They seized, in their States, all the nation's property; their Senators and Representatives in your Congress insulted, bantered, defied, and then left you; they expelled from their land or assassinated every inhabitant of known loyalty; they betrayed and surrendered your armies; they passed sequestration and other acts in flagitious violation of the law of nations, making every citizen of the United States an alien enemy, and placing in the treasury of their rebellion all money and property due such citizens. They framed iniquity and universal murder into law. They besieged, for years, your capital, and sent your bleeding armies, in rout, back here upon the very sanctuaries of your national power. Their pirates burned your unarmed commerce upon every sea. They carved the bones of your unburied heroes into ornaments, and drank from goblets made out of their skulls. They poisoned your fountains, put mines under your soldiers' prisons; organized bands whose leaders were concealed in your homes, and whose commissions ordered the torch and yellow fever to be carried to your cities, and to your women and children. They planned one universal bonfire of the North from Lake Ontario to the Missouri. They murdered by systems of starvation and exposure sixty thousand of your sons, as brave and heroic as ever martyrs were. They destroyed in the five years of horrid war another army so large that it would reach almost around the globe in marching columns; and then to give to the infernal drama a fitting close, and to concentrate into one crime all that is criminal in crime, and all that is detestable in barbarism, they killed the President of the United States.

Mr. Chairman, I allude to these horrid events of the recent past not to revive frightful memories, or to bring back the impulses toward the perpetual severance of this people which they provoke. I allude to them to remind us how utter was the overthrow and obliteration of all government, divine and human; how total was the wreck of all constitutions and laws, politieal, civil, and international. I allude to them to condense their monstrous enormities of guilt into one crime, and to point the gentleman from New York [Mr. RAYMOND] to it, and to tell him that was "the specific act."

Now, Mr. Chairman, if the combined forces of the Constitution and the Public Law, the obvious dictates of reason, justice, and common sense, and these enforced by the approval of repeated and unanimous judgments of the Supreme Court can settle for our own Government any prineiple of its law, then it is established that organized rebellions are not "States," and that these eleven distinct political treasons, which they organized into one, and called it "the confederate States," had *no* powers or rights as States of this Union, nor had the people thereof.

RESTORATION OF THE STATES.

If these States lost their powers and rights as States, by what authority and means are they restored? Is it accomplished by mere cessation of war and the determination of the rebel inhabitants to resume the powers of States; or is this Government entitled to take jurisdiction over the time and manner of their return?

I hold that the latter is the obvious truth.

Let it be admitted that these rebel districts may, without the assent of the United States, and without regard to the state of their loyalty, resume, at pleasure, all the powers of States—this Government having no jurisdiction to determine upon the question of their loyalty or the republican character of the new State governments—then we have this result.

There were, during the first years of the war, twenty-three rebel Senators, including Breckinridge and another. That was more than one third of the Senate. These twenty-three in the Senate are enough to deprive the United States of all power ever to make a treaty, or to expel a member from the Senate, or to remove from office by impeachment a rebel Secretary of War like Floyd, or a rebel Secretary of the Treasury like Cobb, or a rebel United States judge like Humphreys, or an imbecile President who thought secession unconstitutional, and its prevention equally unconstitutional, like Buchanan. How long, sir, could your Government survive with such a Senate, one third rebel? How long can you live deprived of these powers vital to every Government? Not a week, sir.

But, Mr. Chairman, this is precisely what might have occurred at any day during this rebellion if cessation of war entitles the revolted States to resume the powers of States in defiance of the will of this Government; and it is precisely what may occur to-day if these States be indeed disloyal yet at heart. If, after exhausting "all the resources of war" for the overthrow of the Government, and failing, it is, indeed, competent for them to abandon these resources, and resort to "the resources of statesmanship," and resume at once the high powers of States in the Union, without the assent of such Government, then there has not been an hour since the rebellion began, and the hour is not now, in which this Government has not literally been in the power and at the mercy of the rebellion.

Is it replied to what has been said in regard to the power for mischief of disloyal Senators in the case which I have stated, expel them? the reply is vain, because the same tw y-

three who can prevent any impeachment or the formation of any treaty are also enough to prevent any expulsion under the Constitution.

Is it again replied, exclude these rebels from the Senate under the clause making each House the judge of the elections and qualifications of its members? the reply is obviously frivolous.

[Here the hammer fell.]

Mr. LE BLOND moved that the time be extended.

The motion was agreed to.

Mr. SHELLABARGER. Permit me to express my profound gratitude for this indulgence, on which I will not long trespass.

1. If under this clause you may exclude a Senator duly elected and qualified in every other respect and sense than that he comes from and is elected by disloyal States, then you yield the whole argument, and accord to this Government all the powers of self-preservation which I am insisting upon. The difference is that you find the power of self-protection under a clause by which each House is compelled to judge separately of the election and qualification of its members; and hence you occupy a position where you may have twenty-four States in the Union, in the Senate; thirty-four in the Union, in the House; and Heaven knows how many in the Union for electing a President.

2. If you reply, I will reject these twenty-three rebel Senators, not because their States can elect none, but because they are "rebels," in the case you put; the reply is vain. When Mason, Slidell, Davis, and Breckinridge last took their seats in your Senate, who knew, or could have proved, that they came there to embarrass and destroy your Government? Could either have been excluded from any known or ascertainable personal disqualification?

No, Mr. Chairman, there is no escape. If the United States has no power to decide, as a great and sovereign people acting through their Government, what shall be a "State" in her high Union, and cannot determine when, out of the wreck and ruin of old States, have been formed new republican States, based upon the only foundations upon which a republican State of this Union can be built, that of the general consent and loyalty of its people, then indeed is your Government not so much as "a rope of sand." It is a monster compelled by the organic law of its life to terminate that life by self-slaughter.

But, sir, such is not the law of its life. I have already shown that the President has discarded such conclusions. I now invoke the authority of the highest court of the Republic, and by that I show that it has decided this question also.

I state the effect of this decision in the language of a distinguished law author (see 1 Bishop, Crim. Law, sec. 133.) He says:

"It has been settled by adjudication that it is for the President and the two Houses of Congress to decide whether a particular government within a State is republican or not; and to recognize it if it is, and to refuse to recognize it if it is not, and the adjudication of the matter by them is conclusive and binds the courts and the nation. It is not therefore for any class of persons in a State which has ceased to have a government to set up a government of their own."

The language of the court is, (7 Howard, 42 and 43:)

"Under this article of the Constitution it rests with Congress to decide which government" of the two set up in Rhode Island "is the established one, for as the United States guaranties to each State a republican government, Congress must necessarily determine what government is established in a State before it can decide whether it is republican or not. When the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government." * * * * * * * *

"Undoubtedly a military government established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it."

Mr. Chairman, here I must close.

If it is asked me now, granting your position that these States in revolt ceased to have any powers of government in the Union, still have not new ones been reorganized safe and fit to resume these high powers? I answer, sir, the question, "is it safe, and are they fit," are the stupendous *facts* now on trial by the American Congress. It was the whole end of the feeble argument which I have concluded to vindicate my Government's power to take jurisdiction of this inquest and hold this trial.

But if I am demanded by what standard of fitness, and what guarantees for safety, Congress shall decide these great facts now on trial, it will serve all the purposes of this argument and this hour to reply that in the true and high sense and spirit of the memorable words of the President of the United States I find a fitting answer. He says:

"No State can be regarded as thoroughly organized, which has not adopted *irreversible guarantees* for the rights of the freedmen."

Mr. Chairman, let this noble utterance—"*irreversible guarantees for the rights*" *of American citizens of every race and condition*—be written with pen of iron and point of diamond in your Constitution. Let it thus be made "irreversible" indeed, by the action of the State, in the only way it can be made irreversible; and then, to establish this and every other guarantee of the Constitution upon the only sure foundation of a free republic—the equality of the people and of the States—make, by the same organic law, every elector in the Union absolutely equal in his right of representation in that renovated Union, and I am content.

Let the revolted States base their republican State governments upon a general and sincere loyalty of the people and come to us under the guarantees of this renewed Union, and we hail their coming and the hour that brings them.

If you ask again, "Suppose such general loyalty should never reappear, shall they be dependencies forever?"

Sir, convince me that the case is supposable, then with deepest sorrow I answer—FOREVER!

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