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IN THE MATTER OF WALTON.

HABEAS CORPUS.

The writ issued 27th of January, but the hearing was postponed under an arrangement with Col. Peter Mallett, Commandant, &c., in order to have a full argument. In August, 1862, the petitioner being conscripted put in a substitute—the substitution has been adjudged valid. The case, then, depends on the question, had Congress power to pass the Act conscripting men who have put in substitutes? The power of a judicial tribunal to declare an act of Congress unconstitutional, when it is necessary to decide the question, in order to dispose of a case properly constituted before it, is settled. Acts of Congress not unfrequently involve questions purely legal—and the wisdom of giving this jurisdiction to the judiciary, is manifest; for, besides the advantage of having such questions passed on, by those who have not become heated in the arena of politics; there is this further consideration; members of Congress are not elected because of their supposed knowledge of law, and those who have not devoted themselves to the science, however able they may be as statesmen, or eloquent as orators, are not presumed to be as good judges of law, as men who have made it "a life-time study." The courts, however, always presume an act to be constitutional, and so not declare it void, except on the clearest conviction. Whereas, in this instance, a dry question of the common law is involved, the Judge is "more at home," and feels less embarrassment in dealing with the subject, than when the question depends solely on the construction of the Constitution, as in questions of constitutional law, the province of the Judge and that of the statesman, frequently run so nearly together as to make it difficult to distinguish the dividing line.

The power of Congress depends on the question: 1st. Is substitution a contract? 2. Has Congress power to violate its own contract?

1st. Is substitution a contract? This is a dry question of the common law, and should be considered without reference to politics. There are parties capable of contracting, there is a thing to be the subject of contract, so I suppose the only question that can be made is as to the *consideration*. "Gain to one and loss to the other party, is a legal consideration;" see *Coggs* v. *Bernard*, and the cases cited in "Smith's Lead. Cases." If I lend one my horse to ride to Salem, and he takes him and starts, I am not at liberty to follow on and take the horse from him; it is a contract of bailment, although done merely for his accommodation. If you agree to carry a package for me to Salem, and start with it, I can maintain an action for breach of contract, should you be guilty of gross negligence, although I was to pay nothing, and it was purely for my accommodation; your undertaking to carry it, and my confiding it to you, is a consideration. So, if you fancy my horse, and I tell you I will not sell, but to gratify you, I agree to let you have him if you will let me have as good a horse, and the exchange be made, title passes by "contract executed" just as if you had paid me the price in money. So, if you are bound to work for me three years at wages, and for your accommodation I agree to discharge you, in consideration of $500, and the money is paid, or if I agree to discharge you in consideration of your putting another man to work in your place, and it is done, there is in either case a contract executed, and it can make no difference, whether you pay me the money with which I may get another man to supply your place, or whether you pay the money to the other man, and he takes your place. This is substitution. Really, the fact that it is a contract, seems too plain for discussion; it is neither more nor less, than an exchange or "swap," as it is commonly called. The Government agrees to discharge a man in consideration of his putting a sound able-bodied man in his place, and it is done; this is a valid contract.

It is true, substitution is "a privilege," but it is a privilege offered at a stipulated price, which is paid. So it is a privilege *paid for*, and that makes it a contract, and distinguishes it from an *exemption*, and because of this distinction, it is made a distinct clause in the *conscription act*, and is not put in the exemption act. Suppose Congress was induced to enter into the contract of substitution in reference to conscripts, in order to make conscription more palatable to the people, and as a means of relief in cases of unequal hardship, and in reference to volunteers, the Secretary of War was induced to allow it in order to relieve some, who, in a moment of enthusiasm, had entered the ranks, and afterwards found the service too hard for them, or suppose the inducement was that our citizens might procure able-bodied men from Ireland or Germany, and put them in the ranks as substitutes, while the citizen staid at home and raised food and clothing, "there is" no principle of law, by which the inducement can change the nature of the transaction or take from it the character of a contract. You are by the terms of the contract, to furnish a sound able-bodied man, and you do so; that is the *consideration*; one man is taken for the other, just as in an exchange for horses, one horse is the consideration for the other; and the fact that it is made for the gratification or accommodation of one of the parties, does not in any way affect the legal question.

The ground that substitution is a "mere privilege," is that taken in the President's Message and in the debates in Congress, and was the point mainly relied on by Mr. Kittrell and Governor Bragg, in their able and learned argument on the part of the Government; for this reason, I have given to it the most anxious consideration, and feel fully convinced, that although substitution is a privilege, yet, as by the agreement, it was to be paid for, and the stipulated price has been paid and accepted, it is, to all intents and purposes, an executed contract according to the common law.

It is said Congress will not be presumed to have made a contract, by which to deprive the Government of the services of these men, during the war. Allow such to be the presumption, it is rebutted by direct evidence—Congress has agreed to the contract of substitution, in plain and unequivocal words, so as to leave no room for construction or doubt.

Again, it is a suggested, "the manufacturer is exempt upon the condition, that he will dispose of his fabrics, at rates not higher than 75 per cent. added to the cost of production, he promises to manufacture and sell at the reduced price—here is a privilege paid for." A *condition*, is *annexed* to a gratuity, *gift or sale*, by which it may be defeated, a *consideration forms a part of the contract itself;* this is the distinction. But it is true, they sometimes run into each other, and the condition may constitute a consideration, when from the words used that appears to be the intention. Whether this be the case in regard to that class of exemptions, in which a condition to work at certain rates, is imposed on mechanics, is a point not presented; for, take it to be so, it will only add to the list of contracts, which Congress has entered into; unless an exemption be made on the ground, that this is granted merely as an *exemption*, and no plain and unequivocal words of contract are used, as in the case, in regard to substitution. It certainly has not the weight of an argument *in absurdum*, and that is the only point of view in which it can have any bearing.

It is also suggested, "a blacksmith, who has enlarged his business in consequence of his exemption, may say he cannot rightfully be disappointed. A similar argument was urged by Mr *Webster*, to justify his change of opinion on the subject of the tariff. He said the New England States had engaged in manufacturing on the faith of the action of the Government in passing the tariff, and they, therefore, had a right to have their manufactures protected." The case of the blacksmith, like that of the tariff, presents simply a *political question*: shall the Government disappoint a reasonable expectation based on its prior action?—not a dry question of law. *Mr. Webster*, in his speech, puts it on the political ground, and no where intimates, that the prior action of the Government amounted to a valid, legal contract.—One may have reason to expect a legacy and complain should he be disappointed; but he has no *legal* claim; because there is no contract.

2d. Has Congress power to violate its own contract?

The power of Congress is limited by a *written* Constitution. It has no power except what is conferred by that instrument, and it contains no such power, either expressed or implied; indeed, it is excluded; for the power to make contracts, for instance, "to borrow money on the credit of the Confederate States," if there be also power to violate it, would be nugatory. No Government can have power to violate its own contract, except under the rule, "might makes right." The power to violate its own contract, or in other words, the right of "repudiation," has never been claimed by the Confederate States, and I had supposed it was conceded by all, that it did not have the power. But I am asked, "cannot the Confederate States, in a case of extreme necessity, violate its own contract—not with reference to morals, but to the supreme power of the Government, and has the Government of the Confederate State, less, and if less, how much less power than other Governments in a case of extreme necessity?"

The other Governments referred to, have no written Constitution, and may act on the broad and arbitrary rule, "the safety of the State is the supreme law;" but, the Confederate States has a *written Constitution*, which all officers *are sworn to support*. This Constitution and laws made in pursuance thereof, is "the supreme law." The Constitution being *written*, can neither bend or stretch, even in a case of extreme necessity. It is not only written and supported by oaths, but so extreme was the caution of its framers as to provide, "all powers not herein delegated to the Confederate States, or prohibited to the States, are reserved to the States respectively." In some few instances, large powers are conferred to meet extreme cases, for instance; the power to suspend the writ of *habeas corpus*, "where in cases of rebellion or invasion, the *public safety* may require it"—thus excluding, even in a case of "extreme necessity," any power other than those "nominated in the bond."

Again, I am asked, "admit substitution to be a contract, the power of Congress is limited by a written Constitution, where is the power to make a contract of substitution, by which the Government gives up its right to the services of able-bodied citizens, for the public defence in a case of extreme necessity, conferred by the Constitution, either in express words or by implication? the word "*substitution*" is not to be found in that instrument."

In reply, I might ask, is the word "*conscription*" to be found in the Constitution? This is a yankee mode of meeting one question by asking another, which the gravity of the subject forbids; I prefer to meet the question squarely, because I appreciate the motive which prompted it, and recognise it as fair reasoning. The power to conscript is supposed to be conferred by "the power to raise armies," in connection with the general authority, "to pass all laws which shall be necessary and proper to carry that power into effect, and in adopting the *means* to raise an army by conscription, it follows that Congress has power to modify the means in such manner as to make it injure the public as little as possible, and to produce as great collateral benefit as possible; in other words, to modify conscription, by allowing substitution so as to make it answer the purpose of raising an army, and at the same time relieve in cases of unequal hardship, and collaterally benefit the public by providing the means, whereby the citizen might be left at home, to raise food and clothing for the soldiers and "thus *support the army*" at the same time that the full complement of soldiers was kept up by substitutes brought from abroad or found among those who were not liable to military service. Suppose Congress in its wisdom had required, as the consideration for substitution, that *two* able-bodied Irishmen or Germans should be put in place of the citizen, would it have occurred to any one that the power to conscript did not necessarily include the power to allow substitution on such terms? the greater includes the less. And it will be remembered that substitution is not a new thing; it is prominent, and taken to be a matter of course in all prior legislation, both in this country and in England. Where "the militia" is looked on as a mode of defense in cases of invasion or rebellion, and where conscription was made to take the place of the militia organization, as a matter of course it was accompanied by this prominent feature.

Mr. Kittrell, on the argument, treated the subject in a different light. He assumed substitution to be a contract, but insisted Congress had no power to make that particular sort of contract, on the ground, that it would be "political suicide;" for, said he, "if Congress has power to deprive the country by its contract of the services of 1000 of its citizens, it may extend it to 100,000 and 500,000, and so we would have no citizen soldiers!!" Whether it would amount to "political suicide" to have a condition of things in which 500,000 Irishmen and Germans would be in the army, to fight our enemy, while a corresponding number of citizens were at home raising food and clothing, and paying taxes to support this army, is a question, into which a court is not at liberty to enter. I will observe that this mode of reasoning, by supposing extreme cases, is not apt to lead to truth, and is very apt to cover fallacy, (as it manifestly does in this instance) for, allow that in the extreme case put, it would be political suicide, does it prove a *want* of power, or an *abuse* of power? That's the question. If Congress has the power, whether it will so exercise it, as to commit suicide, or to stultify itself is a matter with which the courts have no concern, and a proper respect for a co-ordinate branch of the Government forbids the judiciary from making an extreme supposition, in order to express a conjecture, how far a power, may be so abused, as to avoid it, and require the courts to say it shall not be exercised, under that head of jurisdiction, by which the courts, prevent mad-men or idiots from injuring themselves or "wasting their substance."

Congress has power to borrow money on the credit of the Confederate States. It has, (I believe,) borrowed fifteen millions, and pledged the export duty on cotton, it had power to do so, as a means necessary and proper to enable it to borrow the money. Run out this reasoning, by supposing extreme cases: Congress borrows 150 millions more, and pledges the export duty on tobacco; it then borrows 150 billions and pledges all export and import duties, and all money that may be raised by direct taxation; this might be political suicide or stultification, and after the money is spent, the Government would have "no assets," and no means of raising any, but will any one venture to aver, on this reasoning, that Congress had no power to borrow the fifteen millions and pledge the import duty on cotton? The announcement of such a proposition would startle the commercial world.

Take a case near home: *Gov. Morehead* proposed a plan by which to enable the Government to borrow 400 millions, in consideration, among other things, that the bonds should not at any time be liable to taxation—thereby withdrawing that amount of the wealth of our citizens from liability to support the Government in all time to come;—many said it would be unwise in Congress to withdraw that amount from liability to taxation; but no one ever suggested that Congress did not have power to make the contract; and yet brother Kittrell might run out his mode of reasoning, so as to show that Congress might in this manner abuse its power and reduce itself to absolute beggary; *ergo*, Congress did not have the power!

It is gratifying, however, to know that I am not under the necessity of relying on my own judgment in deciding this question. The "inviolability" of a contract, whether made by the Confederate States, or the State, or an individual, is uniformly upheld by the decisions of our Supreme Court, in a tone of firmness, that is gratifying to every one.—Search from Haywood's reports to Jones', and you will no where meet a decision, or a *dictum* or an intimation, that the State has power to violate its own contract, or to avoid or repudiate it, on the ground, that the power has been or might be abused. To mention a few: *State* v. *Matthews*, 3 Jones, 451, where the Court say, if the State has made a *contract*, allowing the bank to issue "one dollar notes" in so many words, the State is bound; *McRee* v. *Wilmington and R. R. R.* 2 Jones, 186, where the Court say, "if the charter grants the monopoly, and the railroad bridge or structure, comes within the meaning, it is a contract, and the State is bound, unless the effect of the revolution and our bill of rights was to introduce a new order of things and avoid all such monopolies;" *Attorney General* v. *Bank of Charlotte*, 4 Jones' Eq. 287, where it is *decided*, "where a price is stipulated in the grant of the charter, it is the *consideration* for which the sovereign makes the grant, and cannot be increased; to levy a tax on the bank, is to add to the stipulated price, and, therefore, an act of the Legislature imposing such a tax, is in violation of the Constitution and void." Here is a thing withdrawn from the power of taxation by force of a contract.

I have heard some express the opinion, that it would have been better not to have made a Constitution for the Confederate States, until after the war was over! It is sufficient, that it was deemed wise to frame a written Constitution, with a grant of such powers to the Confederate States as are supposed to be ample enough to meet the emergency of the invasion and carry us through the war. That Constitution has been adopted, and we are sworn to support it.

The only authority relied on to support the position, that Congress has power to violate its own contract, is the decision of his honor, Judge FRENCH, *in the matter of Williams*.

The question is, does that decision settle the law, or should it be over-ruled? I am aware that in the opinion of the Secretary of War and of his Excellency, Gov. Vance, the decision of a single Judge on *habeas corpus* questions, is only binding, in *the particular case*, and I infer, from the fact, that none have filed opinions except Judge HEATH, and Judge FRENCH in this instance, the other Judges take the same view, but in my opinion it is also entitled to the weight of "the authority," or "an adjudicated case," as settling the law, until the judgment be reversed, or the principle is over-ruled; for it is the decision of a tribunal of superior, general jurisdiction, over the subject, without appeal.

The power of a tribunal, having equal and concurrent jurisdiction to over-rule a decision is conceded. It is a *judicial* function made necessary by the imperfection of human judgment, and must be exercised in order to secure correctness of decision: true, uniformity as well as correctness are to be desired; but the former is secondary, and must yield when it appears that a court has fallen into error; and the sooner error is corrected, the better, for it will spread and become the source of other errors; *Williams* v. *Alexander*, 6 Jones, 130. On consulting his books, a lawyer is sure to find "cases over-ruled," as instances: *Stowe* v. *Ward*, 1 Dev. 57, is over-ruled by *Ward* v. *Stowe*, 2 Dev. Eq. 509; *Wagstaff* v. *Smith*, 4 Ired. Eq. 1; by *Northcot* v. *Casper*, 6 Ired. Eq. 303; *Spruill* v. *Leary*, 13 Ired. 225; by *Myers* v. *Craige*, Busbee, 169. But the jurisdiction should be exercised sparingly and only when *palpable error* is shown.—Several circumstances were relied on by *Messrs. Gilmer and Bogden*, as tending to weaken the authority of the decision in *Williams' case:* It conflicts with two decisions before made by his honor, Judge HEATH, in *the matter of Farmer*, decided June, 1863, and *in the matter of Ricks*, published August 1863. The opinion in Williams' case does not show error in either of these decisions, and in fact, takes no notice of either adjudication. So, there is a conflict, and the decision, now to be made, is to settle the difference between Judge Heath and Judge French by over-ruling one or the other. Greater respect is due to a decision made after full argument, than to one made hastily and without argument. At the time the decision was made by his honor, Judge French, this case was pending, and the hearing postponed in order to have a full argument, and if the first decision be *conclusive* of the law, it might tend to produce the indecent spectacle of "a race" as to who should get the first judgment; and it was stated, on the argument, that in Williams' case, the writ was issued, returned, and the decision made on Friday, 29th January, and the opinion filed in time to be sent 40 miles, and published on Monday the 1st February, showing haste; or else that the question was prejudged.

Putting these considerations out of view, I take on myself the *onus* of showing palpable error. The first thing that strikes any one who reads the opinion attentively, is the fact, that his Honor does not deny, that according to the principles of the common law, "*substitution* is a *contract*." He says not one word about its being a "*mere privilege*"—which is the ground on which the matter is put in the President's message and the debates in Congress; but yielding that point, and assuming substitution to be a contract, he boldly takes the position—one, which no politician, lawyer and judge had ever before taken—that the Government of the Confederate States has power under the Constitution "to violate its own contract;" in other words, he avows the right of repudiation, and covers his position by setting forth an array of general principles, which he supports by a long list of references. I shall only notice two of the cases cited, being decisions of our Supreme Court: *State* v. *Matthews*, 3 Jones, 451. The charter of the Bank of Fayetteville does not authorise it, in so many words, to issue 1-dollar notes; had such been the fact, there would have been no room for construction, and the Court would have decided, that the act of the Legislature was void as violating a contract, but such was not the fact; the charter authorises the bank "in general terms, "to receive deposits," "discount notes," and "issue notes for circulation," *without saying of what denomination*; and the Court came to the conclusion, that by a fair construction, the power to issue one dollar notes, did not form a part "of the essence of the contract," but was "a mere incident" intended by the parties to be subject to future legislation; on the ground, that the Legislature will not be presumed from the use of general words to give up, by a contract, its power to regulate the currency; but this presumption may be rebutted, by positive proof, that is, by the use of plain and unequivocal terms of contract, as if the charter had specified "one dollar notes," thereby making the evidence of a contract as positive as is done by the words used in the act of Congress, in regard to substitution. His Honor, in what purports to be a quotation from the opinion of PEARSON, J., does me great injustice. I set out two alternative positions: "is authority to issue small notes, conferred by the charter, *as a part of the essence of the contract, with the intention to put it beyond the control of all future legislation?*" or is it conferred *as a mere incident, with the intention, that it should be subject to such limitations as the Legislature, might at any time thereafter, deem expedient*," &c.—he does not set out both of these positions or either of them, but confounds them together; takes the words, "as a part of the essence of contract," from the first, and substitutes them into the second in place of the words, "as a mere incident," which he omits, and this mars the sense and makes nonsense of it, and represents me as saying: The authority to issue small notes is conferred by the charter, "as part of the essence *of the contract*, with the intention that it should be *subject to future legislation*," and that this is so plain that a mere statement is sufficient to dispose of it. I must be allowed to object to this mode of treating the opinion of Judges. *McRee* v. *Wilmington and Raleigh Rail Road Co.*, 2 Jones, 186. The statement made by his Honor, keeps in the back ground the prominent fact on which the case turns, that the structure—a bridge erected by the Company,—was a mere *continuation of the road* across the river; no toll was ever received on it as a bridge, and it was used in every respect as any other part of the road, and the decision is put on the ground, that a structure or bridge of this sort was not in contemplation of the parties in 1776, and was not embraced by the contract. As his Honor admits substitution to be a contract, I am unable to see how these cases have any application to his position, that the Government may violate its own contract. I have not examined the many other references; indeed, it is unnecessary, for I concur in the correctness of "the general principles" in support of which they are cited; and the labor and research bestowed on these general principles only tend to prove, that no case can be found to support the particular position on which his decision rests.

In support of this position, his Honor takes two grounds: 1. "There is nothing in the Constitution of the Confederate States, which prohibits Congress to pass laws violating the obligation of contracts, though such a power is denied to the several States;" therefore, Congress may violate its own contract—I [illegible] *sequitur*. The important distinction, that the States have all legislative powers, except such as are prohibited, whereas Congress has no power except it be conferred by the constitution, is entirely overlooked. As the States have all powers except such as are prohibited, a prohibition in regard to the States was necessary. As the Confederate States has no power except it be conferred by the constitution, a prohibition in regard to the Confederate States, was unnecessary; all warrant for a prohibition is superseded by the article which provides—"The powers not delegated to the Confederate States by the constitution, nor prohibited by it to the States, are reserved to the States respectively," &c. The conclusion drawn from the absence of a prohibition in respect to the Confederate States is illogical and palpably erroneous.

2. "The Congress shall have power to raise and support armies—to make rules for the government of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the Confederate States or any department or officer thereof."

The reasoning is this: the act of Congress conscripting men who have put in substitutes is necessary and proper to carry into effect the power to raise armies, therefore, Congress has power to violate its own contract—a non *sequitur*. His Honor fails to take into consideration the fact that the supposed necessity is caused by the acts of Congress which allows substitution as to conscripts, and the act of the Secretary of War, Oct. 29th, 1862, which allows substitution as to volunteers. He fails to consider, that the clause, to make all laws which shall be necessary and proper for carrying into execution the powers con-