The Old North State

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THE XIV AMENDMENT AND THE LEGISLATURE.

DOES THE OPERATION OF THE THIRD SECTION OF THE XIV AMENDMENT EXCLUDE ANY PERSON, OR CLASS OF PERSONS, FROM HOLDING SEATS IN THE SEVERAL STATE LEGISLATURES?

On the 20th of May we discussed the above question in a somewhat lengthy editorial, in which we labored to maintain the affirmative, in opposition to the opinion of an able legal writer in the Wilmington *Star* of the 13th of February 1869, who labored to maintain the negative of it. The writer of the opinion in the *Star* rejoined in a very able and learned article, in the columns of this paper, on the 10th inst. Not being convinced by the argument of the rejoinder, which, with all its learning and ability, contains, to our mind, much ingenious sophistry, we submit this article as a surrejoinder.

It is admitted by the parties to the discussion that the question at issue resolves itself into another—are members of the Legislature "officers under the State." If they are such officers then it is conceded that persons banned by the XIV Amendment cannot be members of the General Assembly: if they are not such officers then it is conceded that such persons are eligible to seats in that body. The question to be decided then is: *Are members of the Legislature "officers under the State" within the purview of the XIV Amendment?* We contend that they are such officers, while our correspondent simply contends that they are not; he having abandoned the ground taken by him in the *Star*, and upon which much the larger part of his first argument was based,—that the disqualification under the Howard Amendment can only be ascertained and established by the production of a copy of the record of a competent court, judicially fixing the guilt of the disqualifying crime."

In order to determine the question under consideration it becomes necessary to ascertain what an office is, as well as what constitutes a man an officer, so that we may be able to say with certainty whether all the attributes of an officer are to be found in a member of our American Legislatures or not. This, it is believed, can easily be done by reference to the most renowned law lexicographers and commentators, and the decisions of the courts, both in this country and England.

BOUVIER, who was a distinguished Pennsylvania jurist, twelve years a Judge in Philadelphia and the author of a legal work of merit—Bouvier's Institutes—says, in his Law Dictionary:

"An office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it."

In support of this definition he gives the following references: Shiff. on Mortm. 797; Cruise, Digest. Index, h. t; Serg. & R. 149.

BURRILL'S Law Dictionary, a standard work, defines an office to be

"A position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private. * *

* The idea of an office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty. The intrinsic meaning of the word is well expressed by the old English word "Place," and the figurative terms "incumbent," "swearing in," "entering upon," "vacating," which are constantly applied to officers, have the same radical idea.

"A public station or employment; an employment conferred by appointment of Government. An employment in behalf of the government in any station or public trust, not merely transient, occasional or incidental. Platt, J. 20 *Johns. R.* 493. A station or employment conferred by election of the people."

We also quote the following:

"A right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." 2 *Bl. Com.* 36, 1 *Cruik's Real Prop.* 431, & 530.

"A right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it." *Chane. Kent. Com. vol.* 3 *page* 454.

"An *office* is a *right to exercise a public or private employment, and to take the fees and emoluments* belonging to it." *Cruise, Greenl. ed. Vol.* 1 *page* 36.

"A function by virtue whereof a man hath some employment in the affairs of another."—*Cowell–Jacob.*

"What constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation, in whatever shape, whether from the crown or otherwise, is constituted a public officer. * * * If a man takes a reward—whatever be the nature of that reward—for the discharge of a public duty, that instant he becomes a public officer." *Chief Justice Best, in Henly vs. the Mayor of Lyme, 5 Bingham, Eng. Com. Law Rep'ts, Vol.* 15, *page* 494.

"An office is a public station, or employment, conferred by the appointment of government.—The term embraces the ideas of tenure, duration, emolument, and duties." *U. S. v. Hartwell, 6 Wallace, page* 393.

"The term "*office*" implies an authority to exercise some portion of the sovereign power, either in *judging*, administering, or executing the laws." 3 *Cranch. R. App. page* 481; *Bamford v. Melvin, 7 Cranch R.* 14." *Disposed in Crawdey's Cause on R. Prop. Vol.* 1, *page* 87.

The concurrent authorities cited above seem to determine with unmistakable precision what an office is, and what constitutes an officer. Is the position, place or office of a legislator under our American constitutions described by them? We use the word *place* as synonymous with that of *office*, according to an authority cited. When the words, "any office or place of trust and profit," are used in our State Constitution they are used synonomously, notwithstanding the fact that they are "disjoined by 'or,'" as are the words "tract, piece or parcel" in a deed of conveyance of real estate. The distinction attempted to be made by our Supreme Court in Worthy *vs.* Barrett has been very properly characterized as "a distinction without a difference." Both terms are used in the Constitution, as in other instruments, simply to exclude a conclusion.

Has not a member of the Legislature a right "to exercise a public employment and to take the emoluments thereto belonging?" Does he not stand "charged with the performance of certain public duties"? Does not his position or "place" "embrace the idea of tenure, duration, emoluments, rights and powers, as well as duty"? Is it not "a station or employment conferred by election of the people?" Is he not an "incumbent"? Does he not "swear in"? Does he not "enter upon" the discharge of his duties as such? May he not "vacate" his seat in the Legislature, as a Judge may resign *his* seat upon the bench, or as the Secretary of State may vacate his *seat* in the Cabinet?

Is not his place "a public station," and does he not assist in "making" if not in administering the laws? Do not the emoluments attach to the office by virtue of the law which creates it? Do not we find in him all the attributes which go to make an officer according to all the authorities and decisions on the subject? Are not all the conditions complied with to the fullest measure? We think, then, we may say that he is not an officer?—We, we believe, can be found to deny that a member of the Legislature is an officer.

The next question arises, is he "an officer under the State."

And here it may be necessary to determine, if we can, what is THE STATE? The word State is used in various senses. "In its most enlarged sense," says Mr. Justice Story, "it means the people composing a particular state or community. In this sense, the 'State' means the whole people united into one body politic; and the State and the people of the State are equivalent expressions. Mr. Justice Wilson in his Law Lectures, uses the word 'State' in its broadest sense. 'In these States,' says he, 'the people form an artificial person, or body politic, the highest and noblest that can be known. They form that moral person, which, in one of my former lectures, I described as a complete body of free, natural persons, united together for their common benefit; as having an understanding and a will; as deliberating and resolving, and acting; as possessed of interests which it ought to manage; as enjoying rights which it ought to maintain; and as lying under obligations which it ought to perform. To this moral person we assign, by way of eminence, the dignified appellation of "STATE." We accept of this definition of the word "State," from the two very eminent jurists whom we have quoted, as exactly expressing our own idea of it. By "office under the Crown," in England, is meant precisely what is meant in this country by "office under the State." From this great moral person, THE STATE, all offices in this country are derived, as they are supposed to be derived from the KING in England.

It is admitted that in England members of Parliament are not officers, for two reasons. First, one of the essential attributes of an officer is wanting in a member of Parliament, according to the authorities we have cited. A member of Parliament, by law, is entitled to no salary, or pay of any kind, and receives none—there are no "*emoluments*" attached to the place. Secondly, in England the three Estates of the Realm—the King, Lords and Commons—are omnipotent—are, in the discharge of their duties as such, subject to the control of no law, but are above all law. In Parliament assembled they are above the Constitution—are, in fact, the Constitution itself. They are "a law unto themselves"—are *the State*. The Lords and Commons are, in Parliament, as sovereign as the Crown itself. In them and the king the whole sovereign power of the Empire resides, and is supposed to be *inherent*. It is quite apparent then, that members of Parliament are not "officers under the Crown," the State; and why.

But it is very clear, from what has already been written, that the British Parliament is a very different body from our American Legislatures. The sovereign powers of the former are inherent and unlimited,—of the latter derived and limited. The one is above the Constitution, the other the creature of the Constitution. The one is *the State* itself, the other was created *by the State*. The only political bodies in our form of government at all analagous to the British Parliament are our sovereign conventions.—They alone represent the whole sovereignty of the State—they are the people of the State in convention assembled—they are "the artificial person, or body politic"—"the moral person to whom we assign, by way of eminence, the dignified appellation of STATE." The members of these Conventions, though officers in that universal sense in which the King of Great Britain is said to be an officer, are not officers under the State, created by a law of the State, but are *the State itself*. For when we speak of "officers under the State" we use the word "State" in its broadest sense, as used by Justices Story and Wilson in the quotations we have elsewhere made. The Legislature being the creature of the State, as described above, and the election of its members being provided for by the Constitution, which is the supreme law of the State, they must necessarily be officers under the State, if they are officers at all, and it has been shown that they are. They are elected in pursuance of law, their duties, some of which are *judicial*, and some of which are specific in their nature and clearly defined and limited by law, as are the duties of other officers. They were created and brought into existence by the same power that created the Executive and Judicial officers of the State, and are as much officers under the State as they are. They are the representatives of the people in the Legislative Department of the Government, just as the Executive and Judicial officers are in the other two Departments.

The Legislature not only has judicial functions devolving upon it, but it possesses the powers of a court in other respects, by virtue of the principles of the Common Law, among them that to punish persons, not members, for a contempt of its authority:

"The two Houses have power to punish for contempt. The Constitution says nothing of contempts. These were left to the operation of the Common Law principles, that every Court has the right to protect itself from insult and contempt, without which right of self protection they could not discharge their high and important duties. *Nagent's Case*, 1 *Am. L. J.* 139. *Anderson vs. Dunn*, 6 *Wheaton*, 204, 1 *Story on the Const.* § 845, *Bolton vs. Martin*, 1 *Dallas, Pa.* 269;" *digested by Brightly.*

Can it be possible that the members of such a court are less officers than the members of any other court established by the same law?

Thus far we have reasoned from general principles. The question, who are civil officers, says Justice Story in the latest edition of his commentaries, has, perhaps, never been judicially settled in United States. Certainly the question under discussion—are members of the Legislature officers under the State?—has never been judicially settled in North Carolina, unless it is to be considered as settled by the *obiter dictum* of the Supreme Court in Worthy *vs.* Barrett. The question twice arose before the Legislature, upon the meaning and construction of the *language* of the *old* Constitution, and was in both instances evaded.

In the year 1809 a motion was made in our House of Commons to vacate the seat of Jacob Henry, a Jew, who was a member from Carteret County, on the ground that he was excluded by section 32 of the old Constitution which provided, that "no person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority either of the Old or New Testament, &c., shall be capable of holding any office or place of trust and profit in the civil department within their State." Mr. Henry defended his right to the seat in a very able argument, known to be the production of Chief Justice Taylor, the brother-in-law of Gaston, who was also a member of the House at the same time. The ground taken by Chief Justice Taylor in this argument was not that a member of the House was *not* an officer—which would have been a complete defense, could it have been shown—but that Mr. Henry was not excluded from *office* by the section of the Constitution which we have quoted above. The ground taken was that the Declaration of Rights, made by the people of the State in 1776, was intended to consecrate certain great and fundamental rights and principles, which even the Constitution could not impair, and which, it was declared, ought never to be violated on any pretense whatever—that if there was any apparent difference between the two instruments they ought if possible to be reconciled; but if there was a final repugnance between them the Declaration of Rights must be considered paramount—that the Declaration of Rights was to the Constitution what the Constitution was to the law—that it controlled and directed it absolutely and conclusively—that the qualification of belief in the divine authority of the Old and New Testaments and the truth of the Protestant religion was dispensed with by the Declaration of Rights, and, consequently, the provision was nugatory and inoperative; as the language of the Bill of Rights was, "that all men have a natural and inalienable right to worship ALMIGHTY GOD according to the dictates of their own conscience"—that this right having been declared to be inalienable by the people in their original and sovereign capacity, any attempt to alienate it either by the Constitution or by the law, must be vain and fruitless. This reasoning of Judge Taylor was deemed conclusive, though the other point may have been made by Mr. Gaston, and the motion was unanimously rejected on this ground, as far as we are able to ascertain. *See Wheeler's History of N. C., Carteret County, for Judge Taylor's argument.*

In 1833 or '34 the question again arose in our Legislature in Saunders' case. Gen. Saunders, while a commissioner under the Spanish treaty, and, therefore, an officer of the United States, was elected to the House of Commons from Caswell county. He claimed his seat on the ground that a seat in the Legislature was not an office within the meaning of the 55 section of the Constitution, which prohibited "any person in this State from holding more than one lucrative office at any one time." The matter was referred to a committee of which Wm. A. Graham was Chairman, who made a report that disposed of the case without deciding the question which Gen. Saunders had raised. They reported that the two positions were incompatible with each other, and upon this report the applicant was excluded. It was this case which caused the introduction of section 4 of article 4 of the Amendments of 1835. In the amended article it is expressly provided that no person, who holds any office or place of trust and profit under the United States, or under this State, or under any other State or government, shall be eligible to a seat in either House of the General Assembly, so as to exclude for the future the conclusion at which Judge Saunders had arrived.

There are, however, some authorities bearing upon the question which we propose very briefly to present.

In an early case in Massachusetts, the question of the extent of Parliamentary privilege came before the Supreme Court and was largely discussed as well by counsel as by the Court. The Court held that a member was only entitled to certain privileges granted him by the Constitution as a *representative*, when "*in the exercise of the functions of that office*"—that a member "cannot be exercising the *functions of his office as a member* of a body, unless the body is in existence"—that a member must be protected when he is, "in fact discharging the *duties of his office*"—that a member of the House is entitled to his privileges "when executing the *duties of the office*, in a convention of both houses, although the Convention may be holden in the Senate Chamber." *Coffin vs. Coffin*, 4. *Mass.* 1. See the opinion quoted at some length in Cooley's Constitutional Limitations, a work of high authority, pages 446, 447. And the author of the work himself, speaking of this same case, says: "It was shown that the defendant was not in the discharge of any *official duty* at the time." Surely no language can be plainer than that used by the Supreme Court of Massachusets and Prof. Cooley, who is Chief Justice of the Supreme Court of Michigan, in this case.

Members of the Legislature have frequently been expressly recognized as officers in the judicial opinions of our own Supreme Court. In Johnson *vs.* Mallett, Chief Justice Pearson, in his concurrent opinion, expressly recognizes them as officers in the following extract:

"The Governor, members of the Legislature, Judges, and *other* officers of the State, are not *liable to conscription*, by force and effect of the Constitution, and of our form of government; and stand in no need of being excepted. * * So that part of the act of Congress, which enumerates among the persons exempted the members of the several State Legislatures, and such other State officers as the Governors of the respective States may certify to be necessary for the proper administration of the State governments' (act of 17th February 1864, sec. 10, clause 2) is a mere supervacuum." *Winston's Reports, cases at law, page* 13.

It will also be seen from the quotation in the above extract, from the exemption act of the Confederate Congress, that that body also believed, and declared in a solemn act of legislation, that members of the Legislature were officers. And it will certainly not be denied that it was a body composed of men who "well understood the meaning of words."

In the case of Russell *vs.* Whiting, Chief Justice Pearson still more expressly recognizes them as officers in the following language:

"The question is: Does the 2d clause of the 10th section exempt one who is in the service at the time he is elected or appointed a State officer—*a member of the Legislature*, for instance." *Winston's Law, page* 463.

They are also recognized as officers in language as clear and unmistakeable in the matter of Curtis, *Winston's Law, p.* 180.

Justice Story in several places speaks of a seat in the Senate or House of Representatives being an *office*—as "the duration of the office of Senators"—or "the duration of the high office of Senator," and speaks and treats generally of Senators and Representatives as officers. Mr. Madison, in the Federalist, speaks of them as "*Civil Magistrates*," and also speaks of Executive officers as the *representatives* of the people in that capacity.

The Act of Congress of June 1, 1789, regulating the time and manner of administering oaths, makes no distinction between members of the Legislature and executive and judicial officers of the several States, but regards them all alike as officers in the following language:

"And the members of the several State Legislatures, and all executive and judicial officers of the several States, who shall be chosen or appointed after the said first day of August, shall, before they proceed to execute the duties of their *respective offices*, take the foregoing oath," &c.

If there ever was a Congress that understood fully what it was doing it was that of 1789. It was largely composed of the ablest statesmen of the Revolutionary and Constitutional eras, including "the father of the Constitution" himself—"of men who well understood the meaning of words."

This much we have submitted as an argument *de novo;* we now propose to review as briefly as possible the argument of our correspondent. In this review we shall endeavor, in the most courteous style and manner of which we are capable, to unveil the fascinating and ingenius sophistries which have imposed upon the highly cultivated mind of the writer, as well as upon the minds of other able and learned lawyers, but which, we think, we shall prevent from imposing upon the minds of men who rely simply upon their plain, practical common sense to conduct them to correct conclusions.

We fully concur with our correspondent in his estimate of the men who framed the Constitution of the United States. We agree with him that they "well understood the meaning of words." Indeed we doubt if any subsequent age has produced a body of men who could have framed and written such an instrument as well. But we cannot say as much for the old Constitution of North Carolina. It does not seem to us to have been a very well written instrument, and it is no reproach to the body who framed it that it was not. Its members assembled during the war when their minds were more or less distracted by the clash of arms and the fears and doubts which well nigh appalled the stoutest hearts.—Their object was to frame such a civil constitution as would serve the purposes of government during the war. When the struggle should is over they expected to correct its errors. And the very fact that they omitted to provide a way and manner for its amendment shows that no such thought and consideration was given to it as was given to the Federal Constitution by its framers. They had some very correct ideas of government which they had acquired as British subjects. These they hastily embodied for a temporary government. They remembered that members of the British Parliament were not officers and they naturally supposed, without analyzing thoroughly the two systems, that members of the Legislature would not be officers.—Hence the distinction which seems to have been, but which it has never been judicially decided was made between members of the Legislature and Executive and Judicial officers.

The argument to show that in the XIV Amendment, a distinction is made between members of the Legislature and Executive and Judicial officers of a State based upon the use of the word "or" seems to us, though we are not a scholar, to possess no force whatever. He says the terms are disjoined by "or" to distinguish them. This is true in one sense—they are disjoined by "or" to distinguish between *the classes* of officers to which they belong, but not to distinguish them in any other way. It simply distinguishes between Legislative officers and Executive and Judicial offices. More than this it cannot do, as the most general use of the word—and it is certainly so used in this amendment—is in the sense of *either*. But it is often used to disjoin synonyms, in legal instruments, for the purpose of excluding conclusions, as in deeds of conveyance, where we use the expression "*tract, piece or parcel*," &c.

But let us see how absurd the amendment would be if the opposite conjunction, *and*, had been used, and which, according to his reasoning it would have been necessary to use if no distinction was intended to be made. It would then recite, that "no person," "having previously taken an oath as

A member of Congress, *and* as
An officer of the United States, *and* as
A member of any State Legislature, *and* as
An Executive Officer of any State, *and* as
A judicial officer of any State,

to support the Constitution of the United States and shall have engaged in insurrection and rebellion against the same, or given aid or comfort to the enemies thereof, shall be a Senator *and* Representative in Congress, *and* an Elector of President and Vice President of the United States, *and* hold any office civil or military under the United States, or under any State."

It would then simply proclaim that "no person" having previously taken an oath as the holder of *two different* enumerated offices, &c., shall at the *same time* be a Senator *and* Representative in Congress, *and* an Elector of President and Vice President, *and* hold any office, civil or military under the U. S., or under any State. Further remark upon this argument is useless, as it was necessary to use the one conjunction or the other.

In reply to the claim of authority for the *dictum* of the Supreme Court in Worthy *vs.* Barrett—that members of the Legislature are not officers—it is only necessary to say that its authority can be no higher than that of its other *dictum* in the same case—that members of the Legislature are expressly excluded.

It is argued that the oath now required to be taken by a member of the Legislature "*that he will faithfully discharge his duty as a member of the Senate or House of Representatives*"—is not an oath of office, because he simply swears that he will discharge his duty as a *member*, &c., and not as an officer. What is the oath of office? It is simply an oath to perform the duties of the office, or place to which he has been appointed or elected. Is not that precisely the character of the oath quoted above? Let us see by comparing it with other oaths of office. We give below the oath formerly taken by the Judges of the Supreme and District Courts of the United States, which we find quoted at length in the opinion of Chief Justice Marshall, in Marbury *vs.* Madison.

"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and the rich; and that I will faithfully and impartially discharge the duties incumbent on me as a *Judge* of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

According to the logic of our correspondent this is not an oath of office, because the Judge is simply required to swear that he will faithfully discharge his duties as a *Judge*, and *not as an officer*. Yet the Supreme Court of the United States says it is an oath of office, and every intelligent man knows that it is. But suppose he had only been required to swear that he would faithfully discharge the duties devolving upon him as a *member* of the Supreme Court—for that Court is "a judicial body"—would it not still have been an oath of office? Undoubtedly it would. A Judge of the Supreme Court is a *member*, but not an officer, of the Court. A Senator is a member, but not an officer, of the Legislature. Both houses have their officers, but the members of both of them are none the less officers themselves for all that.

The Latin word *officium*, from which the word office is derived, is interpreted to mean, in Anglo-Saxon, "*labor*," and it is contended that an officer is simply "a doer and not a maker of the law." Without giving an opinion one way or the other in relation to the correctness of this translation we will simply say it will not answer the writer's purpose. The Legislature is, in a large sense, "the doer" of the Constitution—the supreme law of the land. This has already been clearly shown and we will dismiss the subject.

All that portion of the article relating to assemblages of the people in pure democracies may be dismissed with a very few words. Of course the people do not become officers under the State when they assemble for the discharge of legislative duties in purely Democratic States, for the reason that they are the State itself in the broadest sense of the word—in the same sense in which sovereign conventions in the American States now are the State, or the representatives of the State. This argument seems to us to have been exceedingly far fetched.

Again it is objected that a member of the Legislature can not be an officer because whatever power he possesses is not in the act of any one member, but in the decision of the whole body, as expressed in the aggregated mass, or "*Court of Assembly*." "If a member can be an officer in any sense whatever," it is said, "his office and official functions are of an anomalous and inconceivable character. He can do nothing at all without the corporation, in the legislative hall, of one hundred and sixty-nine other officers. He is a Bashaw with an innumerous number of tails, and in his caudal appendages all his virtues lie." Is it not passing strange that a gentleman of the great learning and rare intelligence of our correspondent should allow himself to be imposed upon by such flimsy logic as this? As a lawyer of long practice and much learning he must know that the Courts, both of the States and the United States have again and again decided that Boards of Commissioners, of various characters, who could only act in their aggregate capacity, as a board, were officers—have directed mandamuses to, and, issued injunctions against them. He must also know the same thing of the Boards of Aldermen of great cities, who, like the General Assembly, possess legislative powers limited by the law which created them. He must know the same thing of many other bodies, such as our present Boards of County Commissioners. Yet, according to his own logic, every member of such board is but "a Bashaw with a greater or less number of tails in whose his caudal appendages all his virtues lie." He must also know that our Supreme Courts, with their plurality of Judges, are judicial bodies, the members of which can only discharge their duties, as such, in their aggregated capacity, as a Court. And he will certainly admit that the Judges of said Courts are officers under the State, or United States. Yet, according to his logic, Chief Justice Chase is "a Bashaw with eight tails, in whose caudal appendages all his virtues lie."

Again he urges that these legislative corporations or councils—meaning the State Legislatures—are within the purview of the Constitution, "*the States*" themselves. This he says, is manifest from the language of the Constitution; that *no State shall pass* any bill of attainder, *ex post facto* law, &c., which phrases, he says, are clearly referable to the legislative department, and establish that in the contemplation of the Constitution the State and its Legislature are convertible terms. This seems to us to be very unsound logic, as does very much that is used by our correspondent. The opinion of our Supreme Court, in Woodlin *vs.* Slader, is to the point. In that case the Supreme Court say, in substance, that the prohibition is upon that body or organization *in the State* which is authorized to act or legislate *for the State*—that the Legislature is no more the State than is a Convention of her people, or any other agent authorized to act for her and in her name—that the prohibition upon *the State* is a prohibition upon the authorized government or agents of the State. *Phillips Law R. page* 200.

"We say," says Mr. Justice Wilson, in his law lectures, "the State has power to do this or that; the State has passed a law, or prohibited an act; meaning no more than that the proper functionaries, organized for that purpose, have power to do the act, or have passed the law, or prohibited the particular action." It seems to be a self-evident proposition that a prohibition upon the State must operate as a prohibition upon her Legislature or other agents, and be respected by them.

It is further contended that the question is settled by the case of Blount, cited by our correspondent from Story, but is it certain that Judge Story did not think so. The 4th section of article 2nd of the Constitution of the United States, is as follows:

"The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

William Blount, who was a United States Senator from Tennessee, was impeached for some high crime or misdemeanor. The high court of impeachment decided that a Senator was not a "civil officer of the United States, *within the purview* of the section of the Constitution which we have quoted above, not that he was not in any respect a civil officer. And the decision was perfectly in accordance with the views of those who agree with us in the matter we are discussing. Senators and Representatives in Congress are not among the civil officers referred to in the above section of the Constitution, for the reason that their trial and punishment, for the offences enumerated, are specifically provided for in section 5, article 1, of the Constitution. And under this latter section Mr. Blount had *possibly* the *same* punishment imposed upon him that is provided in cases of conviction on impeachment—that of expulsion from office. In the section on impeachments we have quoted above, there is clearly an implied exception of those civil officers whose trial and punishment had *previously* been otherwise provided for in the Constitution.

The opinion of Judge Gaston is cited as,—in connection with Blount's case,—settling the question. We will not allow our correspondent, or any other person, to go before us in our estimate and admiration of the eminent character, talents and legal learning of that truly great and good man. Our political sympathies have always been with him in the two great parties to which he belonged during the term of his long and useful life. He is, indeed, more nearly an oracle with us than any other man that ever lived in North Carolina. But with all this we are not prepared to accept of his single opinion as settling a great question like the one under consideration. More than that, we are not willing to accept of it as conclusive to our mind, unless convinced by the reasoning which convinced him. For even from such a man as Judge Gaston we would know the reasons of an opinion before we adopted it as our own. The opinion stands alone, among the authorities cited, in opposition to the view we have maintained and the conclusion at which we have arrived.

But it must be borne in mind that Judge Gaston's opinion was not given upon the question now under discussion. The present question arises directly under the Constitution and laws of the United States, and only incidentally under the *present* Constitution of the *State*. Judge Gaston was discussing the question under the *old* Constitution of the State, and was measuring the meaning of the word *office* by the *language* used in *that* instrument. We have no where contended that members of the Legislature were officers within the meaning of the language used in that Constitution—only that the question had never been judicially decided. And we readily admit that the construction given to the *language* of that instrument by Judge Gaston, and by our very learned and able correspondent, is, to say the least of it, very plausible, if not *clearly right*. And if the Howard Amendment had only excluded, by its *express* terms, the proscribed classes from what were *held* to be offices under, and by the strict language of the *ante-bellum* Constitutions of the several States respectively, we would certainly never have written a line for the purpose of warning those classes against the policy of running for the State Legislature. Nay, we are sure we would have encouraged them to be candidates. But the question presented is one vastly different from that upon which Judge Gaston gave his opinion in the Convention of 1835. The opinion of that great and learned jurist, upon the construction of the *language* of a Constitution that has ceased to exist—whether members of the Legislature were officers within the plain meaning of the language of that instrument—is the least of all authorities in the construction of the language and meaning of the XIV Amendment, which is so different from it. It is of little authority, even, in determining the question; are members of the Legislature "officers under the State." It is authority as showing that in the old Constitution they were not included among the officers of the State by the *language* of that instrument—nothing more.

Another argument which has been advanced to us by a very distinguished gentleman is that members of the Legislature cannot be officers because they are not amenable to the law as such. Members are to be amenable to Parliamentary law, and may be punished by expulsion by their respective Houses, as other civil officers may be by impeachment. And for bribery, etc., they may afterwards be indicted and punished in the Courts, as may other civil officers who have been removed from office by impeachment.

Still another argument advanced to us by the distinguished gentleman above referred to, is that a writ of *mandamus*, which is a remedy against all officers who fail or refuse to discharge their duty as such, will not lie against members of the Legislature, either individually or as a body. But investigation has satisfied us that the very distinguished gentleman and able and accomplished lawyer and statesman, is mistaken in supposing that the writ of *mandamus* is a remedy against *all* officers.

The Supreme Court of the United States has decided that a writ of *mandamus* will not lie against a Cabinet officer, as such—that "the acts of such an officer, as an officer, can never be examinable by the Courts."

In the same case the Court also say: "To render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific or legal remedy." *Marbury vs. Madison, 1 Cranch* 137.

It will hardly be denied, it is presumed, that a *member* of the Cabinet is an officer under the United States; yet here is a direct decision that a *mandamus* will not lie against him as such "*officer*." Here also is the language of the Supreme Court, Chief Justice Marshall delivering the opinion, implying that there are "officers" to whom writs of *mandamus* cannot, on legal principles, be directed. This, it is hoped, will be deemed a sufficient reply to the last two arguments, which we have thought proper to answer in these columns.

Having concluded our argument, as well as the answer to the arguments of our opponents, it remains for us to say a few words in reference to the jurisdiction of the two Houses over the question and the effect of the enforcement act upon it. Sections 14 and 15 of the act—relating to the enforcement of the 3d section of the XIV Amendment—are as follows:

SEC. 14. *And be it further enacted*, That whenever any person shall hold office, except as a member of Congress or of some State Legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States for the district in which such person shall hold office, as aforesaid, to proceed against such person, by writ of quo warranto, returnable to the circuit or district court of the United States in such district, and to prosecute the same to the removal of such person from office; and any writ of quo warranto so brought, as aforesaid, shall take precedence of all other cases on the docket of the court to which it is made returnable, and shall not be continued unless for cause proved to the satisfaction of the court.

SEC. 15. *And be it further enacted*, That any person who shall hereafter knowingly accept or hold any office under the United States, or any State, to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States and, upon conviction thereof before the circuit or district court of the United States, shall be imprisoned not more than one year, or fined not exceeding one thousand dollars, or both, at the discretion of the court.

It will be seen at a glance that in the opening language of the 14th section, Congress, in express terms, declares members of the State Legislatures, as well as of Congress, to be, not only officers, but officers within the prohibition of the 3d section of the XIV Amendment. It is here as plainly settled as it can be by Congressional construction and action that the proscribed classes cannot be members of the Legislature. It is true that they are excepted from the operations of the writ of *Quo Warranto*, but it is because, upon legal principles, the writ of *Quo Warranto* will not lie against members of a parliamentary body. The whole power of removing members of such bodies from office is, in this country *expressly* given, by our several constitutions, to the Houses of which they are members. In England the power is with the House of Commons under the operation of the principles of the Common, or what is known as Parliamentary, Law.

The language of the 15th section, quoted above, is as plain and unmistakable in its meaning as that of the 14th. Every man who attempts to hold or exercise the functions of *any* office in violation of the provisions of section 3d of the XIV Amendment is to be promptly indicted by the Federal Courts, and, on conviction, be fined $1,000, or imprisoned one year, or both, at the discretion of the Court. The language of the law is so clear that no one can possibly mistake it. The only point that can be raised upon it is the law constitutional? We believe, as we said in our first article on this subject, that they will recognize and follow the decision of the political power on the question that will be involved, should the matter be brought before the Federal Courts in any way. That question is the one now under consideration—are members of the several State Legislatures officers under the State within the purview of the XIV Amendment? Such course on the part of the Courts would be justified by the history of the past. In saying that the Courts would be apt to find reasons and authorities that would justify them in sustaining the other two departments of the Government in matters of this kind, we did not mean to intimate, as our correspondent seems to suppose, that they were nervous, or that they might possibly shrink from the proper performance of their duty. We meant nothing of the kind.—Upon the principles that have *always* governed our Courts in such cases it would be their duty to sustain the other two departments, if possible for them to so honestly.

But, it may be said, the two Houses are the judges of the election and qualification of their members, and have jurisdiction over the whole matter after all. This is true, so far as the rights and powers of the Houses under the State Constitution are concerned. It is also admitted that their decisions cannot be reviewed in any Court, so as to compel the Houses to change that decision. But the question, before the Federal Courts, upon an indictment of a member of the Legislature, for holding office in violation of the provisions of the XIV Amendment, is one that arises under the Constitution and laws of the United States. Consequently the decision of the Houses will not be authority with said Courts. They will proceed to try the indicted member as if totally ignorant of the fact that the House, of which he claims to be a member, had ever acted in the matter at all.—After having been tried, convicted and fined $1,000 the member may again resume his seat in the House to which he has been elected, if there be no objections by that House. But, in doing so, he immediately renders himself liable to second indictment, and he will hardly escape both fine *and* imprisonment next time. This argument, it will be seen, is based upon the supposition that the Houses will admit the members supposed to be banned to their seats. Can any one have an assurance that either House will admit them? Certainly not, especially, if there should happen to be a Republican majority in them, as there *possibly* may be in one or both.

This discussion is now closed, so far as we are concerned. We, however, again make a cordial tender of our columns to our correspondent, and the other distinguished lawyers who are known to differ with us, for the purpose of reviewing this argument, should they think proper to do so within the compass of a newspaper article.

Owing to absence and other causes, we have had but a very short time in which to prepare this article. We have, therefore, been compelled to give it to the compositor in a very crude and imperfect state. Still, for reasons the force of the argument, and we hope it will carry more the less weight with it because it is not arranged in perfect system and expressed in the most elegant English.

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THE TWENTY-FIRST Annual Meeting of the Stockholders of the North Carolina Rail Road Company will be held in Hillsboro', N. C., on 24 Thursday (4th) in July 1870.

Stockholders who cannot attend will please be represented by proxy. E. A. STAGG,
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HAVING OBTAINED AN ORDER from the Superior Court of Davie County at Spring Term 1870, I will offer for sale at Fulton, on the 13th day of August next, all the lands belonging to the estate of A. M. Hanes, dec'd, viz:

One hundred and [illegible] lying on the Yadkin River, adjoining Fulton, on which there is a good Tan Yard, Two Good Dwelling Houses, a splendid Double Barn and other out houses. This tract will be divided to suit purchasers. One Tract of 310 acres, lying on Dutchman Creek, subject to widows dower. ALSO, One interest or sixteenth part of the Fulton Ferry landing and boat.

Parties wishing to purchase can call on the Administrator at Fulton, and view the premises.

Terms will be made known on the day of Sale.

This June 16, 1870. S. J. HANES,
25:7t Administrator.

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