Besides, the state of Georgia (notwithstanding the judgment of the circuit court) may bring an action of *indebitatus assumpsit* against Brailsford (who is a man of fortune), after they have received the money, upon the principle of *Moses* v. *Macferlan* (2 Burr. 1005), and with stronger reason; as, in that case, the parties, in both courts, were the same; but in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, Georgia may obtain complete redress at law.

I do not, upon the whole, consider the refusal of Spalding to bring a writ of error (which he is not compellable to bring), nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and consequently, I think, that an injunction ought not to be awarded.

JAY, Chief Justice.—My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond—whether it belongs to Brailsford, or to Georgia? It is put in suit by Brailsford; but if Georgia, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of Brailsford, and though Brailsford has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the *hands of the marshal until the right to it is fairly decided? and so avoid the risk [*409 of putting the true owner to a suit, for the purpose of recovering it back? For my part, I think, that the money should remain in the custody of the law, until the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue.

An injunction granted.(*a*)

HAYBURN'S CASE.

Constitutional law.

It is not in the power of congress, to assign to the judiciary any but judicial duties.

THIS was a motion for a *mandamus*, to be directed to the circuit court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner. The principal case arose upon the act of congress passed the 23d of March 1792. (1 U. S. Stat. 243.)

The Attorney-General (*Randolph*), who made the motion for the *mandamus*, having premised that it was done *ex officio*, without an application from any particular person, but with a view to procure the execution of an act of congress, particularly interesting to a meritorious and unfortunate class of citizens, THE COURT declared, that they entertained great doubt upon

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(*a*) See the same case, *post*, p. 415, and 3 Dall. 1, as well as on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.

his right, under such circumstances, and in a case of this kind, to proceed *ex officio;* and directed him to state the principles on which he attempted to support the right. The Attorney-General, accordingly, entered into an elaborate description of the powers and duties of his office :—

But THE COURT being divided in opinion on that question, the motion, made *ex officio*, was not allowed.

The Attorney-General then changed the ground of his interposition, declaring it to be at the instance, and on behalf of Hayburn, a party interested ; and he entered into the merits of the case, upon the act of congress, and the refusal of the judges to carry it into effect.

THE COURT observed, that they would hold the motion under advisement, until the next term ; but no decision was ever pronounced, as the legislature, *410] at an intermediate *session, provided, in another way, for the relief of the pensioners.(*a*)

(*a*) See an act passed the 28th February 1793 (1 U. S. Stat. 324).—As the reasons assigned by the judges, for declining to execute the first act of Congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

The circuit court for the district of New York (consisting of JAY, Chief Justice, CUSHING, Justice, and DUANE, District Judge) proceeded, on the 5th of April 1791, to take into consideration the act of congress entitled, "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions;" and were, thereupon, unanimously, of opinion and agreed,

"That by the constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the considertion and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office. That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national legislature, they will execute this act in the capacity of commissioners.

"That as the legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed. That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed, as commissioners, to execute the business of this act in the same court room, or chamber."

Hayburn's Case.

*The circuit court for the district of Pennsylvania (consisting of WILSON and BLAIR, Justices, and PETERS, District Judge) made the following representation, in a letter jointly addressed to the president of the United States, on the 18th of April 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.' Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the Union.

"The people of the United States have vested in congress all *legislative* powers granted in the constitution. They have vested in one supreme court, and in such inferior courts as the congress shall establish, 'the *judicial* power of the United States.' It is worthy of remark, that in congress the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the constitution.' This constitution is 'the supreme law of the land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'

"It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard. They have placed their *judicial* power, not in congress, but in '*courts*.' They have ordained that the 'judges of those courts shall hold their offices during good behavior,' and that 'during their continuance in office, their salaries shall not be diminished.'

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.' Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court held for the Pennsylvania district could not proceed

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded *without* constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.

*"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary [*412 either to the obvious directions of congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, we hope never to experience again."

The circuit court for the district of North Carolina (consisting of IREDELL, Justice, and SITGREAVES, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 8th of June 1792.

"We, the judges now attending at the circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of congress lately passed, entitled, 'An act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the legislature, and that we never can find ourselves in a more painful situation, than to be obliged to object to the execution of any, more especially, to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the

best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit, beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following:—

"1. That the legislative, executive and judicial departments are each formed in a separate and independent manner; and that the ultimate basis of each is the constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"3. That, at the same time, such courts cannot be warranted, as we conceive, by virtue of that part of the constitution delegating *judicial* power, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another act) *any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the constitution requires.

*413]

"4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet, inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary at war, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution; for though congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of secretary at war is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"These, Sir, are our reasons for being of opinion, as we are at present, that this circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether, in our opinion, such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as congress shall direct.

"The high respect we entertain for the legislature, our feelings, as men, for persons whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally, in the character of commissioners, during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the peformance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the judges of it; and as the secretary at war has not a discretion, in all instances, but only in those where he has cause to suspect imposition or mistake, to withhold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude our-

*Rule.

The Attorney-General having moved for information, relative to the system of practice by which the attorneys and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, the Chief Justice, at a subsequent day stated, that—

The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

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*FEBRUARY TERM, 1793. [*415

Oswald, administrator, *v.* State of New York.

Practice.

Proclamation was made in this cause, "that any person having authority to appear for the State of New York is required to appear accordingly;" and no person appearing it was ordered, on motion of *Coxe*, for the plaintiff—

By the Court.—Unless the state appears by the first day of next term to the above suit, or show cause to the contrary, judgment will be entered by default against the state.(*a*)

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selves from a very deliberate consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore, we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being, in general, extremely cautious in not intimating an opinion, in any case, extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a preconceived opinion, even unguardedly, much more, deliberately, given: but in the present instance, as many unfortunate and meritorious individuals, whom congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one, we determined, at all events, to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving, however, that so far as we are concerned, individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being so far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be, from so low a sense of duty, as we think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous."[1]

(*a*) See *ante*, p. 401; and also Chisholm, executor, *v.* Georgia, *post*, p. 419; Cutting, administrator, *v.* South Carolina, and Grayson *v.* Virginia, 3 Dall. 320.

[1] See United States v. Todd, in which the supreme court decided, on the 17th February 1794, that the judges could not act as commissioners, under the statute in question. 13 How. 52, note.