question submitted to the court and decided by them was one of construction, and not of validity. They were called upon to decide what was the true construction of the act of 1829, and what was the meaning of the phrase "additional damages," as there used, and not to declare the act of 1824 unconstitutional. If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the constitution of the United States, but *whether the Supreme Court of Ohio has erred in its construction of them. It is the peculiar province and [*343 privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.

We are of opinion, therefore, that this case must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

JOHN SCOTT AND CARL BOLAND, PLAINTIFFS IN ERROR, *v.* JOHN JONES, LESSEE OF THE DETROIT YOUNG MEN'S SOCIETY, DEFENDANTS IN ERROR.

An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of Congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the Judiciary Act, and therefore this court has no jurisdiction over the subject.[1]

In order to give this court jurisdiction, the statute the validity of which is drawn in question must be passed by a State, a member of the Union, and a public body owing obedience and conformity to its constitution and laws.

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[1] *S. P. Permoli* v. *New Orleans*, 3 How., 589.

If public bodies, not duly organized or admitted into the Union, undertake, as States, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies are situated and acting.

But their measures are not examinable by this court on a writ of error. They are not a State, and cannot pass statutes within the meaning of the Judiciary Act.[2]

THIS case was brought up by a writ of error, issued under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the State of Michigan.

It was an ejectment brought in the Circuit Court for the county of Wayne, State of Michigan (State court), by the Detroit Young Men's Society against the plaintiffs in error, to recover lot No. 56, in section one, in the city of Detroit.

On the trial of the cause, in December, 1841, the plaintiffs below offered in evidence,—

*344] *1. An act of incorporation by the legislature of the State of Michigan, passed on the 26th of March, 1836, entitled "An act to incorporate the members of the Detroit Young Men's Society." To the admission of this act in evidence the defendants objected, but the court overruled the objection, and allowed it to be read to the jury; whereupon the defendants excepted.

2. A deed, bearing date on the 1st of July, 1836, executed by Solomon Sibley, judge, George Morell, and Ross Wilkins, judge, purporting to convey lot No. 56 to the Detroit Young Men's Society, the plaintiffs having first proved, by the witnesses to the deed, that, on or before that day, the said Sibley, Morell, and Wilkins were reputed to be, and acted as, judges of the Territory of Michigan, appointed by the authority of the United States.

The act of Congress under which they acted was that of 21st April, 1806, ch. 43 (2 Stat. at L., 398).

To the admission of this deed as evidence, the defendants objected, upon five grounds. But the court overruled the objections, and allowed the instrument to be read to the jury; whereupon the defendants excepted.

The defendants then offered in evidence the following:—

1. A deed from the treasurer of the county of Wayne to John Scott, dated 10th October, 1833, conveying the title for taxes; which deed the court refused to permit to be read in evidence, unless it were first shown that the title had passed out of the United States, and that the same had been regu-

[2] APPLIED. *Miners' Bank* v. *Iowa*, 12 How., 7; *Messenger* v. *Mason*, 10 Wall., 510. And see *Hay* v. *Washington &c. R. R. Co.*, 4 Hughes, 343.

larly assessed and returned; to which refusal of the court the defendants excepted.

2. A resolution of the governor and judges of the Territory of Michigan, dated on the 8th of September, 1806, that the basis of the town should be an equilateral triangle, having every angle bisected by a perpendicular line on the opposite side, and then proved, by a mathematical calculation, that lot No. 56 was the same as that which was known as lot No. 52 prior to 27th April, 1807; and then offered a resolution of the governor and judges, dated on 13th March, 1807, conveying said lot No. 52 to Elijah Brush.

To all which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants then offered a witness, to prove that he had applied to the governor and judges for information as to what lots were taxable, and that they had informed him that the lot in question was taxable in 1828; to the admission of which evidence the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

The defendants further offered parol evidence relative to the conduct and declarations of the governor and judges, to which the plaintiff objected, and the court sustained the objection; whereupon the defendants excepted.

And on the trial of said issue, it further appeared in evidence, *from the records of the Secretary of State, that a legislature of the State of Michigan, duly elected [*345
and returned, was organized and duly qualified, under the constitution of said State, on the third day of November, A. D., 1835, and that Stevens T. Mason, having been duly elected and returned, was on the same day duly qualified, and took upon himself the execution of the office of governor under the constitution of the said State of Michigan; that the aforesaid act, entitled "An act to incorporate the members of the Detroit Young Men's Society," was approved by the said Stevens T. Mason on the 26th of March, in the year 1836, and who was at that time governor, acting under the constitution of the State of Michigan; that John S. Horner was Secretary of the late Territory of Michigan, and in the month of July, 1835, acted as governor of said Territory; that he was the last person who exercised the functions of territorial governor of the Territory of Michigan; that the last official act of said Horner, as governor of the Territory of Michigan, in the office of the Secretary of State, is a proclamation, dated in the month of July, in the year 1835, but by reputation it appeared, that the said Horner purported to act as territorial governor of Michigan until some time in the

year 1836. It further appeared, by the records produced by the late clerk of the late Supreme Court of the Territory of Michigan, that a session of said court purported to have been holden by George Morell and Ross Wilkins, as territorial judges, in the month of June, 1836, and adjourned the 30th of said month. And it further appeared, on the trial of said issue, that Solomon Sibley, George Morell, and Ross Wilkins purported to act as judges of the Territory of Michigan on the 1st of July, in the year 1836. And on the trial of said issue the defendants offered a witness, who was present at the time, to prove to the jury that Solomon Sibley and Ross Wilkins, acting as judges of the Territory of Michigan, held a session of the Supreme Court of said Territory on the first Monday of January, in the year 1837, and of which the clerk of said Supreme Court made no record; to the admission of which the plaintiff, by his attorney, objected, and the court sustained the objection, and rejected said evidence, and the defendants, by their attorney, duly excepted thereto.

And the testimony on both sides being closed and commented upon, and the said court being about to charge the said jury, and to commit to them the said cause, the said defendants, by their attorney, moved the said court, and requested them to charge the said jury, in the words or effect following, to wit:

First. That the act herein before mentioned, entitled, "An act to incorporate the members of the Detroit Young Men's Society," was not of force, or in any wise sufficient in the law to create and constitute of the lessors of the plaintiff a corporation or body politic, in the law, capable to take or hold said lot or premises, nor the title thereof, nor to exercise any
*346] corporate rights or powers in virtue *or under color of said act, unless the jury should find that the State government of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation.

Second. That from and after the establishment and coming into force and operation of said State government, and of the legislature thereof, the territorial government established by the United States, and previously in full force in and over the Territory of Michigan, ceased, and in law and in fact became abrogated, superseded, and annulled.

Third. That from and after the coming into effect and operation of said State government, the powers, duties, and office of judges of said territory ceased, and became in like manner abrogated and abolished, and by consequence the said Solomon Sibley, George Morell, and Ross Wilkins, as

said supposed judges of said Territory, were no longer, after the said establishment and coming into operation of said government, competent in the law, as such judges of the Territory of Michigan, by said supposed deed by them executed, to convey any right or title in, to, or of said lot No. 56, or the premises in question, to the said lessors of the plaintiff, nor to perform any other of the functions, nor exercise the powers, previously conferred by any act or acts of Congress upon the territorial judges of said Territory of Michigan.

Fourth. But if the said jury should find that the said Solomon Sibley, George Morell, and Ross Wilkins were, on the said first day of July, in the year 1836, severally in the legal exercise of the office of judge of said Territory of Michigan, duly appointed by the United States, and holding office under such appointment, and that they severally signed and sealed said paper, writing, or deed, in the execution of their said offices, according to the act of Congress entitled, "An act to provide for the adjustment of titles to land in the town of Detroit and Territory of Michigan, and for other purposes," approved April 21st, A. D., 1806, then that by consequence it followed and resulted that the said act, entitled, "An act to incorporate the members of the Detroit Young Men's Society," was without authority, and in contemplation of law did not create nor constitute the lessors of the plaintiff on the 26th day of March, A. D., 1836, nor on any other day, a corporation or body politic, and corporation competent to purchase, acquire, or hold the lot in question, or any real estate whatever.

Fifth. That a territorial and State government cannot coexist in any of their respective departments; that if the lessors of the plaintiff were well incorporated, and competent, in virtue of said act of incorporation of the legislature of the State of Michigan, to take and hold the lot or premises in question, then the territorial government of the Territory of Michigan was, at the date of said paper, writing, or deed, under which the lessors of the plaintiff claim title, *abrogated and at an end, and the governor and [*347 judges of said Territory had no legal existence, and said deed is therefore void, and can convey no title in any event; therefore the plaintiff cannot recover.

Sixth. That the paper, writing, or deed under which the lessors of the plaintiff make title to the lot, or premises in question, being a deed of bargain and sale, and not a donation, is void, and can in no manner be the foundation of any title, not being executed by the governor of the Territory of Michigan, as required by the act of Congress, in virtue of

which it purports to have been made and executed; and therefore the plaintiff cannot recover. All which charges the court refused to give to the said jury, and to which refusal the defendants, by their attorney, then duly excepted; and, on the contrary, the court charged the jury that the lessors of the plaintiff were well incorporated by the legislature of the State of Michigan, and by a body competent so to do, and that the aforesaid deed, under which the lessor of the plaintiff makes title, was well executed in the law, and by those competent in the law to convey title to the lot or premises in question; and that, on the 1st day of July, 1836, there was a governor and judges of the Territory of Michigan, competent to convey title to the premises in question, under the act of Congress referred to in said paper, writing, or deed; and that, under said act of Congress, the said paper, writing, or deed was well and sufficiently executed without being executed by the governor of the Territory of Michigan, or being acknowledged or proved, as required by the law of the time when the same was made, in relation to all the conveyances affecting real estate; to which charge of the court the defendants excepted.

The Supreme Court of Michigan, in March, 1843, affirmed the judgment of the court below (1 Doug. (Mich.), 119), and the cause was brought before this court by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

It was argued by *Mr. Woodbridge*, for the plaintiffs in error, and by *Mr. Howard* and *Mr. Hand* (in a printed argument), for the defendants in error.

Mr. Woodbridge, for the plaintiffs in error, enumerated the following causes of error in the decisions of the court below, viz.:—

That the evidence tendered and offered to be introduced at the trial of said cause by the said plaintiffs in error, in support of the right and title specially set up and claimed by them, under the act of Congress in said record mentioned, as by the said record appears, was rejected, and not permitted to be read and heard on the trial of said cause; whereas, by the law of the land and a just construction of said act of Congress, the same, or some of it, ought to have been admitted and received in evidence on said trial.

*348] *That the matters and things which the said plaintiffs in error moved and prayed the court to give in charge to the jury, as the same in said record are stated and set forth, were not so given in charge to said jury; whereas

the same, or some part thereof, ought to have been so by the court given in charge, and the jurors who tried the said cause so therein instructed.

That the matters and things given in charge to the said jurors at the trial of said cause, and as the same in said record appear, ought not, according to the law of the land, to have been so given in charge, nor the said jurors to have been so instructed.

That, on the face of the record and proceedings aforesaid, it appears that the certain legislative act in said record mentioned, the validity whereof was drawn in question in said cause on the ground of its repugnancy to the constitution and laws of the United States, was decided and pronounced to be valid; whereas, by the laws of the land, the decision in the premises ought to have been against the validity thereof.

This is an action of ejectment brought by defendants in error, in the Circuit Court for the circuit of Wayne county, in the State of Michigan, against the plaintiffs in error, for a lot of ground in the city of Detroit. Exceptions being taken during the trial to sundry decisions of the court, the cause was removed on error to the Supreme Court, the highest judicial tribunal of the State. The several points made were there decided against the plaintiffs in error, and the judgment below (in favor of defendants in error) affirmed. That judgment of affirmance and the whole record is brought by error to this court.

The first testimony sought to be introduced by defendants in error (plaintiffs below) was a private act, appearing to have been passed by the legislature of the State of Michigan, on the 26th day of March, 1836. It purports to incorporate the defendants in error by the name of "The Detroit Young Men's Society"; to vest them with the capacity to acquire and hold real estate, to sue and be sued, &c. The introduction of this private act was resisted, on the ground that this pseudo legislature had no legal existence at the time of passing the act. That at that period, and both before and after, the territorial government established by the United States was in full and legal force throughout the District of Michigan, and that Michigan did not become a "State" until the 27th of January, 1837, some ten months after the date of the act objected to; and consequently that the act was repugnant to the sovereignty, constitution, and laws of the United States, and, as such, of no force and null.

The act was permitted to be introduced and read, and was decided by the State courts to be a good and valid act to in-

corporate the defendants. To that decision due exception was taken.

Having thus, by the decision of the court, established their
*349] title *to sue, the defendants in error next offered in evidence the paper purporting to be a deed from the territorial judges, appointed by the President and Senate of the United States, which is set out in the record. Its admission was objected to, on the ground, that, upon a just construction of the act of Congress of April 21, 1806 (which constitutes the territorial governor and judges *ex officio* commissioners or trustees, with power, in the manner and for the purposes it indicates, to convey the title of the United States to those lots, and also to ten thousand acres of land adjacent to the city of Detroit), the joint concurrence of the governor of the Territory in the execution of the deed was indispensable.

Its admission was also objected to, on the ground that the lot in question was not a part of the ten thousand acres mentioned in the act of Congress, which alone the trustees were authorized to sell for money; but a lot within the limits of the town, with respect to which the trustees could dispose of it only by a deed of confirmation to a previous proprietor, or by way of donation to some citizen of the United States who had been resident in the old town at the time of the fire, and who had suffered by the conflagration. There could be no pretence that defendants in error came within that description of persons.

It was objected, also, that the instrument sought to be introduced as a deed was not executed nor authenticated according to the provisions of the ordinance of 1787, nor according to the general law of the Territory. But more especially it was objected, that it appears upon the face of it to have been executed by the United States judges of the Territory on the first day of July, 1836, many months after the State government was, by the same State judges, decided to have come into full operation; and some four months after the defendants in error had caused themselves to be incorporated by a body which assumed to be the legislature of a sovereign State. Assuming that the court would adhere to its own decision, and that, according to that decision, the State government had become fully and constitutionally established on a day prior to the incorporation of defendants in error, it was insisted that the territorial government must *eo instanti* have become abrogated; that the two governments could not exist together; that if the State government had become established, the office of territorial judge, as a

consequence, must have ceased; that whensoever their office ceased, their power as *ex officio* commissioners or trustees ceased also with it; and that consequently their deed was void, as being no longer authorized by the law. These objections were all overruled. The document was received in evidence as a valid instrument to convey the land, and the decisions of the court severally excepted to.

The defendants in error having here rested their case, the plaintiffs in errror, whose peaceable possession of the premises had been *sufficiently established, then undertook to prove that the same lot had been confirmed and conveyed by the governor and judges of the Territory, in 1807, to "Tod & McGill," inhabitants, merchants, and proprietors of lots in the old town of Detroit before its destruction by fire. That, having thus become the property of individual proprietors, it became subject to be assessed and taxed, and, the tax remaining unpaid, to be sold for the payment of it. That it was so taxed, and according to the law of the land offered at public auction; and that plaintiffs in error became the purchasers, and received a deed for it executed by the officer to that end appointed by the law. [*350

In order to establish the important fact, that the title of the lot has passed out of the United States, plaintiffs in error offered and moved to introduce the journals and records of the governor and judges as a board of commissioners or trustees (under the act of 21st April, 1806). Which journals and records purported to show that the "claims of Tod & McGill" had been duly "adjusted," and the lot in question (with others) confirmed to them as proprietors of lots in "the old town." And, also, plaintiffs moved and tendered to introduce proof of the declarations of the board (the governor and judges), formally and officially made in 1828, in answer to the official application of the assessor of taxes for that year (made with the view of obtaining that information which was necessary to enable him to perform his duty as assessor); that the lot in question had been conveyed by them, had become individual property, and was therefore liable to taxation. Plaintiffs in error also moved and tendered to introduce the deed from the officer appointed by the law to conduct the sales of lands for unpaid taxes; the territorial law providing that the deed itself should be evidence of the regularity of the assessment and sale (Laws of Michigan, 1827, p. 378). All the above-mentioned evidence, as from time to time during the trial it was offered, was objected to by the defendants in error, overruled by the court, and those several decisions excepted to. Plaintiffs in error

then moved the court to instruct the jury on the law as is set out in the record, which motion was in like manner overruled; and the court then proceeded to instruct the jury to the effect stated in the record, to which decisions and charge plaintiffs in error excepted; and upon these exceptions, and in this aspect, the case comes before this court for revision and judgment.

Before commenting more specifically upon the points made in this case, it may be proper to advert briefly to the history and general character of the land-titles at Detroit, as they existed prior to the passing of the act of 1806.

It was about the year 1720, that the French constructed a permanent fortification at Detroit. It was made to constitute one of a line of military posts extending from Quebec, through the country of the lakes, to New Orleans. The population had already *become considerable, but no grants of land had yet been issued there. After it became a garrison town, other considerations prevented the issue of such grants. The general policy of the government was to retain the proprietary title to lands in the immediate vicinity of their forts. It was customary, however, for the commanding officers of the garrison to grant possessory rights to occupants of houses and lots; subject always, in any pressing exigency, to be revoked. These permits ultimately came to be considered as substitutes, practically as equivalents, for actual grants. They were bought and sold, and passed by descent. And the instances were rare, if any such ever occurred, in which the occupants were disturbed in their possessions.

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Such was the tenure by which lots, houses, and stores were holden in Detroit, when the sovereignty of the country passed successively from the French to the British government, and from that to the United States; and it continued unchanged until the act of April, 1806; upon which act both the parties rest their respective claims of title.

From the time General Wayne (in 1796) received possession of the military post at Detroit, Michigan became a component part of the old Northwest Territory. When that Territory was divided in 1800, it was made to constitute a part of the western division, or Indiana Territory (2 Stat. at L., 58). And in January, 1805, it was erected into a separate Territory, and its seat of government established at Detroit (2 Stat. at L., 309). A few days before the new government provided by Congress for the Territory was to go into operation, the town was totally destroyed by fire. This event, together with the peculiar and unsettled condition of

its land-titles, led to the enactment of the act alluded to, of April 21, 1806, ch. 43 (2 Stat. at L., 398).

Reversing the order in which the decisions objected to were made in the State court, it is proposed, first, to consider the titles of the plaintiffs in error to the lot in question, and the correctness of the decision by which our proof was excluded. 2d. The validity of the deed read in evidence by defendants in error, in support of their claim of title, and the correctness of the decision by which it was admitted as evidence. And, 3d. The validity of that legislative act, in virtue of which the defendants in error claim to have been incorporated, rendered competent to sue, and to acquire and hold real estate in their corporate capacity.

The character of the title of plaintiffs in error has already been alluded to. It is "set up" under the act of Congress of 1806 (2 Stat. at L., 398). The decision of the State court, in effect, is against it.

Having shown the identity of the lot, the plaintiffs in error tendered in evidence their deed for the premises, executed by the officer appointed by the law, and in respect to which the territorial *statute provides, that the deed itself shall [*352 not only be evidence of the sale, but of the regularity of the proceedings which terminated in that sale (Terr. L. of 1827, p. 378). This testimony was rejected until plaintiffs in error should first have shown, by competent evidence, that the title had passed out of the United States. Plaintiffs in error then offered in evidence the journals and records of the board (the governor and judges), for the purpose of proving the confirmation and conveyance of the premises to "Tod & McGill," according to the provisions of the first section of the act of the 21st April, 1806.

They further tendered to prove, by the oral testimony of the assessor by whom the tax (in 1828) was assessed, for the non-payment of which the lot was sold, that, in his character of assessor, he had applied himself to the governor and judges for a designation of the lots they had conveyed, for the purpose of enabling him to execute his sworn duties; that the board, without qualification, declared to him that the lot in question, among others, had been by them so conveyed, and that the lot was accordingly assessed for taxation.

The whole of this testimony, being objected to by the defendants in error, was rejected and excluded by the court. The State court probably considered that the deed to "Tod & McGill" was of a higher grade of testimony; and, it is presumed, rested their decision upon that cardinal maxim,

that "the best evidence must be given of which the nature of the thing is capable."

But it is the reason of the rule which constitutes the rule. And I have seen that reason nowhere better stated than by this court, in the case of *Tayloe* v. *Riggs*, 1 Pet., 596. After stating the rule as above, the court proceeds to say,—"That is, no evidence shall be received which presupposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents." 1 Pet., 596.

In England all title-deeds, upon alienation, pass into the hands of the purchaser. This is the long established, and, it is believed, the universal custom, especially in the non-registering counties. Upon descent they go also to the heir, who may coerce their delivery if withholden. The law presumes, therefore, in England, that all title-deeds are in the hands of the proprietor; and if a question occur as to their contents, he, being a party, must produce them, unless he show that they are no longer in his possession or power. In such a case the rule is legitimately applied. But it will be perceived that the reason of that rule does not apply to this case. There may be something like privity of estate, but there is no privity of contract, between plaintiffs in error and "Tod & McGill." *Their* estate may be *our* estate, but it passed
*353] from them, **in invitum*, by mere operation of law; and the law cannot presume that those gentlemen should voluntarily have given to us their title-deeds. The deed, then, not being presumed to be in our possession nor power, we will be permitted by the rules, as well as by the philosophy of the law, to produce secondary evidence of the fact, which the deeds would verify. Thus, in a suit by a widow, for her dower, it was holden by Kent that she need not produce the title-deeds, for the law presumes it not to be in her power. *Bancroft* v. *White*, 1 Cai. (N. Y.), 190. Nor in such a case is it necessary for her to coerce their production. 5 Cow. (N. Y.), 299; Adams, Eject., 68, *n.*

But it is not admitted that the journals and records of the governor and judges, in reference to the public trust confided to them by the act of 1806, ch. 43, can be justly deemed as secondary evidence of their public acts. On the contrary, it is respectfully insisted, that they should be deemed primary, and of the highest grade of evidence as to those acts.

Thus, the original book of acts of a surrogate, containing

an order or "fiat" for administration to be granted, is evidence of the issue of letters of administration. 8 East, 188; 13 Id., 234–237. So in a note (Day's edition), 238.

Books of the steward, containing brief minutes of a surrender and admittance (of copyhold estate) are evidence to prove transfer, without producing original conveyance, &c. 16 East, 208.

But a far more authoritative exposition of the law on this point is to be found in 5 Wheat., 424; 4 Cond., 714. The Bardstown trustees were appointed to lay out a town, dispose of lots, &c. The journals of their proceedings were offered in evidence. The court says,—"The trustees were established by the legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved." So in 4 Pet., 342; 16 Id., 55, 56. This doctrine seems abundantly sustained by other authorities. 3 Dane, Abr., 510; Swift, Ev., 23; Esp., 423; Bull. N. P., 249; 4 Burr., 2057.

And even as between individuals, where there is no public trust, nor official oath, proof of an agreement to convey, united with long possession, will authorize a jury to presume a conveyance. 7 Johns., 5.

And in this connection it may be proper to remark, that all that it was incumbent upon plaintiffs in error to establish was the abstract fact, that the title to the lot had passed out of the United States; it is immaterial to whom; and no question could be made as to the terms of the deed. By passing out of the United States it became private property, and as such subject to tax, and to sale if the tax was not paid.

Our whole testimony was excluded by the State court; and that decision, we insist, is equivalent to a decision against the title we set *up under the act of Congress; for it admits the truth not only of what *primâ facie* appears [*354 on the proofs like a demurrer to evidence, but also of all that the jury might justly infer from them. Consequently it is insisted, that the question upon this point is brought clearly within the scope of the 25th section of the Judiciary Act, and therefore within the jurisdiction of this court upon error.

2d point. The defendants in error were plaintiffs in ejectment in the State court. Did they, by legal evidence, show their right to possession? It is insisted that they did not; that the deed introduced by them was not sanctioned by the act of Congress, under color of which it was obtained; that the act of Congress was misconstrued, and the deed itself a nullity; and that any gross misconstruction of the land laws of the United States it is competent for this court upon error

to correct. It has been deemed very necessary that a uniform construction should be put upon the revenue laws. It can hardly be deemed less important, that the same uniformity should prevail in regard to your system of land laws. Nothing, perhaps, more nearly affects the peace, happiness, and prosperity of any country, than that its land-titles should be placed upon a footing of permanency, certainty, and simplicity. There is a strong moral obligation resting upon Congress, and upon those who administer the land laws, that they should cause to be preserved the permanency and the certainty of a system which forms the basis of the titles of the millions of people whose rights to their own domiciles rest upon the action of this government. Besides, the public domain, too, constitutes one of the sources of the revenue of the nation, and its uniform construction should not be less rigorously enforced. I have not been able to discover that the decision in *Mathews* v. *Zane* (4 Cranch, 382) has been overruled or shaken. In that case the court say,—"'Tis supposed that its object (i. e. of the Judiciary Act) is to give a uniform construction to all the acts of Congress," &c.

What is said in *Buel* v. *Van Ness* (8 Wheat., 319) strongly corroborates the doctrine advanced in *Mathews* v. *Zane;* and the principle which forms the basis of the decision in *Durousseau* v. *The United States*, seems fully to justify and amply to establish it. 6 Cranch, 318.

In *Willcox* v. *Jackson* (13 Pet., 516, 517, &c., *Beaubien's case*), the defendant in error, being plaintiff in the State court, had set up a title under the acts of Congress, and the decision was in favor of that title; the law of the court authorizing the admission as *primâ facie* evidence of the final certificate of purchase. The court says, that this rule of evidence, rightly construed, is not repugnant to the laws of the United States; but that the decision of the State court was founded in a manifest misconstruction of the land laws. This court then sustained its jurisdiction upon error; and, although the defendant set up no title in himself, proceeded to *correct the misconstruction of the State court, and reversed its judgment. If this case do not, in direct terms, reaffirm the doctrine of *Mathews* v. *Zane*, it at least strongly illustrates its correctness and wisdom. But in the case before the court, both parties claim title under the same act; the decision must necessarily be in favor of the one, and against the other; and, as in the analogous cases of *Ross* v. *Barland*, 1 Pet., 655, 662, and of *Pollard's Heirs* v. *Kibbe*, 14 Id., 353, the plaintiff in error, against whose title the State court decided, having brought the case here, the whole case may

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properly become the subject of cognizance; the more especially as it seems to be the law of this court, "that a plaintiff in ejectment must show the right of possession to be in himself positively, and it is immaterial as to his right of recovery whether it be out of the tenant or not, if it be not in himself." 9 Wheat., 524. Assuming, then, that "a case consists of rights and claims of both parties," and that the whole case is here, it is proposed next to show that the instrument in writing, purporting to be a deed, and given in evidence against our objection, was not competent to be introduced as evidence of title.

First. Because it was not executed by the governor of the Territory.

Second. Because, on the face of it, it does not purport to convey the lot to any of the persons provided for in the first section of the act of 1806; nor to convey any of that land which the governor and judges were authorized by the second section of the act to sell and convey. As to the first point: whether any power or trust can be properly executed by a bare majority of those upon whom such power is conferred, is sometimes a complicated question not readily solved.

If the power relate to an individual and private act merely, all must concur in the act, unless the instrument conferring the power provide otherwise, as in the case of awards.

If the act to be done be a public act, and merely ministerial, a majority, as a general rule, may be competent to perform it.

If it be a public act, but yet one requiring the exercise of discretion, deliberation, and judgment, and not merely ministerial, all the trustees should be present, that they may respectively interchange their views, reasons, and opinions; and, all being present, though a majority may decide, yet all should join in the execution of the act.

I do not propose to consume time by commenting upon the principles and the authorities which illustrate these distinctions. Such is supposed to be their general spirit, where no variant course is prescribed by the law or instrument conferring the power. 4 Dane, 805, 806; 1 Bac. (Wilson's ed.), 319; 3 T. R., 40, 380; 8 East, 326–328; 2 Id., 244–247; 1 Bos. & P., 229, 241, *n*; 8 T. R., 454. The difference of construction put upon grants of *power in these different classes of cases can hardly be sought for in any difference of terms, because the same terms are construed differently, according to the character of the power. A literal interpretation of the words used would seem to require the universal concurrence of all the trustees. In cases of public [*356

trusts, considerations have reference to public convenience probably induced a relaxation of the more literally exact interpretation. But if, in particular cases, from any peculiarity in the terms used to confer the power, or from other considerations suggested by the nature and objects of the power, an intent may be inferred to require such unanimity, the courts would, no doubt, fall back upon the literal construction.

The act of 1806 exhibits, it is believed, a case for the application of these remarks, and prescribes on the face of it its own rule of construction.

The first section of that act points to three distinct objects. 1st. The laying out of the new town. 2d. The adjustment of the claims and possessory rights of resident proprietors, and the execution of deeds to them; and, 3d. The grant of donation lots to that class of resident citizens designated in the section. The proper execution of these powers implied the necessity of vigilance and patient examination, of discretion, and of judgment. But it held out no temptations to avarice, nor called into action any peculiarly elevated sense of moral integrity; and therefore the law says, that "the governor and the judges, or any three of them, may execute those trusts."

But the trust specified in the second section is of a very different character. That section authorizes those gentlemen to sell for money a very valuable property, and to apply the proceeds of those sales, in their discretion, to the purpose of constructing a court-house and jail for the county, in the place of those which had been destroyed by the fire; and all this without the probability of being called to any, or to a very strict, account. The proper exercise of such a trust implied the necessity of the firmest integrity,—of moral attributes so pure as to elevate them above all imputation of sordid or unworthy influences; it implied, too, the necessity of peculiar caution on the part of those conferring it. In the execution of it, the presence, the deliberation, the concurrence of all were important. It will be observed, accordingly, that this power is made the subject of a separate section, and of distinct provision. It will be observed, that the qualifying expression "or any three of them," twice and emphatically repeated, when providing for the trusts specified in the first section, is altogether and *ex industria* omitted in the second. And why is this, unless it be that Congress intended to vary the rule, and to adopt the more rigid, literal, and better-guarded construction? It is contended, then, that no act of sale—no deed of conveyance, unless it be for some purpose

provided for in the *first section—can be of any validity, unless concurred in and executed by all the members of the board. [*357

This view is strengthened by what has always been the practical construction, as is contended, put upon the statute before the period when the deed objected to was executed. Not an instance before can, it is believed, be found, where any deed, granted in execution of any of the powers defined in either section of the statute, ever before emanated without the signature of the governor or of the acting governor of the territory.

The governor and the judges were the heads, respectively, of two great departments of the territorial government. In the conferring upon those officers, jointly, the power of adopting laws for the territory, the ordinance of 1787 uses words of similar qualification. That high power is granted to the governor and judges, "or a majority of them." But it has always been deemed indispensable, that, in order to give validity to such laws, the governor must have concurred in their adoption; the qualification, "or a majority of them," having always been construed as having reference to the judges only,—the last antecedent. And in the grant of the powers specified in the first section of the act of 1806, ch. 43, it seems probable that Congress had reference to the devolution and the limitations of the powers conferred upon the same classes of officers, acting in the same territory, as defined in the ordinance of 1787.

But however this may be, it is respectfully insisted, that the deed objected to—being a deed of sale, and not a deed of confirmation nor of donation—is fatally defective, being without the signature of the governor.

But, secondly, the deed is objected to, because it does not purport to convey said lot to any of the persons provided for in the first section of the act of April 21, 1806, ch. 43; nor does it purport to sell and convey any of the land which the governor and judges were authorized to sell and convey by the second section of the act.

It is manifestly clear, that the defendants in error do not come within the description of either of the classes of persons mentioned and provided for in the first section of the act. The only power conferred by the second section is that of disposing of the lands comprised within the "10,000 acres adjacent to said town," by sale, and of applying the proceeds as in that section is provided. Now, the lot in dispute is not a part of the 10,000, but is in nearly the middle of the town (see map of the city of Detroit, in 5th vol. of State Papers,

p. 494), and constitutes, beyond a doubt, one of those lots which should have been confirmed to its ancient proprietor; and if not claimed by such proprietor, then it could only have been conveyed as a donation lot, in conformity with the act. And if it be said that these things do not sufficiently appear on the face of the deed, then it may be replied, that that very omission constitutes a defect in the deed, which should be esteemed fatal. The *authority conferred upon the *358] governor and judges was an authority not coupled with an interest. Such an authority must not only be strictly pursued, but it must appear on the very face of the transaction to have been strictly followed. Under the first section no deed is competent, except it be a deed of confirmation or of donation. Under the second section no deed is competent, except it be for a part or the whole of the 10,000 acres; such deed must be executed by the governor and by the judges. It must, in either case, purport to convey the right and title of the United States, and not the title of the governor and judges; or of the judges, as this does. If it be for a part of the 10,000 acres, it should state that fact. The deed is not for a defined tract, but for so much of said lot as had not been previously conveyed by their predecessors. It is not acknowledged; it is not authenticated according to the ordinance of 1787, nor according to the *lex temporis*. It bears evident marks of imperfection, haste, and crudity. "It lacks substance, and wants form," and ought not to have been read in evidence.

But, thirdly, it is most of all and signally defective, in that it purports to convey the lot to such as are not in the law competent to acquire, nor to hold real estate, and to such as have no title to sue.

That there must be a grantee, in order to constitute a grant, is a proposition not likely to be contested here. "That a patent thus made" (after the death of the supposed patentee) "passes no title," says Mr. Justice Catron (12 Pet., 298), "is true in the nature of things; there must be a grantee before a grant can take effect; and so this court held in *Galt* v. *Galloway*" (4 Pet., 345), "and *McDonald* v. *Smalley*" (6 Pet., 261).

Was there, then, a grantee, capable of taking under the deed read in evidence in the State court?

In order to establish the affirmative of this proposition, the defendants in error introduced what purported to be an act of the legislature of the State of Michigan, of the date of March 26, 1836 (Laws of Mich. for 1836, p. 165), constituting them a body politic and corporate, &c., as stated in the record.

If defendants in error were by that act duly incorporated by the name they assume, they were competent to acquire real estate; if not so incorporated, they were incapable of receiving it, and their deed is void. If they were thus duly incorporated, they were competent to sue; if not so incorporated, they had no title to sue. The validity of that act was therefore necessarily drawn into question.

To the introduction of this document, as a private legislative act, to suffer it to be read as the law of the land, it was objected that it was not passed by any competent authority, and that it was repugnant to the constitution and laws of the United States. It was, nevertheless, admitted to be read in evidence, and the defendants in error were, by the same State court, declared to have been duly *incorporated, &c.; [*359 to which decisions exceptions were taken. The whole matter resolves itself into the single question, whether, on the 26th of March, 1836, Michigan was an independent State, and an admitted member of the Union? If, by her own spontaneous movement; if, by assuming that name and character, she were capable of constituting herself such, without any action on the part of the national government, then she undoubtedly constituted at that period one of these United States. But if the action of Congress were necessary in the matter; if it appertain to Congress; if it be the exclusive prerogative of that body to admit new States into this Union, then we have a right to insist that she did not become an independent State, nor an admitted member of the Union, until, by act of Congress of the 26th January, 1837, she was formally declared to be such. (See 5 Stat. at L., 144.)

It cannot be necessary here to refer specifically to that clause in the constitution which vests this power in Congress. But it is understood to be assumed, on the part of the defendants in error, that in virtue of the stipulations contained in the fifth of the articles of compact, set out in the ordinance of July 13, 1787 (1 Stat. at L., 51), Michigan became an admitted member of the Union from the time her population amounted to 60,000, and had formed a permanent constitution and State government. The terms of the ordinance provide, that when these contingencies shall have happened, the new States there spoken of "shall be admitted by their delegates into the Congress of the United States on an equal footing," &c. It will not escape notice, however, that before such admission can be effected, other and preliminary measures must be determined upon by Congress.

The boundaries of three of those new States are defined, but subject to be varied, if Congress should deem it expedient

to constitute more than three. In the event of there being more than three, the northern boundaries of the three are defined. But whether north of the three, there shall be established one or two additional States, and what shall be their boundaries respectively, are questions left open for the subsequent and future determination of Congress. The further action of Congress on those points, therefore, seemed not only competent, but indispensable, before it could become possible that Michigan should be admitted.

The leading purpose of these "articles of compact" unquestionably was, to establish on a permanent footing over those extensive regions the great principles of freedom and well regulated liberty. How far that purpose will have been attained, future ages will decide. But another and a less disinterested purpose was also had in view; and that was, to induce the more early settlement of the country, and of course to make it a more ample and immediate source of revenue.

To that end, the promises contained in the ordinance were holden out as inducing and stimulating motives to all who might be disposed to remove and buy there.

*360] *But afterwards it pleased the whole people of the United States to abolish their government, and to abrogate the old articles of confederation. A new constitution was adopted, an entirely new form of government was established, which took the place of the old one. A literal conformity with the stipulations alluded to became, therefore, neither desirable nor possible. The Congress of the confederation consisted of but one chamber. The votes taken in it were by States. It possessed little power, except that which was merely advisory. It was rather a hall of ambassadors, than a legislative body. Such was the body into which, "by its delegates," the new State was promised admittance; and that body has ceased to exist. But those who framed the new government were too wise and too just to disregard the stipulations and engagements the old government had entered into. They provided, therefore, for meeting those engagements, and fulfilling those stipulations, so far as that could be properly done, consistently with the plan and with the leading principles of the new constitution. They deemed it expedient and wise to vest in Congress exclusively the power to admit those new States into the Union, whenever, in the exercise of a wise and just discretion, the exigency might seem to demand it; and they imposed upon the Congress the moral obligation of conforming to all the *bonâ fide* engagements of the old government, so far as it might be done consistently with the public good, and the paramount

obligations of the new constitution. To have gone further might not have been wise. How far the provisions of the ordinance of 1787 would have executed themselves, if the government of the confederation had continued; and, if Congress had determined the number of the new States, and defined their boundaries, how far, by the mere force of the stipulations in question, each new State, as it should successively have acquired the requisite population, would have become a member of the Union without the further action of Congress, it is, perhaps, unnecessary to inquire. It may be remarked, however, that to admit a State into the Union implies the performance of some political act; that political act could be executed by Congress only. The form of expression used implies that at some future time that act shall be done; and can any more conclusive inference be drawn from the whole matter, than that an imperious moral obligation is devolved upon Congress to perform the act? But whatever speculations may be indulged as to the effect of the stipulation, had the government continued unchanged, it would seem most unreasonable to suppose, that, under the new constitution, it can by its own force operate as an actual admission of the State without the further action of Congress. That body, with whom the exclusive power remained, had not yet determined whether there should be one or two States north of the southern extremity of Lake Michigan. It had not yet acted upon the subject of the boundaries of such State or States, and without such *previous [*361
action, how is it possible, without a gross encroachment upon the acknowledged prerogatives of Congress to constitute, by the gratuitous movement of the people of the Territory, such State or States? Nor is it difficult to suppose that considerations other than those already alluded to might exist, which would render it just and expedient to suspend for a time the exercise of its power to admit a new State, which, having its sixty thousand inhabitants, should apply for admission. There may exist a difficulty with a foreign power in relation to boundary, which prudence may require the previous adjustment of. The constitution requires that the representation in the House shall be in proportion to the population of the different States, and be regulated by a uniform ratio. (The exception to this rule having reference manifestly to two of the original thirteen.) The ratio of representation being fixed then at a larger number than sixty thousand, how, without violating this most essential and vital principle, and thus doing great injustice to the older States, can Congress admit such new State, while its popula-

tion falls short of that required to constitute one election district?

The true principle would seem to be, that every ordinance, law, stipulation, and contract made prior to the constitution must thenceforward be construed and taken in subordination to it. That constitution is the paramount law, and must prevail over every law or contract which conflicts with it. By that constitution, the power to admit new States is vested exclusively in Congress. It is altogether a political power; and for its proper exercise there is no other guaranty than will be found in the honor, wisdom, and moral sense of that body. That power has been exercised. By the act above referred to, of 26th January, 1837 (5 Stat. at L., 144), Congress, by solemn declaration, announced that Michigan was admitted as one of the sovereign and independent States of the Union. The authority for performing this political act, —for making this legislative declaration,—is to be found in the third section of the fourth article of the constitution. Congress may "make all needful rules and regulations" respecting the Territories, and Congress may establish and admit into the Union "new States"; and having thus the power, their execution of it is beyond the control as well of the Territories as of all other departments of the government. The history of each of the Territories, and long continued practical construction, sufficiently sanction this proposition.

Michigan was originally a part of the old Northwest Territory. Without its consent, it was severed from that Territory, and made to constitute a part of that of Indiana. (2 Stat. at L., 58.) In like manner, and without being consulted, it was, in 1805, erected into a new Territory (2 Stat. at L., 309), and its political organization and government totally changed; being thrown back from the second to the first grade of colonial government under the *ordinance of 1787. Many successive changes in its fundamental law were afterwards, in a spirit of great kindness, but in the exercise of a power unqualifiedly dictatorial, made by Congress. (3 Stat. at L., 482, 722, 769.) Nor is it known that the competency of such arbitrary legislation was ever questioned. Its civil, its criminal, and its political codes were all alike the subjects of frequent and habitual legislation by Congress. And insomuch as it would seem manifest that the ordinance of the confederation of July 13, 1787, cannot have the effect, *proprio vigore*, to constitute of Michigan an independent State of the Union, and as, from the foundation of the government, Congress has habitually exercised a sovereign control over the destinies of its Territories, upon what

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basis can rest the pretension that Michigan could, of her own free will, throw off the colonial government established for her by Congress, erect herself into an independent and sovereign State, and *nolens volens* force herself into the Union?

The Legislative Council of Michigan, as it existed in 1834–35, was constituted by Congress. All the power it possessed was derived exclusively from the grant of Congress. It was appointed to uphold, and, within the sphere prescribed by Congress, to administer, the colonial government Congress had established; and to that end the official oaths of its members were administered to them. This same Legislative Council, under the lead of the youthful and ardent-tempered Secretary, who then, in the absence of a commissioned governor, personated the sovereignty of the Union in the executive branch of our territorial government, commenced a course of measures, with a view to subvert and abolish that very government which they had been appointed and sworn to administer, and on the 26th January, 1835, passed an act providing for the election and assembling of delegates to form a constitution and State government; and in the same act prescribed the boundaries within and over which their new State should extend. How far it consisted with good faith, with their own official power and duty, and their oaths of office, thus to undermine the very basis of their political power,—thus to subvert a government to which alone they could look for whatsoever political power they possessed or could exercise,—it would be useless, perhaps, now to inquire. The act has subserved its purpose, and has become extinct; and whatsoever has followed in no wise rests on a foundation so frail. The delegates invoked assembled in May, 1835. They devised the form of a constitution and State government. They defined the boundaries within which it should extend. They demanded of Congress, in proper and set phrase, that their proceedings should be sanctioned and confirmed; and that Michigan, thus constituted, should take her place as a recognized member of the Union. In the mean time, and without waiting for the action of Congress in the matter, a majority of those delegates determined to carry their new *government into immediate effect. Elections, therefore, were holden, [*363 thinly attended to be sure, but they were holden, and a nominal governor and legislature were declared to be duly elected.

In the month of November, 1835, these functionaries were assembled. If Congress were to accede to the demands of the convention, it was expedient that the legislature should

be ready to act; they therefore continued in session during the winter. In this period of uncertainty and solicitude, they prudently avoided definitive action in all very important matters; but having a due regard to the importance of an outward show of confidence in their position, they busied themselves in passing acts for laying out new roads, organizing new townships, creating new corporations, and in operations like those. It was at this period that they amused themselves by settling the details of the law to incorporate the defendants in error, the validity of which is now brought into question.

In the mean time, were the demands of the convention acceded to? Far from it! Considering the admission of new States, and by consequence the adjustment of their boundaries as political matters altogether referable to itself, the Congress deemed it proper to exercise its own judgment upon them; and having regard to its own construction of the Constitution of the United States, and of the obligation and meaning of the articles of compact of 1787, rejected, wrongfully perhaps, but rejected, the demands of the Michigan convention. What remained to be done? Why, if the politicians of Michigan had no right to cast off the government Congress had prescribed for them at pleasure, and erect themselves into an independent and sovereign community, nothing remained for them but to submit, with what grace they might, to the authoritative decision that their movements were not sanctioned, and that their acts were without authority. To continue, in short, as they had continued, under the territorial government of the United States, until, moved by its own sense of right, policy, and justice, Congress should choose to admit the Territory into the Union as an independent State, with such dimensions and boundaries as it might prescribe.

The State boundaries, as the same are prescribed by the Legislative Council by its act calling the convention (of January 26, 1835), as well as those adopted by convention, comprise a strip of country several miles in breadth, extending along the whole base of the peninsula. It comprehends towns, villages, and cities. It contains a country of unsurpassed beauty. It contains points having commercial advantages unequalled, except by those of Buffalo, by any throughout the whole region of the Northwest. That strip of country Congress has annexed to Ohio and Indiana respectively. On the other side, Congress has deemed it proper to add an extensive region, having an area of land and water

far *greater than is contained in the whole of the peninsula! And thus changed in her geographical position, [*364 dimensions, and people too, thousands of those who assisted in forming her organic law having been cut off on one side, and unknown members of such as did not so participate added on the other, with her identity gone, but with her name preserved, the new State is declared by Congress, on the 26th of January, 1837, to be admitted as one of the States of the Union. (5 Stat. at L., 144.)

If the people of Michigan, through the means of its convention and the Legislative Council accorded to them by Congress, had the right to throw off the laws of the United States, organizing its government at pleasure, and erect themselves into an independent government, then Michigan, with the dimensions her convention prescribed for her, became an independent State in November, 1835.

If the sovereign power of legislating for that Territory, and of admitting it as a new State, rested alone in Congress, then Michigan, with dimensions totally variant, became an independent State and a member of the Union on the 26th day of January, 1837, and not before.

Will it be said that her recognition by Congress, in 1837, as a State, will have relation back to the period when she declared herself an independent community, and constitute of her a member of the Union as from November 2d, 1835? What, then, will be the condition of those officers who, deriving their authority directly or indirectly from the general government, executed in the mean time those laws which, by express enactment, or by the sanction of Congress, had become the laws of the district? Were they all usurpers, all trespassers? And the judges, too, appointed by this government,—will all their adjudications and decrees have become void, and those who executed as well as those who pronounced them become liable, both civilly and criminally, for an usurpation which is against the peace and dignity of the new-born State?

The right of the United States to the "Western posts" accrued from the treaty of 1783. They were not delivered until 1796. Shall that delivery have relation to the period when the right accrued? What, then, will become of the contracts made, the rights accrued, the descents cast, judgments rendered in the interim? Are all void, and those who exercised authority trespassers by relation?

Relation is one of those fictitious devices in the law which never shall be permitted to work a wrong to strangers; 3 Cai. (N. Y.), 261; 4 Johns. (N. Y.), 230; and it illy accords

with the nature and purposes of that device that it should be so applied. *Butler & Baker's case*, 3 Co., 29. The explicit declaration of Congress can hardly be carried back by relation.

In the case of *Owings* v. *Speed et al.*, 5 Wheat., 420; 4 Con. R., 714, it became proper to decide when the present *365] national *government took the place of that of the confederation? This court on that occasion say, that "both governments could not be understood to exist at the same time; the new government did not commence until the old one had expired." Referring, then, to the action of other departments of government,—to journals, records, official reports, and to contemporaneous history,—the court determines that the old Congress continued until November, 1788; the old government potentially until March 2, 1789; and that the new government then commenced. Although it is not admitted, especially in view of the clauses in the constitution referred to, that any other than the legislative department of the government can control, or in the smallest decree affect, the action of Congress in this matter, yet it is with much satisfaction that reference is made to the clear and admirably expressed views which were taken on this subject by the executive department of this government; I allude to a communication from the State Department of the 8th of October, 1835, and to be found in House Doc. No. 7 of the First Sess. 24th Congress, pp. 92, 93.

From the views thus presented to the court, it will have appeared very manifestly that the validity of the act incorporating the defendants in error must necessarily have been brought into question on the score of its repugnancy to the constitution and laws of the United States. At the threshold of their case it was incumbent upon them to establish their right to sue by the name they assumed. This could be done only by showing a valid act of incorporation. The decision of the State court was in favor of the validity of that act, and thus the case is brought within the words, and the spirit too, of the twenty-fifth section of the Judiciary Act.

If the legislature of a State should pass any act violating the constitution or the laws of the United States, this court would pronounce such act to be void; and that, in passing it, such legislature had transcended those limits, which all the States, by the constitution of the United States, had prescribed for it; that in respect to such excess of authority, the legislature was as no legislature, and its proceeding *coram non judice*. If the positions assumed in this case be warranted

by the constitution of the United States, can the court fail to pronounce a similar judgment?

Mr. Hand, for the defendants in error.

That part of *Mr. Hand's* argument which related to the question of jurisdiction was as follows.

This cause comes into this court from the Supreme Court of the State of Michigan, to which court it had been carried by a writ of error from the Circuit Court of said State for the county of Wayne. It was an action of ejectment for a lot in the city of Detroit. The defendants pleaded the general issue: verdict and judgment for the plaintiffs, the present defendants in error.

*At the trial, numerous exceptions were taken by the defendants, and a bill containing said exceptions, [*366 duly sealed, which bill of exceptions is embodied in the record, sent up to this court. The Supreme Court of the State affirmed the judgment of the Circuit Court for the county of Wayne. The defendants in error allege and insist that there is nothing upon the record sent up whereby this court can entertain jurisdiction in this cause; which it is believed can be conclusively shown. By reference to the abstract of the cause presented by the defendants in error, and the record in this cause, it will appear that at the trial of this cause the defendants in error, the Detroit Young Men's Society, claimed to have been incorporated by an act of the legislature of the State of Michigan, approved March 26th, 1836, entitled, "An act to incorporate the members of the Detroit Young Men's Society" (Sess. L. of Michigan, 1836, page 165). To the admission of this act in evidence, the plaintiffs in error (then defendants) objected, denying the existence of the State of Michigan at the date of the law, and thus denying the valid existence of the act of incorporation itself. The court overruled the objection, and the party excepted. The subject-matter of said exception does not come within the provisions of section 25, ch. 20, of the Judiciary Act of 1789. An attempt may be made to bring it under the second clause of said section. Under that clause, there must be "drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States." Here was produced an act of the legislature of the State of Michigan. The defendants in the court below objected, not that this statute of the State of Michigan was repugnant to the constitution, laws, or treaties of the United States, but that it was not a law of a State.

It was the existence of the State that passed the law which was denied, and not the authority or power of a State to enact such a law. The objection was, that the act produced had not the sanction or authority of a law of a State, and not that, being a statute of a State, it was repugnant to the laws, &c., of the United States. Certainly this is not within the second clause of section 25.

Mark what is explicitly required by the clause to give the court jurisdiction. First, there must be a statute of a State. Secondly, the authority of such statute must be drawn in question on the ground that it is repugnant to the constitution, &c., of the United States. To any thing but a statute of a State, or to any objection to such statute but that of repugnancy to the constitution, &c., of the United States the clause does not apply.

The act of 26th March, 1836, incorporating the Detroit Young Men's Society, was or was not a statute of a State. If it was not a statute of a State, then by no possibility could the second clause of section 25 have any bearing upon it. If *367] it was a statute of a *State, then Michigan at the time of its enactment was a State, and the only objection made at the trial, to wit, that Michigan was not at the time of the enactment of said act a State, is summarily disposed of.

Again, if said act was a statute of the State of Michigan, then at the trial in the court below its validity was or was not questioned on the ground of its being repugnant to the constitution, treaties, or laws of the United States. If its validity was not questioned on that ground, then it is not within the provisions of section 25. If its validity was questioned on that ground, then it is within said section. But the validity of said act was not questioned on the ground that said statute was repugnant to the constitution, treaties, or laws of the United States; therefore this court has no jurisdiction, by virtue of the matters premised. It may be remarked, that the term *repugnant* is a technical term, of a peculiar, ascertained, and known signification, which signification it bears as it occurs in section 25 of the Judiciary Act. A statute is repugnant to the constitution, treaties, or laws of the United States, when its subject-matter, terms, and provisions are opposed to, and inconsistent with, the subject-matter, terms, and provisions of such constitutions, treaties, or laws, so that they cannot both stand together. Said act (section 1) incorporates the defendants, "for the purpose of moral and intellectual improvement." It confers a common name, a common seal, perpetual succession, capacity to sue

and be sued, and the right to acquire and hold property to the amount of $25,000. Section fifth reserves to the legislature a right to alter, amend, or repeal the said act, by a two-thirds vote. Such are the simple and ordinary powers and franchises conferred by said act. The utmost captiousness could find nothing in it in the smallest degree repugnant to the constitution, treaties, or laws of the United States.

The exception taken,—that Michigan was not a State on the 26th March, 1836, *ergo*, the said act not valid,—might peradventure have been well taken, but could not be a ground of jurisdiction in this court, for so far from showing a statute of a State repugnant, &c., it wholly denies said act to be a statute of a State. If it were not a statute, it is not within the provisions of the twenty-fifth section to give this court jurisdiction. If said act be a statute of a State, then no exception was taken that it was repugnant, &c., and the indispensable prerequisites to jurisdiction again wholly fail. See *Weston* v. *City Counsel of Charleston*, 2 Pet., 463, 464; *Satterlee* v. *Matthewson*, Id., 409; *Wilson* v. *Blackbird Creek Co.*, Id., 245; *Craig* v. *State of Missouri*, 4 Id., 410; *Crowell* v. *Randall*, 10 Id., 368; 5 Cranch, 344. It is clear, therefore, that this is not a case where is "drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States." And this court can entertain no jurisdiction on this ground, it not being a case contemplated by said section.

*From the said case and the record it further appears, that, on the trial of the issue in the court below, the [*368
Detroit Young Men's Society, plaintiffs in that court, claimed title to said lot as grantees thereof from the United States, through the governor and judges of the Territory of Michigan, under an act of Congress, approved April 21st, 1806, entitled "An act to provide for the adjustment of titles of land in the town of Detroit, Territory of Michigan, and for other purposes" (2 Stat. at L., 398), and produced and proved a deed of said lot, executed by said governor and judges, bearing date July 1st, 1836. The defendants made several objections to said deed, all of which were overruled, and the title so claimed under the act of Congress was fully sustained by the State court. Do these facts furnish ground of jurisdiction to this court? I think not. To give this court jurisdiction under the first clause of section 25 of the Judiciary Act, where the validity of an authority exercised under the United States is drawn in question, the decision of the State court must be against its validity. Here the decision of the

State court was in favor of the authority exercised under the United States, so there can be no pretence of jurisdiction on that ground. *Gordon* v. *Caldcleugh*, 3 Cranch, 268. It was perfectly competent for the court below to take cognizance of the title to said lot, there claimed by the plaintiffs under the United States; its decision sustained the title claimed under the United States; it is now *res adjudicata* by a competent tribunal, and this court has no power to revise or disturb the decision of the State tribunal upon that point.

Upon the plaintiff's case as presented in the court below, and the questions raised thereon, nothing appears upon the record to give this court jurisdiction.

Mr. Howard, for the defendants in error, said that his first duty was to disentangle the case from the matters which did not properly belong to it. The entire record has been brought here, just as it was exhibited to the Supreme Court of the State of Michigan, and although all the points raised in it were very proper for the consideration of that tribunal, yet they must nearly all be laid aside under this writ of error. 10 Pet., 268.

The plaintiffs below offered only two pieces of evidence, and then rested their case. These two were,—1. An act of incorporation; 2. A deed from the judges of the United States for the lot in question.

1. The act of incorporation is the hinge upon which the whole controversy turns. It will be considered as properly before this court for examination, and the objections to its admission as evidence will be reserved for discussion hereafter. At present, I am getting rid of superfluous matter.

2. The deed from the judges was also objected to in the State *court. But that objection can find no place here. The Judiciary Act is very explicit in conferring upon this court an appellate power only where a State court decides against the validity of an authority exercised under the United States. But the authority claimed here was, that the judges of the United States had the legal right to execute this deed, and the decision was in favor of its validity. Jurisdiction over this question is therefore excluded by the terms of the act. It is very clear that the framers of the act of 1789 thought that, as long as the State courts decided in favor of any power claimed to be exercised under the United States, or against a power claimed under a State law, there was no necessity of a revising power in this court; because the feelings of State pride and State interest would not probably allow of such decisions unless they were correct. At

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all events, there was no danger of an encroachment upon the powers of the federal government by the States as long as the State tribunals themselves prevented it by their decisions. All this is so clear, that it is deemed unnecessary to consume any more time upon the question of the admission of this deed. If the decision below was erroneous, this court has no power to review it.

Many questions arose in the court below upon the evidence offered by the defendants, but, with the exception of the point reviewed above, none of them can be considered as properly before this court.

1. The defendants below offered a deed from the treasurer of Wayne county to them, which deed the court refused until it was first shown that the lot was assessable for taxes and that the title had passed out of the United States. It is not perceived under what head of jurisdiction the reviewing power over this decision can be placed. The authority to tax and sell did not begin until the title passed out of the United States. Consequently the decision is in favor of the exemption from taxation, and not within the twenty-fifth section.

2. The defendants below then offered in evidence a resolution of the governor and judges, that the basis of the town should be an equilateral triangle, &c., &c., and then proved, by a mathematical calculation, that lot No. 56 was the same as lot No. 52. It is evident that the point ruled by the court was, not the invalidity of the deed from the judges, but the insufficiency of the evidence to prove the identity of the two lots. The deed conveyed lot No. 52. But the lot in dispute was lot No. 56, and the first step for the defendants below to take was to establish the identity of the two lots. But the court decided, as a question of general evidence, that these mathematical calculations were not sufficient to prove it. As a question of general evidence, it can, by no possibility, be before this court.

3. The defendants further offered certain parol evidence, which the court rejected. With this, we have nothing to do.

*The instructions given by the court below were four, viz.:— [*370

1. That the lessors of the plaintiff were well incorporated.

2. That the deed of the judges was well executed.

3. That on the 1st of July, 1836, there were a governor and judges competent to convey title.

4. That the governor need not have signed the deed.

The first point is the one reserved, to which the attention of the court will be called presently. Upon the other three, the

decision is in favor of the validity of the commission under the United States, and affords no ground for the jurisdiction of this court.

So with the instructions asked for and refused. Those which are cognizable by this court are only a repetition, in different phraseology, of the same question, viz. whether or not there was in Michigan, at the time of passing the act of incorporation, a legislature capable of enacting valid laws.

With respect to the question of jurisdiction, it is not necessary to say much, because my colleague has placed that point in an attitude of great strength. But the opposite counsel is endeavoring to maintain two contradictory propositions, which cannot both be correct, viz.:—That Michigan was not a State, because the territorial judges were found to be there in the exercise of territorial authority; and, 2d. That the judges had no right to execute the deed, because the establishment of a State government had annulled their authority. Both of these positions could not be sound. The counsel must choose one of them, and maintain only that one. If, with a view to destroy the deed, he set up a State government, be it so. He could then no longer call into question the legality of the charter. But if, with a view to destroy the State government, he set up a territorial authority, be it so. He must then admit the validity of the deed. It was remarkable, too, that the learned counsel was compelled, in order to maintain his argument, to sweep away the very ground upon which he stood in this court. He came here to complain of the statute of a State, in the language of the twenty-fifth section of the Judiciary Act, and his first blow was against the existence of the State herself. But if Michigan was not a State when the act was passed of which he complains, then he destroyed his own standing here, because it was only the statute of a State which was cognizable. And thus, the more effectively the learned counsel sustained his position, by just so much did he make it more apparent that this court had no jurisdiction over the case.

Passing on to another branch of the case, *Mr. Howard* said he would endeavor to maintain the three following points, viz.:—

1. That the power to admit new States is a political power to be exercised by Congress alone, and that all questions touching its exercise are political questions, not confided to the judicial power by the constitution and laws.

2. That the admission of Michigan into the Union was a *complete exercise of the political power vested in Congress. It ratified the previous proceedings of the

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people of Michigan, and thereby excludes all inquiry into their correctness by the judicial power.

3. If the objection to the jurisdiction fails, then,—That the people of Michigan had a right to proceed to establish a government whenever the contingency happened, as provided for in the ordinance of 1787.

1*st Point.* The existence of two classes of questions, viz. judicial and political, has been more than once recognized by this court, over one of which jurisdiction reaches, but over the other it does not. The line which divides these two classes has never been traced, but the court has wisely contented itself with deciding, in each case, whether it lay on one side of the line or the other. When these decisions shall have become more numerous, it will be time enough to run the line throughout its whole extent, and frame a theory. For example, this court has considered the question of a disputed boundary, such as that of the Rio Perdido, as a political question, into the merits of which it would not look. Perhaps it might be laid down as one of the governing principles on this subject, that when a question, from its nature, belongs to the consideration of either the executive or legislative branches of the government, the judicial power will abstain from exercising any jurisdiction over it. See, on this subject, 12 Pet., 517, 657, 731, 736–738; 5 Id., 20.

No stronger illustration can be given of the nature of the question now before us than to refer to an actual occurrence in our history. The question is, whether Michigan was a State in March, 1836. In the fall of 1836, she cast her vote, as a State, for President and Vice-President of the United States. When the votes were counted, in February, 1837, in the presence of the Senate and House of Representatives, the late attorney-general, Mr. Grundy, then a member of the Senate, was chairman of the joint committee, and announced the result of the count in this manner:—"If the vote of Michigan be counted, Mr. Van Buren has" (naming the number). "If the vote of Michigan be not counted, he has" (naming that number). "But in either event he has received a constitutional majority, and is therefore elected President of the United States."

Now, the question which was thus left unsettled, and which would have distracted the country if it had been necessary to settle, is the precise question which the learned counsel now calls upon this court to decide. Time has not varied it. Suppose that the vote of Michigan had been necessary to make a majority, and this court had then been appealed to to decide whether Michigan had a right to vote or not. Would

not the answer have been, "Non nostrum tantas componere lites"? It is not necessary to pursue this train of reflections any further.

*372] *The government which existed in Michigan during the year 1836 was recognized by the executive of the United States as existing *de facto*, if not *de jure*. It was not denounced and treated as an insurrectionary, disorganizing body. No proclamation was issued, calling upon the insurgents to disperse; no militia of the neighbouring States were called out to suppress the insurrection. But, on the contrary, Congress and the President remained tranquil spectators of what was doing. If this court follows the lead of the executive in recognizing foreign governments *de facto*, why not in this case also?

2*d Point.* It is necessary to recur to dates:—

1835, May 11. Convention met to frame a constitution.

1835, November 3. Legislature met and organized.

1836, March 26. Act of incorporation.

1836, April 1. Society went into operation.

1836, June 15. Act of Congress (5 Stat. at L., 49):—"An act to establish the northern boundary-line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed."

1836, June 23. Supplementary act (5 Stat. at L., 59).

1836, June 30. Session of United States court and judges.

1836, July 1. Sibley, Morell, and Wilkins acted as judges.

1836, July 1. Deed from the judges.

1837, January 26. Michigan finally admitted (5 Stat. at L., 144).

In these acts of Congress, and especially that of June 23, 1836, the proceedings of the people of Michigan are spoken of as valid. The constitution is mentioned as one "which the people have formed," and propositions are submitted to the "legislature of the State of Michigan," &c., &c.

These ratifications by Congress, acting under its express power to admit new States, preclude this court from a reëxamination of the subject. The power in Congress is a political one, and has been fully exercised under its own responsibility. Will this court ever consent to hear an argument whether Texas was constitutionally admitted or not?

3*d Point.* The people of Michigan had a right to do what they did under the ordinance of 1787. This ordinance is reprinted in 1 Stat. at L., 51, note. The fifth article says, when there are sixty thousand persons, it shall be admitted by its delegates into the Congress of the United States; and

shall be at liberty to form a permanent constitution and State government.

The act of Congress of August 7, 1789 (1 Stat. at L., 50), makes this ordinance "continue to have full effect."

The only difference between the learned counsel and us is, that he thinks there must be a preliminary act of Congress, authorizing a census under federal authority, and the sitting of a *convention; whilst we contend that it is competent for the people to number themselves, and to [*373 assemble in convention, if the number shall be found sufficient.

These rights under the ordinance are political vested rights, which no authority can take away or lessen. But if, by an interpolation into the constitution, a previous act is held to be necessary by Congress, these rights no longer depend upon the happening of the contingency provided for, but upon the pleasure of Congress.

Very many circumstances might arise to prevent Congress from passing a preliminary law. Want of time, pressure of other business, party intrigue, a difference of opinion between the Houses, and all the ills that legislation is heir to, might occur to prevent such an act. These dangers were not contemplated by the ordinance. The grant of power was full, direct, unequivocal, and positive; as much so as the right of suffrage in an individual when he attains the necessary age. When the fact happens, the right accrues and becomes active.

There is nothing in the nature of the power in Congress which demands the preliminary act, for the people can just as well number themselves, and assemble spontaneously in convention. For the rule, see 16 Pet., 622.

Again; this course of proceeding is sanctioned by long established practice since the foundation of the government.

1791, Feb. 4. Kentucky was admitted without a previous law for a convention. 1 Stat. at L., 189.

1791, Feb. 18. Vermont was admitted in the same way. 1 Stat. at L., 191.

In this case, Vermont had been passing laws, by her own independent authority, ever since March, 1789. Any one of these laws might have been questioned on the same ground on which this act of incorporation is now disputed. What would have been the reply of this court? It is furnished in 12 Pet., 724, where the court say, speaking of Vermont,—

"The people assumed by their own power the position of a State, and settled the controversy by taking to themselves

the disputed territory as the rightful sovereigns thereof." 12 Pet., 724.

1796, June 1st. Tennessee admitted. 1 Stat. at L., 491.

But these had no Act of Congress to authorize a convention, and this point was distinctly brought before both Houses of Congress. The whole of the discussion is an interesting chapter of American history. The committee of the Senate reported against the admission, on the very ground now taken by the opposite counsel, whilst the committee of the House of Representatives assumed the doctrine for which we are contending.

The result was, that the Senate yielded, and the precise question now at issue was settled by Congress, as far as the legislative branch of the government could settle it, fifty years ago.

*374] *The legislature of Tennessee met on the 28th of March, 1796, and sat until the last of April, in which time the whole State government was organized. The case is exactly parallel with that of Michigan.

For the proceedings, see Senate Journal for 1796, from April 11th, p. 236, to June 1st, and also December 6, 1836; American State Papers, Gales & Seaton, tit. *Miscellaneous*, vol. 1, p. 147.

Mr. Justice WOODBURY delivered the opinion of the court.

I am instructed by the court to say its opinion in this case is, that it possesses to jurisdiction over the questions submitted. No other point is decided by us, though others of much interest are involved in the merits respecting the due organization of States, under our political system, and the effect which their admission into the Union by Congress has on the validity of their previous proceedings.

Some contend, that when these matters properly arise in a cause, they are mere political questions,—to be settled by the action of the other departments of the government, and not to be reëxamined here.[1] *Barclay* v. *Russel*, 3 Ves., 429; *The Nabob of Arcot's case*, 2 Bro. Ch., 6; *Foster et al.* v. *Neilson*, 2 Pet., 309; *The Cherokee Nation* v. *Georgia*, 5 Id., 20; *Rhode Island* v. *Massachusetts*, 12 Id., 730, 736, 738; *Garcia* v. *Lee*, Id., 517, 518.

And it is argued that the acknowledgment of a domestic State is like the recognition of the independence or existence of a foreign State; and the latter is well known to preclude

[1] RELIED ON. *Luther* v. *Borden*, 7 How., 57.

any further inquiry by the judicial tribunals into the fact of their due organization. See, on this, 5 Pet., 50, 59; 2 Cranch, 241; 3 Wheat., 634; 4 Id., 64.

It is further contended, that if a State be recognized or admitted into the Union under a particular form of government or constitution, this, of necessity, implies that such organic arrangement is to be treated as valid from its creation, and the previous legislation under it is to be considered as done or performed by a competent authority.

But we do not find it a duty to decide any of these delicate and important questions, considering the situation of the record in this action and the preliminary points which arise on it, and which must first be disposed of.

This being a writ of error to a State court, sued out with a view to reverse its decision in a case of ejectment between these parties, the only authority and the only ground for our interference with the decisions of the State tribunals is, in substance, that they have overruled some right or defence set up under an act of Congress, or treaty, or constitution of the United States. 14 Pet., 46, 353; 12 Id., 66; *Williams* v. *Norris*, 12 Wheat., 124.

The principle under which the Judiciary Act of 1789 allows this interference of ours in the relations between the two governments, *always of so sensitive and responsible a character, is, that no government can be efficient or [*375 just without the means of self-protection; and hence, that those who act under it or claim rights beneath the shield of its laws should, within its own territory, be able to appeal to its own tribunals for relief whenever their claims under it are decided against in the courts of the States. But prejudices here are to be guarded against as well as there; and hence the paramount rule of construction, in all cases of this kind, ought to be, not to interfere at all unless the decision is shown to come clearly within the letter and spirit of the act of Congress permitting an appeal; and, when interfering, not to overrule the judgment of the State court unless clearly erroneous.

Firstly, then, is there a proper case presented here for our interference at all? Three instances are enumerated in the Judiciary Act, in which a writ of error lies to a State court, e. g. (1.) "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; (2.) or where is drawn in question the validity of a statute of, or authority exercised under, any State on the ground of their being repugnant to the constitution, treaties, or laws of the

United States, and the decision is in favor of such their validity; (3.) or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of said constitution, treaty, statute, or commission." 1 Stat. at L., 85, § 25.

A claim is made to sustain this writ and our jurisdiction under the first specification, because an authority was set up by the original plaintiffs, that the deed to the Young Men's Society was good under the acts of Congress, and this was excepted to by the defendant. But that cannot be made the subject of a writ of error, because the State court decided in favor of its validity. *Gordon* v. *Caldcleugh et al.*, 3 Cranch, 268; *Walker* v. *Taylor et al.*, 5 How., 64.

Another decision, which was made by the State court against the right set up by the original defendant under acts of Congress in respect to his title, is attempted to be made a subject for reëxamination under this writ. But it cannot be, for two reasons. One is, it does not appear what acts of Congress are referred to; and the other is the probability, on the face of the record, not that such acts were decided against, but only that the evidence adduced in relation to the right set up under them was overruled. Consequently, nothing remains under which to claim jurisdiction, except the second specification in the Judiciary Act. It is contended that the objection, which was made in this case to the validity of a statute of the State, on the ground that the legislature were not competent or duly organized, under acts of Congress and the constitu-
*376] tion, *so as to pass valid statutes, and which was overruled, comes within that specification.

The first difficulty interposed against this point is, that the plaintiffs in error do not in the record specify what parts of the constitution or act of Congress they consider to have been overruled by the State court, nor in terms that any parts of either were so overruled. The course pursued here is a looser mode of stating exceptions than is customary, and could hardly be sustained if it did not appear on the record that the competency of the legislature of the State of Michigan to pass certain laws was in fact called directly in question, and the validity of them contested, on the ground that, when the laws passed, the territorial government over Michigan was still in force, and the new State government had not been duly organized. And it seems to have been admitted on both sides that this objection was urged,—and it is difficult to conjecture

any other ground for such an objection to the competency and power of the new State government, unless founded on its non-conformity to the existing acts of Congress as to the Territory, and the clause in the constitution for the admission of new States. The argument was a fair one, that, as the territorial government was still in operation in Michigan for some purposes, no new political organization could take place within its limits which was capable of passing valid laws or charters of incorporation, without a previous sanction by Congress, under the third article of the constitution.

There probably is enough in this record to show that such questions were raised, and that the State court decided against the validity of the objection, and under this view and the authorities of the following cases we shall then treat this exception as sufficiently set out in the record. *Coons et al.* v. *Gallager*, 15 Pet., 18; *Williams* v. *Norris*, 12 Wheat., 117; *McBride* v. *Hoey*, 11 Pet., 167; *Crowell* v. *Randell*, 10 Id., 368; *M'Kinney* v. *Carroll*, 12 Id., 70; 5 Id., 248.

But the exception, if well stated, applies to nothing except the validity of the particular statute that incorporated the Young Men's Society, under which Jones, the original plaintiff, claims. Nor does it question the validity of that statute on account either of its terms or subject-matter, but the inability or incompetency of its makers as a political body to pass any statute whatever. Now to ascertain whether such an objection can come within the true meaning of the Judiciary Act, it will be necessary to look at the language as well as obvious design of the latter in conferring this searching and overshadowing power of revision over the State tribunals. As before suggested, it was to prevent partiality in them against the authority and agents of the general government; to hold the protecting supervision in respect to its own constitution, treaties, and acts of Congress, for purposes of self-preservation and self-defence, and finally to insure uniformity in the construction and operation of them over the whole Union.

*Hence, two things must unite, in order to justify it. There must be an act of solemnity and import- [*377
ance, such as a statute, and that statute must be by a State, a member of the Union and a public body, owing obedience and conformity to its constitution and laws. This seems to have been settled by this court as to the meaning of the word "State," where empowering one to bring an action. It must be a member of the Union. *Cherokee Nation* v. *Georgia*, 5 Pet., 18. And it is not enough for it to be an organized political body within the limits of the Union.

In conformity with this, where it is required that a party should be a citizen of a different "State" in order to give a Circuit Court jurisdiction, it has been held it is not sufficient to be a citizen of the District of Columbia (*Hartshorn* v. *Wright et al.*, Pet. C. C., 64; *Hepburn et al.* v. *Ellzey*, 2 Cranch, 445), or citizen of a Territory (*New Orleans* v. *Winter*, 1 Wheat., 90), but the party must belong to a State in the Union, one of the members of the confederacy. Chief Justice Marshall, in *Hepburn et al.* v. *Ellzey*.

Indeed, it has been settled also, that a law passed by Virginia, before the government of the Union took effect, cannot be examined and decided upon under this clause of the Judiciary Act. *Owings* v. *Speed et al.*, 5 Wheat., 420.

The words of this clause also appear to be such, as to admit of no other construction than that the statute is a measure by a body confessedly a State. They are,—"where is drawn in question the validity of a statute of, or authority exercised under, any State," &c.

Besides this apparent recognition, that nothing is to be examined which does not apply to what is contained in a statute, and that passed by a State, the evil to be remedied and guarded against was connected merely with the subject-matter of statutes, and not with the political competency of their makers.

The fears were, from the reasons just enumerated, that through some inadvertence, if not design, a State might legislate against some part of the constitution, or a treaty, or an act of Congress, and might trench upon matters not within its province nor belonging to its internal concerns, but belonging to Congress, and which, by express terms or necessary implication, were forbidden to be acted on by the State governments.

Such being the evil or danger, it precludes the idea that this clause in the Judiciary Act had any reference to the fact, that public bodies which had not been duly organized, and not been admitted into the Union, would, as States, undertake to pass laws, without being empowered to do it, which might encroach on the Union or its granted powers, and hence should be thus guarded against. Such conduct by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of any of the departments of this government, unless so *378] *interfering with its rights as to call for the political exercise of the executive and legislative authority over our foreign relations.

Again, such conduct by bodies situated within our limits,

unless by States duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies unlawfully organized are situated and acting. While in that condition, their measures are not examinable at all by a writ of error to this court, as not being statutes by a State, or a member of the Union. And after such bodies are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunals of the general government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State, within the meaning and spirit of the Judiciary Act. And, if so, we must inquire only into the validity of their subject-matter, and not as to the new, any more than the old, States, ever suppose that the question of their political competency or power to pass statutes at all was an inquiry intended to be placed under our consideration and decision by the twenty-fifth section of the Judiciary Act.

It follows, then, that a statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of § 25 of the Judiciary Act, unless reënacted or adopted after becoming a State (3 How., 482); then it is treated like the statute of any State; or the admission of the State into the Union by Congress, subsequently with the constitution and political organization under which the statute was passed, must bring it under our consideration as a statute passed by the State,—a competent State,—leaving, as in other cases, merely its subject-matter to be examined in order to see if it violates or not any acts or provisions of the general government.

The question of their competency is not, however, thus made a closed one, but may be discussed before the proper political tribunals. And where, under particular laws, their competency is not conceded, it may come under the consideration and decision of the State courts, and probably of those of the United States. All we decide in this instance is, that it is not one of the grounds for our reëxamination of decisions on it, under the Judiciary Act. And it is no more objectionable to shut out such a question from revision in that way, than numerous others which are not included either in the words or objects of that act. Indeed, there were, and still are, some of the highest motives of expediency and sound

public policy not to entangle this court with the reconsideration in this way of a matter so purely political and often so
*379] full of party agitation. It is pretty *strong evidence that this view of the Judiciary Act, and our duties under it, must be the correct one, when, on full examination of the precedents, no case can be found where an objection of this character to a statute of a State has ever been sustained, or deemed even a proper ground for exception below, and afterwards brought under the revision of this court by a writ of error. The case of *Owings* v. *Speed et al.*, 5 Wheat., 421, before cited, comes nearest to this. Taking it for granted, then, we have shown that the revision in a case like this must be of a "statute" and a statute of a "State," and not of a Territory, or corporation, college, or unacknowledged political body, and considering these as concessions, or admitted data, before the jurisdiction arises to issue a writ of error, and look into the subject-matter of such statute in order to ascertain whether in its terms or operation it runs counter to the powers of the general government, and that it is acknowledged on both sides there is nothing exceptionable in the subject-matter of this statute, it follows that there is nothing to revise or correct, which is within the purview of the judicial functions of the general government under the Judiciary Act.

Let the writ of error be dismissed for want of jurisdiction.

Mr. Justice McLEAN.

I think there is jurisdiction in this case. The Detroit Young Men's Society, in their corporate capacity, brought an action of ejectment against Scott and Boland to recover possession of the lot in question.

The deed under which the lessors of the plaintiff claimed was dated the 1st July, 1836, and was signed by three judges of the Territory of Michigan. In making the conveyance, the judges acted under a law of Congress of the 21st April, 1806. As regards this question, it is not important to examine the execution of this trust.

On the trial it was proved "that a legislature of the State of Michigan, duly elected and returned, was organized and duly qualified under the constitution of the State of Michigan on the 3d November, 1835; and that Stevens T. Mason, having been duly elected and returned, was on the same day qualified as governor, &c. That the act entitled 'An act to incorporate the members of the Detroit Young Men's Society' was approved 26th March, 1836."

It was proved, by reputation, that John S. Horner pur-

ported to act as territorial governor of Michigan until some time in the year 1836, and that George Morell and Ross Wilkins acted as judges until June of that year. That a session of the territorial court was held on the first Monday of January, 1837.

The State of Michigan was admitted into the Union by the act of the 26th January, 1837.

On the trial, the counsel moved the court to instruct the jury, that the act "to incorporate the members of the Detroit Young *Men's Society" was not of binding force, [*380 "unless the jury should find that the State government of the State of Michigan was, at the time of the passing and approval of said act, established, and in full and legal force and operation."

The twenty-fifth section of the Judiciary Act of 1789 provides, "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity," may be reëxamined in this court by a writ of error.

This act of incorporation was given in evidence, as a part of the plaintiff's title; and on the validity of the act his right to a recovery depended. The deed having been made to the lessors of the plaintiff as corporators, they could recover only in that capacity. The validity of this statute was questioned, as appears from the record, on the ground that it was passed before the State was admitted into the Union; and the court held that the statute was valid. By the constitution, Congress has power to admit into the Union "new States." The time of admission is a question of law, and not a political question. At the present term we have had occasion to decide the date of the admission into the Union of the States of Florida and Iowa.

The above facts present the very case provided by the statute for the exercise of jurisdiction by this court. A right was set up under the statute of a State, and that statute was alleged to be repugnant to the constitution and laws of the United States; and the decision of the State court was in favor of the validity of such statute. No case, it would seem, could arise, more completely within the letter and spirit of the twenty-fifth section.

It is said that the act upon its face does not purport to be repugnant to the constitution or laws of the United States.

If this be admitted, it by no means follows that the act is constitutional. Whether constitutional or not must be determined by the effect of the act. But in my judgment this act is repugnant to the constitution and laws of the Union.

Michigan was an organized Territory of the United States. Its governor, judges, and all other territorial officers, were in the discharge of their various functions. The sovereignty of the Union extended to it. Under these circumstances, the people of Michigan assembled by delegates in convention, and adopted a constitution, and under it elected members of both branches of their legislature, governor, and judges, and organized the State government. No serious objection need be made, in my judgment, to the assemblage of the people in convention to form a constitution, although it is the more regular and customary mode to proceed under the sanction of *an act of Congress. But until the State shall be admitted into the Union by act of Congress, the territorial government remains unimpaired.

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No act of the people of a Territory, without the sanction of Congress, can change the territorial into a State government. The constitution requires the assent of Congress for the admission of a State into the Union; and "the United States guaranty to every State in the Union a republican form of government." Hence the necessity, in admitting a State, for Congress to examine its constitution.

The act "to incorporate the members of the Detroit Young Men's Society," was the exercise of sovereign power,—a power totally repugnant to the sovereignty of the Union, in its territorial form. Until the 26th of January, 1837, Michigan was not admitted into the Union and recognized as a State. Whatever effect this admission may have, by way of relation, on the exercise of the political powers of the State prior to that time, is not now a question. The question of jurisdiction relates to the time the act was passed, and its validity.

This act of incorporation was repugnant to the constitution of the United States, under which the territorial government was organized. It was repugnant to the laws of Congress which formed that organization. It was an exercise of sovereignty incompatible with the sovereignty of the Union, in all its legal forms. And this act was declared by the Supreme Court of Michigan to be valid. I cannot conceive of a clearer case for jurisdiction.

In *Holmes* v. *Jennison*, 14 Pet., 540, the governor, in the exercise of a supposed power in the State, directed a fugitive from justice, claimed by the Canadian government, to be

delivered up; and the Supreme Court of that State, having brought the accused before it by a *habeas corpus*, remanded him to custody. This court, under the twenty-fifth section, took jurisdiction of the case, on the ground, in the language of the chief justice, "that the exercise of the power in question by the States is totally contradictory and repugnant to the power granted to the United States." And again he says,— "All the powers which relate to our foreign intercourse are confided to the general government." "If there was no prohibition to the States, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."

Now, in the case of Holmes, there was no power to surrender the fugitive in the federal government, as such power was not conferred by the laws of nations, but must be given by a treaty, or by reciprocal legislation. Still, as the foreign intercourse was vested in the general government, no part of it could be exercised by the States without conflicting with the federal power. Now the conflict of power, in the case under consideration, is clear and direct. *The two [*382 sovereignties of the State and the territorial government cannot exist at the same time within the same limits. The territorial government exists in full vigor until it is abolished by the admission of the State. There was, then, a direct and irreconcilable repugnance in the exercise of the sovereign power by the State, so long as the federal authority was exercised in the Territory.

Mr. Justice WAYNE concurred, that this court had not jurisdiction in this case, but did not assent to any conclusions in the opinion on the merits in this controversy involving the political relations of Michigan with the United States before Michigan was admitted into the Union.

Mr. Justice NELSON concurred with the opinion of Mr. Justice McLean.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Michigan, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.