by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

Malinda Fox *v.* The State of Ohio.

The power conferred upon Congress by the fifth and sixth clauses of the eighth section of the first article of the constitution of the United States, viz.: —"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures"; "To provide for the punishment of counterfeiting the securities and current coin of the United States";—does not prevent a State from passing a law to punish the offence of circulating counterfeit coin of the United States.[1]

[1] Followed. *Moore* v. *Illinois*, 14 How., 20 (but see Id., 21). Cited. *Passenger Cases*, 7 How., 556. See *Ex parte Houghton*, 8 Fed. Rep., 898, 902; s. c., 7 Id., 659; *United States* v. *Yates*, 6 Id., 864; *Dashing* v. *State*, 78 Ind., 358; *State* v. *Oleson*, 26 Minn., 517.

United States v. *Field*, 16 Fed. Rep., 778; *Brown* v. *Evans*, 8 Sawy., 493.

In *Fox* v. *State*, the Court arrived at the conclusion that the State punished one offence, and the United States another, and therefore there was no conflict of authority. Other cases are of the same kind. *Commonwealth* v. *Tenney*, 97 Mass., 50. Other cases are put upon the express ground that the Act of Congress expressly permitted State courts to punish the crime for which the criminal was prosecuted. *Commonwealth* v. *Fuller*, 8 Metc. (Mass.), 313. The permit was held constitutional. In several other State courts parties were indicted for offences relating to the current coin of the United States, and no exception was taken to the jurisdiction. *Peek* v. *State*, 2 Humph. (Tenn.), 78; *Rosnick* v. *Commonwealth*, 2 Va. Cas., 356; *State* v. *Collins*, 2 Hawks (N. C.), 191; *State* v. *Bowman*, 6 Vt., 594; *Miller* v. *People*, 2 Scam. (Ill.), 233; *Rouse* v. *State*, 4 Ga., 136. Some cases expressly put it that such acts are unconstitutional because Congress having express power to punish counterfeiting, no State can legislate upon the subject. *Mattison* v. *State*, 3 Mo., 421. Other cases hold that it is an offence against two jurisdictions, and each may punish it. *Chess* v. *State*, 1 Blackf. (Ind.), 198; that the power to punish such an offence is inherent in the State, to protect her citizens. *State* v. *Tutt*, 2 Bail. (S. C.), 44; *State* v. *Antonio*, 2 S. C. (O. S.), 776; *People* v. *White*, 34 Cal., 183; *State* v. *McPherson*, 9 Iowa, 53; *Jett* v. *Commonwealth*, 18 Gratt. (Va.), 933; *State* v. *Brown*, 2 Oreg., 221; *Sizemore* v. *State*, 3 Head (Tenn.), 26; *State* v. *Antonio*, 3 Brev. (S. C.), 562; *Sutton* v. *State*, 9 Ohio, 133; *State* v. *Pitman*, 1 Brev. (S. C.), 32; *Hendrick* v. *Commonwealth*, 5 Leigh (Va.), 707; *State* v. *Rankin*, 4 Coldw. (Tenn.), 145; *Long* v. *State*, 10 Tex. App., 186; *State* v. *Randall*, 1 Aik. (Vt.), 89; *Darling* v. *State*, 78 Ind., 557. And perhaps a party who steals money out of mail bags may be punished under the United States laws, for violating the postal laws, and under the State laws, for theft. *United States* v. *Amy*, 14 Md., 149, *n.*, 152.

The indictment must charge the offence as one against the State, and not against the United States. *Harlan* v. *People*, 1 Doug. (Mich.), 207. In Massachusetts it is held that, since the passage of the Act of Congress,

*The two offences of counterfeiting the coin, and passing counterfeit money, are essentially different in their characters. The former is an offence directly against the government, by which individuals may be affected; the latter is a private wrong, by which the government may be remotely, if it will in any degree, be reached.[2] [*411

The prohibitions contained in the amendments to the constitution were intended to be restrictions upon the federal government, and not upon the authority of the States.[3]

punishing national bank officers for embezzlement, an accessory to such embezzlement by an officer of a national bank cannot be indicted for a felony under the State law, even though he is not indictable in the federal court. *Commonwealth* v. *Felton*, 101 Mass., 204. So in the United States District Court of Vermont it was decided that the federal courts had exclusive jurisdiction over the offence of passing counterfeit national bank bills, and where a person was imprisoned by a State court upon a charge of such an offence, a writ of *habeas corpus* would be issued to release him. *Ex parte Houghton*, 2 Crim. L. Mag., 759; see *Commonwealth* v. *Ketner*, 1 Id., 227; *Luberg* v. *Commonwealth*, Id., 779. A State court cannot punish one violating the United States laws, as to perjury. *People* v. *Kelly*, 38 Cal., 145; *State* v. *Adorne*, 4 Blackf. (Ind.), 147; *State* v. *Pike*, 15 N. H., 83. The case of *People* v. *Kelly* was one of perjury committed to obtain a land patent, and it was held that the offence could not be punished in the State courts. To the same effect are other cases. *People* v. *Sweetmore*, 3 Park. Cr., 358; *Sherwood* v. *Burns*, 58 Ind., 502. *Contra*, *Rump* v. *Commonwealth*, 6 Carey (Pa.), 475.

[2] EXPLAINED. *United States* v. *Marigold*, 9 How., 568. CITED. *Coleman* v. *Tennessee*, 7 Otto, 537, 539; *Tennessee* v. *Davis*, 10 Id., 278; *Ex parte Siebold*, Id., 390.

[3] FOLLOWED. *Twitchell* v. *Commonwealth*, 7 Wall., 327. CITED. *Smith* v. *Maryland*, 18 How., 76; *Withers* v. *Buckley*, 20 Id., 91; *Edwards* v. *Elliott*, 22 Wall., 557; *United States* v. *Cruikshank*, 2 Otto, 552. The clause in the Constitution of the United States that "no person shall be . . . subject, for the same offence, to be twice put in jeopardy of life or limb," bind only the United States, and does not extend to the several States. *United States* v. *Keen*, 1 McLean, 429; *United States* v. *Gibert*, 2 Sumn., 19; *Jackson* v. *Wood*, 2 Cow. (N. Y.), 819; *Livingston* v. *Mayor of New York*, 8 Wend. (N. Y.), 85; *Colt* v. *Eves*, 12 Conn., 243; *Baker* v. *People*, 3 Cow. (N. Y.), 686; *Hoffman* v. *State*, 20 Md., 425; *Contra*, *State* v. *Moor*, Walk. (Miss.), 134; *People* v. *Goodwin*, 18 Johns. (N. Y.), 187; *Commonwealth* v. *Purchase*, 2 Pick. (Mass.), 521.

The law also is well settled that the municipality may punish for the same act that is an offence both against a State law and a town or city ordinance. The proceeding under the ordinance is regarded as a civil suit to enforce a penalty, although the judgment rendered is enforced by imprisonment. When the town or city prosecutes the offender, it is for an offence against the town or city only, and not against the State. *Rogers* v. *Jones*, 1 Wend. (N. Y.), 261; *Mayor* v. *Allaire*, 14 Ala., 400; *Mayor* v. *Rowe*, 8 Ala., 515; *Inhabitants &c.* v. *Mullins*, 13 Ala., 341; *Mayor* v. *Hyatt*, 3 E. D. Smith (N. Y.), 156; *People* v. *Stevens*, 13 Wend. (N. Y.), 341; *Blatchley* v. *Moses*, 15 Wend. (N. Y.), 215; *Amboy* v. *Sleeper*, 31 Ill., 499; *State* v. *Crummey*, 17 Minn., 72; *State* v. *Oleson*, 26 Minn., 507; *Levy* v. *State*, 6 Ind., 281; *Brownville* v. *Cook*, 4 Neb., 101; *Greenwood* v. *State*, 6 Baxt. (Tenn.), 567; s. c., 32 Am. Rep., 539; *St. Louis* v. *Bentz*, 11 Mo., 61; *State* v. *Gordon*, 60 Mo., 383; *State* v. *Ludwig*, 21 Minn., 202; *Shaffer* v. *Mumma*, 17 Md., 331; Bloomfield v. Trimble, 54 Iowa, 399; s. c., 37 Am. Rep., 212; *Fennell* v. *Bay City*, 36 Mich., 186; *Chicago Packing &c. Co.* v. *Chicago*, 88 Ill., 221; s. c., 30 Am. Rep., 545; *McRea* v. *Americus*, 59 Ga., 168; *Hamilton* v. *State*, 3 Tex. App., 643. *Contra*, *Savannah* v. *Hussey*, 21 Ga., 80. See Mr. Thompson's Essay on "Once in Jeopardy," 4 Crim. L. Mag., 487.

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 Ohio.

It was an indictment, in the State court, against Malinda Fox, for "passing and uttering a certain piece of false, base, and counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin currently passing in the State of Ohio, called a dollar."

Being convicted, the case was taken by her, upon writ of error, to the court in bank of the State, its highest judicial tribunal; and at the December term, 1842, of that court, the judgment of the Common Pleas was affirmed.

From this decision of the court in bank the plaintiff in error brought the case to this court, and claimed a reversal of the judgment, on the ground that the courts of that State had no jurisdiction of the offence charged in the indictment, but that the jurisdiction belongs exclusively to the courts of the United States.

The cause was argued by *Mr. Convers*, for the plaintiff in error, and *Mr. Stanberry* (Attorney-General of Ohio), for the State.

The opening and closing arguments of *Mr. Convers*, for the plaintiff in error, have been consolidated, and will be found after that of *Mr. Stanberry*.

Mr. Stanberry made the following points:—

1. That the offence charged in the indictment is not for uttering any counterfeit of the coin of the United States, or of any foreign coin regulated by Congress, or made current money of the United States.

2. That, if it should be held that the coin so passed was a counterfeit of any of the current coin of the United States, that for the mere offence of uttering there is no jurisdiction in the courts of the United States, but it exclusively belongs to the courts of the State. 1 East, P. C., 162; 1 Hale, P. C., 19, 188; 1 Hawk. P. C., 20.

3. That if not exclusive, the jurisdiction of State courts is concurrent with those of the United States. Federalist, No. 32; *Houston* v. *Moore*, 5 Wheat., 1, 31; *State* v. *Antonio*, 3 Wheel. Cr. Cas., 508; *State* v. *Tutt*, 2 Bail. (S. C.), 44; *Chess* v. *State*, 1 Blackf. (Ind.), 198; *White* v. *Commonwealth*, 4 Binn. (Pa.), 418.

1. The first question which arises upon the transcript is as to the *character of the piece of coin which the plaintiff in error has been convicted of passing. It seems

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to be taken for granted by her counsel, that it was a counterfeit of some piece of coin which, under the laws of Congress, has been made current money of the United States. The only description given is, that it was a piece of coin in the similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar.

The silver coins which have been made current by acts of Congress are the following:—

All silver coins of the coinage of the mint of the United States; Spanish milled dollars; Spanish pillar dollars; French crowns; the five-franc pieces; and the dollars of Mexico, Peru, and Bolivia.

The Congress of the United States, in the exercise of the power to coin money and regulate its value and the value of foreign coin, has not seen fit to regulate the value of any other foreign silver coins than those above mentioned. The power to punish offences respecting the coin, vested in Congress by the sixth clause of the eighth section of the first article of the constitution of the United States, is limited to the counterfeiting of the current coin of the United States. No coin can be said to be current coin of the United States but that which has been made so by actual coinage at the mint, or by some act of Congress regulating its value.

Here, then, is a power given, in the most unlimited terms, to regulate the value of all foreign coins, and to make them current money of the Union; and a further power to punish the counterfeiting of the coin so made current. Obviously the power of punishment, in other words, the jurisdiction over offences against the coin, is limited to the currency so established. The power to punish arises out of the exercise of the power to regulate. Does it then appear that the piece of coin, which the plaintiff in error was convicted of passing, was a counterfeit of any of the coins so made current by Congress?

There is no term of the description given of this coin which can be relied upon as bringing it within the coin made current by Congress, except the words "good and legal silver coin." Now, if that description of the coin can only refer to the national currency, and could only be satisfied by proof that the counterfeit dollar was in the similitude of an American, Mexican, Peruvian, or Bolivian dollar, all which are established by act of Congress, then it would be sufficient.

No such limited signification can be given to these words. If the averment was "good and legal silver coin of the United States," it would be different; but it is "good and legal silver coin, currently passing in the State of Ohio."

But there is a certain test of the meaning of this descriptive allegation, and that is, to inquire whether a conviction
*413] under this *indictment could have been had, upon proof of passing a counterfeit in the similitude of any of the foreign silver coins of the denomination of a dollar not made part of our national currency by act of Congress.

In order to this, we must look at the statute of Ohio creating the offence, as well as at the indictment.

The words of the statute are:—"That if any person shall counterfeit any of the coins of gold, silver, or copper, currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," &c. 29 Ohio St., 136.

There can be no question that this provision covers every description of coin, domestic and foreign, whether made current by act of Congress or not. Take, then, the case of passing a counterfeit of a German dollar, which is a description of coin not made current by act of Congress, and what difficulty would be in the way of a conviction under this statute and indictment.

It may be claimed, by the plaintiff in error, that the words "good and legal silver coin currently passing in the State of Ohio," though not used in the statute, yet make a descriptive averment of some coin made legal or current by act of Congress. If that be so, there is no question that the averment, though unnecessarily made, must be proved, upon the familiar doctrine that all merely descriptive allegations become material.

Now, these words, "good and legal coin," are not found in that clause of the constitution which gives to Congress the power to regulate the coin, or in the other clause which provides for the punishment of counterfeiting; but the descriptive words there used are "current coin of the United States." These last are the operative words which distinguish the national coin from the mass of the currency.

It may be argued, that *legal coin* can only mean current coin of the United States, as none other is legal. That is true in one sense. If we were now engaged in the construction of a contract to pay money, in which the payment was stipulated to be made in good and legal coin, the meaning undoubtedly would be current coin of the United States; for it is only that sort of coin which can discharge a contract to pay money, or which is a legal tender in payment. But we are not now looking for the meaning of these words as used in a contract, but in an indictment for passing counterfeit

money. Coin, which may not be legal for the payment of a debt, may yet be legal as a currency; although not regulated in value by act of Congress, it is yet lawful as a circulation. It seems to me there can be no question that the latter is the true sense in which these words are used in the indictment, especially when we take the whole sentence,—"good and legal silver coin currently passing in the State of Ohio"; and that, instead of being descriptive of a particular coinage, they are merely descriptive of the genuineness *and lawfulness of the original which has been counterfeited, and [*414 are put in opposition to the other words used in the indictment,—"forged, base, and counterfeit,"—to express exactly the contrary.

2. The constitution authorizes Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States."

The plaintiff in error has been convicted of passing a counterfeit dollar. I claim, that though it be admitted this coin was of the current coin of the United States, yet the offence of uttering or passing it is not an offence cognizable by the United States.

This leads to a consideration of the meaning of the term "counterfeiting," as used in the constitution. It is claimed for the plaintiff in error that it is a generic term, and includes every offence in relation to the coin.

This clause does not carry with it a power to define and punish the offence, as is the case in the clause in relation to piracies and felonies committed on the high seas, but is strictly limited to the punishment of an offence named and designated. The consequence is, that, in the absence of any grant of power to define or enlarge, the jurisdiction of the United States is to be confined to the very offence so named,—the offence of counterfeiting. What, then, is the meaning of this term, as used in the constitution? It is nowhere defined in the constitution itself, so that we are to find its meaning elsewhere. At the time the constitution was framed, the offence of counterfeiting was well known and certainly defined; and in that country from which it was adopted, it stood among the class of crimes which amounted to high treason.

It was never understood that the offence of counterfeiting the coin of England, and the offence of passing coin so counterfeited, were the same. On the contrary, they were carefully distinguished and defined; the one amounting to treason, the other to simple felony or misdemeanour.

Speaking of the English statutes against this species of treason, Mr. East, in his P. C., vol. 1, p. 162, says:—"It is

first to be seen what is a counterfeiting within these statutes. There must be an actual counterfeiting, either by the party himself or by those with whom he conspires. A mere attempt to counterfeit, such as preparing the materials or fashioning the metal, is not sufficient, except in those particular instances which have been so declared by statute."

So, too, in Hale, P. C. (p. 19):—"What shall be a counterfeiting? Clipping, washing, and filing of the money, for lucre or gain, any of the proper money of the realm, or of other realms, allowed to be current by proclamation, not within this statute, but made high treason by Stat. 5 Eliz., but no corruption of blood or loss of dower. Impairing, diminishing, falsifying, scaling, or lightening the proper money
*415] of this realm, or the money of any *other realm made current by proclamation, their counsellors, consenters, and aiders, within neither of the former, but made treason by the statute of 18 Eliz., but without corruption of blood or loss of dower."

Several of these modes of debasing the coin were not understood to be within the common law offence of counterfeiting; for it is said by Hale, in reference to the statute against clipping the coin, that it was "introductive of new laws."

1 Hawk. P. C., 20, is yet closer to the point. "High treason, respecting the coin, is either with respect to counterfeiting the king's coin, or with respect to bringing false money into the realm. As to the first branch of counterfeiting, it is declared, by 25 Ed. 3, c. 2, 'that, if a man counterfeit the king's money, he shall be guilty of high treason.' As to what degree of counterfeiting will amount to high treason, it is said that those who coin money without the king's authority are guilty of high treason within this act, whether they utter it or not; and that those who have the king's authority to coin money are guilty of high treason if they make it of baser alloy than they ought; and that those also are guilty of the same crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, &c., are not within the statute. But it seems that those who barely utter false money made within this realm, knowing it to be false, are neither guilty of high treason, nor of a misprision thereof, but only of a high misprision."

Further, in 1 East, P. C., p. 178, under the title, "Receiving, uttering, or tendering of counterfeit coin," it is said:—"These may amount to different degrees of offence, according to the circumstances. If A. counterfeit the gold or silver coin current, and by agreement before such counterfeiting B. is to receive and vent the money, he is an aider and abettor

to the act itself of counterfeiting, and consequently a principal traitor within the law." "But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanour, before the statute 15 Geo. 2, hereafter mentioned; yet, if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treason, and therefore a misprision of the same. In like manner, I have before shown that the statutes against the importation of false money do not extend to the receivers, not having taken any part in the bringing in of such money."

These authorities show conclusively that the term "counterfeiting" has had a long and well-established meaning; that it is confined to the act of making or debasing; that those only are guilty who are engaged in the act, either as principals or abettors; and that the mere uttering of the false money so manufactured by another belongs to another and lower class of offences.

*Now, how can it be said that this term is used in the constitution in any new or enlarged sense, as *nomen generalissimum*, including the passing, vending, receiving, and unlawful possession of false coin, as well as the making and unlawful possession of the instruments for counterfeiting, and all the other like offences which are found in the criminal laws of the several States? If we give this term its meaning at the common law, or its more enlarged signification in the English statutes in existence at the adoption of the constitution, it will not include any of these lesser offences. [*416

It is certainly to be understood that the learned men who framed the constitution were well advised of the true meaning of this term, and if they intended to use it in any new sense, that intention would have been expressed.

But I think it quite clear, not only from the use of a well-known term, but from the nature of the thing, that it was used expressly according to that meaning.

This criminal jurisdiction was given to the United States in aid of its duty to coin money and regulate its value.

The coining and legitimation of money are prerogatives of the sovereign power. (1 Hale, P. C., 188.) The laws of England vest this power in the king; and, to secure it, they declare that the offence of counterfeiting alone shall amount to high treason. It was not found expedient or necessary to guard this royal prerogative by making any lesser offence touching the coin a matter of *lese majestie*.

The constitution of the United States very wisely vests the same prerogative in the federal government; and, follow-

ing the English laws, it vests along with the prerogative the power to punish the single offence, which in England was found to be the most dangerous invasion of the power. The prerogative is to coin good money, and regulate its value, and the offence is to coin bad money, and impair the value of the good. The power to punish is simply given in aid of the prerogative, and goes no further than the offence which directly and necessarily impairs it.

3. If the court should be against the defendant in error upon the foregoing points, we are next to consider the more important question, whether the States have jurisdiction over offences against the current coin of the United States.

Such a jurisdiction, if not indispensable, is to the last degree useful and expedient. And it has been exercised almost, if not quite, universally by the different States which compose the Union. The rightfulness of this jurisdiction is now, for the first time, questioned in this court. Certainly it presents a question of the first magnitude, for no one can foresee what may be the consequences of taking from the States the power of self-protection, which they have so long exercised, against a class of criminals swarming over the entire Union, and against a species of crime which, more than any other, affects the common business of the people.

*417] *The argument against the exercise of this jurisdiction by the States proceeds upon the ground that it exclusively belongs to the courts of the United States, and that it arises out of the provisions of the constitution giving to Congress the power to coin money, regulate its value and the value of foreign coin, and to punish the counterfeiting of the current coin of the United States; and out of the exercise of these powers by Congress in the enactment of laws regulating the coin, and providing punishment for the offence of counterfeiting.

The question is simply one of criminal jurisdiction over an offence cognizable in every State of the Union, either at the common law or by virtue of State legislation.

It is clear, in the first place, that this branch of criminal jurisdiction belonged to the States, respectively, before the adoption of the constitution; and that it continues with them, unless it has been wholly surrendered to the federal government. It is also clear, that there is no express prohibition in the constitution to the exercise of this jurisdiction by the States. The exclusion of State jurisdiction is argued from the fact that the constitution vests a jurisdiction over this offence in the United States, by authorizing Congress to pass laws for its punishment, which jurisdiction, it is said,

must necessarily be exclusive. We deny this inference, and claim that the jurisdiction may be concurrent.

The mere grant of a power in the constitution has never been held to divest the States of the power so granted. There must be something more; either a prohibition, a grant in exclusive terms, or a manifest incompatibility.

Take, for instance, the power to levy taxes. This is granted in the constitution, but no one has ever supposed that thereby the States divested themselves of this power. So, too, in the clause granting to Congress the power to coin money; inasmuch as this power existed in the States as independent sovereignties, it would have remained in them, notwithstanding the grant, if, by a separate clause, it had not been expressly prohibited to them.

This express prohibition against the coinage of money by the States, which follows the grant of the power in the constitution, affords a cogent argument against any implied prohibition of jurisdiction over offences against the coin. The prohibition was not left to inference, but was expressly stated. It is, therefore, a legitimate argument against a like prohibition of the criminal jurisdiction, that it is not also expressed.

There are undoubtedly powers granted in the constitution which are necessarily exclusive, though not expressly prohibited to the States. The power to establish uniform rules for naturalization, to regulate the value of foreign coin, to fix the standard of weights and measures,—all these are necessarily exclusive; for there could be no regulation, uniformity, or fixed standard, if each State were allowed to legislate upon these subjects.

*In respect of such powers as are not necessarily exclusive, but which it was deemed expedient to withdraw altogether from State jurisdiction, it will be found that an express and cautious prohibition accompanies the grant. This is so as to the power to lay duties, to coin money, to enter into treaties, to declare war, to emit bills of credit, and to maintain armies or navies in time of peace. It can be said of nearly all those powers, with infinitely more force than as to the mere power of criminal jurisdiction now in question, that they are essentially of a national character, and that the exclusion of State authority might have been left to inference. Why, then, if a prohibition of criminal jurisdiction was intended, was it not also expressed? Why expressly prohibit, with respect to powers of such a character, and omit the prohibition as to a power much less obvious to a prohibition by implication? [*418

In the absence, then, of exclusive grant and express prohi-

bition, the plaintiff in error has no ground to stand upon, unless she makes out a case of repugnancy or incompatibility.

I think it is quite evident that, if this power is lost to the States on this doctrine of incompatibility, the loss is altogether fortuitous, and not the result of intention; and that, consequently, such a loss ought not to obtain, except from the most controlling necessity. Indeed, that is true of all the exclusive powers claimed for the federal government on this ground.

The true doctrine is found in the thirty-second number of the Federalist, and is stated as follows:—

"An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to Congress. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases; where the constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another, which might appear to resemble it, but which would, in fact, be essentially different; I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction, or repugnancy, in point of constitutional authority."

It very clearly appears, from this exposition of the powers *419] of the *general government and of the States, that there may be an exercise of concurrent jurisdiction in the case of a granted power; that the mere grant works no exclusion of State sovereignty, even where its concurrent exercise may lead to occasional interference in the policy of either government, and that nothing short of absolute and total repugnancy and contradiction will suffice.

And now what is there in the exercise of this criminal jurisdiction by the States, which makes it so absolutely repugnant to the exercise of the same jurisdiction by the general gov-

ernment? I have heard nothing urged which amounts to more than an argument of expediency or convenience, or that shows any thing beyond a liability to "occasional interference."

And, in truth, these arguments from inconvenience are more fanciful than real; for the experience of forty years, during which there has been a concurrent exercise of this jurisdiction, has not furnished a solitary instance of collision or practical inconvenience.

It is said the criminal may be subjected to a double prosecution by this concurrent jurisdiction, and that the conviction or acquittal in one tribunal will not bar a prosecution in the other. This admits of serious question. The doctrine of criminal proceedings and sentences, between governments that are essentially foreign to, and independent of, each other cannot apply, in full force, between the United States and one of the States, in respect of an offence committed within the limits of one of the States, and which is prohibited as well by the laws of the Union and of the particular State.

It is said by Mr. Justice Washington, in *Houston* v. *Moore*, 5 Wheat., 31, that, in cases of concurrent criminal jurisdiction between the general government and the States, the sentence of either court may be pleaded in bar in the other, in like manner as the judgment in a civil suit. Crimes have reference to place, and are necessarily confined to territorial limits. It follows from this that a crime committed in one State cannot be cognizable in another, either for the purposes of trial and punishment, and that the result of the prosecution, either of acquittal or conviction, is necessarily confined to the territorial limits of the State. It has even been held that a conviction for an infamous offence in one of the States, which works a personal disqualification in the State where the conviction is had, is of no force in another State. *Commonwealth* v. *Green*, 17 Mass., 515.

The doctrine, it seems to me, does not apply to an offence committed in the body of a State, which is at the same time an infraction of federal and State law. It is not as to either, in regard to territorial limits, a foreign offence, except when committed in some fort, arsenal, dock-yard, or other place lying within any State over which the sole jurisdiction has been surrendered by the State to the general government. Such places no longer belong to the States, *and are as essentially foreign to them, for all purposes of local [*420
jurisdiction, as if they were situate in another State.

The objection founded on the power of pardon vested in the two executives is also made to the concurrent jurisdic-

tion. It is said, by the exercise of this power either government may obstruct the due administration of the criminal laws of the other. This is not to be intended, even if it should be granted that a pardon by either would expiate the offence against both. Arguments founded on a supposed abuse of power are most unsatisfactory. In point of fact, no such abuse has yet arisen, nor is it likely to arise; for both governments are deeply concerned in the prevention of this sort of crime, and the State much more than the federal government.

But if it were admitted that the concurrent jurisdiction involved a liability to a double prosecution, or that there was probability of interference by the exercise of the pardoning power, these results would not divest the States of this portion of their sovereignty. We must look for that in the constitution,—in the terms of the grant; and if the surrender is not found there, it is not to be taken from the States, merely on the ground of occasional interference or collision.

The double prosecution never can extend to cases of life and limb, for that is forbidden, as well to the States as to the general government, by the fifth article of the amendments to the constitution. There is no constitutional difficulty in the way of a double prosecution, involving merely imprisonment or fine, or any other punishment short of life or limb. Indeed, there are many cases of admitted concurrent jurisdiction which lead to this result. Such is the case of a soldier of the United States who commits a crime in the body of a State, and not within a place over which the United States possess exclusive jurisdiction. He is unquestionably liable to prosecution and punishment, as well in the State courts as before a court-martial of the United States. So, too, the same offence may be punished by impeachment by the United States, and prosecution in the local criminal tribunals.

Indeed, in the ordinary administration of criminal law by the respective States, it may happen that what at the common law is considered, and is in fact, but one offence, may be punished in two States. This is so in respect of goods stolen in one State and carried into another. Very many of the States take jurisdiction of the offence, by reason of the mere asportation of the goods into their territory, and not one of them allows the plea of acquittal or conviction of the larceny in the State where the theft was committed, except, perhaps, the State of New York.

It is not pretended, on the part of the plaintiff in error, that there has been any decision of the question at bar by

this court. Reliance is had upon a solitary decision by the Supreme Court of one of the States, in which State jurisdiction has been denied. This is the case of *Mattison* v. *Missouri*, 3 Mo., 421.

*That case, instead of establishing a rule, stands as a remarkable exception to the universal practice of the courts of all the other States. If it were necessary to say more, it might be added, that the force of its authority is weakened by a strong dissenting opinion of one of the judges, and that it does not appear to have been followed, or at all relied upon, in a subsequent case before the same court. *State* v. *Shoemaker*, 7 Mo., 177. [*421

In most of the States, this branch of concurrent jurisdiction has constantly been exercised without question, and in those States in which it has been drawn into question the decisions have fully sustained the jurisdiction. *State* v. *Antonio*, 3 Wheel. C. C., 508; *State* v. *Tutt*, 2 Bail. (S. C.), 44; *Chess* v. *State*, 1 Blackf. (Ind.), 198; *White* v. *Commonwealth*, 4 Binn. (Pa.), 418.

Another argument in favor of concurrent criminal jurisdiction is found in the fact, that in every general law passed by Congress on the subject of crimes, this power in the States has been recognized by a provision very similar to that contained in the twenty-sixth section of the act now in force. That section is in these words:—"That nothing in this act contained shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by this act." 4 Stat. at L., 121.

I admit that Congress cannot confer jurisdiction upon the State courts, and that this provision could not give the power if it be surrendered in the constitution. It is not in that view that this section helps out the state jurisdiction, but merely as a long-continued exposition of the opinion of Congress that such jurisdiction exists, and has not been surrendered.

Furthermore, this section quite overcomes any argument to be derived from the eleventh section of the Judiciary Act, which provides, that the Circuit Courts of the United States shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act, or the laws of the United States, shall otherwise provide. 1 Stat. at L., 78.

It is claimed for the plaintiff in error, that this provision in favor of State jurisdiction ought to be limited to a jurisdiction under the laws of the States in force at the time of its enactment; and as the law of Ohio, under which this

prosecution was had, has been enacted subsequently, it cannot be helped by the provision.

The case of the *United States* v. *Paul*, 6 Pet., 141, is relied upon as establishing this distinction.

That case was a prosecution in the Circuit Court of the United States, for an offence committed at West Point, a place within the exclusive jurisdiction of the United States. No question of concurrent jurisdiction could arise, for in such places the jurisdiction of the United States is exclusive. The
*422] prosecution was for an *offence not defined in the criminal code of the United States, and was had under the provisions of the third section of the act of Congress of March 3, 1825, which provides, that all crimes committed in places within the exclusive jurisdiction of the United States, which crimes are not defined by any law of the United States, shall be punished in the same manner in which such crimes are punished by the laws of the particular State. The offence was one not made punishable by the laws of New York when the act of 1825 was passed, and the only question was, whether the jurisdiction of the United States should be limited to such offences as were then defined by the State legislation. This court held, that the jurisdiction should be so limited.

The distinction between the question there made and the one at bar is obvious. The third section of the act of 1825 adopted the entire criminal code of the States, as to all crimes other than those specifically enumerated in the body of the act. This was a code of criminal law for the regulation of all persons within the places under the exclusive jurisdiction of the United States, and it was precisely equivalent to an enactment by Congress of every offence then constituting the criminal codes of the States. No laws or offences were adopted into this code of the United States but those then in existence. To bring a subsequent State law or a new offence into this code would require a further adoption, or a new enactment by Congress. It could not otherwise be made the law for the exclusive place, for it would work the greatest injustice to persons within such place to make them liable to new offences, created by a foreign jurisdiction, not in any way provided for or established by the laws under which they lived.

Now, with regard to the provision for concurrent jurisdiction by State courts, under the twenty-sixth section, there is no reason for a limitation to such laws as were in force at the time of the passage of the act. The subsequent laws could only operate upon persons within the jurisdiction in which they were enacted, and bound in every sense to obey them.

The plaintiff in error also relies upon the case of *Prig* v. *Pennsylvania*, 16 Pet., 539. The doctrine declared in that case is, that, as to fugitives from labor, the jurisdiction of the United States is exclusive, and that no State can exercise any jurisdiction even favorable to the right secured by the constitution.

There is perhaps nothing in the clause of the constitution upon that subject which amounts to an express exclusion of State jurisdiction, and yet the peculiar nature of the subject leads to that result. The reclaimation of fugitives is essentially a national subject, and matter of international law and treaty stipulations between independent sovereignties. It was therefore proper to provide for it in our constitution, and the provision is so made as to execute itself without the aid of any legislation. Besides, this provision is not so [*423 *much in the character of a grant, or surrender of power, as of a compromise or treaty between the States, securing to a portion of the States an important and delicate right against all subsequent interference. In this compromise the federal government is alone vested with all jurisdiction over the subject, and neither of the States can, by the exercise of any jurisdiction or power, change or impair the right so secured. It is wholly withdrawn from State sovereignty.

I have now considered the arguments for the plaintiff in error against the exercise of concurrent jurisdiction. They have been shown to be all founded in supposed inconvenience. In conclusion, I must ask the attention of the court to some of the consequences which must follow a denial of this jurisdiction.

The criminal code of the United States is made up of a few sections, and defines but a few offences. Except in places under the exclusive jurisdiction of the United States, it has a very limited operation; and as to such places, it adopts for their government the criminal code of the particular State in which they happen to be situate. It establishes no rules for criminal procedure, other than by some general adoption of the State laws and practice. There is no local magistracy in the several States appointed to take the initiative in prosecutions; and the courts of the United States, sitting in one place, and at long intervals, are badly accommodated to the administration of criminal law. Besides all this, the federal government does not possess a jail or penitentiary out of the District of Columbia or its Territories.

Now, to say nothing of other crimes, if it be held that the offence of counterfeiting includes the long list of crimes which

have relation to spurious coin, and that jurisdiction over all of them is wholly withdrawn from the States, any one can see that the consequences must be most disastrous. There is not a class of crime so common, nor a class of offenders so dexterous, and requiring so much a local vigilance. What speed could be made by the marshal of such a State as Ohio, and his deputy, the only executive officers in that State bound to act in arresting and bringing to justice these offenders, carrying on their business in the eighty counties of the State? If it be said that the State magistrates, sheriffs, and constables may act,—a matter by the way of grave doubt, especially as to judicial action,—yet no one pretends that they are bound to act; you relieve them from the obligation to act under State law the instant you oust the State jurisdiction.

And what is to be done with this class of criminals now convicted in State courts, and undergoing their punishment in the penitentiaries of the States? If this branch of jurisdiction does not belong to the States, their sentences are nullities, and all these felons must be released.

These are some of the arguments from inconvenience, from *424] a *denial of this salutary jurisdiction to the States; and they far outweigh all like arguments which have been urged for the plaintiff in error.

Mr. Convers, in reply, for the plaintiff in error.

The whole subject-matter of the coin—its creation, regulation, its protection—is vested exclusively in the federal government (Constitution of U. S., art. 1, §§ 8, 20). That the right to coin money is exclusively in Congress is conceded; for not only is the power to coin expressly granted by the constitution, but the exercise of the coining power by the States is expressly prohibited.

This exclusive power of creation would, of itself, upon all sound principles of construction, carry with it the right of regulating and of protecting the thing when created, even in the absence of express grant to regulate and protect. But as the right of coinage is one of the highest attributes of sovereignty, the constitution, for the purpose of shutting out all controversy between the federal and State governments touching so delicate and important a power, proceeds, not from the necessity of the thing, but *ex abundanti cautelâ*, to prohibit coining by the States,—preferring that the exclusive right of the federal government to this great prerogative power should not rest upon construction alone, however clear and necessary might be the implication in favor of its exclusive claim. The

prohibition against the exercise of this power by the States was therefore inserted in the constitution.

So with respect to the right to punish an injury to the coin of the United States,—the right to preserve it and make it subserve the great purpose of its creation,—this is a necessary incident to the power to create, and as the chief power is exclusive, so is this power to preserve the coin and make it available also exclusive; for the incident follows and partakes of the character of its principal. Notwithstanding this incidental power thus results, by necessary implication, as an exclusive power, it was prudent not to leave it to construction, clear as that is; but, in a matter of which the people were so jealous as of the exercise of criminal jurisdiction by the federal government, to declare in express terms the right to punish.

The legislative power over the subject being exclusive, it follows that the judicial power of the United States over the same thing is also exclusive. In all governments, the judicial is coextensive with the legislative power. They are coexistent and coessential elements of government. The courts of the States, therefore, have no jurisdiction over offences against the coin.

The constitution declares that the judicial power shall extend to "*all* cases arising under the constitution, laws, and treaties of the United States." This is a grant of exclusive jurisdiction. It extends to all cases arising under the laws of the United States. It *is clearly exclusive; for the [*425
constitution, after declaring that the judicial power shall extend to "all cases" of certain descriptions, and proceeding to provide for other cases, in which it is admitted the jurisdiction is concurrent, drops, *ex industriâ*, the word "all," and declares that it shall extend to "controversies between citizens of different States," &c.; thus leaving, in the cases last enumerated, concurrent jurisdiction with the States. The distinction upon which the constitution proceeds in this respect is a clear and intelligible one. Where the federal jurisdiction is made to depend upon the subject-matter, the constitution extends it to "all cases" growing out of such subject-matter, and makes it exclusive. Where it depends, not upon the subject-matter, but upon the character of the parties, it is simply declared to extend to "controversies" between certain parties, not to "*all* cases" or to "*all* controversies" between them, and the jurisdiction is not exclusive, but concurrent with a like jurisdiction in the State tribunals.

Now, it has repeatedly been decided that the State courts

cannot take jurisdiction of a prosecution for an offence against an act of Congress, or for the recovery of a penalty for the violation of any of the penal laws of the United States. *Commonwealth* v. *Feely*, 1 Va. Cas., 321; *Jackson* v. *Rose*, 2 Id., 34; *United States* v. *Lathrop*, 17 Johns. (N. Y.), 4; *Haney* v. *Sharp*, 1 Dana (Ky.), 442; *Eli* v. *Peck*, 7 Conn., 244; *Davison* v. *Champlin*, Id.; *State* v. *McBride*, 1 Rice (S. C.), 400; *Mathison* v. *Missouri*, 4 Mo., 421. From these authorities it follows, that Congress has no right to confer judicial power, touching its own proper legislation, upon State tribunals. They are not "ordained and established by Congress." Their judges are not amenable to Congress. They hold, in many of the States, by a different tenure of office from that declared by the federal constitution. The judicial power of the United States is declared to extend to all cases arising under the laws of the United States, and is expressly vested in the Supreme Court and such other tribunals as Congress may ordain and establish (art. 3, § 1).

It is true, that, in some of the cases just cited, it is said that the State tribunals, although not bound to take the jurisdiction tendered by Congress, yet may, if they see proper to do so, assume it. This cannot be. The question is one of power under the constitution, not of discretion.

Now, under the constitution, Congress has or has not the power to transfer jurisdiction to the courts of the States. If it have the power, then it is the duty of the States to receive and exercise the jurisdiction; for, in the peculiar relations subsisting between the general and State governments, the right on the part of Congress to transfer jurisdiction implies the corresponding duty on the part of the States to receive it. Right and duty, used in reference to the general and State
*426] governments, are correlative terms. If *it be not the duty of the States to take upon themselves the jurisdiction, when directed so to do by Congress, it is not the right of Congress to confer it.

This view of the subject accords with the contemporaneous construction of the constitution afforded by the eleventh section of the Judiciary Act of 1790 (1 Stat. at L., 78), which provides that "the Circuit Courts of the United States shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that act or the laws of the United States shall otherwise provide." The latter part of this provision has reference to the cases as to which that act or the laws of the United States may provide that some other court of the United States (not State court) shall have cognizance, instead of the Circuit

Court. It countenances no such thing as giving to the State tribunals cognizance of these crimes and offences.

The twenty-sixth section of the Crimes Act of March 3d, 1825 (4 Stat. at L., 122), relied upon by the defendant in error, is only a saving of jurisdiction to the States, under the laws thereof, over offences made punishable by that act. It does not profess to confer jurisdiction, but only to leave with the States any jurisdiction which, under their laws, they might rightfully have. That act assumed to exercise over the offences therein declared all the jurisdiction rightfully belonging to the United States, under the constitution and by the twenty-sixth section, to guard against encroaching upon the rights of the States.

But if this section of the act of 1825 did expressly provide that jurisdiction should be vested in State courts over offences made cognizable by that act, it would clearly be void; for, as already shown, Congress has no power to delegate judicial power to the State courts. If it be intended to authorize the State legislatures to make laws to be enforced in their own courts for the punishment of the same offences punishable by that act, Congress transcended its powers in thus attempting to assign to the States the power of legislation, which, by the constitution, is vested in Congress itself. The legislative power of Congress is not an assignable commodity. The federal government is not an original, but derivative government of delegated and limited, not original, powers. Its powers, both legislative and judicial, are vested in itself, to be exercised by itself,—not to be transferred to others,—*delegatus non est delegare.*

Whether, then, the saving in the 26th section of the act of 1825 were intended to apply only to the exercise of judicial power by the State court over the particular "offences made punishable by that act," where the laws of the States required their courts to take cognizance of offences against the laws of the United States, in cases where Congress so directs, or, what would be more objectionable, to authorize the States to legislate for the punishment of the identical offences made punishable by the act of Congress, and to enforce *such laws in the State forum, it is in either case [*427 alike unconstitutional and void.

But it is said, that, admitting that the power to punish the offence of counterfeiting is an exclusive power, being expressly granted to the United States, yet that the power to punish the passing of counterfeit coin does not belong to Congress, or if it possess such power at all, it holds it concurrently with the States. In support of this, it is urged

that whilst the constitution expressly invests Congress with power to punish the offence of counterfeiting, it is silent as to the right to punish the uttering of false coin.

Indeed, the argument of the counsel for the defendant in error goes to the extent of denying to the general government the right to punish at all the offence of passing counterfeit money. But the argument cannot be sustained. The power to punish the offence of uttering is essential to enable Congress to protect its coinage, and to make it available. The circulation of the base interferes with that of the genuine coin. It discredits it by casting suspicion upon it. The law of self-protection gives to Congress the right to provide against the uttering and passing of the counterfeit.

It is said, however, that technically there is a distinction between the crime of counterfeiting and uttering. That the former is of higher grade; that in England it is denounced as high treason, while the latter is regarded as a misdemeanour. But this was not so at common law. It is only in virtue of certain acts of Parliament, expressly declaring that counterfeiting should be regarded as treason against the crown, and punished as such,—leaving the kindred crimes of uttering, as all offences against the coin originally were, misdemeanours only. Blackstone, in his Commentaries (vol. 4, pp. 88, 89), says, that there is no foundation in reason for the distinction created by the British statutes.

From the fact, that, at the time of the adoption of the constitution, this distinction obtained in England, although only in virtue of statutes of that realm, and with no reason to justify it, the counsel for the defendant in error claims that the power given to Congress to punish "counterfeiting" must be taken as restricted to that which was declared high treason in England, and does not extend, therefore, to any of the offences which grow out of counterfeiting, and are necessarily incident to it.

This argument cannot be sustained. The reasoning by which it is attempted to support it is too artificial to be applied to such an instrument as the constitution,—the organic law of a great nation,—which deals only in generals, and cannot, from its nature, be expected to descend into details. The constitution having granted the power to punish the crime in chief, gives, as incidental to that, the right to punish all other crimes of like nature, growing out of the principal offence, and which are its necessary concomitants; —especially where, as in this instance, the grant is of power
*428] to punish *the higher grade of the like offence, for the greater power includes the less.

The term "counterfeiting," as used in the constitution, is *nomen generalissimum*,—the generic term for crimes debasing or imparing the coin. The passing of the spurious is an immediate and direct injury to the genuine coin, for it displaces it in the circulation, and discredits it by exciting distrust and suspicion. Indeed, it is only by the passing of the base that the genuine is injured. To what end is it, that the counterfeiting is prohibited and punished, but to prevent the counterfeit from getting into circulation,—to prevent its passing? The sole object of punishing the act of counterfeiting is to prevent the circulation and passing of the counterfeit, to the prejudice of the genuine.

The argument of the counsel for the defendant in error, while it concedes the power to punish the act of counterfeiting, in order to prevent the consequence which flows from it, —the passing and circulation of counterfeit coin,—would yet deny the power to punish for bringing about that very consequence itself,—the passing; for doing the very thing to prevent which the act of counterfeiting is itself made punishable.

However apposite the argument might be, on a question of criminal special pleading, which deals in technical refinement, it is wholly out of place when applied to constitutional construction.

Again; the ground upon which it is claimed that the States have power to punish offences against the coin of the United States is, that the powers belonging to the States prior to the adoption of the constitution are retained by them, unless prohibited by the constitution in express terms, or by necessary implication.

Now, if it were conceded that the exclusive right of punishing the passing of base coin was not vested in Congress by express grant, it would not follow that the States possessed that power,—because the States never, at any time, had the power of punishing offences against the coinage of the United States. They had no such original power before the constitution, because no such coinage was then in existence. They then had the power to punish counterfeiting of their own State coin, and of foreign coin. But the coin of the United States is not the coin of a State, but of the federal government. It is not a foreign coin; for in regard to the federal coin, the States are not foreign to each other, or to the United States,—all deriving their coin from the same source, the federal government.

A coin so peculiar in the relation which the States sustain to it as that of the United States coin was wholly unknown to

the original States. It is a new thing,—a creation of the constitution itself. It cannot, therefore, be said that the States, before the adoption of the constitution, were ever possessed of the right to punish offences against the federal coin, or de-
*429] structive of its end, *and that such power, not being taken away from the States by the constitution, remains to them, to be exercised as part of their original proper powers. This view of the question seems conclusive in favor of the exclusive power of the United States over the protection and preservation of its coin, including the derivative and secondary offence of passing, as well as the offence in chief of counterfeiting. Finally, it is claimed on behalf of the defendant in error, that if the United States possess the power to punish the uttering, it is only concurrent with a like power belonging to the States.

What has been already said shows, I think, conclusively, that the power of Congress to punish the crime of counterfeiting is exclusive; and as the power to punish the passing is derived from the same source, being necessarily incidental, that also is exclusive. The same reasoning that supports the claim of one to an exclusive character supports that of the other to a like exclusive character.

The difficulties and collisions which result from the concurrent exercise of power in either case are precisely the same. A slight consideration of the consequences which result from regarding the power to punish either the counterfeiting or the passing as concurrently vested in the federal and State governments, will conclusively show that no such concurrent power can exist.

Now, if the power be concurrent, a conviction in the State court is, on the one hand, a bar to a prosecution in the federal court, and *e converso*, a conviction in the federal court is a bar to a prosecution in the State court; or, on the other hand, such conviction in one court is not a bar to a prosecution in the other. The weight of authority is decidedly in favor of the doctrine, that a conviction in either court is a bar to a prosecution in the other. It has been repeatedly held that a man cannot be convicted and punished for two distinct felonies growing out of the same identical act, and that a former conviction or acquittal of an offence of one denomination is a bar to another prosecution for an offence of another and different denomination, founded upon the same act. 1 Green (N. J.), 362; 2 Hayw. (N. C.), 4; 2 Hawks (N. C.), 98; 2 Tyler (Vt.), 387; 2 Va. Cas., 139; 7 Conn., 54.

In regard to concurrent jurisdiction, it is also a universal

principle, wherever the common law is known, that, of the concurrent courts, the one which first takes jurisdiction acquires by that act the right to go on and exercise the jurisdiction throughout, to the exclusion of all other concurrent tribunals. The right to jurisdiction is concurrent; but when the exercise of the right once begins in any one of the concurrent courts, so that jurisdiction attaches to the particular case, the case then becomes one exclusively cognizable by that court, and the other tribunals cannot interfere. 16 Mass., 171; Id., 203; 3 Yerg. (Tenn.), 167; 2 Stew. & P. (Ala.), 9; 1 Hawks (N. C.), 78; Paine, 621.

*In *Antonio's case*, 3 Wheel. C. C., 508 (and also reported in 2 (N. Y.), 781), so strongly relied upon [*430 by the defendant in error to show the concurrent power of the State, it is said that a conviction in the State is a bar to a prosecution for the same act in the federal court. The same thing is said by Mr. Justice Washington, in *Huston* v. *Moore*, 5 Wheat., 31.

Now, if a prosecution in a State court is to be sustained under the twenty-sixth section of the act of Congress of 1825, it follows that Congress has the power to divest the courts of the United States of their jurisdiction over acts declared offences and made punishable by act of Congress, notwithstanding the constitution expressly declares that the judicial power in "all cases arising under the constitution, laws, and treaties of the United States" shall be vested in the courts of the United States. And Congress in the twentieth section of that act has expressly provided for punishing the crime of passing and uttering counterfeit coin,—the very crime of which the plaintiff in error was convicted in the State court. And not only so, but, if the conviction in the case now before the court be sustained, being a conviction under a statute of Ohio, passed in 1835, providing for the punishment of the same crime, Congress also parts with its proper power of legislation and transfers that to the legislatures of the States,—transfers a power given to Congress to be exercised by itself alone for the benefit of the people of the whole Union, and not to be delegated to other legislative bodies.

The principle that a State conviction is a bar to a federal prosecution, and that, where there is concurrent jurisdiction, the tribunal first taking jurisdiction afterwards holds that jurisdiction, and exercises it throughout, to the exclusion of all others, necessarily leads to this result. Both the legislative and judicial powers of the United States are thus rendered abortive. The States, by the agency of Congress

(whether the language of the act of Congress authorizing it be in terms imperative or permissive), are made to defeat the powers granted by the constitution to the general government.

But the evil does not stop here. The jurisdiction of the States, when a prosecution is once begun in their tribunals, is exclusive, as well to discharge the convict from punishment, as for inflicting it; and the pardoning power, in such case, becomes exclusively vested in the executive of the State. The President, then, has no right to pardon, or to refuse to pardon, although the offence consists of an act made punishable by Congress. The pardoning power vested in him by the constitution is by the action of the State governments, by the direction or with the consent of Congress, invaded. Congress has placed a case which properly belongs to him, under the constitution of the United States, beyond his reach.

Thus, upon this construction, not only are the functions *431] of the *legislative and judicial departments of the federal government taken from them, and vested in the States, but the President of the United States is stripped of his prerogative of executive clemency. Surely a doctrine leading to such results cannot be sustained; and there is no escape from it but to hold that a conviction in a State court is no bar to a prosecution in the courts of the United States. For, if the concurrent jurisdiction of the State courts do not become exclusive, upon a prosecution being commenced and carried on to conviction and punishment, it follows that neither a prosecution nor conviction in a State court can be a bar to a prosecution under the act of Congress in the federal courts; and that a person may be thus twice put in jeopardy, and twice punished, for the same offence, contrary to the fifth article of the amendments to the constitution of the United States, which declares that no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb."

If Congress merely permit the States to punish the offence, when it might prevent it, and afterwards punish the same act itself, it violates both the letter and spirit of this great safeguard of the citizen,—one which is also a fundamental principle of the common law. It has already pervaded its criminal jurisprudence. Indeed, even in civil cases the common law declares *nemo bis vexare pro eadem causâ.*

The constitution of Ohio contains a like prohibition against a double prosecution and double punishment; and yet, if the doctrine of the defendant in error be sustained, the plain-

tiff in error is liable, notwithstanding this double guarantee, to be twice prosecuted, twice convicted, and twice punished, for the same offence. These great constitutional provisions become a mere mockery. There is no escape from the alternative presented, between divesting the judicial, legislative, and executive departments of the federal government of their constitutional powers, and the double jeopardy and punishment, except to hold that the cognizance of the offence is exclusively vested in the general government.

It is suggested by the counsel for the defendant in error that the protection against the double jeopardy does not apply to this case, where the punishment is imprisonment only, the language of the fifth article of the amendment to the constitution being "twice put in jeopardy of life or limb." He seems to think that it must be a case of actual, total loss or destruction of limb, to come within the constitutional protection. This is clearly a mistake. That it extends to cases where the punishment was total loss or destruction of limb is true, although there were but very few cases of such punishment known to the common law at any time, even in its earliest and most barbarous periods; and I believe none at all when the constitution was adopted. But the jeopardy of limb was not confined to cases of actual dismemberment. It is a common law *term, and extends to all cases where punishment inflicted any injury upon limb, and [*432 of course to confinement or restraint of the freedom of limb, whether it be by imprisonment in the stocks, the dungeon, or the penitentiary, as well as to cases of actual dismemberment.

In conclusion I ask, what reason is there for vesting a concurrent jurisdiction in State tribunals? The federal government has no need of such aid. In its own ample resources, in the plenitude of its own proper powers, lie the means of its safety and protection. *Hic arma, hic currus.* To hold that the States have concurrent power will lead to jealousies and contentions between the two jurisdictions. It cannot be expected that this *divisum imperium*, this "joint occupation" of the same ground by the federal and State governments, can go on without engendering strifes and collisions.

In view, then, of the difficulties that result from the doctrine of concurrent right in the States, as well as of the clear grant to the federal government of the whole subject-matter of the coin, I submit whether the attempt to make out the concurrent right does not fail, and ask, therefore, a reversal of the judgment.

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of the State of Ohio, by whose judgment was affirmed the judgment of the Court of Common Pleas for the county of Morgan in that State, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her for that offence to imprisonment and labor in the State penitentiary for three years.

The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7th, 1835, and the particular clause on which the indictment was founded is in the following language, viz.:—"That if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or *put off* counterfeit coin or coins, knowing them to be such," &c., "every person so offending shall be deemed guilty of a misdemeanour, and upon conviction thereof shall be imprisoned in the penitentiary and kept at hard labor not more than fifteen nor less than three years." As has been already stated, the plaintiff was convicted of the offence described in the statute, her sentence was affirmed by the Supreme Court of the State, and, with the view of testing the validity of the sentence, a writ of error to the latter court has been issued.

With the exceptions taken to the formality or technical accuracy of the pleadings pending the prosecution, this court can have nothing to do. The only question with which it can regularly deal in this case is the following, viz.:—Whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and, consequently, whether the conviction and sentence founded *433] on *the statute, are consistent with or in contravention of the constitution of the United States, or of any law of the United States enacted in pursuance of the constitution? For the plaintiff, it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the eighth section of the first article of the constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offences which may be denominated offences against the coin itself, such as counterfeiting, scaling, or clipping it, or debasing it in any mode, but that they embrace other offences, such as frauds, cheats, or impositions between man and man by intentionally circu-

lating or putting upon any person a base or simulated coin. On behalf of the State of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the constitution in question, either by a natural and philological interpretation of their language, or by any real necessity for the attainment of their objects; and that if any act of Congress should be construed as asserting this meaning in the constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the constitution, nor one deriving its authority regularly from that instrument.

We think it manifest that the language of the constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the legal coin as it was,—affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offences, but essentially also in their characters. The former is an offence directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree, be reached. A material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the *counterfeiting* of the coin is made high treason, whether it be uttered or not; but those who barely *utter* false money are neither guilty of treason nor of misprision of treason.[1] 1 Hawk. P. C., 20. Again (1 East, Crown Law, 178), if A. counterfeit the gold or silver coin, and by agreement before such counterfeiting B. is to receive and vent the money, he is an aider and abettor to the *act itself of [*434
counterfeiting, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanour, &c. These citations from approved English

[1] Cited. *United States* v. *Coppersmith*, 2 Flipp., 557.

treatises on criminal law are adduced to show, in addition to the obvious meaning of the words of the constitution, what has been the adjudged and established import of the phrase *counterfeiting the coin*, and to what description of acts that phrase is restricted.

It would follow from these views, that if within the power conferred by the clauses of the constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the federal and State authorities, operating each upon these distinct characters of offence. If any such conflict can be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary State power. The punishment of a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable. It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offence of passing base coin, and the federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the constitution, declaring that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens. Such has been the interpretation given to those amendments by this court, in the case of *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet.,

243; and such indeed is the only rational and [*435
*intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority,—restrictions which some of the States regarded as the *sine qua non* of its adoption by them. It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offence described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the State. So far, then, neither the statute in question, nor the conviction and sentence founded upon it, can be held as violating either the constitution of any law of the United States made in pursuance thereof. The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things affirmed.

Mr. Justice McLEAN.

I dissent from the opinion of the court, and, as this is a constitutional question, I will state the reasons of my dissent.

The defendant in the State court was indicted and convicted of passing "a certain piece of false, base, counterfeit coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." This is made an offence by the law of Ohio, and punished by imprisonment in the penitentiary, and being kept at hard labor, not more than fifteen, nor less than three years. The defendant was sentenced to imprisonment at hard labor for three years.

The act of Congress of the 3d of March, 1825, punishes the same offence, "by a fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years."

The eighth article of the constitution gives power to Congress "to coin money, regulate the value thereof, and of foreign coin." Also, "to provide for the punishment of counterfeiting the securities and current coin of the United States."

Jurisdiction is taken in this case, on the ground that the *436] law under which the defendant in the State court was sentenced is repugnant *to the constitution of the United States, and the above-cited act of Congress.

Objection is made to the sufficiency of the description of the counterfeit coin alleged to have been passed. But I think the indictment, although not technical in this averment, is maintainable. The false coin is alleged to be of the similitude "of the good and legal silver coin, currently passing in the State of Ohio, called a dollar." The words "legal," "currently passing," and "dollar," are significant, and must be held to be the coin made legal and current by act of Congress, and that the denomination of a dollar, so connected, is a coin legal and current.

The power to "coin money, regulate the value thereof and of foreign coin," vested by the constitution in the federal government, is an exclusive power. It is expressly inhibited to the States. And the power to punish for counterfeiting the coin is also expressly vested in Congress. This power is not inhibited to the States in terms, but this may be inferred from the nature of the power. Two governments acting independently of each other cannot exercise the same power for the same object. It would be a contradiction in terms to say, for instance, that the federal government may coin money and regulate its value, and that the same thing may be done by the State governments. Two governments might act on these subjects, if uniformity in the coin and its value were not indispensable. There can be no independent action without a freedom of the will, and in this view how can two governments do the same thing, not a similar thing? The coin must be the same and the value the same; the regulation must be the result of the same discretion, and not of distinct and independent judgments. This power, therefore, cannot be exercised by two governments.

The act of Congress of the 3d of March, 1825, "more effectually to provide for the punishment of certain crimes against the United States," &c., provides, by the twenty-sixth section, that "nothing in that act shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by that act."

Offences are made punishable in that act committed on the high seas, in navy-yards, and other places where the United States have exclusive jurisdiction, and also for counterfeiting the coin of the United States. Now it must be admitted that Congress cannot cede any portion of that jurisdiction which the constitution has vested in the federal government. And it is equally obvious, that a State cannot punish offences committed on the high seas, or in any place beyond its limits. The above section, therefore, cannot extend to offences without the State, nor to State statutes subsequently enacted. It is a settled rule of construction, that the statutes of a State subsequently enacted must be expressly adopted by Congress. The statute under which the defendant below was *indicted was passed the 7th of March, 1835, so that [*437 no force could be given to it by the act of Congress of 1825.

That Congress have power to provide for the punishment of this offence seems to admit of no doubt. Coin is the creation of the federal government; and the power to punish the counterfeiting of this coin is expressly given in the constitution. And these powers must be incomplete, and in a great degree inoperative, unless Congress can also exercise the power to punish the passing of counterfeit coin. Such a power has been exercised by the federal government for many years, and its constitutionality has never been questioned.

Counterfeiting the notes of the Bank of the United States was made an offence by Congress, and punishments were inflicted under that law. This power was never doubted by any one who believed that Congress had power to establish a national bank. It seemed to be the necessary result of the power to establish the bank. For the principal power was in a great degree a nullity, unless Congress had power to protect that which they had created. I speak not of the power to establish the bank, but of the power which necessarily resulted from the exercise of that power. And if this power to protect the notes of the bank was necessary, the power to protect the coin is still clearer, as there can be no question as to the constitutionality of the act of Congress to establish the coin and punish the act of counterfeiting it. In relation to the bank, the principal power is doubted by many, but in relation to the coinage there can be no doubt. The protection of the coin was at least as necessary as the protection of the notes of the bank. But it cannot be necessary further to illustrate the power of Congress to punish the passing of counterfeit coin. It is a power which seems never to have been doubted.

Under the power "to establish post-offices and post-roads," Congress have provided for punishing violations of the mail,

regulated the duties of the agents of the post-office department, required, under heavy penalties, ferry-keepers to pass over the mail without delay, &c. These and numerous other regulations are necessary to carry out the principal power. And so in relation to the coins. Is it reasonable to suppose that Congress, having power to coin money, and to punish for counterfeiting the coin, should have no power to punish for passing counterfeit coin? Is this coin created by the federal government, and thrown upon the community, without power to prevent a fraudulent use of it? The powers of the general government were not delegated in this manner. Where a principal power is clearly delegated, it includes all powers necessary to give effect to the principal power. This is not controverted, it is believed, by any one. It would seem, therefore, that the power to punish for passing counterfeit coin is clearly in the federal government.

*438] *Can this same power be exercised by a State. I think it cannot. Formerly Congress provided that the State courts should have jurisdiction of certain offences under their laws, and in several States indictments were prosecuted, and to a limited extent the laws of the Union were enforced by the States. But some States very properly refused to exercise the jurisdiction in such cases, and it was too clear for argument that Congress could not impose such duties on State courts. And this doctrine is now universally established. Consequently no State court will undertake to enforce the criminal law of the Union, except as regards the arrest of persons charged under such law. It is therefore clear, that the same power cannot be exercised by a State court as is exercised by the Courts of the United States, in giving effect to their criminal laws.

In some cases the acts of Congress adopt the laws of the States on particular subjects; but even these, so far as the United States are concerned, become their laws by adoption, as fully as if they had been originated by them, and cannot be considered in any different light than as if they had been so passed.

If a State punish acts which are made penal by an act of Congress, the power cannot be derived from the act of Congress, but from the laws of the State. And in this light must the act of Ohio be considered, under which the defendant below was punished.

The act of Ohio does not prescribe the same punishment for passing counterfeit coin as the act of Congress. This State law must stand upon the power of the State to punish an act over which the law of Congress extends and punishes. The

passage of counterfeit coin is said to be a fraud which the State may punish.

With the same propriety, it is supposed that a State may punish for larceny a person who steals money from the mail or a post-office. And yet a jurisdiction over this offence, it is believed, has not been exercised by a State.

The postmaster or the carrier, as the case may be, has a temporary possession of letters, but the money abstracted from a letter in the mail or in the post-office may be laid in the owner, who, in contemplation of law, retains the right of property until the money shall be received by the person to whom it is forwarded.

Many, if not all, of the States punish for counterfeiting the coin of the United States, while the same offence is punished by act of Congress. And, as before stated, the constitution vests this power expressly in Congress. Now in these two cases, viz. counterfeiting the coin, and passing counterfeit coin, the same act is punished by the federal and State governments. Each government has defined the crime and affixed the punishment, without reference to the action of any other jurisdiction. And the question arises whether, in such cases, where the federal government has an undoubted jurisdiction, a State government can punish the same act. The point is not *whether a State may not punish an offence [*439 under an act of Congress, but whether the State may inflict, by virtue of its own sovereignty, punishment for the same act, as an offence against the State, which the federal government may constitutionally punish.

If this be so, it is a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the laws of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offence, and must be supposed to have acted in reference to its own sovereignty.

There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offence. This, it is true, applies to

the respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and the federal government.

Mr. Hamilton, in the thirty-second number of The Federalist, says there is an exclusive delegation of power by the States to the federal government in three cases:—1. Where in express terms an exclusive authority is granted; 2. Where the power granted is inhibited to the States; and 3. Where the exercise of an authority granted to the Union by a State would be "contradictory and repugnant."

The power in Congress to punish for conterfeiting the coin, and also for passing it, is exercised under the third head. That a State should punish for doing that which an act of Congress punishes, is contradictory and repugnant. This is clearly the case, whether we regard the nature of the power or the infliction of the punishment. As well might a State punish for treason against the United States, as for the offence of passing counterfeit coin. No government could exist without the power to punish rebellion against its sovereignty. Nor can a government protect the coin which it creates, unless it has power to punish for counterfeiting or passing it. If it has not power to protect the constitutional currency which it establishes, it is the only exception in the exercise of federal powers.

There can be no greater mistake than to suppose that the federal government, in carrying out any of its supreme functions, is made dependent on the State governments. The federal is a limited government, exercising enumerated
*440] powers; but the powers given are *supreme and independent. If this were not the case, it could not be called a general government. Nothing can be more repugnant or contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization. It would bring our system of government into merited contempt. The sixth article of the constitution preserves the government from so great a reproach. It declares, that "this constitution, and the laws of the United States made in pursuance thereof, &c., shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." That the act of Congress which punishes the passing of counterfeit coin is constitutional, would seem to admit of no doubt. And if that act be constitutional, it is the supreme law of the land; and any State law which is repugnant to it is void. As there cannot, in the nature of things, be two punishments for the same act,

it follows that the power to punish being in the general government, it does not exist in the States. Such a power in a State is repugnant in its existence and in its exercise to the federal power. They cannot both stand.

I stand alone in this view, but I have the satisfaction to know, that the lamented Justice Story, when this case was discussed by the judges the last term that he attended the Supreme Court, and, if I mistake not, one of the last cases which was discussed by him in consultation, coincided with the views here presented. But at that time, on account of the diversity of opinion among the judges present, and the absence of others, a majority of them being required by a rule of the court, in constitutional questions, to make a decision, a reargument of the cause was ordered. I think the judgment of the State court should be reversed.

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 the judgment of the said Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, in this cause be and the same is hereby in all things affirmed, with costs.

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*NATHANIEL S. WARING AND PETER DALMAN, OWNERS OF THE STEAMBOAT DE SOTO, HER TACKLE, APPAREL, AND FURNITURE, APPELLANTS, *v.* THOMAS CLARKE, LATE MASTER OF THE STEAMBOAT LUDA, AND AGENT OF P. T. MARIONOUX AND T. J. ABEL, OWNERS OF SAID STEAMBOAT LUDA, HER TACKLE, APPAREL, FURNITURE, AND MACHINERY, APPELLEES. [*441

The grant in the constitution, extending the judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor to be interpreted by, what were cases of admiralty jurisdiction in England when the constitution was adopted by the States of the Union.[1]

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[1] CITED. *The Belfast*, 7 Wall., 636; *Atkins* v. *Disintegrating Co.*, 18 Id., 304. Judge Woodbury, in *United States* v. *The New Bedford Bridge*, 1 Woodb. & M., 402, examines the admiralty jurisdiction of the United States courts at great length, with much research. An indictment had been found by reason of the bridge obstructing the navigable stream over