to the question before us can be made between the case of an appeal under the act of 1803, and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction, apply with equal force to the former. This result disposes of the motions on the part of the appellant to amend the petition of appeal, citation, and bond, and also the motion to amend the libel.

MOTION TO DISMISS GRANTED.

Mr. Justice SWAYNE (with whom concurred Mr. Justice BRADLEY) dissenting:

I dissent from the conclusions announced by the court in this case. The defect objected to is, in my judgment, amendable under the 32d section of the Judiciary Act of 1789, and I think an amendment should be permitted to be made.

UNITED STATES v. TYNEN.

1. When there are two acts of Congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first.

   Accordingly, the thirteenth section of the act of Congress of 1813 "for the regulation of seamen on board the public and private vessels of the United States," which defined certain offences against the naturalization laws, and prescribed their punishment, was held to be repealed by the act of Congress of 1870, "to amend the naturalization laws, and to punish crimes against the same, and for other purposes," which declared not only that the commission of the several acts mentioned in the thirteenth section of the law of 1813 should constitute a felony, but that also a great number of other acts of a fraudulent character, in connection with the naturalization of aliens, should constitute a similar offence, and made the infliction of a larger punishment for each offence discretionary with the court.

2. By the repeal of an act, without any reservation of its penalties, all criminal proceedings taken under it fall. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence.

Statement of the case.

ON certificate of division in opinion between the judges of the Circuit Court for the District of California; the case was thus:

Tynen, the defendant, was indicted under the thirteenth section of the act of Congress of March 3d, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States." The general object of the act, as expressed in its title, was carried out in the first eleven sections.

They declared that it should not be lawful, after the termination of the war then existing with Great Britain, to employ on board any public or private vessels of the United States any persons except citizens of the United States, or persons of color natives of the United States; and they required naturalized citizens thus employed to produce to the commanders of public vessels, or collectors of customs, as the case might be, a certified copy of the act by which they were naturalized, setting forth the naturalization and the date thereof. They also contained various clauses to give effect to these requirements, but, at the same time, declared that the provisions of the act should not preclude the employment, as seamen, of the subjects or citizens of any foreign nations, which should not have prohibited, by treaty or special convention with the United States, the employment on board of her public or private vessels of native citizens of the United States, who had not become citizens or subjects of such nation.

The twelfth section declared that no person living within the United States after the act took effect should be admitted to become a citizen who should not, for the continued term of five years next preceding his admission, have resided within the United States, without being at any time absent therefrom.

Then followed the thirteenth section, upon which the indictment was found. That section declares it to be felony "to falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in the act, or to pass,

utter, or use as true any false, forged, or counterfeited certificate of citizenship, or to make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued, and to whom it may, of right, belong;" and prescribes as punishment for the offence imprisonment for a period of *not less than three* nor more than *five* years, OR a fine in a sum not less than $500 nor more than $1000, at the discretion of the court.

The indictment charged the defendant with the second of the offences here designated; that he did wilfully, falsely, and feloniously pass, utter, and use as true a false, forged, and counterfeited certificate of citizenship purporting to have been issued by one of the District Courts of California, and setting forth, with particularity, a compliance with the several requirements of the law for the naturalization of aliens.

The indictment did not allege what use was made by the defendant of the forged certificate, or any purpose for which it was uttered; and the defendant demurred. The several grounds of demurrer—reduced to substantially one—were that the indictment did not charge that the certificate or evidence of naturalization was forged to accomplish any purpose contemplated by the act of Congress under which the indictment was found, or for any other unlawful purpose, or with intent to injure the United States, or any State, person, corporation, or association.

Upon this demurrer the question arose whether the indictment charged any offence against the laws of the United States, and whether it were necessary for the indictment to aver that the certificate or evidence of citizenship mentioned in it was produced to the commander of a public vessel of the United States or to a collector of the customs, as provided in previous sections of the act, when naturalized citizens were employed as seamen on board of the public or private vessels of the United States. Upon these questions the judges of the Circuit Court were opposed in opinion, and a certificate of division having been prepared accordingly the case was sent to this court. While pending here,

on the 14th July, 1870, Congress passed an act entitled "An act to amend the naturalization laws and to punish crimes against the same, and for other purposes,"* which embraced the whole subject of frauds against the naturalization laws. It declared all the acts mentioned in the thirteenth section of the law of 1813 felonies, but also declared a great number of other acts of a fraudulent character in connection with the naturalization of aliens felonies, in addition, and made the infliction of a larger punishment for each offence discretionary with the court. Thus it authorized imprisonment AND fine, either or both, in the court's discretion, where the former act gave one OR the other only; and where the act of 1813 made the imprisonment *not less than three* years and the fine not less than $500, the new act made the imprisonment not less than *one* year and the fine not less than $300.

The matter now to be considered by this court was, what was the effect of this act of July 14th, 1870, upon the provisions of the thirteenth section of the act of 1813; and if it worked a repeal of those provisions, what was the proper action to be taken by the court on the certificate of division?

Mr. Akerman, the Attorney-General, and Mr. B. H. Bristow, Solicitor-General, for the United States; no one appearing for the defendant.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

An opposition of opinion, like that in the court below, occurred between the judges of the Circuit Court for the Southern District of New York, in a similar case which came before this court at the December Term of 1868, but as the opposition arose upon a motion to quash the indictment, the case was dismissed for want of jurisdiction.† In the present case the questions presented have ceased to be materia', and, consequently, it has become unnecessary to determine them,

* Approved July 14th, 1870, 16 Stat. at Large, 254.

† United States *v.* Rosenburgh, 7 Wallace, 580.

for, since they arose in the Circuit Court, Congress has passed a statute amending the naturalization laws, and prescribing certain punishments for their violation, which has worked a repeal of the provisions of the 13th section of the act of 1813. That statute, which was approved on the 14th of July, 1870, declares not only that the commission of the several acts mentioned in the 13th section of the law of 1813 shall constitute a felony, but that also a great number of other acts of a fraudulent character in connection with the naturalization of aliens, shall constitute a similar offence, and has made the infliction of a larger punishment for each offence discretionary with the court. The act of 1813 imposes as punishment, either imprisonment or fine, at the discretion of the court. The act of 1870 authorizes either of these punishments, or both, in the like discretion of the court. The act of 1813 allows the imprisonment to run between three and five years, and the fine to extend between five hundred and one thousand dollars. The act of 1870 fixes the imprisonment between one and five years, and the fine between three hundred and one thousand dollars.

There is no express repeal of the 13th section of the act of 1813 declared by the act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.*

Now between the provisions of the act of 1813 and the act of 1870 there is a clear repugnancy. The first act makes

* Davies *v.* Fairbairn, 3 Howard, 636; Bartlet *v.* King, 12 Massachusetts, 537; Commonwealth *v.* Cooley, 10 Pickering, 36; Pierpont *v.* Crouch, 10 California, 315; Norris *v.* Crocker, 13 Howard, 429; Sedgwick on Statute Law, 126.

the punishment for the offences designated imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again, the act of 1813 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this also it permits what the first act forbids.

Again, the act of 1813 declares that the fine, when imposed, shall not be less than five hundred dollars. The act of 1870 allows the fine to be as low as three hundred dollars, thus authorizing what the first act declares shall not be done.

When repugnant provisions like these exist between two acts, the latter act is held, according to all the authorities, to operate as a repeal of the first act, for the latter act expresses the will of the government as to the manner in which the offences shall be subsequently treated.

One of the earliest cases on this subject is that of *Rex* v. *Cator*, reported in 4th Burrow.* There were two English statutes against enticing and seducing artificers in the manufactures of the kingdom into foreign service. The penalty under the first statute was, for the first offence, a fine of one hundred pounds and three months' imprisonment; for the second offence, the fine was discretionary and imprisonment for twelve months. Under the second statute the penalty was, for the first offence, a fine of five hundred pounds and twelve months' imprisonment; for the second offence the fine was one thousand pounds and two years' imprisonment. The latter act, said Lord Mansfield, seems to be a repeal of the former act; it was made to supply the deficiencies of the former. Accordingly, the defendant, who had been convicted under both statutes, was sentenced under the last. In *Rex* v. *Davis*,† it appeared that there were two statutes

* Page 2026.

† 1st Leach, Crown Cases, 271.

against killing deer in an inclosed park. The first statute made the offence a felony punishable with death. The last statute punished the first offence with a fine, and made the second offence a felony; and the twelve judges were unanimously of opinion that the last statute amounted to a repeal of so much of the first as related to the offence of felony.

There are numerous cases in the modern reports to the same effect. We will cite only one, which was decided in this court, that of *Norris* v. *Crocker et al.** In that case the defendants were sued in an action of debt to recover the penalty of five hundred dollars upon the 4th section of the act of Congress of February, 1793, respecting fugitives from justice and persons escaping from the service of their masters. That section provided that any person who should, knowingly and willingly, obstruct or hinder the claimant, his agent, or attorney, in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent, or attorney, when arrested by the authority given by the act, or should harbor or conceal him, after notice that he was a fugitive from labor, should forfeit and pay for each of these offences the sum of five hundred dollars, to be recovered by the claimant in an action of debt.

Pending the action brought under this section against the defendants, Congress, in 1850, passed an act amendatory of and supplementary to the act of February, 1793, the seventh section of which embraces the offences specified in the act of 1793, and creates new offences, and affixes to each a different punishment from that named in the old act, prescribing a fine not exceeding one thousand dollars, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of one thousand dollars for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative

* 13 Howard, 429.

remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending, that had accrued to him; and that the court would not favor repeals by implication. But the court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was "not open to controversy, that when a new statute covers the whole subject of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together."

By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker* the court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case, "The repeal of the law imposing the penalty is of itself a remission."* In the case at bar, when the 13th section of the act of 1813 was repealed, there was no offence remaining for the court to punish in virtue of that section.

It follows that in this case no answer can be returned to the questions certified to us, but that the case must be remanded to the court below with directions

TO DISMISS THE INDICTMENT.

* State of Maryland *v.* The Baltimore and Ohio Railroad Co., 3 Howard, 534.