no assignee had been appointed when the alleged offer to redeem was made, which affords a demonstration that the charge of the court that he had ceased to be the owner of the land and thereby lost his right to redeem was improper, being equivalent to a direction to the jury to find a verdict for the plaintiff.*

JUDGMENT REVERSED, and the cause remanded with directions to issue

A NEW VENIRE.

MECHANICS' AND TRADERS' BANK *v.* UNION BANK.

1. The Constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts was the exercise of the ordinary rights of conquest.
2. A court established by proclamation of the commanding General in New Orleans, on the 1st of May, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been authorized by the President.
3. Though *called*, in the order establishing it, a Provost Court, a larger jurisdiction than one over minor criminal offences might, in fact, have validly been given to it by the power which constituted it.
4. Whether such court acted within its jurisdiction in a case where one bank of the State of Louisiana was claiming from another bank of the same State a large sum of money, is not a question for this court to determine, but a question exclusively for the State tribunals.

ERROR to the Supreme Court of Louisiana; the case being thus:

The State of Louisiana, as is known, during the late rebellion joined the rebel forces. On or about the 29th of April, 1862, however, the government forces under General Butler—then in command of the conquering and occupying army, and commissioned to carry on the war in the Depart-

* Wright *v.* Johnson, 4 National Bankrupt Register, 627; Same Case, 8 Blatchford, 150; Bump on Bankruptcy (7th ed.), 22.

ment of the Gulf, a department which included Louisiana—took possession of New Orleans. At the time of his thus occupying the city, the only money then circulating there was notes issued by the rebel confederacy; "Confederate notes." In the confusion of things for a few days after the capture, it did not appear plainly to the people generally what would be done about these notes, and there being no other sort of money whatever in general circulation, General Butler, on the 1st of May, 1862, in the necessities of the case, issued a proclamation allowing the circulation of them "until further orders."

On the day following, by general order, he established a court. The powers of the court were not defined otherwise than by the order establishing it. The order said:

"Major J. M. Bell, volunteer aid-de-camp, of the division staff, is hereby appointed provost judge of the city of New Orleans, and will be obeyed and respected accordingly.

"Captain J. H. French, aid-de-camp and acting inspector-general, is hereby appointed provost marshal of the city of New Orleans, and Captain Stafford, volunteer aid-de-camp, deputy provost marshal. They will be obeyed and respected accordingly."

No direct authorization or approval of this court by the President was shown; nor any direct evidence that it was not authorized by him, or that he disapproved it.

At different dates between the 5th and 13th of May, 1862, the Union Bank of New Orleans lent to the Mechanics' and Traders' Bank there $130,000 in Confederate notes, which still had a circulation of a certain kind. Whether any specific agreement was made between the two banks as to the sort of notes in which the money borrowed should be returned, that is to say, whether it was agreed that it should be returned in Confederate notes, or whether there was no understanding or agreement in relation to the payment except that tacitly understood, that it should be returned in notes as current at the time of payment as were the Confederate notes when borrowed—this was a matter not clear; the great weight of evidence, however, as the reporter read

it, being that there was no understanding in the case other than that last mentioned.

On the 16th of May, 1862, General Butler, by general order, directed that on the 27th following, that is to say, within eleven days, all circulation of or trade in Confederate notes should cease within his department. The depreciation of them, of course, was rapid and great; though the Confederation not yet having fallen to pieces, the notes had some circulation, though a circulation at a great discount compared with good money, in other places in the South.

In this depreciated state of them, the Mechanics' and Traders' Bank, on the 26th of May, that is to say, the day before the notes were to cease circulating in New Orleans, and thereabouts, not then owning any such amount of the notes, tendered to the Union Bank in Confederate notes the $130,000 borrowed, with interest. The Union Bank declined to receive them; and soon after brought suit in the Provost Court to recover in good money the $130,000 lent. That court dismissed the suit, holding that the loan was payable as the borrowing bank had offered to pay it, that is to say, in Confederate money. However, the parties were summoned afterwards before General Butler, who heard an argument from the counsel of the borrowing bank. On a still later day they appeared again before the Provost Court, when the counsel of the borrowing bank being about to make an argument to show the rectitude of the former decision, the provost judge, according to the testimony of the president of that bank, said that he had been ordered to reopen the case and grant a new trial; that counsel "need read no law to him, for the case would be decided under orders." The borrowing bank accordingly paid the $130,000 and interest, in lawful money of the United States; paying it, however, under protest.

It may be here stated, as part of the general history of things—though no part of this appeared in the record—that, on the 20th of October, 1862—a little less than six months after General Butler established his court already mentioned—the Federal occupation in Louisiana having now

Statement of the case.

become secure and more extended, President Lincoln himself established at New Orleans, in a formal way, by commission, under the seal of the United States, what was called the "Provisional Court;" declaring that it should be a court of record *for the State of Louisiana*, and appointing Mr. Charles A. Peabody judge thereof. This court was in form authorized to hear and determine all causes, civil and criminal.*

* The following is the order of President Lincoln, from which the Provisional Court in New Orleans derived its existence. The reporter inserts it, the whole subject of that court being much referred to in the argument for the plaintiff in error, and in the dissenting opinion:

"EXECUTIVE MANSION, WASHINGTON, October 20th, 1862.

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the State in military occupation, and it being indispensably necessary that there should be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a court of record for the State of Louisiana, and I do hereby appoint CHARLES A. PEABODY, of New York, to be a provisional judge, to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States in Louisiana; his judgments to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensations as follows: The judge at the rate of $3500 per annum; the prosecuting attorney, including the fees, at the rate of $3000 per annum; and the clerk, including the fees, at the rate of $2500 per annum; such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission.

"Let the seal of the United States be hereunto affixed.

[L. S.] "ABRAHAM LINCOLN.

"By the President:

"WILLIAM H. SEWARD,
"Secretary of State."

Statement of the case.

The lending bank now sued the other bank in one of the inferior courts of Louisiana to recover the money.

Its petition adverted to certain clauses of the Constitution, among them to those clauses which ordain that,

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* may from time to time ordain."

And also that,

"The *President* . . . shall nominate, and by and with the advice of the senate . . . shall appoint judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for."

And, assuming, apparently, that the court established by General Butler—if not meant to be a mere provost's court, that is to say, a court confined to the trial of criminal matters, and, therefore, without jurisdiction in a civil one, such as this suit—was, of necessity, meant by the said Butler to be an establishment by him as a commanding officer of the United States in an occupied city, of a court of the United States, with a judge of the same appointed by him, it went on to submit that—

"The ordaining and establishing by General Butler of the said court, the appointment of Major Bell as the judge thereof by the said general, and the action and proceedings of the latter in the premises, were acts in violation of the Constitution, and consequently null and void, conferring no right on the Union Bank to invoke the authority of the said Bell to obtain from him judgment in behalf of the said bank against the defendant, compelling it to pay to the said bank the sum adjudged by Bell to be due to it."

It submitted further—

"That if the court had been one endowed with perfect jurisdiction, the interference of General Butler in the administration by its judge of its justice, and causing him to make decisions 'under orders,' rendered void all that he did."

It then alleged that it did not owe to the Union Bank the money which it had been made to pay under an order at

once unjust and in violation of the Constitution, and which had been made effective only through military force; and that all this being so it was entitled *ex æquo et bono*, to have back the money thus taken away.

The petition admitted, as respected the Union Bank, that in all that it had done, it had acted as it thought that it ought to act, and had been seeking to recover what it deemed to be a just debt by a proceeding which it deemed a fair one. Accordingly all claim for damages was waived.

Previously to the case coming on to be heard before the inferior State court of Louisiana, that State adopted a constitution, of which the 149th article was thus:

"All rights, actions, prosecutions, claims, contracts, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if it had not been adopted; all *judgments* and judicial sales, marriages, and executed contracts *made in good faith and in accordance with existing laws in this State* rendered, made, or entered into, between the 26th day of January, 1861, and the date when this constitution shall be adopted, are hereby declared to be valid," &c.

Having heard the case, the State court in which the suit was brought said:

"Conceding, for the sake of argument, the incompetence of the Provost Court to render the judgment it did against the borrowing bank, the practical effect of its judgment, viz., the payment of the money, cannot now be inquired into with a view to its restitution, for two reasons:

"1st. There was a valid obligation on the part of the borrowing bank to pay the amount borrowed; and, after the money has been paid, it is immaterial, in a civil point of view, by what means the payment was enforced. Had the officers of the Union Bank forcibly taken the money from the vaults of the other bank, the latter could not recover it if the taker was a legal creditor to the amount taken.

"2dly. Whether the Provost Court was or not a competent court in law, it was a court in fact, and the admission of the plaintiff in his petition of the good faith of the Union Bank brings the case within the terms of article 149 of the constitu-

tion of Louisiana,* and secures for the judgment obtained under such circumstances the validity which probably it did not previously possess."

The case being then taken to the Supreme Court of the State on appeal, that court said:

"The important question is, was the judgment which the plaintiff was compelled to pay an absolute nullity, and can he recover from the defendant the amount paid by reason of said judgment?

"This raises the question whether General Butler had the right after the capture of the city, in May, 1862, to appoint a judge to try civil cases. If he had this right the judgment was not an absolute nullity, and the amount paid by the plaintiff cannot be recovered. If the judge had the right to hear and determine the case, the plaintiff cannot recover the money paid in satisfaction thereof, even though it be conceded that there was not sufficient proof to authorize the judgment or that the debt was for Confederate money.

"Under the Constitution the United States has the right to make war, to raise and to support armies and navies, to suppress insurrections, and to repel invasions. The measures to be taken in carrying on war and suppress insurrections are not defined; and the decision of all such questions is in the discretion of the government to whom these powers are confided by the Constitution.

"When the United States captured the city of New Orleans, in 1862, the civil government, existing under the Confederacy, ceased to have authority. As an incident of war powers, the President had the right to establish civil governments, to create courts, to protect the lives and the property of the people.

"The question is, had the general commanding the military forces of the United States which captured the city, the right to establish the provisional court called the Provost Court which rendered the judgment against the plaintiff? We are of the opinion that he had. This was an exercise of the war powers of the United States, presumably with the consent and authorization of the President, the commander in chief.

"The plaintiff paid a judgment rendered by a competent

* See it, *supra*, p. 281.

court, established by the United States in the exercise of its war powers (the only authority competent to organize a court in this city at the time), and has no cause of action against the Union Bank for the money paid in pursuance of the decree of that court. The United States had authority to establish this court, and the judgment is validated by article 149 of the constitution of Louisiana."

The judgment in favor of the Union Bank was accordingly affirmed.

From that judgment the case was brought here as within section 709 of the Revised Statutes.*

The errors assigned were that the Supreme Court of Louisiana erred:

"1st. In holding that the President had a right to authorize General Butler to establish a court of civil jurisdiction in New Orleans in May, 1862.

"2d. In holding that it was to be *presumed* that the President *did* authorize General Butler to establish the court of Judge Bell, with the civil jurisdiction attributed to it by the opinion of the court.

"3d. In holding that the court of Judge Bell had jurisdiction to render its judgment against the Mechanics' and Traders' Bank, and that the said judgment was not a nullity.

"4th. In holding that, supposing the judgment of the Provost Court to have been originally void, it was validated, and so made a bar to the claim of the plaintiff in error, by force of the 149th article of the constitution of Louisiana."

Messrs. E. and A. C. Janin, for the plaintiff in error:

The order establishing the court in question is for a Provost Court simply. The jurisdiction of such a court is of the criminal sort, and is confined to the minor sort of offences.†

Now, conceding that General Butler had power to establish, and that he did establish, and rightly, a Provost Court, yet a case of the kind that this was—a suit by one bank cor-

* See the section in the Appendix.

† Webster's Dictionary, *in verbo*, "Provost Marshal."

poration against another bank corporation, for $130,000—was no proper subject for the cognizance of such a tribunal.

Can the jurisdiction be maintained on the ground that the court was a civil tribunal? It cannot be, for two reasons:

1st. Because the character of the court is established as that of a criminal court by the very use of the words "*provost* judge." What a provost judge is, is well known. We have already stated the character of his jurisdiction. He is almost invariably a military officer. Here he was a "major" in the army, and "volunteer aid-de-camp of the division staff." His military character shows that it cannot be meant that his jurisdiction should include civil things.

2d. Because it is indispensable for such a court that it should be established, or at least approved, by the President. There is no record of any civil court during the war being otherwise established. In the case of the "Provisional Court" established at New Orleans in October, 1862—a civil court—after the occupation of that city, during the war, there was a formal establishment of it by President Lincoln, and by a commission, longer and more full than any ever issued to any judge of this court, sent, under the seal of the United States, to Mr. Peabody, the person appointed by the President to be judge. A court thus formally constituted by the President may be sustained on the authority of certain recent cases here,* though perhaps it cannot be sustained without difficulty, in view of the plain language of the Constitution, which makes no provision for the establishment of any sort of civil courts in time of war different from those to be established in times of peace.

The inferior State court of Louisiana, in which the suit for the recovery of the money paid under protest was brought, perceived the pressure of this part of the case and put its decision denying a recovery, on two grounds, which were consistent with want of jurisdiction in the Provost Court. The Supreme Court was less wise. Admitting, in effect, that a mere provost's court could have no jurisdiction

* The Grapeshot, 9 Wallace, 132; Handlen *v.* Wickleff; Pennewet *v.* Eaton, 15 Id. 382.

Argument against the jurisdiction of the "Provost Court."

of such a case as this was, it assumes that this court was a civil court. But still the difficulty remained that there was nothing to show that the President ever authorized its establishment, and that if he did not, the court had no jurisdiction. The court then "jumps" this difficulty, and says that General Butler's act "was an exercise of the war powers, *presumably* with the consent and authorization of the President;" thus assuming the matter to be proved.

Now, we say, contrariwise, that an act done, in irregular times, and in opposition to what the law requires—an act which on its face is one of usurpation and despotism, as this act was—is not to be presumed to have been rightly done, but until proven to have been so done is to be presumed to have been done wrongly. This is true when there is no evidence in the case and all rests on presumption.

But here we have evidence, and the evidence is that the establishment of this court was General Butler's own act, and was not authorized by the President in advance of it, nor approved by him after it was done.

1. What were General Butler's own ideas of the necessity of an approval by the President? In *Ex parte Milligan*,* a brigadier-general had appointed a military court in the State of Indiana (a State at the time, as always before and since, loyal to the Union) to try a man named Milligan for various offences against the laws of war. The civil courts were all in session, and a grand jury was exercising its functions. No hostile army was within the borders of the State, nor expected there. Notwithstanding this, Milligan was convicted and was sentenced to death. A motion was made to this court for a habeas corpus, and the case presented the point whether the man had been sentenced by a competent court. General Butler—the same eminent person who had established the Provost Court now under consideration—having reaped the victories of war, and having by this time returned to the bar to reap those, not less renowned, of peace, appeared before this court as special counsel of the

* 4 Wallace, 2.

United States, to justify the action of the military commission in Indiana, and to insure, if possible, such action from it as would secure the execution of Milligan. In his argument in the case, as reported,* he announces his idea of martial law and of the rights of the officer executing it. He asserts that such officer is "supreme legislator, supreme judge, and supreme executive." That, therefore, was his idea of what he himself was when, a conquering hero in New Orleans, he established the Provost Court. A gentleman who was at once a general, a conqueror, and a lawyer, "supreme legislator, supreme judge, and supreme executive," had no occasion to communicate about anything with the President of the United States, a person who is never a legislator, never a judge, and though for a short time an executive, is yet never a supreme executive, but an executive limited, coarcted, and restrained by numerous and clear ordinances of a written constitution.

Every presumption, therefore, from what we know of General Butler's views of the action of times of war upon constitutional law, as those views were declared by himself to this court in *Ex parte Milligan* make it improbable that he consulted anybody before he established his provost's court, or informed anybody, even the President of the United States, afterwards. If his own views of his powers were right, he had perhaps little occasion to do so.

2. The action of that President, as we have it in written records, tends to the same conclusion. On the 20th of October, 1862, the President did establish a civil court in New Orleans, in very great form, as we have already said. Among other formalities, he issued a commission to Mr. Peabody, constituting him judge. This commission recites that the insurrection had temporarily "swept away the civil institutions of the State, including the judiciary and judicial authorities of the Union," and that it was "indispensably necessary that there should be *some* judicial tribunal existing there capable of administering justice." The President

* 4 Wallace, 14.

plainly considered that no such tribunal was there, or since the rebellion had been there. He accordingly established such a one; a Provisional Court; one confessedly not such as the Constitution and laws authorized in time of peace, and established only in an exercise of the rights of war; that is to say, such a one as General Butler pretended to establish. Is it not plain, from the establishment of this court, and especially from the recitals just quoted, that the President never did authorize General Butler's Provost Court at all as a civil court, and that if he ever heard of it acting as such a court, that he disapproved of its doing so? Mr. Lincoln, it is quite plain, felt that to establish a civil court, even in an occupied city, a commission was necessary from *him*, and when he wished to establish such a court he gave one in form.

In the face of such evidence, both of General Butler's views and of President Lincoln's views, you can presume nothing in this matter.

The authorities in this court show too that the case is not one for favorable presumptions of approval by the President. In the *Sea Lion*,* an act of Congress, after restricting commercial intercourse in the insurrectionary districts, authorized the President to license it in certain cases, with a proviso that the licensed intercourse should be carried on only in pursuance of regulations prescribed by the Treasury Department. The construction was that the *President alone* had the power to license such intercourse. The court said:

"The license finds no warrant in the statute. The statute prescribed that the PRESIDENT shall license trade."

It is to be observed too, that in this case General Banks licensed the trade, and that Rear-Admiral Farragut indorsed the license "Approved." Yet it was held that "the President only could license it;" and no presumptions that he had licensed it were indulged in, even though such officers

* 5 Wallace, 613; and see the Ouachita Cotton, 6 Id. 531; Cappell *v.* Hall, 6 Id. 557, and McKee *v.* United States, 8 Id. 166.

as General Banks and Admiral Farragut with their combined power had sanctioned it.

But the extraordinary part of the case is that Major Bell, the Provost Court, *decided the case in favor of the Mechanics' and Traders' Bank;* that his judgment was not appealed from to General Butler; but *suâ sponte—motu mero suo*—in exercise of his power as "supreme legislator, supreme judge, and supreme executive"—the General ordered him to open the case and reverse his decision; and that the provost judge did do this, and, as he says, "under orders." Who was the judge? Surely not Major Bell, for his will, his mind, his judgment, were at variance with his decree. General Butler was the judge, and Bell did but record *his* decree.

Mr. P. Phillips, contra:

1. The case has been argued on the other side as if the jurisdiction of this court under section 709 of the Revised Statutes was clear. But it is not clear; on the contrary, it does not exist.

The grounds on which it is assumed that the jurisdiction exists under the section just referred to, are:

1st. That no court could be established in Louisiana by the government of the United States, nor any judge appointed by it—not even in time of civil war—but in the way provided in certain clauses of the Constitution.

2d. That there was an implied contract by the borrowing bank to restore money received by it from the Union Bank in virtue of a void decree, enforced by military power; and that this implied contract was violated by section 149 of the State constitution.

But no constitutional question is *necessarily* involved. The judge of the inferior State court seems to have avoided much discussion about any. He found that the debt claimed by the Union Bank was a just debt, and that this being so, and that bank having got, even by a void decree, its money, there was an end to the case.

There thus being ground, not involving a Federal question, upon which the case can be rested, no Federal question

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should be entertained.* The Supreme Court of Louisiana in resting the case on the ground which it did, did not mean to abandon the ground taken by the court below it; ground taken in the pleadings, and of course covered by the final judgment in the Supreme Court as well as in the inferior court.

Whether or not this point not Federal was rightly decided is not a matter open for judgment here. But plainly it was decided rightly. It is impossible to believe that when the Union Bank lent this money—General Butler being then in occupation of the city—and allowing the circulation of Confederate money, only "till further orders"—it is impossible to believe that the directors or officers of the Union Bank lent Confederate notes to be returned at the borrower's pleasure in kind. The tender made in repayment, on the 26th, was an offer to pay a debt in a thing utterly worthless. In one day afterwards no one would be permitted to circulate or to deal in it. The borrowing bank did not own the notes which it tendered; and the tender was made knowing that it would not be accepted.

2. But assuming that jurisdiction exists in this court, under section 709, or that the decision on the point not Federal was wrong.

The position of the other side is that the court established by General Butler was not established, nor its judge appointed, in accordance with certain articles of the Constitution; the same being the articles which prescribe in what way the courts of the United States shall be established, and judges in them appointed, in cases generally.

That the court was not so established, and that its judge was not so appointed is conceded. But we assert at the same time that the provisions of the Constitution relied on by the other side are not applicable to a state of war.

If they are so applicable then every other provision of the same Constitution, applicable to times and cases generally, may be applied.

* Murdock *v.* City of Memphis, 20 Wallace, 591.

For example, "No one," says the Constitution, "shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without due compensation."

But it would be bordering on the absurd to say that such provisions were in force while the State was occupied by an invading army to compel its citizens to lay down their arms.

The occupation of New Orleans by the Federal forces did not restore to its citizens the rights which they had renounced under the Constitution of the United States. If the acts of reconstruction are valid, these rights were not restored until Congress provided for their representation in its body. To some extent, indeed, the people of New Orleans ceased to be enemies. For when the city was taken possession of, a proclamation was issued by the commanding general, which, while it declared martial law, promised protection to rights of property. But this was all; all, at least, at the dates which are under our consideration.

Then the question is—admitting that the court established by General Butler was not a court established nor its judge appointed in the way customary in times of peace—was its organization or the appointment of its judge, and its action void, in view of the special circumstances existing when it was established?

The condition of New Orleans when the Federal forces took possession of it has been frequently described by this court. On the 20th October, 1862—months after the establishment of the Provost Court—the President issued his executive order, by which a provisional court was instituted. In this he describes the "insurrection" as having subverted and swept away the civil institutions of the State, including the judiciary, so that "it has become necessary to hold the State in military occupation."

The President accordingly established a provisional court with wide powers and complete ability to enforce them. That in this he acted in accordance with the Constitution

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has been decided in *The Grapeshot*,* and affirmed in *Pennywit* v. *Eaton*† and in *Handlen* v. *Wickliffe*.‡

Indeed, it seems to be conceded on the other side that if the Provost Court had been established by the executive under an order issuing directly from him, no question could now exist as to its validity. But surely a general in the command of a department, in the exercise of war powers, must in the absence of evidence to the contrary, be presumed to act in accordance with the views and under the sanction and authority of the commander in chief.§ When insurrection has swept away the judicial tribunals of a State as well as of the United States, the commanding general in the exercise of the war power had authority to organize a provisional court for the trial of civil as well as of criminal cases. And what if he does *call* it a Provost Court, provided he show, as he here is alleged by the other side to have done, that the court was meant to be one for the trial of civil causes also? The community must be saved from chaos, and courts are the means by which this end is attained. It is better for the true sovereign that when he is restored to his rights he should find order instead of chaos. On this ground the judgments of the Confederate courts, though presided over by judges in sworn hostility to the United States, have been held valid by this court. The necessity which gave validity to such judgments was certainly no greater than that which called for the organization of courts in New Orleans in May, 1862. It was in this spirit that article 149 of the constitution of the State was passed, affirming all judgments rendered between January, 1861, and its adoption.

That the President was informed of what General Butler had done, and that he approved it so far as even by the views of the other side would be enough to give to it his official sanction, is not to be doubted. His omitting to establish any provisional court *in form* for nearly six months after the city was occupied proves this. He established this

* 9 Wallace, 132. † 15 Id. 382. ‡ 12 Id. 175.
§ Leitensdorfer *v.* Webb, 20 Howard, 176.

provisional court not by way of showing his ignorance or disapproval of what in the first moment of occupation had been done, but because it was desirable now, though only *something* like former times prevailed in New Orleans, and till such times prevailed entirely, to have a tribunal established in more form, with better evidences of its powers and jurisdiction, and of the limits upon them which might now safely be made.

But the other side should show affirmatively a disapproval; approval being to be presumed in a case like this.

Besides, the Provisional Court was a court for the State of Louisiana, and not, like the Provost Court, for the city of New Orleans alone.

Yet, further, *The Grapeshot* did not decide that the President's knowledge or authorization was necessary to make a valid court. In that case, a court established by him during war, and in a place where courts could not be established as in times of peace, was held to have been validly established. But it was not decided that a military commander occupying a place might not have validly established one also. Suppose that after occupying New Orleans General Butler's communications with the President had been cut off, and remained for months cut off entirely, as in fact they were cut off, in every way but by sea, when the Provost Court was established. What then? Could no civil court at all be established? The argument of the other side is reduced to the *absurdum*.

As to the evidence of General Butler's compelling Major Bell to reverse his decision, the thing rests on the evidence of the officer of the borrowing bank of what the provost judge *told* him. There is really no legal evidence that General Butler ever did more than hear what the counsel of the borrowing bank had to say. If Major Bell, in such a place and in such a situation as he was in, did no more than consult with General Butler, and after being enlightened by his views reconsider his former decision, what does the "acting under orders" come to?

Reply:

As to the jurisdiction.

1. In suing in the inferior State court to recover the money which the bank borrowing Confederate notes had been obliged by the Provost's Court to pay in good money, that bank set up specially that the establishment of Major Bell's court, his appointment as judge, and his actions and proceedings as such, in the suit before him between the banks, were null and void as being in violation of the Constitution of the United States, which vests the judicial power of the Union in one Supreme Court and such inferior courts as Congress may, from time to time, ordain and establish. And on this ground the plaintiff claimed immunity from any effect resulting from the judgment of Judge Bell's court.

The Supreme Court of Louisiana, however, held that the Provost Court was a lawful one, and the judgment valid and a bar to plaintiff's claim. This presents a Federal question, and assimilates the present case to that of *Pennywit* v. *Eaton*.*

2. A Federal question is also presented since the Supreme Court of Louisiana held, that supposing the judgment of the Provost Court to have been void, it was made valid by article 149 of the State constitution. For, if that judgment was void when the money was paid under it, to the Union Bank, under protest, an implied contract attached to the Union Bank to refund it, and if article 149 bars or assumes to bar the enforcement of that contract, it impairs the obligation of the contract, and is, consequently, unconstitutional so far as it applies to the present case.†

Mr. Justice STRONG delivered the opinion of the court.

The facts of this case, so far as they are necessary to a proper understanding of the question raised, are the following:

In May, 1862, after the capture of New Orleans by the United States army, General Butler, then in command of

* 15 Wallace, 380. † Railroad Company *v.* McClure, 10 Wallace, 511.

the army at that place, issued a general order appointing Major J. M. Bell, volunteer aid-de-camp, of the division staff, provost judge of the city, and directed that he should be obeyed and respected accordingly. The same order appointed Captain J. H. French provost marshal of the city, and Captain Stafford deputy provost marshal. A few days after this order the Union Bank lent to the plaintiffs the sum of $130,000, and subsequently, the loan not having been repaid, brought suit before the provost judge to recover the debt. The defence was taken that the judge had no jurisdiction over civil cases, but judgment was given against the borrowers, and they paid the money under protest. To recover it back is the object of the present suit, and the contention of the plaintiffs is that the judgment was illegal and void, because the Provost Court had no jurisdiction of the case. The judgment of the District Court was against the plaintiffs, and this judgment was affirmed by the Supreme Court of the State. To this affirmance error is now assigned.

The argument of the plaintiffs in error is that the establishment of the Provost Court, the appointment of the judge, and his action as such in the case brought by the Union Bank against them were invalid, because in violation of the Constitution of the United States, which vests the judicial power of the General government in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and that under this constitutional provision they were entitled to immunity from any liability imposed by the judgment of the Provost Court. Thus, it is claimed, a Federal question is presented, and the highest court of the State having decided against the immunity claimed, our jurisdiction is invoked.

Assuming that the case is thus brought within our right to review it, the controlling question is whether the commanding general of the army which captured New Orleans and held it in May, 1862, had authority after the capture of the city to establish a court and appoint a judge with power to try and adjudicate civil causes. Did the Constitution of

the United States prevent the creation of civil courts in captured districts during the war of the rebellion, and their creation by military authority?

This cannot be said to be an open question. The subject came under consideration by this court in *The Grapeshot*,* where it was decided that when, during the late civil war, portions of the insurgent territory were occupied by the National forces, it was within the constitutional authority of the President, as commander in chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States, and it was ruled that a court instituted by President Lincoln for the State of Louisiana, with authority to hear, try, and determine civil causes, was lawfully authorized to exercise such jurisdiction. Its establishment by military authority was held to be no violation of the constitutional provision that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." That clause of the Constitution has no application to the abnormal condition of conquered territory in the occupancy of the conquering army. It refers only to courts of the United States, which military courts are not. As was said in the opinion of the court, delivered by Chief Justice Chase, in *The Grapeshot*, "It became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide, as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice. The duty of the National government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent. It was a military duty, to be performed by the President, as commander in chief, and intrusted as such with the direction of the military force by which the occupation was held."

* 9 Wallace, 129.

Thus it has been determined that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors. What that power is has several times been considered. In *Leitensdorfer & Houghton* v. *Webb*,* may be found a notable illustration. Upon the conquest of New Mexico, in 1846, the commanding officer of the conquering army, in virtue of the power of conquest and occupancy, and with the sanction and authority of the President, ordained a provisional government for the country.† The ordinance created courts, with both civil and criminal jurisdiction. It did not undertake to change the municipal laws of the territory, but it established a judicial system with a superior or appellate court, and with circuit courts, the jurisdiction of which was declared to embrace, first, all criminal causes that should not otherwise be provided for by law; and secondly, original and exclusive cognizance of all civil cases not cognizable before the prefects and alcaldes. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, this court ruled that they were lawfully established. And there was no express order for their establishment emanating from the President or the commander in chief. The ordinance was the act of General Kearney, the commanding officer of the army occupying the conquered territory.

In view of these decisions it is not to be questioned that the constitution did not prohibit the creation by military authority of courts for the trial of civil causes during the civil war in conquered portions of the insurgent States. The establishment of such courts is but the exercise of the ordinary rights of conquest. The plaintiffs in error, therefore, had no constitutional immunity against subjection to

* 20 Howard, 176.

† Executive Documents, 2d session 29th Congress, vol. 3, Document 19.

the judgments of such courts. They argue, however, that if this be conceded, still General Butler had no authority to establish such a court; that the President alone, as commander in chief, had such authority. We do not concur in this view. General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of the war, were the acts of his commander in chief.

Again, it is argued that even if the Provost Court was rightly established, it had no jurisdiction over civil causes. It must be conceded that the order by which the court was created did not define expressly the nature and extent of its jurisdiction. And it is also true that a Provost Court ordinarily has cognizance only of minor criminal offences; but that a larger jurisdiction may be given to it, by the power which brings it into being, is undeniable. Whether a larger jurisdiction was conferred in the case now under consideration we are not called upon to determine. It is not a Federal question. The Supreme Court of Louisiana decided that General Butler had a right, after the capture of New Orleans, in May, 1862, to appoint a judge to try civil cases, notwithstanding the provisions of the Constitution. Having determined that he had such a right, we have disposed of the question which entitles the case to be heard here, and it is not for us to inquire whether the Provost Court acted within its jurisdiction or not. That is a question exclusively for the State tribunals. In determining, as the State Supreme Court did, that the plaintiffs had no such constitutional immunity as they claim, there was no error. If in other respects errors were committed, they are not reviewable by this court, unless they present some other Federal question.

Such a question the plaintiffs allege is presented. Assuming that the judgment given by the Provost Court in favor of the Union Bank was void for want of jurisdiction in the court, they argue that when they paid the sum adjudged against them the law raised an implication of a promise by the Union Bank to refund it, and that the obligation of this contract was impaired by the 149th article of the State constitution of 1868. That article ordained that all judgments and judicial sales, marriages, and executed contracts made in good faith and in accordance with existing laws in the State, rendered, made, or entered into between the 26th day of January, 1861, and the adoption of the constitution, should be valid. But if the court was lawfully established, as the Supreme Court of the State decided, the law raised no such promise as is asserted, and the validating clause of the constitution, therefore, impaired no contract obligation. Besides, we cannot admit that the legislation of a State may not validate the judgments of a court in fact, though in giving the judgments the court may have transcended its jurisdiction.

Nothing more need be added. Sufficient has been said to show that, in our opinion, the plaintiffs have been denied no right or immunity secured to them by the Constitution and laws of the United States. If there is any error in the record, it is one of which this court can take no cognizance.

JUDGMENT AFFIRMED.

Mr. Justice FIELD, dissenting.

I am unable to agree with a majority of the court in this case. I do not differ from them so much in the judgment rendered as in the reasons assigned for it. Had they placed their decision on the ground that the plaintiff bank owed the money it was compelled by the decree of the Provost Court to pay, and, therefore, could not recover it back, however illegal the action of that tribunal, I should have made no objection to their judgment. But as they pass by this ground and not only affirm the legality of the establish-

ment of the Provost Court by the commanding general at New Orleans, which is not seriously controverted, but the validity of the jurisdiction in civil cases exercised by that tribunal, I must dissent from their opinion. I can find no sufficient warrant for any such doctrine as there expressed in the action of the government during the late war, or in the previous decisions of this court.

The case, as disclosed by the record, is briefly this: On the 2d of May, 1862, General Butler, commanding the forces of the United States then occupying the city of New Orleans, by general order appointed Major Bell, aid-de-camp of the division staff, provost judge of the city. Soon after this, and previous to the 13th of May, the Union Bank of Louisiana loaned the Mechanics' and Traders' Bank of New Orleans $130,000 in Confederate notes. On the 26th of the month the borrowing bank tendered payment of this amount in notes of the same kind, but the tender was refused, the lending bank claiming payment in either the notes of the borrowing bank or in United States currency. It appears that the commanding general had, by proclamation issued on the 16th, prohibited the circulation of Confederate notes after the 27th of the month. This prohibition necessarily affected the value of the notes. A dispute thereupon arose between the two banks as to the character of the currency in which the loan was to be paid, it being contended on the one side that Confederate notes were to be received in payment, and on the other that the money should be refunded in notes as current at the time as the Confederate notes were when they were loaned. The lending bank thereupon brought suit for the $130,000 before the Provost Court.

That court dismissed the suit, holding that the claim was payable in Confederate notes. This was early in July, 1862. Some days afterwards the commanding general directed the provost judge to set this judgment aside, and to try the case again. Accordingly, when counsel for the Mechanics' and Traders' Bank appeared in the action after this order and attempted to make a defence, he was informed by the judge that he need not read any law to the court, that the judge

had been ordered to grant a new trial, and that "the case would be decided under orders." A judgment for the amount claimed payable in currency was accordingly rendered in favor of the Union Bank, and the same was paid under protest. This was on the 24th of July, 1862.

It was to recover this sum that the present action was brought in a State District Court of Louisiana. That court declined to pass upon the competency of the Provost Court to render the judgment in question, but held that the Mechanics' and Traders' Bank was indebted to the Union Bank in the amount for which that judgment was rendered, and that the same could not be recovered back in the present action; and further, that the 149th article of the constitution of the State of 1868, which declared that all judgments, with certain exceptions, not material in the present case, rendered in good faith and *in accordance with existing laws in the State*, between the 26th of January, 1861, and the adoption of the constitution, should be valid, secured for the judgment in question, to use the language of the court, "the validity which probably it did not previously possess."

On appeal the Supreme Court of the State went further, and held that the commanding general had the right to establish the Provost Court and invest it with jurisdiction to decide all civil cases, including the one complained of; that its establishment was the exercise of the war power of the United States, presumably with the consent and authorization of the President, and that the judgment was validated by the 149th article of the State constitution.

The plaintiff combats these positions, and contends that the commanding general had no authority to invest that military tribunal with jurisdiction in civil cases; and that it was exempted under the Constitution from any liability imposed by a judgment rendered in the exercise of any such jurisdiction.

The Constitution secures to every one immunity from liability and consequent deprivation of property from the unwarrantable exercise of jurisdiction by tribunals established under the authority of the United States, whether by Con-

gress acting under the judiciary article of that instrument, or by the executive, or military officers appointed by him, acting under the war powers of the government. And the right to inquire in this court whether any such unwarranted jurisdiction has been exercised is not, in my judgment, dependent upon the determination of a State court as to the validity of the asserted jurisdiction.*

Had this court, as already stated, confined itself to an affirmation of the judgment of the State court on the ground that the plaintiff bank owed the money borrowed, and that it could not recover it back in this action, although paid under the coercion of the decree of the Provost Court, I should have acquiesced. But to uphold the civil jurisdiction of that military tribunal upon the presumed assent to its investment with such jurisdiction by the President of the United States, when, as I think, the President refused to permit the exercise of any such jurisdiction during the war, appears to me to be uncalled for and erroneous.

Provost courts are military courts having a well-known jurisdiction, which is limited exclusively to minor offences, tending to disorder and breaches of the peace, by soldiers and citizens within the lines of an army, and occupy with reference to such offences a similar position with that of police courts in our cities.

The power and jurisdiction of these courts were the subject of frequent consideration during the late war by the Judge-Advocate-General of the army, and by him were brought to the attention of the Secretary of War and the President. His opinions upon these subjects, when approved by the Department of War, were adopted as directions of the executive head of the government for the guidance of the officers of the army. And it is impossible to read the opinions without perceiving in almost every line that the jurisdiction of the tribunals was limited to offences of a petty character, and that the government intended that such jurisdiction should not in any case be enlarged. By

* Trebilcock *v.* Wilson, 12 Wallace, 692–4.

them it was declared that a general commanding a department, in which the ordinary criminal courts were suspended, was authorized, *under circumstances requiring the prompt administration of justice*, to appoint a provost judge for the trial of minor offences, but that the graver violations of the law should be referred to military commissions; that the provost court was a tribunal whose jurisdiction was derived from the customs of war, and was unknown to our legislation; that it had no jurisdiction of offences of soldiers triable before a court-martial or military commission; and that the judgment of the Provost Court at New Orleans, directing the imprisonment of men at Ship Island and the Dry Tortugas for desertion, marauding, mutiny, robbery, and larceny, was without sanction of law and wholly void. "The jurisdiction of a provost court," said one of these opinions, "should be confined to cases of police merely, to wit: such cases as are summarily disposed of daily by the police courts in our large cities, as, for instance, cases of drunkenness, disorderly conduct, assault and battery, and of violation of such civil ordinances or military regulations as may be in force for the government of the locality. The provost judge supplies the place of the local police magistrate in promptly acting upon the class of cases described, without, at the same time, being necessitated (as a formal military commission would be) to preserve a detailed record of the testimony and proceedings in each case."

In another case, where an order of a commander of a department authorized a provost court to settle questions of title to personal property, it was declared that that was a subject of which no military court could properly take cognizance, and the department commander was advised that the jurisdiction of such tribunals as provost courts, in time of war, could only be extended to matters of police.*

* See record of opinions in the office of the Judge-Advocate-General, vol. ii, 14; vol. vi, 635, 639; vol. viii, 638; vol. xii, 386; vol. xiii, 392; vol. xv, 519. An excellent digest of these opinions was prepared by Major W. Winthrop, of the United States Army, in 1868, and published by authority of the Secretary of War.

In the face of these promulgations from the department of military justice, approved by the Secretary of War, and through him by the President, how can it be said that the Provost Court in New Orleans was presumably authorized by the President to exercise civil jurisdiction? From inquiries which I have made since this case has been pending, I think I am justified in stating that no case has arisen in which the exercise of civil jurisdiction by one of these tribunals has ever been, even impliedly, sanctioned by the government. Whenever any attempt by them to exercise such jurisdiction has been brought to the attention of the executive department, it has been uniformly and promptly condemned.

Besides, the assent of the executive can only be presumed in support of such acts of a subordinate officer as legitimately fall within the sphere of that officer's duties, and with the execution of which he is usually charged. Acts relating to the movement of troops and the furnishing of supplies to them, directed by the Secretary of War, may well be presumed to have been authorized by the President, because the execution of such measures falls within the sphere of the War Department. But no presumption would arise that they were thus authorized if the directions proceeded from the Postmaster-General or the New York collector of customs, because to neither of those officers are such duties usually intrusted.

Now, it is no part of the duty of a military commander, whether putting down an insurrection against the government or engaged in making foreign conquest, to settle the pecuniary obligations of citizens to each other, or to provide a court for their determination. His whole duty is to subdue, by force, the insurrection in the one case and opposition to the extension of the dominion of his government in the other; and when this is accomplished, to preserve order in the community until his superior authorities direct what further proceedings shall be taken. Until such directions are given the military commander cannot lawfully go beyond his simple military duties.

So, when a civil government was established in New Mexico, by order of General Kearney, after that officer had conquered that province by the forces under his command, he acted pursuant to special instructions from the President, through the head of the War Department. He carried the instructions with him, prepared in advance, so confident was the President that certain conquest would attend the march of our troops.

"Should you conquer and take possession of New Mexico and Upper California, or considerable places in either," said these instructions, issued on the 3d of June, 1846, "*you will establish temporary civil governments therein*, abolishing all arbitrary restrictions that may exist, so far as it may be done with safety. In performing this duty it would be wise and prudent to continue in their employment all such executive officers as are known to be friendly to the United States, and will take the oath of allegiance to them."*

I think, therefore, that the majority of the court are mistaken in their statement that there was no express order for the establishment of courts and a judicial system by General Kearney in New Mexico, emanating from the President or commander-in-chief. The authority for the establishment of civil government included the establishment of different departments of such government, judicial as well as others.†

The case of *Leitensdorfer* v. *Webb*,‡ cited by the majority in support of their views, does not, therefore, appear to me to touch the real question at issue. There, General Kearney, having his specific instructions from the President, and, as this court stated in that case, "holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants, ordained, *under the sanction and*

* Executive Documents, 2d session of 29th Congress, vol. iii, 1846 and 47, No. 19.

† The ordinance of General Kearney establishing civil government in New Mexico, with courts of civil and criminal jurisdiction, provided that the judges of those courts should be appointed by the President of the United States. Same documents, No. 19, page 30.

‡ 20 Howard, 176.

authority of the United States, a provisional or temporary government for the acquired territory."

As to the appointment of Judge Peabody as provisional judge of New Orleans, which was held valid in the case of *The Grapeshot*,* a case cited as conclusive of the question under consideration here, the appointment came directly from the President. On the 20th of October, 1862, he issued his order, reciting that the insurrection had temporarily subverted and swept away the civil institutions of Louisiana, including the judiciary and judicial authorities of the Union, so that it had become necessary to hold the State in military occupation, and that it was indispensable that there should be some judicial tribunal existing there, capable of administering justice; and that, therefore, he had thought proper to establish and did establish a Provisional Court, and appoint a judge thereof, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, conforming his proceedings, as far as possible, to the course of proceedings and practice of the courts of the United States in Louisiana, but that the appointment of the judge should not extend beyond the period of military occupation of the city of New Orleans or the restoration of the civil authority in that city and State.†

Upon the restoration of the civil authority the Provisional Court thus established ceased to exist. In July, 1866, Congress enacted that all suits, causes, prosecutions, and proceedings of that court, proper for the jurisdiction of the District or Circuit Court of the United States for Louisiana, should be transferred to those courts respectively, and be heard and determined therein, and that all judgments, orders, and decrees of the Provisional Court, in cases thus transferred, should at once become the orders, judgments, and decrees of the District or Circuit Court, as the case

* 9 Wallace, 129.

† See the commission of President Lincoln to Mr. C. A. Peabody, *supra*, p. 279.

might be, and be enforced, pleaded, and proved accordingly.*

We thus have the establishment of the court by the President, and the recognition of the legality of its establishment by Congress. Surely there is no analogy between that case and the one at bar.

No other case is cited in support of the extraordinary judgment of the Provost Court we are now considering, and I feel confident that there is no authority in the previous decisions of this court for the doctrine announced by the majority in their opinion.

I do not question that it was competent for the President to authorize the establishment by military officers, or civilians appointed military governors, of temporary courts, to continue during the war, with civil as well as criminal jurisdiction to the extent essential for the security of persons and property, in territory dominated by our forces, after the overthrow of the insurgent power of the Confederates. Such was the case with the military governor of Louisiana, who was specially authorized in his commission from the President to establish all necessary tribunals within the State, and whose appointment of judges of the third and fourth District Courts in New Orleans was recognized as valid by this court in the cases of *Handlin* v. *Wickliffe*, reported in the 12th of Wallace, and *Pennywit* v. *Eaton*, reported in the 15th of Wallace.† All that I insist upon is, that where

* 15 Stat. at Large, 360.

† The following is a copy of the commission issued by the President to General Shepley as military governor of Louisiana:

"COMMISSION AS MILITARY GOVERNOR.

"WAR DEPARTMENT, WASHINGTON CITY, June 3d, 1862.

"Hon. GEORGE F. SHEPLEY, &c., &c.

"SIR: You are hereby appointed military governor of the State of Louisiana, with authority to exercise and perform, within the limits of that State, all and singular the powers, duties, and functions pertaining to the office of military governor (*including the power to establish all necessary offices and tribunals and suspend the writ of habeas corpus*), during the pleasure of the President, or until the loyal inhabitants of that State shall organize a civil government in conformity with the Constitution of the United States.

"By the President.

[SEAL OF THE UNITED STATES] "E. M. STANTON,
"Secretary of War."

such courts were established the authority from the President must be shown, and that it cannot be presumed from the mere existence of the courts, and the exercise of jurisdiction by them. Sometimes, indeed, the general power conferred upon a subordinate officer carried with it authority to establish such tribunals; as, for example, the power conferred upon a military commander to establish a civil government, carried authority to establish tribunals with civil as well as criminal jurisdiction in the territory governed, for the administration of justice. But the mere possession of military power in a particular district within the United States by an officer of the army of the United States carried with it, by itself, no authority to establish tribunals to dispose of civil controversies between the inhabitants of such district, and where any such authority is asserted to have existed it must be shown to have been granted by the President; it cannot be presumed, certainly not where the ordinary jurisdiction of the court excluded any power over civil controversies, as was the case with provost courts.

But supposing that the provost court in the present case was rightly invested with civil jurisdiction, there was nothing to justify its judgment in the case mentioned. It had already given its judgment that the suit before it of the Union Bank should be dismissed. There its powers ended. What subsequently it did was done under the dictation of its military superior; and so, as if in derision of the proceeding, the provost judge afterwards said to the counsel of the defendant, that no law need be read to him; that the commanding general had ordered a new trial, and that "the case would be decided under orders."

A judgment thus rendered wants all the elements of a judicial determination, and is entitled to no respect in any tribunal where justice is administered. The commanding general, we all know, was a man of eminent ability, and competent to sit in judgment upon any question of law, however difficult; but he was not judge there; he was only a military chieftain, and his order had nothing in it which

took from its character as an arbitrary edict of despotic power.

The position that the judgment of the Provost Court was validated by article 149 of the constitution of Louisiana of 1868, does not seem to me to merit any consideration.* The article requires for the validation of the judgment that it must have been rendered *in accordance with existing laws in the State*, and the assertion that any laws of the State at the time authorized the establishment of a provost court, or that such court should rehear a case upon the mandate of a commanding general of the United States, is a proposition which needs only to be mentioned to be answered.

Besides, it is a novel doctrine in this country, that a judgment affecting private rights of property, not merely defective for want of compliance with some matter of form, but absolutely void for want of jurisdiction in the court to render it, can be validated by subsequent enactment, legislative or constitutional. I know of no judicial determination recognizing any such doctrine or even looking that way.

Mr. Justice BRADLEY was not present at the argument of this case, and took no part in its decision.

GAVINZEL *v.* CRUMP.

In November, 1863, during the rebellion, Confederate notes being then so much depressed in market value that in Richmond, Virginia, $3260 of them were worth but $204 in gold coin, G., a Swiss, at the time resident in Richmond, but desirous to go to Europe—to escape to which through the rebel lines was then extremely difficult—agreed to lend C., an American, resident in Richmond, the said sum of $3260 in the Confederate notes above mentioned, and C. borrowed the said sum in such notes. C. executed his bond to G., by which it was agreed that the money was not to become due and payable until the civil war should be ended (during which no interest should be chargeable), nor become

* See the 149th article in the statement of the case, *supra*, 281.