Court of Appeals of Kentucky.

DARIUS NORRIS *vs.* REBECCA DONIPHAN.

The Act of Congress, approved July 17th 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," after declaring that all the estate and property, money, stocks, and credits, of certain officers of the so-called Confederate States, and of certain other persons therein mentioned, shall be seized and confiscated, by proceedings *in rem* in the Federal courts, declares that "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." *Held*, first, that the last-named provision applies to suits for the recovery of debts; secondly, that it was designed to apply to suits in the state as well as the Federal courts.

If the provisions of the act, concerning the seizure and confiscation of such property, are unconstitutional and void, it seems clear that Congress has no power to prohibit the state courts from giving to the owners the relief to which they are entitled by the laws of the states.

The forfeitures or confiscations proposed by this act are to be effected on account of offences which the owner may commit, without reference to the use of his property; hence, the doctrine that property which is used to violate a blockade, or revenue laws, may be forfeited by proceedings *in rem*, without conviction of the owner, has no application to this case.

That clause of the Constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," has no bearing on this question. It relates only to wars with foreign nations. (The *Brilliant* vs. *United States.*)

The usage of nations, if applicable to the case, does not sanction the confiscation of property here belonging to rebels, and debts owing to them before the commencement of hostilities.

A sovereign, engaged in a public war, may disregard the usage of nations and establish a different rule toward the enemy, which shall bind those within his jurisdiction.

The existence of a public war gives to Congress the power, as a belligerent right, to confiscate enemies' property on land, though such is not the usage of nations.

Congress possessed the power to pass the act in question, if the existence of civil war gives to the Government all the belligerent rights against rebellious citizens which it possesses against alien enemies during a public war.

The authority to make war for the suppression of rebellion is derived from those clauses of the Constitution which declare that "the President shall take care that the laws be faithfully executed," and that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

The right given by the Constitution to make war upon rebels, gives the power to perform acts of war, and no other power whatever.

The seizure and confiscation of enemies' property on land are not acts of war. (*Brown* vs. *United States*, 8 Cranch.)

The Constitution does not prohibit the confiscation of the property of alien enemies. The protection received by aliens residing abroad, with reference to their property here, is due, not to the Constitution, but to international comity, which may be suspended during war. But the Constitution, and not the law of nations, governs the relations between the Government and citizens of the United States. They, though traitors, must be dealt with according to the Constitution.

The act under consideration is unconstitutional, because it attempts to authorize the confiscation of the property of citizens, as a punishment for treason and other crimes, without due process of law, by proceedings *in rem* in any district in which the property may be, without presentment or indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases. (Con., art. 3, sec. 2, sub. 3, and sec. 3, sub. 1; 5th and 6th amendment.)

Suit upon a note. The answer avers that when the rebellion commenced the plaintiff resided in Missouri, became a Secessionist, actually joined the Confederate government, and moved to Arkansas, where she could better have its protection, and where she has continued to this time to give aid and comfort to the rebellion by her means and money: *held*, upon demurrer, that, if the statements of the answer are true, the plaintiff cannot, upon common law principles, maintain an action here during the war; and her petition should be dismissed without prejudice.

T. F. Hord and *James Harlan*, for appellant.

Harrison Taylor, for appellee.

The opinion of the court was delivered by

BULLITT, J.—In September 1862, the appellee, Rebecca Doniphan, by her attorney, filed a petition seeking to recover from the appellant $5000 due upon his note to her, executed in the year 1860.

The appellant filed an answer, alleging that when the present rebellion commenced, the said Rebecca resided in the state of Missouri, and became a Secessionist, and actually joined the Confederate government, and moved to the state of Arkansas, where she could better have the protection thereof, and where she has continued to this time to assist and give aid and comfort to the rebellion by her means and money; that, on the 22d day of July

1862, the President of the United States issued his proclamation, as required by the 6th section of the Act of Congress, approved July 17th 1862, and entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and that the said Rebecca has not returned to her allegiance to the United States, but still remains in Arkansas, assisting the rebellion, and giving aid and comfort to the rebels, by giving to them money to carry on the said rebellion; and he pleaded the Act of Congress in bar, and prayed that the petition might be dismissed.

A demurrer to the answer was sustained, and a judgment rendered against the defendant, to reverse which he prosecutes this appeal.

The above-mentioned Act of Congress declares that any person who shall commit treason shall be punished by death and by the liberation of his slaves, or by fine and imprisonment and the liberation of his slaves, and that any person who shall incite or engage in any rebellion or insurrection, or give aid and comfort thereto, shall be punished by imprisonment, or by a fine and the liberation of his slaves, or by both of said punishments, at the discretion of the court; and then, after directing the President to seize all the property of certain officers, civil and military, of the so-called Confederate States of America, and of certain other persons therein mentioned, and to use the same and the proceeds thereof for the support of the army of the United States, declares as follows:

"SEC. 6. *And be it further enacted*, That if any person within any state or territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, money, stocks, and credits of such person shall be liable to seizure as aforesaid; and it shall be the duty of the President

to seize and use them as aforesaid, or the proceeds thereof; and all sales, transfers, or conveyances of any such property, after the expiration of the said sixty days from the date of such warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property or any of it, to allege and prove that he is one of the persons described in this section."

The 7th section authorizes proceedings *in rem*, in the District Courts of the United States, to be instituted in any district in which the property or any part thereof may be found, or into which the same, if movable, may at first be brought, which shall conform as nearly as may be to proceedings in admiralty or revenue cases, "to secure the condemnation and sale of any of such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid."

By a joint resolution adopted July 17th 1862, it was declared that no "punishment or proceedings under said act shall be construed to work a forfeiture of the real estate of the offender beyond his natural life."

The act does not authorize the state courts to condemn such property. It can only be condemned by the District Courts of the United States. The only provision of the act that can possibly be regarded as designed to control the action of the state courts, with reference to the proceedings which it authorizes, is that which declares that "it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Does this provision apply to suits for the recovery of debts? The 6th section declares that "all the estate and property, moneys, stocks, and credits" of the persons therein described shall be seized, &c.; and that all sales, transfers, or conveyances "of any such property" shall be void, and that it shall be a sufficient bar to any suit for the possession or use "of any such property," to allege, &c.; and the 7th section authorizes the proceedings before mentioned to secure the condemnation and sale "of any of

such property." It seems clear that the words "such property" were designed to embrace all the property first mentioned, namely: "All the estate and property, moneys, stocks, and credits" of the persons described in the act.

But does the provision concerning pleas in bar relate to the state courts? If it does, and is valid, a state court may render a judgment in bar of an action, upon the ground that the plaintiff is a rebel; and the District Court, having jurisdiction over the subject, may afterwards refuse to confiscate the property, upon the ground that he is not a rebel.

It seems unreasonable to suppose that Congress intended to make a rule capable of producing such a result. But it seems equally extraordinary that Congress should have contemplated other results of a similar character that were evidently aimed at by the act in question, which undertakes to authorize the seizure by the President and condemnation by a district judge, of the property of any citizen whom those officers may consider guilty of either of the offences mentioned in the act, without a trial by jury, or upon a trial by jury in any district in which any of the property may be found, or into which, if movable, it may first be brought, whilst, by the same act, for the same offence, the same citizen is made amenable to a criminal prosecution, which, after his property has been confiscated, and the proceeds expended by the President, may result in his aquittal by a jury in the state and district in which the offence may be alleged to have been committed.

The provision prohibiting the rendition of judgments in favor of persons described in the act, was evidently made chiefly for the purpose of facilitating the seizure and confiscation of their property by the agents and courts of the United States. The state courts, by rendering judgments in favor of such persons, might seriously impede the efforts of those agents and courts to seize and confiscate such property. In view of these facts, and of the comprehensive language of the provision, our opinion is, that it was designed to apply to suits in the state as well as the Federal courts.

Although Congress could not have required the state courts to take jurisdiction over proceedings for the confiscation of such property, if it had attempted to do so, yet it ought, perhaps, to be conceded, and will be conceded for the purposes of this case, that, if Congress has the power to authorize the seizure and confiscation of the property of the rebels in the manner contemplated by this act, it has also the incidental power to prohibit the recovery of such property, by such persons, in the state courts. But, on the other hand, if the provisions of the act, concerning the seizure and confiscation of such property, are unconstitutional and void, leaving the rights of the owners unimpaired and indefeasible, it seems clear that Congress has no power to prohibit the state courts from giving to them the relief to which they are entitled under the laws of the states.

Thus the question arises, whether the provisions of the act, authorizing the seizure and confiscation of the property of rebels, are valid, or unconstitutional and void.

The cases in which it has been held, that property with which the owner has attempted to violate a blockade, or *revenue* laws, may be forfeited by a proceeding *in rem*, without a conviction of the owner, have no bearing on this question. Those cases rest upon the ground that "the thing is primarily the offender, or rather the offence is primarily attached to the thing." Per STORY, J., in *The Palmyra*, 12 Wheaton 14. But the forfeitures, or confiscations, contemplated by the statute under consideration, are to be effected, not on account of any use of the property by its owner, but on account of offences which the owner may commit without reference to his property.

Counsel seek to sustain the power of Congress thus to punish rebels, upon several grounds:

1. It is contended that this power can be exercised under that clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." That clause, however, has no bearing on this question, because it relates only to wars with foreign nations, as was recently decided by the Supreme Court of

the United States, in the cases of *The Brilliant, &c.*, vs. *United States*, 2 Am. Law Register 334.

2. It is contended that the right to confiscate the property of rebels is conferred on the government of the United States by the law of nations.

The usage of nations, if applicable to the case, does not sustain this effort to confiscate property here belonging to rebels, and debts owing to them, before the commencement of hostilities; for it is settled that the modern usage of nations does not sanction such confiscation of the property of even alien enemies: *Bell* vs. *Chapman*, 10 John. 183; *Hutchinson* vs. *Brock*, 11 Mass. 119; *Brown* vs. *United States*, 8 Cranch 110; 1 Kent's Com. 92.

It must be conceded, however, that the courts of a sovereign, engaged in war, cannot compel him to observe the usage of nations, nor treat as void any act of his because it violates that usage. The law of nations has no obligatory force upon him in dealing with his subjects. He may disregard it and establish a different rule; and if he does so, those within his jurisdiction must observe the rule so established, however it may conflict with the usage of nations. In the absence of any positive law to the contrary, the usage of nations may furnish a rule for the guidance of courts of justice; but they cannot be governed by it in the presence of a positive conflicting law made by a sovereign who may choose to disregard it. This is all that Chief Justice MARSHALL meant when he spoke of "the modern usage of nations which has become law" *United States* vs. *Percheman*, 7 Peters 86; as is shown by his opinion in the case of *Brown* vs. *United States*, 8 Cranch 110, in which he used this language:

"This usage [of nations] is a guide which the sovereign follows or abandons at his will. The rule, like other rules of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. * * * Respecting the power of the government [to confiscate the property of alien enemies on land] no doubt is entertained. That [public] war gives to the sovereign full right to take the persons and con-

fiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court."

It seems, therefore, that the act of a sovereign, exercising belligerent rights against a separate nation, however grossly it may violate the usage of nations, gives the law by which, at least, all courts and persons within his jurisdiction must be governed. And, as the existence of a public war gives to Congress the power, as a belligerent right, to confiscate enemy's property on land, though such is not the usage of nations, it follows that Congress possesses the power to pass the act under consideration, if the existence of civil war gives to the government all the belligerent rights against its rebellious citizens, which it possesses against alien enemies during a public war.

The Constitution of the United States declares that the President "shall take care that the laws be faithfully executed," and that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." It will be conceded, for the purposes of this case, not only that these provisions authorize the government to make war for the suppression of an insurrection, which takes the shape of war, as the present one has done, but that the army and navy may lawfully prosecute the war as if it were a war with alien enemies, and according to the usages of public wars. Does it necessarily follow that the rebels may lawfully be treated as alien enemies by all the departments of the government? We believe not.

The right, given by the Constitution, to make war upon rebels, gives the power to perform acts of war, and gives no other power whatever.

Civil wars being, in many respects, of the same nature as public

wars, the right to treat armed rebels, in many respects, as if they were alien enemies, necessarily results from the power to make war upon them.

The facts, that prisoners are exchanged, that flags of truce are respected by the opposing forces, that armed rebels may be lawfully slain in battle, that their arms, ammunition, and stores may be lawfully taken and used or destroyed, that articles, contraband of war, being sent to them, may be lawfully confiscated, that their ports may be lawfully blockaded, and that their property on the high seas may be lawfully seized as prize of war; these facts prove that civil wars are, in many respects, the same as wars between separate nations; and they prove nothing more. These being acts of war, the right to perform them necessarily results from the power to make war.

But the fact that the army may fight rebels as if they were alien enemies, does not prove that Congress can legislate against them as if they were alien enemies.

The courts have as much right to treat them as alien enemies by refusing to try them for treason, as Congress has to treat them as alien enemies by confiscating their property.

Circumstances may arise which would authorize the army to destroy the dwelling-house of a rebel. Can Congress, for that reason, confiscate all the dwelling-houses of rebels? If so, it can, for the same reason, confiscate the dwelling-houses of friendly citizens in states adhering to the Union; for the army may destroy the latter, as well as the former, to save itself from destruction.

In the case of *The Amy Warwick*, in the United States District Court for the district of Massachusetts, Judge SPRAGUE, after stating that "in war each belligerent may seize and confiscate all the property of the enemy wherever found," and that "this right extends to the property of all persons residing in the enemy's country," expressed the opinion that, in this civil war, "the United States, as a nation, have full and complete belligerent rights, which are in no degree impaired by the fact that their enemies owe allegiance, and have superadded the guilt of treason to that of an unjust war." We are not prepared to admit that Con-

gress has the power to confiscate the property of persons residing in the rebellious states, who have given no aid to the rebellion, or who have given it no aid except upon compulsion, and who have given all the aid they could to the Government of the United States, whilst receiving from it none of the protection to which they were entitled. The conclusion arrived at by Judge SPRAGUE, if correct, proves that Congress has the power to confiscate the property of such persons. And we do not perceive how that conclusion can be avoided, if the law of nations governs this controversy, or if, in other words, the Government of the United States possesses, in this contest, all the rights of a belligerent engaged in a public war.

If the law of nations governs the relations of the parties to this contest, it gives to each of them precisely the same rights. If it gives to the Federal Government the right, as a belligerent, to confiscate real estate and personal property on land belonging to rebels, it gives to the Confederate Government the right, as a belligerent, to confiscate like property of citizens adhering to the Federal Government; and confiscation sales made by the Confederate authorities would pass valid titles, which could not be annulled by the courts of the United States, after the suppression of the rebellion. This is unquestionable, if the relations of the parties to this contest are governed by the law of nations.

But, to meet this difficulty, it is contended that the rebels are, in legal contemplation, and may lawfully be treated as, at the same time, alien enemies and rebellious citizens, and that the Government has against them, at one and the same time, all the rights conferred upon it by the Constitution over citizens of the United States, and all the rights conferred by the law of nations upon a belligerent engaged in a public war.

This, in our opinion, cannot be, because the law of nations and the Constitution of the United States are, in many respects, inconsistent with each other. Their co-existence and co-operation are, therefore, in many respects impossible, and would produce irreconcilable conflicts between different departments of the Gov-

ernment. For instance, under the law of nations it is the right and duty of the army to treat rebels taken in arms as prisoners of war; but under the Constitution it is the right and duty of the courts to treat them as traitors. We do not perceive how that conflict can be avoided, except by holding that the Constitution alone governs the relations between the parties to this contest; that it governs the army, as well as the President, the Congress, and the courts, with reference to the conduct of the war; and that it gives to the army, as an incident inseparable from the power to prosecute the war, the same right to treat rebels taken in arms as prisoners of war, which it gives to the courts, under other circumstances, to treat them as traitors.

It has been said that, during a civil war, the sovereign may exercise both belligerent and sovereign rights: Per MARSHALL, C. J., in *Rose* vs. *Himely*, 4 Cranch 272; *The Brilliant, etc.*, vs. *United States, supra.* This cannot be doubted, but it does not prove that the sovereign may treat those in rebellion both as alien enemies and as rebellious subjects; nor is anything to that effect contained in either of those cases. On the contrary, in the last-mentioned case it was declared that all persons residing within the Confederate States "whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated *as enemies, though not foreigners.*"

Unquestionably the usage of nations, in the conduct of public wars, may be considered for the purpose of ascertaining what are the rules of civil war, and what is the meaning of those provisions of the Constitution which authorize the Government to prosecute such a war, just as the common law, though the Constitution does not make it the law of the Government of the United States, may be considered for the purpose of ascertaining the meaning of several provisions of the Constitution. And though the law of nations does not govern the relations existing between the parties to this war, it of course governs their several and mutual relations to other nations. It governs our intercourse with foreign nations, as it has hitherto done, and must be considered by us, as it is by them, in determining questions of blockade and of prize

and other questions touching our foreign relations. Such were the questions involved in the cases of *The Brilliant, etc.*, vs. *United States, supra.*

In our opinion, the law of nations can have no other application to this contest. But if we err in that opinion, it does not follow that this Government can exercise all the powers conceded to belligerents by that law. What we have stated, and the language which we cited from Chief Justice MARSHALL'S opinion in the case of *Brown* vs. *United States*, concerning the powers of a belligerent sovereign, relate to unlimited sovereignties. The law of nations cannot convert a limited into an unlimited sovereignty. It cannot be substituted for the Constitution of the United States in war any more than in peace. The Constitution was designed to be perpetual, and neither the President nor the Congress has power to suspend it in war or in peace. Even if the law of nations applies to this contest, it cannot confer upon the Government any power, the exercise of which is prohibited by the Constitution, or which is inconsistent with the nature of the Government established thereby. The law of nations concedes to a sovereign who has closed a war by conquest, the right to establish any form of government that he may choose over the conquered nation. Consistently with that law he may completely change their municipal laws and political regulations; he may convert a free commonwealth into a dependent province, and govern it despotically. Why may not similar powers be exercised by this Government over the people of the Southern States? If it can deprive them of their rights of property, in the manner proposed by the act under consideration, why may it not, by a sweeping act of outlawry, deprive them of the right of suffrage and of all other of their rights as citizens of the Union and of the states in which they reside? If it may adopt any policy it pleases for the purpose, or the avowed purpose, of subduing them, why may it not adopt any policy it may please for the purpose, or the avowed purpose, of holding them in subjection after subduing them? Yet it seems clear that such powers cannot be lawfully exercised over them if the rebellion should be subdued, because they are

inconsistent with the nature of the Government, and the exercise of them is prohibited by the Constitution, which declares that "the United States shall guaranty to each state in this Union a republican form of government," and which contains many other provisions that are entirely incompatible with the exercise of the powers in question.

If Congress had the power to enact this statute, it can adopt such measures as may be necessary to carry it into effect. It is probable that, in order to carry its provisions into effect, it will be necessary not only to defeat and disperse the rebel armies in the field, but to subjugate the people of the rebellious states, and to hold them in a condition of permanent subjection to the Government of the Union, to be controlled by the people of the other states. It seems certain that the framers of the Constitution did not mean to clothe Congress with such power.

The facts, that the Constitution declares, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" that it prescribes the mode of trying citizens charged with levying war against the United States, and the place of trial, and that it limits the punishment of them, proves that its framers did not contemplate a suspension of its provisions by civil war, nor a denial even to traitors of its guarantees, nor the exercise over them of powers which it does not confer.

The right of a sovereign to establish courts of prize in a conquered country is conceded by the law of nations. But it was decided by the Supreme Court of the United States that, during the war between the United States and Mexico, neither the President nor any inferior executive officer could establish a court of prize in territory conquered from Mexico. The court said:—

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the *question* of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And, under the Constitution of the United States, the judicial power of the General Government is vested

in one Supreme Court and in such inferior courts as Congress shall from time to time establish. Every court of the United States must therefore derive its jurisdiction and judicial authority from the Constitution or laws of the United States; and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States or of individuals, in prize cases, nor to administer the law of nations:" *Juker* vs. *Montgomery*, 13 Howard 515.

That case proves that the powers of each department of the Government of the United States are limited by the Constitution, even during a war with a foreign nation, and within its territory. It is clear, therefore, that no department of the Government can relieve itself from the restraints of the Constitution within the territory of the United States, and in a war with its citizens.

It seems equally clear that the Constitution does not authorize the confiscation of the property of a rebel, because of his crime, without a trial by jury of the offender, and his conviction "by due process of law" (5th amendment), unless the power can be derived from those provisions of the Constitution which authorize the Government to suppress insurrections. Whether or not the power can be thus derived depends upon the question whether or not such confiscation is an act of war.

The right of the Government of the United States, during either a public or civil war, to confiscate enemy's property taken upon the high seas is not denied. This is an act which is made lawful by the declaration or existence of war, and need not be authorized by Congress. The seizure, in such cases, is a purely military act, and its sanction, by a judicial condemnation of the property, does not deprive it of that character, but justifies it, as such, to foreign nations, whose citizens may have an interest in the property.

But the seizure and confiscation of enemy's property on land, which is not contraband of war, are not acts of war. If they were, they could be performed by the army, or be made lawful by an order of the commander-in-chief, without other authority than that conferred by the declaration or existence of war. It

has been decided, however, by the Supreme Court of the United States, that the declaration and existence of war between the United States and Great Britain did not authorize the confiscation of enemy's property on land, and that it could not be confiscated except by virtue of an Act of Congress: *Brown* vs. *United States*, *supra*. That decision proves that the seizure and confiscation of enemy's property on land are not acts of war.

In that case it was conceded that, in a public war, such right of confiscation belongs to Congress, as a belligerent right; and we are not disposed to question the correctness of that concession. But it does not follow that Congress has the same belligerent right against rebellious citizens of the United States. The restrictions in the Constitution upon the powers of the Government were designed to protect the people of the United States, and not aliens resident abroad. The protection received by aliens residing abroad, with reference to their property here, is due to international comity, and not to the Constitution of the United States. War may authorize the Government to refuse comity to its enemies, but cannot authorize it to suspend the Constitution, by virtue of which alone it has a right to exist. And, moreover, as has been shown, the Constitution contains a provision authorizing Congress "to make rules concerning captures on land and water" during public wars, which does not apply to civil wars. In our opinion, the existence of civil war does not confer upon this Government any belligerent right whatever, except the right to perform acts of war for the suppression of the rebellion. We have shown, at any rate, that the law of nations concedes to belligerents many powers which cannot be exercised by this Government, and that it cannot exercise any of those powers which are in conflict with the Constitution.

Though the Constitution declares that "no person shall be deprived of life, liberty, or property, without due process of law," yet a rebel may lawfully be slain in battle, and thus be deprived of life, or he may lawfully be captured in battle, and thus be deprived of liberty: because these, being acts of war, are authorized by those other provisions of the Constitution which authorize the

prosecution of the war. But those provisions do not authorize the confiscation of his property in the manner proposed by the statute under consideration, because such confiscation is not an act of war. Nor is such confiscation authorized by any other provision of the Constitution. On the contrary, it is prohibited.

The 5th amendment, declaring that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation," prohibits the confiscation or forfeiture of the property of any citizen of the United States, unless it can be sustained as a purely military act, which, as has been shown, cannot be done with reference to the property aimed at by the statute under consideration, or unless it can be sustained as a punishment for treason or other crime, the punishment of which Congress is authorized to prescribe.

The confiscation aimed at by the statute under consideration cannot be sustained as a punishment for treason, because the statute undertakes to authorize the condemnation of the property by a District Court, in any district in which any of the property may be found, or into which, if movable, it may first be brought, without presentment or indictment by a grand jury, without the arrest or summons of the owner, and upon such evidence of his guilt as would be sufficient proof of any fact in admiralty or revenue cases; whilst the Constitution declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger (5th amendment); that the trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the state where the said crime shall have been committed (art. 3, sec. 2, sub. 3); and shall be by an impartial jury of the state and district wherein the said crime shall have been committed, and that the accused shall enjoy the right to be confronted with the witnesses against him (6th amendment); and that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in

open court (art. 3, sec. 3, sub. 1). And these provisions, except the last one, render it equally clear that this attempt at confiscation, or rather at forfeiture, cannot be sustained as a punishment for any crime less than treason.

If, therefore, the act should be regarded, as we believe it must be, as an attempt to punish citizens for treason, or for aiding or abetting the rebellion, it is unconstitutional and void, because it authorizes a trial of those crimes in a mode different from that required by the Constitution.

If it should be regarded as an attempt, not to punish those citizens for crime, but to support the army of the United States with the proceeds of their property, it is unconstitutional and void, because it makes no provision for compensation. The Constitution does not recognise military necessity nor any other necessity whatever, as an authority for "taking private property for public use," in peace or in war, without just compensation.

Whether or not the provisions of the act concerning the confiscation of personal property are in conflict with that clause of the Constitution which declares that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," is a question upon which a majority of the court deem it unnecessary to express an opinion. Upon this point Judge WILLIAMS dissents, and proposes to write his own separate opinion.

3. It remains to be determined whether or not, upon common law principles, the appellee can, during the war, maintain an action for the money claimed in her petition.

This question is entirely distinct from that relating to the right of confiscation, and depends, as we have just intimated, not upon the Constitution nor upon the law of nations, but upon the common law. The fact that the Government is not authorized by the Constitution to confiscate the debt, does not prove that the appellee is entitled, by the common law, to recover the money during the war, and take it to Arkansas, where it may be used against the Government.

By the common law, though war does not create a forfeiture of the rights of alien enemies, growing out of pre-existing contracts,

it is settled that the right of action of an alien enemy, residing in the enemy's country, is suspended by war during its continuance.

It is from reasons of national policy that the alien is prevented from recovering the money and carrying it out of the country during the war: *Levine* vs. *Taylor*, 11 Mass. R. 12; *Russell* vs. *Skipwith*, 6 Binney 249.

As we have remarked, this insurrection has taken the shape of war. Those engaged in it have established a *de facto* government, complete in all its parts, and exercising sovereign powers over an extensive territory. "It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners:" *The Brilliant, &c.*, vs. *United States.*

Whether or not merely residing in that territory would render a person liable to be treated as an enemy, is a question upon which we need not express an opinion.

We are satisfied that, if the statements of the answer are true, those principles of the common law which suspend an alien enemy's right of action during war, apply to this case, and forbid our courts from aiding the appellee to recover money which might be used by her to support the wicked and causeless rebellion against the United States.

The Code of Practice does not authorize a plea in abatement. But one of the grounds of defence that may be presented in the answer is, "that the plaintiff has not legal capacity to sue." If the facts stated in the answer are true, the petition should be dismissed without prejudice.