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The Spectre of Attainder in New York (Part 2)

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THE SPECTRE OF ATTAINDER IN NEW YORK*

V. From the Adoption of the Constitution in 1789 to 1830

A. *Federal and State Constitutions*

As we have previously observed, the New York Constitution adopted at Kingston, April 20, 1777, in Article XLI had provided: "that no acts of attainder shall be passed by the legislature of this state, for crimes other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood." [185] We have seen that this provision was of no aid to the loyalists, nor even to that group of Americans who loved their country and desired to remain neutral, as, for example, in the case of the distinguished lawyer, Peter Van Schaack, yet were not willing to commit treason against the British Crown.

The Federal Constitution contained three provisions having a bearing on our topic.[186] Article III, Section III, Clause 2, provided that "No Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." Article I, Section IX, Clause 3, provided that "No Bill of Attainder or Ex Post Facto law shall be passed," and Article I, Section X, Clause 1, provided that "No state shall . . . pass any Bill of

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[185] 1 Laws of New York 14 (1789).

[186] For a discussion of the adoption of the attainder provisions of the Constitution in the Constitutional Convention of 1789, see Watson on the Constitution, pp. 733-739, Chicago (1910).

Attainder. . . ." Thus the prohibition as to the exercise of this device of tyranny was made good both as against the State and the Nation, and even in a case of treason corruption of blood was not to extend beyond the life of the person attainted.

With the relevant provisions of the state and federal constitutions in mind, as well as the provisions of the Treaty of Peace of 1783,[187] we may now proceed to consider the cases growing out of the forfeiture and attainder acts, but which arose after the adoption of the Federal Constitution in 1789.

B. *Decisions Involving Constitutional, Statutory or Treaty Provisions*

1. English Decisions

Since *Mostyn v. Fabrigas,*[188] the general rule has been that transitory as opposed to local causes of action could be sued upon in any court having personal jurisdiction of the defendant, without regard to where the cause of action arose. In practice, however, for various reasons, exceptions to the rule have been made. One of the exceptions, to use the words of Chief Justice Marshall, is that "The Courts of no country execute the penal laws of another. . . ." [189] Two earlier English cases [190] arose out of the Revolutionary War and the Peace Treaty of 1783, by which the United States Government undertook to guarantee British subjects who owned property in America from further confiscation of the same under existing attainder laws of the several states. One of these cases, *Folliot v. Ogden,*[191] involved New York, and is of significant interest as revealing the viewpoint of the English government and courts as to the validity of confiscations

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[187] The pertinent provisions of the Treaty of 1783 are set out in the text, *ante* pp. 33-34.

[188] 1 Cowp. 161, 98 Eng. Rep. 1021 (1774).

[189] *See* The Antelope, 10 Wheat. 66, 123, 6 L. ed. 268, 282 (U. S. 1825). See also article by Leflar, *Extraterritorial Enforcement of Penal Claims,* 36 HARV. L. REV. 194-225 (1932).

[190] Wright v. Nutt, 1 H. Bl. 136, 126 Eng. Rep. 83 (1788); Folliot v. Ogden, 1 H. Bl. 123, 126 Eng. Rep. 75 (1789), *aff'd,* 3 T. R. 720, 100 Eng. Rep. 825 (1790); Ogden v. Folliot, 4 Bro. P. C. 111, 2 Eng. Rep. 75 (1792).

[191] 1 H. Bl. 123, 126 Eng. Rep. 75 (1789).

of property in New York under the Attainder Act of 1779, and in view of the Treaty of Peace in 1783.

The facts in the case were that the plaintiffs, Richard Morris and Lewis Morris, and the defendant were inhabitants of the United States of America, while those states were still colonies of Great Britain, and before the War broke out between the two countries. In that situation, Richard Morris and Lewis Morris executed a bond to the plaintiff Folliot, Ogden signing as surety for the obligation. During the War and after the Declaration of Independence by the Congress, both parties were attainted, their property confiscated and vested in the respective states, New York and New Jersey, of which they were inhabitants, by the legislative acts of those states, and a fund was provided for the payment of the debts of the defendants. The defendants having failed to perform, the plaintiff, Folliot, brought an action of debt in the Court of Common Pleas, at Westminster, against the defendants. The defendants pleaded that by the Acts of Attainder in New York and New Jersey, the plaintiff's title to the bond had been cut off, hence that he could not maintain the action. Two issues were thus prescribed:

1. Whether, under the circumstances of the case, the plaintiff had a right to sue? The answer to this first question was held to turn on the effect of the New York Act of Attainder of 1779 upon the plaintiff. As to this the court observed that these Acts having been made by persons or states in a state of rebellion at the time, were null and void. Nor was their invalidity cured by the Treaty of Peace. It could not ratify those acts which were performed by Americans while in a state of rebellion, and at a time when the British Crown was seeking to restore them to obedience. Nor could the Treaty confirm such Acts, or the attainder of the loyal subjects of the Crown. Accordingly, if the bond of the plaintiff had been signed by the people of New York, it could not have had the effect of depriving the plaintiff of his right of action, before any acknowledgment of the lawfulness of the power making it. The court ruled further that as the bond was not signed, as it was never divested out of him, and

he was still possessor of it, nothing could prevent his suit upon it in England.

2. Whether, under the circumstances, the defendant was liable to be sued in England on a bond made in America?

This depended on whether the defendant could establish as a defense his own attainder in New Jersey, and the confiscation of his property. As to this the court held that the New Jersey Act of Attainder did not disable the plaintiff from suing nor exempt the defendant from being sued in England. Nor was it a good plea in bar that an ample fund was provided out of the effects of the defendant for the payment of his debts, to which the plaintiff might or ought to have resorted, and been paid, although it might constitute ground for relief in equity. This judgment on writ of error to the King's Bench, was affirmed,[192] but on an entirely different ground, to wit, on the theory that the New York Attainder Act of 1779, passed after the Declaration of Independence, and before the Treaty of Peace, by which England acknowledged the independence of the colonies, was to be considered as a nullity in the English courts. The real ground of the decision was that the penal laws of one country could not be given effect in another. To the plaintiff's action on the bond, the defendant had pleaded that, by the penal laws of New York and New Jersey, the property in the bond had been divested, and cut off. To this contention the court replied that the Acts of New York and New Jersey being penal in character, were unenforceable in England, hence such action was a nullity and was powerless to affect the laws and rights of the citizens of England. This decision in turn was affirmed by the House of Lords on February 25, 1792.[193]

In the second case, *Dudley v. Folliot*,[194] a covenant in a conveyance of lands in America, executed during the War of the Revolution, that the grantor had a legal title, and that the grantee might peaceably enjoy, without interruption of

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[192] 3 T. R. 720, 100 Eng. Rep. 825 (1790).
[193] 4 Bro. P. C. 111, 2 Eng. Rep. 75 (1792).
[194] 3 T. R. 585, 100 Eng. Rep. 746 (1790).

the grantor and his heirs, or by any other person, was held not to be broken by the act of New York seizing the lands as forfeited for an act done prior to the conveyance. This was held to be true in spite of the subsequent acknowledgment by England of the independence of New York, as such a covenant did not extend to the act of wrongdoers, but only to persons claiming by a legal title.

Finally, in *Kempe v. Antil,*[195] in which the former attorney and Advocate General for the province of New York in North America, sought to restrain an action in England on a bond, because the creditor had failed to satisfy his claim out of his estate which had been confiscated under the forfeiture acts of New York and New Jersey, an injunction was refused. Accordingly, the original plaintiff was paid.

2. New York Statutes and Decisions

a. Statutes

(I) Act of March 3, 1789

The Act of March 3, 1789,[196] provided that, since no person was permitted to benefit under the Act of July 12, 1782, unless he had taken the oath of allegiance and obtained a certificate signed by twelve respectable persons, and since the word "two" had been substituted in place of the word "twelve," and certificates had been accepted by certain creditors, the receipts therefor were to be deemed to have extinguished the debt. And in all cases where proceedings had been prosecuted to judgment of preclusion against certain creditors, and certificates had not been received, interest was to be discharged for the period between January, 1776 and May 1, 1786. Any remainder of money due was to be authorized to be paid in three installments.

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[195] 2 Bro. C. C. 11, 29 Eng. Rep. 6 (1785). *Contra:* Wright v. Nutt, 3 Bro. C. C. 326, 29 Eng. Rep. 562 (1791).

[196] This Act was entitled, "An Act to give Relief respecting Debts due to Persons formerly within the Enemy Lines." 2 Laws of New York, c. XLIX, p. 470 (1789).

(II) Act Abolishing Forfeitures and Corruption of Blood (1796)

By the Act of March 26, 1796,[197] it was provided that no conviction or attainder of any person for any offense except treason, should work a forfeiture of chattels or lands, as well as forfeitures in the nature of deodands and in the case of suicide. This, in effect, abolished forfeiture and corruption of blood as known at common law in England.

(III) Act Barring Actions as to Forfeited Estates (1797)

The statutory phase of the story was now rapidly drawing to a close. Thus, we find that the Act of March 28, 1797,[198] barred all claims against forfeited estates if not prosecuted within five years after the passing of the act, with a proviso as to infants, femme coverts, and insane persons.

(IV) Act on Civil Death (1799)

By the Act of March 29, 1799,[199] it was provided that persons convicted of a felony thereafter should be deemed to be civilly dead to all intents and purposes. Apparently, this was only declaratory of the common or existing law, the enactment being "for greater caution." [200]

(V) Treason Act (1801)

On March 20, 1801, the legislature passed a new treason statute providing for attainder where any person levied war against the people of the state within the state, or adhered to the enemies of the state, giving them aid or comfort in the state, or elsewhere.[201] In such case forfeiture or chattels

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[197] See "An Act making Alterations in the Criminal Law of this State, and for erecting State Prisons." 3 Laws of New York, c. XXX, p. 291 (1797).

[198] This Act read: "An Act limiting the Period of bringing claims and Prosecutions Against Forfeited Estates." 1 Laws of New York, c. LII, p. 162 (2d ed. 1807).

[199] *See* Troup v. Wood, 4 Johns. Ch. 228 (N. Y. 1820).

[200] *Id.* at 246.

[201] The Act was entitled, "An Act relative to Treason," 1 Laws of New York, c. XXIX, § 1 (2d ed. 1807).

and lands was provided for, but the attainder was not to be construed as corrupting the blood of the offender, or as forfeiting the dower of his wife.[202]

(VI) Outlawry Act (1801)

The Act of March 21, 1801,[203] provided the process of outlawry for the personal actions of account, debt, annuity, covenant, conspiracy, case and replevin, but such outlawry was not to work any disability or forfeiture in favor of any other person than the plaintiff.[204]

(VII) Act for Discovery of Forfeited Lands (1803)

On March 31, 1802,[205] a statute was made to facilitate the discovery and sale of estates of attainted persons, and it gave twenty-five per cent of the estate to the person making the discovery. It also permitted the person found in possession to purchase the land so discovered.

(VIII) Statute Abolishing Writs of Attaint Upon Untrue Verdicts

And finally, on April 5, 1813,[206] a statute abolished attaints upon untrue verdicts as a method of controlling the jury, thus for all practical purposes bringing to an end the statutory chapter on attainder.

b. Decisions

(I) Purchaser's Claim for Rent Against Seller in Possession Under Attainder Act—Sleight v. Kane (1801)

In the earliest New York case of *Sleight v. Kane*,[207] the facts were that the defendant, Kane, a British subject, re-

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[202] *Id.* at §§ 9, 10.

[203] The Act was entitled, "An Act for regulating Outlawries," 1 Laws of New York, c. LI, pp. 246-250 (2d ed. 1807).

[204] On March 24, 1801, "An Act for the Relief of Debtors with respect to the Imprisonment of their Persons," 1 Laws of New York, c. LXVI (2d ed. 1807).

[205] This Act was entitled, "An Act to facilitate the Discovery and Sale of the Estate of Attainted Persons," 3 Laws of New York, c. LXXXII, p. 47 (1804).

[206] 1 Laws of New York, c. XL, § 27, p. 358 (1807).

[207] 2 Johns. Cas. 236 (N. Y. 1801).

siding in Dutchess County, on December 17, 1777, purchased a farm and dwelling house from Sleight in the Town of Fishkill for £2,400, giving a note for part of the consideration, it being agreed that Sleight, the intestate, should remain in possession during the war, at a reasonable rent. Thereafter, the defendant took refuge on August 1, 1777, behind the British lines in New York City, where he remained until November 25, 1783, when he evacuated with the British Army, not returning to the State until September 1, 1793. On August 4, 1784, the plaintiff sued on the promissory note for £100, payable on demand. The defendant, in addition to other defenses, claimed a set-off for rent due from December 17, 1777 to October 20, 1779. On October 22, 1779, the Legislature had declared "for the forfeiture and sale of the estate of persons who have adhered to the enemies of the State," by which act the defendant was by name convicted and attainted, his real and personal property on that day being forfeited to and vested in the State of New York." The issue therefore was whether the rent claimed by the defendant could be set-off against the defendant's demand?

The court, in holding for the plaintiff, said that although the note was given as consideration for the farm, the retention of its possession by the plaintiff was not a condition of the purchase, hence there were two distinct transactions. Accordingly, the defendant's claim for rent was merely a chose in action, and, as personal property, was transferred under the forfeiture act to the people, as also was his right to the real estate, the consideration for the rent failed. Therefore he could neither maintain an action for it, nor set it off by way of defense.

Finally, it was said: "The Treaty of Peace does not affect this case."

(II) Attainder of Plaintiff as Defense to Action of Ejectment—Jackson v. Sands (1801)

The next case, *Jackson* ex dem. *St. Croix v. Sands*,[208] was also decided in 1801 under the Act of Attainder and

[208] 2 Johns. Cas. 267 (N. Y. 1801).

Banishment of October 22, 1779. The facts were that in an action of ejectment it was proved that the lessor of the plaintiff, by the name of Joshua Temple De St. Croix, was seized of the premises in question from the year 1776 to 1782. The defendant offered in evidence a record of conviction of Joshua De St. Croix, dated July 15, 1783, by which it appeared that he had been indicted and attainted, and his real and personal property forfeited to the State. The defendant also gave in evidence a deed from the Commissioners of Forfeitures, dated May 18, 1786, which stated that they had been "forfeited to the people of the state of New York by the Conviction of Joshua T. De St. Croix." The lessor's name of baptism was proved to be Joshua Temple. An offer by defendant, to prove that the lessor was known by the name of Joshua De Croix, was objected to, but overruled. Several witnesses testified that they knew the lessor was generally called Joshua De St. Croix, as mentioned in the record of conviction, and Joshua T. De St. Croix, named in the deed to the defendant, were one and the same person. The court also directed the jury to return a verdict for the defendant, if they believed them to be one and the same person. A verdict having been returned for the defendant, a motion to set aside the verdict, and for a new trial, was made.

The issue thus presented was whether the variance in the name between the record of conviction, and the deed, was sufficiently material to be fatal to the plaintiff's case?

The court took the view that even if the variance in the record were fatal, it was not so as to the deed, for there it appeared not as evidence of the person convicted, but as a part of the description of the premises conveyed, hence was subject to explanation by proof. Noticing a procedural distinction between those cases in which the person was attainted by name in the act and in those attainted by the procedure prescribed under the act for those not named, the court concluded that in both instances the attainder was legislative in character, hence not subject to common law rules of construction in the ordinary case. On the contrary, said the court, an attainder by statute being a high and vigorous act of sovereignty, and defendable only as necessary to public safety or national policy, the act was to be con-

strued liberally according to its true intent. So construing it, and relying upon the authority of a case in Foster's Reports,[209] the court concluded the description of the lessor was merely incomplete in point of form, and not repugnant to the truth, hence evidence could not be received to show that the identity of the person named in the record of conviction and in the deed were one and the same, and it followed that that being so, the plaintiff was precluded from recovery of the forfeited estate. Moreover, observed Kent, J., by the Act of May 19, 1784,[210] any error in the proceedings relating to prior forfeitures or confiscations were ratified and confirmed. Accordingly, judgment was entered for the defendant. Apparently, this case presented no issue under the Treaty of 1783.

(III) Attainder of Grantee as Defense to an Action of Ejectment—Jackson v. Catlin (1807)

The next case, *Jackson* ex dem. *Gratz v. Catlin*,[211] decided in 1807, involved an action of ejectment. The facts were that the land in question was originally owned by one Croghan against whom William Peters secured a judgment for debt. This was followed by a sale at public auction in July, 1774, to Thomas Jones, afterward a judge of the Supreme Court of New York, and a deed was executed on November 9th following, in favor of Jones, the purchaser, but delivered to James Duane,[212] as an escrow, to be delivered to Jones upon payment of the purchase money. On October 22, 1779, Thomas Jones was attainted of the offense of adhering to the enemies of the state, thus forfeiting "all his estate, both real and personal, held or claimed by him, whether in possession, reversion or remainder, and also all estates and interests claimed by executory devise or contingent remainder."

The issue thus raised was whether, in an action of ejectment by the heirs of the lessor of the plaintiff, Croghan, could

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[209] Grantham v. Gordon, 1 P. Wms. 612, 24 Eng. Rep. 539 (1719).
[210] 1 Laws of New York, c. LXX, p. 159 (1789).
[211] 2 Johns. 248 (N. Y. 1807).
[212] Doubtless this was the same James Duane who presided over the case of Rutgers v. Waddington in 1784.

succeed against the defendant Catlin, who claimed under a transfer made by the Surveyor-General, acting under the authority of the Act of March 21, 1788,[213] authorizing a transfer of the interest of Jones, who had been attainted by the Act of October 22, 1779.

The determination of this issue turned on a secondary issue as to the nature of the estate which the defendant acquired, or the nature of the estate which Jones acquired when the deed was delivered in escrow. Was it an estate vested in possession, reversion, remainder, by executory devise, or contingent remainder, or was it an estate on condition?

If the latter, then no interest vested in Jones, and through him, the defendant.

The court held, Justice Kent delivering the opinion, that the delivery of the deed in escrow, until the condition was performed, did not transfer the legal title to the purchaser Jones, that the Act of Forfeiture did not apply to estates upon condition, hence upon the attainder of Jones, the estate of the lessor of the plaintiff did not vest in the people of the State; and that the State could not, by paying the money, perform the condition, so as to make the deed, delivered in escrow, absolute, and thereby vest the estate in the person attainted; and that the only effect of the State's transfer was that of a quitclaim deed.

In reaching this conclusion Justice Kent pointed out that at common law no condition, use or mere right of action, was forfeited to the King, upon attainder of treason even though such attainder reached the lands and tenements. This, apparently, was the rule under the English Statute of Treasons,[214] a defect which was cured by a later statute,[215] which declared uses, entries and conditions, as well as possessions, reversions and remainders should be forfeited upon attainder. Since then, observed Chief Justice Kent, the only issue has been whether the condition was personal and inseparable from the person attainted, or could be performed by the Crown. Comparing the language of the Act of Oc-

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213 2 Laws of New York, c. XC, p. 372 (1789).
214 25 EDW. III, c. 2 (1351).
215 33 HEN. VIII, c. 20 (1541-42).

tober 22, 1779, to the language used in the English Statute of 26 Hen. VIII, c. 13 (1534), the court found the language of the latter as broad as that used in the state act, and then pointed out that such language was not regarded as including a condition. Accordingly, it required the express words of the Statute of 33 Hen. VIII, c. 20 (1541-2), to embrace those cases. Even in the face of the amendment the court said the language of the statute had been strictly construed where a question of the forfeiture of conditions was involved, citing the *Duke of Norfolk's case*,[216] which held a personal condition not forfeitable; *Englefield's case*,[217] permitting a nonpersonal condition to be performed by the Queen, only later to be confirmed by statute,[218] because of doubt. Accordingly, said the Chief Justice, whether viewed from the standpoint of the common law, or the decisions since the statute of 33 Hen. VIII, c. 20 (1541-2), the attainder of Jones did not vest in the state any right to pay the purchase money and take legal title to the land. It followed that the heirs of Croghan, the lessor of the plaintiff, still held title to the premises, unless the sale by the Surveyor-General alienated this right. As to this, the court observed that the Act of March 22, 1788, being a private act, and without a saving clause, did not bring strangers within its purview, but only those whose consent was obtained.[219] It was for this reason that the Act merely directed the Surveyor-General to execute a deed with a clause of warranty. Therefore the deed was good against no person except the state; it was a mere quitclaim of whatever right or interest the state had. As it did not declare the sale a bar to Croghan's claim, there was no issue as to the constitutional validity of the statute. The Act in question, finally observed the court, was passed under a misapprehension of the rights of the state resulting from the attainder of Thomas Jones, and at the suggestion of William Peters, who held the judgment against

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[216] 3 Rep. Ch. 1, 22 Eng. Rep. 931 (1683).

[217] 7 Co. Rep. 11b, 77 Eng. Rep. 428 (1591).

[218] 35 ELIZ., c. 3 (1592-3). *See also* Wardner v. Hardwin, Latch. 102, 82 Eng. Rep. 295 (1625-28); Smith v. Wheeler, 1 Mod. 38, 86 Eng. Rep. 714 (1670).

[219] The court cited as authority: Boswell's Case, 25 & 26 ELIZ., cited in Barrington's Case, 8 Co. 136B, 77 Eng. Rep. 681 (1611).

Croghan, for the purpose of transferring the interest of the state whatever it might be. The Treaty of 1783 was in no way involved.

(IV) Right of Mortgagee in Possession to Set Up Mortgage Against State as Successor to Attainted Mortgagor—Jackson v. Pierce (1813)

The case of *Jackson* ex dem. *The People v. Pierce,* decided in 1813,[220] also involved an action of ejectment. The facts were that Weatherhead, on March 2, 1773, executed a mortgage deed to Thomas Warnold and others of Leeds, Great Britain, to secure the payment of a bond. On March 3, 1803, the mortgage was assigned to Thurman. In the meantime, by the Act of October 22, 1779, Weatherhead had been attainted, and went to England, and on March 29, 1802, upon petition by the occupants of the land in question, the Attorney-General and Surveyor-General reported that there was a sum of six thousand dollars or more due on the mortgage, and advised the State against redeeming the mortgage, suggesting a sale subject to the mortgage. The land in issue was not settled or inhabited until 1786, and the mortgage debt had laid dormant from April, 1774 to March, 1802. The issue thus presented was whether the defendant in possession under the mortgagee could set up the mortgage against the state, as having succeeded to the rights of the mortgagor, who had been attainted? The court held that a mortgage given by the attainted mortgagor, Weatherhead, could be set up against the state. The case is only interesting as showing the unexpected difficulties which arose once the policy of attainder was embraced and as showing further how long it was to take for the effects to die out.

(V) Effect of Issuance of Writ of Scire Facias to One Civilly Dead in Suit to Quiet Title—Troup v. Wood & Sherwood (1820) and Platner v. Sherwood (1822)

The case of *Troup v. Wood and Sherwood*[221] is not directly related to our topic, but has an indirect bearing be-

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[220] 10 Johns. 414 (N. Y. 1813).
[221] 4 Johns. Ch. 228 (N. Y. 1820).

cause it involved the application of the Act of March 29, 1799, which declared that a person convicted thereafter of any felony should be deemed to be civilly dead to all intents and purposes. The plaintiff, seeking to quiet title to his premises, was holding under Henry Platner, who had been convicted of forgery, and under the amendment to the civil death statute of March 29, 1799, which reduced the punishment from death to imprisonment for life, and provided that no such conviction should work a forfeiture of property real or personal, contended that the writs of scire facias issued to one civilly dead, and not to his personal representatives, could have no legal operation or effect in reviving a judgment against him. The court, Chancellor Kent presiding, so held.

The next case, *Platner v. Sherwood,*[222] decided in 1822, was a sequel to the case of *Troup v. Wood,* in which Platner, still seeking to quiet title, stated that in 1783, being indebted to Abraham Bachman, he executed a bond to secure the debt, that in 1787 judgment was entered in the Supreme Court for the penalty of the bond, that he made a final settlement with Bachman, and got a receipt, but no satisfaction of the judgment was entered on the record, that in 1799, he was indicted, tried and convicted of a forgery committed before March 29, 1779, that he was sentenced to life imprisonment, and later pardoned, that at the time of said conviction he owned several lots of land in the military tract, that after his conviction Bachman acquired the receipt, and revived the judgment, and that his lands were accordingly sold on execution of the judgment, wherefore he prayed that the defendant be decreed to quiet the plaintiff in his title, to account for the rents and profits, and for general relief.

The defendant Sherwood demurred to the bill on the ground that it appeared by the bill that plaintiff was divested of his estate by the conviction, attainder and imprisonment stated in the bill, that he had not been restored thereto, hence he was not required to answer thereto.

The court overruled the demurrer and ordered the defendant to answer.

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[222] 6 Johns. Ch. 118 (N. Y. 1822).

The effect of this was to hold that a person convicted and attainted of felony and sentenced to imprisonment for life, prior to March 20, 1799, the date of the act creating civil death, was not civilly dead, hence his estate was not divested. It follows logically that the plaintiff was entitled to have his title quieted.

(VI) Statute Barring From Public Office Persons Convicted of Duelling as Violation of Constitutional Prohibition Against Attainder—Barker v. New York (1823)

The case of *Barker v. The People of the State of New York* [223] is only of negative interest, holding that the Act of November 5, 1816, to suppress duelling, and declaring any person convicted of challenging another to fight, should be incapable of being elected to any post of profit, trust or emolument, civil or military, under the state, was constitutional and did not involve the federal constitutional prohibition against the enactment of a bill of attainder.[224]

(VII) Attainder of the Plaintiff's Ancestor as a Defense to a Writ of Right to Recover Land Occupied by Tenants as Owners—Inglis v. Sailor's Snug Harbor (1830)

Inglis, Demandant v. The Trustees of the Sailor's Snug Harbor in the City of New York,[225] which arose in New York, and was tried in the Circuit Court of the United States for the Southern District of New York, evidently because it was concerned with the rights of a New York and a foreign citizen, was the first New York case, since *Rutgers v. Waddington,* to raise serious issues under the Treaty of 1783, and is of considerable significance as shedding a light on developments in New York long after the close of the War.

The facts were that the plaintiff brought a writ of right to recover certain real estate located in New York City, whereof Robert Richard Randall died seized. The count was

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[223] 3 Cow. 686 (N. Y. 1823); *affirming* 20 Johns. 457 (N. Y. 1823).

[224] Two cases, Hartung v. The People, 22 N. Y. 95 (1860), and Shepherd v. The People, 25 N. Y. 406 (1862), sometimes referred to as involving problems of attainder, are omitted, as in reality they are concerned with ex post facto laws.

[225] 3 Pet. 99, 7 L. ed. 617 (U. S. 1830).

upon the seizin of Robert Richard Randall, and went for the whole premises, as his brother and sister who both survived him, had since died without issue. The plaintiff traced his relationship to Robert Richard Randall, through Margaret Inglis, his mother, who was a descendant of John Crooke, the common ancestor of Robert Richard Randall, Catherine Brewerton and Paul R. Randall. The tenants put themselves upon the grand assize, and the mise was joined upon the mere right.

At the trial evidence was offered to show that the tenants, in possession for a number of years, were holding the land as owners, that Robert Richard Randall who was seized, had purchased from one Baron Poelnite; that the plaintiff was the next collateral heir of Robert R. Randall on the part of his mother, and that the blood of Thomas Randall, father of Robert Richard Randall, was extinct. It was also in evidence that the British troops entered New York on September 15, 1776, under authority of the British Commander-in-Chief, that the plaintiff, Inglis, was born in New York City and was not then more than one year old, that the plaintiff's father, a native of Ireland, resided in New York and continued to do so until the day before, or the day of evacuation on November 25, 1783, at which time the plaintiff was taken to England, that the father later went to Nova Scotia, where he died, that the mother of the plaintiff died in New York on September 21, 1783, before the evacuation of British troops, that Charles Inglis, the father of plaintiff, had always been considered a royalist, that the plaintiff was born before the year 1779, that in 1783 he could not speak plainly and was considered not more than five years old, that he resided in Nova Scotia with his father, and had continued there ever since, that Charles Inglis had four children, the eldest of which, a son, died in infancy, on January 20, 1782, two daughters, and the plaintiff, who was the youngest child.

It further appeared that on July 16, 1776, the Members of a New York State convention, prior to the entry of the British into New York City, Resolved: ". . . that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and all members of the state; and that all persons pass-

ing through, visiting, or making a temporary stay in said state, being entitled to the protection of the laws, during the time of such passage, visitation, or temporary stay, owe, during the same, allegiance thereto. That all persons, members of, or owing allegiance to, this state, as before described, who shall levy war against the said state, within the same, or be adherent to the King of Great Britain, or others, the enemies of the said state, within the same, giving to him or them aid or comfort, are guilty of treason against the state, and being thereof convicted, shall suffer the pains and penalties of death."

The tenants then gave in evidence acts of the legislature of New York "for the forfeiture of the estate of persons who adhered to the enemies of the state," passed October 22, 1779;[226] and the supplement thereto, passed March 27, 1783.

Robert Richard Randall died in New York City between June 1 and July 1, 1801, leaving a will, which was duly probated.

The provisions of the will, under which the tenants claimed title, read:

6. As to and concerning all the rest, residue and remainder of my estate, both real and personal, I give devise and bequeath the same unto the chancellor of the state of New York, the mayor and recorder of the city of New York, the president of the chamber of commerce in the city of New York, the president and vice-president of the Marine Society of the city of New York, the senior minister of the Episcopal church in the said city, and the senior minister of the Presbyterian church in the said city, to have and to hold all and singular the said rest, residue and remainder of my said real and personal estate, unto them, the said chancellor of the state of New York, mayor of the city of New York, the recorder of the city of New York, the president of the chamber of commerce, president and vice-president of the Marine Society, senior minister of the Episcopal church, and senior minister of the Presbyterian church in the said city, for the time being, and their respective successors in the said offices for ever, to, for and upon the uses, trusts, intents and purposes, and subject to the directions and appointments hereinafter mentioned and declared concerning the same, that is to say, out of

[226] 1 Laws of New York, c. XXV, p. 39 (1789).

the rents, issues and profits of the said rest, residue and remainder of my said real and personal estate, to erect and build upon some eligible part of the land upon which I now reside, an asylum or marine hospital, to be called "the Sailor's Snug Harbour," for the purpose of maintaining and supporting aged, decrepid and worn-out sailors, as soon as they, my said charity trustees, or a majority of them, shall judge the proceeds of the said estate will support fifty of the said sailors, and upwards; and I do hereby direct, that the income of the said real and personal estate, given as aforesaid to my said charity trustees, shall for ever hereafter be used and applied for supporting the asylum or marine hospital, hereby directed to be built, and for maintaining sailors of the above description therein, in such manner as the said trustees, or a majority of them, may, from time to time, or their successors in office may, from time to time, direct. And it is my intention, that the institution hereby directed and created should be perpetual, and that the above-mentioned officers for the time being, and their successors, should for ever continue and be the governors thereof, and have the superintendence of the same. And it is my will and desire, that if it cannot legally be done, according to my above intention, by them, without an act of the legislature, it is my will and desire, that they will, as soon as possible, apply for an act of the legislature to incorporate them for the purposes above specified. And I do further declare it to be my will and intention, that the said rest, residue and remainder of my real and personal estate, should be at all events applied for the uses and purposes above set forth; and that it is my desire, all courts of law and equity will so construe this my said will, as to have the said estate appropriated to the above uses, and that the same should, in no case, for want of legal form or otherwise, be so construed, as that my relations or any other persons should heir, possess or enjoy my property, except in the manner and for the uses herein above specified.

And lastly, I do nominate and appoint the chancellor of the state of New York, for the time being, at the time of my decease; the mayor of the city of New York, for the time being; the recorder of the city of New York, for the time being; the president of the chamber of commerce, for the time being; the president and vice-president of the Marine Society in the city of New York, for the time being; the senior minister of the Episcopal church in the city of New York, and the senior minister of the Presbyterian church in the said city, for the time being; and their successors in office, after them, to be the executors of this my last will and testament, hereby revoking all

former and other wills, and declaring this to be my last will and testament.[227]

Immediately upon the testator's decease, and the probate of the will, the officers named in the will entered upon the premises as owners in fee, until the legislature of New York on February 6, 1806, passed "An Act to incorporate the Sailor's Snug Harbor, in the City of New York," which act authorized the new corporation to purchase, hold and convey real estate for the use and benefit of said corporation.

Thereupon, the counsel for the tenants gave in evidence the legislative act "for the relief against absconding and absent debtors," passed April 4, 1786,[228] and a report made to the Supreme Court of Judicature of the State of New York, of proceedings under the act against Paul Richard Randall, by which he was declared an absent debtor. Under this act the estate of Paul Richard Randall was seized on November 13, 1800, and conveyed on December 22, 1801, to Charles Ludlow, James Brewerton and Roger Strong, of New York City, as trustees for the creditors of the said debtor.

Subsequently, the demandant offered in evidence two rules of the Supreme Court of Judicature; the *first,* dated February 17, 1804, ordered that the said Trustees pay to the said Paul Richard Randall . . . the sum of $5,500, out of the money now remaining in the hands of the said trustees; the *second,* dated August 9, 1804, vacated the prior rule, and ordered the said sum of $5,500 . . . to be paid over by them to the said Alexander Phoenix, as the attorney and agent of the said Paul Richard Randall."

It further appeared that Catherine Brewerton died about 1815, that Paul Richard Randall died in 1820, that Catherine Brewerton, while a widow, executed a will on June 5, 1815, devising her estate to her executors upon trust for uses described in her will.

Upon the trial in the circuit court, the judges were opposed in opinion upon the following points, which were certified to the Supreme Court:

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[227] Note 225 *supra* at 104, 7 L. ed. at 619.
[228] 1 Laws of New York, c. LIV, p. 96 (1789).

1. Whether, as the count in the cause was for the entire right in the premises, the defendant could recover a less quantity than the entirety?

As the determination of this issue has little relation to our general topic, it is sufficient that Justice Thompson, for the majority, answered the question in the affirmative.[229] This view, after a very exhaustive survey of the common law and statutory authorities in England and New York and Massachusetts, was confirmed by Justice Story in his dissenting opinion.[230]

2. Whether John Inglis, the demandant, was or was not capable of taking lands in the State of New York by descent?

This issue was broken up into four subordinate issues:

A. Whether, in case John Inglis was born before July 4, 1776, he was an alien, and hence disabled from inheriting real estate?

B. Whether, in case he was born after July 4, 1776 and before September 15, 1776, at which time the British took possession of New York, he was under a like disability?

C. Whether, if he was born after September 15, 1776 and before the British evacuation on November 25, 1783, he was under a like disability?

D. What would be the effect upon the right of John Inglis to inherit real estate in New York if grand assize found that Charles Inglis, the father, and John Englis, the demandant, did elect, in point of fact, to become and continue as British subjects, and not American citizens?

As to this issue, and without discussing each subordinate issue, Justice Thompson held that if John Inglis was born before July 4, 1774, he became a British subject, and in the absence of some subsequent act on his part, continued an alien, hence was disabled from taking the land in question.

Justice Johnson, of the majority, held that the demandant was in the beginning clearly a subject of the British

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[229] 3 Pet. 99, 7 L. ed. 617 (U. S. 1830).
[230] *Ibid.*

Crown, that by the revolution, that allegiance, under the principles of common law, adopted by the twenty-fifth article of the New York Constitution of 1777, was transferred to the state, that the common law declared that an individual could not put off his allegiance by his own act, that no legislative act changing the common law was passed, that the demandant was prohibited by the provisions of the state constitution: the thirteenth article of the act of the constitution providing that "no member of the state shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of the state by that constitution, unless by the laws of the land or the judgment of his peers," and the forty-first article declaring that "no act of attainder shall be passed by the legislature of the state, for crimes other than those committed before the termination of the present war, and that such acts [of attainder] shall not work corruption of blood," hence the second question should be answered in the affirmative; that is, that John Inglis was entitled to inherit as a citizen born in the State of New York.

Justice Story, after a survey of the general principles of the subject of alienage, said that peculiar difficulties developed where a country was divided by civil war. Thus, while the rule that allegiance due by birth could not be changed by any act of the subject, but might be by a complete overthrow of the existing government, notwithstanding the civil war, remained in existence and in active possession of a part of the country. Accordingly, under such circumstances, the principle adopted was to permit all persons, whether natives or inhabitants, to elect to remain subjects of the British Crown, or to become citizens of the United States, such choice to be made within a reasonable time.[231] He then considered the facts and found that, John Inglis' parents, as early as September 15, 1776, had joined the British troops in New York, and remained under their protection until the close of the war, that he then withdrew and re-

[231] Cases cited for authority included: Martin v. Commonwealth, 1 Mass. 347 (1805); Commonwealth v. Chapman, 1 Dall. 53, 1 L. ed. 33 (U. S. 1781); Caignet v. Pettit, 2 Dall. 234, 1 L. ed. 362 (U. S. 1795); Inhabitants of Manchester v. Inhabitants of Boston, 16 Mass. 230 (1819); M'Ilvane v. Cox's Lessee, 4 Cranch. 209, 2 L. ed. 598 (U. S. 1808).

mained thereafter under allegiance to the British Crown. Referring to the Ordinance of July 16, 1776, which declared "that all persons *abiding* within the state of New York and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state," by operation of law, Justice Story said that the word "abiding" did not mean merely present inhabitancy, but present inhabitance coupled with an intention of permanent residence. Hence, he argued that the temporary stay mentioned in the resolution, passed only twelve days after the declaration of independence by Congress and within five days after the adoption of the declaration by the convention of this state, clearly indicated that those persons resident here without a permanent intention to remain, were not to be regarded as members of the state. Pointing out that the Attainder Act of 1779, which named the parents of the demandant, and that hence they were absolved of allegiance, and that this was the status at the close of the war, Justice Story therefore concluded that John Inglis was born and remained a subject of Great Britain unless it could be shown he was born between July 14, 1776 and September 15, 1776, the date of the British occupation of New York.

3. Whether the will of Catherine Brewerton was sufficient to pass her right and interest in the premises in question, so as to defeat the demandant; the premises being, at the date of the will and ever since, held adversely by the tenants in this suit?

Mrs. Brewerton was the sister of Robert Richard Randall, and in the event the devise in his will was void, and could not take effect, she, as one of his heirs, was entitled to a moiety of the lands. It appeared that she died in 1815, leaving a will by which she devised her real and personal estate, in law and equity, in possession, reversion, remainder or expectancy, unto her executors, upon certain trusts therein described. If this will was operative so as to pass her right to her brother's estate, the demandant's right to recover would be defeated as to one-half of the land.

The operation of the will was objected to on the ground that the premises at the time were held adversely by the

tenants in the suit. The validity of this objection turned upon the construction of the New York Statute of Wills,[232] or on the issue as to whether the owner of lands could devise land, which at the time of the devise and his death, was held adversely. More specifically, the question was whether a person having a right of entry had an estate by inheritance in lands within the meaning of the statute of wills. In answer to this question Justice Thompson held that Mrs. Brewerton had a right of entry, which was devisable, notwithstanding it was held adversely by the tenants in the suit.[233] Justice Story, who dissented, agreed with the majority conclusion on this third issue.

4. Whether the proceedings against Paul R. Randall, as an absent debtor, passed his right or interest in the lands in question to, and vested the same in, the trustees appointed under the said proceedings, or either of them, so as to defeat the demandant?

Paul R. Randall died in 1820 and he and his sister, Mrs. Brewerton, were the heirs at law to the estate of their brother, Robert Richard Randall, hence if the will of Mrs. Brewerton passed her right, Paul R. Randall was entitled to the other moiety; if not, he was entitled to the whole of his brother's estate. The determination of this issue turned upon whether a right of entry passed under the provisions of the Absconding Debtor Act.[234] This depended on whether the term "estate," as used in the Act, extended to the interest which the debtor had in the adversely held lands. Justice Thompson found that the language of the Act was broad enough to include a right of entry, hence the estate of the debtor, under the New York statute, vested in the trustees by operation of law, without any assignment.

Justice Story, on this point in his dissent, held that the proceedings against Paul R. Randall did not pass his right or interest in the lands so as to defeat the demandant, basing this conclusion on the common law rule that the word

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[232] 1 N. Y. Rev. Laws 364, § 1.

[233] The authority relied upon was Jackson v. Varick, 7 Cow. 237 (N. Y. 1827).

[234] 1 N. Y. Rev. Laws 157.

"estate" did not include a right of entry,[235] plus an analysis of the New York statutory provision designed to show that they never were intended to cover rights of entry. Accordingly, he concluded that the right of entry of Paul R. Randall did not pass to the trustees under the absconding debtor statute. But, said Justice Story, even if they did, and all the trusts had been satisfied, there was a resulting trust to him in the unsold estate.

5. Whether the devise in the will of Robert Richard Randall of the lands in question, was a valid devise, so as to divest the heir-at-law of his legal estate, or to affect the lands in his hands with a trust?

This question arose under the residuary clause of the will, under which the testator declared that as to the residue and remainder of his estate, he gave, devised and bequeathed the same to the Chancellor of the State of New York, and several persons in official positions, to have and to hold unto them and their successors in office, for ever, upon such trusts, and subject to the directions and appointments mentioned in the will, to erect on some part of the land upon which he resided, an asylum or marine hospital, to be called "The Sailor's Snug Harbor," for the purpose of supporting aged, decrepit and worn-out sailors. If this could not be legally done without an act of the legislature, he directed the trustees to apply for an act of the legislature to incorporate them for the purposes stated above. He then declared it his will to have his property so used, and stated it was his desire to have all courts of law and equity to construe his will in such a way as to prevent his relations or any other person from possessing or enjoying his property, except in the manner and for the uses specified.

Within five years after the death of the testator, the legislature of New York State, on application of the trustees, passed a law constituting the persons holding the offices designated in the will, and their successors, a body corporate,

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[235] See LITTLETON § 347; Co. LITT. *214, 345 (a, b); PRESTON, ESTATES 20; COMYN'S DIG. Assignment C, 1-3

by the name of the "Trustees of the Sailor's Snug Harbor," and enabling them to execute the trusts declared in the will.

Justice Thompson held this to be a valid devise, to divest the heirs of his legal estate, or at all events, to affect the lands in his hands, with the trust declared in the will. His theory was that the intention of the testator had to be carried out in view of the unequivocal declaration of the testator, that if that intention could not be precisely carried into effect, the testator had provided in the alternative, which, with the aid of an act of the legislature, would remove every difficulty. Distinguishing the case of *Baptist Association v. Hart's Executors* [236] from the instant case, the Court said that there the bequest was void because of the uncertainty of the devisees, hence the property vested in the next of kin, or was disposed of by some other provision of the will. If, said the Court, the testator had bequeathed to the Baptist Association, subject to its thereafter becoming incorporated, within a reasonable time, there would have been little doubt but that the subsequent incorporation would have conferred on the association the capacity of taking and managing the fund. In the instant case, however, said Justice Thompson, there was no uncertainty as to the individuals who were to execute the trusts. Nor could there be any objection to this as a valid executory devise, which is a disposition of lands, where no estate vests at the death of the devisor, but only upon a future contingency. In substance Justice Johnson agreed with Justice Thompson, basing his conclusion on a long survey of the scope and effect of the Statute of Charitable Uses.[237] Justice Story, dissenting, and with the concurrence of Chief Justice Marshall, held that the devise, if valid, was not such as to divest the heir at law of his legal estate; that the devise could have effect only as a trust for a charity fastened on the legal estate in the hands of the heir.

The next effect of this decision was to hold that in determining the allegiance of the demandant, or of one born in this country, the rule as to the point of time at which such

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[236] 4 Wheat. 1, 4 L. ed. 499 (U. S. 1819).
[237] 43 ELIZ., c. 4 (1601).

person elected was, under American law, the Declaration of Independence; under British law, the Treaty of Peace in 1783. Accordingly, the demandant left before the Declaration because of the attainder of his parents, and having not returned, became an alien, incapable of inheriting lands by descent.

With the close of this case, it may be said that the forces of tyranny which had been given full vent in the Attainder Act of October 22, 1779, had run its full course, the forces having spent itself only after a period of fifty-one years.

VI. FROM 1830 TO THE CIVIL WAR

Between the Inglis case and the Civil War the spirit of attainder, long prevalent throughout the land, appears to have been quiescent. The nearest approach to it may be found in the two cases of *Hartung v. The People of the State of New York*,[238] and *Shepherd v. The People of the State of New York*,[239] both of which involved laws alleged to operate ex post facto.

VII. THE DOCTRINE OF ATTAINDER AS APPLIED TO THE TEST OATH CASES ARISING OUT OF THE CIVIL WAR

A. *General Background of Problem*

Prior to the Civil War the federal courts were not called upon to consider the constitutionality of either state or federal legislation as amounting to a bill of attainder. Cases had reached the Supreme Court involving the interpretation and application of the provisions of the Treaty of Peace of 1783 to the colonial statutes of attainder.[240] But at the very beginning of the Reconstruction period following the conclusion of the Civil War, several cases arose which involved the validity of "test-oaths," which were imposed either by Congress or by state legislatures during the period of Reconstruction. These statutes required as a condition precedent,

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[238] 22 N. Y. 95 (1860).
[239] 25 N. Y. 406 (1862).
[240] *See* Inglis v. Sailor's Snug Harbor, 28 U. S. 99, 7 L. ed. 617 (1830).

any person seeking to vote, hold office, or participate in certain professions or occupations, to take an oath that he had never participated in the rebellion against the United States. Either membership in the Confederate Army, sympathy with, or aid to the forces of secession, were within the purview of these statutes.

The first cases arose out of a federal statute requiring attorneys petitioning to practice before the federal courts to take an oath of both past and present loyalty to the Government of the United States.[241] The first of these cases, In re *Shorter*,[242] decided by the Alabama District Court in December, 1865, held an act of Congress unconstitutional as amounting to a bill of attainder, as an invasion of the court's inherent jurisdiction over the admission, regulation and expulsion of attorneys, where the act required an oath of loyalty of attorneys petitioning to practice before the courts of the United States. The District Court of Tennessee, in January, 1866, in In re *Baxter*,[243] reached a similar conclusion, without saying whether the statute was a bill of attainder or not. In Ex parte *Law*,[244] the Georgia District Court held the act void as a bill of attainder. Shortly thereafter the same state of facts reached the Supreme Court in Ex parte *Garland*,[245] considered with *Cummings v. Missouri*,[246] and which arose under the test-oath law involved and which operated as a punishment for past acts committed against the Government of the United States, and as the act made no provision for trial prior to the time of the infliction of the punishment, it was in substance a bill of attainder. In so finding, the Court treated the Missouri constitutional provision, in the *Cummings* case, as similar to the act of Congress.

Dissenting vigorously, Justice Miller argued that the act was not a bill of attainder, as it lacked the necessary element of punishment, and was only an expression of the

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[241] 12 STAT. 502 (1862), *repealed*, 23 STAT. 22 (1884).
[242] 22 Fed. Cas. 16, No. 12,811 (D. C. Ala. 1865).
[243] 2 Fed. Cas. 1043, No. 1,118 (C. C. E. D. Tenn. 1866).
[244] 15 Fed. Cas. 3, No. 8,126 (D. C. D. Ga. 1866).
[245] 4 Wall. 333, 18 L. ed. 366 (U. S. 1867).
[246] 4 Wall. 277, 18 L. ed. 356 (U. S. 1867).

state's sovereign power to protect its people against an unlimited right of suffrage. Moreover, said the Justice, the disfranchisement by deprivation of suffrage of any portion of the citizens of a state, was not at common law regarded as passing a bill of attainder, hence he argued, no such effect ought to be given to the act of Congress in the Missouri constitutional provision. This dissent was in accord with the view expressed in the Missouri case of *Blair v. Ridgeley*,[247] and the *Murphy* and *Glover Test Oath* cases.[248]

B. *The Situation in New York—Green v. Shumway (1868)*

It is against this background that the next development in the New York case of *Green v. Shumway*[249] must be viewed. The facts were that the plaintiff, seeking to vote in a lawful election on April 23, 1867, was denied the privilege because he refused to take the test oath as required by the Act of March 29, 1867.[250] The act declared that no person shall vote at the election for delegates to said convention, who will not, if duly challenged, take and subscribe, an oath that he had not done certain acts mentioned therein, and inflicted the penalty of political disfranchisement, without any preliminary trial for a refusal to take said oath. The New York Court of Appeals held, Justice Miller writing for the majority, that such a statutory provision violates both the federal and state constitutional prohibitions against bills of attainder.

By the statute, said Justice Miller, the citizen was deprived of a right guaranteed by the Constitution; to deprive one of the elective franchise for past conduct, inflicted upon him a penalty, which by the law of the state, was a part of the punishment for a felony, and which followed upon conviction for such a crime. The practical effect of the test oath required by the act deprived the citizen of equality with his neighbors in the enjoyment of certain rights and privileges. The Constitution, said Justice Miller, sought to prevent the

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[247] 41 Mo. 63 (1867).
[248] 41 Mo. 340 (1867).
[249] 39 N. Y. 418 (1868).
[250] Laws of N. Y. 1867, c. 194.

exercise of such power of the legislature by usurpation of the judicial function, and for the punishment of alleged offenders in advance of trial, for offenses unknown to the law, by its prohibition of attainder both as to state and nation. Justice Miller also held that the act violated the state constitution, to wit, Article I, Section 2, providing for submission of the questions whether a convention should be called to the electors qualified to vote for members of the legislature. Article I, Section 1, which declared that "no member shall be disfranchised, or deprived of any of the rights or privileges secured the citizens thereof, unless by the law of the land, or the judgment of his peers; Article I, Section 6, providing that no person should be held to answer for a crime, except on presentment of a grand jury, and the second section of the same article, which secured the right of trial by jury in all cases in which it had theretofore been held inviolate. In reaching these conclusions Justice Miller relied for authority upon *Cummings v. The State of Missouri* [251] and Ex parte *Garland.*[252]

Justice Mason dissented, arguing that the power to regulate the elective franchise had not been delegated to the United States, that the passage of the act requiring a test oath was not in conflict with the federal constitutional prohibition against bills of attainder by the states, as this provision was adopted against the common law background of attainder, and that so understood, it had never had any relation or reference to regulating the elective franchise. Accordingly, the Justice declared:

> The disfranchising, by depriving of the right of suffrage . . . was never in any country regarded as passing bills of attainder against them, and no such effect can be given to this clause of the Constitution, without doing violence to its language and pushing it by a farcical construction, beyond the well recognized and received impact of the word "employed."

In short, Justice Mason felt that the test oath was not imposed as punishment, but was imposed as a part of the state's sovereign power to protect its citizens from the dan-

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[251] See note 246 *supra.*
[252] See note 245 *supra.*

gers alleged to be lurking in the doctrine that the right of suffrage was an unqualified right of every citizen.[253]

VIII. ATTAINDER AND CIVIL DEATH

The next case, *Avery v. Everett*,[254] involved civil death, not as an incident of attainder but as a result of a conviction of felony and a sentence to life imprisonment, under the New York statute providing that such a person should be deemed to be "civilly dead to all intents and purposes in the law." In this situation the testator devised his real estate to his wife, for life if she remained unmarried, and upon her decease or marriage, to *C*, his son; in case of the death of *C* without children, the remainder to *A*, another son. The wife survived the testator, and after her death *C*, who at the time was unmarried and without children, was convicted of murder in the second degree and sentenced to life imprisonment in the state prison. The plaintiff, claiming under *A*, brought an action of ejectment, while *C* was still living.

The issue thus presented was whether such a death was contemplated by the testator, and whether the words of limitation were to be construed as applying to a civil, or only to the natural death of *C*?

The court held that the title of *C* was not divested as a result of his sentence to imprisonment for life; hence the grantee of *A*, the plaintiff, had no present interest upon which to maintain ejectment.

Andrews, J., speaking for the majority, traced the history of the problem at common law and found that prior to

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[253] In accord with the dissent, *see* Anderson v. Baker, 23 Md. 531 (1865); State v. Neal, 42 Mo. 119 (1868); Randolph v. Good, 3 W. Va. 551 (1869); Washington v. State, 75 Ala. 585 (1884); Boyd v. Mills, 53 Kan. 595 (1894).

[254] The next case in order of time, is Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274 (1886), in which it was held that the provision of the Civil Service Act (Laws of N. Y. 1883, c. 354, § 1, as amended, Laws of N. Y. 1884, c. 410), provided for the appointment by the governor, and the confirmation by the senate, of three persons as civil service commissioners, "not more than two of whom shall be adherents of the same party," is not violative of the provision of the State Constitution declaring that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers" (§ 1, art. 1); nor is it violative of the provision declaring that no person shall be "deprived of life, liberty or property without due process of law" (§ 6, art. 1).

1799, the incident of civil death attached upon conviction of a felony, observing that Chancellor Kent, in *Troup v. Wood,*[255] entertained no doubt on the matter. The law was changed thereafter by the Act of March 29, 1799, which provided that in all cases where a person shall be convicted and attainted of any felony thereafter committed and adjudged to imprisonment for life in the state prison should be "deemed and taken to be civilly dead to all intents and purposes in the law." [256] Thereafter, in 1813, the law was revised to read that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead," and this provision was subsequently reenacted in the penal code.[257]

Referring to the relevant decisions, Judge Andrews discussed *Troup v. Wood* [258] and *Platner v. Sherwood,*[259] both of which related to lands once owned by one Platner who, in June, 1799, was convicted of forgery and sentenced to life imprisonment, only to be pardoned in 1806. The trial and conviction took place after the enactment of the Act of March 29, 1799, but the offenses were committed prior thereto. In the *Troup* case, the bill was filed by a grantee of Platner, under a deed executed before his conviction in 1792, to set aside sales of the same lands, made after Platner's conviction and sentence and during his imprisonment under judgments against him, obtained prior to the complainant's deed. The Chancellor set aside the sales and titles of defendants, on the ground that the judgment upon which the executions issued had been paid prior to the sales thereon, and that the sales were fraudulent. Moreover, the Chancellor said the sales were void for another reason, to wit, that the *scire facias* to review the judgment against Platner was directed to his "representatives and to the terre-tenants," he being civilly dead. The implication was that the Chancellor felt that a civil death divested the offender's estate, with the heirs inheriting immediately, as in case of a natural death, forfeiture and corruption of blood having been abolished by

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[255] 4 Johns. Ch. 228 (N. Y. 1820).
[256] Laws of N. Y. 1799, c. 57.
[257] Derived from PENAL CODE § 708, Laws of N. Y. 1881, c. 676.
[258] 4 Johns. Ch. 228, 248 (N. Y. 1820).
[259] 6 Johns. Ch. 118 (N. Y. 1822).

the Constitution of 1777, except forfeitures for a limited time in case of treason.

The second case of *Platner v. Sherwood* [260] was brought by Platner after his pardon, to set aside sales of other lands made during his imprisonment. The defendant's demurrer to the complaint on the ground that the plaintiff had been divested of his interest by civil death, was overruled, the Chancellor, on reconsideration of the law as stated in the prior decision, holding that at common law that such consequences did not follow upon civil death. Sustaining the bill, the Chancellor gave as a reason for his prior misapprehension, that the Act of March 29, 1799, in force at the time of the trial, only applied to offenses thereafter committed. This suggestion implied that the Act of 1779 changed the common law.[261] The effect of the *Platner v. Sherwood* decision was to hold that civil death, under the common law, did not operate as a divestation of the estate of the convicted felon. Accordingly, Justice Andrews held the word "death" as used in the statutes of devolution meant "natural death." The Justice concluded his opinion by quoting the words of Chancellor Kent, in *Platner v. Sherwood:* "The penal consequences of attainder must be necessary deductions, severely required by the premises; and as there was to be no forfeiture of estate, the law would not be consistent with itself, if it held the party alive, for the purpose of being sued and charged in execution, and yet dead as to the purpose of transmitting his estate to his heirs." [262]

Justice Earl dissented vigorously, taking the view that the Act of March 29, 1799, was enacted to remove the uncertainties of the common law, by declaring the person convicted and sentenced to life imprisonment as "in law, dead and buried"; and such were the views of Chancellor Kent when he wrote the opinions in *Troup v. Wood* (4 Johns. Ch. 229) and *Platner v. Sherwood* (6 id. 118), and also of the court in *Denning's Case* (10 Johns. 232). The slight change in the phraseology of the second statute was not intended

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[260] *Ibid.*
[261] See note 256 *supra.*
[262] 6 Johns. Ch. 118, 131 (N. Y. 1822).

to change the scope or meaning of the law.[263] Moreover, observed Judge Earle, the provisions of the act relating to "absconding, concealed and non-resident debtors" clearly implied, as Judge Andrews admitted, that the legislature, when framing that provision, understood that a life convict was divested of his estates.

So in the year 1888 in the State of New York we have the spectacle of two judges of the Court of Appeals at opposite ends of the pole when faced with the issue as to whether civil death, an incident of attainder for treason or felony, operated to divest the person convicted of a felony and sentenced to life imprisonment, was divested of his estate, under a proper construction of the statute.

IX. Conviction of Crime as Bar to Practice of Profession

The next development came in *Hawker v. New York*.[264] By an indictment, the plaintiff in error was charged with having committed the crime of abortion on September 1, 1877. He was found guilty and sentenced, March 6, 1878, to imprisonment in the penitentiary for the term of ten years. In 1895, an amendment to Chapter 661, Laws of New York of 1893,[265] provided that "any person who, after conviction of a felony, shall attempt to practice medicine, shall be guilty of a misdemeanor." Thereafter, the plaintiff in error was indicted under this statute, for having practiced medicine, after having been convicted of a felony in 1878, by "then and there unlawfully medically examining, treating and prescribing for Dora Hoenig." The defendant's demurrer having been overruled, upon a plea of not guilty, he was tried, convicted and sentenced to pay a fine of $250. This conviction having been sustained by the Court of Appeals, he sued out a writ of error to the Supreme Court.

The issue thus raised was whether the New York statute of May 9, 1893, providing that any person who, after conviction of a felony, shall practice medicine, should be guilty

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[263] 6 Johns. Ch. 118 (N. Y. 1822).
[264] 170 U. S. 189, 42 L. ed. 1002 (1898).
[265] Laws of N. Y. 1895, c. 398.

of a misdemeanor, punishable, upon conviction, by fine or imprisonment, violated Article I, Section 10, of the Constitution of the United States, providing that: "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or law impairing the Obligation of Contracts."

In affirming the judgment of the New York Court of Appeals, Justice Brewer, speaking for the majority, and in reply to the plaintiff in error's argument, that he had been convicted of a criminal offense, and suffered the punishment therefor, that the legislature had no power to add to that punishment, that the right to practice medicine was a valuable property right, that to deprive a man of such right was in the nature of a punishment, and that after he had fully expiated his offense a statute inflicting an additional penalty amounting to increasing the punishment for the original offense, was void as a bill of attainder or an ex post facto law, held that it was within the acknowledged reach of the policy power of a state to prescribe the qualifications of one engaged in a business concerned directly with the lives and health of the people as the practice of medicine. Thus, it might require both qualifications of learning and of good character. Accordingly, if the state regarded one who had violated its criminal laws as not possessed of a sufficiently good character, it might deny such person the right to practice medicine, making the prior record of conviction conclusive evidence of the violation of the criminal law and of the absence of the requisite character. Moreover, the commission of crime, the violation of the penal laws, said Justice Brewer, had a direct relation to the question of character. And the fact that the form in which the legislation was cast suggested the idea of the imposition of an additional penalty for past conduct was not conclusive. Looking at the substance, the Justice observed that the vital matter was the violation of the law, not the conviction, the latter being only the evidence of the former. Analyzing the cases [266] relied upon by the plaintiff in error, Justice Brewer declared:

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[266] Cummings v. State of Missouri, 4 Wall. 277 (U. S. 1867); *Ex parte* Garland, 4 Wall. 333 (U. S. 1867).

The thought which runs through these cases, and others of similar import which must be cited, is that such legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be and what is in fact appropriate evidence of such qualifications.[267]

Justice McKenna dissented, declaring that:

If the statute in force when the offense of abortion was committed had provided that, *in addition* to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practice medicine, no one, I take it, would doubt that such prohibition was a part of the *punishment* prescribed for the offense. And yet it would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offense in 1877, and which, by its own force, made it a crime for the defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in 1878. I cannot assent to this view.[268]

Justice McKenna distinguished the instant case from the case of *Dent v. West Virginia*,[269] by pointing out that the statute in that case merely provided that a license was a condition precedent to the practice of medicine, whereas the instant case involved a "state enactment which, by its own force, made it a crime for any person, lawfully engaged, when such act was passed, in the practice of the medical profession, to continue to do so, if he had at any time in his past life committed a felony, although he may have suffered all the punishment prescribed for such felony when it was committed."

Moreover, a requirement of good character as laid down by the statute should relate to the present status or condition of a person coming within its terms; the act involved dealt not with present, but past moral character, and was based upon felonies entirely unconnected with the profession of medicine. Thus, said Justice McKenna, the act enhances the punishment of the prior offense by depriving the petitioner of his property right and by preventing his practice

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[267] Hawker v. New York, 170 U. S. 189, 200, 42 L. ed. 1002, 1007 (1898).
[268] *Id.* at 200, 42 L. ed. at 1007.
[269] 129 U. S. 114, 32 L. ed. 623 (1889).

of his profession, because of his past, and in this case expiated crime.

So in 1898, just twelve years before the dawn of the twentieth century, we have a case, arising in New York, carried to the Supreme Court, in which the spirit of attainder was incorporated in a state statute, the validity of which was of such a doubtful character as to demand a decision by the highest court in the land, which decision, when delivered, was by a divided court.

X. ATTAINDER AND THE SLAYER'S BOUNTY

A. *Riggs v. Palmer (1889)*

The spirit of attainder again makes its appearance in the field of the problem of the slayer and his bounty. In New York the earliest case involving this problem was *Riggs v. Palmer*[270] in which the Court of Appeals held that the slayer devisee could not take the legal title of the property of the murdered testator. This decision raised no issue of attainder as nothing was being taken from the slayer.

B. *Ellerson v. Westcott (1896)*

This holding was subsequently qualified in *Ellerson v. Westcott*[271] in which substantially the same court, on essentially the same state of facts, stated that what they really meant to hold in the *Riggs* case was that any available remedy lay by way of injunctive relief. This was developed in the constructive trust theory as a New York solution of the problem of the slayer and his bounty. Thus, also, was laid the foundation for the introduction of the attainder element in the picture.

C. *Van Alstyne v. Tuffy (1918) and In re Santourian's Estate (1925)*

This element is illustrated by two cases.[272] The first

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[270] 115 N. Y. 506, 22 N. E. 188 (1889).

[271] 48 N. Y. 149, 42 N. E. 540 (1896), *reversing* 88 Hun 389, 34 N. Y. Supp. 813 (Sup. Ct. 1895).

[272] Van Alstyne v. Tuffy, 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918); *In re* Santourian's Estate, 125 Misc. 668, 212 N. Y. Supp. 116 (Surr. Ct. 1925), 26 COL. L. REV. 482 (1926).

case, *Van Alstyne v. Tuffy*,[273] involved the right of one tenant by the entirety who has killed the other in order to take, decided in 1918 by the New York Supreme Court. This case held that the slayer should take nothing, and should be entirely excluded, even from the one-half interest of the profits of the estate, which, under the common law he would be entitled to enjoy for the period of his life.

The facts in *Van Alstyne v. Tuffy* were: *H* and *W* held real estate as tenants by the entirety. *H* murdered *W* and immediately thereafter committed suicide. At that time *H* was 45 and *W* was 36 years of age. *Y*, the executor of *W*, and *K(1)* and *K(2)*, her only heirs, also legatees under *W's* will, brought suit in equity against *X* the administratrix of *W*, and all the heirs of *W*, and asked that they be adjudged owners of the real estate in question in accordance with the will of *W*, and that the defendants, and all persons claiming under them, be enjoined from making or asserting any claims of ownership to said premises. The complainant further alleged that the killing was "wilful in order that *H* might thereby acquire and possess the real estate above described." The answer admitted the killing, but denied the intent, and asked that the defendants be adjudged the owners of the real estate in question.

In granting the prayer of the complainants, the court held (1) that no one will be permitted to acquire property by his own crime; (2) that where, while plaintiff's testatrix and defendant's intestate were tenants by the entirety of certain real estate, he murdered her and immediately took his own life, the executor and heirs at law of the wife will be granted judgment in an action in equity against the administratrix and heirs at law of the husband adjudging that the plaintiffs are the owners of the real estate in question in accordance with the will of their testatrix, even though there is no evidence that the husband murdered his wife in order that he might acquire her real estate.

The opinion in *Van Alstyne v. Tuffy* [274] purports to fol-

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[273] 103 Misc. 455, 169 N. Y. Supp. 173 (Sup. Ct. 1918).
[274] *Ibid.*

low the leading New York case of *Riggs v. Palmer*,[275] as modified by *Ellerson v. Westcott*,[276] that is, it purports to apply the constructive trust theory against the innocent heirs of the murderer, and this regardless of the motives of the wrongdoer, and, also, to hold that this principle applies to prevent the operation of the statute of descent as well as a succession by will, thereby repudiating the theory of In re *Carpenter's Estate*.[277]

In holding that the constructive trust theory applied whether death was caused with or without intent to profit, this case clearly repudiates the case of In re *Wolf*.[278] But the court is not clear as to the theory by which the legal title which passed to *H* by survivorship, passed to the heirs of *W*. It contents itself with a recital of the phrase "that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity or to acquire property by his own crime." [279] Such an explanation is entirely unsatisfactory, and fails to consider the nature of the estate by the entirety.

The application of the constructive trust theory to the case where a tenant by the entirety murders his co-tenant, in the manner in which it was used in the *Van Alstyne* case,[280] deprives the heirs of the murderer of any interest in the property that was so held. Under such a holding the nature of the estate by the entirety is completely disregarded.

Is it possible to evolve a theory, consistent with established rules of law, which will meet the situation? It seems clear that such a theory must not ignore the common-law nature of estates by the entirety; it must prevent the murderer from enjoying any benefits because of his wrongful act; it must avoid conflict with the constitutional prohibition against corruption of blood and forfeiture of estates;

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[275] 115 N. Y. 506, 22 N. E. 188 (1889).
[276] 148 N. Y. 149, 42 N. E. 540 (1896), *reversing* 88 Hun 389, 34 N. Y. Supp. 813 (Sup. Ct. 1895).
[277] 170 Pa. 203, 32 Atl. 637, 30 AM. L. REV. 130, 41 CENT. L. J. 377 (1895), 71 MADRAS L. J. 1 (1936).
[278] 88 Misc. 433, 150 N. Y. Supp. 738 (Surr. Ct. 1914), 28 HARV. L. REV. 426 (1915).
[279] 115 N. Y. 506, 511, 22 N. E. 188, 190 (1889).
[280] See note 273 *supra*.

it must recognize that the descent of estates, legal or equitable, is immediately cast upon the death of the owner and cannot be held in abeyance.

The evolution of such a theory must begin with a consideration of the common-law theory of the estate by the entirety. At common law a conveyance or devise to two persons who are married to each other at the time of the conveyance creates an estate in entirety. The husband and wife, as a unity, own the legal title. The four unities of time, title, interest and possession are present. The right of survivorship exists between them, since the estate belongs to the unity, and therefore continues in the survivor as the surviving member of the unity. Upon a severance of this fictitious unity of persons by the natural death of either, by a condition implied in law, the survivor held the legal title, the deceased leaving no interest which was devisable or descendable. During the continuance of such estate neither the husband nor the wife could convey, encumber or destroy the right of the survivor. Under the common law the husband was entitled to the rents and profits during their joint lives, which right was an incident of the husband's estate by the marital right.

Under modern statutes, the nature of the estate remains the same, but under the statutes abolishing the husband's estate by the marital right, the husband and wife are each entitled to one-half of the rents and profits during their joint lives.

Now, let us see what the status of the husband and wife, and their respective heirs at law or representatives, is before the wrongful act is committed. Before the wrongful act, both *H* and *W* have a vested interest in the estate, subject to be divested by the happening of a condition subsequent—the death of one of them leaving the other surviving. Prior to the happening, the heirs or legal representatives of both parties have only what may well be called a contingent interest in the entire estate, dependent upon the happening of the condition subsequent, namely, the divestiture of their respective ancestor's co-tenant by lawful death. There must be both a legal divestiture and a legal survivorship in contemplation of the law in order for the ordinary incidents of

the tenancy by the entireties to attach. Merely outliving the wife does not satisfy the conditions imposed by the common law; survivorship in law as well as survivorship in fact is an indispensable requisite, and the decease of the other co-tenant must be in the ordinary course of events and subject only to the vicissitudes of life, in order for the survivor to hold the complete ownership, freed from the right of participation on the part of the decedent or his or her legal representatives.

Under either the common-law or modern statutory theory as to the nature of estates by entireties, when *H* kills *W*, he ought not to be wholly deprived of the rents and profits to which he was clearly entitled at common law, or the one-half interest to which, under the modern law, he would be entitled for the period of his life. If this characteristic of the estate by the entirety is not overlooked, all danger of violating constitutional prohibitions against corruption of blood and forfeiture of estates may be easily avoided, and the very vital distinction between the divesting of property and merely denying one's right to inherit is observed. To prevent a forfeiture, therefore, it must be held that upon *W's* death at the hands of *H*, the legal fee simple must be allowed to rest in *H*, for how other can a forfeiture be prevented and *H* be allowed to enjoy the life interest in the rents and profits which was a vested interest and which interest he did not acquire by the murder? This result seems inescapable and takes care of the element of forfeiture in this type of case.

If our theory stopped at this point, the murderer would not be prevented from benefiting by his wrongful act; something more must be added. To prevent such a result, the heirs of *W* must acquire some interest or right (possibly by descent) at the very moment of *W's* death, to which the legal interest passing to *H* by his wrongful act, will be subordinated. The acquisition of such a right of interest may be worked out as follows: *W* and *H* originally took the estate in question subject to a condition implied in law that neither could destroy the interest of the other; that the possibility of either holding, not taking, the entire estate, free from the possibility of participation by the other, by survivorship, was

dependent upon the natural death of one of the co-tenants in the ordinary course of life; that the doctrine of survivorship, as applied to tenancies by the entireties, does not include within its contemplation a survivorship which arises by a wrongful, illegal homicide, committed by such survivor who, and those under him, may claim all the entirety estate. If this be true, when *H* killed *W,* he violated the condition upon which, under the fiction of the legal unity of husband and wife, he would ordinarily have been entitled to hold and enjoy the entire estate, free from participation by his wife, and forever barred the possibility of his being, in the light of the law, the legal survivor of *W.* As a result of *H's* felonious act, this right of freedom from participation, whether we denominate it as an equitable interest or not, and to which *H* would have been entitled if he had legally survived *W,* descended to *W's* heirs, while the legal title passed to or remained in *H,* who now has a vested interest in at least one-half of the rents and profits for life, and the bare legal title, subject to an equitable remainder in fee in the heirs of *W.* On the basis of such interest, the heirs of *W* may institute a suit in equity, praying:

(1) That *H* be restrained from conveying the bare legal title to bona fide purchasers for value and without notice;

(2) That *H* be declared constructive trustee of the wife's interest or right of participation, however described, for her heirs;

(3) That upon *H's* death, the legal title held by *H,* subject to the equitable remainder in fee in favor of *W's* children, be adjudged to pass by the decree to such children or heirs.

Such a theory gives full recognition to the nature of the common-law theory of estates by entireties, prevents the murderer from profiting by his wrong, gives full effect to his vested rights, and assumes that the descent of estates is cast immediately upon the owner's death.

The second case, *Santourian's Estate,*[281] dealt with a

[281] 125 Misc. 668, 212 N. Y. Supp. 116 (Surr. Ct. 1925), 26 COL. L. REV. 482 (1926).

joint tenancy which in some respects is analogous to tenancy by the entirety. The facts in this case were: In February, 1923, *W* opened an account in the *X* Bank in Troy in her individual name which continued until May 12, 1924, when the sum of $399.20, the total deposit, was withdrawn and a new account in the same bank opened in the name of "*W* and *H*, either to draw or the survivor." After certain deposits and withdrawals, on June 1, 1925, there remained to the joint credit of *W* and *H*, the sum of $306.27.

On June 12, 1925, *W* was killed by her husband *H*, who pleaded guilty to the crime of murder in the second degree, and was sentenced to prison for a term of not less than twenty years nor more than the rest of his natural life. The administrator of *W* instituted his proceeding under Section 205 of the Surrogate's Court Act to compel the delivery of the bank deposit, joining the *X* Bank and *H* as defendants. The bank answered and the only question was:

Whether or not this fund should be paid over to the petitioning administrator or remain in the bank as the property of *H*? The Banking Law [282] provided:

> When a deposit shall be made by any person in the names of such depositor and another person and in the form to be paid to either or the survivor of them, such deposit and any additions thereto made by either of such persons after the making thereof, shall become the property of such persons as joint tenants, and the same together with all dividends thereon shall be held for the exclusive use of such persons and may be paid to either during the lifetime of both or to the survivor after the death of one of them. . . . The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor.

The court, after referring to the general doctrine of *Riggs v. Palmer*,[283] and after admitting that under the Banking Law, *H* "had title prior to his wife's death, as well as after," nevertheless gave a decree for the plaintiff, holding

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[282] N. Y. BANKING LAW § 249(3).
[283] See note 275 *supra*.

that the deposit should be turned over to the administrator of *W*, to pay the funeral expenses, and the balance to be devoted to the support of the child.

The decision in this case, as in *Van Alstyne v. Tuffy*,[284] which involved an estate by the entirety, which, to some extent, is analogous to the joint estate here involved, entirely overlooked the fact that the murderer in each case had a vested interest. If this be so, then the holding of the court in effect declares a forfeiture of this property as an additional punishment for crime, which, of course, is prohibited by the New York Constitution.[285] Such a view has been taken as to dower by North Carolina; as to estates by the entireties by North Carolina, Missouri and Tennessee.[286]

Under the doctrine as thus developed, the vested interest of *H*, the murderer, cannot be taken from him even by a court of equity. But by his crime *H* has taken away *W's* vested interest in one-half of the land, and a contingent right to the whole upon surviving his co-tenant, which, giving proper effect to the theory of joint tenancies, *W* was entitled to, and therefore *H* must hold such interest as constructive trustee for the heir of *W*. By reason of *H's* wrongful conduct, the contingent interest to which *W* was entitled in the event of survivorship, was not destroyed; an equitable interest in remainder in fee descended upon *W's* death to her heirs or legal representatives, the bare legal title passing to *H* to prevent a forfeiture of *H's* vested interest in a moiety of the land, but subject, nevertheless, upon *H's* death to the equitable remainder in fee in favor of *W's* heirs.

No such reasoning is suggested by the court. Instead, clinging to what it blindly terms its rule of public policy, the court held that in the *Van Alstyne* case, involving an estate by the entirety, and in In re *Santourian's Estate*,[287] involving a joint tenancy, all rights were forfeited in their respective tenancies. Such holdings have not been passed upon

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[284] See note 273 *supra*.

[285] Art. I, § 6.

[286] Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); Beddingfield v. Estill & Newman, 178 Tenn. 393, 100 S. W. 108 (1907); Bryant v. Bryant, 193 N. C. 373, 137 S. E. 188 (1927); Barnett v. Couey, 27 S. W. 2d 757 (Mo. 1930).

[287] See note 281 *supra*.

by the New York Court of Appeals, and both seem to be open to the constitutional objection of taking property without due process of law.

XI. DEPORTATION OF ALIEN AS AMOUNTING TO BILL OF ATTAINDER

This brings us to the latest case, *United States v. Reimer*,[288] which was decided in 1938, and arose in the Southern District Court of New York. A federal statute authorized the deportation of an alien who at any time after entering the United States was found to have secured a preference-quota visa through fraud, by contracting a marriage which, subsequent to entry, had been annulled retroactively to the date of marriage, or where the alien failed to fulfill his promise of marriage to procure his entry.[289] The petitioner was in the latter situation and sought a writ of habeas corpus to secure his release after the Commissioner of Immigration had ordered his deportation, on the theory that the statute was unconstitutional, as amounting to a bill of attainder or involved an ex post facto law. As to the first contention, the court held that a statute providing for deportation of an alien, after an administrative hearing, was not unconstitutional for failure to provide a judicial trial and as amounting to a bill of attainder. Nor was it void as an ex post facto law, as Article I, Section 1, has no application to purely civil proceedings.

XII. CONCLUSION

In retrospect, it appears that the spirit of attainder, forfeiture and corruption of blood has been present in New York from the early colonial period up to the present time. The act abolishing forfeitures in 1683 [290] was a step in the opposite direction, but the first treason statute of 1691 [291] followed almost immediately by the attainder and execution of Jacob Leisler and James Milbourne in the same year, set

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[288] 22 F. Supp. 573 (S. D. N. Y. 1938).
[289] 50 STAT. 165 (1937), 8 U. S. C. § 213(a) (1946).
[290] See note 2 *supra*.
[291] See note 4 *supra*.

off a series of developments which, in one form or another, have continued and have profound significance today. Following the Leisler trial comes the *King v. Legget* case in 1696,[292] the treason trial of *King v. Bayard* in 1702,[293] and finally, on the very eve of the American Revolution, the proposed attainder of Ethan Allen [294] by New York's Royal Governor, Lord Tryon,[294] who, himself, was subsequently attainted by the Colonial Legislature, over which he formerly reigned.[295] This event marked the end of colonial developments.

In the next period—from the Declaration of Independence to the Treaty of Peace in 1783—the spirit of attainder ran riot, resulting in approximately 60 statutory enactments by the colonial, provincial or state legislature, reaching a climax in the Attainder Act of October 22, 1779,[296] under which fifty-nine New York citizens of great prominence and property were attainted with a consequent forfeiture of their real and personal estates. Among those specifically named in the statute were John Murray, Earl of Deermore, formerly Governor of the Colony of New York, the late Governor William Tryon, Oliver De Lancey, late Member of the Colonial Council, George Duncan Ludlow and Thomas Jones, late Justices of the Supreme Court, John Tabor Kempe, late Attorney-General, and many others. A semi-climax was reached in this period in the enactment of the famous Trespass Act of March 4, 1783,[297] which, as we have seen, produced the *Rutgers v. Waddington* [298] case during the following year.

During the period between 1783 and the adoption of the Constitution in 1789, and extending up to 1813, the state legislature enacted approximately forty-eight additional pieces of legislation dealing directly or collaterally with

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[292] See note 21 *supra.*
[293] See note 36 *supra.*
[294] See the Act entitled, "Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the most speedy and effectual punishment of the Rioters." 5 Colonial Laws of New York 647-655 (1894). See also *ante* p. 13 *et seq.*
[295] See note 83 *supra.*
[296] *Ibid.*
[297] See note 112 *supra.*
[298] See note 129 *supra.*

various phases of the problems growing out of the established policy of attainder and confiscation.

The climax of this period was reached with the passage of the Attainder Act of May 12, 1784,[299] which was designed to immediately convert into money the goods, chattels, lands and tenements, vested in the people of New York under this policy. This development was followed almost immediately by the decision of *Rutgers v. Waddington*[300] which threatened a renewal of the conflict, raised complex national and international issues of great significance, and left a continuing problem for future students of constitutional law as to its effect on the history of judicial review.

The period between 1789 and 1830 was filled with English and New York decisions having mainly to do with the rights of English and New York citizens under the statutes of the state, as presumably modified by the provisions of the Treaty of Peace of 1783. These decisions were interspersed by a series of related statutes, among which were the Act of Abolishing Forfeitures and Corruption of Blood in 1796;[301] the Act Barring Actions as to Forfeited Estates in 1797;[302] the Act for Discovery of Forfeited Lands in 1803,[303] and finally the Act Abolishing Writs of Attaint Upon Untrue Verdicts in 1813.[304] This last Act is of peculiar interest as its repeal presupposes the prior use of the writ of attaint as a method of controlling the jury, although the writer has been unable to discover a single example of its use in a specific case.

Thus the barbarous policy of attainder and confiscation, which began with the Attainder Act of 1779[305] after a period of fifty-one years, had now run its course, leaving in its wake a land filled with civil strife, a land in which prosperous homes had been destroyed, with separation of men, women and children who had occupied these homes and pursued gainful occupations. In many cases the children

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[299] See note 125 *supra.*
[300] See note 129 *supra.*
[301] See note 197 *supra.*
[302] See note 198 *supra.*
[303] See note 205 *supra.*
[304] See note 206 *supra.*
[305] See note 83 *supra.*

were apprenticed out in what was in effect but a form of human slavery.

During this period Flick [306] estimates that approximately thirty-five thousand residents of the Province of New York were driven out and forced to settle in Nova Scotia and Upper Canada. As to property, the same authority concludes [307] that these former citizens of New York sacrificed or lost some $40,000,000 worth of property.

These figures, at best, are very rough estimates as to the loss to the state in resources, of population and property. What the losses were in terms of cultural and spiritual value will never be known, but any impartial investigator of this period must conclude that they were tremendous. And last, but perhaps not least, the animosities, bitterness and hatred, engendered among those forced to flee to Canada, have resulted in repercussions which may still be heard among the descendants of those loyalists who once were proud to claim New York citizenship.

The period between 1830 and the close of the Civil War was the one period during which the spirit of attainder was most quiescent, although there were two cases [308] in which the issue was broached.

As a result of the Civil War we were faced with that series of decisions known as the test-oath cases, of which the New York case of *Green v. Shumway,*[309] decided in 1868, was somewhat typical.

In 1888, *Avery v. Everett* [310] raised the issue of attainder and civil death; in the same year in *Hawker v. New York,*[311] conviction of crime as a bar to the practice of a profession, was urged as amounting to attainder. In 1889, in *Riggs v. Palmer,*[312] in 1896, in *Ellerson v. Westcott,*[313] in 1918, in *Van Alstyne v. Tuffy,*[314] and in 1925, in In re *Santourian's*

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[306] See note 184 *supra.*
[307] *Ibid.*
[308] Hartung v. The People of the State of New York, 22 N. Y. 95 (1860); Shepherd v. The People of the State of New York, 25 N. Y. 406 (1862).
[309] See note 249 *supra.*
[310] See note 254 *supra.*
[311] See note 264 *supra.*
[312] See note 283 *supra.*
[313] See note 271 *supra.*
[314] See note 280 *supra.*

Estate,[315] attainder, as applied to persons killing in order to profit, was in issue.

Finally, in 1938, in a case arising in New York, but decided in the United States District Court—*United States v. Riemer* [316]—it was argued that the deportation of an alien amounted to a bill of attainder.

Tie this long train of events in the single state of New York up to the decision of *Lovett v. United States,*[317] in which, one hundred and fifty-eight years after attainder was outlawed as to both state and nation, the Supreme Court was called upon to declare an act of Congress unconstitutional as amounting to a bill of attainder, and it becomes evident how very, very thin and shadowy is the line, which even at this late date, separates liberty from tyranny.

ALISON REPPY.

[315] See note 287 *supra.*
[316] See note 288 *supra.*
[317] 328 U. S. 303, 90 L. ed. 1252 (1946).