

in respect to the survival of actions. Every reason which can be assigned for perpetuating one or the other of them, whether of merit in the case of the party injured, or of turpitude in the conduct of the wrongdoer, is equally applicable to both of them.

This view has been accepted in the courts of the state and by the legislative assembly. In passing Lord Campbell's act in 1872, the territorial assembly must have acted upon the theory that the right of the party injured did not survive to his personal representative under the act of 1868 (9 Sess. Laws, p. 117). It will be observed that the act of 1868 continues the right of action to and against executors and administrators in equal terms, and if, by that act, the right of action survived against the executor of the trespasser, it would survive to the executor of the party injured by the same terms, and Lord Campbell's act wrought no change in the law. Of many cases cited in argument, several support the conclusion to which we have been led, and it is believed that none are opposed. No useful purpose would be served by reviewing them at length. This action against Gumry's administrator, for an injury done to the plaintiff during the lifetime of Gumry, or at the moment of his death, will not lie, and the demurrer will be sustained.

In re CRAIG.

(Circuit Court, D. Kansas. June 6, 1895.)

1. GRAND JURY—PERSONS IN MILITARY PRISONS.

Act Cong. March 3, 1873, providing that prisoners under confinement in military prisons undergoing sentences of court-martial shall be liable to trial and punishment by courts-martial for offenses committed during said confinement, is not in conflict with Const. Amend. 5, providing that no person not in the land or naval forces or in the militia shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.

2. SAME.

The statute is applicable to one confined in a military prison, though at the time of his sentence to such confinement he was likewise sentenced to be discharged from the service.

In the matter of the application of Edward Craig for a writ of habeas corpus.

H. D. Reeve, for petitioner.

W. C. Perry, U. S. Atty., opposed.

THAYER, Circuit Judge. The application for a writ of habeas corpus in behalf of Edward Craig is not "signed by the person for whose relief it is intended," as section 754 of the Revised Statutes requires; neither does the petition for the writ affirmatively show that the application is made at his instance or request. This fact, alone, would justify a refusal of the writ; but, inasmuch as the application is probably made with the full knowledge of the prisoner, and as there is no reason to doubt that his signature to the petition

could be readily obtained, I have deemed it expedient to overlook the defect and to consider the important question in the case, whether the military court-martial had jurisdiction of the offense for which Craig was tried and is now undergoing punishment. The facts on which the decision of this question depends are not in dispute. Craig, it seems, was an enlisted soldier in the army of the United States, and, before his term of enlistment had expired, he deserted. For this offense he was apprehended and tried by a military court-martial, and sentenced to dishonorable discharge from the service and to confinement at hard labor in the Leavenworth military prison for the term of 2 years and 6 months. While serving this sentence he assaulted the commandant of the prison, Capt. J. W. Pope, "with intent to kill," and was again tried by a court-martial for the latter offense, found guilty on his own plea to that effect, and was sentenced "to be confined at hard labor in such penitentiary as the reviewing authority may direct for the period of 10 years." With the approval of the secretary of war, and by his direction, the Kansas State Penitentiary, at Lansing, Kan., was designated as the place of confinement, and Craig is at present serving his term of imprisonment at that place.

It is contended by counsel that, after the prisoner had been sentenced to be dishonorably discharged from the military service, and that part of the sentence for desertion had been executed by the issuance of a certificate of discharge, he was no longer subject to the jurisdiction of a military court-martial for any offense that he might thereafter commit, although committed while he was confined in the military prison at Ft. Leavenworth in execution of the residue of the sentence for desertion. This claim is based on the first clause of article 5 of the amendments to the constitution, which declares:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The congress of the United States has taken a different view of the scope and effect of article 5 of the amendments by declaring, in "An act to provide for the establishment of a military prison and for its government," approved on March 3, 1873, "that all prisoners under confinement in said military prisons undergoing sentences of court-martial shall be liable to trial and punishment by courts-martial under the rules and articles of war for offenses committed during said confinement." 17 Stat. 584, c. 249, § 12. See, also, 18 Stat. 48, c. 186; and section 1361, Rev. St. U. S. The question at issue, therefore, is whether section 12 of the act of March 3, 1873, *supra*, is constitutional. It is a cardinal rule, in obedience to which *nisi prius* courts always act, that a law duly enacted by the legislative department of the government will be upheld and enforced unless it is clearly repugnant to the organic law. If a reasonable doubt exists as to whether an act of congress is constitutional or otherwise, the inferior courts of the United States will give effect to its provisions, until it has been declared to be void by the court of last resort. It cannot be said that, by authorizing a trial by courts-martial of per-

sons confined in the military prison established at Ft. Leavenworth, for offenses committed while so confined, congress has clearly, or even probably, exceeded its powers. The prison in question was designed as a place of punishment for those persons only who, while in the military service of the government, either as enlisted men or otherwise, are guilty of offenses "against the rules, regulations and laws for the government of the army of the United States." It is a part of our military establishment, as much as the guardhouse, with which our forts and military encampments are always provided. And, inasmuch as it was intended as a place of punishment for those who are subject to military law and discipline, congress provided, in substance, that the prison should be placed in charge of officers and enlisted men of the army who were to be detailed for that duty by the secretary of war. There can be no doubt of the fact that the prison was thus placed in charge of army officers because it was regarded as a military institution, the same as a fort or an arsenal or a navy yard, and for the purpose of subjecting persons who might be confined therein to military law and to the same discipline that is enforced in the army.

Much stress, however, is laid on the fact that when the offense for which Craig was tried and convicted was committed, he had been discharged from the army, and was no longer subject to military law or discipline. This contention overlooks the fact that the discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a military prison. A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held. The views thus expressed are supported by an opinion of Judge Foster, United States district judge for the district of Kansas, in the case of *Ex parte Wildman*, Fed. Cas. No. 17,653a, which was decided in the year 1876; also, by an opinion of Attorney General Devens (16 Op. Attys. Gen. 292), and by an elaborate decision of Judge Sawyer in *Re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596.

The application for writ of habeas corpus will accordingly be denied.

UNITED STATES v. HUGHES.

(District Court, E. D. South Carolina. December 9, 1895.)

1. CRIMINAL PROCEDURE — PRELIMINARY EXAMINATION — HEARING BEFORE JUDGE.

When the examination of a person accused of a crime against the United States is held before the district judge, instead of a United States commissioner, the powers of the judge are simply those of a United States commissioner.

2. SAME—POWERS OF UNITED STATES COMMISSIONER.

United States commissioners have no judicial power to hear and determine any matter. Their duties are those of examining magistrates, and, upon the examination of a person accused of crime, they have only to determine whether there is probable cause to believe that an offense was committed by the defendant, and have no authority to pass upon the credibility of testimony, or to find any fact.

3. CRIMINAL LAW—AIDING MILITARY EXPEDITION—PROBABLE CAUSE.

Upon the preliminary examination of one H. for aiding a military expedition in violation of Rev. St. § 5286, there was evidence that the steamship of which H. was captain, after leaving the port of New York and passing outside Sandy Hook, stopped two or three miles from shore; that two tugs approached, and put on board 35 men, with several boxes and three boats; that the boxes were opened, and guns and other arms taken out; that during the voyage the men so taken on board were constantly drilled; that said men spoke Spanish, and some of them said they were going to Cuba to fight; that the steamer approached the coast of Cuba at night, with her lights extinguished; that the men disembarked there, taking their arms with them, and using their own three boats and one lent by the steamer; and that, after their landing, the steamer proceeded on her voyage to Jamaica. *Held*, that there was probable cause to believe that H. had violated the statute, by providing or preparing the means for a military expedition to be carried on against a foreign state, and he should be held for trial.

4. SAME—PLACE OF TRIAL.

Held, further, that all the acts constituting such offense were committed on the high seas,—the taking on of provisions at New York, in addition to those required for the crew, not constituting an overt act in furtherance of the enterprise, or evidence of intention to commit such an act,—and, accordingly, that H., under Rev. St. § 730, must be tried in the district where he was arrested, and could not be removed thence to the Southern district of New York.

Examination of Samuel Hughes upon a charge of conducting a military expedition in violation of Rev. St. § 5286.

Edward B. Whitney, Asst. Atty. Gen., and W. Perry Murphy, for United States.

S. Mallet Prevost and Buist & Buist, for Spanish government.

M. C. Butler and J. P. K. Bryan, for defendant.

BRAWLEY, District Judge. The American steamship *Laurada*, owned in Philadelphia, was chartered by Kerr & Co., in September, for two voyages to the West Indies, and sailed during that month for Port Anton, in the Island of Jamaica, with an assorted cargo of merchandise; and, although it appears from the testimony in this case that she had no quarters for passengers, it was in evidence that upon that voyage she carried 86 Italian laborers to work upon a railroad in the Island of Jamaica. Upon her return voyage she