moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognised or admitted as a legal defence. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and, consequently, that no such defence to the bond can be made.

BERNARD PERMOLI, PLAINTIFF IN ERROR, *v.* MUNICIPALITY No. 1 OF THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty.

The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.

The act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and state government, contained, in the third section thereof, two provisoes; one in the nature of instructions how the constitution was to be formed, and the other, reserving to the United States the property in the public lands, their exemption from state taxation, and the common right to navigate the Mississippi.

The first of these provisoes was fully satisfied by the act of 1812, admitting Louisiana into the union, "on an equal footing with the original states." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation.

The act of 1805, chap. 83, extending to the inhabitants of the Orleans territory the rights, privileges and advantages secured to the North Western territory by the ordinance of 1787, had no further force after the adoption of the state constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They are none of them in force unless they were adopted by the state constitution.

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the City Court of New Orleans, the highest appellate court in the state to which the question could be carried.

In 1842, the defendants in error passed the following ordinance:

"Municipality No. 1 of the City of New Orleans.

"Sitting of Monday, October 31st, 1842.—Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart street, wherein all funeral rites shall be performed as heretofore.

Signed, PAUL BERTUS, Recorder.

Approved, November 3d.

Signed, D. PRIEUR, Mayor."

And a few days afterwards, the following:—

"Sitting of November 7th, 1842.—Resolved, that the resolution passed on the 31st October last, concerning the exposition of corpses in the Catholic churches, be so amended as to annul in said resolution the fine imposed against all persons who should transport and expose, or cause to be transported or exposed, any corpses in said churches.

"Be it further resolved, that the said fine shall be imposed on any priest who shall officiate at any funerals made in any other church than the obituary chapel.

Signed, PAUL BERTUS, Recorder.

Approved, November 9th.

Signed, D. PRIEUR, Mayor."

On the 11th of November, 1842, the municipality issued the following warrant against Permoli, a Catholic priest.

"Municipality No. 1
v.
Bernard Permoli.

"Plaintiff demands of defendant fifty dollars fine, for having, on the 9th November, 1842, officiated on the body of Mr. Louis Le Roy, in the church St. Augustin, in contravention of an ordinance passed on the 31st of October last."

To which the following answer was filed:

"The answer of the Reverend B. Permoli, residing at New Orleans, to the complaint of Municipality No. 1.

"This respondent, for answer, says: true it is that the corpse of Mr. Louis Le Roy, deceased, was brought (enclosed in a coffin) in the Roman Catholic church of St. Augustin, and there exposed; and that when there thus exposed, this respondent, as stated in the complaint, officiated on it, by blessing it, by reciting on it all the other funeral prayers and solemnity, all the usual funeral ceremonies

prescribed by the rites of the Roman Catholic religion, of which this respondent is a priest. That in this act he was assisted by two other priests, and by the chanters or singers of the said church.

"This respondent avers, that in so doing he was warranted by the Constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion. He contends that the ordinance on which the complainants rely is null and void, being contrary to the provisions of the act of incorporation of the city of New Orleans, and to those of the Constitution and laws of the United States, as above recited.

"This respondent therefore prays to be hence dismissed with costs.

Signed, D. SEGHERS, of counsel."

The judge, before whom the case was tried, decided that the ordinance was illegal, and not supported by any of the acts of the legislature incorporating the city of New Orleans. But the case being carried up by appeal to the City Court, the decision was reversed, and judgment entered in favour of Municipality No. 1 against Permoli, for fifty dollars and costs.

The judge of the City Court, before deciding the case, made the following remarks, which it may not be inappropriate to transcribe.

"Before entering into a statement of the case, as it appeared on the trial before this court, I consider it necessary to give a mere outline of the circumstances which induced the Council of the First Municipality to pass the ordinances of the 31st of October and 7th of November, 1842.

"By an ordinance of the corporation of the city of New Orleans, approved 26th September, 1827, and entitled 'An ordinance supplementary to an ordinance concerning public health,' it was 'Resolved, that from and after the first of November next, (1827,) it shall not be lawful to convey and expose into the parochial church of St. Louis any dead person, under penalty of a fine of fifty dollars, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead person into the aforesaid church; and also under penalty of a similar fine of fifty dollars, against all priests who should minister to the celebration of any funeral in said church; and that from the first of November of the present year, (1827,) all dead persons shall be conveyed into the obituary chapel in Rampart street, where the funeral rites may be performed in the usual manner.'

"This ordinance continued in force during a period of fifteen years, without any opposition on the part of the Catholic Clergy or population; but in the year 1842, the late lamented and venerable revered Abbé Moni, curate of the parish of St. Louis, having departed this life, some misunderstanding took place between his successor and the church-wardens. The new curate and assistant clergy abandoned the cathedral, and commenced to celebrate funeral ceremonies in other churches than the obituary chapel, this chapel being

under the administration of the said wardens. The council thereupon passed the ordinances, for the violation of which the defendant is sued.

"The case was presented here on the same pleadings as in the court below, but the plaintiff's counsel introduced evidence to prove several facts; this evidence was in substance as follows:

"The Right Reverend A. Blanc, Bishop of New Orleans, testified that the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only; that the witness, as bishop of this diocese, had authorized the clergy to leave the cathedral, and not to officiate at funeral rites at the obituary chapel, and that these ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop.

"The Reverend C. Maenhant, curate of the parish of St. Louis, testified, that he was the curate of said parish, and in that capacity he had given orders for no funeral service to be said at the obituary chapel; that, from the situation of the clergy with regard to the wardens, these funeral services could not, with propriety, be performed at said chapel; that he had been several times applied to, by persons who wished these ceremonies celebrated over the dead bodies of their friends or relatives at the obituary chapel, but he had replied that, under present circumstances, these ceremonies would not be performed at that place, but at the chapel of St. Augustin, or in the house where the deceased person was lying, at the choice of the relatives.

"Cross-examined.—This witness testified, that the St. Augustin chapel was, in his opinion, as conveniently situated for these purposes as the obituary chapel; that, in the funeral office, there is nothing calculated to disturb the public peace, nothing contrary to morals, and that the greatest decency is always observed in these mortuary rites.

"The Reverend Jacques Lesne testified, that he is the priest employed as chaplain at the obituary chapel; that he is entitled to no remuneration, besides what he receives from the church-wardens, for attending at the chapel, to bless the bodies of the dead which are brought there; that he does not celebrate funeral obsequies with that pomp which is given to them in special cases, but he continues, with the permission of the bishop, to read the office of the dead, whenever required, at the obituary chapel, as he did previous to the departure of the clergy from the cathedral; that he is not permitted to leave the chapel to accompany funerals to the cemetery.

"Cross-examined.—He said, there is nothing immoral or contrary to the public tranquillity in the prayers which are said at funerals.

"Messrs. José Fernandez, Bernard Turpin, Anthony Fernandez, and Joseph Génois, proved that, for fifteen years past, the funeral

service has been performed at the obituary chapel, only that this chapel is the best situated for this purpose, and that nothing disorderly ever occurred there.

"Mr. A. Fernandez, cross-examined, added that he had never known of the occurrence of any disturbance of the public peace, during the ceremonies at the St. Augustin chapel, but he had heard a great deal of complaint about it; and that, being a native of New Orleans, and having almost constantly resided here, he has never seen or heard of the performance of funeral rites at any of the Protestant churches.

"The Honourable Paul Bertus, recorder of Municipality No. 1, proved, that having had the misfortune to lose his sister-in-law, he desired that the funeral solemnities should have been celebrated at the obituary chapel; but that the clergy had left him no choice but between the St. Augustin chapel and the mortuary house, and that he determined upon the latter place.

"The following resolutions, passed by the church-wardens of the parish of St. Louis, were next introduced:

"'Sitting of Friday, 11th November, 1842.—Resolved, that the obituary chapel shall be open for the reception of the remains of all deceased Catholics. Resolved, that all persons who desire to have dead bodies exposed in funeral state, at the said chapel, are requested to give notice to the secretary of the wardens, in order that he may cause the necessary preparations to be made.

"'Resolved, that the public be informed that the Reverend Abbé Lesne shall continue to bless all bodies of dead persons brought to the obituary chapel, and that he will continue to say the usual funeral prayers at said chapel.'

"A correspondence between the mayor and the curate was also introduced, by consent of parties; but the court, considering this evidence as having no legal effect upon the case, contents itself merely with the mention of its introduction.

"Henry St. Paul, Esq., (one of defendant's counsel,) testified, that at Lexington, Kentucky, he saw the body of a deceased person taken into the Methodist Episcopal church, where a funeral oration was pronounced for the occasion by the Reverend Maffit, a minister of that persuasion, and that said oration was followed by prayers.

"Finally, the testimony of Mr. P. E. Crozat proved, that one of his friends having departed this life, and having been warned by Mr. Rufino Fernandez of the existence of the ordinance, he had nevertheless insisted that the body should be taken to the St. Augustin chapel for the funeral rites, holding himself responsible for the fine imposed, for his opinion was on the side of the clergy."

The judge of the City Court then gave his opinion at large and decided, as has already been stated, in favour of Municipality No. 1, from which decision a writ of error brought the case up to this court.

William G. Read and *Coxe* for the plaintiff in error.
Barton for the defendant in error.

Read's argument was as follows:

Three questions arise on this record—

1. Is the cause before the court, in accordance with the requirements of the act of September 24th, 1789, sect. 25?

2. Have the court jurisdiction over cases of infringement of the religious liberty of citizens of Louisiana, by the municipal authorities of that state?

3. Do the ordinances of November 3d and November 9th, recited in the record, infringe the religious liberty of citizens of Louisiana?

1. The first question is settled affirmatively by a bare inspection of the record. It falls within the very terms of the act.

2. For an answer to the second question, we must go back, in the first place, to the "ordinance for the government of the territory of the United States north-west of the river Ohio," passed by Congress on the 13th of July, A. D. 1787; part of preamble and article 1st: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which for ever hereafter shall be formed in the said territory. . . . . It is hereby ordained and declared . . . . That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and for ever remain unalterable unless by common consent, to wit:

"Art. 1st. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."

This ordinance, so comprehensive, so far-reaching, so simple, and sublime, established a new era for the millions who were destined to swarm within the sphere of its benevolent operation. For them, we may say in the words of the Roman poet, "*magnus ab integro sæclorum nascitur ordo!*" Till then, the right of the civil power to control the religion of the state had always been practically asserted and recognised; if not by moralists and theologians, at least by statesmen and jurists. Such has been the theory and practice of European governments, from the times when the emperors lighted the streets of Rome with blazing Christians, to the last liturgy forced on his Protestant subjects by the despot of Prussia. Even these American states, planted as they were by refugees from religious persecution, presented for generations any thing but a land of religious liberty. The government of the Puritans was the very opposite of tolerant; and if they spilled not the lives of their dissentient brethren as freely as others had done, it was because they fled from before their face into the wilderness. The government of Virginia

was equally exclusive; and the land of the Calverts was peopled by exiles from both. Even Old Maryland, the primal seat of Christian freedom, has enfranchised the Israelite within our own brief memories. It was but yesterday that the Catholic was made eligible to office in North Carolina; and his continued exclusion from it disgraces New Hampshire to-day. But the ordinance of 1787 drew a broad line of distinction between the thirteen original states, which, in conquering their independence, acceded to all the known attributes of sovereignty, and the new ones to be carved out of the immense regions north-west of the Ohio; which come into the national community shorn of this flower, or rather thorn, of prerogative. It has left not the trace of a foundation, within their vast extent, whereon bigotry can erect her citadels. The United States have guarantied, to their inhabitants, religious liberty; as absolutely as they have republican government to us all.

This ordinance gave the key-note to our territorial legislation; and every subsequent passage has, on this paramount interest of humanity, harmonized therewith. By the act of April 7th, 1798, chap. 45, sect. 6, the inhabitants of the Mississipi territory were admitted to "all the rights of the people of the north-west territory, as guarantied by the ordinance;" and by the act of March 2d, 1805, chap. 437, sect. 1, the inhabitants of the territory of Orleans, (now Louisiana,) became entitled to "all the rights, privileges, and advantages secured by said ordinance, and enjoyed by the people of the Mississippi territory."

But we do not rely on the ordinance of 1787 and the aforesaid extending acts alone. The act of February 20th, 1811, chap. 298, by which the people of the territory of Orleans were empowered to form a constitution and state government, provided expressly in the 3d section, that the constitution to be formed, "should contain the fundamental principles of civil and religious liberty;" and the act of April 8th, 1812, chap. 373, sect. 1, by which the state of Louisiana was admitted into the union, provided "that all the conditions and terms contained in the said third section, should be considered, deemed, and taken as fundamental conditions and terms, upon which the said state is incorporated into the union."

The argument then is strictly consecutive; that, both under the ordinance of 1787, and the acts for admitting Louisiana into the union, there is a solemn compact between the people of that state and the United States, (which this high conservative tribunal will protect from violation by state authority,) that they shall not be molested on account of their religious belief, or mode of worship; but that they shall for ever enjoy religious liberty in the fullest and most comprehensive acceptation of the term.

To obviate the force of this conclusion, the judge "a quo" (Preaux) has, in his opinion, which is part of the record, (16 Peters, 285,) been compelled to advance doctrines of the wildest nullification, subversive of the very first principles of political morality.

He argues (pages 19 and 20 of the record,) "that the ordinance of 1787 was superseded by the constitution of the state of Louisiana; . . . that constitution became the supreme law of the state, and all acts of Congress regulating the government of the territories of the United States ceased to exist within the limits of Louisiana—a sovereign state; . . . . the erection of Louisiana into an independent state, under a constitution adopted by her own citizens, and sanctioned by Congress, must necessarily set aside the charter established for its territorial government by Congress. To accede to a contrary doctrine, would be to admit that the power of Congress might be perpetuated, notwithstanding this solemn act, contrary to the rights of the states as defined and reserved by the federal compact," and this notwithstanding the most carefully expressed and guarded stipulations between the federal empire and its newly admitted member! To what a solemn farce does this argument reduce the earnest debates, the stern remonstrances, the enthusiastic appeals, which shake our legislative halls, and agitate this vast union from one extremity to the other! What avail our anxious compromises, our reluctant concessions, our cautious provisoes, if, the instant a new partner is admitted to the national firm, she is at liberty to cast her most solemn obligations behind her? To what a ridiculous condition is one at least of the high contracting parties degraded by these fancies! Is she sovereign? Oh, no! not "sovereign" till she becomes "a state!" Is she subject? How can subject stipulate with sovereign? She is then a nondescript, "tertium quid"—a sort of political redemptioner; with just enough of the slave to submit to humiliating conditions, and just enough of the freeman to count the days the indentures have yet to run, and rejoice in anticipated repudiation of the most formal and explicit engagements.

Such, however, is not the doctrine of this court. In Menard *v.* Aspasia, 5 Peters, 515, Judge McLean, delivering the opinion of the court, distinctly intimated that the ordinance of 1787 might be insisted on, as yet in force, within the sovereign state of Missouri. His words are too clear for misconception: "If the decision of the Supreme Court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the 25th section of the Judiciary Act, could be exercised;" and although the same learned judge, in Spooner *v.* McConnell and others, 1 McLean's C. C. R. 341, subsequently admitted that such provisions of the ordinance as were intended to produce a moral or political effect, (among which he classes those which secure the rights of conscience,) were annulled, in Ohio, by the adoption of the federal and state constitutions, as implying the "common consent" required for their abrogation; his language must necessarily be understood as harmonizing with that of this court in Menard *v.* Aspasia, and inapplicable to the case of Louisiana; unless it can be shown either that the federal constitution abolished those provisions explicitly,

which it did not; or vested the states with powers repugnant thereto, which it did not; or superseded them by higher federal guaranties, which it did not; or that the constitution of Louisiana proceeded on either of those grounds, which it certainly did not, in terms; and, if at all, only by inference from the conditions imposed by the act for admitting that state to the union; which supposition leaves the case as strong as under the ordinance.

Equally unfortunate is the gloss by which the judge below has endeavoured (pages 14 and 15 of the record) to evade the constitutional guarantees of Louisiana, on the subject of religious liberty. The Supreme Court of his own state, in the recent case of "The Wardens of the Church of St. Louis, New Orleans, *v.* Blanc, Bishop, &c.," (which is reported, as it would seem by authority, in the New Orleans Weekly Bulletin of July 6th, 1844,) holds this most emphatic language in reference to the constitution of Louisiana. "If the state constitution, framed a few years afterwards, contained no such restriction upon the legislative power, it was because it was thought unnecessary. It had already been settled, by solemn and inviolable compact, that religious freedom, in its broadest sense, should form the essential basis of all laws, constitutions and governments, which should for ever after be formed in the territory; and that compact was declared to be unalterable unless by common consent." . . . "In the opinion of the court, no man can be molested, so long as he demeans himself in a peaceable and orderly manner, on account of his mode of worship, his religious opinions and profession, and the religious functions he may choose to perform, according to the rites, doctrine, and discipline of the church or sect to which he may belong. And this absolute immunity extends to all religions, and to every sect." So that, had the judiciary system of Louisiana permitted an appeal from the City Court of New Orleans to the supreme law tribunal of the plaintiff's own state, this court would not probably have been troubled with this argument.

3d. To read the ordinances, under which the plaintiff in error has been fined, is to dispose of the third question presented by this cause. Their bearing upon only one denomination of worshippers establishes their tyrannical character. Equality before the law is of the very essence of liberty, whether civil or religious. The performance of funeral obsequies, in buildings consecrated to public adoration of the Deity, is not confined to Catholics, but is practised by many other religious societies.

Again; the ordinances, as they now stand, contain but a single penal prohibition. They punish the performance of a religious function by individuals acting in their religious capacity or character, "according to the rites, doctrine, and discipline of the church to which they belong." They legislate for the priest as priest, and only as priest; not as a person transporting and exposing, or causing to be transported or exposed, any corpse in the interdicted

churches; but as the ordained celebrant of the office for the dead. What is this function he is forbidden to exercise? His church—the holy Catholic church—teaches that the mercy of God, while it mitigates, does not merge his justice; that, though many, through the atoning blood of the Saviour, escape eternal wo, they do not all pass directly from this probationary state to celestial bliss. Souls may depart this life unpolluted with mortal sin, which would consign them to everlasting misery, and yet bearing some stains of earth, which may not be admitted to His presence, before whose awful purity archangels veil their faces; and such, according to the fearful parable, are cast into that prison whence there is no egress till "payment of the uttermost farthing;" till expiation of "every idle word," of which we are to "give account." This expiatory state is termed by theologians, "purgatory;" and the Catholic doctrine is, that those who suffer there are aided by the prayers, almsdeeds, and other good works of their brethren still in the flesh, and the suffrages of the blessed spirits; exhibiting thus, blended in one tender "communion of saints," the church triumphant in heaven, the church militant on earth, and her suffering members in the middle state. Thus Catholic charity ceases not with the last sad offices rendered to these fainting frames. When eyes that beamed on us with kindness are closed for ever, when the intellectual light that blazed about and guided us is darkened, when the hearts that loved and trusted us are cold and still, then are we stimulated to new demonstrations of affection, by the very agony of our bereavement. And the church, whose every precept is founded on the deepest philosophy of human nature, knowing that the efficacy of prayer is proportioned to its urgency, (as her divine master "in his agony prayed the more,") directs that they shall be offered under every circumstance that can animate hope, strengthen faith, or kindle charity. And, therefore, to her temples, where she receives the little child at "the laver of regeneration," and where she delights to bless the nuptial ring, she commands that we bring the bier; that, kneeling beside the dear remains of friend or relative, before the awful memorials of our redemption, surrounded by the relics of those who have gone before, and whom we believe to be confirmed in glory, in the very presence of the mercy-seat, where, less terrible but dearer than in the *shekinah* that filled the tabernacle of the early dispensation, the Almighty shrouds his glory beneath the sacramental veil, we may pour out our souls in fervent supplication, that those we mourn may be admitted to the mansions of eternal rest, and have their longing hopes crowned with everlasting fruition. And tell us not this is a fond superstition. It is an office in which "the church of the New Testament is in communion with the church of the Old;" with the Hebrew of three thousand years ago and the Hebrew of to-day. In it the Catholic unites with the Nestorian and the Copt, and the separated Greek, and every liturgist before the

sixteenth century; nay, with many of the wise and good, who, half doubting or rejecting it as of revealed authority, still practise it at the instinctive teaching of their own hearts; and with the great Dr. Johnson, bow down for them they loved in prayer that God "may have had mercy." But were it, on the contrary, the last novelty of the day; were it confined to the little chapel where the plaintiff in error ministers to his flock, still he could lay his hand on the ordinance of 1787, and exclaim with the sage of Tusculum, "Si erro, libenter erro; nec hunc errorem a me extorqueri volo!"

But the judge "a quo" has argued, that the praying for the dead in churches, with the body there present, is merely a disciplinary observance, as stated in the evidence of Bishop Blanc, and may, therefore, be regulated or controlled by the legislature, without violating religious liberty.

Now if there be aught essentially characteristic of religious liberty, it is the exemption of ecclesiastical discipline (defined by the learned Hooker, "church order,") from secular control; and this, because the external forms and practices of religion are all that temporal power can directly invade. Faith, doctrine, are beyond its reach; objects of the understanding and the heart. Discipline is the sensible law which regulates the manifestation of our belief or opinion, in our public and social devotional intercourse with our Creator. Faith is the soul of religion; discipline the visible beauty in which she commends herself to our veneration and love. And it may be safely asserted, that there never was an arbitrary change introduced by governments into the religious opinions of a community, which was not masked by a pretended reform of exterior observances. What distinguishes the most numerous sect of Christians, in our country, from the many who agree with them on doctrinal points, but their method; the practical methods established by the founders of their peculiar system of church polity? In fact, they have taken their name from it. Yet what is "method" but another word for "discipline?" And would a member of that society consider himself in the enjoyment of religious liberty, if told "believe what you please of the divinity, the incarnation, the atonement, the influences of the Holy Spirit, baptism; but hold no class-meeting—hold no camp-meeting. These, though perhaps edifying and consolatory to you, are only matters of discipline, and amenable, therefore, to the municipal police?"

But the judge below contends that the Catholic office for the dead is not prohibited; inasmuch as it is permitted in the "obituary chapel." That is to say, religion is free, though its observances may be limited to a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself. The point is stated *arguendo;* but borrowed from the facts which gave rise to this appeal to the court.

But it was further insisted below, that, as a measure of quarantine precaution, the exposition of corpses may be prohibited. Not if such prohibitory legislation infringes rights more precious than mere animal health, which are guarantied by the Constitution or supreme law of the land. Judge Marshall's language on this point is clear. In Wilson and others *v.* The Blackbird Creek Marsh Co., 2 Peters, 251, he says, "The value of the property on the banks (of this creek) must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to promote these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." And if it be true, as inferred from this language, that a sovereign state, in her high legislative capacity, cannot, for the preservation of the health of her citizens, encroach on the constitutional guarantees for unrestricted commerce between man and man; can we suppose she could delegate the more dangerous power of interfering with the intercourse of man with God, specially guarded as it has been by the organic law of Louisiana, to a petty corporation? This case, however, passes clear of that suggestion. The judge below endeavoured to implicate the priest, as the ultimate cause of exposing the sad relics of mortality which "lie festering in the shroud;" but the words of the ordinances, which, being penal, must be construed strictly, have expressly waived the penalty against all concerned in exposing, or causing them to be exposed, and directed their vengeance exclusively against the priestly function.

Barton's argument was this:

The First Municipality of New Orleans embraces the whole of what is called "the city proper," or "square of the city," and is bounded by a wide front levee, and the three streets of Esplanade, Rampart, and Canal, (which are as wide as Pennsylvania Avenue,) and covering also the whole suburbs, and low grounds in the rear of Rampart, extending to Lake Ponchartrain. The obituary chapel, referred to in the record, is situate upon Rampart, but on the rearward side, and is thus separated from the city proper by an area of the width of three of its principal streets. The parochial church of St. Louis is the principal Catholic cathedral in the city, and, like the church of St. Augustin, is situate within the square of the city, where all the streets are very narrow.

New Orleans is visited annually with the yellow fever, in either the sporadic or epidemic form, and strong sanitory measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes.

The great body of the Catholic citizens of New Orleans (other than those of Irish descent) reside in the First Municipality. The American Protestant population reside chiefly in the Second Municipality; they

have but one church in the First Municipality, and that fronts the Second, on Canal street.

The usages of the Catholics there are to perform the mortuary services with the corpse exposed in open church, and before the congregation. Protestant churches there are never used for such purposes, but services for the dead are performed at the cemeteries where the bodies are deposited.

The statement of facts contained in the opinion of the judge of the City Court having been used in the opening argument at this forum, gives warrant for the statement now made, which it is thought may be useful besides as a clue to the *quo animo* of the council of the First Municipality in enacting the ordinance complained of. If that measure had its origin in the mere purpose of infringing upon, and discriminating, to the prejudice of the religious rights of one denomination of Christians, it is not to be defended; but if designed merely as a regulation of sanitory police, for the preservation of the public health, then the law of necessity pleads in its behalf; and all obituary rites and ceremonials which tend to frustrate its objects, or impair its efficacy, must yield to the supremacy of the common good.

The learned counsel also cited and quoted, from the New Orleans Bulletin, an opinion of the Supreme Court of Louisiana, in the case of the Wardens of the Church of St. Louis *v.* The Right Rev. Bishop Blanc, instituted for the legal adjustment of certain differences between them in relation to church affairs, and which that court's judgment happily put an end to. It may be proper to remark, however, that this controversy was between Catholics; the one administering the temporalities of the church, and maintaining the rights of the corporation—the other administering the ecclesiastical functions, and maintaining the rights of the clergy. None but those professing the Roman Catholic religion can vote for church-wardens, as that opinion makes known; and none, therefore, are chosen such, who are not of that religious persuasion. Nothing could have been further from the designs of either party to that controversy, than to have trenched upon or abridged the civil or religious privileges of Catholicism itself, and still less to have favoured, to its prejudice, any other denomination of Christians.

The controversy referred to having arisen, too, in the same year (1842) in which the ordinance was passed under which the fine was imposed on the plaintiff in error, leaves the inference fair that there was a necessary connection between them. But this is not so; and the circumstances strongly repel all inferences that the First Municipality council could have designed any infringement upon, or impairment of, the privileges of Catholics. The great body of the constituency of that council is Catholic; and it is believed, *ab urbe condita*, to the present day, a majority, and very frequently the whole, of that council, are such as have been reared up in the Catholic faith, and have continued in that religious persuasion. Hence, if the

ordinance complained of abridges the privileges of Catholics, it abridges to a like extent the privileges of those who enacted it. If Catholics are wronged, Catholics have wronged them. This circumstance, indeed, may not lessen the injury, though it weakens the wrong. It may not test the lawfulness, but it defends the motive.

Though the particular ordinance under which the fine was imposed, bears date the 31st October, 1842, (modified as it was by the ordinance of the 7th of November, 1842,) yet the purpose and the occasion originated at a far earlier period, at a season when dissensions in the parochial church were unknown, and when the venerable and reverenced Abbé Moni—a priest of all worth and all appreciation—presided as curate of the parish of St. Louis. As far back as the 26th of September, 1827, (fifteen years before,) the city council adopted an ordinance upon this subject of precisely similar import with that of the 31st October, 1842; and the motive of its enactment is conspicuous in the very title of the ordinance. It is entitled "An ordinance supplementary to an ordinance concerning public health." It is as follows:

"Resolved, That from and after the 1st of November next, (1827,) it shall not be lawful to convey and expose, into the parochial church of St. Louis, any dead person, under penalty of a fine of $50, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead into the aforesaid church; and also under penalty of a similar fine of $50, against all priests who should minister to the celebration of any funeral in said church; and that from the 1st of November of the present year, (1827,) all dead persons shall be conveyed into the obituary chapel in Rampart street, where the funeral rites may be performed in the usual manner."

This act has remained in force ever since the 1st November, 1827. Its sole purpose was manifested in its title and provisions. All persons concerned gave it their obedience, and none ever complained that it impaired or abridged the civil or religious rights and privileges of the Catholics. No motive was attributed to its authors, other than the fears they may have entertained, in seasons of disease, of the perils of contagions, or the spread of epidemics. The ordinance of the 31st October, 1842, made no change whatever in the ordinance of 1827, except in its penalties, for conveying to, and exposing in, other Catholic churches, in the First Municipality, of dead bodies; the obligations not to do so, and to use the obituary chapel in Rampart street for that purpose, remained as before. Neither has the ordinance of the 7th November, 1842, wrought any modification in that of 1827, for its amendments are confined by special references to the ordinance of the 31st October, 1842. That the ordinance of 1827, in principle, affected the rights and privileges referred to, equally with the subsequent ordinances, is too plain to be questioned; and that grievance seems altogether too slight and impalpable to

claim the protection of this august tribunal, when in fifteen years, for aught that is known, it has passed without complaint, and for the reason, it may be, that it was so subtle and ethereal as to elude detection.

2. The ordinances of the 31st of October, and the 7th November, 1842, do not invade the rights or privileges of the Catholic citizens of New Orleans.

The testimony of the Right Rev. Bishop Blanc would seem to establish this proposition incontrovertibly, for he says that "the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only." A dogma is a matter of church-faith, and affects conscience; discipline affects conduct only, where conduct does not affect faith. Under these ordinances, then, and the bishop's testimony, faith and conscience are left free; nothing molests the enjoyment or constrains the exercise of either. How is it made to appear, then, that they conflict with that "free enjoyment of religion," secured to the "inhabitants of the ceded territory," by the Louisiana treaty of 1803, which has been cited? Or, with the 1st article of the ordinance of 1787, which says, that "no person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments," which has been also cited? Or, with the 4th section of the act of Congress of March 26, 1804, which prohibits the Legislative Council of the Orleans territory from passing any law "which shall lay any person under restraint, burden, or disability, on account of his religious opinions, profession, or worship; in all which he shall be free to maintain his own, and not burdened for those of another," which has been also cited? Or, with the act of Congress of the 20th February, 1811, (also cited,) which provides that the constitution to be formed by the people of the Orleans territory, "shall contain the fundamental principles of civil and religious liberty?" Or, with the act of Congress of the 8th April, 1812, admitting Louisiana as a state, and providing that the terms of admission contained in the 3d section of the act of 20th February, 1811, "shall be considered, deemed, and taken, as fundamental conditions and terms upon which the said state is incorporated in the union?"

Supposing these various provisions, relied on by the plaintiff in error, to have not spent their force by the operations of time, nor the change of government, it is submitted, that there is nothing in these ordinances repugnant to either or any of them; for, if they be enforced evermore, they do not, and cannot, affect the religious sentiments or opinions, the worship or the liberty, of any. But the bishop says, further, that "these ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop." The place, then, for the mortuary cere-

monials not being sacramental, how is the faith or conscience of Catholics assailed, by designating a few places in which they could not be performed? The essence of the right consists in the thing that is to be done, and not in the place of performance. If the thing itself were forbidden, then might have been drawn in question the power to forbid, coupled with the further inquiry, how far religious, as well as civil rights and privileges, may be constrained to give way to the public necessities and the common good?

3. The ordinances complained of were within the competency of the council of the First Municipality.

No express authority is needed to invest in a corporation a power of preservation of the public health. The law of necessity would constitute it an incident essential to its existence. Vide Bacon's Abridgment, tit. *Corp.* (D.) It is there laid down that "there are some things incident to a corporation—which it may do without any express provision in the act of incorporating—such are powers to make laws, for a body politic cannot be governed without laws." And Chief Justice Holt says, (Carth. 482,) "That every by-law, by which the benefit of the corporation is advanced, is a good by-law for that very reason, that being the true touch-stone of all by-laws."

So in matters of corporate police. In Com. Dig. 3, tit. *By-law* C, it is laid down, "That a by-law to restrain butchers, chandlers, et al., from setting up in Cheapside, or such other eminent parts in the city of London, was good"—(not because a special power was conferred to enact it, but)—"because such trades were offensive, and apt to create diseases; and that, therefore, for fear of infection, and for the sake of public decorum and conveniency, such kind of offensive trades might be removed to places of more restraint." The validity of a similar by-law, made by the corporation of Exeter, was afterwards affirmed by Lord Mansfield. See Cowp. R. 269, 270.

"Where a restraint appears to be of manifest benefit to the public, such is to be considered rather as a regulation than as a restraint." Willes, 388; 1 Strange, 675; 2 Strange, 1085; 3 Burr. 1328; 1 H. Black. 370; 1 Roll. Abr. 365; 3 Salk. 76; Sid. 284; 2 Kyd. on Corp. 149.

In The Village of Buffalo *v.* Webster, 10 Wend. 101, Chief Justice Savage puts this case *ex gratia*. "A by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold, except in a particular place, is good, not being a restraint of the right to sell meat, but a regulation of that right."

In the case of The Commonwealth *v.* Abram Wolf, 3 Serg. & Rawle, 48, Chief Justice Tilghman affirmed the validity of an ordinance of Philadelphia, imposing a fine for working on a Sunday, against a Jew; though under the teachings of the Jewish Talmud and the Rabbinical Constitutions, the Jew deemed Saturday as the

Jewish Sabbath, and felt it both as a privilege and a duty to labour for six days, and to rest on the seventh, or Saturday.

In the case of the Mayor of New York *v.* Slack, 3 Wheeler, 248, *et seq.*, the court affirmed the validity of an ordinance imposing penalties for burying the dead within three miles of the city limits, on the ground that the preservation of the public health was an incident of the corporate power. The opinion of the court is particularly referred to for the minuteness and learning with which it reviews the whole power of city corporations over matters of general police and sanitary regulation.

To the same end reference is also made to the ordinances of Boston, pp. 53, 55, 76; of Nashville, p. 60; the revised ordinances of Baltimore, (1838,) p. 285, for the act of assembly, conferring the power; and from p. 37 to 51, for the ordinances made under that authority; quarantine laws, &c.

So far as the legislative power of Louisiana, both territorial and state, could confer the power to make the ordinances in question, that power has been amply conferred. The 6th section of the act of the 17th February, 1806, provides that "the said council shall have the power to make and pass all by-laws and ordinances for the better government of the affairs of the said corporation, for regulating the police, and preserving the peace and good order of the said city;" so the act of the 14th March, 1816, provides "that the city council shall have power and authority to make and pass such by-laws and ordinances as they shall deem necessary to maintain the cleanness and salubrity of the said city, &c. And to make any other regulations which may contribute to the better administration of the affairs of the said corporation, as well as for the maintenance of the police, tranquillity, and safety of the said city.

These acts were all in force at the time these ordinances were passed, and still are; and also the 4th section of an act of the 8th of March, 1836, which provides that "each of the municipalities, &c., shall possess generally all such rights, powers, and capacities as are usually incident to municipal corporations, &c., &c.

The power conferred on the council, then, is ample enough to sanction these ordinances; but it is material to know, whether the delegating power could rightfully do what it has thus done; and if it could not, whether it is the province, or within the competency of this court to say so? This brings us to the question:

4. Has this court jurisdiction in this case?

If it has, it does not derive it from the character of the parties, for they are all citizens of the same state; and not deriving it thence, the function of this court to administer state laws between certain classes of parties does not attach. The questions raised here, therefore, of the repugnancy of these ordinances to the laws of the state, or of the repugnancy of those laws to the state constitution, be such repugnancy what it may, it is most respectfully submitted, are mere

municipal questions, upon which the judgment of the court, *a quo*, in the present conjuncture, is final and conclusive. If, indeed, there be a repugnancy between these ordinances and "the constitution, treaties, or laws of the United States," and their validity is "drawn in question" by the court's judgment, the jurisdiction is conceded.

1st. There is no repugnancy to the constitution, because no provision thereof forbids the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the states.

2d. The provisions of the treaty of 1803 are *functæ officiorum*, with regard to that portion of "the ceded territory" which has been formed into states which have been admitted into the union. To that end the guarantees in behalf of the "inhabitants" were directed and confined, for no higher or other privileges were claimed or provided for them; and it is hence submitted, that when a state, formed out of that territory, enters the union, the treaty, *quoad hoc*, has been executed, and has spent its force. The "inhabitants" of Louisiana have provided their own securities for their own rights in their own constitution, which they themselves have established; and the federal government has admitted her into the union upon their own terms. They have absolved the government from its treaty dues to them, and the government has absolved itself from its treaty dues to France on their account.

3d. So much of the ordinance of 1787 as may have been extended to the people of the Orleans territory expired within the jurisdiction of Louisiana when she was admitted as a state into the union. That ordinance is older than the Constitution, but it cannot, to any extent, supersede it. The federal government possesses no powers but such as it has derived from the states; and no one state has conferred upon it, or can confer upon it, more or less power than any other state has conferred, or can confer. This results from the incapacity of the government to take, rather than from the incapacity of the states to give. Hence there is, and must be, from a constitutional necessity, a perfect and unchangeable equality among the states, not indeed in reference to the powers which they may separately exercise, (for that depends upon their own municipal constitutions,) but in reference to those which they separately retain. What Massachusetts may do, Louisiana may do. What Congress may not forbid Massachusetts to do, it may not forbid Louisiana to do. If Congress may not extend over Massachusetts the provisions of the ordinance of 1787, or any portions thereof, neither can it over Louisiana, or retain them there after Louisiana became Massachusetts's equal, and had the power to decide for herself. If they are retained there they derive their exclusive obligation and force from Louisiana's adoption, and not from the authority of Congress. They have thus become laws of Louisiana, and have ceased to be laws of

the United States. If they have so ceased to be laws of the United States, how could the imputed repugnancy between them and the city ordinances confer any jurisdiction upon this court? As laws of Louisiana, the judicial functionaries thither are the constitutional and final expounders in cases between her own citizens, like the one at bar.

The act of Congress of the 8th April, 1812, which admitted Louisiana into the union, acknowledged that very equality with her sovereign sisters, which is here asserted. The 1st section provides—"That the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever." It is not the mere assertion of her equality, in this clause, which establishes her equality—it only pronounces that equality which the Constitution establishes. If she be equal, however, she must be equally exempt from the legislation of Congress, past or future, as her elder sisters. If the 1st article of the compact created by the ordinance of 1787, in these words, "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments," has been extended over Massachusetts by any act of Congress, and through its own proper vigour has the force of law, it binds Louisiana to the same extent, but no further, and not otherwise.

The learned counsel for the plaintiff in error have cited two decisions of this court—the one 5 Peters, 515, the other 9 Peters, 235—to sustain their position upon this branch of the issues raised by the record; but it is presumed that there is some error in the references; for there is naught to be found at those pages applicable to the matter for which they are cited.

A case has also been cited from 1 McLean's C. C. Rep. 341, to maintain that the ordinance of 1787 survives the organization of a state government over territory to which it applies. That may be, in those new states which have been erected in the identical territory to which the compact contained in the ordinance relates. Nor is the authority understood as extending beyond that. The case arose in Ohio. It had reference especially to the free navigation of her waters, as secured to the other states by the compact, and it may be doubted if Ohio could have deprived them of that, though there had been no compact. The learned judge, in delivering his opinion, and in speaking of the ordinance, says:

"Many of the provisions were temporary in their nature, having for their object the organization and operation of a territorial government. Others assume the solemn form of a compact between the original states and the people and states in the territory which were to remain for ever unalterable, unless by common consent."

The portion of the ordinance thus deemed "unalterable," could never have been made applicable to the "inhabitants" of the Orleans

territory, because there could have been no such "compact" made in reference to them; nor was it made. Indeed, other parts of the opinion seem to assail the position it was cited to support. At p. 343, the learned judge says:

"The change from a territorial government to that of a state necessarily abolished all those parts of the ordinance which gave a temporary organization to the government, and also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience—which declared that education should be encouraged, and excessive bail should not be required," &c.

What "provisions" of the ordinance "secured the rights of conscience," other than those forbidding a person to "be molested on account of his mode of worship, or religious sentiments," already quoted from the 1st article of the compact? The counsel of the plaintiff in error has made reference to no other "provisions," and it is believed there are none. Then we are furnished by the learned counsel with the high authority of Mr. Justice McLean, that these "provisions" are "necessarily abolished," by the erection of a territory, in which they apply, into a state government. And as this is true of a territory embraced within the very limits to which the compact originally referred, *à fortiori* must it be applicable to states formed out of territory *aliunde*.

It is believed that the opinion also sustains other views presented in the argument in behalf of the defendants in error, in the following passage:

"It may be admitted that any provision in the constitution of the state must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by Congress; so that there was the 'common consent' required by the compact to alter or annul it."

So, too, the constitution of Louisiana "was sanctioned by Congress." If there be a repugnancy between its provisions and those "provisions" of the ordinance referred to, those provisions are annulled. If not, then the state of Louisiana has retained them, and made them her own proper laws, and they are, in no just sense, since then, laws of the United States; for Congress is without capacity to make for her, or to extend over her sovereign domain, any laws of Congress upon that subject.

The defendants in error further rely on, and make reference to, the well-reasoned opinion of the judge, *a quo*, and the authorities cited therein.

Coxe, in reply, directed his attention chiefly to the other questions in the case than that of jurisdiction, and referred to the opening

argument of his colleague, Mr. *Read*, as a full exposition of the merits of the case.

Mr. Justice CATRON delivered the opinion of the court.

As this case comes here on a writ of error to bring up the proceedings of a state court, before proceeding to examine the merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

The ordinances complained of, must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power by the 25th section of the Judiciary Act to interfere. The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following acts of Congress. That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and state government; by sect. 3, certain restrictions were imposed in the form of instructions to the convention that might frame the constitution; such as that it should be republican; consistent with the Constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus;* that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States. Then follows by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from state taxation—with a declaration that the navigation of the Mississippi and its waters shall be common highways, &c.

By the act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the act of 1811; Congress declared it should be on the conditions and terms contained in the 3d section of that act; which should be considered, deemed and taken, as fundamental conditions and terms upon which the state was incorporated in the union.

All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances: the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the state, "on an equal footing with the original states in all respects whatever," in express terms, by the act of 1812, Congress was concluded from assuming

that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended.

The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The act of 1805, chap. 83, having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

In the ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed north-west of the Ohio, unalterable, unless by common consent—one of which stipulations is, that "no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by the record is exclusively of state cognisance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.