Universal rule is that where an instrument will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred.*

Theory of the defendants is that the note is usurious and illegal on its face, but the authorities are clearly the other way, that the presumption is that the note was given upon a state of facts which authorized the taking of the instrument, and that the contract was lawful and valid.†

Tested as matter of principle, or by the decided cases, the better opinion is that the presumption is that such a contract is valid and not usurious, and that the burden to prove the contrary is upon the party who makes the charge.

JUDGMENT AFFIRMED.

EX PARTE MCCARDLE.

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress; but is conferred "with such exceptions, and under such regulations, as Congress may make;" and, therefore, acts of Congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for.
2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also.
3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.
4. The act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts, in cases of *habeas corpus*, does not except from the appellate jurisdiction of this

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* Archibald *v.* Thomas, 3 Cowen, 290.

† Andrews et al. *v.* Hart et al., 17 Wisconsin, 307; Leavitt *v.* Pell, 27 Barbour, 332; Levy *v.* Hampton, 1 McCord, 147.

Statement of the case.

court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of *habeas corpus*.

APPEAL from the Circuit Court for the Southern District of Mississippi.

The case was this:

The Constitution of the United States ordains as follows:

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

"§ 2. The judicial power shall extend to all cases in law or equity arising *under this Constitution, the laws of the United States*," &c.

And in these last cases the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations, as the Congress shall make.*"

With these constitutional provisions in existence, Congress, on the 5th February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and *from the judgment of the said Circuit Court to the Supreme Court of the United States.*

This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of *habeas corpus*.

Statement of the case.

The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody; but, upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal-bond, for costs, he was admitted to bail upon recognizance, with sureties, conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied.*

Subsequently, on the 2d, 3d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress,† returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

"*And be it further enacted*, That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed."

* See Ex parte McCardle, 6 Wallace, 318.

† Act of March 27, 1868, 15 Stat. at Large, 44.

Argument against the operation of the act.

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act.

Mr. Sharkey, for the appellant:

The prisoner alleged an illegal imprisonment. The imprisonment was justified under certain acts of Congress. The question then presents a case arising under "the laws of the United States;" and by the very words of the Constitution the judicial power of the United States extends to it. By words of the Constitution, equally plain, that judicial power is vested in one Supreme Court. This court, then, has its jurisdiction directly from the Constitution, not from Congress. The jurisdiction being vested by the Constitution alone, Congress cannot abridge or take it away. The argument which would look to Congressional legislation as a necessity to enable this court to exercise "the judicial power" (any and every judicial power) "of the United States," renders a power, expressly given by the Constitution, liable to be made of no effect by the inaction of Congress. Suppose that Congress never made any exceptions or any regulations in the matter. What, under a supposition that Congress must define when, and where, and how, the Supreme Court shall exercise it, becomes of this "judicial power of the United States," so expressly, by the Constitution, given to this court? It would cease to exist. But this court is coexistent and co-ordinate with Congress, and must be able to exercise the whole judicial power of the United States, though Congress passed no act on the subject. The Judiciary Act of 1789 has been frequently changed. Suppose it were repealed. Would the court lose, wholly or at all, the power to pass on every case to which the judicial power of the United States extended? This act of March 27th, 1868, does take away the whole appellate power of

this court in cases of *habeas corpus*. Can such results be produced? We submit that they cannot, and this court, then, we further submit, may still go on and pronounce judgment on the merits, as it would have done, had not the act of 27th March been passed.

But however these general positions may be, the case may be rested on more special grounds. This case had been argued in this court, fully. Passing then from the domain of the bar, it was delivered into the sacred hands of the judges; and was in the custody of the court. For aught that was known by Congress, it was passed upon and decided by them. Then comes, on the 27th of March, this act of Congress. Its language is general, but, as was universally known, its purpose was specific. If Congress had specifically enacted 'that the Supreme Court of the United States shall never publicly give judgment in the case of McCardle, already argued, and on which we anticipate that it will soon deliver judgment, contrary to the views of the majority in Congress, of what it ought to decide,' its purpose to interfere specifically with and prevent the judgment in this very case would not have been more real or, as a fact, more universally known.

Now, can Congress thus interfere with cases on which this high tribunal has passed, or is passing, judgment? Is not legislation like this an exercise by the Congress of judicial power? *Lanier* v. *Gallatas** is much in point. There a motion was made to dismiss an appeal, because by law the return day was the 4th Monday in February, while in the case before the court the transcript had been filed before that time. On the 15th of March, and *while the case was under advisement*, the legislature passed an act making the 20th of March a return day for the case; and a motion was now made to reinstate the case and hear it. The court say:

"The case had been submitted to us before the passage of that act, and was beyond the legislative control. Our respect for the

* 13 Louisiana Annual, 175.

General Assembly and Executive forbids the inference that they intended to instruct this court what to do or not to do whilst passing on the legal rights of parties in a special case already under advisement. The utmost that we can suppose is," &c.

In *De Chastellux* v. *Fairchild*,* the legislature of Pennsylvania directed that a new trial should be granted in a case already decided. Gibson, C. J., in behalf of the court, resented the interference strongly. He said:

"It has become the duty of the court to temporize no longer. The power to order new trials is judicial. But the power of the legislature is not judicial."

In *The State* v. *Fleming*,† where the legislature of Tennessee directed two persons under indictment to be discharged, the Supreme Court of the State, declaring that "the legislature has no power to interfere with the administration of justice in the courts," treated the direction as void. In *Lewis* v. *Webb*,‡ the Supreme Court of Maine declare that the legislature cannot dispense with any general law in favor of a particular case.

Messrs. L. Trumbull and M. H. Carpenter, contra:

1. The Constitution gives to this court appellate jurisdiction in any case like the present one was, only with such exceptions and under such regulations as Congress makes.

2. It is clear, then, that this court had no jurisdiction of this proceeding—*an appeal from the Circuit Court*—except under the act of February 5th, 1867; and so this court held on the motion to dismiss made by us at the last term.§

3. The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. No court can do any act in any case, without jurisdiction of the subject-matter. It can make no difference at what point, in the progress of a cause, the

* 15 Pennsylvania State, 18.
† 7 Humphreys, 152.
‡ 3 Greenleaf, 326.
§ 6 Wallace, 318.

jurisdiction ceases. After it has ceased, no judicial act can be performed. In *Insurance Company* v. *Ritchie*,* the Chief Justice, delivering the opinion of the court, says:

"It is clear, that when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction."

And in that case the repealing statute, which was passed during the pendency of the cause, was held to deprive the court of all further jurisdiction. The causes which were pending in this court against States, were all dismissed by the amendment of the Constitution denying the jurisdiction; and no further proceedings were had in those causes.† In *Norris* v. *Crocker*,‡ this court affirmed and acted upon the same principle; and the exhaustive argument of the present Chief Justice, then at the bar, reported in that case, and the numerous authorities there cited, render any further argument or citation of cases unnecessary.§

4. The assumption that the act of March, 1868, was aimed specially at this case, is gratuitous and unwarrantable. Certainly the language of the act embraces all cases in all time; and its effect is just as broad as its language.

The question of merits cannot now, therefore, be passed upon. The case must fall.

The CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, con-

* 5 Wallace, 544.

† Hollingsworth *v.* Virginia, 3 Dallas, 378.

‡ 13 Howard, 429.

§ Rex *v.* Justices of London, 3 Burrow, 1456; Yeaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Id. 329; United States *v.* Preston, 3 Peters, 57; Com. *v.* Marshall, 11 Pickering, 350.

ferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau* v. *The United States*,* particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other

* 6 Cranch, 312; Wiscart *v.* Dauchy, 3 Dallas, 321.

appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.*

On the other hand, the general rule, supported by the best elementary writers,† is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris* v. *Crocker*,‡ and more recently in *Insurance Company* v. *Ritchie*.§ In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

* Lanier *v.* Gallatas, 13 Louisiana Annual, 175; De Chastellux *v.* Fairchild, 15 Pennsylvania State, 18; The State *v.* Fleming, 7 Humphreys, 152; Lewis *v.* Webb, 3 Greenleaf, 326.

† Dwarris on Statutes, 538. ‡ 13 Howard, 429. § 5 Wallace, 541

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It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.*

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

MOORE v. MARSH.

Under the fourteenth section of the Patent Act of 1836, enacting that damages may be recovered by action on the case, to be brought in the name of the person "interested," the original owner of the patent, who has afterwards sold his right, may recover for an infringement committed during the time that he was owner. The word "interested," means interested in the patent at the time when the infringement was committed.

ERROR to the Circuit Court for the Western District of Pennsylvania.

The eleventh section of the Patent Act of 1836, relating to the assignment of patents, thus enacts:

"Every patent shall be assignable in law either as to the whole interest, or any undivided part thereof, by any instrument in writing, which assignment, and also every grant and conveyance of the exclusive right under any patent to make

* Ex parte M'Cardle, 6 Wallace, 324.