25th Congress, 3d Session. Doc. No. 35. Ho. of Reps.

COMMUNICATION

FROM

THE HONORABLE ALFRED CONKLING,

Made at the request of Mr. M. Fillmore, of Defects of Law, &c. Presented by Mr. Fillmore.

December 20, 1838.

1st. Refer so much as relates to courts and piracy, to Committee on Judiciary;
2d. So much as relates to neutrality, to Committee on Foreign Relations;
3d. So much as relates to steamboats, to Select Committee on that subject.

Extract from a letter from the Hon. A. Conkling, district judge of the northern district of New York, dated

Auburn, *December* 10, 1838.

In reference to your invitation to suggest any further remedial legislation, which, in the course of my experience, has occurred to me as necessary, I can at once invoke your agency in regard to one subject which ought unquestionably to receive immediate attention, though I am not certain you will feel much relish for it. By the first section of the act of 1818, relative to our neutral relations, it is made penal to accept a commission from any foreign Power, to fight against another with which we are at peace; and, by the second, to enlist, or hire or retain another person to enlist, or to go beyond the limits of the United States, for the purpose of enlistment, in the service of any foreign Power.

Now it is very clear that the reason and spirit of these prohibitions extend to the case of interference in an insurrection in the territory of a nation in amity with us, and of invasion of a peaceful foreign territory by our citizens, in the manner recently practised by them.

But these enactments do not (at least according to my construction of them) embrace these cases. And the only part of this act which is applicable to such aggressions, is the 6th section, which declares it penal, *within the United States*, to begin or set on foot, or to prepare or provide the means for a military expedition to be carried on *from the United States*, against the dominions of a friendly nation. It is only for acts, therefore, committed *within our own territory*, and of a *particular nature*, such as very few, at least, of the ostensible actors in the late outrages have committed, and such as, from their character, it is very difficult to prove, that our citizens are amenable under this act, in the cases above indicated—cases, it should be remembered, too, far more likely hereafter to occur than those so fully provided against by this act. To

Thomas Allen, print.

me it appears, I confess, very singular that this great defect was not supplied by the act of March last.

After what I have written, I need not add, that what the exigency of the case requires is an inhibition, with suitable penalties, of the act of engaging in any military enterprise against, or going with hostile intentions, to be carried into effect by military force, into the territories of a foreign Power with which we are at peace. As the law now stands, little can be done towards punishing offenders of the description in question. Our people may shoulder their rifles, go to Canada, shoot down its peaceful inhabitants, and burn their houses; and, if they have the good fortune to escape destruction or capture there, may return in triumph and security.

Believe me, dear sir, with great regard, &c.

A. CONKLING.

Hon. MILLARD FILLMORE.

AUBURN, *November* 10, 1838.

MY DEAR SIR: I avail myself of the first day of leisure I have had since I had the pleasure of conversing with you in Buffalo, to fulfil my promise then made to write to you on the subject of the organization of the national courts in this district.

When I first saw the act of July last, requiring five sessions of the district court to be held, in addition to the two sessions of the newly-established circuit court, recollecting that we had, until 1837, got on pretty well, and, as far as I had observed, without public complaint, with only three sessions of the district court exercising circuit-court powers, it certainly did not, as I believe I intimated to you, appear to me that so considerable a change was necessary. It is true, however, that this is the most populous district in the Union, and one of the largest in territorial extent. It is true, also, that it has several hundred miles of inland frontier bordering on the British dominions, affording facilities for illicit trade, and for infractions of our neutrality acts, of which, unhappily, too many of our citizens are disposed to avail themselves. The business of the national courts, therefore, as might naturally be expected, is already considerable, and is constantly increasing. It is always desirable, too, that the administration of justice should be speedy, and that it should be brought to the door of the citizen. These considerations, perhaps, fully justify the act of the last session. At any rate, such appears to have been the opinion of Congress, and I have no right nor disposition to find fault with the measure, notwithstanding the large additional amount of travel, and, what to me is of more concern, of expense, to which it subjects me. The following suggestions, therefore, are intended to be in strict conformity with the policy of the late act. I propose for your consideration the alternative of three several schemes.

1. Leave the system substantially as it is, but modified as follows: First, change the time for holding the Buffalo session of the district court to the third or fourth Tuesday of September. Second, fix the time and place for holding the session required to be held in the northern counties. Let the time be (say) the third Tuesday of August, or the fourth of October; and the place, the seat of justice of either of the three counties, or of each of them in annual succession.

The first of the above-mentioned alterations is designed merely to remedy the inconvenience of requiring the district judge to hold a court at one extremity of the district on the second, and at the other on the third Tuesday of the same month. The change is further recommended, also, as you will remember, by the interference of a term of your common pleas with the present arrangement. The second of the above proposed alterations I consider clearly expedient on the ground of convenience. No reason occurs to me why the time and place for holding the session in the northern counties, more than elsewhere, should be left discretionary. The existing regulation will be found troublesome in practice. It will require a preliminary correspondence, first with the district attorney, next with the clerk, and lastly with the State printer; and then, if by any accident the notice should happen not to be seasonably published, the proceeding would be void.

I hope you will concur with me in this view of the matter. If any emergency should at any time render a court necessary in the northern or other part of the district, a special session may (as has happened several times since I came into office) be appointed.

2. In addition to the foregoing modifications, restore circuit court jurisdiction to the district court, giving a writ of error and appeal in cases of district-court jurisdiction to the circuit court; and in cases of circuit-court jurisdiction, to the supreme court, as was done by an act of the late session [chap. 46] in the western district of Virginia. Under this arrangement, the Albany session of the circuit court might, moreover, without prejudice, be abolished, and the northern session of the district court might then be more conveniently held in June.

Touching this scheme, and more especially the following one, inasmuch as they propose an enlargement of the powers of the district court, I owe it to myself to observe that I should not have taken it upon myself to suggest them, had I not understood you, in our conversation at Buffalo, spontaneously to express yourself favorable to a return to the old system. I will frankly say, however, that I think the measure of restoring circuit-court jurisdiction to the district court would be conducive to public convenience. Among so large and active a population as this district comprises, it is to be expected that there will arise a considerable number of causes of circuit-court jurisdiction; but, under the present system, the district, as you will remember, being partitioned into two divisions for the exercise of circuit-court jurisdiction, and all actions in that court being required to be tried in the division where they arose, there is virtually but one court in a year for the trial of causes of this description. The change proposed would provide three or four; as the district court would then virtually be a circuit as well as a district court.

3. Restore circuit-court powers to the district court, and abolish the circuit court, giving an appeal and writ of error to the circuit court of the southern district in cases of district-court jurisdiction, to the supreme court in cases of circuit court jurisdiction, preserving the arrangement of the district into divisions, and requiring six sessions of the court to be held annually. The sessions might be arranged, for example, as follows: one in Albany, on the fourth Tuesday of April; one in Utica, on the last Tuesday of October; one in Canandaigua, on the third Tuesday of January; one in Buffalo, on the second Tuesday of September; one in Ro-

chester, on the second Tuesday of June; and one in Plattsburg, on the fourth Tuesday of July.

This, if I understood you correctly, is substantially the scheme hinted at by you. It has the advantage over the last of being more simple, and, upon the whole, more convenient. I doubt, however, whether Congress will be disposed to abandon the circuit-court system in this district, and am not certain that it would be satisfactory to all our citizens. One reason on account of which I was greatly rejoiced at the establishment of a circuit court here, I am sorry to say, however, has proved fallacious. You have heard of the multitude of writs of right (more than one hundred of which are still pending) brought by Mr. Bradstreet, and of the extremely harassing manner in which they have been conducted. When the circuit court was organized, and these causes, of course, removed to it, I flattered myself that I should be measurably relieved from a very unpleasant duty; but, unfortunately, Judge Thompson refuses to sit in these cases; Mr. Thompson having an interest, as he supposes, in the lands in controversy. Personally, therefore, I am, upon the whole, nearly indifferent whether the circuit court be suffered to continue, or be abandoned. Under different circumstances, I should, it is true, greatly prefer an adherence to the existing system in this respect, as I am inclined to avoid rather than to court responsibility, as it is agreeable to me to be associated with a man of the high intellectual and moral character of Judge Thompson. But, in truth, a desire, on his account, to relieve him in this respect, is one of my reasons for venturing to suggest what, after all, may, for aught I know, appear not quite becoming.

Should you, upon reflection, either before you set out for Washington, or after your arrival there, come to a conclusion in favor of either the second or third of the above schemes; and should you, for any reason, desire me to draw up what I may suppose the proper form of a bill to carry it into effect, I will cheerfully do it.

In the course of the conversation to which I have alluded, you suggested a quere whether or to what extent the jurisdiction of the district court, as a court of admiralty and maritime jurisdiction attached, to the commerce of the lakes, to which I engaged to reply more definitely in the communication which I promised to make to you. Of one description of cases falling within this branch of jurisdiction—that of proceedings *in rem* against property seized on waters navigable from the ocean, by vessels of not less than ten tons burden, I need say nothing, as you are familiar with it. But the limits of the admiralty and maritime jurisdiction of these courts are by no means accurately defined; it is, however, admitted to embrace suits *in rem* for seamen's wages; upon marine hypothecations, for the recovery of the value of materials furnished and labor performed in shipbuilding, in case of a foreign ship or of a domestic ship when actually hypothecated by the owner, and suits for pilotage; also, claims for salvage in cases of shipwreck and of vessels derelict; also cases of disagreement among part owners as to the employment of vessels, and cases of disputed title or possession of ships.

There is nothing in the nature of these cases which necessarily limits their occurrence to commercial transactions on the ocean or tide-waters; nor can I discover any reason why the remedies in admiralty would be less beneficial applied to inland commerce than to that carried on by sea.

But, as I understand the matter, they are subject to this limitation, and

must continue to be so until it shall be removed by Congress. There is also room for doubt as to the power of Congress to extend this branch of jurisdiction. Indeed, the constitutionality of the act declaring seizures of the description above mentioned to belong to this head was very earnestly contested, and not without reason. I suppose, however, there can be no question of the power of Congress to confer jurisdiction on the national courts over all the above-enumerated cases, provided only the course of proceeding prescribed be according to the common law instead of the civil law.

The crime of piracy, too, as now defined, is limited to the high seas. The extent and rapid increase of our inland commerce renders this an important subject, and to your great and growing inland commercial city it is peculiarly interesting; but it requires full and mature consideration. Should you be disposed, at some future time, to turn your attention to it, with a view to legislative action upon it, it will give me pleasure, should you choose to consult me, to render what assistance I can in examining it in all its bearings.

There is yet another subject of deep interest to the community, to which I take the liberty of inviting your attention: I refer to the late act relative to steamboats. When I was at Buffalo, I was consulted by Mr. Battel, whom I had just appointed inspector, (and who, by the by, appeared to me to be a man of uncommon sagacity and discrimination,) touching the proper construction of certain parts of this act, which seem to me to require further legislation. I have already taxed your patience so severely that I will not trouble you with minute explanations, but will enclose a rough draught of a bill, such as appears to me to be adapted to the case, merely observing that the object of the first section is to ensure the authentic communication of very important information to the collector, which he may not otherwise obtain; and of the second, to close the door against imposition easily practised under the construction which I understand is practically given to the law as it now stands. If you have time and inclination to attend to the matter at all, you will naturally examine the act, and will then, of course, understand the matter. Perhaps, also, you may think it worth while to converse with Mr. Battel, who has a perfectly clear view, at once practical and lawyer-like, of the whole subject.

Unreasonably long as I fear you will think my letter already is, you must pardon me, my dear sir, for very reluctantly adding a few lines relative to a subject pertaining to myself. From what passed between us at Buffalo, you will readily surmise that I allude to the subject of my compensation. I stated to you then, and told you truly, that I was not avaricious, and that I had long since ceased to indulge the expectation, and indeed scarcely had a wish, to amass property; that I had no repugnance to labor, and was ready to encounter, with cheerfulness, any amount of it that Congress might see fit to exact of me. But I am of opinion that I have an equitable claim for such an addition to my salary, at least, as will defray the additional expenses to which I am subjected by the late acts regulating the courts in this district. When my salary was fixed, (about seven years ago, if I remember rightly,) I was required to hold annually but three stated sessions of the court; now I am obliged to hold seven; and in order to do so, must travel, in the course of the year, but little short of 2,000 miles, and pay tavern bills, (which of late have become enormous,) during several months in the year.

I removed from Albany to this place, chiefly from the hope of being able to get through the year here with less of the absolute parsimony that I was compelled to practise there. Had my public duties continued the same, my expectations in this respect would have been realized; but, as the matter now stands, I am worse off than ever. I will not trouble you with a detail of my private affairs, but it would be easy for me to show you that this is to me a matter of painful import. I know well that the salaries of many of the district judges are lower than mine, and I do most sincerely wish that Congress would increase them. It ought, however, to be borne in mind that, with very few exceptions indeed, this is the most important district in the Union; and that the duties and responsibilities of many of the judges are really trifling compared with mine. There is, I suppose, more actual adverse litigation, and, therefore, more intellectual labor to be performed, in this than in the southern district; and yet the judge of that district receives $3,500 per annum, and withal is not obliged to go from home in the public service at all. Is there not some degree of inconsistency in this? At the time my salary was fixed, too, that of the chancellor and judges of this State was but $2,000, with the addition, however, of a per diem compensation as members of the court of errors, which they still retain; but, recently, their salaries have been raised to $2,500. But I will not dwell longer on this subject. I have, perhaps, already said too much.

With great regard, I am, dear sir, faithfully yours,

ALFRED CONKLING.

Hon. MILLARD FILLMORE.