if the evidence could be construed to prove such an entry, and taking of possession, under the law regulating proceedings in cases of forcible entries, the instructions of the court might, upon the supposition of its having been hypothecated upon the existence of those facts which the evidence conduce to prove, be sustained. But we apprehend the jury might have fairly inferred from the evidence, the assent of Overton to the possession which was delivered by the sheriff to Woolfolk. It is true, no express assent was proven; but from the circumstance of Overton's being present, encouraging Woolfolk to bid for the land, and making no objections to the possession which he knew was about to be delivered, taken in connection with the circumstance of his having set out with the sheriff, and proceeded part of the way to the mill, when possession was about to be delivered, *demonstrate, as satisfactorily as it is possible for conduct to do, that Overton not only assented to, but was [*70 perfectly willing for Woolfolk to take and enjoy the possession of the mill. After thus manifesting his assent and willingness to Woolfolk's entry and possession, Overton cannot, we apprehend, be entitled to restitution under the law regulating forcible entries; for an entry cannot be denominated forcible, when it is taken by the assent of the person in possession; and it cannot be important whether the assent be expressly given, or implied from the conduct of the person on whose possession the entry is made.

It results, therefore, that the court erred in its instructions to the jury, and, consequently, the judgment must be reversed, with costs, the cause remanded, and further proceedings had, not inconsistent with this opinion.

Hardin for appellant, *Wickliffe* for appellee.

RHODY ELY *alias* HOLLY *v.* MATTHEW THOMPSON ET AL.

Writ of Error to reverse a Judgment of the Clarke Circuit Court,—1st December, 1820.

The law, subjecting a free person of color to corporal punishment for raising his hand in opposition to a white person, is repealed by the law "to suppress riots, routs, and unlawful assemblies of the people, and breaches of the peace."

It is competent for the legislature to repeal any act, though every other clause in the repealing statute may be unconstitutional.

The act first referred to is unconstitutional, in so far as it subjects the free person of color to corporal punishment for raising his hand in opposition to a white person, if it be in self-defence, and in so far as it infringes the privileges secured by the tenth section of the tenth article.

Although free persons of color are not parties to our social compact, yet they have many privileges secured thereby, and have a right to its protection.

A judicial officer is not liable for errors in judgment in cases within his jurisdiction; but this rule does not hold if he exercises authority where he has none, or assumes jurisdiction without any power.

Judge MILLS delivered the opinion.

This is an action of trespass, assault, battery, and imprisonment, brought by a free person of color, against a justice of the peace and constable in their individual characters. The justice pleaded his office, and the fact, that the plaintiff had lifted his hand in opposition to a white man, who had proved the fact before him, and that he had issued his warrant to apprehend the plaintiff, who was accordingly brought before him, and that he gave sentence, that for the offence the plaintiff should receive thirty lashes on his bare back, according to an act of assembly in such cases provided, and avers this to be the same trespass in the declaration mentioned. The constable likewise justifies by alleging his office, and the execution of the warrant, and the infliction of the stripes, pursuant to the sentence of the justice.

To these pleas of the defendants the plaintiff replied, in avoidance,

that he was a free person of color. To this replication the defendants demurred. The court below sustained the demurrer, and gave judgment for the defendants. To reverse this judgment this writ of error is prosecuted.

*71] The section of the statute, relied on in these pleas, will *be found in 2 Littell, 116, and reads as follows:—"If any negro or mulatto, or Indian, bond or free, shall, at any time, lift his or her hand in opposition to any person not being a negro, mulatto or Indian, he or she, so offending, shall, for every such offence, proved by the oath of the party, before a justice of the peace of the county where such offence shall be committed, receive thirty lashes on his or her bare back, well laid on, by order of such justice."

It is contended for the plaintiff in error, that this section of this statute is repealed by the act to suppress riots, routs, unlawful assemblies of the people, and breaches of the peace, which repeals all laws within its purview. And if it is not repealed, that it is contrary to the constitution of this state, and therefore void; and that, in either case, the justice or constable could not justify under it.

On the contrary it is contended, that this section is not repealed; and if it is not, that it is consistent with, and does not contravene, any of the provisions of the constitution, and that the legislature might adopt this punishment, notwithstanding its cruelty, with regard to white persons. But it is further contended, that although this section may contravene the provisions of the constitution, yet free persons of color are no parties to our political compact, and of course are not entitled to its privileges or shielded by its provisions, and that they are subject to any regulation which the legislature may adopt, although such regulations are contrary to the constitution in their terms. And, finally, it is insisted, that if all these points are against the defendants in error, yet the one being a judicial officer, cannot be responsible for this error in judgment; and the other, being a ministerial officer, and not entitled to judge of the matter, but bound to execute process without inquiring into its validity, neither can be responsible.

The act to suppress riots, routs and unlawful assemblies of the people, which is passed as a substitute for another of the same nature, previously adopted, does repeal all acts coming within its purview. The fair construction of this repealing clause is, that it repeals all statutes which provide punishments for the same offences; the punishment of which is fixed by that act. The inquiry then is, does this law provide a punishment for the same offence which is directed to be punished by the act first recited? The latter act provides the punishment for riots, routs,

*72] unlawful assemblies *of the people, and *breaches of the peace*. Riots, routs and unlawful assemblies of the people, being well defined in criminal law to be the combination of at least three or more, in perpetrating, attempting to perpetrate, or conspiring to effect, some mischievous design, to the disturbance of the peace of society, cannot, it is evident, include within them, or either of them, the crime in question. The words, breach of the peace, then, must include it, if it be included at all. There is a breach of the peace in every criminal offence; but some of them include far more. The question then is, is there any single crime, or offence, or class of offences, which are included under the denomination *breach of the peace*, as a technical term, so that by that appellation they may be

distinguished from others? In 1 Hawkins, 282, we are told "that inferior offences more immediately against the subject not capital, either amount to an actual *disturbance of the peace*, or do not." The same author proceeds, page 263, to point out and class those offences which amount to a breach or actual disturbance of the peace, and he divides them into two kinds, to wit, such as may be committed by one or two persons, and such as require a greater number. Those which require a greater number, he defines to be riots, routs, and unlawful assemblies, which are expressly provided for by the repealing statute, which we are considering, and cannot, as we have said, include the crime in question. Those which may be committed by one or two persons, are defined to be assaults and batteries, affrays and forcible detainers. As to forcible detainers, they have no resemblance to the crime in question. But affrays and assaults and batteries have, and are included within the crime provided against by the statute pleaded by the defendants, and as the term, breach of the peace, is used in the repealing statute, and the same statute provides specially for riots, routs, and unlawful assemblies, which are part of the offences included within the generic term, breach of the peace, the term itself can have no force or meaning in the statute, unless it does actually include affrays and assaults and batteries. This we conceive is the true meaning of the words as used in the repealing act, and of course it does provide a punishment for affrays and assaults and batteries, and all former acts, providing a punishment for these offences, and with them, the statute, relied on by the defendants in error, so far as that act provides a punishment for assaults, *batteries or affrays, [*73
by free persons of color, are repealed. We are aware that it has been contended by many, that this statute now, relied on as repealing the former, is unconstitutional, because it provides for the punishment of offences said to be indictable without the intervention of a grand jury, and an indictment first found. Be this as it may, we are under no necessity of now deciding the question. It was competent for the legislature in the same act to repeal any former one, within its purview, although every provision in the repealing act was unconstitutional. We are then of opinion, that the statute relied on by the defendants, was repealed as to all affrays, assaults and batteries, committed by free persons of color, and that their case comes under the latter act.

We have before said, that the act relied on by the defendants included within it affrays, assaults and batteries by free persons of color. But it, in fact, includes far more, and affrays, assaults and batteries are not the only offences which come within its letter, and, therefore, as to these other offences it is not repealed. Its expression, "*lift his or her hand in opposition to any person*," includes many acts which will not be either an affray or assault or battery. It is not necessary, according to the letter of the act, that this lifting of "*hand in opposition*" should be so directly against the person as to commit either. It is not necessary that it should be done in an angry or threatening manner. It may be done in self-defence, or in warding off injury, or in repelling attempts on the virtue of the female of color, by an intended ravisher. Another remarkable feature exists in the act. The proof is pointed out. The oath of the party complaining *is conclusive*, and the justice *must* inflict the punishment, although the proof may be untrue, and he disbelieves it. This extensive nature of the act imposes upon us the disagreeable necessity of deciding upon its constitutionality, so far as it operates on free persons of color.

In deciding this question, we shall not long descant upon the severity of the act, and its want of those mild features which characterise the rest of our code; nor can they have much influence in deciding this question. For, however severe, cruel and rigorous its features may be, if it does not contravene the constitution, it must be executed, until the legislative power of the government shall see cause to change it. It would, however, be difficult to exempt this section from the imputation of cru-
*74] elty, within the meaning of the *fifteenth section of the tenth article of the constitution, so far as the act subjects a free person of color to thirty lashes, for lifting his hand in opposition to a white person who was attempting wantonly to violate his or her person, contrary to the peace and good order of society. That section provides, "That excessive bail shall not be required, nor excessive fines imposed, nor *cruel punishments inflicted*." If a justice of the peace, or any other tribunal should, under this act, inflict the stripes against a free person of color, who lifted his hand to save him or herself from death or severe bodily harm, all men must pronounce the punishment *cruel* indeed. Several clauses of the constitution have been quoted, as repugnant to this statute. We shall, however, content ourselves with one more, and that is the tenth section of the tenth article, which provides, "That in all *criminal prosecutions*, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land." It is evident that this section contemplates more kinds of public or criminal prosecutions, than those which are carried on by indictment or information. In all, it secures the right of being heard; of obtaining the nature and cause of the accusation; of confronting the witnesses, and disproving their evidence: in those by indictment or information, a trial by jury is secured. Determining what is the meaning of, and included in, the words "*criminal prosecutions*," in this section, measurably controls the whole section. They evidently mean, any prosecution carried on in the name of the commonwealth, for any offence or crime against society. The word "*criminal*" is used as opposed to civil suits or actions. The one includes all suits of the government, the end and design of which is the punishment of the accused; the other embraces all actions for individual redress. If this be not the meaning of the words, and they are designed to embrace the quality of those offences only of deeper dye and greater magnitude, usually denominated *crimes*, the section then absurdly makes a distinction between the whole class,
*75] and those prosecuted by *indictment or information. For, all these greater crimes are so prosecuted, and the convention must be convicted of the absurdity of first providing for all, and then for a particular class, which included all. The act, then, in question, as it subjects the free person of color to punishment, on the oath of the party, without trial, and without the possibility of contradicting and disproving his statements, is against both the letter and spirit of the constitution, and, of course, so far as it is not repealed, it has no force, and could furnish no defence or justification to the defendants in error.

But we are still met by the argument, that free persons of color are not parties to the political compact. This we cannot admit, to the extent contended for. They are certainly, in some measure, parties. Although they have not every benefit or privilege which the constitution secures, yet they have many secured by it. We need not take the trouble of inquiring how far they are, or are not, parties. For, suppose the premises are admitted, the conclusion would not follow that the legislature had a right to do with them as it chose, and that their acts on that subject could never be brought to a constitutional test. Although they are not parties to the contract, yet they are entitled to repose under its shadow, and thus secure themselves from the heated vengeance of the organs of government. Aliens, who sojourn here, and belong to another, and claim nothing of our government, but the right of passage, could not be taken up and hung by a justice of the peace, without a hearing, without an opportunity of proving themselves innocent, and without a jury, even if the legislature, by a solemn act, should direct it to be done. The tenth section of the constitution, which we have quoted, restricts the powers of the legislature, and every department of government. The powers which they are therein forbidden to exercise, they do not possess, and cannot exercise over any man or class of men, be they aliens, free persons of color, or citizens. This is demonstrable from the last section of that article, which declares, "That *every thing*, in this article, *is excepted out of the general powers of government*, and shall forever remain inviolate; and that all laws contrary *thereto*, or contrary to this constitution, *shall be void*." But it is still insisted that, notwithstanding all this, the judicial act of one of the defendants, and executive character of the other, ought to secure them from this action.

*It is very true, that a judicial officer cannot be punished for errors in judgment, on subjects within the scope of his authority, and over which he has jurisdiction. But this does not hold good when he attempts to exercise authority where he has none, and assumes jurisdiction without any power. Hence it was decided in the case of *Kennedy* v. *Terrell & Duley*, Hard. 490, that a justice of the peace was liable for issuing a warrant unknown to the provisions of the law. If this doctrine be correct, in the case of an illegal warrant, how much more so ought it to be in a case where the constitution is violated? It is an instrument that every officer of government is bound to know and preserve, at his peril, whether his office be judicial or ministerial; and he cannot justify an act against its provisions, even with the authority of the legislature to aid him, however much that may mitigate his case. [*76

The judgment of the court below must, therefore, be reversed, with costs, and the cause remanded, with directions to overrule the *demurrer*, and for new proceedings to be had, consistent with this opinion.

Hanson and *Pope* for plaintiff, *Clay* for defendants in error.

CURTIS'S HEIRS *v.* JAMES ELLIS.

Writ of Error to reverse a Decree of the Mason Circuit Court,—4th December, 1820.

The allegations of a bill are not evidence of the truth of the fact alleged; and it is error to take a decree against a defendant alleged to be an infant, without the answer of his guardian *ad litem*.

The Chief Justice delivered the opinion.

This was a bill exhibited by Ellis against the children and heirs of Eleanor and John Curtis, deceased. He alleges that Curtis died seised