Laura Clay.

= Slaughter House

Cases

And leaving a balance in hand, at the conclusion of the business, of $33,014.08

The original capital had been increased to this sum, and had the assets all been good, there would have been a clear profit of $18,610.87. But the bad and uncollected debts being deducted, the profit is reduced to $13,149.31; one half of which, besides his or their original capital, belonged to each party.

Gunnell's capital was.....	$6,627.56
His half of the profits was.....	6,574.65
Total amount due to Gunnell.....	$13,202.21
Bird and Hepburn's capital was....	$7,775.65
Their half of the profits was.....	6,574.66
Total amount due to Bird and Hepburn	$14,350.31

308*] *There remains to be adjusted a question of interest due to Bird and Hepburn for having contributed more capital than Gunnell whilst the business was being carried on. The auditor makes this interest $183.52, one half of which should be deducted from the share of Gunnell, and added to that of Bird and Hepburn. This would reduce the former to $13,110.45, and raise the latter to $14,442.07.

Now the books show that Bird and Hepburn drew and collected only $7,552.68. This left a balance still due them of $6,889.39 to be accounted for by Gunnell.

In this account neither party is charged with the bad and uncollected debts. They are simply deducted from the profits and the loss is thus equally divided. It is claimed by the defendant that Bird and Hepburn should be charged with the whole of this loss because they had the securities and failed to collect them, when, by the use of due diligence, they might have done it. This fact does not appear in the case except by the unsupported allegation of the defendant, made in his answer to the bill of review. This portion of the answer was entirely impertinent to the bill, which was strictly and purely a bill of review. No formal replication was required to avoid its effect as evidence in the cause.

The result is that the complainants are entitled to a decree against the defendant for the sum of $6,889.39, with interest from the 1st of May, 1849, and costs.

The decree of the District Court must be reversed, and a decree rendered for the complainants accordingly.

273*] *SLAUGHTER HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, Plff. in Err.,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

SAME v. SAME.

HOTAIR IMBAU, Jordan F. Aycock and Josiah Gitzenger, Composing the firm of Imbau, Aycock & Co., Plffs. in Err.,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

THE LIVE STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, Plff. in Err.,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

PAUL ESTEBEN et al.,

v.

THE STATE OF LOUISIANA, ex rel.

(See S. C. 10 Wall. 273–299.)

Supersedeas, when issued—effect of—writ of error to state court—injunction, how affected by.

This court has power to issue a supersedeas before the return day of the writ of error, where the return has been made.

A writ of error to a State Court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court.

Neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

The only effect of the supersedeas is to prevent all further proceedings in the subordinate court, except such as are necessary to preserve the rights of the parties.

[Nos. 475, 476, 477, 479, 480.]

Argued Nov. 18, 1870. Decided Dec. 2, 1870.

WRIT of error to the Supreme Court of the State of Alabama.

On motion for writs of supersedeas.

These cases arose in the State Courts of Louisiana, and all involve the question of the validity of a certain Statute of that State, giving to the Corporation named, the Crescent City Live Stock Landing and Slaughter House Co., certain exclusive privileges.

The several cases, which had been variously decided in the courts where brought, were, upon appeal to the Supreme Court of the State, all decided in favor of the Corporation named, and various injunctions were sustained in favor of that Corporation. Writs of error having sued out in each of the cases, the plaintiffs in error now move for writs of supersedeas to the judgments of the courts below.

The case is further stated by the court.

Messrs. **J. A. Campbell, P. Phillips** and **J. Q. A. Fellows**, for plaintiffs in error:

The 25th section of the Judiciary Act of 1789 authorizes the issue of the writ of error in this cause, and the 23d section prescribes that the writ shall be a supersedeas if allowed within ten days of the judgment, and be served on the defendant and a bond be given and be filed in the same time.

The effect of the writ thus accompanied is described in the decisions of this court.

Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762; R. R. Co. v. Harris (ante, 100).

A writ of error which is a supersedeas, removes the cause from the court to which it is addressed, and prevents the inferior court from doing any act to carry that judgment into effect. It suspends its power and jurisdiction over the cause, and whatever is done in the cause subsequently, until its disposition in the Supreme Court, is done under the order or allowance of that court. The writ commands the record and proceedings to be sent to the Su-

preme Court, and the Act of Congress declares that this writ shall be a supersedeas.

Cases above cited; Bac. Abr. Supersedeas, a; Stockton v. Bishop, 2 How. 74; Hogan v. Ross, 11 How. 294; Hardeman v. Anderson, 4 How. 640.

The writ at common law was a supersedeas by implication (Cro. Jac. 534), but was regulated afterwards by statute, the principle of which (3 James, ch. 8) suggested the Act of Congress of 1789.

In the present cause the final order was made in the Supreme Court of Louisiana, May 9, 1870. The writ of error was allowed, served, and the bond approved and filed before and on May 16, 1870. No execution had been issued. These Acts made the writ operative and entitle us to claim the supersedeas. The cause was transferred from the Supreme Court of Louisiana to the Supreme Court of United States.

1 Har. & J. 475; cases above cited; Bryan v. Bates, 12 Allen, 202; 5 Taunt. 204; 1 Chit. 241; 2 Tidd, Pr. 1145; 4 Conn. 365; 4 Sm. & M. 670.

A certiorari would have operated in the same manner.

43 Pa. 377; Patchin v. The Mayor, 13 Wend. 664.

The cause in the Fifth District Court before the Eighth Court had been created, was determined and was removed from that court by a suspensive appeal to the Supreme Court of the State. The effect of the suspensive appeal to the Supreme Court of the State, is to devest the inferior court of jurisdiction of the cause.

The fact that the appeal is suspensive being ascertained, all other questions are to be settled in the Supreme Court.

Code Pr. 564; La. v. Judge, etc., 19 La. 168, and the cases cited; S. C. 20 La. Ann. 529; S. C. 21 La. Ann. 43; 1 Bioche Dic. d. pro, tit. Appel, No. 470; Talainder a l'appel, 347.

The injunction granted in the Fifth District Court upon the petition ex parte, was operative until the judgment rendered in the cause in that court. The judgment in that court converted it from a temporary into a perpetual injunction, and the allowance of that perpetual injunction was the judgment appealed from.

By the suspensive appeal, its operation was suspended until the judgment in the Supreme Court of the State, which affirmed that of the Fifth Court. But before the execution of that judgment, the confirmatory judgment was itself suspended by the writ of error of the Supreme Court.

If there had been no writ of error to the Supreme Court of the United States, the judgment of the Supreme Court of the State might have been carried to the Fifth Court and spread on its record, and by motion in open court, would have been made executory. But until all this had been done, the Fifth Court could not have issued the final writ of execution (a perpetual injunction) for the writ of injunction is at one stage of proceeding an administrative writ, and at another, a judicial writ—final process. This will appear from R. R. Co. v. Bradleys (ante, 274). Louisiana cases above cited.

And for the practice in regard to making judgments executory.

Ingraham v. Dawson, 20 How. 486, 15 L. ed. 984.

The courts of the United States under the Acts of Congress have adequate power to protect its jurisdiction from interfering between courts and parties, and to protect suitors before it from oppression. The final order of the Eighth Court on the motion to attach for a contempt is a final execution, and the sheriff has seized and holds property under it. Any court of record at common law will protect its jurisdiction by the issue of writs of supersedeas in a matter properly cognizable there. In the case of Taylor v. Carryl, 20 How. 583, 15 L. ed. 1028, the cases are collected in which such power is exerted.

The 25th section of the Judiciary Act places the State Courts in subordination to the Supreme Court, within the range of the cases described in it. The court may compel obedience to the writ of error.

* U. S. v. Booth, 18 How. 476. 15 L. ed. 464.

It may render and enforce the final judgment in the cause arising under that section. The case before the court is one of an aggravated character. All that was required of the plaintiffs they have done to bring their cause hither.

Bac. Abr. tit. Sup. B; 1 Str. 419; 3 D. & E. 643; Tidd, Pr. 1145; Morris' Cotton (ante, 481); Ex parte Milwaukee Co. 5 Wall. 188, 18 L. ed. 676; R. R. Co. v. Bradleys, (ante, 274); Stockton v. Bishop, 2 How. 74; Hardeman v. Anderson, 4 How. 640; 5 B. & Ald. 903; Bryan v. Bates, 12 Allen, 202; Taswell v. Stone, 4 Bur. 2454; 8 East, 416; Slocum v. Mayberry, 2 Wheat. 1; Kershaw v. Thompson, 4 Johns. Ch. 609; 6 H. & J. 302.

The Act of Congress of 1789, in relation to the revisory powers of the Supreme Court over State Courts, referred alone to the process and mode of proceedings at common law, and adopted them—writs of error and their effect. The supersedeas, whether by implication or writ of error, was adopted in toto. In reference to state adjudications, it has not been changed. The Act of 1803 adopts the appeal in equity and admiralty cases, but under the same regulations and restrictions. Upon this discussion some light may be thrown by considering the question before us with reference to the chancery law. The effect of an appeal will be found in the Louisiana decisions, and the French work on practice we have cited.

The appeal transfers the record; devests jurisdiction of the subordinate court; invests the superior court with full jurisdiction, and the appellate court generally decides de novo. The admiralty appeal is the purest form in which this writ is used. So it was in chancery. In Great Britain, this was found inconvenient from the slowness of the proceedings.

Notwithstanding an appeal, the subordinate court may go on with the cause. This was settled by rule of the House of Lords in 1807. The rule is to be found in Huguenin v. Baseley. 15 Ves. 182.

The appellant might then apply to the House of Lords for stay of proceedings after appeal.

Macnachten v. Boehm, 1 J. & W. 48; Gwyne v. Lethbridge, 14 Ves. 585.

The history is told (Hart v. The Mayor of Albany, 3 Paige, Ch. 381), and the New York alteration of the English rule stated (Green v. Winter, 1 Johns. Ch. 80), and the present English practice is stated.

Barrs v. Fewkes, L. R. 1 Eq. 395; Gibbs v. Daniel, 4 Giff. 1.

The change in the English rule was adopted after 1789, and the Judiciary Act of 1789 was the rule of the English courts at that date, both at law and in chancery. The writ of error with bond, and the appeal with or without bond, removed the suit to the appellate court entirely and absolutely.

The American Statute provided against vexatious delays by prescribing that no appeal or writ of error should issue, except on a final judgment. 4 Bibb, 221.

Messrs. **T. J. Durant, J. S. Black,** Matt. H. Carpenter and Charles Allen, for defendants in error:

The general doctrine applicable to writs of error at common law is stated in Tidd, Pr. late ed., quite fully.

But writs of error, to reverse judgments at law, rest on a different basis from writs of error brought for the purpose of obtaining a revision of a case by the Supreme Court of the United States. Supersedeas is a law term, and has no application to a chancery proceeding.

Second. In the English chancery practice, the question whether an appeal shall stay proceedings, rests very much in the discretion of the tribunal from which the appeal is taken; and it is common to make special application to that tribunal, either to stay further proceedings, or to pass an order that proceedings shall not be stayed.

2 Sm. Ch. Pr. 68.

Such was the course in the recent English case, Barrs v. Fewkes, L. R. 1 Eq. 392.

The application was made to the court appealed from. See, also, Harrington v. Harrington, L. R. 3 Ch. App. 564.

The general rule is, that an appeal will not stay proceedings.

See, General Order in House of Lords in 1807, copied in 15 Ves. 184; Gwynn v. Lethbridge, 14 Ves. 585; Willan v. Willan, 16 Ves. 216; 9 Ves. 316; Waldo v. Caley, 16 Ves. 209; 4 Ves. 316; 2 Ves. 563; Hart v. Mayor, etc. 3 Paige, Ch. 381, where there is some account of the English practice; also in 2 Dan. Ch. Pr. under the head of "Re-hearings and Appeals," there is a general statement of the doctrine; see, also, Walburn v. Ingilby, 1 Myl. & K. 161; 6 Eng. Ch. Cas. 498.

Third. Under the practice by which causes are removed from State Courts to the United States Supreme Court on writs of error, the removal is in the nature of an appeal. It is a continuation of the same litigation, and not a mere suit as a writ of error at common law. The mode of removal is only a matter of form. The substance of the matter is, that the cause is brought before a supervising tribunal for revision; and the jurisdiction of the United States Courts is in its nature appellate. This doctrine has been consantly stated.

Martin v. Hunter, 1 Wheat. 349; Cohens v. Va. 6 Wheat. 410; Nations v. Johnson, 24 How. 204, 16 L. ed. 631; Bryan v. Bates, 12 Allen, 213.

The writ of error, therefore, only inaugurates a new stage in the same cause; and accordingly an injunction should, of course, continue in force until the determination upon the writ of error, which is the ultimate determination of the original suit.

Fourth. The doctrine we contend for will be found in the following cases: Hart v. Mayor, etc., 3 Paige, 381; Graves v. Maguire, 6 Paige, 381; Stone v. Carlan, 2 Sandf. 738; Mining Co. v. Fremont, 7 Cal. 131; Spring v. Ins. Co. 6 Wheat. 519; Thompson v. McKim, 6 Har. & J. 302; Williamson v. Carnan, 1 Gill & J. 184; Boren v. Chisholm, 3 Ala. 513; Garrow v. Carpenter, 4 Stew. & P. 336; Colman v. Bridge Co. 5 Blatchf. 58.

Fifth. It is impossible to suppose that there should not be authority in a court of equity, by a decree, to hold matters in a certain fixed position until the ultimate determination of the cause. This is apparent by considering the nature of the relief which may be granted by means of an injunction, in many cases where, if the injunction is suspended while the appeal or writ of error is pending, all the mischief will be done which is sought to be prevented.

For instance:

If an injunction to stay waste by cutting down trees is suspended, the trees will be cut.

Disease and death will prevail if an injunction to restrain a nuisance affecting health, to abate and suppress a source of diseases, is suspended.

If an injunction to restrain the marriage of a ward in chancery is suspended, an irretrievable mischief may occur at once.

2 Seton, Forms of Decrees, 3d Lond. ed. 727, for a form of such a decree.

Sixth. So in cases at law. Suppose articles have been seized on a search-warrant—stolen goods, obscene books or pictures, lottery tickets or gambling materials, counterfeit coins, forged bank notes, implements for counterfeiting or any other article deemed dangerous or obnoxious—which state laws may authorize to be seized, and held for condemnation and forfeiture; and a restoration to the owner (in case of stolen goods), or a condemnation and forfeiture and destruction of them have been decreed. If a writ of error is sued out, that supersedes the final order of restoration to the owner, or condemnation; but shall the articles, therefore, be given up to the person who had the guilty possession of them, or shall they still be held in the custody of the law?

Seventh. It must be the case that there is power in a court of equity, and also when necessary in a court of law, to pass orders which shall have the effect to hold things as they are and prevent any subsequent change in the situation of things, which shall be disastrous to the plaintiff or to the public, and fatal to the relief which is sought.

The law of Louisiana is very explicit in this regard.

See, La. Cr. art. 307; De La Croix v. Villere, 11 La. Ann. 39; White v. Cazenave, 14 La. Ann. 57; Knabe v. Fernot, 14 La. Ann. 860.

Eighth. What power then has the Supreme Court of the United States in the premises?

Take the illustration put by the counsel for the plaintiff in error. A prisoner under sentence of death sues out a writ of error. The counsel says: "Shall he hung while his writ of error is pending?"

It is not necessary to say "yes;" because it may well be that this court has power to issue a writ for the purpose of holding things as they are; of preventing execution of the final judg-

ment. But does it follow that the prisoner shall go at large?

It is perfectly plain, in the case supposed, that this court cannot order the discharge of the prisoner while the writ of error is pending.

"Why not? Is he not held on final sentence?"

The answer is, that the supersedeas attaches to so much of the final sentence as determines the ultimate rights of the party.

In Bryan v. Bates, 12 Allen, 213, a case in Massachusetts, much considered and well-reasoned out; one who had been convicted of a misdemeanor and sentenced to imprisonment thereon, and committed to jail in pursuance of that sentence, sued out a writ of error in a United States Court, and then applied for his discharge of habeas corpus on the ground that the writ of error was a supersedeas. The court decided that although the writ of error was a supersedeas, yet they had authority to hold him until he should give bail.

See, also, Nauer v. Thomas, 13 Allen, 574: Fleming v. Clark, 12 Allen, 191, in the latter of which cases the same question was argued, but not decided.

Ninth. It is constantly held that only final judgment and decrees can be re-examined and reversed on writs of error. The cases are numerous where this court has refused to entertain any application to deal with preliminary decrees.

A striking case, in some respects analogous to the present, was that of Gibbons v. Ogden, 6 Wheat. 448. There a bill was filed in the State Court, to restrain the defendant from navigating steamboats upon certain waters, upon which the Legislature had granted to Livingston and Fulton, the exclusive right to navigate steamboats. On filing the bill, a preliminary injunction was granted. The defendant set up a right under the laws of the United States and moved to dissolve the injunction. This motion was denied. An appeal was taken to the highest court of the State, and that court also refused to dissolve the injunction. The defendant then appealed to the Supreme Court of the United States, on the ground that a question under United States laws was involved; but as no final decree had been made in the State Court, the appeal was dismissed for want of jurisdiction.

So the preliminary injunction stood, and was not interfered with.

See, also, Verden v. Coleman, 18 How. 86, 15 L. ed. 272; Boyle v. Zacharie, 6 Pet. 656, et seq. and numerous other cases.

Tenth. The United States Circuit of 1789, section 23, recognizes that preliminary injunctions shall stand. The statute provides that a writ of error shall be "a supersedeas and stay of execution in case," etc. Executions are not to issue; that is, precepts to enforce the final judgment of the state courts are not to issue.

It is only the final and ultimate rights, and not the incidental rights of parties, that writs of error are designed to vindicate.

Mr. Justice **Clifford** delivered the opinion of the court:

All persons and corporations, except the Crescent City Live Stock Landing and Slaughter House Company, are prohibited, by an Act passed by the Legislature of the State of *Louisiana, to land, keep or slaughter any [*285 cattle, beeves, calves, sheep, swine or other animals, or to have, keep or establish any stock landings, yards, pens, slaughter houses or abattoirs at any point or place within the City of New Orleans or the Parishes of Orleans, Jefferson and St. Bernard, or at any place on the east bank of the river within the corporate limits of the city, or at any point on the west bank of the same above the railroad depot therein mentioned and designated.

Said Act was passed on the 8th day of March, 1869, and is entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock Landings and Slaughter Houses, and to Incorporate 'the Crescent City Live Stock Landing and Slaughter House Company.'" Though approved on the day mentioned, still the Act did not go into operation till the first day of June following but it appearing that the Company created an organized under the Act intended to enforce the prohibition, the plaintiffs in the suit first mentioned, on the 26th of May of that year, filed a petition or bill of complaint in the Sixth District Court of New Orleans against that Company, alleging that for more than thirty years past there had existed in the Parish of Orleans and the adjacent parishes the lawful trade of butchering domestic animals to supply with meat the markets of the city and the adjacent parishes, and that the regular pursuit of that trade involved the necessity of collecting, feeding and sheltering such animals before they were slaughtered, and of preparing and preserving their meat for use or sale for food, and their hides, tallow and other valuable parts of the animals for the market; that a thousand persons throughout that period have been engaged in that trade without interruption and unmolested prior to the organization of that Company by any ordinance, regulation or enactment from any public authority; that they, the petitioners, are duly incorporated under a law of the State, and that for more than two years they have been and are in the lawful exercise of that trade and employment, and that they have constructed and erected for that purpose *and now hold, [*286 within those parishes, places for landing cattle and for sheltering the same, and slaughter houses for butchering the animals for market, and have secured stalls and such other privileges in the market places as are necessary and convenient to the prosecution of the business; that the respondents, though they must well know that the Act is in violation of the Constitution of the United States, openly declare that it is their intention to execute its provisions and to compel the complainants to abandon the objects of their incorporation, and to destroy the value of their investments, and render it necessary for them to relinquish their lawful pursuit, and the prosecution of their legitmate business.

Wherefore they pray that the respondents may be enjoined from any such interference with the petitioners, and from interfering, directly or indirectly, by suit or otherwise, with their customers in purchasing, slaughtering or butchering animals of any kind used for meat, during the pendency of the suit, and also for process; and that they, the complainants, may

have judgment against the respondents in damages for the sum of $10,000.

On the same day the respondents in that suit instituted in the Fifth District Court of New Orleans a counter suit against the complainants in the suit commenced against them in the Sixth District Court of the same municipality. They allege in their petition that "The sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business in that city and its environs is vested in their Company, as is fully set forth in the Act of their incorporation; that the Corporation named in their petition, as respondents, are about to land, shelter and protect cattle, etc., intended for slaughter, and to conduct and carry on the live stock landing and slaughter house business within the limits of the city as prohibited by law and in violation of their exclusive rights and privileges. Wherefore they pray that the respondents, the complainants in the suit pending in the Sixth District Court, may be enjoined and prohibited from landing, 287*] stabling and sheltering cattle, *etc., and other animals destined for sale and slaughter in that city, and from conducting and carrying on the live stock landing and slaughter house business within the limits of the parishes described in their charter, and from molesting and interfering with the petitioners in the exercise and enjoyment of their exclusive rights and privileges; and they also claim damages in the sum of $4,000, and for general relief."

Judgment in the first suit was rendered for the petitioners, and it was ordered that the injunction previously issued in the case against the respondents should be made perpetual. Pursuant to the suggestion of the respondents in that case, that there was error to their prejudice in the final judgment of the Sixth District Court, it was ordered "that a suspensive appeal be granted herein to the defendants, returnable to the Supreme Court of the State."

Hearing was also had in the suit commenced in the Fifth District Court by the Crescent City Live Stock Landing and Slaughter House Company against the Butchers' Benevolent Association of New Orleans, and it was ordered, adjudged and decreed in that case that there be judgment in favor of the petitioners, and that the Corporation respondents, their president and members, be forever enjoined and prohibited, as prayed in the petition.

Exceptions having been filed to certain rulings of the court, it was also ordered, on motion of the respondents, that they, the respondents, be allowed a suspensive appeal, to the Supreme Court of the State, as in the preceding case.

Separate suits were also commenced in the Seventh District Court of the city against the Crescent City Live Stock Landing and Slaughter House Company by Hotair Imbau et al., and by the Live Stock Dealers' and Butchers' Association of New Orleans, as appears by the transcripts filed here in those cases. Injunctions were prayed and granted against the respondents in both of those cases, and they, the respondents, were allowed suspensive appeals to the Supreme Court of the State from the respective judgments.

Suit was also commenced in behalf of the 288*] State by the *Attorney-General against Paul Esteben et al., in which it is alleged that they have, without authority of law, formed themselves into a Corporation by the name of the Live Stock Dealers' and Butchers' Association of New Orleans; that they, as such Corporation, are about to lease or purchase a certain tract of land partly in the city and partly in the Parish of St. Bernard, and that they are about to commence the erection of buildings and structures thereon for the purpose of collecting, landing and sheltering beef cattle designed for food, to be sold in the Parishes of Orleans, Jefferson and St. Bernard, contrary to the Act of the General Assembly of the State. Wherefore the petitioner prays that a writ of injunction may issue restraining and enjoining the respondents from using that tract of land for the purpose set forth in the petition and from slaughtering any beef cattle or any other animals intended to be sold for food in those parishes. Final judgment in the case was rendered in favor of the State, and it was also ordered, adjudged and decreed, that the respondents be forever enjoined and restrained, as prayed by the petition. Attempt was made by the respondents to secure a re-hearing, but the motion was denied, and on their petition it was ordered that they be allowed a suspensive appeal to the Supreme Court of the State, as in the preceding cases.

These several appeals, together with one other which it is unnecessary to describe, were duly entered in the Supreme Court of the State, and were, by the written agreement of the parties, submitted for decision at the same time. They were submitted on the 28th of January, 1870, and the opinion of the appellate court was delivered on the 11th of April following. Pursuant to that opinion, the judgment of the Sixth District Court, as rendered in the first case, was reversed, and the directions of the Supreme Court of the State were, that the injunction granted by the subordinate court should be dissolved, and that the demand of the petitioners should be rejected, with costs in both courts. They also rendered a judgment of reversal in the same form and with the same directions in the third and *fourth cases, being the [*289 two appeals from the judgments rendered in the Seventh District Court. Judgments of affirmance were also rendered on the same day in the second and fifth cases, in the order herein adopted, with costs of appeal.

Where the decision in the court below sustained the pretentions of the Crescent City Live Stock Landing and Slaughter House Company the judgment of the subordinate court was affirmed, but the judgment of the subordinate court was reversed in each case where the decision of the subordinate court was adverse to those pretentions, and the injunctions in those cases were dissolved.

Petitions for re-hearing were filed by the losing parties, on the 26th of April, 1870, and on the 9th of May following an entry was made in each case, that the petition for re-hearing was refused. Writs of error to the State Court were subsequently prayed by the same parties, and on the 13th of May last the writs of error were allowed by the Associate Justice of this court allotted to that circuit, and they were duly filed on the 16th day of the same month, as appears of record.

Filed, as the writs of error were, within ten

days from the date of the entry refusing the petition for re-hearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution, under the 23d section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brockett v. Brockett, 2 How. 238, the question must be considered as settled in accordance with the views of the plaintiffs. Rubber Co. v. Goodyear, 6 Wall. 155, 18 L. ed. 763.

Sufficient bonds were given in each of these cases, which is necessary in every case, in order that the appeal or writ of error may operate as a supersedeas and stay execution on judgments removed into this court for re-examination. What is necessary is, that the bond shall be sufficient, and when it is desired that the appeal or writ of error shall operate as a supersedeas the bond must be given within ten days from the date of the decree or judgment. Rubber Co. v. Goodyear [supra].

290*] *Suppose the writs of error were seasonably sued out and that they operate in each case as a supersedeas and stay execution, as provided in the 23d section of the Judiciary Act still the court is of the opinion that the several motions under consideration must be denied upon other grounds, and for reasons which are entirely satisfactory.

Controversies determined in a State Court which are subject to re-examination in this court, are such and such only as involve some one or more of the questions enumerated and described in the 25th section of the Judiciary Act, and which have passed to final judgment or decree in the highest court of law or equity of a State in which a decision in the suit could be had, as provided by the Constitution and laws of the State. Appeals were taken in the cases before the court from the respective district courts, where they were commenced, to the Supreme Court of that State before the writs of error granted by this court were sued out, and the decrees or judgments brought here for re-examination are the final decrees or judgments of the Supreme Court of the State in those cases.

Writs of error issued under the 25th section of the Judiciary Act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a supersedeas and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree. 1 Stat. at L. 85.

Such a writ of error is in the nature of a commission, by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into

291*] the *court granting the writ of error and to submit it to re-examination, and the 23d section of the Judiciary Act provides to the effect that where all the conditions prescribed in that section concur in the case the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal. Cohens v. Va. 6 Wheat. 410; Suydam v. Williamson, 20 How. 437, 15 L. ed. 982; Barton v. Forsyth, 5 Wall. 192, 18 L. ed. 546.

Exceptional cases arise where the judgment or decree given on appeal in the highest court of a State is required by the law of the State to be returned to the subordinate court for execution, and in such cases it is held that the writ of error from this court may operate as a supersedeas, if granted and served at any time within ten days from the return entry of the proceedings in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a supersedeas and stay execution. McGuire v. Com. 3 Wall. 386, 18 L. ed. 165; Gelston v. Hoyt, 3 Wheat. 246; Green v. Van Buskirk, 3 Wall. 450, 18 L. ed. 245.

Appeals and writs of error do not become a supersedeas and stay execution in the court where the judgment or decree remains by virtue of any process issued by this court merely as such, but they are constituted such by the Act of Congress when the conditions prescribed in the 23d section of the Judiciary Act are fulfilled. Where those conditions are complied with, the Act of Congress operates to suspend the jurisdiction of the court to which the writ of error is addressed, and stay execution in the case pending the writ of error and until the case is determined or remanded. Hogan v. Ross, 11 How. 296; U. S. v. Addison, 22 How. 183, 16 L. ed. 305; Hudgins v. Kemp, 18 How. 535, 15 L. ed. 513; Adams v. Law, 16 How. 148.

Power to issue a supersedeas to a judgment rendered in a subordinate court does not exist in this court where the writ of error is not sued out and served within ten days from the *date of the judgment, except where the [*292 aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district. Hogan v. Ross, 11 How. 296; Ex parte Milwaukee R. R. Co. 5 Wall. 188, 18 L. ed. 676; Stockton v. Bishop, 2 How. 74; Wallen v. Williams, 7 Cranch, 279; Saltmarsh v. Tuthill, 12 How. 389; Hardeman v. Anderson, 4 How. 640.

Undoubtedly, the writs of error in these cases were seasonably sued out and served, and it is equally clear that the parties in whose favor they were granted complied in each case with all the conditions prescribed in the Act of Congress as necessary to give the writ effect as a supersedeas and stay execution, as contended by the plaintiffs in the pending motions. Such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for this court to issue a supersedeas, as an exercise of appellate power to correct the error. Stockton v. Bishop, 2 How. 75.

Doubt upon that subject cannot be entertained where it appears that the court to which the writ of error was directed has made the return of the same to the proper term of the court, pursuant to the commands of the writ, and the same has been duly entered on the calendar. Objection is made, however, that the motions before the court are premature, as the return day of the writ of error is the first day of the next term, but we are of the opinion that the court possesses the power to grant a remery in such a case, even before the return day of the writ of error, where it appears that the court to which it was addressed has made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law.

Except in a case of urgent necessity, the court, 293*] in the exercise *of a proper discretion, might well decline to exercise the power before the return day of the writ; but the better opinion, we think, is, that the jurisdiction for such a purpose attaches from the time the party in whose favor the writ of error is granted has complied with all the conditions prescribed in the Act of Congress to make the writ of error operate as a supersedeas and stay of execution. R. R. Co. v. Bradley [ante, 274].

Grant all this, still the court is of the opinion that the motions cannot be granted, as it is conceded that nothing has been done by the Supreme Court of the State since the writs of error were served and became a supersedeas, inconsistent with the prohibition contained in the Act of Congress which gives the writs of error that effect. Argument upon that topic is unnecessary as the affidavits filed in support of the motions affirm nothing of the kind, nor do the plaintiffs set up any such theory.

Incorporated as the respondents in the motions are by the General Assembly of the State, they claim the sole and exclusive privilege of conducting and carrying on the livestock landing and slaughter house business within the limits described and the privileges granted in the Act giving them corporate powers. On the other hand, the plaintiffs contend that the Act granting them such exclusive privileges is in violation of the Constitution of the United States, and void; and that they, the plaintiffs, have equal right to establish a live stock landing, and to erect slaughter houses, and to conduct and carry on that business as if no such special privileges had been granted to the respondents.

Injunctions were obtained by each party against the other in the courts where the suits were commenced, but appeal was taken, in each case, by the losing party, to the Supreme Court of the State, where the injunctions previously granted against the respondents in the motions were dissolved and those previously granted against the plaintiffs were made perpetual. Judgments of reversal on the one side and of affirmance on the other were, accordingly, ren-294*] dered by the *Supreme Court of the State in the respective causes, as before explained, and it is to those judgments and to that court that the writs of error in question were directed and addressed. Those judgments remained in the Supreme Court of the State when the respective writs of error were sued out and became a supersedeas and stay of execution, and the records show that that court has neither reversed nor modified the judgments, nor any one of them, nor has that court done anything to vary or impair the rights of the parties or to carry the judgments into effect.

Subsequent to the commencement of these several suits, but before the judgments were rendered in the Supreme Court, the General Assembly of the State created another court in that city, called the Eighth District Court, and conferred upon that tribunal the exclusive original jurisdiction of injunction causes, and also made provision in the same Act for the removal of such causes from other courts to that jurisdiction.

Supersedeas writs of error having been sued out by the plaintiffs to the respective judgments rendered in the Supreme Court, they claimed that the injunctions against them granted by that court were inoperative, and their theory was and still is that the writs of error had the effect to dissolve or suspend the injunctions granted by the Supreme Court of the State and to restore and render operative the injunctions decreed in the subordinate courts.

Governed by these views, the plaintiffs denied that the respondents could claim to exercise any such exclusive privileges as those described in their charter, and proceeded to make the necessary preparations for carrying on the same business. Opposite views were entertained by the respondent Corporation and by the State authorities, and especially by the Attorney-General, and for the purpose of testing the question, he moved, in the Fifth District Court, that the fifth case embraced in the motions, as here classified, should be removed into the Eighth District Court, and the motion was granted.

Application was then made by him to the latter court to *enforce the judgment ren-[*295 dered on appeal in that case by the Supreme Court of the State, making perpetual the injunction originally granted by the court from which the cause was removed, but the court refused to grant the motion, because, as the court held, the writ of error sued out in the case operated as a supersedeas.

Attempt is not made to call in question the correctness of that decision, but the Attorney-General on the same day obtained a rule in that court against all the respondents in that case, except one, to show cause, if any, why they should not be punished for contempt, as having violated the injunction granted in the case before the same was appealed to the Supreme Court of the State. Service was made under the rule and the respondents appeared, and were fully heard, but it appearing that the respondents had acted under the advice of counsel, the court refused to inflict any punishments. Directions, however, were given to the sheriff in the form of an order to enforce the preliminary injunction granted by the Fifth District Court.

Proceedings of an original character were also instituted by the present respondents in the same District Court, in which they prayed that the board of metropolitan police might be enjoined to prevent all persons, except the petitioners in that case, from conducting or carrying on the live stock landing and slaughter house business within their chartered limits.

Accompanying that petition was an affidavit of merits, and upon that petition and affidavit an injunction was granted as prayed.

Three days later, to wit: on the 6th of June last, the Attorney-General intervened for the State in the suit and adopted the petition and prayed that the injunction might be made perpetual. Various motions were made by parties opposed to the proceedings to dissolve or modify the injunction, but they were all overruled and denied by the court. No appeal was taken to the Supreme Court of the State, nor does it appear that any attempt was made by the respondents, in any form, to cause the proceedings to be re-examined in the court of last re-
296*] sort. They regarded it as unnecessary *to seek any such revision of the proceedings, as they insist that the legal effect of the writ of error issued from this court to the Supreme Court of the State was to vacate the injunction granted by the latter court and to continue in force the suspensive features of the appeals allowed by the subordinate courts.

Beyond doubt, the appeal, in the form granted by the subordinate court, operated as a stay of execution, and suspended the jurisdiction of the court to proceed further in the cause until the same should be determined or remanded, but the Supreme Court rendered a final judgment in the case and granted a perpetual injunction.

Whatever conditions were annexed to the appeal in the subordinate court were abrogated by the final judgment of the appellate tribunal, as the appeal was then fully executed. Had no writ of error been granted by this court, the plaintiffs, it is presumed, would admit the correctness of that rule, but they insist that the effect of the writ of error, if made a supersedeas, is, that it suspends the judgment of the Supreme Court and leaves the judgment of the subordinate court in full operation during the pendency of the writ of error.

Independent of statutory regulations, the term "supersedeas" has little or no application in equity suits, as the rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court. Huguenin v. Baseley (Gen. Or.), 15 Ves. 184; Waldo v. Caley, 16 Ves. 209; Willan v. Willan, 16 Ves. 216; 2 Dan. Ch. Pr. 1547.

Proceedings are stayed in the courts of New York by appeal in a chancery suit to the extent that if the party desires to proceed, notwithstanding the appeal on the point from which the appeal was taken, he must make application to the Chancellor for leave. Green v. Winter, 1 Johns. Ch. 80.

Different rules upon the subject prevail in different jurisdictions, but the Act of Congress provides that appeals in the Federal Courts shall be subject to the same rules, regulations
297*] *and restrictions as are prescribed in law in case of writs of error. 2 Stat. at L. 244.

Appeals do not lie from a State Court to this court in any case, as the Act of Congress gives no such remedy. Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court, denying an application for an injunction, does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity. Hart v. Mayor, 3 Paige, 381; Graves v. Maguire, 6 Paige, 380; Merced Min. Co. v. Frémont, 7 Cal. 131; McGarrahan v. Maxwell, 28 Cal. 91; La. Code Pr. art. 307; Delacroix v. Villere, 11 La. Ann. 39; White v. Cazenave, 14 La. Ann. 57; Knabe v. Fernot, 14 La. Ann. 60.

Separate examination of the several cases before the court as respects the effect of the writs of error upon the judgments removed into this court, may well be omitted, as the plaintiffs were the losing party in all the appeals from the courts of original jurisdiction to the Supreme Court. They prevailed in three of the suits in the District Courts, but they were defeated in the Supreme Court in all the cases.

Viewed in any light, it is clear that a writ of error to a State Court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court, and it is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

Judgments and decrees of the Circuit Court are brought here for re-examination, and so are the judgments and decrees of a State Court, and the only effect of the supersedeas is to prevent all further proceedings in the subordinate court *except such as are necessary to [*298 preserve the rights of the parties.

Reference is also made to the 5th section of the Act of the 2d of March, 1793, as conferring power upon this court to enjoin the proceedings in the Eighth District Court; but the conclusive answer to that suggestion is, that there is no appellate relation between a subordinate State Court and the Supreme Court of the United States, and where no such relation is established by law the prohibition of that section—"nor shall a writ of injunction be granted to stay proceedings in any court of a State"—applies to the Supreme Court as well as to the Circuit Court. 1 Stat. at L. 335.

Final judgments or decrees in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, may be removed here for re-examination if they involve some one or more of the questions specified in the section conferring the jurisdiction, and otherwise come within the rules which regulate that jurisdiction. Appeals lie, it is conceded, from the District Courts of that State to the Supreme Court, as fully appears also from the records in these suits, which shows to a demonstration that this court possesses no power to grant any relief to the plaintiffs under the Act of Congress on which these motions are founded.

Motions denied.

Mr. Justice **Bradley**, dissenting:

I dissent, with some diffidence, from the opinion of the court, on the following grounds:

1. That, notwithstanding the Act of Congress declares that a writ of error shall be a

supersedeas if certain conditions are performed, the judgment of the court has the effect of leaving many classes of decrees and judgments in equity, though appealed from, entirely effective and operative between the parties, whereas the writ of error ought to suspend
299*] *the effect and operation thereof until the case is heard in this court.

2. That the judgment of this court will have the effect to allow subordinate State Courts to evade the supersedeas of a writ of error in all cases where the court of last resort remits the record to them for execution. The judgment of this court disclaims all jurisdiction over the acts of the subordinate State Courts and thereby, in my judgment, surrenders a very important power necessary to the effective support of its appellate jurisdiction.

3. That the judgment of the court remits the the practice on this subject substantially back to the practice of the English courts of equity, in which it is conceded that an appeal does not suspend proceedings nor act as a superseadeas on the proceedings in the court appealed from; and, in effect, departs from the Act of Congress, which declares that a writ of error or an appeal in the Federal Courts shall be a supersedeas.

4th. That the effect of the judgment of the court is to disclaim its just control over the parties to the record.

WILLIAM H. FEILD, Plff. in Err.,
v.
WILLIAM M. FARRINGTON and Henry B. Howell, Partners, as Farrington & Howell.

(See S. C. 10 Wall. 141–152.)

Ratification by principal—sales by factors—question for jury.

Where the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal, who has received a letter informing him what has been done on his account.

Where factors have made large advances on account of a consignment, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor.

By leaving the agent's letter unanswered, the principal does not relieve the agent from the consequences of subsequent neglect, or want of good faith.

Whether a long delay in making the sale, in view of a falling market, was in the exercise of a sound discretion, good faith and reasonable diligence, was a question for the jury.

If the delay was unreasonable, it was in violation of the factors' duty, and they should bear the loss that resulted from it.

[No. 58.]

Submitted Nov. 22, 1870. Decided Dec. 6, 1870.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Suit was brought in the court below, by the defendants in error, to recover a sum of money alleged to be due for advancements made upon cotton. Judgment having been given for the plaintiffs, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. **Watkins & Rose**, for plaintiff in error:

The instruction given by the judge was simply to say that if the letter was received and not answered, there was an end of the matter. No doctrine of estoppel ever went farther; and we submit, with entire confidence, that the cases on this subject do not go so far. This was to take the evidence of a thing for a thing itself. The law on this point, though stringent enough, has never been collated under the head of estoppels, whither it must be transferred if this instruction stands approved.

In Prince v. Clark, 1 Barn. & C. 186, a letter received by the principal May 29 was passed by in silence until Aug. 7. Bayley, J., said: "I am of opinion that the plaintiff's neglect to make inquiry from the 29th of May to the 7th of August was evidence to go to the jury, to show that he acquiesced in the purchase of the sugars made by Coffin & Clark."

See, also, Bell v. Cunningham, 3 Pet. 82; Cairnes v. Bleecker, 12 Johns. 300; Courcier v. Ritter, 4 Wash. (C. C.), 550; Bredig v. Dubarry, 14 Serg. & R. 27.

If Feild had written: "I have received your letter, and approve of your course," what was the course which would be thereby indicated? "You say that under certain conditions you will sell; I do not object; proceed under those conditions to sell." If they failed to sell in a reasonable time after the conditions attached—a question for the jury—themselves were derelict to that extent; and Feild should not thereby suffer; unless, indeed, the court will assess him with exemplary damages; and this, we submit, is not a case for that.

Mr. **A. H. Garland**, for defendant in error:

The first instruction asked for by Feild could not be given, for the reason, in itself law, that it had no application to the case at all. It was at best a mere abstract proposition, with nothing in the facts here to rest upon. If given, its only effect would have been to mislead or confuse the jury; and such instructions the courts never give.

Brooks v. Marbury, 11 Wheat. 78; Tucker v. Moreland, 10 Pet. 58; Caldwell v. U. S. 8 How. 366; Blackburn v. Crawfords, 3 Wall. 176, 18 L. ed. 186.

The third instruction asked by Feild is liable to the like objections, and to the further objection that it attempts to shield Feild by his own silence in not replying to the letters of his factors, which cannot be done, as will be seen when the instructions given by the court are considered.

The court is not bound to instruct the jury in terms required by either party. It is enough if so much thereof is given as is applicable to the evidence and the merits of the case; and if the court charge rightly upon the case generally, it is enough, although it does not instruct upon the specific request of counsel.

Clymer v. Dawkins, 3 How. 674; Pitts v. Whitman, 2 Story, 609; Mills v. Smith (ante, 346).

If the charge upon the whole record is correct this is sufficient.

3 Grah. & W. N. T. 767–772, et seq.

If a consignee inform his principle by letter

of what he has done, the silence of the latter after a reasonable time, is approval of it.

Norris v. Cook, 1 Curt. 464; Vianna v. Barclay, 3 Cow. 281; Cairnes v. Bleecker, 12 Johns. 300; Towle v. Stevenson, 1 Johns. Cas. 110; Codwise v. Hacker, 1 Cai. 526; Armstrong v. Gilchrist, 2 Johns. Cas. 431; Brown v. McGran, 14 Pet. 479; Paley, Ag. (by Lloyd), 31; Prince v. Clark, 1 Barn. & C. 186; Bell v. Cunningham, 3 Pet. 69–81; Courcier v. Ritter, 4 Wash. (C.C.), 549; Bredig v. Dubarry, 14 Serg. & R. 30; Rich. Mfg. Co. v. Starks, 4 Mas. 296; Marfield v. Goodhue, 3 N. Y. 62; Owsley v. Woolhopter, 14 Ga. 124; Crane v. Bedwell, 25 Miss. 507; Lee v. Fontaine, 10 Ala. 755; Johnson v. Wingate, 29 Me. 404; Emerig. (Meredith), 116, 117; Poth. Pand. lib. 14, tit. 6, n. 6; Dig. lib. 14, tit. 6, 1, 16.

Mr. Justice **Strong** delivered the opinion of the court:

There is some conflict in the testimony respecting the instructions given to the plaintiffs below by the defendant, at the time when he obtained the advance on his consignment, and at the time when he last saw them, some fifteen days afterwards. It is claimed that he then gave them instructions to sell the cotton before the price should fall any lower, and that this direction was given not later than the 28th of October, 1865. It was upon this theory that his first prayer for instructions to the jury was framed.

That prayer was, that "if the jury find from the evidence that after the cotton was placed in the hands of the plaintiff, Feild (the defendant), gave them instructions to sell before the price should fall any lower, and that the plaintiffs failed to do so, then the plaintiffs must suffer any loss occasioned by reason of their failure to sell at the time, and Feild is entitled to a credit for the amount the cotton would have brought if sold at the time such instructions were given." It is very obvious that no such directions, as that prayer asked for, should have been given to the jury. The prayer was based upon a very imperfect statement of the case. It overlooked material facts, without considering which it could not be determined to what amount of credit he was entitled. There was undisputed evidence that, on the 16th of November, 1865, some three weeks after the defendant's alleged directions were given to the plaintiffs, they wrote to him a letter informing him that they had not sold his cotton, as the market had been dull and on the decline every day since he left; that his cotton would not then sell for more than from forty-three [*148] to forty-four *cents per pound, and that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight. They wrote further that they had held on thus far to meet his views, but that the declining tendency of the market induced them to write, and they asked to hear from him on his receipt of their letter. It was also in evidence that the defendant received this letter, and that he purposely declined to answer it. No allusion was made to these facts in the defendant's first prayer for instructions to the jury. Yet it is manifest they ought not to have been overlooked by the court, for they bear directly upon the question, whether the defendant was entitled to credit for the sum for which the cotton would have sold if the plaintiffs had sold it before the price fell in the market. The effect of his refusal to reply to their letter within a reasonable time after he received it, was, undoubtedly, to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified. Mr. Livermore, in his Treatise on Agency, Vol. 1, p. 50, says that "When the relation of principal and agent does, in fact, exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what had been done on his account." And in Story, Ag. sec. 259, it is said that: "In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time; and if he does not, it is presumed he admits the propriety of the acts of his correspondent, and confirms and adopts them." See, also, Abbe v. Rood, 6 McL. 106; Norris v. Cook, 1 Curt. 464. *Whatever, then, may have [*149 been the instructions given to the plaintiffs by the defendant respecting the time of sale, even though they were disobeyed, and though the cotton was not sold before the price had fallen, his refusal or neglect to reply to the plaintiffs' letter of November 16th, 1865, which notified him of the fall in the market price, and informed him that they had not sold but had held on thus far to meet his views, must be deemed an approval of their delay, and equivalent to an antecedent authority. It has been argued that, at most, it raised a presumption of fact that should have been submitted to the jury. To this it may be answered there was nothing in the case to repel the presumption, and the jury would, therefore, have been bound by it had it been submitted. But the defendant's prayer for instruction ignored it and, in effect, called upon the court to withdraw it from the jury.

There is still another reason why the court should not have affirmed the defendant's first proposition. The plaintiffs had made large advances on the cotton consigned to them—advances very nearly, if not quite, equal to its value, and much more than its market value at any time after their letter to the defendant was written. They had, therefore, acquired a special property in the cotton, and they held it for their own indemnity as well as for the benefit of the defendant. Now, though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure

Cited with approval in Henshaw v. Bissell, 18 Wall. 263, 21 L. 838, holding power of governor over tract covered by floating grant, ceased after grant.

Distinguished in McMicken v. United States, 97 U. S. 216, 24 L. 951, holding grantee's interest lost where no survey, settlement or improvement made.

Treaty.— Rights under Mexican grantee's claim, whether merely imperfect and equitable, or not, are property rights, protected by treaty of cession and rules of international law, pp. 241–242.

Cited with approval in Slidell v. Grandjean, 111 U. S. 423, 28 L. 325, 4 S. Ct. 479, recognizing Spanish rule allowing grantee preference over land adjoining river land; Bryan v. Kennett, 113 U. S. 192, 28 L. 912, 5 S. Ct. 413, holding incomplete Spanish title to lands in Missouri, a property right protected by cession treaty.

Distinguished in Ainsa v. United States, 161 U. S. 221, 40 L. 677, 16 S. Ct. 549, refusing to confirm unlocated grant of a certain quantity.

10 Wall. 246–251, 19 L. 890, THE COLUMBIA.

Collision.— Where a vessel is seen off starboard side of another, it is latter's duty to keep clear, and she is responsible for a collision caused by her crossing the former, pp. 249–251.

Followed in The Zouave, 90 Fed. 443.

Collision.— It is duty of following vessel to keep clear, and, where she crosses, she is responsible in event of collision, pp. 250–251.

Distinguished in The St. Paul, 21 Fed. Cas. 218, refusing to allow forward vessel, willfully thrown across path of overtaking vessel, recovery for collision, though latter vessel also at fault.

10 Wall. 251–256, 19 L. 893, DEMING'S APPEAL.

Appeal and error.— A motion made on November 7th, to reinstate a case dismissed on appellant's motion, on April 20th preceding, denied, Supreme Court refusing to consider respondent's consent that the order of dismissal be rescinded, pp. 255–256.

Not cited.

10 Wall. 256–263, 19 L. 892, NEW ORLEANS R. R. v. MORGAN.

Appeal and error.— Where, on error to Circuit Court, the whole record is removed, and no error disclosed, a motion to dismiss will be denied and judgment affirmed, pp. 260–261.

Appeal and error.— Questions of reversal or affirmance will not be determined on a motion to dismiss, as whether the proceedings in the Circuit Court, or executory process awarded by it, were void, p. 262.

Appeal and error.— An order dismissing a petition in the nature of an audita querela, praying that executory process, awarded on a mortgage, be restrained, because ordered without notice, is final judgment to which a writ of error will lie, p. 263.

Approved in Spitley v. Frost, 5 McCrary, 51, 15 Fed. 306, holding order confirming sale and overruling motion to set it aside because of homestead rights, final, and an estoppel.

10 Wall. 263–272, 19 L. 887, DEERY v. CRAY.

Deeds.— Where ambiguity in a deed was not patent, such as would render it void for inapplicability to the subject-matter, the court properly exercised its discretion in admitting it, subject to exclusion, if not made good by competent evidence, pp. 269–270.

Deed referring for one boundary line to an existing plat, presents no apparent uncertainty, or patent ambiguity, and is not void, p. 270.

Followed in Smith v. Brown, 34 Mich. 459, holding sheriff's deed, omitting county and State, not objectionable for variance, where parties treated it as covering premises in question.

Distinguished in Green Bay, etc., Co. v. Hewitt, 66 Wis. 467, 29 N. W. 239, holding exception from grant of buildings and improvements too vague to except fee under the buildings; Chapman v. Railroad Co., 26 W. Va. 334, holding railroad's mortgage of all "property held in trust" conveyed only real property specifically described in other parts of deed.

Boundaries.— Where a deed refers for one line to a plat, the existence of the line may, after the lapse of eighty years, be proven, without producing the plat, by parol evidence, by ancient deeds and by a fence recognized as a dividing line for thirty-five years, p. 272.

Appeal and error.— Instruction as to effect of a mortgage on plaintiff's title will not be considered where plaintiff had no title on which jury could find in her favor, p. 272.

Followed in West v. Camden, 135 U. S. 521, 34 L. 258, 10 S. Ct. 841, collecting cases, refusing to examine instruction harmful to plaintiff, who could not recover in any event.

10 Wall. 273–299, 19 L. 915, SLAUGHTER-HOUSE CASES.

Appeal and error.— Writ of error, to operate as supersedeas, after giving sufficient bond, must be allowed within ten days after final order, such as decree refusing rehearing, except in certain enumerated cases, pp. 289, 291–292.

Cited with approval in French v. Shoemaker, 12 Wall. 99, 20 L. 271, holding writ of error supersedeas where bond not shown by

record to be insufficient; Kitchen v. Randolph, 93 U. S. 88, 23 L. 811, holding Supreme Court justice could not allow supersedeas where appeal taken after sixty days after judgment; Texas, etc., Ry. v. Murphy, 111 U. S. 490, 28 L. 493, 4 S. Ct. 498, allowing supersedeas where writ of error taken within twenty days after decision on petition for rehearing; Southern Pac. Co. v. Johnson, 69 Fed. 564, 44 U. S. App. 1, holding time to file bill of exceptions properly extended after motion for new trial; Woods v. Lindvall, 48 Fed. 74, 4 U. S. App. 45, allowing bill of exceptions to be filed at succeeding term, after argument on motion for new trial; Altenberg v. Grant, 83 Fed. 981, 54 U. S. App. 314, holding time for writ of error suspended until disposition of motion for new trial.

Appeals or writs of error do not become supersedeas by process of Supreme Court, but are constituted such by act of Congress, on compliance with certain conditions, p. 291.

Cited and applied in Arnold v. Frost, 9 Ben. 269, F. C. 558, taking jurisdiction over action on supersedeas bond after affirmance, though no supersedeas order made. Cited generally in State v. Mitchell, 29 Fla. 315, 10 So. 749.

Distinguished in State v. Judge, 33 La. Ann. 1389, holding judgment declaring office vacant not superseded by appeal; Crowder v. Morgan, 72 Ala. 540, in action on bond, holding bond not supersedeas where not approved or copy deposited with clerk of court.

Appeal and error.— Writ of error suspends jurisdiction of lower court and prevents further proceedings, p. 291.

Cited with approval in Cralle v. Cralle, 81 Va. 775, holding lower court not empowered, pending appeal, to grant temporary maintenance; Ex parte Dunn v. Railroad, 6 S. C. 309, holding like cited case; Blair v. Compton, 33 Mich. 448, holding stay did not dissolve completed levy and sheriff authorized to proceed. See note to Butchers' Asso., etc. v. Slaughter-House Co., etc., 1 Woods, 54 F. C. 2,234, refusing to order giving of additional bonds after appeal and supersedeas bond.

Distinguished in May v. Printup, 59 Ga. 135, sustaining power of Circuit Court to appoint receiver after appeal to Supreme Court; Richter v. Jerome, 25 Fed. 681, permitting examination of witnesses de bene esse, pending appeal to Supreme Court.

Appeal and error.— After writ of error, operating as a stay, Supreme Court can enforce supersedeas against subordinate court, proceeding to final process, even before return day of writ, where return has been made and record filed, p. 292.

Appeal and error.— In absence of statute, or special order, appeal in equity does not stop proceedings under decree appealed from, p. 296.

Distinguished in Cralle v. Cralle, 81 Va. 775, holding lower court not empowered, pending appeal, to allow temporary maintenance. And see citations under last syllabus point.

Appeals do not lie from State court to Supreme Court, but are subject to same rules as writs of error, pp. 296–297.

Appeal from order denying, dissolving or granting injunction does not stay proceedings or suspend operation of order, p. 297.

Approved and followed in Hovey v. McDonald, 109 U. S. 161, 27 L. 891, 3 S. Ct. 143, holding appeal from order vacating injunction against collecting fund did not continue injunction; State v. Stallcup, 15 Wash. 265, 46 Pac. 251, holding temporary injunction operative, pending appeal from order granting it; Nat. Docks, etc., Co. v. Pa. R. R. Co., 54 N. J. Eq. 172, 33 Atl. 938, holding appeal did not vacate order restraining interference with complainant's work; Green v. Griffin, 95 N. C. 54, holding appellant in contempt for violating order restraining building of wall; Leonard v. Ozark Land Co., 115 U. S. 468, 29 L. 445, 6 S. Ct. 127, affirming S. C., 24 Fed. 659, holding injunction restraining cutting of trees not dissolved by appeal; Knox Co. v. Harshman, 132 U. S. 16, 33 L. 251, 10 S. Ct. 9, holding appeal from order refusing to restrain collection of judgment did not operate as an injunction; Tyler v. Presley, 72 Cal. 292, 13 Pac. 857, holding order disbarring attorney operative pending appeal; State v. Judge, 33 La. Ann. 1389, holding judgment declaring office vacant, operative despite appeal; State v. Burke, 35 La. Ann. 187, following rule, but refusing to distribute fund, until determination of appeal from order dissolving injunction which restrained distribution; State v. Dillon, 96 Mo. 62, 8 S. W. 783, sustaining contempt proceedings for violation of injunction pending appeal; Mining Co. v. Mining Co., 5 Utah, 152, 13 Pac. 175, holding contempt not established, in proceeding for violation of injunction, appealed from; May v. Printup, 59 Ga. 135, sustaining appointment of receiver pending appeal; dissenting opinion in State v. Hirzel, 137 Mo. 450, 38 S. W. 961, majority holding appeal vacated appointment of receiver.

Distinguished in Dent v. Ferguson, 29 Fed. 10, refusing to dispossesses receiver, pending appeal from final decree awarding possession to respondents; Stewart v. Superior Court, 100 Cal. 546, 35 Pac. 157, holding injunction, authorizing plaintiff to connect water-pipes with defendant's pipe-line, suspended by appeal. Cited, but not followed, in Gulf, etc., Ry. v. Ft. Worth, etc., Ry., 68 Tex. 103, 2 S. W. 200, holding appeal vacated dissolution of injunction and revived it. Limited in Staffords v. King, 90 Fed. 141, 61 U. S. App. 497, holding court may, in its discretion, order otherwise.

Courts.— An injunction will not issue from the Supreme Court to stay proceedings in subordinate State court; there is no appellate relation between them, p. 298.

Cited with approval in Yick Wo v. Crowley, 11 Sawy. 424, 26 Fed. 208, refusing to enjoin police officer from serving warrants of arrest issued by State court.

Miscellaneous.— Cited in Slaughter-House Cases, 16 Wall. 58, 21 L. 402, reviewing history of litigation; United States v. Wong Kim Ark, 169 U. S. 723, 42 L. 917, 18 S. Ct. 485; dissenting opinion in People v. Hawkins, 157 N. Y. 29, 51 N. E. 266, 42 L. R. A. 502, very generally.

10 Wall. 299–303, 19 L. 894, WASHINGTON R. R. v. BRADLEYS.

Equity.— Where a cause is at issue and an amended bill is filed without leave of court, it is a gross irregularity to hear the cause without some order imposing terms, vindicating the rules of practice, p. 302.

Equity.— It is irregular to hear a cause on an amended bill and answer without replication, as cause is not at issue, and defendant is entitled to dismissal, unless court allows a replication to be filed upon terms, nunc pro tunc, p. 302.

Equity.— Process and defendants are necessary to cross-bills; and where bill prayed for an injunction against a trust sale, decree ordering sale upon cross-bill, without defendants or process, was error, the cross-bill being a nullity, pp. 302–303.

Approved and principle applied in Fidelity, etc., Co. v. Mobile, etc., Ry. Co., 53 Fed. 852, holding substituted service upon attorney of independent bill in nature of cross-bill, not good; Wood v. Collins, 60 Fed. 142, 23 U. S. App. 224, holding defendant, in suit to restrain action of trespass to try title, not entitled to affirmative relief without a cross-bill; Meyer v. Kuhn, 65 Fed. 711, 25 U. S. App. 174, holding co-defendants not bound by decree by default in favor of defendant seeking affirmative relief, where no service of answer was made; Hill v. Ryan Grocery Co., 78 Fed. 27, 41 U. S. App. 714, reversing decree for money judgment in favor of respondent, on bill praying for cancellation of trust deed, there being no cross-bill; Owens v. Heidbreder, 78 Fed. 838, 41 U. S. App. 736, holding defendant, in action of trespass to try title, not entitled to have cause heard in equity by asserting equitable rights in answer; Ringo v. Woodruff, 43 Ark. 498, holding co-defendant not required to meet evidence on allegations constituting grounds for affirmative relief, there being no cross-complaint or process.

Equity.— Decree cannot go further than prayer of bill and allegations as proved; therefore decree ordering sale, where bill prayed to have it enjoined, and cross-bill was a nullity, was erroneous, p. 303.

Approved and principle applied in Dumont v. Fry, 12 Fed. 21, refusing to entertain a bill where there was adequate remedy at

law; Wood v. Collins, 60 Fed. 142, 23 U. S. App. 224, holding decree awarding possession to defendant, on bill to restrain action of trespass to try title, erroneous, there being no cross-bill; Hill v. Ryan Grocery Co., 78 Fed. 27, 41 U. S. App. 714, reversing decree awarding money judgment to respondent, on bill praying for cancellation of trust deed, there being no cross-bill; White v. Bowen, 48 Fed. 188, refusing affirmative relief on answer in the nature of a cross-bill, to bill for accounting and discovery; Alabama, etc., Co. v. Austin, 94 Fed. 901, reversing decree on bill to set aside preferential transfer, where allegations not sustained by proof; Ringo v. Woodruff, 43 Ark. 498, holding co-defendant not required to meet allegations in answer looking for affirmative relief; Griffith v. Security, etc., Assn., 100 Tenn. 412, 45 S. W. 670, refusing decree of foreclosure on mortgagor's bill for accounting, in absence of cross-bill.

Appeal and error.— Supreme Court will notice objections not taken in the court below, where the errors are grave and numerous, p. 303.

Miscellaneous.— Cited in North British, etc., Co. v. Lathrop, 70 Fed. 433, 25 U. S. App. 443, to no point decided by cited case.

10 Wall. 304–308, 19 L. 913, GRINNELL v. BIRD.

Partnership.— In adjustment of partnership accounts, the active managing partner should be charged with capital placed in his hands and proceeds of sales, and credited with cost of stock contributed by himself and expenses, p. 307.

Cited and followed in Hellebush v. Coughlin, 37 Fed. 295, holding partner contributing invention liable for half of loss of capital contributed by other partner; Keaton v. Mayo, 71 Ga. 653, holding partner contributing plantation entitled to its full value before profits figured.

Partnership.— In partnership accounting, bad and uncollected debts are deducted from profits and the loss thus equally divided, p. 308.

Equity.— An unsupported allegation in an answer to a bill of revivor, being impertinent to the bill, will not be considered, and requires no formal replication to avoid its effect as evidence, p. 308.

Approved and principle applied in Fretz v. Stover, 22 Wall. 204, 22 L. 770, holding new defenses in answer to bill of revivor, not pertinent, and replication not necessary; Newcombe v. Murray, 77 Fed. 493, considering demurrer to bill of revivor only so far as it disputed right of complainants to revive; Dunham v. Carson, 42 S. C. 389, 20 S. E. 199, holding general answer to bill of revivor against heir and devisee of defendant improper.

Slaughter House
Cases.

warrant the finding of the jury. Suppose that is so, still it is insisted by the defendant that the instruction is erroneous, because it assumes that the plaintiff, notwithstanding the written agreement to which he was a party, could make such purchases on his own account, but the bill of exceptions shows that there was no property to be purchased, of the kind specified in the written agreement, and that the plaintiff, having ascertained that the authority of the other party had been revoked, determined not to act under the agreement; that the plaintiff purchased the cotton on his own account, and paid the whole of the purchase money; and that none of the cotton had ever been captured by our army or surrendered to our military authorities; and that none of it was the property of the Confederate states or had ever been abandoned by the owners.

Tried, as the case was, by a jury, it was certainly proper that the court should submit the whole evidence to their determination; and it is clear that the jury by their finding **517*]** *have affirmed every proposition involved in the instruction in favor of the plaintiff. Such being the fact, the rule is that where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and the instructions are framed in clear and unambiguous terms, it is no cause for the reversal of the judgment to show that one or more of the prayers for instruction presented by the losing party, and not given by the court, were correct in the abstract as the refusal of the court to give the instructions as requested under those circumstances could not work any injury to the party making the request, and therefore cannot be regarded as error. *Pub. Schools* v. *Risley*, 10 Wall. 115, 19 L. ed. 857; *Law* v. *Cross*, 1 Black, 536, 17 L. ed. 187; *Tome* v. *Dubois*, 6 Wall. 555, 18 L. ed. 946. What more the defendant could properly have it is difficult to see, as the court submitted every inquiry of fact involved in the instruction to the judgment of the jury, and they, having returned their verdict for the plaintiff, it follows that the theory of fact assumed in the instruction is established as true, unless a new trial is granted by the court which tried the cause, or by the direction of this court for error of law. Taken together, the charge and the verdict as perfected by the judgment, afford a presumption that the theory of fact assumed in the instruction is true, unless the contrary is stated in the bill of exceptions, or it appears that there was no sufficient evidence to warrant the court in submitting the question to the jury. *Russell* v. *Ely*, 2 Black, 580, 17 L. ed. 260; *State* v. *Hopkins*, 5 R. I. 58; *Murray* v. *Fry*, 6 Ind. 372; *Day* v. *Raquet*, 14 Minn. 283.

Three requests for instructions were made by the defendant, to the effect following:

1. That a writ of sequestration would not lie if the defendant held the cotton in question as deputy-general agent of the treasury department, under the acts of Congress relating to captured or abandoned property.

Sufficient has already been remarked to show that there was no evidence in the case to war- **518*]** rant the court in submitting *such a question to the jury as an independent instruction, and the exception is accordingly overruled. *U. S.* v. *Breitling*, 20 How. 254, 15 L. ed. 902.

2. That the circuit court had no jurisdiction by virtue of the writ of sequestration to direct the cotton to be taken from the possession of the defendant, if the jury find that the same, at the time the writ issued, was in his possession as such agent under the color of the acts of Congress relating to captured and abandoned property.

But the defendant had no right to seize the cotton in question, as the evidence showed that it had never been captured nor abandoned, and that the title to the same had become vested in the plaintiff by purchase from the private owners. Proof to show that the theory of the defense in that behalf is correct was entirely wanting. On the contrary, the defendant himself testified that he had no evidence at all to affect it as captured and abandoned property at the time the suit was instituted, which is certainly sufficient to show that the instruction requested was properly refused, as it is settled law that it is error in the court to give an instruction when there is no evidence in the case to support the theory of fact which it assumes. *U. S.* v. *Breitling, supra; Goodman* v. *Simonds*, 20 How. 359, 15 L. ed. 938.

3. That the defendant, if he held the possession of the cotton, as such agent for the collection of captured or abandoned property, had the right to retain the same, and that the plaintiff could not recover the property except by suit in the court of claims.

Throughout the several propositions of the defense, the theory of fact is constantly interwoven that the defendant held the cotton under color of the acts of Congress relating to captured and abandoned property, but it is clear that a party cannot be held to have acted under color or by virtue of an act of Congress which did not confer any authority upon him, or any other person, to perform the act, which is in controversy. *Reynolds* v. *Orvis*, 7 Cow. 272; *Bigelow* v. *Stearns*, 19 Johns. 40; *King* v. *Bedford*, 6 East, 369; *Britton* v. *Butler*, 9 Blatchf. 462. Neither an officer nor an agent can properly *be said to have acted under color [***519** of a law which neither gave him nor any other person authority to do the act in question; nor can an officer be said to have acted under the authority of his office unless he has some appearance of right to it and is in possession and acting in that capacity, as the acts of a mere intruder or usurper of an office, without any colorable title, are undoubtedly wholly void both as to individuals and the public. *Plymouth* v. *Painter*, 17 Conn. 593; *People* v. *White*, 24 Wend. 525; *Carleton* v. *People*, 10 Mich. 258; *People* v. *Hopson*, 1 Denio, 579. Whenever a person sued sets up a defense that he was an officer or an employee of the government acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the act in question to be done, and that he acted in good faith; but nothing of the kind is shown in this case. Instead of that he admits in his own testimony that he had no evidence at all to affect the cotton as captured or abandoned property.

Apart from that defense the theory is also constantly set up that the plaintiff during that period could not purchase cotton of the owners even though it was neither captured nor abandoned property, as he was, by virtue of that

agreement, an agent of the United States; to which two answers may be made, either of which is sufficient to show that the theory is unfounded and without merit: (1) Because the agreement does not contain any stipulation that the plaintiff should devote his whole time to the business of the agency nor any other of a character to prohibit him from purchasing cotton from the private owners if the same was not included in the category of the cotton described in the written agreement. (2) Because the written agreement never in fact became operative, as the plaintiff, not finding any such cotton in the district specified, never made any such purchases.

Nothing need be added in respect to the ruling of the court in denying the motion in arrest of judgment, as the motion raises the same questions as those involved in the prayers for instruction presented by the defendant, and which were refused by the court.

520*] *Mention has already been made of the fact that the United States intervened in the suit, and the record shows that their claim was subsequently dismissed and that they also sued out a writ of error and removed the whole proceeding into this court, which is number 136 on the calendar.

All that is necessary to add upon the subject is, that the principal suit having been decided in favor of the plaintiff, the proceeding in intervention must necessarily fall with the defense set up by the defendant in that suit.

Judgment in each case affirmed.

Mr. Justice **Bradley,** dissenting:

I dissent from the opinion of the court in these cases. Tweed, the defendant in error, repaired to the Red river region to purchase cotton, under a written engagement with a government agent to purchase and pay for the same and to deliver one fourth part to the government, upon the express consideration stated in the agreement, that it was well known that a great deal of cotton belonging to the Confederate government was in that district, but could not be identified, and was kept back by the parties having it in possession for fear of its being seized. Tweed was to have the prestige of government protection; was to purchase any cotton he could find for sale, without any questions; was to send it to the government agent at New Orleans, and there three fourths of it was to be set apart to his use and one fourth to the use of the government. This was the general purport and effect of the agreement. There cannot be a doubt, from the evidence in the case, that he derived great advantage from his semi-official character. But having made his purchases, he concluded that it would be a better speculation to have all the cotton than only three fourths of it; and, therefore, he sets up the pretense that he did not act under the agreement, but on his own independent account. The cotton, however, went forward, protected by the general policy of insurance taken out by the government agent, and arrived at New Orleans. The government agent, Flanders, took

521*] *possession of it, and gave up to Tweed his three fourths according to the agreement. The balance he retained for the government, against Tweed's consent, and was sustained in his action by the Secretary of the Treasury.

Tweed sued out a sequestration (a writ in the nature of the common law replevin) from the United States circuit court of Louisiana, and by virtue of that writ one fourth part of the cotton held by Flanders, the government agent for the government, was taken out of his possession, and the court held that this was a lawful exercise of the judicial authority.

Now, on the merits of the case, I cannot concur in the opinion that Tweed could, under the circumstances, repudiate his agreement; but I think he was bound by it and by his acts, and was estopped from asserting an independent purchase of the cotton on his own account; and that the charge of the court should have been to that effect, and that the charge given and the refusal to charge as requested were erroneous.

I also hold that this was a suit against the government itself. Flanders did not hold the cotton on his own account, but on government account; and his acts were sanctioned and adopted by the treasury department. He was acting for the government, and his possession was the government's possession. Whether he was acting lawfully or unlawfully was a question which the court could not decide by an adverse proceeding in a suit brought for the recovery of the cotton.

This is a very different case from that of a replevin brought by the owner of goods unlawfully taken by a sheriff upon execution against another person. Goods in the custody of the law, seized for the benefit of a private party, in satisfaction of a judgment or to meet an asserted claim, may be replevied by the true owner; but goods claimed by the government itself, as its own goods, and held by its agents in possession, cannot be reclaimed in this manner. They can only be reclaimed by application to Congress, or, in certain cases, to the court of claims.

*Nor is the case governed by that [**522** class of cases in which a mandamus will lie against a government officer to compel him to perform a ministerial duty. Such a writ is issued, or is supposed to be issued, by the government itself, to compel its officials to do their duty to its citizens.

I am authorized to say that Mr. Justice **Davis** concurs in this opinion.

SLAUGHTER-HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, *Plff. in Err.*

v.

THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

PAUL ESTEBEN, L. Ruch, J. P. Rouede, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J. D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J. P. Aycock, D. Verges, and the Live-Stock Dealers' and Butchers' Association of New Orleans, and Charles Cavaroc, *Plffs. in Err.*,

v.

STATE OF LOUISIANA, *ex rel.* S. BELDEN, Attorney General.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, *Plff. in Err.*,

v.

THE CRESCENT CITY LIVE-STOCK LANDING AND SLAUGHTER-HOUSE COMPANY.

(See S. C. 16 Wall. 36–130.)

Slaughter-house — exclusive privileges of — when valid—constitutional amendments—construction of—13th and 14th articles—civil rights—equality of.

†1. The charter of the Slaughter-House Company, a corporation created by a statute of Louisiana, contained, among other exclusive privileges, the right to establish and maintain stock-yards and landing places and slaughter-houses for the city of New Orleans, at which all stock must be landed and all animals intended for food must be slaughtered. This grant of privilege guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample convenience with permission to all owners of stock to land, and to all butchers to slaughter at those places, was a police regulation for the health and comfort of the people (the statute locating them where health and comfort required) within the power of the state legislatures unaffected by the Constitution of the United States previous to the adoption of the 13th and 14th articles of the amendment.

2. The Parliament of Great Britain and the state legislatures of this country have always exercised the power of granting exclusive rights wnen they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class and has until now never been denied.

3. It is now claimed that such power is forbidden by the 13th article of amendment, and by the 1st section of the 14th article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the last three amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men, who had formerly held them in slavery.

5. In giving construction to any of those articles, it is necessary to keep this main purpose steadily in view, though the letter and spirit of those articles must apply to all cases coming within their purview whether the party concerned be of African descent or not.

5. While the 13th article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage, or the Chinese coolie trade when they amount to slavery or involuntary servitude; and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery, of whatever class or name.

6. The 1st clause of the 14th article was primarily intended to confer citizenship on the negro race; and secondly, to give definitions of citizenship of the United States and citizenship of the states, and it recognizes the distinction between citizenship of a state and citizenship of the United States by those definitions.

7. The 2d clause protects from the hostile legislation of the states, the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states.

These latter, as defined by Justice Washington in *Corfield* v. *Coryell*, and by this court in *Ward* v. *Maryland*, embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted, and they remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments, and of this class are those set up by plaintiffs.

8. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the 14th amendment.

9. It is not necessary to inquire here into the full force of the clause forbidding a state to enforce any law which deprives a person of life, liberty, or property without due process of law, for that phrase has been often the subject of judicial construction and is, under no admissible view of it, applicable to the present case.

10. The clause which forbids a state to deny to any person the equal protection of the laws, was clearly intended to prevent hostile discrimination against the negro race, so familiar in the state where he had been a slave; and for this purpose the clause confers ample power on Congress to secure his rights and his equality before the law.

†Headnotes by Mr. Justice MILLER.

NOTE.—*As to municipal power over nuisances relating to slaughter-houses*—see note, 38 L. R. A. 646.

[Nos. 8, 9, 10.]

Argued Feb. 3, 4, 5, 1873. Decided Apr. 14, 1873.

IN ERROR to the Supreme Court of the State of Louisiana.

These cases arose in the district courts of New Orleans, upon petitions for injunctions, some of them filed by the Crescent City Live-Stock Landing & Slaughter-House Company, and others against the said company.

The cases were variously decided by the said district courts, and were all taken by appeals to the supreme court of Louisiana, by which court judgment was given in every case for the said Slaughter-House Company; whereupon the parties defeated in that court sued out these writs of error.

The cases are fully stated in the opinion of the court.

Messrs. **John A. Campbell,** *J. Q. A. Fellows, P. Phillips, S. M. Johnson* and *W. W. McFarland*, for plaintiffs in error:

The act is described to be an act of police which the state has adopted to promote salubrity, security and public order. That these interests are under the exclusive guardianship of the state, and no law of the United States nor authority of the United States can legally interfere with its discretionary control. But this argument cannot be true, unless it be ascertained that no article or clause of the Constitution of the United States has been violated by the conditions of the act of the state legislature. Laws of police, as well as other laws, nay, even the state Constitution itself, are only valid under the limitations imposed by the Constitution of the United States.

So the inquiry is, whether the privileges, immunities, life, liberty, property, or title of the plaintiff to equal protection have been infringed. If they have been, the act acquires no strength by being denominated as being, or because the act really is to operate as a police act.

The passenger acts of Massachusetts and New York were police acts. The acts to prevent free men of color who are employed on vessels, from coming ashore or going at large, were police acts.

Passenger Cases, 7 How. 283; *Sinnot* v. *Davenport*, 22 How. 244, 16 L. ed. 248; 1 Sprague, 88.

The plaintiffs claim an interest, a privilege, a property, in their labor, and the faculty of applying their labor in useful occupations of

which they cannot be deprived for the profit or gain of other persons or corporations.

These claims were recognized in the American customs and habitudes and were assumed as valid in written law and judicial decision, and in all the intercourse of society.

The 13th Amendment to the Constitution of the United States approved these customs and habitudes as normal and rightful, by prohibiting institutions and relations which were contrary to them, and Congress in its legislation to enforce that Amendment adopts their existence as the basis of its action.

Turgot, in edict of 1776, by which the industries of France were emancipated from the restraints and monopolies of trade, corporations, guilds, and companies, sets forth the natural constitutional and legal principles applicable to this subject.

The edict declares that "God in creating man with necessities has compelled him to resort to labor, and has made the right to labor, the first, most sacred and imprescriptible right of man. It ordains, therefore, that those arbitrary institutions which prevent the indigent from living by work; which extinguish emulation and industry and render useless the talents of those who do not belong to a corporation or company; which load industry with a tax onerous to the subject without benefit to the state; which finally, by the facility which they afford to combinations of the rich to force the poor to submit to their will, and to create conditions that enhance the price of the most necessary articles of subsistence,—be abrogated." Therefore, every person was authorized to exercise his art, trade or profession; and the privileges of corporations, guilds and trading companies to the contrary were abolished.

The state is commanded neither to make nor to enforce any law that deprives or even abridges any citizen of his enjoyment of his privileges or immunities. To limit him in the choice of a trade, to deprive him of a business he has pursued, and to give to others the sole and exclusive right to follow that trade or to prosecute that business, violates this Constitution.

The emancipating edict of Turgot and the enslaving act of the Louisiana legislature in different ways manifest the aim of the Amendment to the Constitution. The spirit of the edict pervades the amendment, and it was framed to suppress all institutions of the kind. The Louisiana statute creates a corporation having all the odious features of those suppressed by the edict.

The title to labor freely was declared by the National Assembly in 1791, and the freedom of choice of professions, arts, or trades, has been maintained since that date, as the law of France.

With reference to the trade of preparing animal food for market, and providing for and securing animals, each *commune* in France may regulate these to maintain salubrity, security and order. These regulations embrace the inspection of the meat; an abundant supply for the public want; the convenience of selling, the preservation of cleanliness in *abattoirs;* and the prevention of accidents by the roaming of the animals. But it is a fundamental condition that the freedom of men to engage in trade shall not be violated, and no monopoly be created in the sale or disposition of the supply.

6 Dall. Jur. Gen., p. 237, No. 20; 27 *Ibid.* p. 720; No. 209; 20 *Ibid.* p. 19, Nos. 54, 55.

The consequences of the monopoly, according to Lord Coke, are the increase of the price of the commodity, the deterioration of its quality, and the impoverishment of traders and consumers.

Monopolies restrain industry, promote idleness, are oppressive to consumers and contrary to the common and statute law, and violate common right.

3 Co. Inst. 181; 11 Co. Rep. 86.

The King could not grant a charter nor an allowance to particular persons for the buying, selling, making, working, or using of anything which would operate as a restraint of trade or the application of industry.

Adjudged cases show the King cannot grant that a corporation shall use a trade at a particular place, exclusively of those not free of the corporation; nor that only one hundred persons shall have the sole buying and selling of goods imported into Ireland; nor that the grantee should have the sole privilege of making of ordinance during war; nor can a corporation grant a monopoly for private gain under the guise of a police regulation.

3 Co. Inst. 181; 2 Atk. 484; 1 Rol. 364; 2 Rol. 113; Godb. 125; 3 Mod. 126; Willes, 384; Com. Dig. Trade, D; 1 Burr. 12; 3 Burr. 1847; 1 P. W. 184.

In some of the reported cases, by-laws in restraint of trade were supported because of special custom. By the municipal reform act, all of these trades companies, and restraints upon freedom were abolished. Grant, Corp., 83; 6 Q. B. 383.

The principle of the British law is declared by Erle in his work on Trades' Union, ch. 1.

The contest upon the subject of monopolies, we have detailed. Judicial decisions have been cited, and the writings of publicists quoted to prove the inequality, injustice, violation of private and individual rights, and denial of the protection which each member of the body politic ought to have. "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hand, and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty, both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." Smith, Wealth of Nations, p. 1, ch. X., part 2.

Guarded as the states have been by written constitutions, with bills of rights, it is not surprising that we find but two cases of the direct interference with the rights of labor and equality of rights, either in the legislative enactments or in the jurisprudence of the country.

The principles to which we have referred are accepted as fundamental, and have been applied to cases when they have occurred.

The courts of Connecticut, Illinois, New York, Massachusetts, Tennessee, and Maine

have pronounced opinions, which support the doctrine we maintain.

25 Conn. 19; 45 Ill. 90; *Mayor* v. *Thorne*, 7 Paige, Ch. 261; *Taylor* v. *Blanchard*, 13 Allen, 370; 2 Yerg. 554; 3 Greenl. 326; Cooley, Const. Lim. ch. 11, p. 393.

The terms, "privileges and immunities" were applied in the Roman law to describe classes of rights. They comprised those special endowments or benefits to some, which were made by the legislator and which were not shared by all (*privilegium affirmativum*), or in those exemptions (*immunitas, privilegium negativum*), from duties or services to which others were subjected. These privileges and immunities were right.

Lindley, Jur. §§ 30–32; App., note to § 31.

These are akin to charters, private statutes and patents. McElvey, Roman Law, §§ 188, 189.

With this general meaning they are used in modern legislation and jurisprudence.

The separate estates of the realm in Great Britain, lords, clergy, and people, have their rights and immunities. Under charters and customs, cities and classes of subjects have the same.

In the colonial discussions we find a claim for the rights, privileges and immunities of Englishmen for the colonial population. In the Congress of 1776 we find a resolution inviting desertion from the British army, and promising the deserter protection in his religion, and that he should be invested with the rights, privileges, and immunities of natives as established by law. The terms are found in the 4th of the Articles of Confederation, and the 2d section of the 4th Article of the Constitution of the United States; and evidently apply not to political but civil rights. These rights are protection to life, personal freedom, property, religion, reputation, and in the treaty of Paris of 1803, providing for the cession of Louisiana, the United States promised to grant the natives of that territory the rights, advantages, and immunities of citizens.

Permoli v. *New Orleans*, 3 How. 589; *American Ins. Co.* v. *Canter*, 1 Pet. 511.

The states of the Union are political organizations, with powers to accomplish the ends of government. By the 14th Amendment these governments are particularly bound to accomplish the same ends as the government of the United States, in reference to all citizens of the United States alike, and in some sort under control and supervision. No citizen of the United States may be abridged in his privileges or immunities; he must be secured from arbitrary legislation over life, liberty and property; he must not be denied equal protection under the law. These fundamental conditions being assured, he may acquire the means of subsistence and have the advantage of the union or division of free application of industry to ennoble his nature, promote progress in his art, trade, or profession, and to improve the moral and material state of himself and of his posterity. Thus union, justice, domestic tranquility and liberty may be attained, for the existing generation and their posterity.

4 Wash. C. C. 380; 18 How. 591, 15 L. ed. 497; 3 H. & McH. Md. 525; 14 Ala. 627; Cooley, Lim. 16, 392; 3 Story, Const. 625.

The authorities we have cited show that labor is a doom, and if submitted to with fidelity, secures a blessing to the human family. The obligation to labor being imperious, confers a right to labor, which right is property; and it cannot be withdrawn or destroyed by arbitrary legislation without the violation of natural right. This right is a social right, and constitutions have been made to secure it from invasion. No state of the American Union can deprive a man of his title by arbitrary edict; and arbitrary institutions to limit, depress, impair or to take away this right, cannot be favored nor maintained. No protection can be extended to such institutions, for the reason that they in their constitution and nature take away the equal protection due to those who are not members of them.

The act, No. 118, allows the company it establishes to carry on exclusively the business of preparing animal food for market, and of keeping animals for sale within a large district, for three parishes. The company can land them at its docks or wharves, keep them in its yards or stables, and prepare them in its slaughter-house for market, or exhibit them for sale in its stables.

Any other citizen must, under a penalty, use the docks, wharves, yards, and slaughter-house of the company, and none other. The company may purchase for these purposes any land in that district. No other person may have, use or bargain for land for the same purpose. The Delery Plantation is now used for all of these purposes by the company, it being owner; the injunction upon Cavaroc restraining him from selling, and the other defendants from using that plantation for such purposes. No butcher can exercise his art, except at the place designated by the company and at a price not determined by himself. It is not the butcher alone who is affected. The entire community is restrained in the same manner. The labor of some, the property of all, in those parishes is restricted to the company by this enactment. The rights, privileges, and immunities of the citizen have been diminished and impaired, that this corporation shall have a monopoly.

The object of the act is to create a monopoly in favor of the Live-Stock Landing and Slaughter House Co., by placing all persons not belonging to that company under a disability to do and perform acts in the course of the regular business, for the benefit of the company. Austin, in his Jurisprudence, p. 586, defines monopoly "to consist in the duty which is imposed on persons generally to forbear from all such acts as would defeat or thwart its purpose." Again, he says (pp. 48–401), "the right styled a monopoly is a right *in rem* which has no subject. There is no specific subject over, or to which the right exists, or in which the right inheres. The *officium* or common duty to which the right corresponds, is a duty lying on the world at large from selling commodities of a given description or class; but it is not a duty lying on the world at large to forbear from acts regarding determinately a specific subject." The statement is true as to inventions and copyrights, the only forms of monopoly existing under the laws of Great Britain.

But under the act No. 118, there is a determinate subject. The monopoly is not only that all men shall forbear to make use of their property for the preservation of animals intended for

sale and slaughter in three parishes, but that they shall carry to, and deposit in the buildings and inclosures of the corporation, their property upon an involuntary contract of bailment with the company; and also that all persons doing work in a regular vocation, shall use their buildings to carry on their work.

But the question comes: has a state power to declare that all the lands within a large territory shall not be used in a particular manner, in order to benefit the owners of a single parcel of land in their neighborhood? In this case, an owner is enjoined from selling, and persons competent to contract are restrained from purchasing land, lest they might interfere with the monopoly of the defendant. They are prohibited from improving it, or any other land in the three parishes with docks, ways, stables, yards, etc. Such thralldom of the soil in feudal times was not uncommon.

The 14th Amendment embodies all that the statesmanship of the country has ordained for accommodating the Constitution and the institutions of the country, to the vast additions of territory, increase of the population, multiplication of state and territorial governments, the annual influx of aliens, and the mighty changes produced by the Revolutionary events, and by social, industrial and commercial development. The purpose is manifest, to establish through the whole jurisdiction of the United States one people, and that every member of the Empire shall understand and appreciate the constitutional fact, that his privileges and immunities cannot be abridged by state authority; that state laws must be so framed as to secure life, liberty, property, from arbitrary violation, and protection of law shall be secured to all. Thus, as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government might seem to be justified.

The 14th Amendment is not confined to any class or race. It comprehends all within the scope of its provisions. The vast number of laborers in mines, manufactories, and commerce, as well as the laborers on the plantation, are defended against the unequal legislation of the state. Nor is the Amendment confined in its application to laboring men.

The mandate is universal in its application to persons of every class and condition.

Under the decisions of this court, the bulwarks that have been erected around the investments of capital are impregnable against state legislation. The obligation of contracts has been asserted with vigor, and the scope of the provision under the administration of the court is nearly as comprehensive as the dealings of men. Labor, under the 14th Amendment, is placed under the same protection. The signs of the times very plainly show that the protection has not been extended too soon.

No consideration for the public health will explain such a novelty as that the daily meat of the entire population of three parishes, one of which is the largest city for the reception of domestic products for sale in the United States, is forbidden, except at the establishment mentioned by seventeen persons, without any knowledge of the business or connections of the people; and this to be for twenty-five years. The words of Lord Coke are potent in their application to it. "New things which have fair features are most commonly hurtful to the commonwealth, for commonly they tend to the grievous vexation and oppression of the subject, and not to that glorious end that at first was presented." Co. Inst. 540.

No consideration of public health required the universal prohibition of these establishments anywhere in three parishes, when it is manifest that the whole complaint is confined to the damage done the water passing through the water-pipes at very low stages of water. No consideration of public health required that what was denied to all should, under any exception, be allowed as a favor to seventeen persons. These seventeen persons were, under no condition, guardians of the public health, nor are they now under any other obligation to regard it than that which attaches to every member of the community. Centralization is complained of as destructive of local self-government and as tending to the erection of a despotism. Can there be any centralization more complete, or any despotism less responsible, than that of a state legislature concerning itself with dominating the avocations, pursuits and modes of labor of populations, conferring monopolies on some, voting subsidies to others, restraining the freedom and independence of others and making merchandise of the whole?

A proposition to any constitutional convention sitting at any time before this decade, to permit discriminations between members of the same profession or the same trade, as to the conditions on which they might labor, would have met with no sanction or favor.

The judicial tribunals were intolerant of laws that had any such object or tendency. The case of *Phila. Association* v. *Wood*, 39 Pa. 73, is an instance. The legislature imposed taxes upon foreign insurance companies which were appropriated to a fireman's association.

The decision of the supreme court of Pennsylvania was adverse to the act, and the opinion of the court contains a clear and creditable exposition of the injustice of such an act. In the case of *Ward* v. *Maryland*, 20 L. ed. 449, this court expressed decided disapprobation of an act which was designed to depress the business of one class for the advantage of one more favored.

It was argued in that case, that the purchase of a license was voluntary. That the tax could be evaded by abandoning the business that required a license; that no coercion was employed, and that the dealer could comply with the act and so maintain his business. The court did not adopt such conclusions.

Louisiana has created monopolies in the slaughter-house business; the sale of gas; the making of levees in the state; the erection of privies in New Orleans, and the selling of lottery tickets; the endowments of various state companies with state bonds, and the indorsement of their securities; the funding of all sorts of securities as debts; prodigal expenditures and jobs innumerable form only a portion of the mischiefs of a government destitute of any sense of moral responsibility.

If an ordinance be unreasonable; if it be unequal; if it be unjust, because of its inequality; does it not fall within the exact letter of the 14th Amendment of the Constitution? "No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction, equal protection of the law."

Life, liberty, and property, if not affected by laws in opposition to the section of the Constitution mentioned, were entirely under the cognizance and control of the state governments. The state governments might devest vested rights if they did not impair the obligation of contracts, or violate the prohibitions of the Constitution. The state governments might fix the status of every person on its soil. It did so in the laws tolerating slavery. The admitted slaves, they created slaves by the laws, and they emancipated slaves. They could have made any sort of grades of population they thought fit, without violating the Constitution, or being subject to the control of this court. How is the case now? Every act of the legislature that affects any individual member of the population, by abridging the privileges or immunities which he claims to have as a citizen, which affects his life, liberty or property arbitrarily, or which denies him equal protection of its laws, all those become subject to the control or the revisory power of this court. The Constitution, by declaring that every member in the empire is its citizen, every person born within its jurisdiction derives his state and condition from its authority and at the same time stating to those states, that this citizen of ours must not be disturbed in his privileges or immunities or in his life, liberty, or property, brings the government into immediate contact with every person, and gives to every citizen a claim upon its protecting power.

Now, therefore, when a state makes a law which oppresses any portion of its own citizens, it is just as much the subject of examination here as it was in the olden times, when they made a law affecting the privileges and immunities of citizens of other states of the Union. Citizens of the different states are all, without discrimination, or without being affected by any fact of residence, subject to the same degree of protection.

Messrs. **T. J. Durant,** *Charles Allen, J. S. Black* and **M. H. Carpenter,** for defendants in error:

1. The only ground on which the jurisdiction of this court can rest is, that the charter is in violation of the Constitution of the United States.

2. There is no provision of the Constitution prior to the 14th Amendment, which this charter can be supposed to violate.

There is no provision in the Constitution of Louisiana which prohibits the granting of such charter. On the other hand, the Constitution contains a recognition of the power to impose excises or duties on particular occupations, in the provision that "all places of business or of public resort for which a license is required by either state, parish, or municipal authority, shall be deemed places of a public character," etc.

So, under the former Constitution, statutes involving a similar exercise of legislative power were passed and upheld.

See, *Morano* v. *Mayor*, 2 La. 217; *Pontchartrain R.* v. *Orleans Nav. Co.* 15 La. 404.

And in a later case the doctrine was broadly laid down that the power of the legislative department is supreme, except where restricted by the Constitution.

N. O. Draining Co. etc. 11 La. Ann. 338.

The latter doctrine of the authority of the legislature of a sovereign state has been reiterated and affirmed, in various phrases, by numerous courts and text writers. This authority, when not restricted by constitutional provisions, is sometimes said to be equal to the power of Parliament. Cooley, Const. Lim. 2d ed. 85, 88, 89.

Thorpe v. *Rutland, etc. R. R.* 27 Vt. 142; *City of New York* v. *Miln*, 11 Pet. 138; *Martin* v. *Waddell*, 16 Pet. 410; Story, J., in 11 Pet. 605; Curtis, J., in 13 How. 90; *License Cases*, 5 How. 588; *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 428; *License Tax Cases*, 5 Wall. 470, 18 L. ed. 500; *Moor* v. *Veazie*, 31 Me. 360; S. C., 32 Me. 343, S. C., on error, 14 How. 568; Cushing's Law of Legislative Assemblies, § 717; Dwarr. Stat. Potter's ed. 450; Cooley, Const. Lim. 573; Gov. & Const. Law, by Tiffany, 109; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 448, by Morton, J.; *Varick* v. *Smith*, 5 Paige, 160.

The foregoing authorities amply show that the power of a state is complete, unqualified and exclusive in relation to all those powers which relate to mere municipal legislation or internal police. The legislature is the sole and exclusive judge of whether a statute is reasonable and for the benefit of the people. Judge Story said: "Whether the grant of a franchise is or is not on the whole promotive of the public interest, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the legislature, which is invested with full discretion, etc. . . . "I know of no power or authority confided to the judicial department to rejudge the decisions of the legislature upon such a subject." *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 605.

So, also, this court, in a later case said: "With the exception of the powers surrendered by the Constitution of the United States, the people of the several states are unconditionally and absolutely sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion. Contracts are sometimes incautiously made by states, as well as individuals, and franchises, immunities, and exemptions from public burdens improvidently granted; but whether such contracts shall be made or not is exclusively for the consideration of the state."

Ohio Life Ins. Co. v. *Debolt*, 16 How. 428.

The legislature of this country and of England furnishes numerous illustrations of characteristic features of the present charter.

Legislation conferring exclusive privileges.

Markets or fairs, common in England, have not been unknown in the United States. Of late years markets are established by act of Parliament in England.

See, Grant, Corp. 155, 182, for much information as to markets; Markets and Fairs, Clauses' act of 1847; St. 10 and 11 Vict. ch. 14; 1 Steph. Com. (6th ed.) 683; Dane, Abr. 11 Pet. 621, by Story, J.

Ferries, bridges, railroads, and turnpikes, with exclusive privileges, are common.

See, *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 448; *Boston & Lowell Railroad* v. *Salem Railroad*, 2 Gray, 31; *Newburgh Turnpike Co.* v. *Miller*, 5 Johns. Ch. 111, and many other cases.

Exclusive rights of fishing.

Chalker v. *Dickinson*, 1 Conn. 384; *Gould* v. *James*, 6 Cow. 376; *Collins* v. *Benbury*, 5 Ired. 118; *Delaware, etc. R. R.* v. *Stump*, 8 Gill & J. 510; Washb. Eas. 412; 2 Bl. Com. 40; 3 Kent, Com. 6th ed. 418.

Exclusive rights of navigation.

Ogden v. *Gibbons*, 4 Johns. Ch. 150; S. C., on error, and 9 Wheat. 1; *Moor* v. *Veazie*, 31 and 33 Me. and S. C., on error, 14 How. 568.

Gas companies with exclusive rights.

Shepard v. *Milwaukee Gas Co.* 6 Wis. 547; *People* v. *Bowen*, 30 Barb. 24.

Telegraph companies with exclusive rights.

Cal. State Tel. Co. v. *Alta Tel. Co.* 22 Cal. 398.

Legislation imposing restrictions and burdens.

It is laid down generally that all inspection laws, quarantine laws and health laws of every description, belong to the state government.

Gibbons v. *Ogden*, 9 Wheat. 203; *New York* v. *Miln*, 11 Pet. 141.

Offensive trades of all descriptions, bone-boiling establishments, petroleum factories, livery stables, ten-pin alleys, and the like, are subjects of almost universal legislation.

Restrictions upon slaughter-houses and the keeping of animals are also common.

See, *Pierce* v. *Bartrum*, Cowp. 269; *Player* v. *Jenkins*, 1 Sid. 284; *Bosworth* v. *Herne*, Cas. *t.* Hardw. 405; *Butcher's Co.* v. *Morey*, 1 H. Bl. 370; *Commonwealth* v. *Patch*, 97 Mass. 221; *Brooklyn* v. *Cleves*, H. & D. 231; *Cooper* v. *Schultz*, 32 How. Pr. 132; *Milwaukee* v. *Gross*, 21 Wis. 240; *Ex parte Shrader*, 33 Cal. 280.

Statutes for the observance of the Lord's day, prohibiting labor or business, exist in many states, and with universal recognition by the courts.

Statutes limiting the hours of labor, prohibiting the employment of children, except under certain conditions, in mechanical and manufacturing establishments, also exist in certain states.

In many states, taxes are imposed, or excises or duties, upon various lawful employments; for instance, upon attorneys, auctioneers, brokers, dealers in junk and second-hand articles, factors, inn-holders, keepers of intelligence offices, pawnbrokers, peddlers, pilots, theaters and retailers of liquors.

The general authority of the legislature to lay such burdens upon particular occupations has been vindicated whenever assailed.

Simmons v. *The State*, 12 Mo. 268; *Commonwealth* v. *Ober*, 12 Cush. 493.

The Constitution of Massachusetts, adopted in 1780, contains the following provisions:

"All men are born free and equal, and have certain natural, essential and inalienable rights; among which may be ranked the right of acquiring, possessing and protecting property."

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to children, or descendants, or relatives by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural. Dec. of Rights, arts. 1 and 6.

Yet it was long since held that the first of these provisions did not prevent the legislature from imposing a license fee on particular occupations.

In *Portland Bank* v. *Apthorp*, 12 Mass. 255, the court says a reasonable revenue may be exacted by the legislature on certain "means of acquiring property"—"the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors," etc. "Every man has a natural right to exercise either of these employments, free of tribute, as much as a husbandman or mechanic has to use his particular calling." (p. 256). "According to the Constitution, there can be no doubt that the legislature might as well exact a fee or tribute from brokers, factors or commission merchants for the privilege of transacting their business, as from auctioneers, or inn-holders, or retailers, or attorneys." (p. 257). "Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required." (p. 258).

That decision was affirmed on great consideration, in *Com.* v. *People's Savings Bank*, 5 Allen, 431; *Attorney-General* v. *Bay State Mining Co.* 99 Mass. 152, where the language above quoted is referred to and approved; *Com.* v. *Provident Inst. for Savings* and *Com.* v. *Hamilton Mfg. Co.* 12 Allen, 312, 298; the decisions in the two latter cases having been affirmed on error by this court. See *Providence Inst.* v. *Mass.* 6 Wall. 611, 18 L. ed. 907.

The decision in the same state, that the statute requiring peddlers to obtain a license and pay a fee was constitutional, has been cited before.

Comth. v. *Ober*, 12 Cush. 493.

Likewise, in the same state a statute conferring an exclusive privilege upon a railroad company has been held to be not within the constitutional prohibition.

King v. *Tirrell*, 2 Gray, 331.

The provisions of the Constitution have not been deemed to extend to such cases.

This state has been selected as an illustration because the Constitution was adopted long ago, the construction above referred to was contemporaneous with its adoption, or nearly so, and has been long acquiesced in.

Other illustrations to the same effect might be given, if necessary. But the validity of such legislation, under similar constitutional provisions, is recognized in the general treatises, and is hardly open to question.

See, Cooley, Const. Lim. 390.

Nor is it open to question, at the present time, that until the adoption of the 14th Amendment, it was fully within the power of any state legislature to pass a law declaring occupations unlawful which were before lawful, and imposing burdens and restrictions upon occupations then lawful. Legislation concerning the employment of selling liquor and carrying on lotteries, in certain states, has changed occupations which were lawful into unlawful occupations, and has interfered with the acquisition of property, by those who were engaged in those occupations; and has abridged their natural rights, and prevented them from laboring in their chosen employment; but the validity of that legislation has been established by this court.

The charter, in the present case, falls within these principles. It conferred certain exclusive privileges, but it was upon the consideration of moneys to be expended and duties to be performed by the corporation for the public benefit.

The company was bound to expend very large sums of money in the first instance, in preparing for the accommodation of the public, and continuously to perform duties for the benefit of the public. It was bound alike to the provisions of the charter and by the Constitution of Louisiana, to maintain a public slaughter-house, where all persons might resort for the purpose of slaughtering their animals, upon the same terms. The company owed duties to the public, which it was bound to perform, under penalty of the forfeiture of its charter and a fine, and it might, moreover, be indicted for the non-performance of them.

It is apparent that these sums to be thus expended and these duties to be performed, furnished a substantial consideration for the granting of the charter. The legislature deemed it an adequate consideration. The supreme court of the state has found no reason for setting aside the judgment of the legislature.

Shall this court revise the judgment of the legislature upon a question like this?

This charter does not come within the legal meaning of the word "monopoly." A monopoly is an exclusive privilege granted without consideration.

Any man with capital or credit enough to procure the necessary animals may now be a butcher. This charter, therefore, is not a monopoly, in the sense that it prevents anybody from being a butcher; instead of that, it makes it easier to be a butcher than it was before. It is not a monopoly in the sense that it confers exclusive privileges without consideration. And this is the legal test of a monopoly.

See, *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 567, per McLean, J. "A monopoly is that which has been granted without consideration. The accommodation afforded to the public by the Charles River Bridge and the annuity paid to the College constitute a valuable consideration for the privilege granted by the charter." And in the same case, Mr. Justice Story said: "As long ago as the case in the Year Book, 22, Hen. VI., 14, the difference was pointed out in the argument between such grants as involve public duties and public matters, for the common benefit of the people, and such as are for mere private benefit, involving no such consideration." p. 639; see, also, 7 Pick. 448; 3 Kent, Com. 6th ed. 358, and note.

It is not necessary, therefore, in the present case, to fall back upon the doctrine that the legislative power of a state extends to the granting of strict monopolies; because this charter is not a monopoly. But Chief Justice Gibson did not shrink from the assertion that monopolies were not inconsistent with the laws of Pennsylvania. *Commonwealth* v. *Canal Comrs.* 5 Watts & S. 388.

And the power of Parliament to grant monopolies has not been denied.

Grant, Corp. 34.

Two cases have been chiefly relied on in opposition to these views: *Norwich Gas Light Co.* v. *Norwich City Gas Co.* 25 Conn. 19, and *Chicago* v. *Rumpff*, 45 Ill. 90.

The Connecticut case differs from the present in this: that the company there was under no obligation to make gas at all; or, if gas should be made, the company might refuse to supply it to any particular citizen. The company owed no duties, and incurred no obligations. There was, therefore, no consideration for that charter, and it might with reason be called a monopoly. Assuming it to be a monopoly, the court thought it unconstitutional; a conclusion not assented to by Chief Justice Gibson in *Commonwealth* v. *Canal Comrs.* 5 Watts & S. 388.

Whether the decision of the Connecticut case was right or wrong, that case differs from the present in the very particular upon which the decision chiefly rests.

In the Illinois case the power of the legislature to authorize such a city ordinance as there deemed invalid was not questioned by the court. The ordinance was invalid because not authorized by the legislature.

The provision in this charter for the inspection of animals designed to be eaten, is so manifestly an appropriate matter of legislation as to require no extended comment. It is similar in principle to the common inspection laws, which in different states reach a very great variety of articles.

Assuming, therefore, that the present charter would not be in violation of any provisions of the Constitution of the United States prior to the adoption of the 14th Amendment, the question remains, whether the adoption of that Amendment involves the surrender on the part of all the states, to the general government, of all right of legislation of this character.

So far as can be judged by public debates upon the subject, it was certainly never intended or contemplated that this Amendment should receive such construction. Have Congress and the whole nation been deceived, misled, mistaken? Have they done that which they did not intend to do?

The language of the Amendment is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws."

Taken in the broadest sense, this provision would prohibit any state from abridging any existing privileges of any citizens of the United States, or from enforcing any law already enacted which abridges any privileges or immu-

nities of citizens. It operates as a repeal of all laws which abridge privileges or immunities of citizens.

Taking it broadly, therefore, this Amendment will have the following results:

(*a*) Repeal all laws imposing license fees upon any particular employments, lawful to pursue under the common law.

(*b*) Repeal all laws regulating the mode carrying on any lawful employments—all offensive or dangerous trades and articles.

(*c*) Repeal all existing laws restraining the manufacture or sale of intoxicating liquors, restraining lotteries, etc.

(*d*) Repeal all existing laws as to the observance of the Lord's day, prohibiting labor or business thereon.

(*e*) Repeal all existing laws regulating and fixing the hours of labor, and prohibiting the employment of children, women, and men in any particular occupations or places for more than a certain number of hours per day.

(*f*) Repeal all existing charters and laws conferring exclusive privileges heretofore adjudged constitutional and valid.

(*g*) Preventing any legislature from passing any new statutes abridging the natural liberty of citizens in respect to any of these or kindred matters.

(*h*) Bring within the jurisdiction of this court all questions relating to any of these kindred subjects, and deprive the legislatures and state courts of the several states from regulating and settling their internal affairs.

There is no occasion to give any such broad significance to the words "privileges and immunities."

The true method of constitutional interpretation is; not to take a provision from its connection and consider it by itself alone, but to consider it with reference to all other provisions upon the same or kindred subjects, and to the state of things in which it had its origin.

The letter killeth.

Various illustrations might be given of departures from a literal construction of constitutional provisions.

The prohibition of *ex post facto* laws is held by judicial construction to have reference only to crimes.

Calder v. *Bull*, 3 Dall. 390.

The right conferred by certain state Constitutions for every subject to produce all proofs favorable to him, and be fully heard in his defense, gives no right to attend the investigation of his case by the grand jury.

The right to meet witnesses face to face does not exclude proof of dying declarations.

Commonwealth v. *Richards*, 18 Pick. 437.

The provision that no person "shall be compelled in any criminal case to be a witness against himself," was held in New York not to render invalid a statute against bribery, which required participators to testify against each other, with a provision that their testimony so given should not be used against themselves.

People v. *Hackley*, 24 N. Y. 81; see, also, *Perrine* v. *Striker*, 7 Paige, 598; *Henry* v. *Bank of Salina*, 5 Hill, 523; Redf., section in 1 Greenl. Ev. sec. 451, a.

The provision securing the right of trial by jury is held not to be applicable to proceedings in admiralty.

These are but illustrations.

The phrase "privileges and immunities of citizens" is not used for the first time in this Amendment. The original Constitution provided "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The privileges and immunities here contemplated are those which are fundamental, as, for instance, the right of going into any state for the purpose of residing therein; the right of taking up one's residence therein, and becoming a citizen; the right of free entrance and exit, and passage through; the protection of the laws affecting personal liberty.

See *Corfield* v. *Coryell*, 4 Wash. C. C. 381; *Bennett* v. *Boggs*, Bald. 60; *Smith* v. *Maryland*, 18 How. 71, 15 L. ed. 269; *Paul* v. *Virginia*, 8 Wall. 180, 19 L. ed. 360; *Dunham* v. *Lamphere*, 3 Gray, 276.

There is no reason for giving any more extensive signification to this phrase, as used in the Amendment, than was given to it as used in the original Constitution.

The design establishing this amendment to the Constitution was simple and well known. It was to assure to all citizens and persons the same rights enjoyed by white citizens and persons. Every citizen should enjoy the same rights as white citizens. Every person should enjoy the same protection of the laws as white persons.

This view of this amendment has been substantially recognized in California.

People v. *Brady*, 40 Cal. 198; see, also, *People* v. *Washington*, 36 Cal. 658, and in *North Carolina* v. *Hairston*, 63 N. C. 452; see, also, *State* v. *Underwood*, *Ib.* 98.

The same view is obvicusly taken by Judge Cooley, of Michigan, in Cooley, Const. Lim. 573, n. 597.

Mr. Justice **Miller** delivered the opinion of the court:

These cases are brought here by writs of error to the supreme court of the state of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing & Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that state.

The cases named above, with others which have been brought here and dismissed by agreement, were all decided by the supreme court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or *supersedeas*, *pending the action of the court on the [*58 merits. The opinion on that motion is reported in 10 Wall. 273, 19 L. ed. 915.

On account of the importance of the questions involved in these cases they were, by permission of the court, taken up out of their order on the docket and argued in January, 1872. At that hearing one of the justices was absent, and it was found, on consultation, that there was a diversity of views among those who were present.

Impressed with the gravity of the questions raised in the argument, the court under these circumstances ordered that the cases be placed on the calendar and re-argued before a full bench. This argument was had early in February last.

Preliminary to the consideration of those questions is a motion by the defendants to dismiss the cases, on the ground that the contest between the parties has been adjusted by an agreement made since the records came into this court, and that part of that agreement is that these writs should be dismissed. This motion was heard with the argument on the merits, and was much pressed by counsel. It is supported by affidavits and by copies of the written agreement relied on. It is sufficient to say of these that we do not find in them satisfactory evidence that the agreement is binding upon all the parties to the record who are named as plaintiffs in the several writs of error, and that there are parties now before the court, in each of the three cases, at the head of this case, who have not consented to their dismissal, and who are not bound by the action of those who have so consented. They have a right to be heard, and the motion to dismiss cannot prevail.

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the state courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the 13th and 14th articles of Amendment of the Constitution of the United States. The juris- [*59 diction and the duty of this court *to review the judgment of the state court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-landings and Slaughter-houses, and to Incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The 1st section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined; or the keeping or establishing any slaughter-houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition.

The 2d section designates the corporators, gives the name to the corporation, and confers on it the usual corporate powers.

The 3d and 4th section authorize the company to establish and erect within certain territorial limits, therein defined, one or more stock-yards, stock-landings, and slaughter-houses, and impose upon it the duty of erecting, on or before the first day of June, 1869, one grand slaughter-house of sufficient capacity for slaughtering five hundred animals per day.

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock landing and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company, for each steamboat and for each animal landed.

Section 5 orders the closing up of all other stock-landings *and slaughter-houses aft- [*60 er the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the state for that purpose.

These are the principal features of the statute, and are all that have any bearing upon the questions to be decided by us.

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens, the whole of the butchers of the city, of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions.

It is true that it grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, or furnishing the people of the city with the necessary daily supply of animal food.

The act divides itself into two main grants of privilege, the one in reference to stock-landings and stock-yards, and *the other to [*61 slaughter-houses. That the landing of live-stock in large droves, from steamboats on the bank of the river, and from railroad trains, should, for the safety and comfort of the people and the care of the animals, be limited to proper places, and those not numerous, needs no argument to prove it. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing places, and receiving a fair compensation for the service.

It is, however, the slaughter-house privilege, which is mainly relied on to justify the charges of gross injustice to the public, and invasion of private right.

It is not, and cannot be successfully contro-

verted, that it is both the right and the duty of the legislative body, the supreme power of the state or municipality, to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else.

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher, then, is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this **62***] statute, with the *duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, 2 Com. 340, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. *Com.* v. *Alger*, 7 Cush. 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.

"It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." *Thorpe* v. *Rut. & B. R. Co.* 27 Vt. 149.

*The regulation of the place and man- [***63** ner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise.

In *Gibbons* v. *Ogden*, 9 Wheat. 203, Chief Justice Marshall, speaking of inspection laws passed by the states, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a state not surrendered to the general government—all of which can be most advantageously administered by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation."

The exclusive authority of state legislation over this subject is strikingly illustrated in the case of *New York* v. *Miln*, 11 Pet. 102. In that case the defendant was prosecuted for failing to comply with a statute of New York which required every master of a vessel arriving from a foreign port, into that of New York city, to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of Congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the state, and unaffected by the clause of the Constitution which conferred on Congress the right to regulate commerce.

*To the same purpose are the recent [***64** cases of *The License Tax*, 5 Wall. 471, 18 L. ed. 500, and *United States* v. *De Witt*, 9 Wall. 41, 19 L. ed. 593. In the latter case an act of Congress which undertook as a part of the internal revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the states, and did not belong to Congress.

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent and effectual. But it is said that, in creating a corporation for this purpose, and conferring upon it exclusive privi-

leges—privileges which it is said constitute a monopoly — the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch* v. *Maryland*, Wheat. 316; in relation **65***] to the power of Congress to organize *the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a state?

The eminent and learned counsel who has twice argued the negative of this question has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, 11 p. 84; and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the Crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from **66***] Macaulay clearly *establishes that the contest was between the Crown and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have, from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges, privileges denied to other citizens, privileges which come within any just definition of the word "monopoly," as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that state or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the Constitution of the state, the supreme court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the 13th article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the 1st section of the 14th article of amendment.

*This court is thus called upon for the [**67** first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several states to each other, and to the citizens of the states, and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement

that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added, by the voice of the people, to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the states, for additional guaranties 68*] of human rights; *additional powers to the Federal government; additional restraints upon those of the states. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the states of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the states in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The Proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the Proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the 13th article 69*] of amendment of that instrument. *Its two short sections seem hardly to admit of construction; so vigorous is their expression and so appropriate to the purpose we have indicated.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves — and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant, is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than "slavery," as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation. *Matter of Turner*, 1 Abb. (U. S.) 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana now under consideration.

*The process of restoring to their [*70 proper relations with the Federal government and with the other states those which had sided with the Rebellion, undertaken under the Proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of the legislation adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property, to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced,

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the Rebellion, and who supposed that by the 13th article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the 14th Amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, 71*] until they *ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the 15th Amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude." The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 72*] 15th Amendment, in terms, *mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so, if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The 1st section of the 14th article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether *this proposition was [*73 sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and, if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a state, the 1st clause of the 1st section was framed:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can ad-

mit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established.

74* *Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.

The language is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words "citizen of the state" should be left out when it is so carefully used, and used in contradistinction to "citizens of the United States" in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

75* *If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the Articles of the old Confederation.

It declares "That, the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the 4th article, in the following words: The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823. 4 Wash. C. C. 371.

*"The inquiry," he says, "is, what are [**76** the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate." "They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward* v. *Maryland*, 12 Wall. 430, 20 L. ed. 452, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure.

In the case of *Paul* v. *Virginia*, 8 Wall. 180, 19 L. ed. 360, the court, in expounding this clause of the Constitution, says that "the privi-

leges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter
77*] *states under their Constitution and laws by virtue of their being citizens."

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government. Was it the purpose of the 14th Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposi-
78*] tion of the *plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the supreme court of Louisiana in these cases would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states, which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges *and [*79
immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*, 6 Wall. 36, 18 L. ed. 745. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land-offices, and courts of justice in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that, for all the great purposes for which the Federal government was established, we are one people with one common country; we are all citizens of the United States;" and it is as such citizens that their rights are supported in this court in *Crandall* v. *Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guarantied by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with

foreign nations, *are dependent upon [80* citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the 13th and 15th articles of Amendment, and by the other clause of the Fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the 14th Amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state, wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the 5th Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present Amendment may place the restraining power over the states in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both state and national, of the mean- [81*] ing of this clause. And it *is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the 5th section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and we do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the Amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has *never been very well defined in pub- [*82 lic opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power and it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between state and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are affirmed. [*83

Mr. Justice **Field**, dissenting:

I am unable to agree with the majority of the

courts in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the state of Louisiana, entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-landings and Slaughter-houses, and to Incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company.'" which was approved on the 8th of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to "land, keep or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughter-houses, or *abattoirs* within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard," except as provided in the act; and imposes a penalty of $250 for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, "wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect and preserve all kinds of horses, mules, cattle and other animals," and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the com-
84*] pany, and be there *yarded, sheltered and protected, if necessary; and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid within fifteen days, to take proceedings for their sale. Every person violating any of these provisions, or landing, yarding, or keeping animals elsewhere, is subjected to a fine of $250.

The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the Port of New Orleans, at the same time authorizing the company to erect other landing places, and other slaughter-houses at any points consistent with the provisions of the act.

The act then provides that when the slaughter houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time "all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of $100 for each and every offense."

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore and entrails of all animals except of swine.

Other provisions in the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only *follows from the provisions I have cited, [*85 but it is declared in express terms in the act. In the 3d section the language is that the corporation "shall have the sole and exclusive privilege of conducting and carrying on the live stock, landing and slaughter-house business within the limits and privileges granted by the provisions of the act." And in the 4th section the language is, that after the first day of June, 1869, the company shall have "the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson," and "the exclusive privilege of having slaughtered" in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson, 384 square miles; and the parish of St. Bernard, 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation to prevent the assertion and enforcement of these privileges. The second case was instituted by the Attorney General of the state, and in the name of the state, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock-dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error *is this: That prior to the [*86 passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard, animals suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes

named about a thousand persons were thus engaged in procuring, preparing and selling animal food. And they complain that the business of landing, yarding and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is made by that act unlawful for anyone except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1,154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error; *87] and I shall endeavor to *show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement.

In the law in question there are only two provisions which can properly be called police regulations: the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it, of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city, embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such *object could possibly [*88 justify legislation removing such buildings from a large part of the state for the benefit of a single corporation. The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively *for twenty-five years, [*89 for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature be equally granted to a single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted

for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therfore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent Amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by state legislation. In my judgment the 14th Amendment does afford such protection, and was so intended by the Congress which framed and the states which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the 13th Amendment.

That Amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form [*90] of slavery which had *previously prevailed in this country, and to which the recent Civil War owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evident that the language of the Amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the civil rights act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects everyone, and to enjoy equally with others the fruits of his labor. A prohibition to him to pursue certain callings open to others of the same age, condition and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, *and would equally constitute [*91] an element of servitude. The counsel of the plaintiffs in error therefore contend that "wherever a law of a state, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others," there involuntary servitude exists within the meaning of the 13th Amendment.

It is not necessary in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the civil rights act, which was framed and adopted upon a construction of the 13th Amendment, giving to its language a similar breadth. That Amendment was ratified on the 18th of December, 1865. The proclamation of its ratification was made on that day (13 Stat. at L. 774), and in April of the following year the civil rights act was passed. 14 Stat. at L. 27. Its 1st section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as enjoyed by white citizens."

This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others was, to the extent of the denial, subjecting him to an involuntary *servitude. Sen- [*92] ator Trumbull, who drew the act, and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the Amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the southern states, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." Cong. Globe, 1st Sess. 39th Cong. part 1, p. 474.

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France 93*] where, as says a French *writer, the possessor was prohibited "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market." The exclusive right to all these privileges was vested in the lords of the vicinage. "The history of ancient times," says the writer from whom I have quoted, "of the most execrable tyranny offers nothing like this. This category of oppressions cannot be applied to a free man, or to the possessor, except in violation of his rights." Championniere, ch. 9, § 4.

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the constructions and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations of private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the Thirteenth Amendment. The provisions of the Fourteenth Amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The Amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the civil rights act, and to place the common rights of the American citizens under the protection of the National government. It first declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." It then declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process *of law, nor deny to any person within its [*94 jurisdiction the equal protection of the laws."

The first clause of this Amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the state, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the state. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill in 1833, referring to the reliance expressed by a Senator upon the fact that we are citizens of the United States, he said: "If, by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some state or territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some state or territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several states; and it is in this and no other sense that we are citizens of the United States."

In the *Dred Scott Case* this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several states, under their constitutions and laws.

*The Chief Justice, in that case, and a [*95 majority of the court with him, held that the words "people of the United States" and "citizens of the United States" were synonymous terms; that the people of the respective states were the parties to the Constitution; that these people consisted of the free inhabitants of those states; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any state to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that, therefore, the descendants of persons brought to this country and sold as slaves were not, and could not be, citizens within the meaning of the Constitution.

The first clause of the fourteenth Amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their

birth, or the fact of their adoption, and not upon the Constitution or laws of any state or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the state, or city, or town where he resides. They are thus affected in a state by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the state, or by the residence of the citizen therein. They *96] do not derive *their existence from its legislation, and cannot be destroyed by its power.

The Amendment does not attempt to confer any new privileges or immunities upon citizens or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgement by state legislation?

In the 1st section of the civil rights act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the 14th Amendment, but the Amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to *97] legislation *of a similar character, extending the protection of the national government over the common right of all citizens of the United States. Accordingly, after its ratification Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the Amendment. May 31, 1870, 16 Stat. at L. 144.

The terms "privileges and immunities" are not new in the Amendment; they were in the Constitution before the Amendment was adopted. They are found in the 2d section of the 4th article, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell*, 4 Wash. C. C. 380, Mr. Justice Washington said he had "no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign;" and in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be "all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions *in Congress upon the passage of the [*98 civil rights act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the 1st section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth "as appertaining to every freeman."

The privileges and immunities designated in the 2d section of the 4th article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each state in the several states upon the same terms and conditions as they are enjoyed by the citizens of the latter states. No discrimination can be made by one state against the citizens of other states in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several states whilst in the same state.

Nor is there anything in the opinion in the case of *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed.

357, which at all militates against these views, as is supposed by the majority of the court. The act of Virginia, of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the state, should carry on its business within the state without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the state bonds of a specified character, to an amount varying from $30,000 to $50,000. No such deposit was required of insurance companies incorporated by the *99] state, for carrying on *its business within the state; and in the case cited the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other states was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." But the court answered, that corporations were not citizens within the meaning of this clause; that the term "citizens" as there used applied only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state, under the laws of which it was created, and to this extent would treat a corporation as a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different states, it had never been held in any case which had come under its observation, either in the state, or Federal Courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each state to the privileges and immunities of citizens in the several states. And the court observed, that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter states, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own states were not secured in other states by the provision; that it was not intended by it to give to the laws of one state any operation in other states; that they could have no such operation except by the permission, expressed or implied, of those states; and that the special privileges which they conferred must, therefore, be enjoyed 100*] at home unless the assent *of other states to their enjoyment therein were given. And so the court held that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other states, and the enforcement of its contracts made therein, depended purely upon the assent of those states which could be granted upon such terms and conditions as those states might think proper to impose.

The whole purport of the decision was, that citizens of one state do not carry with them into other states any special privileges or immunities, conferred by the laws of their own states, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each state do carry with them into other states and are secured there by the clause in question, in the enjoyment of such privileges and immunities upon terms of equality with citizens of the latter states. This equality in one particular was enforced by this court in the recent case of *Ward* v. *Md.* reported in 12 Wall. 430, 20 L. ed. 452. A statute of that state required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the state, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each state the privileges and immunities of citizens of the several states. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one state against hostile and discriminating legislation of other states, the 14th Amendment does for the *protection of every citizen of the Unit- [*101 ed States against hostile and discriminating legislation, against him in favor of others whether they reside in the same or in different states. If, under the 4th article of the Constitution, equality of privileges and immunities is secured between citizens of different states, under the 14th Amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the 4th article of the Constitution any state could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other states. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the state so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the 4th article with the citizens of the state exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the state to exclude at any time the citizens of other states from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one state against the creation of monopolies in favor of citizens of other states, the 14th Amendment does for the

protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgement in any form by any state. The 14th Amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were **102*]** *held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.

A monopoly is defined "to be an institution of allowance from the sovereign power of the state by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom of liberty they had before, or hindered in their lawful trade." All such grants relating to any known trade have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom of liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential for the free and successful prosecution, by any butcher, of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole **103*]** *right to import playing cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. "All trades," said the court, "as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable to the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject." The case of *Davenant* and *Hurdis*, 11 Coke, 86, was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one half of his cloths to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, "and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void."

*Although the court, in its opinion, re- [**104**
fers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I., by which "it was declared that all monopolies and all commissions, grants, licenses, charters and letters patent, to any person or persons, bodies, politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything" within the realm of the Dominion of Wales, were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the King, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I., to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, to-

gether with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties." Journ. Cong. **105*** Vol. I, pp. 28–30. *Of the statutes, the benefits of which was thus claimed, the statute of James I. against monopolies was one of the most important. And when the colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British Empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness; and that to secure these rights governments are instituted among men."

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI., in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds and trading companies, and authorized every person to exercise, without restraint, his art, trade or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that state of the civil law as the basis of its jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the 14th Amendment secures the like protection to all citizens in that state against any abridgement of their common rights, as in other states. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the 14th **106*** Amendment every *citizen of the United States should be able to plead his citizenship of the Republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocation of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the interference with the privilege of the citizen has been pronounced illegal and void. When a case under the same law under which the present cases have arisen came before the circuit court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen. *Live-Stock Assoc.* v. *Crescent City Co.* 1 Abb. U. S. 398. The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a state could not by its laws invade, but that so far as the question under consideration was concerned, it might be safely said that "It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

In *The City of Chicago* v. *Rumpff*, 45 Ill. 90, which was before the supreme court of Illinois, we have a case similar in all its *features [**107** to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an "ordinance" in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: "The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner

to be paid a specific sum for the privilege, what **108*** would prevent the making a *similar contract with some other person that all of the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle."

It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a state. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of *The Gaslight Co.* v. *Norwich C. G. Co.* 25 Conn. 19, which was before the supreme court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against **109*** a monopoly, *yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the 1st section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."

In *The Mayor, etc.* v. *Thorne*, 7 Paige, 261, an application was made to the Chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the Chancellor said: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business."

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, *throughout the [***110** whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name. The 14th Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.[1] As stated by the

[1] "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." Smith's wealth of Nations, b. 1, ch. 10, part. 2.

In the edict of Louis XVI., in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: "It was the allurement of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the King might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all." . . . He, therefore, regards it "as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity."

111*] supreme court of Connecticut, in *the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.[1]

I am authorized by Mr. Chief Justice **Chase**, Mr. Justice **Swayne** and Mr. Justice **Bradley**, to state that they concur with me in this dissenting opinion.

Mr. Justice **Bradley**, dissenting:

I concur in the opinion which has just been read by Mr. Justice Field, but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The 14th Amendment to the Constitution of the United States, section one, declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretense of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings **112***] for cattle, and yards for *confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Second. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the 14th Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary depending upon the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein, *and an [***113** equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every state in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the state where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a state legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular state? Or if a state legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that state as citizens of the United States, or only as citizens of the state. Would they have no redress but to appeal to the courts of that particular state?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of *his most valuable rights, and [***114** one which the legislature of a state cannot invade, whether restrained by its own Constitution or not.

The right of a state to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may

[1] "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." 1 Sharswood's Blackstone, 127, note 8.

leges—privileges which it is said constitute a monopoly — the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch* v. *Maryland*, Wheat. 316; in relation **65***] to the power of Congress to organize *the Bank of the United States to aid in the fiscal operations of the government.

It can readily be seen that the interested vigilance of the corporation created by the Louisiana legislature will be more efficient in enforcing the limitation prescribed for the stock-landing and slaughtering business for the good of the city than the ordinary efforts of the officers of the law.

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. And in this respect we are not able to see that these privileges are especially odious or objectionable. The duty imposed as a consideration for the privilege is well defined, and its enforcement well guarded. The prices or charges to be made by the company are limited by the statute, and we are not advised that they are on the whole exorbitant or unjust.

The proposition is, therefore, reduced to these terms: can any exclusive privileges be granted to any of its citizens, or to a corporation, by the legislature of a state?

The eminent and learned counsel who has twice argued the negative of this question has displayed a research into the history of monopolies in England, and the European continent, only equalled by the eloquence with which they are denounced.

But it is to be observed that all such references are to monopolies established by the monarch in derogation of the rights of his subjects, or arise out of transactions in which the people were unrepresented, and their interests uncared for. The great *Case of Monopolies*, reported by Coke, 11 p. 84; and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the Crown; for whoever doubted the authority of Parliament to change or modify the common law? The discussion in the House of Commons cited from **66***] Macaulay clearly *establishes that the contest was between the Crown and the people represented in Parliament.

But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have, from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges, privileges denied to other citizens, privileges which come within any just definition of the word "monopoly," as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good, have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that state or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the Constitution of the state, the supreme court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the 13th article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the 1st section of the 14th article of amendment.

*This court is thus called upon for the [***67** first time to give construction to these articles.

We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several states to each other, and to the citizens of the states, and of the United States, have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go.

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement

that they were practically contemporaneous with the adoption of the original; and the twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added, by the voice of the people, to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the states, for additional guaranties 68*] of human rights; *additional powers to the Federal government; additional restraints upon those of the states. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the states of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the states in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the War of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel. And when hard pressed in the contest these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The Proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the Proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the 13th article 69*] of amendment of that instrument. *Its two short sections seem hardly to admit of construction; so vigorous is their expression and so appropriate to the purpose we have indicated.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves — and with a microscopic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant, is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than "slavery," as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word "slavery" had been used. The case of the apprentice slave, held under a law of Maryland, liberated by Chief Justice Chase, on a writ of habeas corpus under this article, illustrates this course of observation. *Matter of Turner*, 1 Abb. (U. S.) 84. And it is all that we deem necessary to say on the application of that article to the statute of Louisiana now under consideration.

*The process of restoring to their [*70 proper relations with the Federal government and with the other states those which had sided with the Rebellion, undertaken under the Proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of the legislation adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property, to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some states forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the Rebellion, and who supposed that by the 13th article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the 14th Amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, 71*] until they *ratified that article by a formal vote of their legislative bodies.

Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

Hence the 15th Amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude." The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union.

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 72*] 15th Amendment, in terms, *mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so, if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The 1st section of the 14th article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether *this proposition was [*73 sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case*, only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not and could not be a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and, if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States and also citizenship of a state, the 1st clause of the 1st section was framed:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can ad-

mit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. **74*** *Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.

The language is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words "citizen of the state" should be left out when it is so carefully used, and used in contradistinction to "citizens of the United States" in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

75* *If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history is to be found in the fourth of the Articles of the old Confederation.

It declares "That, the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the 4th article, in the following words: The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823. 4 Wash. C. C. 371.

*"The inquiry," he says, "is, what are [**76** the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate." "They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward* v. *Maryland*, 12 Wall. 430, 20 L. ed. 452, while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure.

In the case of *Paul* v. *Virginia*, 8 Wall. 180, 19 L. ed. 360, the court, in expounding this clause of the Constitution, says that "the privi-

leges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter
77*] *states under their Constitution and laws by virtue of their being citizens."

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government. Was it the purpose of the 14th Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

All this and more must follow, if the proposi-
78*] tion of the *plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the supreme court of Louisiana in these cases would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states, which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges *and [*79
immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its Constitution, or its laws.

One of these is well described in the case of *Crandall* v. *Nevada*, 6 Wall. 36, 18 L. ed. 745. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land-offices, and courts of justice in the several states." And quoting from the language of Chief Justice Taney in another case, it is said "that, for all the great purposes for which the Federal government was established, we are one people with one common country; we are all citizens of the United States;" and it is as such citizens that their rights are supported in this court in *Crandall* v. *Nevada*.

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guarantied by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with

foreign nations, *are dependent upon [80* citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the 13th and 15th articles of Amendment, and by the other clause of the Fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the 14th Amendment under consideration.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state, wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the 5th Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the states, as a restraint upon the power of the states. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present Amendment may place the restraining power over the states in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both state and national, of the mean- [*81 ing of this clause. And it *is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the states did not conform their laws to its requirements, then by the 5th section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a state that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and we do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the Amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the national government from those of the state governments, and though this line has *never been very well defined in pub- [*82 lic opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power and it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state, and of contiguous states, for a determined resistance to the general government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong national government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between state and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

**The judgments of the Supreme Court [*83 of Louisiana in these cases are affirmed.*

Mr. Justice **Field**, dissenting:

I am unable to agree with the majority of the

courts in these cases, and will proceed to state the reasons of my dissent from their judgment.

The cases grow out of the act of the legislature of the state of Louisiana, entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-landings and Slaughter-houses, and to Incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company.'" which was approved on the 8th of March, 1869, and went into operation on the first of June following. The act creates the corporation mentioned in its title, which is composed of seventeen persons designated by name, and invests them and their successors with the powers usually conferred upon corporations in addition to their special and exclusive privileges. It first declares that it shall not be lawful, after the first day of June, 1869, to "land, keep or slaughter any cattle, beeves, calves, sheep, swine, or other animals, or to have, keep, or establish any stock-landing, yards, slaughter-houses, or *abattoirs* within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard," except as provided in the act; and imposes a penalty of $250 for each violation of its provisions. It then authorizes the corporation mentioned to establish and erect within the parish of St. Bernard and the corporate limits of New Orleans, below the United States barracks, on the east side of the Mississippi, or at any point below a designated railroad depot on the west side of the river, "wharves, stables, sheds, yards, and buildings, necessary to land, stable, shelter, protect and preserve all kinds of horses, mules, cattle and other animals," and provides that cattle and other animals, destined for sale or slaughter in the city of New Orleans or its environs, shall be landed at the landings and yards of the com-
84*] pany, and be there *yarded, sheltered and protected, if necessary; and that the company shall be entitled to certain prescribed fees for the use of its wharves, and for each animal landed, and be authorized to detain the animals until the fees are paid, and if not paid within fifteen days, to take proceedings for their sale. Every person violating any of these provisions, or landing, yarding, or keeping animals elsewhere, is subjected to a fine of $250.

The act then requires the corporation to erect a grand slaughter-house of sufficient dimensions to accommodate all butchers, and in which five hundred animals may be slaughtered a day, with a sufficient number of sheds and stables for the stock received at the Port of New Orleans, at the same time authorizing the company to erect other landing places, and other slaughter-houses at any points consistent with the provisions of the act.

The act then provides that when the slaughter houses and accessory buildings have been completed and thrown open for use, public notice thereof shall be given for thirty days, and within that time "all other stock-landings and slaughter-houses within the parishes of Orleans, Jefferson, and St. Bernard shall be closed, and it shall no longer be lawful to slaughter cattle, hogs, calves, sheep or goats, the meat of which is determined [destined] for sale within the parishes aforesaid, under a penalty of $100 for each and every offense."

The act then provides that the company shall receive for every animal slaughtered in its buildings certain prescribed fees, besides the head, feet, gore and entrails of all animals except of swine.

Other provisions in the act require the inspection of the animals before they are slaughtered, and allow the construction of railways to facilitate communication with the buildings of the company and the city of New Orleans.

But it is only the special and exclusive privileges conferred by the act that this court has to consider in the cases before it. These privileges are granted for the period of twenty-five years. Their exclusive character not only *follows from the provisions I have cited, [*85 but it is declared in express terms in the act. In the 3d section the language is that the corporation "shall have the sole and exclusive privilege of conducting and carrying on the live stock, landing and slaughter-house business within the limits and privileges granted by the provisions of the act." And in the 4th section the language is, that after the first day of June, 1869, the company shall have "the exclusive privilege of having landed at their landing-places all animals intended for sale or slaughter in the parishes of Orleans and Jefferson," and "the exclusive privilege of having slaughtered" in its slaughter-houses all animals, the meat of which is intended for sale in these parishes.

In order to understand the real character of these special privileges, it is necessary to know the extent of country and of population which they affect. The parish of Orleans contains an area of country of 150 square miles; the parish of Jefferson, 384 square miles; and the parish of St. Bernard, 620 square miles. The three parishes together contain an area of 1154 square miles, and they have a population of between two and three hundred thousand people.

The plaintiffs in error deny the validity of the act in question, so far as it confers the special and exclusive privileges mentioned. The first case before us was brought by an association of butchers in the three parishes against the corporation to prevent the assertion and enforcement of these privileges. The second case was instituted by the Attorney General of the state, and in the name of the state, to protect the corporation in the enjoyment of these privileges, and to prevent an association of stock-dealers and butchers from acquiring a tract of land in the same district with the corporation, upon which to erect suitable buildings for receiving, keeping and slaughtering cattle, and preparing animal food for market. The third case was commenced by the corporation itself, to restrain the defendants from carrying on a business similar to its own, in violation of its alleged exclusive privileges.

The substance of the averments of the plaintiffs in error *is this: That prior to the [*86 passage of the act in question they were engaged in the lawful and necessary business of procuring and bringing to the parishes of Orleans, Jefferson, and St. Bernard, animals suitable for human food, and in preparing such food for market; that in the prosecution of this business they had provided in these parishes suitable establishments for landing, sheltering, keeping and slaughtering cattle and the sale of meat; that with their association about four hundred persons were connected, and that in the parishes

named about a thousand persons were thus engaged in procuring, preparing and selling animal food. And they complain that the business of landing, yarding and keeping, within the parishes named, cattle intended for sale or slaughter, which was lawful for them to pursue before the first day of June, 1869, is made by that act unlawful for anyone except the corporation named; and that the business of slaughtering cattle and preparing animal food for market, which it was lawful for them to pursue in these parishes before that day is made by that act unlawful for them to pursue afterwards, except in the buildings of the company, and upon payment of certain prescribed fees, and a surrender of a valuable portion of each animal slaughtered. And they contend that the lawful business of landing, yarding, sheltering, and keeping cattle intended for sale or slaughter, which they in common with every individual in the community of the three parishes had a right to follow, cannot be thus taken from them and given over for a period of twenty-five years to the sole and exclusive enjoyment of a corporation of seventeen persons or of anybody else. And they also contend that the lawful and necessary business of slaughtering cattle and preparing animal food for market, which they and all other individuals had a right to follow, cannot be thus restricted within this territory of 1,154 square miles to the buildings of this corporation, or be subjected to tribute for the emolument of that body.

No one will deny the abstract justice which lies in the position of the plaintiffs in error; *87] and I shall endeavor to *show that the position has some support in the fundamental law of the country.

It is contended in justification for the act in question that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the state. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the state and its legitimate exercise I shall not differ from the majority of the court. But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgement.

In the law in question there are only two provisions which can properly be called police regulations: the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it, of special and exclusive privileges by which the health of the city is in no way promoted. It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city, embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals. The health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle, but no such *object could possibly [*88 justify legislation removing such buildings from a large part of the state for the benefit of a single corporation. The pretense of sanitary regulations for the grant of the exclusive privileges is a shallow one, which merits only this passing notice.

It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.

Nor is there any analogy between this act of Louisiana and the legislation which confers upon the inventor of a new and useful improvement an exclusive right to make and sell to others his invention. The government in this way only secures to the inventor the temporary enjoyment of that which, without him, would not have existed. It thus only recognizes in the inventor a temporary property in the product of his own brain.

The act of Louisiana presents the naked case unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively *for twenty-five years, [*89 for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature be equally granted to a single individual. If they may be granted for twenty-five years they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted

for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.

The question presented is, therfore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent Amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by state legislation. In my judgment the 14th Amendment does afford such protection, and was so intended by the Congress which framed and the states which adopted it.

The counsel for the plaintiffs in error have contended, with great force, that the act in question is also inhibited by the 13th Amendment.

That Amendment prohibits slavery and involuntary servitude, except as a punishment for crime, but I have not supposed it was susceptible of a construction which would cover the enactment in question. I have been so accustomed to regard it as intended to meet that form **90***] of slavery which had *previously prevailed in this country, and to which the recent Civil War owed its existence, that I was not prepared, nor am I yet, to give to it the extent and force ascribed by counsel. Still it is evident that the language of the Amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.

The words "involuntary servitude" have not been the subject of any judicial or legislative exposition, that I am aware of, in this country, except that which is found in the civil rights act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects everyone, and to enjoy equally with others the fruits of his labor. A prohibition to him to pursue certain callings open to others of the same age, condition and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, *and would equally constitute [***91** an element of servitude. The counsel of the plaintiffs in error therefore contend that "wherever a law of a state, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others," there involuntary servitude exists within the meaning of the 13th Amendment.

It is not necessary in my judgment, for the disposition of the present case in favor of the plaintiffs in error, to accept as entirely correct this conclusion of counsel. It, however, finds support in the act of Congress known as the civil rights act, which was framed and adopted upon a construction of the 13th Amendment, giving to its language a similar breadth. That Amendment was ratified on the 18th of December, 1865. The proclamation of its ratification was made on that day (13 Stat. at L. 774), and in April of the following year the civil rights act was passed. 14 Stat. at L. 27. Its 1st section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "such citizens, of every race and color, without regard to any previous condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as enjoyed by white citizens."

This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others was, to the extent of the denial, subjecting him to an involuntary *servitude. Sen- [***92** ator Trumbull, who drew the act, and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the Amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the southern states, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited." Cong. Globe, 1st Sess. 39th Cong. part 1, p. 474.

By the act of Louisiana, within the three parishes named, a territory exceeding one thousand one hundred square miles, and embracing over two hundred thousand people, every man who pursues the business of preparing animal food for market must take his animals to the buildings of the favored company, and must perform his work in them, and for the use of the buildings must pay a prescribed tribute to the company, and leave with it a valuable portion of each animal slaughtered. Every man in these parishes who has a horse or other animal for sale must carry him to the yards and stables of this company, and for their use pay a like tribute. He is not allowed to do his work in his own buildings or to take his animals to his own stables or keep them in his own yards, even though they should be erected in the same district as the buildings, stables and yards of the company, and that district embraces over eleven hundred square miles. The prohibitions imposed by this act upon butchers and dealers in cattle in these parishes, and the special privileges conferred upon the favored corporation, are similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France [*93] where, as says a French *writer, the possessor was prohibited "to hunt on his own lands, to fish in his own waters, to grind at his own mill, to cook at his own oven, to dry his clothes on his own machines, to whet his instruments at his own grindstone, to make his own wine, his oil, and his cider at his own press, . . . or to sell his commodities at the public market." The exclusive right to all these privileges was vested in the lords of the vicinage. "The history of ancient times," says the writer from whom I have quoted, "of the most execrable tyranny offers nothing like this. This category of oppressions cannot be applied to a free man, or to the possessor, except in violation of his rights." Championniere, ch. 9, § 4.

But if the exclusive privileges conferred upon the Louisiana corporation can be sustained, it is not perceived why exclusive privileges for the constructions and keeping of ovens, machines, grindstones, wine-presses, and for all the numerous trades and pursuits for the prosecution of which buildings are required, may not be equally bestowed upon other corporations of private individuals, and for periods of indefinite duration.

It is not necessary, however, as I have said, to rest my objections to the act in question upon the terms and meaning of the Thirteenth Amendment. The provisions of the Fourteenth Amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration. The Amendment was adopted to obviate objections which had been raised and pressed with great force to the validity of the civil rights act, and to place the common rights of the American citizens under the protection of the National government. It first declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." It then declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process *of law, nor deny to any person within its [*94 jurisdiction the equal protection of the laws."

The first clause of this Amendment determines who are citizens of the United States, and how their citizenship is created. Before its enactment there was much diversity of opinion among jurists and statesmen whether there was any such citizenship independent of that of the state, and, if any existed, as to the manner in which it originated. With a great number the opinion prevailed that there was no such citizenship independent of the citizenship of the state. Such was the opinion of Mr. Calhoun and the class represented by him. In his celebrated speech in the Senate upon the Force Bill in 1833, referring to the reliance expressed by a Senator upon the fact that we are citizens of the United States, he said: "If, by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some state or territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some state or territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several states; and it is in this and no other sense that we are citizens of the United States."

In the *Dred Scott Case* this subject of citizenship of the United States was fully and elaborately discussed. The exposition in the opinion of Mr. Justice Curtis has been generally accepted by the profession of the country as the one containing the soundest views of constitutional law. And he held that, under the Constitution, citizenship of the United States in reference to natives was dependent upon citizenship in the several states, under their constitutions and laws.

*The Chief Justice, in that case, and a [*95 majority of the court with him, held that the words "people of the United States" and "citizens of the United States" were synonymous terms; that the people of the respective states were the parties to the Constitution; that these people consisted of the free inhabitants of those states; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that their descendants and persons naturalized were the only persons who could be citizens of the United States, and that it was not in the power of any state to invest any other person with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that, therefore, the descendants of persons brought to this country and sold as slaves were not, and could not be, citizens within the meaning of the Constitution.

The first clause of the fourteenth Amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their

birth, or the fact of their adoption, and not upon the Constitution or laws of any state or the condition of their ancestry. A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the state, or city, or town where he resides. They are thus affected in a state by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the state, or by the residence of the citizen therein. They *96] do not derive *their existence from its legislation, and cannot be destroyed by its power.

The Amendment does not attempt to confer any new privileges or immunities upon citizens or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

What, then, are the privileges and immunities which are secured against abridgement by state legislation?

In the 1st section of the civil rights act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." That act, it is true, was passed before the 14th Amendment, but the Amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to *97] legislation *of a similar character, extending the protection of the national government over the common right of all citizens of the United States. Accordingly, after its ratification Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the Amendment. May 31, 1870, 16 Stat. at L. 144.

The terms "privileges and immunities" are not new in the Amendment; they were in the Constitution before the Amendment was adopted. They are found in the 2d section of the 4th article, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and they have been the subject of frequent consideration in judicial decisions. In *Corfield* v. *Coryell*, 4 Wash. C. C. 380, Mr. Justice Washington said he had "no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign;" and in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be "all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." This appears to me to be a sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. In the discussions *in Congress upon the passage of the [*98 civil rights act repeated reference was made to this language of Mr. Justice Washington. It was cited by Senator Trumbull with the observation that it enumerated the very rights belonging to a citizen of the United States set forth in the 1st section of the act, and with the statement that all persons born in the United States, being declared by the act citizens of the United States, would thenceforth be entitled to the rights of citizens, and that these were the great fundamental rights set forth in the act; and that they were set forth "as appertaining to every freeman."

The privileges and immunities designated in the 2d section of the 4th article of the Constitution are, then, according to the decision cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each state in the several states upon the same terms and conditions as they are enjoyed by the citizens of the latter states. No discrimination can be made by one state against the citizens of other states in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several states whilst in the same state.

Nor is there anything in the opinion in the case of *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed.

357, which at all militates against these views, as is supposed by the majority of the court. The act of Virginia, of 1866, which was under consideration in that case, provided that no insurance company, not incorporated under the laws of the state, should carry on its business within the state without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the state bonds of a specified character, to an amount varying from $30,000 to $50,000. No such deposit was required of insurance companies incorporated by the *99] state, for carrying on *its business within the state; and in the case cited the validity of the discriminating provisions of the statute of Virginia between her own corporations and the corporations of other states was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." But the court answered, that corporations were not citizens within the meaning of this clause; that the term "citizens" as there used applied only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed; that though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the state, under the laws of which it was created, and to this extent would treat a corporation as a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different states, it had never been held in any case which had come under its observation, either in the state, or Federal Courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each state to the privileges and immunities of citizens in the several states. And the court observed, that the privileges and immunities secured by that provision were those privileges and immunities which were common to the citizens in the latter states, under their constitution and laws, by virtue of their being citizens; that special privileges enjoyed by citizens in their own states were not secured in other states by the provision; that it was not intended by it to give to the laws of one state any operation in other states: that they could have no such operation except by the permission, expressed or implied, of those states; and that the special privileges which they conferred must, therefore, be enjoyed 100*] at home unless the assent *of other states to their enjoyment therein were given. And so the court held that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other states, and the enforcement of its contracts made therein, depended purely upon the assent of those states which could be granted upon such terms and conditions as those states might think proper to impose.

The whole purport of the decision was, that citizens of one state do not carry with them into other states any special privileges or immunities, conferred by the laws of their own states, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing. These the citizens of each state do carry with them into other states and are secured there by the clause in question, in the enjoyment of such privileges and immunities upon terms of equality with citizens of the latter states. This equality in one particular was enforced by this court in the recent case of *Ward* v. *Md.* reported in 12 Wall. 430, 20 L. ed. 452. A statute of that state required the payment of a larger sum from a non-resident trader for a license to enable him to sell his merchandise in the state, than it did of a resident trader, and the court held, that the statute in thus discriminating against the non-resident trader contravened the clause securing to the citizens of each state the privileges and immunities of citizens of the several states. The privilege of disposing of his property, which was an essential incident to his ownership, possessed by the non-resident, was subjected by the statute of Maryland to a greater burden than was imposed upon a like privilege of her own citizens. The privileges of the non-resident were in this particular abridged by that legislation.

What the clause in question did for the protection of the citizens of one state against hostile and discriminating legislation of other states, the 14th Amendment does for the *protection of every citizen of the Unit- [*101 ed States against hostile and discriminating legislation, against him in favor of others whether they reside in the same or in different states. If, under the 4th article of the Constitution, equality of privileges and immunities is secured between citizens of different states, under the 14th Amendment the same equality is secured between citizens of the United States.

It will not be pretended that under the 4th article of the Constitution any state could create a monopoly in any known trade or manufacture in favor of her own citizens, or any portion of them, which would exclude an equal participation in the trade or manufacture monopolized by citizens of other states. She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the state so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the 4th article with the citizens of the state exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease. If this were not so it would be in the power of the state to exclude at any time the citizens of other states from participation in particular branches of commerce or trade, and extend the exclusion from time to time so as effectually to prevent any traffic with them.

Now, what the clause in question does for the protection of citizens of one state against the creation of monopolies in favor of citizens of other states, the 14th Amendment does for the

protection of every citizen of the United States against the creation of any monopoly whatever. The privileges and immunities of citizens of the United States, of every one of them, is secured against abridgement in any form by any state. The 14th Amendment places them under the guardianship of the national authority. All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were
102* *held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth.

A monopoly is defined "to be an institution of allowance from the sovereign power of the state by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom of liberty they had before, or hindered in their lawful trade." All such grants relating to any known trade have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities. The definition embraces, it will be observed, not merely the sole privilege of buying and selling particular articles, or of engaging in their manufacture, but also the sole privilege of using anything by which others may be restrained of the freedom of liberty they previously had in any lawful trade, or hindered in such trade. It thus covers in every particular the possession and use of suitable yards, stables and buildings for keeping and protecting cattle and other animals, and for their slaughter. Such establishments are essential for the free and successful prosecution, by any butcher, of the lawful trade of preparing animal food for market. The exclusive privilege of supplying such yards, buildings and other conveniences for the prosecution of this business in a large district of country, granted by the act of Louisiana to seventeen persons, is as much a monopoly as though the act had granted to the company the exclusive privilege of buying and selling the animals themselves. It equally restrains the butchers in the freedom and liberty they previously had, and hinders them in their lawful trade.

The reasons given for the judgment in the *Case of Monopolies* apply with equal force to the case at bar. In that case a patent had been granted to the plaintiff giving him the sole
103* *right to import playing cards, and the entire traffic in them, and the sole right to make such cards within the realm. The defendant, in disregard of this patent, made and sold some gross of such cards and imported others, and was accordingly sued for infringing upon the exclusive privileges of the plaintiff. As to a portion of the cards made and sold within the realm, he pleaded that he was a haberdasher in London and a free citizen of that city, and as such had a right to make and sell them. The court held the plea good and the grant void, as against the common law and divers acts of Parliament. "All trades," said the court, "as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable to the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law and the benefit and liberty of the subject." The case of *Davenant* and *Hurdis*, 11 Coke, 86, was cited in support of this position. In that case a company of merchant tailors in London, having power by charter to make ordinances for the better rule and government of the company, so that they were consonant to law and reason, made an ordinance that any brother of the society who should have any cloth dressed by a cloth-worker, not being a brother of the society, should put one half of his cloths to some brother of the same society who exercised the art of a cloth-worker, upon pain of forfeiting ten shillings, "and it was adjudged that the ordinance, although it had the countenance of a charter, was against the common law, because it was against the liberty of the subject; for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what cloth-worker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly and, therefore, such ordinance, by color of a charter or any grant by charter to such effect, would be void."

*Although the court, in its opinion, re- [***104**
fers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman.

The struggle of the English people against monopolies forms one of the most interesting and instructive chapters in their history. It finally ended in the passage of the statute of 21st James I., by which "it was declared that all monopolies and all commissions, grants, licenses, charters and letters patent, to any person or persons, bodies, politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything" within the realm of the Dominion of Wales, were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the King, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war.

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I., to which I have referred, only embodied the law as it had been previously declared by the courts of England, although frequently disregarded by the sovereigns of that country.

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, to-

gether with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties." Journ. Cong. **105*** Vol. I, pp. 28–30. *Of the statutes, the benefits of which was thus claimed, the statute of James I. against monopolies was one of the most important. And when the colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British Empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty and the pursuit of happiness; and that to secure these rights governments are instituted among men."

If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI., in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds and trading companies, and authorized every person to exercise, without restraint, his art, trade or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her cession to the United States. Since then, notwithstanding the existence in that state of the civil law as the basis of its jurisprudence, freedom of pursuit has been always recognized as the common right of her citizens. But were this otherwise, the 14th Amendment secures the like protection to all citizens in that state against any abridgement of their common rights, as in other states. That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the 14th **106*** Amendment every *citizen of the United States should be able to plead his citizenship of the Republic as a protection against any similar invasion of his privileges and immunities.

So fundamental has this privilege of every citizen to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocation of life, been regarded, that few instances have arisen where the principle has been so far violated as to call for the interposition of the courts. But whenever this has occurred, with the exception of the present cases from Louisiana, which are the most barefaced and flagrant of all, the interference with the privilege of the citizen has been pronounced illegal and void. When a case under the same law under which the present cases have arisen came before the circuit court of the United States in the District of Louisiana, there was no hesitation on the part of the court in declaring the law, in its exclusive features, to be an invasion of one of the fundamental privileges of the citizen. *Live-Stock Assoc.* v. *Crescent City Co.* 1 Abb. U. S. 398. The presiding justice, in delivering the opinion of the court, observed that it might be difficult to enumerate or define what were the essential privileges of a citizen of the United States, which a state could not by its laws invade, but that so far as the question under consideration was concerned, it might be safely said that "It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."

In *The City of Chicago* v. *Rumpff*, 45 Ill. 90, which was before the supreme court of Illinois, we have a case similar in all its *features [**107** to the one at bar. That city being authorized by its charter to regulate and license the slaughtering of animals within its corporate limits, the common council passed what was termed an "ordinance" in reference thereto, whereby a particular building was designated for the slaughtering of all animals intended for sale or consumption in the city, the owners of which were granted the exclusive right for a specified period to have all such animals slaughtered at their establishment, they to be paid a specific sum for the privilege by all persons exercising it. The validity of this action of the corporate authorities was assailed on the ground of the grant of exclusive privileges, and the court said: "The charter authorizes the city authorities to license or regulate such establishments. Where that body has made the necessary regulations, required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have an opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression. Or, if they should regard it for the interest of the city that such establishments should be licensed, the ordinance should be so framed that all persons desiring it might obtain licenses by conforming to the prescribed terms and regulations for the government of such business. We regard it neither as a regulation nor a license of the business to confine it to one building or to give it to one individual. Such an action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly. It impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business. Whether we consider this as an ordinance or a contract, it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws. The principle of equality of rights to the corporators is violated by this contract. If the common council may require all of the animals for the consumption of the city to be slaughtered in a single building, or on a particular lot, and the owner

to be paid a specific sum for the privilege, what **108*** would prevent the making a *similar contract with some other person that all of the vegetables or fruits, the flour, the groceries, the dry goods, or other commodities should be sold on his lot and he receive a compensation for the privilege? We can see no difference in principle."

It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a state. But, as it is justly observed by counsel, a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.

In the case of *The Gaslight Co.* v. *Norwich C. G. Co.* 25 Conn. 19, which was before the supreme court of Connecticut, it appeared that the common council of the city of Norwich had passed a resolution purporting to grant to one Treadway, his heirs and assigns, for the period of fifteen years, the right to lay gas-pipes in the streets of that city, declaring that no other person or corporation should, by the consent of the common council, lay gas-pipes in the streets during that time. The plaintiffs having purchased of Treadway, undertook to assert an exclusive right to use the streets for their purposes, as against another company which was using the streets for the same purposes. And the court said: "As, then, no consideration whatever, either of a public or private character, was reserved for the grant; and as the business of manufacturing and selling gas is an ordinary business, like the manufacture of leather, or any other article of trade in respect to which the government has no exclusive prerogative, we think that so far as the restriction of other persons than the plaintiffs from using the streets for the purpose of distributing gas by means of pipes, can fairly be viewed as intended to operate as a restriction upon its free manufacture and sale, it comes directly within the definition and description of a monopoly; and although we have no direct constitutional provision against **109*** a monopoly, *yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of Rights, the 1st section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."

In *The Mayor, etc.* v. *Thorne*, 7 Paige, 261, an application was made to the Chancellor of New York to dissolve an injunction restraining the defendants from erecting a building in the city of Hudson upon a vacant lot owned by them, intended to be used as a hay-press. The common council of the city had passed an ordinance directing that no person should erect, or construct, or cause to be erected or constructed, any wooden or frame barn, stable, or hay-press of certain dimensions, within certain specified limits in the city, without its permission. It appeared, however, that there were such buildings already in existence, not only in compact parts of the city, but also within the prohibited limits, the occupation of which for the storing and pressing of hay the common council did not intend to restrain. And the Chancellor said: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business and prohibit another who has an equal right from pursuing the same business."

In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, *throughout the [***110** whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name. The 14th Amendment, in my judgment, makes it essential to the validity of the legislation of every state that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.[1] As stated by the

[1] "The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." Smith's wealth of Nations, b. 1, ch. 10, part. 2.

In the edict of Louis XVI., in 1776, giving freedom to trades and professions, prepared by his minister, Turgot, he recites the contributions that had been made by the guilds and trade companies, and says: "It was the allurement of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the King might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all." . . . He, therefore, regards it "as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity."

111*] supreme court of Connecticut, in *the case cited, grants of exclusive privileges, such as is made by the act in question, are opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.[1]

I am authorized by Mr. Chief Justice **Chase**, Mr. Justice **Swayne** and Mr. Justice **Bradley**, to state that they concur with me in this dissenting opinion.

Mr. Justice **Bradley**, dissenting:

I concur in the opinion which has just been read by Mr. Justice Field, but desire to add a few observations for the purpose of more fully illustrating my views on the important question decided in these cases, and the special grounds on which they rest.

The 14th Amendment to the Constitution of the United States, section one, declares that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

The legislature of Louisiana, under pretense of making a police regulation for the promotion of the public health, passed an act conferring upon a corporation, created by the act, the exclusive right, for twenty-five years, to have and maintain slaughter-houses, landings 112*] for cattle, and yards for *confining cattle intended for slaughter, within the parishes of Orleans, Jefferson, and St. Bernard, a territory containing nearly twelve hundred square miles, including the city of New Orleans; and prohibiting all other persons from building, keeping, or having slaughter-houses, landings for cattle, and yards for confining cattle intended for slaughter within the said limits; and requiring that all cattle and other animals to be slaughtered for food in that district should be brought to the slaughter houses and works of the favored company to be slaughtered, and a payment of a fee to the company for such act.

It is contended that this prohibition abridges the privileges and immunities of citizens of the United States, especially of the plaintiffs in error, who were particularly affected thereby; and whether it does so or not is the simple question in this case. And the solution of this question depends upon the solution of two other questions, to wit:

First. Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?

Second. Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?

The first of these questions is one of vast importance, and lies at the very foundations of our government. The question is now settled by the 14th Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary depending upon the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein, *and an [*113 equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens. And when the spirit of lawlessness, mob violence, and sectional hate can be so completely repressed as to give full practical effect to this right, we shall be a happier nation, and a more prosperous one than we now are. Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every state in this Union, subject to such regulations as the legislature may rightfully prescribe. If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States.

Every citizen, then, being primarily a citizen of the United States, and, secondarily, a citizen of the state where he resides, what, in general, are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them?

If a state legislature should pass a law prohibiting the inhabitants of a particular township, county, or city, from tanning leather or making shoes, would such a law violate any privileges or immunities of those inhabitants as citizens of the United States, or only their privileges and immunities as citizens of that particular state? Or if a state legislature should pass a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary, so that no one could follow any such trades or professions except that which was pursued by his father, would such a law violate the privileges and immunities of the people of that state as citizens of the United States, or only as citizens of the state. Would they have no redress but to appeal to the courts of that particular state?

This seems to me to be the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of *his most valuable rights, and [*114 one which the legislature of a state cannot invade, whether restrained by its own Constitution or not.

The right of a state to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may

[1] "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." 1 Sharswood's Blackstone, 127, note 8.

prescribe the manner of their exercise, but it cannot subvert the rights themselves. I speak now of the rights of citizens of any free government. Granting for the present that the citizens of one government cannot claim the privileges of citizens in another government; that prior to the union of our North American states the citizens of one state could not claim the privileges of citizens in another state; or, that after the union was formed the citizens of the United States, as such, could not claim the privileges of citizens in any particular state; yet the citizens of each of the states and the citizens of the United States would be entitled to certain privileges and immunities as citizens, at the hands of their own government—privileges and immunities which their own governments respectively would be bound to respect and maintain. In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors. Citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the states.

The people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history. One of these fundamental rights was expressed in these words, found in Magna Charta: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him **115*]** or condemn *him but by lawful judgment of his peers or by the law of the land." English constitutional writers expound this article as rendering life, liberty and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of habeas corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. And of the last he says: "The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land."

The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written Constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that Constitution in the colonies, namely: the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution.

This, it is true, was the violation of a political right; but personal rights were deemed equally sacred, and were claimed by the very first Congress of the colonies, assembled in 1774, as the undoubted inheritance of the people of this country; and the Declaration of Independence, which *was the first political act of the Amer- [***116** ican people in their independent sovereign capacity, lays the foundation of our national existence upon this broad proposition: "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Here again we have the great three-fold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he can not be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

I think sufficient has been said to show that citizenship is not an empty name, but that, in this country at least, it has connected with it certain incidental rights, privileges, and immunities of the greatest importance. And to say that these rights and immunities attach only to state citizenship, and not to citizenship of the United States, appears to me to evince a very narrow and insufficient estimate of constitutional history and the rights of men, not to say the rights of the American people.

On this point the often quoted language of Mr. Justice Washington, in *Corfield* v. *Coryell*, 4 Wash. C. C. 380, is very instructive. Being *called upon to expound that clause in [***117** the 4th article of the Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," he says: "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. What these

fundamental privileges are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one state to pass through, or to reside in, any other state for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

It is pertinent to observe that both the clause of the Constitution referred to, and Justice Washington in his comment on it, speak of the privileges and immunities of citizens in a state, not of citizens of a state. It is the privileges and immunities of citizens, that is, of citizens as such, that are to be accorded to citizens of other states when they are found in any state; or, as Justice Washington says: "privileges and immunities which are, in their nature, 118*] fundamental; *which belong, of right, to the citizens of all free governments."

It is true the courts have usually regarded the clause referred to as securing only an equality of privileges with the citizens of the state in which the parties are found. Equality before the law is undoubtedly one of the privileges and immunities of every citizen. I am not aware than any case has arisen in which it became necessary to vindicate any other fundamental privilege of citizenship; although rights have been claimed which were not deemed fundamental, and have been rejected as not within the protection of this clause. Be this, however, as it may, the language of the clause is as I have stated it, and seems fairly susceptible of a broader interpretation than that which makes it a guaranty of mere equality of privileges with other citizens.

But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The states were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal Government; such as the right of habeas corpus, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of not being deprived of life, liberty, or property, without due process of law. These, and still others, are specified in the original Constitution or in the early Amendments of it, as among the privileges and immunities *of citizens of [*119 the United States, or, what is still stronger for the force of the argument, the rights of all persons whether citizens or not.

But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling and enjoying property; the privilege of engaging in any lawful employment for a livelihood; the privilege of resorting to the laws for redress of injuries and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any state or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a state, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated; and among these none is more essential and fundamental than the right to follow such profession or employment as each one may choose, subject only to uniform regulations equally applicable to all.

II. The next question to be determined in this case is: is a monopoly or exclusive right, given to one person, or corporation, to the exclusion of all others, to keep slaughter-houses in a district of nearly twelve hundred square miles, for the supply of meat for a great city, a reasonable regulation of that employment which the legislature has a right to impose?

The keeping of a slaughter-house is part of and incidental to the trade of a butcher—one of the ordinary occupations of human life. To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughter-house and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary and unjust. It has none of the *qualities of a police regulation. If [*120 it were really a police regulation, it would, undoubtedly, be within the power of the legislature. That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, etc., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one. It is one of those arbitrary and unjust laws made in the interest of a few scheming individuals, by which some of the southern states have, within the past few years, been so deplorably oppressed and impoverished. It seems to me strange that it can be viewed in any other light.

The granting of monopolies, or exclusive

privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty. It was so felt by the English nation as far back as the reigns of Elizabeth and James. A fierce struggle for the suppresison of such monopolies, and for abolishing the prerogative of creating them, was made and was successful. The statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve. It was a part of that inheritance which our fathers brought with them. This statute abolished all monopolies except grants for a term of years to the inventors of new manufactures. This exception is the groundwork of patents for new inventions and copyrights of books. These have always been sustained as beneficial to the state. But all other monoplies were abolished, as tending to the impoverishment of the people and to interference with their free pursuits. And ever since that struggle no English speaking people have ever endured such an odious badge of tyranny.

It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets and other establishments of a public kind. It re-
121*] quires but a slight *acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

Lastly: can the Federal Courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a state? Of this I entertain no doubt. Prior to the 14th Amendment this could not be done, except in a few instances, for the want of the requisite authority.

As the great mass of citizens of the United States were also citizens of individual states, many of their general privileges and immunities would be the same in the one capacity as in the other. Having this double citizenship, and the great body of municipal laws intended for the protection of person and property being the laws of the state, and no provision being made, and no machinery provided by the Constitution, except in a few specified cases, for any interference by the general government between a state and its citizens, the protection of the citizen in the enjoyment of his fundamental privileges and immunities (except where a citizen of one state went into another state) was largely left to state laws and state courts, where they will still continue to be left unless actually invaded by the unconstitutional acts or delinquency of the state governments themselves.

Admitting, therefore, that formerly the states were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States, except *in a [*122
few specified cases, that cannot be said now, since the adoption of the 14th Amendment. In my judgment, it was the intention of the people of this country in adopting that Amendment to provide national security against violation by the states of the fundamental rights of the citizen.

The 1st section of this Amendment, after declaring that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the state wherein they reside, proceeds to declare further, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that Congress shall have power to enforce by appropriate legislation the provisions of this article.

Now, here is a clear prohibition on the states against making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

If my views are correct with regard to what are the privileges and immunities of citizens, it follows conclusively that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens.

The Amendment also prohibits any state from depriving any person (citizen or otherwise) of life, liberty or property, without due process of law.

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.

The constitutional question is distinctly raised in these cases; the constitutional right is expressly claimed; it was *violated [*123
by state law, which was sustained by the state court, and we are called upon in a legitimate and proper way to afford redress. Our jurisdiction and our duty are plain and imperative.

It is futile to argue that none but persons of the African race are intended to be benefited by this Amendment. They may have been the primary cause of the Amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed.

The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the national government which had troubled the country for so many years in some of the states, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The Amendment was an attempt

to give voice to the strong national yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect in every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

But great fears are expressed that this construction of the Amendment will lead to enactments by Congress interfering with the internal affairs of the states, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the state governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of state tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.

In my judgment no such practical inconveniences would arise. Very little, if any, legislation on the part of Congress would be required to carry the Amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. **124***] The point would *be regularly raised in a suit at law, and settled by final reference to the Federal Court. As the privileges and immunities protected are only those fundamental ones which belong to every citizen, they would soon become so far defined as to cause but a slight accumulation of business in the Federal Courts. Besides, the recognized existence of the law would prevent its frequent violation. But even if the business of the national courts should be increased, Congress could easily supply the remedy by increasing their number and efficiency. The great question is: what is the true construction of the Amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort. The national will and national interest are of far greater importance.

In my opinion the judgment of the Supreme Court of Louisiana ought to be reversed.

Mr. Justice **Swayne,** dissenting:

I concur in the dissent in these cases and in the views expressed by my brethren, Mr. Justice Field and Mr. Justice Bradley. I desire, however, to submit a few additional remarks.

The first eleven Amendments to the Constitution were intended to be checks and limitations upon the government which that instrument called into existence. They had their origin in a spirit of jealousy on the part of the states, which existed when the Constitution was adopted. The first ten were proposed in 1789 by the first Congress at its first session after the organization of the government. The eleventh was proposed in 1794, and the twelfth in 1803. The one last mentioned regulates the mode of electing the President and Vice-President. It neither increased nor diminished the power of the general government, and may be said in that respect to occupy neutral ground. No further Amendments were made until 1865, a period of more than sixty years. The 13th Amendment was proposed by Congress on the 1st of February, 1865, the fourteenth on *the 16th of June, 1866, and the fif- [***125** teenth on the 27th of February, 1869. These Amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the states, and deeply affect those bodies. They are in this respect, at the opposite pole from the first eleven. *Barron* v. *Baltimore,* 7 Pet. 243; *Livingston* v. *Moore,* 7 Pet. 551; *Fox* v. *Ohio,* 5 How. 429; *Smith* v. *Md.* 18 How. 71, 15 L. ed. 269; *Pervear* v. *Com.* 5 Wall. 476, 18 L. ed. 608; *Twitchell* v. *Com.* 7 Wall. 321, 19 L. ed. 223.

Fairly construed, these Amendments may be said to rise to the dignity of a new Magna Charta. The thirteenth blotted out slavery and forbade forever its restoration. It struck the fetters from four millions of human beings and raised them at once to the sphere of freemen. This was an act of grace and justice performed by the nation. Before the war it could have been done only by the states where the institution existed, acting severally and separately from each other. The power then rested wholly with them. In that way, apparently, such a result could never have occurred. The power of Congress did not extend to the subject except in the territories.

The 14th Amendment consists of five sections. The first is as follows: "All persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The 5th section declares that Congress shall have power to enforce the provisions of this Amendment by appropriate legislation.

The 15th Amendment declares that the right to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Until this Amendment was adopted the sub- *ject to which it relates was wholly [***126** within the jurisdiction of the states. The general government was excluded from participation.

The 1st section of the 14th amendment is alone involved in the consideration of these cases. No searching analysis is necessary to eliminate its meaning. Its language is intelligible and direct. Nothing can be more transparent. Every word employed has an established signification. There is no room for construction. There is nothing to construe. Elaboration may obscure, but cannot make clearer the intent and purpose sought to be carried out.

(1) Citizens of the states and of the United States are defined.

(2) It is declared that no state shall, by law, abridge the privileges or immunities of citizens of the United States.

(3) That no state shall deprive any person, whether a citizen or not, of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

A citizen of a state is *ipso facto* a citizen of

the United States. No one can be the former without being also the latter; but the latter, by losing his residence in one state without acquiring it in another, although he continues to be the latter, ceases for the time to be the former. "The privileges and immunities" of a citizen of the United States include, among other things, the fundamental rights of life, liberty, and property, and also the rights which pertain to him by reason of his membership of the nation. The citizen of a state has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the state, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. It is only over those which belong to the citizen of the United States that the category here in question throws the shield of its protection. All those which belong to the citizen of a state, except as **127*]** to bills of attainder, *ex post facto* *laws, and laws impairing the obligation of contracts (Const. U. S. art. 1, sec. 10), are left to the guardianship of the Bills of Rights, Constitutions, and laws of the states respectively. Those rights may all be enjoyed in every state by the citizens of every other state by virtue of clause 2, sec. 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

In the next category, obviously *ex industria* to prevent as far as may be the possibility of misinterpretation, either as to persons or things, the phrases "citizens of the United States" and "privileges and immunities" are dropped, and more simple and comprehensive terms are substituted. The substitutes are "any person," and "life," "liberty," and "property," and "equal protection of the laws." Life, liberty, and property are forbidden to be taken "without due process of law," and "equal protection of the laws," is guarantied to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. "Due process of law" is the application of the law as it exists in the fair and regular course of administrative procedure. The "equal protection of the laws" places all upon a footing of legal equality and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness. *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Lemmon* v. *People*, 26 Barb. 274, and 20 N. Y. 626; *Conner* v. *Elliott*, 18 How. 593, 15 L. ed. 498; *Murray* v. *McCarty*, 2 Munf. 399; *Campbell* v. *Morris*, 3 Har. & McH. 554; *Towles' Case*, 5 Leigh, 748; *State* v. *Medbury*, 3 R. I. 142; 1 Tucker, Bl. 145; 1 Cooley, Bl. 125, 128.

*It is admitted that the plaintiffs in [***128** error are citizens of the United States, and persons within the jurisdiction of Louisiana. The cases before us, therefore, present but two questions:

(1) Does the act of the legislature, creating the monopoly in question, abridge the privileges and immunities of the plaintiffs in error as citizens of the United States?

(2) Does it deprive them of liberty or property without due process of law, or deny them the equal protection of the laws of the state, they being persons "within its jurisdiction?"

Both these inquiries I remit for their answer as to the facts to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley. They are full and conclusive upon the subject. A more flagrant and indefensible invasion of the rights of many for the benefit of a few has not occurred in the legislative history of the country. The response to both inquiries should be in the affirmative. In my opinion the cases, as presented in the record, are clearly within the letter and meaning of both the negative categories of the 6th section. The judgments before us should, therefore, be reversed.

These Amendments are all consequences of the late Civil War. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members. The provisions of this section are all eminently conservative in their character. They are a bulwark of defense, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language "citizens of the United States" was meant all such citizens; and by "any person" was meant all persons within the ju- [***129** risdiction of the state. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective. The construction adopted by the majority of my brethren is, in my judgment, much too narrow. It defeats, by a limitation not anticipated, the intent of those by whom the instrument was framed and of those by whom it was adopted. To the extent of that limitation it turns, as it

were, what was meant for bread into a stone. By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the states. That want was intended to be supplied by this Amendment. Against the former this court has been called upon more than once to interpose. Authority of the same amplitude was intended to be conferred as to the latter. But this arm of our jurisdiction is, in these cases, stricken down by the judgment just given. Nowhere, than in this court, ought the will of the nation, as thus expressed, to be more liberally construed or more cordially executed. This determination of the majority seems to me to lie far in the other direction.

130* *I earnestly hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.

HUGH CARLISLE *et al., Appts.*, *v.* UNITED STATES.

(See S. C. 16 Wall. 147–156.)

Aid to rebellion, what is—treason—aliens, allegiance of — President's pardon — effect of — Court of Claims — suits by aliens.

†1. Aliens domiciled in the United States in 1862, were engaged in manufacturing saltpeter in Alabama, and in selling that article to the confederate states, knowing that it was to be used by them in the manufacture of gunpowder for the prosecution of the war of the rebellion; held that they thus gave aid and comfort to the rebellion.

2. The doctrine of *Hanauer* v. *Doane*, 20 L. ed. U. S. 439, that "He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or misprision thereof," repeated and reaffirmed.

3. Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States. They are bound to obey all the laws of the country not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were therefore subject to be prosecuted for violation of the laws of the United States against treason, and for giving aid and comfort to the rebellion.

4. The Proclamation of the President of the United States dated December 25, 1868, granting "Unconditionally and without reservation to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof," includes aliens domiciled in the country who gave aid and comfort to the rebellion.

5. The pardon and amnesty thus granted relieved claimants prosecuting in the court of claims for the proceeds of captured and abandoned property under the act of Congress of March 12, 1863, from the consequences of participation in the rebellion, and the necessity of establishing their loyalty in order to prosecute their claims, which would otherwise be indispensable to a recovery.

6. By the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its courts, and, therefore, British subjects, if otherwise entitled, may, under the act of Congress of July 27, 1868, prosecute claims against the United States in the court of claims.

†Headnotes by Mr. Justice FIELD.

NOTE.—*Effect of pardons*—see note to Armstrong's Foundry v. U. S. 18 L. ed. U. S. 882; and note to Fischel v. Mills, 15 L. R. A. 395.

[No. 270.]

Submitted Mar. 10, 1873. Re-argued Apr. 3, 1873. Decided Apr. 14, 1873.

APPEAL from the Court of Claims.

The history and facts of the case are fully stated by the court.

The case having been submitted, on Mar. 10, 1873, it was "Ordered that this case be re-argued on the 1st day of April next, upon the question whether the Amnesty Proclamations of the President applied to domiciled aliens as well as to citizens."

Messrs. J. M. Carlisle and **J. D. McPherson,** for appellants:

The court of claims has decided that the claimants are entitled to recover, unless their right be barred by reason of their having committed certain acts, which acts the court decides amount to a giving of aid and comfort to the rebellion.

This court decided in the case of *U. S.* v. *Padelford*, 9 Wall. 531, 19 L. ed. 788, that not the mere fact of having aided the rebellion bars the claimant under the acts of 1863, but that there must concur a guilty intention on the part of the claimants, and in that case a subscription by Padelford of money to the confederate loan, though a direct aid to the rebellion, yet, being compelled by duress and threats and so not voluntary, was held not to bar his recovery.

Said the court: "It would violate the soundest maxims of interpretation, if we were to construe the act so as to deprive claimants of the benefits intended to be given by it, because of aid and comfort to the rebellion not voluntarily given." And see the opinion *passim*.

But, by the Constitution, the President has "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Const. Art. 11, sec. 2, par. 1.

The character of the offender is immaterial; if the offense exists, the power of pardon coexists. The language of the Constitution has no terms of limitation. The power of the President to pardon is co-extensive with the power of the courts to convict. And this court has, in numerous cases, held that the President's pardon restored to claimants their right to sue in the court of claims.

If these propositions be true, the conclusion is inevitable, that if an alien can commit an offense against the United States, the President can pardon him. And if the act of the appellants was a giving of aid and comfort to the rebellion, it was within the meaning of the act of Congress of July 17, 1862, which punished with fine and imprisonment, the giving of aid and comfort to the rebellion, it was an offense against the United States; for, to prescribe punishment for any act is to prohibit the act, and to make its commission an offense against the government.

If, on the other hand, the act of these appellants was not an offense against the United States, it does not bar their recovery.

But it may be suggested that an alien cannot commit an offense against the United States by rebellion or insurrection; that such offense is treason, and an alien cannot commit treason,

because he owes no allegiance to the United States.

If this proposition be correct, it would not help the defense, for as above remarked, it is only the offense against the law of the United States that constitutes the bar, and if the appellants, by reason of their national character, were incapable of committing the offense, it would follow that they would not be punishable under the laws of the United States and, consequently, would not be barred by the acts of Mar. 3 and 12, 1863.

If their disability was that of an alien enemy only, the disability ceased when peace was restored, as their title to their property never was devested, and could not be without legal provisions for the purpose.

Brown v. *United States*, 8 Cranch, 110; *Klein* v. *United States*, 13 Wall. 128, 20 L. ed. 519.

Their right of action was restored by the return of peace. Peace is amnesty as to aliens. 1 Kent, 169.

But the proposition is not correct. If aliens be not capable of committing treason, they are still capable of committing the statutory crime of giving aid and comfort to the rebellion.

The act barring the claim is not defined to be treason; it is the giving of aid and comfort to the rebellion. It is the defense denounced in the act of July 17, 1862, 12 Stat. at L. 580, which declares that "If any person shall . . . engage in any rebellion or insurrection against the authority of the United States or the laws thereof, or shall give aid or comfort thereto," he shall be fined and imprisoned. This act in terms applies to all persons within the jurisdiction of the United States.

Kent says (part 1, sec. 2): "Strangers are equally bound with natives to obedience of the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law." 1 Kent, 36.

But aliens may also commit treason.

Kent again says: "During the residence of aliens amongst us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens; and if they are guilty of any illegal act, they are amenable to the ordinary tribunals of the country." 2 Kent, Com. 63, 64.

Blackstone says: "Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former also being perpetual; and the latter temporary. . . . Local allegiance is such as is due from an alien, or stranger born, for so long a time as he continues within the King's dominion and protection." 1 Bl. Com. 369, 370.

This language is also adopted by Story, Confl. L. sec. 21.

Greenleaf says: "It (allegiance) may be proved by evidence that the party was by birth a citizen of the state or of the United States, as the case may be, or an alien who is resident here with his family and effects; and if he were gone abroad, leaving his family and effects, his allegiance is still due for the protection which is afforded them."

3 Greenl. Ev. § 239, citing 1 East, P. C. 52, 53; 1 Hale, P. C. 59, 62, 92; Vatt. L. Nat. b. 2, §§ 101, 102.

Wildman, 1 Int. Law, 40, says: "The rights of sovereignty extend to all persons and things not privileged, that are within the territory. They extend to all strangers resident therein; not only to those who are naturalized, and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territory and owe a temporary allegiance in return for that protection;" citing Grot. II. 18; III. 8; IV. 5; Bynk. F, L, II., III., XXIV., p. 183; Vatt. I. 230; II. 101.

Such also is the common law.

Calvin's Case, 7 Co. 11, and authorities there cited; 9 Bac. Abr. 382, tit. Treason, A.

See, also, the report of Mr. Webster, Sec'y of State, to the House of Representatives, in December, 1851, on the case of *J. S. Thrasher*, cited, Law. Wheat. 1st ed. pp. 124, 125.

The same volume, pp. 132, 133, contains Mr. Secretary Marcy's letter on the *Koszta Case*, in which he says:

"Such domiciled citizen pays the same price for his protection as native born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them, incurs the same penalties."

The statute of Treasons, 25 Edw. 3 ch. declared it to be treason, "if a man shall levy war against the King in his realm, or be adherent to his enemies in his realm."

And commenting upon this statute, Hale says (1 P. C. 8): "It seems clear that the subjects of a foreign prince coming into England and living under the protection of our King, may, in respect to that local allegiance which they owe to him, be guilty of treason and be indicted; that *contra dominum regem* (the words *naturalem dominum suum*, being omitted) did compass, etc., etc. It has been holden . . . that there is no necessity for the words *contra regem, supremum dominum suum* in any indictment of treason." That is to say, whether the sovereign against whom he wages war in his realm is his lord or not, is immaterial. It is only necessary to aver that the offense was against the King, and not against his King.

The President having the power to pardon the offense, the next question is, whether the terms of amnesty of Dec. 25, 1868, include these appellants.

The grant of pardon follows the tenor of the act creating the offense, and in terms includes these appellants.

On this point, which in our judgment is so clear upon principle, we give one authority.

In *Courteen's Case*, Hob. 270, *a*, certain Dutchmen were charged with the offense of exporting coin. They set up the defense of a general pardon, but this pardon was offered only to "his (the King's) loving and obedient subjects." Hobart thought the Dutch living here within the King's protection, being of a friendly country, to be also truly under his subjection, and therefore capable of the title of "his loving and obedient servants." And he said: "I think no judge will doubt but that such stranger shall have the benefit of such pardon

against common penal statutes and other common offenses."

Messrs. Geo. H. Williams, Atty. Gen., and *C. H. Hill, Asst. Atty. Gen.*, for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This case comes before us from the court of claims. The claimants are subjects of the Queen of Great Britain, but they were residents within the United States prior to the war of the rebellion and during its continuance. In 1864, they were the owners of sixty-five bales of cotton, stored on a plantation in Alabama. This cotton was seized during that year by naval officers of the United States, and turned over to an agent of the treasury department by whom the cotton was sold and the proceeds paid into the treasury. The present action was brought in the court of claims, under the act of Congress of March 12, 1863, known as the Captured and Abandoned Property Act, to recover these proceeds.

The court found that the claimants were the owners of the cotton and that it was seized and sold as stated, and that the net proceeds, amounting to $43,232, were paid into the Treasury.

The court also found that the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its own courts; but that the claimants were engaged in 1862, in manufacturing saltpeter in Alabama, and selling that article to the confederate states, and that they thus gave aid and comfort to the rebellion, and for that reason were not entitled to recover the proceeds of the cotton seized. Their petition was accordingly dismissed.

The circumstances attending the manufacture and sale of the saltpeter, as disclosed in the findings of the court, plainly show that the claimants knew that the saltpeter was to be used by the confederates in the manufacture of gunpowder for the prosecution of the war of the rebellion, and there is little doubt that the sale was made in order to aid the confederates in accomplishing their treasonable purposes. By thus furnishing materials for the prosecution of the war whilst they were domiciled in the country, knowing the uses to which the materials were to be applied, the claimants became participators in the treason of the confederates equally as if they had been original conspirators with them. The court of claims, therefore, did not err in its conclusion that the act of the claimants in selling the saltpeter to the confederates, under these circumstances, was an act of aid and comfort to the rebellion. We have already held in *Hanauer* v. *Doane*, 12 Wall. 347, 20 L. ed. 441, and we repeat and re-affirm what we there said, that "he who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is him- [*151 self guilty of *treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act."

But the aid and comfort thus given to the rebellion by the claimants did not justify a denial of their right to recover the proceeds of their property in the Treasury of the United States after the Proclamation of Pardon and Amnesty made by the President on the 25th of December, 1868, unless their character as aliens excludes them from the benefit of that Proclamation, a question which we shall presently consider. Assuming that they are within the terms of the Proclamation, the pardon and amnesty granted relieve them from the legal consequences of their participation in the rebellion, and from the necessity of proving that they had not thus participated, which otherwise would have been indispensable to a recovery. It is true, the pardon and amnesty do not and cannot alter the actual fact that aid and comfort were given by the claimants, but they forever close the eyes of the court to the perception of that fact as an element in its judgment, no rights of third parties having intervened.

There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of a pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself.

When, therefore, in *Padelford's Case*, 9 Wall. 531, 19 L. ed. 788, a claimant under the Captured and Abandoned Property Act, who had given aid and comfort to the rebellion, appeared in the court of claims, asking for restoration of the proceeds of his property, *and showing that he had taken the oath prescribed by the Proclamation of President Lincoln, of December 8th, 1863, and had since then kept the oath inviolate and was thereby, by force of the Proclamation, pardoned, this court held that after the pardon thus granted no offense connected with the rebellion could be imputed to him; that if in other respects he made the proof which under the act entitled him to a decree for the proceeds of his property, the law made the proof of pardon a complete substitute for proof that he had given no aid or comfort to the rebellion; and that a different construction would defeat the manifest intent of the Proclamation and of the act of Congress which authorized it.

In *Klein's Case*, 13 Wall. 128, 20 L. ed. 519, which subsequently came before the court, an act of Congress designed to deny to the pardon of the President the effect and operation which the court had thus adjudged to it, and which declared that an acceptance of pardon without disclaimer should be conclusive evidence of the acts pardoned, and be inoperative as evidence of the rights conferred by it in the court of claims and in this court,—was held to be unconstitutional and void.

In *Mrs. Armstrong's Case*, 13 Wall. 154, 20 L. ed. 614, which was here at the last term, the court declined to consider whether the evidence was sufficient to prove that the claimant had given aid and comfort to the rebellion, and held that the Proclamation of Pardon and Amnesty issued by the President on the 25th of Decem-

ber, 1868, entitled her to the proceeds of her captured and abandoned property in the treasury, without proof that she never gave such aid and comfort; that the Proclamation granting pardon unconditionally, and without reservation, was a public act of which all courts of the United States were bound to take notice, and to which all courts were bound to give effect.

In *Pargoud's Case*, 13 Wall. 156, 20 L. ed. 546, also here at the last term, the claimant stated in his petition that he was guilty of participating in the rebellion, but that he had been **153***] pardoned by the President, *by special act, in January, 1866, and also by operation of the President's General Proclamation. The court of claims decided against the claimant on the ground that his petition did not aver that he had not given any aid or comfort to the rebellion, and did not sufficiently aver a pardon by the President. This court reversed the judgment, following the decision in *Mrs. Armstrong's Case*, and holding that the President's Proclamation of December 25, 1868, relieved claimants of captured and abandoned property from proof of adhesion to the United States during the Civil War.

After these repeated adjudications, it must be regarded as settled in this court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows whether we regard the pardon as effacing the offense, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion, during the rebellion, to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property, by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature. *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278.

Such being the general effect of pardon and **154***] amnesty *granted by the President, it only remains to consider whether the Proclamation of December 25, 1868, embraces the claimants who were aliens domiciled in the country, within its provisions. And upon this point we entertain no doubt. The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. "The rights of sovereignty," says Wildman, in his Institutes on International Law, p. 40, "extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection."

By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of *Thrasher*, a citizen of the United States resident in Cuba, who complained of injuries *suffered from the government of [***155** that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: "Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country." And again: "Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation." 6 Web. Works, 526.

The same doctrine is stated in Hale's Pleas of the Crown, Vol. I., ch. 10, East's Crown Law, Vol. I., ch. 2, § 4, and Foster's Discourse upon High Treason, § 2, p. 185, all of which are treatises of approved merit.

Such being the established doctrine, the claimants here were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion. They were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the government of the United States. They subsequently

took their lot with the insurgents, and would be subject like them to punishment under the laws they violated, but for the Proclamation of of the President of December 25, 1868. That Proclamation in its comprehensive terms, includes them and all others in like situation. It grants "unconditionally, and without reserva-
156*] tion, to all *and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late Civil War, with restoration of all rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof."

The Act of Congress of July 27, 1868, (15 Stat. at L. 243), authorizes any alien to prosecute claims against the United States in the court of claims, where the government of which he is a citizen or subject accords to citizens of the United States the right to prosecute claims against such government in its courts. In *O'Keefe's Case*, 11 Wall. 178, 20 L. ed. 131, it was held, that, by the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute claims against that government in its courts and, therefore, that British subjects if otherwise entitled, may prosecute claims against the United States in the court of claims. There is, therefore, no impediment to the recovery by the claimants in this case of the net proceeds of their cotton paid into the treasury.

The judgment of the court of claims must, therefore, be reversed, and that court directed to enter judgment in favor of the claimants for the amount of such net proceeds; *and it is so ordered.*

WILLIAM W. CRAPO *et al., Plffs. in Err.*
v.
JOHN KELLY, Sheriff of the City and County of New York.

(See S. C. 16 Wall. 610–644.)

Jurisdiction over state judgment—assignment of vessel at sea.

1. Where a party claimed title under a Massachusetts record, and his claim was overruled by the state court of New York, this gives the court jurisdiction to review the case.

2. An insolvent assignment in Massachusetts held to convey a ship at sea, in preference to an attachment subsequently levied upon her in a New York port.

[No. 154.]

Argued Mar. 10, 11, 1873. Decided Apr. 14, 1873.

IN ERROR to the Supreme Court of the State of New York.

Suit was brought by the defendant in error, in the supreme court of the state of New York, to recover the value of an undivided one half interest in a certain vessel.

A verdict was rendered for the plaintiff by direction of the court, subject to the opinion of the court at general term but judgment was subsequently entered by order of the general term, dismissing the complaint. Thereupon the plaintiff took an appeal to the court of appeals of the state which reversed said judgment, and ordered that judgment be entered upon the verdict of the jury in favor of the plaintiff. Whereupon the defendants sued out this writ of error:

The case is further stated by the court.

Messrs. **Edwards Pierpont** and **W. Stanley,** *Langdell & Brown,* for plaintiffs in error:

I. If the effect of the insolvent proceedings taken in Massachusetts was, under their law, to transfer the interest from Gibbs, Jenny, & Allen in The Arctic, to the plaintiffs in error, for the benefit of all their creditors ratably, then full faith and credit was not given to those judicial proceedings by the court of appeals of N. Y.

The Constitution declares that "full faith and credit shall be given each state to judicial proceedings in every other state, and that Congress may prescribe the manner in which such proceedings shall be proved, and the effect thereof."

Constitution, art. IV., § 1.

Congress, by Act of 1790, did accordingly provide that they should have such faith and credit given to them in every other court of the United States as they have by law or usage in the court from which they are taken.

1 Stat. at L. 122; see, also, amendatory Act of Mar. 27, 1804, 2 Stat. at L. 298; see, also, amendatory Act of Feb., 1867, 14 Stat. at L. 385, § 2.

The court of appeals necessarily decided what effect the insolvent proceedings in Massachusetts had, by the law and usage in that state, and as it decided against the effect which plaintiffs in error claimed for them, the supreme court has jurisdiction to review the judgment of the court of appeals.

Judiciary Act, 1 Stat. at L. 385, § 25; *Green* v. *Van Buskirk*, 7 Wall. 139, 19 L. ed. 109; opinion of the court by Justice Davis, 145.

Justice Sutherland, in his dissenting opinion in the supreme court of N. Y., expressly admits that the title to The Arctic passed to the assignees, and he expressly says that the N. Y. courts will not recognize and give effect to the assignment as against New York credit.

II. The effect, by the law of Massachusetts, of the assignments, by the judge of probate and insolvency, was to convey to the plaintiffs in error by the voluntary consent and upon the application and request of Gibbs, Jenny & Allen, over whom the court had complete jurisdiction, all their property "which they could have lawfully sold, assigned or conveyed."

Mass. Stat. ed. 1860, p. 586, § 44.

As there is no question that Gibbs, Jenny, & Allen should have sold their interest in The Arctic, whether she was within or without the state, there is no room for the construction of the statute which would limit the assignment to property within the state.

After provisions for the examination of the debtor, it is provided that the debtor shall, at the expense of the estate, make and execute such deeds and writings, and indorse such bills, notes and other negotiable papers, draw such checks and orders for money deposited in banks and elsewhere, and do all such other lawful acts and things as the assignee at any reasonable time requires, and which shall be necessary and useful for confirming the assignment and enabling the assignee to demand, recover and receive all

NOTE.—*Jurisdiction of U. S. Supreme Court to review state judgment*—see note, 42 L. ed. U. S. 998.

the estate and effects so assigned, especially any part thereof which is without the state. Sec. 70, p. 590; see, also, § 72.

It cannot be disputed that it was the intention of the legislature to convey to the assignees all the property of the debtor, nor that it was the intention of Gibbs, Jenny & Allen to convey all their property by means of their assignments.

III. The Arctic having been an American vessel, belonging to the Port of Fair Haven, Mass., where all the insolvent debtors resided, and having been engaged at the time of the insolvent assignments, in the prosecution of a voyage upon the high seas, the assignments, when delivered *proprio vigore eo instanti*, effected an immediate transfer of the vessel to the assignees, as fully and completely as if she had been lying at the time in her home port.

1 Kent, Com. 26; *Plestoro* v. *Abraham*, 1 Paige, 236, and on appeal, 3 Wend. 553; *People* v. *Comrs. of Taxes*, 23 N. Y. 224, 240; *Thuret* v. *Jenkins*, 7 Mart. 318; *Moore* v. *Willett*, 35 Barb. 663; Story, Confl. L. § 419; op. of Justices Clerke and Leonard, in supreme court below, and opinion of Justice Foster in court of appeals below; *Hoyt* v. *Thompson*, 5 N. Y. 320.

Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights (*droits*) it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory.

Wheat. Int. L. (8th ed. by Dana, 1866), § 106, p. 169.

The learned Chief Justice is in error in saying that Massachusetts "Has no jurisdiction or legislative dominion on the high seas." She possesses all sovereign rights, both on land and sea, except such as she has surrendered to the United States. She cannot punish crimes committed on the high seas, because she has parted with all admiralty jurisdiction (Const. art. III. § 2); nor can she interfere with the operation of the laws enacted by Congress for the regulation of commerce and navigation (Const. art. 1, § VIII. subd. 4); nor can she generally lay duties on ships and vessels, or their cargoes (Const. art. I. § X. subd. 2); but in other respects she has parted with her rights at sea to no greater extent than she has upon land within her own territories.

The Constitution and laws of the United States generally take no cognizance of private property, either on land or at sea; and the consequence is, that private property in both places is mainly governed by the laws of the respective states; otherwise it would be subject to no law at all.

The Massachusetts assignments went into effect instantly upon their delivery to the assignees.

It is not argued below that they could take effect at any other or different time. And the Chief Justice below takes the position squarely that no title whatever did, at any time, pass to the assignees.

Judge Sutherland, upon the same side, takes a contrary position, and is constrained to admit that, by the assignments, the title did pass upon delivery of the assignments, but says that the N. Y. court will not recognize it.

Suppose she had sunk in mid-ocean, whose ship would have been sunk? Suppose the assignees had sold her while on the ocean, and had divided the money among the creditors of Gibbs, Jenny, & Allen, and the purchasers had taken possession of her and brought her to N. Y., could she, on her arrival, have been seized as the property of Gibbs, Jenny, & Allen? Certainly, upon the theory of the learned Chief Justice.

Suppose, after the execution and acceptance of the assignment she had been lost, being insured in a New York company, could Mr. Robinson have attached and held the insurance money as the property of Gibbs, Jenny, & Allen to the exclusion of the other creditors?

The insolvent court had jurisdiction over the persons of Gibbs, Jenny, & Allen, and had adjudicated them to be insolvent, and having such jurisdiction over their persons, had, at their request, and pursuant to the Massachusetts statute, assigned their property, wherever situated.

This assignment conveyed all their property which was not then subject to other jurisdictions, and in regard to which there was no conflict of laws. No case can be cited which is in opposition to this position. Every case relied upon by the other side will be found to involve this element of a conflict of laws.

That a Massachusetts court would not give priority to such a claim as that of the defendants in error, whether the claimant was a citizen of another state or of its own is apparent from the act itself, and from the decisions of her courts.

The object of her insolvent act is a ratable distribution of the property of an insolvent among his creditors. In that state no creditor of an insolvent is allowed a preference over others.

Any assignment by an insolvent, giving preferences, is illegal.

Insolvent Act, § 91, p. 594.

Robinson's attachment, therefore, in Massachusetts, would have been clearly illegal, and there can be no question that, by the laws and usage of that state, the title to The Arctic passed to the assignees, and no single creditor of Gibbs, Jenny, & Allen, could, by any means known to Massachusetts law, have appropriated The Arctic to the payment of his own debts in preference to that of other creditors.

The claim of the plaintiffs in error is supported by two legal fictions, which are perfectly well settled law.

1. That personal property has no situs other than the domicil of its owners.

Story, Confl. L. §§ 376, 409.

2. That personal property on a ship on the high seas is within the territory of the domicil of its owners.

Hoyt v. *Comrs. of Taxes*, 23 N. Y. 224.

It is conceded that the first legal fiction gives way where it would work injustice, and where there is a conflict of laws between the different states.

Story, Confl. L. §§ 412, 420, 421.

No instance can be cited where the other legal fiction has ever been set aside.

It is evident that the case at bar is not one where either would work injustice. The effect of setting aside the rule would be, in this case:

I. To deprive the plaintiffs in error of prop-

erty which they had lawfully acquired under the laws of Massachusetts.

II. It would do that in favor of a person who had lived nearly all his life in Massachusetts, and whose business interests were still there.

III. It would be to give an inequitable preference to this one wealthy creditor, at the expense of the other creditors of Gibbs, Jenny, & Allen.

IV. By the rule of comity, an insolvent assignment, made pursuant to the laws of Massachusetts, will have full effect in N. Y., provided it does not conflict with the law or the public policy of that state, nor deprive its citizens of any of their just rights.

Story, Confl. L. §§ 29, 38, 349, 351.

It is not claimed that the insolvent assignments in the present case conflict with any law of public policy in N. Y.; nor has any citizen of that state shown that they will deprive him of any of his just rights. Admitting Robinson to be a citizen of N. Y., within the meaning of the rule, with what right of his will the assignments interfere? It is not denied that, under the assignments, he would have received his full *pro rata* share of the insolvent estates.

It is surprising that the learned Chief Justice of the court of appeals of N. Y. should suffer his prejudices to be aroused against the state of Mass., merely because its courts declined to permit an insolvent debtor of N. Y. to appropriate his property in Mass. to the payment of his N. Y. creditors in full, to the total exclusion of his creditors in Mass.; and that he should be willing to assist one of the citizens of N. Y., in doing a wrong to creditors in Mass., because the courts of Mass. refused to permit another N. Y. citizen to do a similar wrong as to property within the jurisdiction of that state.

See *Zipcey* v. *Thompson*, 1 Gray, 243.

V. The court below refers to some cases in Mass., apparently with the view to show that in a similar case to the one now before the court, a Massachusetts court would make a similar decision to that made by the court of appeals; but the cases do not sustain that position.

1. It would not be material if an authority sustaining such a position should be found, for the N. Y. assignees would have their writ of error to the supreme court, and such decision could be reversed. To correct precisely such errors and such violation of the Constitution, and of the laws of Congress, the writ of error to this court was provided.

2. But no support for such position can be found in the reported decisions of Massachusetts.

The Chief Justice seems entirely to have misapprehended the cases in Mass., referred to by him.

In each of the cases cited, the question arose as to property within that state at the time the assignments were made, which, by their laws, citizens of Mass. had the power and right to seize by attachment when the assignments were made, and the effect of the foreign assignments was to deprive their citizens of those rights. But what right or power had a citizen of N. Y. to attach The Arctic when she was in the Pacific Ocean, when the assignments were made to the plaintiffs in error? None, whatever; and no right of any person in N. Y. to attach her was interfered with. The fact is, that the defendant in error had attached the property of Crapo and others, plaintiffs in error, as the property of Gibbs, Jenny, & Allen, simply because they once owned it.

Neither does any other case cited by the court of appeals differ from those above referred to, favorably to defendant in error, in this respect. They were all cases of a conflict between the laws of different sovereignties at the time the assignments were made.

VI. The Chief Justice of the court of appeals says, in his opinion, that the learned judge who delivered the opinion of the supreme court laid down the general principle that the line of demarcation in relation to this subject should be between property actually within our limits at the time of the assignment in insolvency or bankruptcy and property not actually within our limits, and adds: "I can find no authority, nor can I find any reason for such a distinction."

The distinction is sustained by both reason and authority.

Hoyt v. *Thompson*, 19 N. Y. 207, was an explicit authority with many other cases there cited for the rule that property passes by a foreign statutory assignment when in a different state from that where the assignment is executed, provided that there be no conflict of law regarding it. And the language of all the cases sustains that position. Story, Kent and Chief Justice Parsons, of Massachusetts, went much farther, even to the extent of giving effect to the insolvent assignment when there was a conflict of law, if it was prior in point of time. In regard to the suggestion that there is no reason for such a distinction, we respectfully submit:

1. That if it is the fact that the rule is firmly established, it is not essential that reasons be given; but,

2. The rule is a reasonable one. What business has New York to refuse effect to a law of Massachusetts, if there was no conflict between it and New York law at the time the Massachusetts law took effect.

Why should New York attempt or undertake to effect the limit of a Massachusetts law, when it was not in conflict with its own? Why should it undertake to devest a title vested under Massachusetts law?

See, second point and cases *supra*.

Kent and Story, who gave the matter full consideration, and also Chief Justice Parsons, of Massachusetts, are in favor of the broad doctrine firmly established in England and on the continent of Europe, that personal property, wherever situated, passes by insolvents' and bankrupts' assignments, made according to the law of the country in which the bankrupt has his domicil, even as against creditors.

Holmes v. *Remsen*, 4 Johns. Ch. 460; Story, Confl. L. § 430; *Goodwin* v. *Jones*, 3 Mass. 517; and Justice Story, in referring to the great authority of Kent, very aptly quoted the language of a great orator of antiquity: "*Ego assentior Scævolæ.*"

It is respectfully submitted that the court, upon a close examination of the reasoning of the great Chancellor and of the great professor, judge and commentator, will be strongly inclined in their views.

But, in this case, the plaintiffs in error do not ask or require the indorsement of that position; but only that property which passed to them when it was on the high seas, which are free

and common to all and where all are on a footing of entire equality, be not taken away from them by the courts of N. Y. for the exclusive benefit of one of its citizens, because a learned Chief Justice conceived it to be his duty to prefer such N. Y. creditor to all the others instead of permitting him to share equally with the other creditors of the insolvent.

Mr. **Wm. M. Evarts,** for defendant in error:

This court has no jurisdiction of the cause, as the controversy between the two competing claims of creditors, one asserted by a New York sheriff and the other by the Massachusetts sequestrators, involves no question under the Constitution or statutes of the United States, and the record discloses no such question.

Certainly, the fact that controversies between litigants involve rights and titles claimed under the laws and jurisprudence of different states does not subject the determination of the state courts made the forum of such controversies to review by this court. Unless the controversy and its decision in the state court involves the further element that some right and protection claimed under the Constitution of the United States has been denied by the state court, its judgment is not reviewable here.

Maxwell v. *Newbold,* 18 How. 511, 15 L. ed. 506; *Hoyt* v. *Sheldon,* 1 Black, 518, 17 L. ed. 65.

The pretense that, because, under the laws of Massachusetts, the sequestration of the insolvent's property is effected through the agency of a judge of probate and insolvency, and the administration of the insolvent's assets and distribution among the creditors is committed to the same supervision, therefore the maintenance, by the *lex fori,* of the sheriff's title in preference to the Massachusetts assignee's title raises a question under the 1st section of the 4th article of the Constitution, and the act of 1790 under the same, is preposterous.

Certainly, if the insolvent proceedings in Massachusetts are to be considered as within the sense of this article of the Constitution, "judicial proceedings," the fullest faith and credit was given to their utmost purport at the trial of this cause in the N. Y. courts.

Certainly, no judicial proceeding in Mass. has adjudicated anything whatever concerning the ship Arctic, her title or possession, or any consequences that have attached to her by reason of the insolvency of her owners.

Certainly, the controversy between these two competing pursuits of the ship Arctic in the Port of N. Y. was *res integra,* as a judicial question, when the action now under review was commenced in N. Y.

Certainly no adjudication on this controversy has ever yet been had in Massachusetts, and all that the insolvent proceedings in Massachusetts have contributed toward such an adjudication has been to furnish the assignees a *persona standi* which has been fully recognized in the New York courts.

The case of *Green* v. *Van Buskirk,* 5 Wall. 310, 18 L. ed. 600, and 7 Wall. 139, 19 L. ed. 109, where this section of the Constitution has been reasonably and fully considered, while it upheld the appellate jurisdiction of this court in that case, manifestly excludes it in this.

The Illinois court, in that case had passed judgment *in rem,* and the New York court, in trying the title to the *res* subsequently, was held by this court to have refused such faith, credit and effect to the Illinois judgment as it was entitled to under the Constitution of the United States and act of 1790.

The case of *Green* v. *Van Buskirk, supra,* upon the merits, seems conclusive of this case, upon its merits; that is to say, the *lex fori,* where the *res* is found, must determine when and how it shall be subjected to the pursuit of creditors seeking the forum.

But if the judgment of the court of appeals of the state of New York is reviewable here, that judgment is clearly right.

The insolvent proceedings in Massachusetts never operated nor purported to operate to transfer, by their own force, possession of choses in possession beyond the jurisdiction of the powers of the court, to wit: the county of its jurisdiction.

Whatever further transfer of property beyond this coercive possession by the messenger of the court was competent for the statute or for the court, was by virtue of jurisdiction over the persons of the insolvents, and needed their personal exercise of their *jus disponendi* in aid of the court.

Gen. Stat. Mass. ch. 118, p. 590, § 70.

This section provides that the debtor "Shall, when required by the assignees, make and execute all such deeds and writings and do all such other lawful acts and things which may be necessary and useful for confirming the assignments so made by the said judge, and for enabling the assignees to demand, recover and receive all the estate and effects assigned as aforesaid, especially such part thereof, if any, as may be without this commonwealth."

It is too late to dispute the doctrine, which has been accepted and established throughout the United States, that the insolvent laws of a state have no force to transfer the title to property not within the territory of a state, and that the title of such assignees will not be recognized when it comes in conflict with liens acquired by domestic creditors under the local laws. International comity may require us to permit such assignees to come here and take possession of property and collect choses in action; but they must take subject to the prior liens of creditors here, who, by greater diligence, have availed themselves of the remedies provided by our laws against the property of the debtor.

In this case the attachment had been already levied before the assignees arrived in the state for the purpose of taking possession.

Holmes v. *Remsen,* 20 Johns. 229; *Abraham* v. *Plestoro,* 3 Wend. 538; *Johnson* v. *Hunt,* 23 Wend. 87; *Mosselman* v. *Caen,* 34 Barb. 66; *Olyphant* v. *Atwood,* 4 Bosw. 459; *Willitts* v. *Waite,* 25 N. Y. 577; *Booth* v. *Clark,* 17 How. 322, 15 L. ed. 164; *Ogden* v. *Saunders,* 12 Wheat. 219; *Harrison* v. *Sterry,* 5 Cranch, 289; *Milne* v. *Moreton,* 6 Binn. 353; *Green* v. *Van Buskirk,* 5 Wall. 310, 18 L. ed. 600; 7 Wall. 139, 19 L. ed. 109; *Guillander* v. *Howell,* 35 N. Y. 657.

It being clear, therefore, in respect to the ship at sea, the assignment was inoperative *proprio vigore,* and can only be recognized by the courts of the state in the furtherance of justice and where the convenience and rights of its citizens shall not be prejudiced, the simple

question remains whether, because the vessel did not arrive until after the assignment was executed, comity requires that a N. Y. creditor of the insolvent, pursuing with diligence the remedy prescribed by the law of N. Y., shall be deprived of the fruits of his diligence for the accommodation and benefit of his assignees and the Massachusetts creditors whom they represent. To this there can be but one answer, and the right of the N. Y. creditor must be preferred and his remedy upheld.

Story, Confl. L. § 414.

The learned counsel for the plaintiff in error, in his brief, virtually concedes that if the point in issue is regarded as a question of comity between attaching creditors and foreign statutory assignees, contending for property situated as this ship was at the time of the assignment, the superior rights of the former must prevail. He seeks to avoid the question of comity altogether, and rests the argument upon the proposition that the operation of the insolvent law of Massachusetts did *proprio vigore* transfer the absolute title of the ship, being at sea, to the assignees, to the exclusion of creditors attaching under the laws, of whatever state and jurisdiction she should first reach.

This proposition is in defiance of the settled law of the Federal and state courts. And, not only is there no authority whatever for the new and startling proposition contended for; not only must this court, to establish it, override the well settled current of American law, by which bankrupt laws and proceedings of foreign states have been allowed no effect upon property situated outside their territorial limits; but the result sought to be obtained will be contrary to our best interests and subversive of our long established and well recognized policy. It will be a complete abandonment of our American doctrine and a submission to the rule devised by Great Britain for its own benefit as the great creditor nation of the world, so that it might, in the language of Judge Platt, in *Holmes* v. *Remsen*, 20 Johns. 264, "By issuing a commission against the bankrupt merchant in London, spring a net which shall cover all the effects of such bankrupts throughout the world, and draw them over into her own forum for distribution, . . . for the fact cannot be disguised that Great Britain having the most extended commerce, and her merchants and manufacturers crediting abroad vastly more than they owe to foreign creditors, has a strong and peculiar interest in contending for a rule which draws to herself the distribution of all the effects which her lucrative commerce had dispersed over the globe."

Unfortunately, our relative position in this respect has not been changed in the lapse of fifty years since that case was decided.

Massachusetts is the last state in the Union to which any enlarged comity should be extended in regard to the recognition of her insolvent laws, and of titles thereby created. In 1854, the supreme court of that state decided that an assignment of property in that commonwealth made in N. Y. by an insolvent citizen, to a trustee for the benefit of creditors, giving preference to certain creditors, also citizens of N. Y., is ineffectual as against an attachment made in Massachusetts by a citizen thereof.

When a state which pursues such a policy sends its assignees in insolvency in N. Y. to take possession of property, no principle of comity, heretofore announced, can require our courts, for their benefit, to take the property away from N. Y. creditors, who have acquired a prior lien.

Zipcey v. *Thompson*, 1 Gray, 243.

"In regard to goods and merchandise belonging to a foreign bankrupt or insolvent person found here, if attached before any possession is taken by the assignees, whether under a commission of bankruptcy or otherwise, the attaching creditor would hold, because delivery, either actual or constructive, is necessary to complete the transfer."

Blake v. *Williams*, 6 Pick. 303; *Lanfear* v. *Sumner*, 17 Mass. 110.

"All comity of this sort must be built up, in a great measure, upon the doctrine of reciprocity."

Story, Confl. L. § 414.

Mr. Justice **Hunt** delivered the opinion of the court:

The claim of Federal jurisdiction over this action is based upon article 4, section 1, of the Constitution of the United States. It is there declared that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect *thereof." In 1790 and in 1804 Con- [*619 gress passed laws prescribing that manner and effect. By the Act of May 26, 1790 (1 Stat. at L. 122), after prescribing the forms of authentication, it is enacted: "And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Under this statute it has been held in this court, from an early day, that the faith and credit spoken of are not limited to the form of the record, and are not satisfied by its admission as a record. It is held that the same effect is to be given to the record in the courts of the state where produced, as in the courts of the state from which it is taken. *Mills* v. *Duryee*, 7 Cranch, 483; *Leland* v. *Wilkinson*, 6 Pet. 317; *United States* v. *Johns*, 4 Dall. 412.

The defendant in error insists, in reply, that the validity of the record of the court of probate and insolvency in the state of Massachusetts is not involved, and the faith and credit due to it is not in question. This is based upon the argument that that record has never adjudicated upon the title or possession of the vessel in question, and that the same was *res integra* when this action was commenced in New York.

The case of *Green* v. *Van Buskirk*, 5 Wall. 310, 18 L. ed. 600, 7 Wall. 139, 19 L. ed. 109, is relied upon as conclusive upon this point. In that case, Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same state, a chattel mortgage on certain iron safes which were then in the city of Chicago. This was done on the 3d day of November, 1857. Two days after this Green, who was

also a citizen of New York, being ignorant of the existence of the mortgage, sued out a writ of attachment in the courts of Illinois, levied on the safes, and sold them in satisfaction of the judgment obtained in the attachment suit. There was no appearance or contest in defense of this attachment suit, and Van Buskirk was **620*]** not *a party to it, although he had power to make himself such party. It was conceded that, by the laws of Illinois, mortgages of personal property, until acknowledged and recorded, are void as against third persons. In this state of the affair Van Buskirk sued Green in the New York courts for the value of the safes mortgaged to him by Bates, and of which Green had thus received the proceeds. Green pleaded his attachment suit in bar of the action. The courts of New York gave judgment in favor of Van Buskirk, holding that the law of New York was to govern, and not the law of Illinois, although the property was situated in the latter state, and that the title passed to him by the execution of the mortgage. The case first came before this court on a motion to dismiss for want of jurisdiction. *Green* v. *Van Buskirk, supra.* The motion was maintained, on the ground that the record neither showed that the construction of any clause of the Constitution was drawn in question in the state court, nor that any right was claimed under such clause, or that any decision was made against such right. The only issue it was said was as to the right of property and possession at the time of such seizure. In the opinion of the court, delivered by Mr. Justice Miller, after discussing the law applicable to the general questions in the case, the conclusion on the question of jurisdiction is thus stated: "We do not here decide that the proceedings in the state of Illinois have there the effect which plaintiff claims for them, because that must remain to be decided after argument on the merits of the case. But we hold that the effect which these proceedings have there by the law and usage of that state was a question necessarily decided by the New York courts, and that it was decided against the claim set up by the plaintiff in error, under the constitutional provision and statute referred to, and that the case is, therefore, properly here for review." Without reference to whether he was right or wrong the fact that Green claimed under the judicial record of Illinois, and that his claim was overruled, was held to give this court jurisdiction. Without **621*]** *reference to whether Crapo was right or wrong, whether the question was *res integra,* or *res judicata,* the fact that he claimed title under the Massachusetts record, and that his claim was overruled, gives the court jurisdiction of the present case. The authority of *Green* v. *Van Buskirk, supra,* is clear to that point.

The case as reported in 7 Wall. *supra,* is to the same effect. In restating the argument of jurisdiction, Mr. Justice Davis says: "This court, in denial of the motion to dismiss, held that the supreme court of New York necessarily decided what effect the attachment proceedings in Illinois had by the law and usage in that state, and as it was decided against the effect that Green claimed for them, this court had jurisdiction under that clause of the Constitution aboved quoted. Whether the supreme court of New York held correctly or otherwise was important when the case came before this court for a final hearing, but the fact simply that it had decided against Green's claim of the effect of the records gave jurisdiction.

We think the jurisdiction of the court now to hear and decide the case is sufficiently clear.

Omitting all superfluous circumstances, the facts necessary to present the question on the merits are these: on the 23d of February, 1861, the insolvent court of Massachusetts appointed Crapo and others assignees in insolvency of Gibbs & Jenny, and the judge of that court executed and delivered to them an assignment of all the personal property of Gibbs & Jenny. At this date Gibbs & Jenny were the owners of the ship Arctic, an American vessel registered at the Port of Fairhaven, in the district of New Bedford, in the state of Massachusetts, which vessel was then on the high seas, to wit: in the Pacific Ocean. On the 30th day of the following April this vessel arrived in the port of New York, and was at once seized as the property of Gibbs & Jenny, by an attachment issued at the suit of one Robinson, a creditor of Gibbs & Jenny, residing in New York. On the next day but one after the arrival of the vessel, Crapo came to New *York and took posses- [*622 sion of her, subject to the possession of Kelly, the sheriff. Crapo represents the title under the Massachusetts assignment, which then, and at all times since, he has sought to enforce. Kelly claims under the New York attachment.

The question is: which proceeding gave the better title?

Certain propositions relating to the question are not disputed.

1. If the assignment under which Crapo claims had been the personal act of Gibbs & Jenny, it would have passed the title to the vessel wherever she might have been at the time of its execution.

2. If the vessel at the time of the execution of the assignment had been within the territorial limits of Massachusetts, the assignment, although not the personal act of Gibbs & Jenny, would have devested their title and that of all persons claiming under them, provided diligence has been used to reduce the vessel to possession.

3. If the vessel had been in the Port of New York at the time of the execution of the insolvent assignment (there being no personal assignment), and had subsequently been seized there under attachment proceedings by a New York creditor, such attachment proceeding would have held the vessel as against the prior insolvent assignment.

The first of these propositions results from the fact that personal property, wherever it may be, is under the personal control of its owner, and the title passes by his actual transfer. The second is based upon the idea that the property being actually present and under the control of the law, passes by act of the law. The third proposition assumes that a transfer by legal proceeding possesses less solemnity than one made by the owner himself; that each nation is entitled to protect its own citizens, and that the remedy by law taken by its citizens having the actual possession of the *corpus,* ought to prevail over a title by law from another state, which is not accompanied by such possession. This principle authorizes the Massachusetts assignee to hold the property when in

Massachusetts, and the New York creditor **623***] *to seize it when it is in New York, under the circumstances stated. 1 Pars, Mar. L. 78, *v. c.* and *n.*; Abb. Ship. 6 Am. ed. 36 and *n.*; *Joy* v. *Sears*, 9 Pick. 4; *Conard* v. *Ins. Co.* 1 Pet. 449.

The present case is deficient in each of the elements necessary to bring the vessel within the range of the foregoing principles. She was not transferred by the personal act of the owner. She was not literally within the territory of Massachusetts when the insolvent assignment took effect; and, thirdly, she was not in the Port of New York.

The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts? If she was, the insolvent title will prevail.

It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the state of Massachusetts possesses all the rights and powers of a sovereign state. By her own consent, as found in article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas. To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized **624***] to hear and determine *them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States court.

To Congress is also given power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that The Arctic sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the states wherever it may be. Had the claim of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the states of the Union.

It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that state were an independent sovereign state, unconnected with the other states of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that state passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed.

The rule is thus laid down by Mr. Wheaton in his treatise on International Law (8th ed., sec. 106, *et seq.*): "Both the public and private vessels of every nation on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction *of [**625** the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions, and by its possessions we are not to understand its territory only, but all the rights it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea." As an illustration of the proposition that the ship is a portion of the territory of the state, the author proceeds: "Every state has an incontestable right to the service of all its members in the national defense, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any state may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects."

Chancellor Kent, in his Commentaries (Vol. I., p. 26), says: "The high seas are free and open to all the world, and the laws of every state or nation have there a full and perfect operation upon the persons and property of the citizens or subjects of such a state or Nation." "No nation has any right or jurisdiction at sea, except it be over the persons of its subjects, in its own public and private vessels; and so far territorial jurisdiction may be conceded as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs."

Wharton (on the Confl. of L. sec. 356), says: "A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries." "By this (he says) may be explained several cases quoted as establishing the *lex domicilii*, though they are only sustainable on the ground that the ship at sea is part of the territory whose flag she bears. . . . In respect to principle, ships at sea and the property in them, must be viewed as part of the country to which they belong."

*The modern German law is to the [**626** same point. Bluntschil, in his *Moderne Volkerrect*, sec. 168, says: "Ships are to be regarded as floating sections of the land to which they

16 Wall. 16–32, 21 L. 268, VOORHEES v. BONESTEEL.

Equity will not grant affirmative relief upon ground of fraud, unless it be made a distinct allegation in bill, so that it may be put in issue by the pleadings, p. 29.

Cited and principle applied in Bradley v. Converse, 4 Cliff. 375. F. C. 1,775, declaring that no decree can be founded upon matters not in issue between the parties; Bartol v. Walton, 92 Fed. 14, holding that in suit to rescind subscription to stock for fraud, the facts constituting the fraud must be stated; Southall v. Farish, 85 Va. 410, 7 S. E. 537, 1 L. R. A. 644, and n., holding that no relief can be based upon bill not charging fraud, and specifying wherein it consists.

Equity cannot decree against denials in answer, on testimony of single witness, p. 30.

Cited in Hill v. C. R. Ryan Grocery Co., 78 Fed. 25, 41 U. S. App. 714, holding that two instruments were to be regarded as distinct, and that trust deed was valid.

Husband and wife.— In New York, married woman may manage her separate property through the agency of her husband, without subjecting it to claims of his creditors; and application of a portion of income to his support will not impair her title, p. 31.

Reaffirmed in Aldridge v. Muirhead, 101 U. S. 399, 25 L. 1014, Hyde v. Frey, 28 Fed. 823, Tresch v. Wirtz, 34 N. J. Eq. 130, and Trapnell v. Conklyn, 37 W. Va. 252, 38 Am. St. Rep. 40, 16 S. E. 574. Cited and principle applied in Lorillard v. Standard Oil Co., 18 Blatchf. 201, 2 Fed. 904, holding married woman, sole owner of patent, need not join husband in suit for infringement; Johnson v. Christie, 79 Mo. App. 51, wife can make husband her agent, and the profits are not subject to his debts; Talcott v. Arnold, 54 N. J. Eq. 578, 35 Atl. 535, holding that business was the husband's and subject to his debts. Cited in 78 Am. Dec. 634, note, that creditor of husband cannot subject to his demand improvements on wife's land made by him without any participation by her in any intentional wrong.

16 Wall. 33–36, 21 L. 465, THE COMMERCE.

Collision.— Steamer held at fault for failure to keep out of way of sailing vessel, p. 35.

Cited in The Golden Grove, 13 Fed. 688, to point that it is the duty of sailing vessel to hold her course until danger is imminent.

Collision.— When both lower courts agree as to amount of damages, from collision, their conclusions will not be set aside without satisfactory evidence that they were mistaken, p. 36.

16 Wall. 36–130, 21 L. 394. SLAUGHTER-HOUSE CASES.

Constitutional law.—A State may validly limit the places in or near a city, where live stock for slaughtering may be landed, giving to one corporation exclusive right to maintain such stock landing yards, p. 61.

Cited in New Orleans v. Steamship Co., 20 Wall. 399, 22 L. 360, sustaining lease by military authorities of New Orleans water-front property.

Constitutional law.— Under its police power a State may validly regulate slaughter-houses and prescribe their location, pp. 61–62.

Later decisions have frequently recognized the controlling authority of the principal case in upholding ordinances excluding slaughter-houses from within a city's limits, Spokane v. Robison, 6 Wash. 550, 33 Pac. 961, Portland v. Meyer, 32 Or. 370, 67 Am. St. Rep. 539, 52 Pac. 22, Beiling v. Evansville, 144 Ind. 650, 42 N. E. 623, 35 L. R. A. 274, Ex parte Hielbron, 65 Cal. 611, 4 Pac. 649; or regulating them within those limits, Boyd v. City Council, 117 Ala. 680, 23 So. 664, and Darcantel v. Slaughter-House Co., 44 La. Ann. 640, 11 So. 241. It has been cited and relied upon also in upholding a statute providing for inspection of animals designed for food, State v. Slaughter-House Co., 46 La. Ann. 1035, 15 So. 409; an ordinance prohibiting hogpens in a town within one hundred yards of a neighbor, State v. Hord, 122 N. C. 1095, 65 Am. St. Rep. 744, 29 S. E. 953; and an ordinance regulating the location of livery-stables within a city, St. Louis v. Russell, 116 Mo. 254, 22 S. W. 471, 20 L. R. A. 726, and n., State v. Beattie, 16 Mo. App. 137, 145; dissenting opinion, Commonwealth v. Perry, 155 Mass. 125, 31 Am. St. Rep. 537, note, 28 N. E. 1128, 14 L. R. A. 328, and n., majority holding act void, prohibiting employers withholding weavers' wages for defects in their work; People v. Budd, 117 N. Y. 37, 56, sub nom. People v. Walsh, 22 N. E. 683, 690, majority upholding State regulation of grain warehouses and elevators; People v. Hawkins, 157 N. Y. 29, see 51 N. E. 266, erroneously citing 10 Wall. 273, majority annulling law requiring convict-made goods to be so marked. See also notes 25 Am. St. Rep. 887, 92 Am. Dec. 203.

Distinguished in Huesing v. Rock Island, 128 Ill. 476, 15 Am. St. Rep. 136, 21 N. E. 560, holding municipality without power to establish public slaughter-house.

Constitutional law.— Police power is incapable of exact definition. The security, life, health and comfort of the citizen and the beneficial use of property depend upon it, and it extends to protection of lives, limbs, health, comfort and quiet of all persons within the State, p. 62.

The foregoing general observations as to the extent of the police power have been extensively referred to. Several citing cases per-

tain to the liquor traffic, and regulations as to the persons to whom liquor-selling licenses might be granted, have been sustained, Trageser v. Gray, 73 Md. 257, 260, 25 Am. St. Rep. 592, 594, 20 Atl. 907, 908, 9 L. R. A. 785, 786, and n.; so also an act making lessors of property on which liquor sold liable for damages done by one intoxicated, Bertholf v. O'Reilly, 74 N. Y. 522, 30 Am. Rep. 334; the dispensary system of selling liquor has been sustained, State v. Aiken, 42 S. C. 235, 20 S. E. 226, overruling McCullough v. Brown, 41 S. C. 241, 19 S. E. 470, 23 L. R. A. 419, Plumb v. Christie, 103 Ga. 696, 30 S. E. 763, 42 L. R. A. 186, and Guy v. Commissioners, 122 N. C. 474, 29 S. E. 772; as also a law enacting penalties for selling liquor, State v. Hodgson, 66 Vt. 145, 28 Atl. 1091; or prohibiting its sale, Weil v. Calhoun, 25 Fed. 872. And see Garrett v. Mayor, 47 La. Ann. 630, 17 So. 243. The syllabus principle has also been relied upon in upholding ordinances abating privy vaults within a city, Sprigg v. Garrett Park, 89 Md. 409, 43 Atl. 814, Harrington v. Board of Aldermen, 20 R. I. 338, 38 Atl. 3, 38 L. R. A. 311, and n.; regulating livery-stables in a city, State v. Beattie, 16 Mo. App. 137, St. Louis v. Russell, 116 Mo. 254, 22 S. W. 471, 20 L. R. A. 726, and n.; ordinances prohibiting deposit of garbage, Ex parte Casinello, 62 Cal. 540; prohibiting disinterment of dead, In re Wong Yung Quy, 6 Sawy. 447, 2 Fed. 629; licensing hackmen and regulating their conduct at railway stations, Chillicothe v. Brown, 38 Mo. App. 616; requiring removal of powder magazines from city limits, although previous location thereof was authorized by city, Davenport v. Richmond City, 81 Va. 642, 59 Am. Rep. 697; in upholding statutes prohibiting payment of coal miners in scrip, and regulating weighing of coal, State v. Peel Splint Coal Co., 36 W. Va. 812, 15 S. E. 1003, 17 L. R. A. 388; prohibiting Sunday freight trains, Norfolk, etc., R. R. v. Commonwealth, 93 Va. 756, 57 Am. St. Rep. 832, 24 S. E. 839, 34 L. R. A. 107; respecting Sunday observance generally, Swann v. Swann, 21 Fed. 302; assessing lands for drainage purposes, Zigler v. Menges, 121 Ind. 103, 16 Am. St. Rep. 360, 22 N. E. 784; upholding legislative regulation of piping of natural gas, Jamieson v. Indiana, etc., Oil Co., 128 Ind. 564, 579, 28 N. E. 79, 84, 12 L. R. A. 655, and see p. 660; upholding tax on venders of Police Gazette, and similar papers, Thompson v. State, 17 Tex. App. 258; regulating practice of medicine and surgery, Eastman v. State, 109 Ind. 279, 58 Am. Rep. 401, 10 N. E. 97; excluding cattle from neighboring State, where disease prevalent, St. Louis, etc., Ry. v. Smith, 20 Tex. Civ. App. 459, 49 S. W. 631; prescribing terms on which foreign insurance companies might do business, Swing v. Munson, 191 Pa. St. 589, 71 Am. St. Rep. 589, 43 Atl. 344; prohibiting unusual traffic within two miles of religious meeting, State v. Cate, 58 N. H. 241; requiring tenement-houses in New York to be supplied with water on each floor, Health Department v. Rector, 145 N. Y. 39, 45 Am. St. Rep. 581, 39 N. E. 835, 27 L. R. A. 713; requiring regis-

tration of dairymen and inspection of stock, State v. Broadbelt, 89 Md. 586, 43 Atl. 775, 45 L. R. A. 438; requiring State registration of letters-patent by vendors of patent rights, Breckbill v. Randall, 102 Ind. 529, 52 Am. Rep. 696, 1 N. E. 363; upholding law requiring corporations to redeem their scrip and store orders in cash, Harbison v. Knoxville Iron Co., — Tenn. —, 53 S. W. 960; statute upholding game law, and prohibiting importation of game out of season, Magner v. People, 97 Ill. 336. Elsewhere the right of a city to grant exclusive right to remove dead animals on its streets, unless removed by owner within twelve hours, has been upheld as police regulation, National Fert. Co. v. Lambert, 48 Fed. 461; as also law punishing bankers taking deposits when insolvent, Baker v. State, 54 Wis. 371, 373, 12 N. W. 14, 15. The dissenting opinion in Leisy v. Hardin, 135 U. S. 128, 34 L. 139, 10 S. Ct. 691, relies upon the syllabus holding, but the court declared a State prohibition law void as to sale of liquor in original package by importer. Cited, arguendo, United States v. Boyer, 85 Fed. 435, discussing limitations of police and commerce powers; Cory v. Carter, 48 Ind. 346, 17 Am. Rep. 750, New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 661, 29 L. 520, 6 S. Ct. 258, Pearsall v. Great Northern Ry., 161 U. S. 666, 40 L. 845, 16 S. Ct. 710, and Capital City Gas Co. v. Des Moines, 72 Fed. 825. See the following notes: 1 Am. St. Rep. 644, 35 Am. Dec. 334, 23 Am. Rep. 213, 42 Am. Rep. 457, and 62 Am. Dec. 639.

Distinguished in Georgia Packing Co. v. Macon, 60 Fed. 777, 22 L. R. A. 777, avoiding ordinance making discriminating regulations against importers of meat. Not followed in State v. Indiana, etc., Min. Co., 120 Ind. 580, 22 N. E. 779, 6 L. R. A. 583, and n., holding State may not prohibit carrying of natural gas to another State; American Fert. Co. v. Board of Agriculture, 43 Fed. 613, holding license exacted of importer of fertilizer, not justifiable as police regulation; In re Tie Loy, 11 Sawy. 477, 26 Fed. 614, annulling ordinance prohibiting laundry within a city.

Constitutional law.— Police power is exclusive in the several States, p. 63.

Cited in Western U. Tel. Co. v. Pendleton, 95 Ind. 16, 48 Am. Rep. 696, upholding law penalizing failure to send telegraph message; Phelps v. Racey, 60 N. Y. 15, 19 Am. Rep. 144, upholding State game law.

Constitutional law.— Louisiana statute of 1869, granting to a corporation exclusive slaughter-house and stock-landing privileges, in New Orleans and vicinity, for twenty-five years, regulating prices to be charged therein and prohibiting maintenance of similar works by others, is a valid exercise of the police power, the monopoly thereby created is not forbidden by the thirteenth or fourteenth amendments, pp. 61–82.

The effect of this decision was subsequently much modified. In 1879, Louisiana declared by its Constitution then adopted, that the

monopoly features of the Slaughter-House Company's charter were a nullity, and that police juries of the several parishes should have power to regulate the slaughtering business. Thereupon other slaughter-houses were authorized within the limits of the Crescent Company's monopoly, and the Supreme Court by a unanimous judgment sustained the validity of this annihilation of the Crescent Company's exclusive rights, Butchers' Union Co. v. Crescent City Co., 111 U. S. 747, 748, 28 L. 586, 587, 4 S. Ct. 652, 654, reversing S. C., 4 Woods, 97, 9 Fed. 745 (and see Crescent, etc., Co. v. Butchers' Union, 120 U. S. 142), 30 L. 615, 7 S. Ct. 473, Darcantel v. Slaughter-House Co., 44 La. Ann. 640, 11 So. 241, Putnam v. Ruch, 56 Fed. 417, Crescent City, etc., Co. v. New Orleans, 33 La. Ann. 939. The concurrence of the judges dissenting in the Slaughter-House Cases, went upon the ground that the monopoly feature of the original charter had been void ab initio, the remaining judges, adhering to the theory that it was valid when granted, declared that the State, nevertheless, had power to abrogate the stipulation at any time. This was upon the theory that one legislature had not the power thus to bind its successors, or even itself, when the administration of the State's power of police was concerned. The view which seeks thus to reconcile the two decisions, absolves the State from the embarrassment of an irrepealable contract, creating a monopoly, but still affirms the power of the State to grant an exclusive right to carry on an otherwise lawful business. It substitutes an exclusive license, terminable at will, for an irrevocable monopoly, yet it still involves the proposition that the legislature may validly prohibit the slaughtering business to all, save its licensees, create a monopoly by licensing only designated persons, or terminate it by according the license freely to all proper applicants. There is a wide difference between a license available to all and a license available to one only. The former is a common incident to the exercise of the powers of taxation and police. The latter creates a monopoly, which the prevailing opinion in the principal case justified as also a proper incident of the police power, and the dissenting opinion condemned in vigorous terms.

Several citing cases have relied upon the doctrine under discussion in upholding municipal contracts, granting exclusive rights, such as gas or electric-light privileges within a city, Crescent City Co. v. New Orleans Co., 27 La. Ann. 147, St. Louis v. Gas-Light Co., 5 Mo. App. 504, and New Orleans Gas Co. v. La. Light Co., 115 U. S. 668, 669, 29 L. 523, 6 S. Ct. 262, Contra, Citizens' Gas Co. v. Louisville Gas Co., 81 Ky. 273, Grand Rapids Co. v. Grand Rapids, etc., G. Co., 33 Fed. 669, St. Louis Gas Co. v. St. Louis Co., 16 Mo. App. 70, 73; and exclusive garbage contracts, Sanitary, etc., Works v. California Reduction Co., 94 Fed. 700, State v. Orr, 68 Conn. 110, 35 Atl. 771, 34 L. R. A. 282, and Coombs v. MacDonald, 43 Neb. 634,

62 N. W. 42. So a city may be authorized to regulate and license market stalls, Jacksonville v. Ledwith, 26 Fla. 205, 23 Am. St. Rep. 574, 7 So. 892, 9 L. R. A. 78, and n. Others follow it in upholding a liquor dispensary act, challenged as creating a monopoly, Guy v. Commissioners, 122 N. C. 474, 29 S. E. 772, Plumb v. Christie, 103 Ga. 696, 30 S. E. 763, 42 L. R. A. 186; contra, McCullough v. Brown, 41 S. C. 241, 19 S. E. 470, 23 L. R. A. 419, overruled in State v. Aiken, 42 S. C. 235, 20 S. E. 226; in upholding regulation of telephone rentals, Hockett v. State, 105 Ind. 259, 55 Am. Rep. 207, 5 N. E. 183; in upholding State's power to make exclusive school text-book contract, Bancroft v. Thayer, 5 Sawy. 505, F. C. 835; and to require a license of engineers, McDonald v. State, 81 Ala. 284, 60 Am. Rep. 161, see 2 So. 832. And see State v. Haworth, 122 Ind. 502, 23 N. E. 959, 7 L. R. A. 253, dissenting opinion. Approved, arguendo, in National Water-Works Co. v. Kansas, 28 Fed. 923, Sedalia Gas Co. v. Mercer, 48 Mo. App. 652, Western U. Tel. Co. v. New York, 38 Fed. 557, 3 L. R. A. 453, St Louis, etc., Ry. v. Matthews, 165 U. S. 23, 41 L. 620, 17 S. Ct. 251, Baumgartner v. Hasty, 100 Ind. 584, 50 Am. Rep. 837, Camblos v. Philadelphia, etc., R. R., 4 Fed. Cas. 1101. See 62 Am. Dec. 240, note, as to State inspection laws, and 92 Am. Dec. 203.

Cited, but not followed, in Brenham v. Water Co., 67 Tex. 565, 4 S. W. 155, denying city's power to make exclusive water contract; Birmingham, etc., Ry. v. Birmingham St. Ry., 79 Ala. 474, 58 Am. Rep. 618, denying city's power to grant exclusive street railway franchise; In re Lowe, 54 Kan. 761, 39 Pac. 711, 27 L. R. A. 547, holding scavenger license ordinance void as seeking to create a monopoly.

Monopolies.— State legislatures have always exercised power to grant exclusive privileges in nature of monopolies, pp. 65, 66.

Cited in Laredo v. International Bridge Co., 66 Fed. 248, 30 U. S. App. 110, upholding exclusive bridge and ferry franchise; Ex parte Levy, 43 Ark. 53, 51 Am. Rep. 553, holding County Court might in its discretion refuse liquor license.

Constitutional law.— Involuntary servitude, prohibited by the thirteenth amendment, means personal servitude. The term is more comprehensive than slavery. While designed to free the negro, it comprehends also peonage or the Chinese coolie system, pp. 69, 72.

Cited and relied upon in In re Thompson, 117 Mo. 90, 38 Am. St. Rep. 642, 22 S. W. 865, 20 L. R. A. 464, annulling law directing that vagrants be hired out to highest bidder; arguendo, in State v. Strauder, 11 W. Va. 810, 27 Am. Rep. 614; also in United States v. Wong Kim Ark, 169 U. S. 677, 42 L. 901, 18 S. Ct. 467, to this point; Cory v. Carter, 48 Ind. 347, 17 Am. Rep. 751, and Plessy v. Ferguson, 163 U. S. 542, 41 L. 257, 16 S. Ct. 1140, upholding separate railway coach law.

Cited, but not followed, in Robertson v. Baldwin, 165 U. S. 282, 41 L. 717, 17 S. Ct. 329, seamen may be required to finish out the term of their shipping articles.

Constitutional law.— In interpreting thirteenth, fourteenth and fifteenth amendments, it is necessary to consider their purpose, and the evil to be remedied; these were the freedom and protection of the negro race, p. 72.

Cited and relied upon in **Strauder** v. West Virginia, 100 U. S. 306, 25 L. 665, reversing S. C., 11 W. Va. 810, 27 Am. Rep. 614, holding State law prohibiting negro jurors, void; Ohio Valley Ry. v. Lander, — Ky. —, 47 S. W. 349, upholding separate railway coach law; **Frasher** v. State, 3 Tex. App. 268, 30 Am. Rep. 133, upholding Texas law, making marriage of white and black a felony; Felkner v. Tighe, 39 Ark. 356, 43 Am. Rep. 276, sustaining law, prohibiting carrying of all except navy pistols; Coger v. North, etc., Packet Co., 37 Iowa, 158, steamboat company's rule excluding blacks from dining table, is unenforceable. Approved, arguendo, in Caldwell v. Wilson, 121 N. C. 469, 28 S. E. 561, United States v. Cruikshank, 1 Woods, 321, F. C. 14,897, Attorney-General v. Abbott, — Mich. —, 80 N. W. 381, dissenting opinion in In re Hall, 50 Conn. 133, 47 Am. Rep. 627, Civil Rights Cases, 109 U. S. 36, 44. 27 L. 848, 854, 3 S. Ct. 40, 45, and dissenting opinion in Ex parte Virginia, 100 U. S. 345, 25 L. 679. See note on fourteenth amendment, 25 Am. St. Rep. 871; also 62 Am. St. Rep. 169.

Distinguished in Plessy v. Ferguson, 163 U. S. 543, 41 L. 258, 16 S. Ct. 1140, upholding separate coach law. Qualified in Holden v. Hardy, 169 U. S. 382, 42 L. 787, 18 S. Ct. 384, holding amendment not restricted to protection of negroes.

Citizens.— First section of fourteenth amendment, declaring all persons born in United States, citizens, was intended to establish the citizenship of the negro. It also establishes a citizenship of the United States distinct from citizenship of individual States, pp. 72, 73.

Cited and principle relied upon in Cory v. Carter, 48 Ind. 349, 17 Am. Rep. 752, upholding separate schools for negro and whites; Smith v. Du Bose, 78 Ga. 433, 6 Am. St. Rep. 267, white man may make testamentary provision for black paramour; Smoot v. Kentucky, etc., Ry., 13 Fed. 343, holding void act of Congress compelling railroad to let negroes ride in white coaches; In re Rodiguez, 81 Fed. 352, Mexican may be naturalized; Elk v. Wilkins, 112 U. S. 101, 28 L. 646, 5 S. Ct. 45, Indian is not a citizen, though severed from tribal relation; Marshall v. Donovan, 10 Bush, 687, 688, upholding law, under which only whites voted on school improvements; United States v. Wong Kim Ark, 169 U. S. 676, 42 L. 900, 18 S. Ct. 467, affirming 71 Fed. 385, holding Chinese children born here, United States citizens; City of Minneapolis v. Reum, 56 Fed.

581, 12 U. S. App. 446, though State confer many rights of citizenship, alien is still such until naturalization. Cited in Boyd v. Thayer, 143 U. S. 160, 36 L. 109, 12 S. Ct. 381, arguendo. See note on who are aliens, 84 Am. Dec. 212.

Citizens.— First section of fourteenth amendment, declaring all persons born or naturalized in United States "subject to the jurisdiction thereof," citizens, was intended to exclude children of ministers, consuls, and subjects of foreign States, born within United States, p. 73.

Criticised and distinguished in United States v. Wong Kim Ark, 169 U. S. 678, 679, 42 L. 901, 18 S. Ct. 468, see dissenting opinion contra, p. 724, 42 L. 917, 18 S. Ct. 485, holding children of Chinese subjects, born here, United States citizens.

Constitutional law.— Fourteenth amendment, guaranteeing privileges and immunities "of citizens of the United States," means only privileges and immunities incident to citizenship of the United States as distinguished from citizenship of the several States. Hence, though Louisiana statute gave slaughter-house business of New Orleans to a monopoly, no privileges or immunities of national citizenship are thereby abridged, and this portion of the amendment is not infringed, pp. 74–80.

In the Civil Rights Cases, the operation of the amendment was further restricted by the declaration that the laws which Congress might pass in carrying it into effect, must be confined to corrective, rather than direct legislation. Accordingly the provisions of the civil rights act of 1875, prohibiting discriminations against the negro in inns, places of public amusement, etc., were annulled, notwithstanding vigorous dissent, Civil Rights Cases, 109 U. S. 47, 54, 27 L. 851, 854, 3 S. Ct. 47, 54, United States v. Washington, 4 Woods, 352, 20 Fed. 632, charge to grand jury, 30 Fed. Cas. 1006, and see Civil Rights Bill, 1 Hughes, 549, F. C. 2,774; and revised statutes, section 5519, punishing a conspiracy to deprive any persons of the equal protection of the laws was declared invalid, United States v. Harris, 106 U. S. 638, 27 L. 293, 1 S. Ct. 608.

The syllabus doctrine has been approved and followed by later cases. In reliance upon it, separate schools for black and white have been declared within the legislative power of the States, unembarrassed by the fourteenth amendment, Board of Education v. Tinnon, 26 Kan. 17, Cory v. Carter, 48 Ind. 350, 360, 17 Am. Rep. 753, 763, People v. Gallagher, 93 N. Y. 447, 449, 45 Am. Rep. 237, 238, Lehew v. Brummell, 103 Mo. 550, 23 Am. St. Rep. 897, 15 S. W. 766, 11 L. R. A. 829, and Martin v. Board of Education, 42 W. Va. 516, 26 S. E. 349. So a private school, though recipient of municipal aid, may lawfully exclude colored pupils, Clark v. Maryland Inst., 87 Md. 663, 41 Atl. 130; and the State may provide separate coaches for black and white, Cully v. Baltimore, etc., R. R., 1

Hughes, 539, F. C. 3,466, Ohio V. Ry. v. Lander, — Ky. —, 47 S. W. 349, and Plessy v. Ferguson, 163 U. S. 543, 41 L. 258, 16 S. Ct. 1140. The States may validly prohibit marriages between black and white, Ex parte Kinney, 3 Hughes, 13, 14, F. C. 7,825, and Frasher v. State, 3 Tex. App. 271, 30 Am. Rep. 136. The right to practice as attorney is not a privilege or immunity of national citizenship, hence a State court judgment disbarring an attorney is not impeachable as an abridgement thereof, Philbrook v. Newman, 85 Fed. 142; and the State may declare only white male citizens qualified to become attorneys, In re Taylor, 48 Md. 32, 33, 30 Am. Rep. 453, 454; or only male citizens, Bradwell v. State, 16 Wall. 139, 21 L. 445. Nor is the right to sell liquor a privilege incident to citizenship of the United States, Bartemeyer v. Iowa, 18 Wall. 133, 21 L. 931 (and see dissenting opinion, pp. 135, 141), 21 L. 931, 933, State v. Bradley, 26 Fed. 291; although the right to import it in original packages is such, Tuchman v. Welch, 42 Fed. 557. It has been held also that trial by jury is not a right which States may not abridge, Caldwell v. Wilson, 121 N. C. 459, 28 S. E. 558; and that a statute providing for trial by jury of eight persons, was valid, State v. Bates, 14 Utah, 299, 47 Pac. 79, 43 L. R. A. 43, and n.

The following citing cases also affirm and rely upon the syllabus holding: Fox v. Territory, 2 Wash. Ter. 302, 5 Pac. 606, and State v. Call, 121 N. C. 647, 648, 28 S. E. 518, both upholding State regulations prerequisite to the practice of medicine; Wright v. State, 88 Md. 442, 41 Atl. 798, upholding law prohibiting sale of oleomargarine; Miller v. Texas, 153 U. S. 539, 38 L. 813, 44 S. Ct. 876, Texas law prohibiting carrying of concealed weapons is valid; McPherson v. Blacker, 146 U. S. 37, 36 L. 878, 13 S. Ct. 11. So also is Michigan law respecting manner of election of presidential electors; In re Kemmler, 136 U. S. 448, 34 L. 524, 10 S. Ct. 934, upholding New York election law; United States v. Anthony, 11 Blatchf. 204, F. C. 14,459, as also law under which only male citizen could vote; State v. Judge, 39 La. Ann. 137, 58 Am. Rep. 772, 773, note, 1 So. 440, 441, upholding Sunday law; Plunkard v. State, 67 Md. 369, 10 Atl. 227, sustaining State bastardy law, providing for support of white bastards only; Short v. State, 80 Md. 401, 31 Atl. 323, 29 L. R. A. 413, and n., upholding State poll tax; People v. Loeffler, 175 Ill. 610, 51 N. E. 793, sustaining civil service provisions of municipal corporation's laws; State v. Peel, etc., Coal Co., 36 W. Va. 826, 15 S. E. 1008, 17 L. R. A. 393, sustaining law regulating payment of coal miners, etc.; Commonwealth v. Vrooman, 164 Pa. St. 314, 44 Am. St. Rep. 605, 30 Atl. 218, 25 L. R. A. 252, upholding act forbidding issuance of fire insurance policies without corporate charter authority; Green v. State, 73 Ala. 32, 35, 37, but holding allegation that sheriff wrongfully excluded negroes from grand jury list, not within the fourteenth amendment; United States v. Cruikshank, 92 U. S. 549, 23 L. 590, holding indictment charging conspiracy to de-

prive Africans of rights of national citizenship, defective, because too general; Kinneen v. Wells, 144 Mass. 498, 59 Am. Rep. 106, 11 N. E. 919, holding privilege of voting, one incident to State citizenship; Ex parte Plessy, 45 La. Ann. 87, 11 So. 951, 18 L. R. A. 643, and n., holding fourteenth amendment created no new rights. Cited also in dissenting opinion in Ex parte Virginia, 100 U. S. 364, 365, 25 L. 685, 686, majority holding valid, provision of civil rights act of 1875, punishing the exclusion of negroes from jury lists; Neal v. Delaware, 103 U. S. 406, 26 L. 577, majority refusing removal of cause to Federal court on mere allegation that negroes were not allowed as jurors, in absence of showing that the State law so provided, or was interpreted. See dissenting opinion in O'Neil v. Vermont, 144 U. S. 361, 36 L. 466, 12 S. Ct. 707, discussing what are privileges or immunities of national citizenship; also dissenting opinion in United States v. Wong Kim Ark, 169 U. S. 723, 42 L. 917, 18 S. Ct. 485, arguendo. Approved, arguendo, in United States v. Sanges, 48 Fed. 84, holding bad an indictment under Federal statute, punishing conspiracy to deprive of equal protection of the laws; Boyd v. Thayer, 143 U. S. 160, 36 L. 109, 12 S. Ct. 381, and Davidson v. New Orleans, 96 U. S. 100, 24 L. 618; also Brenham v. Water Co., 67 Tex. 565, 4 S. W. 155, denying city's power to make exclusive water contract; United States v. Judges of Election, 1 Hughes, 505, 507, F. C. 16,036, right to vote is not protected by fourteenth amendment.

Distinguished in dissenting opinion in Butchers' Union v. Crescent City Co., 111 U. S. 764, 28 L. 589, 4 S. Ct. 658, holding privileges and immunities belonging to citizens of every free government comprehended by phrase. Explained in Green v. State, 73 Ala. 37, supra.

Constitutional law.— Privileges and immunities of citizens of the States include those which are fundamental, protection by government, with right to acquire and possess property of every kind and pursue and obtain happiness and safety, subject to governmental restraints exerted for the general good, pp. 76, 97, 117.

Cited approvingly in People v. Loeffler, 175 Ill. 609, 51 N. E. 793, upholding civil service law respecting municipal affairs; Burdick v. People, 149 Ill. 611, 41 Am. St. Rep. 337, 36 N. E. 951, 24 L. R. A. 156, and n., upholding law against sale of scalped railroad tickets; Parrott's Chinese Case, 6 Sawy. 372, 1 Fed. 504, annulling law prohibiting employment of Chinese by corporations; Ritchie v. People, 155 Ill. 112, 46 Am. St. Rep. 325, 40 N. E. 458, 29 L. R. A. 84, declaring void, act prohibiting employment of females more than eight hours daily; State v. Scougal, 3 S. Dak. 70, 44 Am. St. Rep. 767, 51 N. W. 863, 15 L. R. A. 485, and n., annulling statute restricting banking to corporations; Cummings v. Wingo, 31 S. C. 435, 10 S. E. 110, upholding act requiring security for costs from non-residents.

Constitutional law.— Federal guaranty, entitling citizens of each State to privileges and immunities of citizens of several States, created no rights, but merely guaranteed the same measure of rights to each, p. 77.

Cited and principle applied in People v. Lowndes, 130 N. Y. 463, 29 N. E. 752, query whether State may not discriminate in favor of its own citizens as respects its oyster beds; Bliss's Petition, 63 N. H. 135, State cannot withhold peddler's license from citizen of another State; Cory v. Carter, 48 Ind. 345, 17 Am. Rep. 749, upholding law respecting separate schools for black and white; United States v. Harris, 106 U. S. 643, 27 L. 295, 1 S. Ct. 613, annulling Federal statute punishing conspiracy to deprive persons of equal protection of the laws; Blake v. McClung, 172 U. S. 252, 19 S. Ct. 170, holding Tennessee act, preferring resident creditors of corporation, void on this ground; United States v. Patrick, 54 Fed. 350, arguendo; In re Morgan, — Colo. —, 58 Pac. 1079, arguendo; Eingartner v. Illinois Steel Co., 94 Wis. 77, 83, 59 Am. St. Rep. 861, 866, 68 N. W. 666, 668, 34 L. R. A. 506, 508, holding citizen of another State has same right to maintain action in domestic tribunal on cause arising elsewhere, as a domestic citizen; State v. Holden, 14 Utah, 87, 46 Pac. 759, 37 L. R. A. 105, upholding eight-hour mining labor law.

Constitutional law.— Privileges and immunities of national citizenship include right to go to seat of government and transact business with it, right of free access to its seaports, right to demand care and protection of the government when on high seas or in foreign State, and others, pp. 79, 80.

Cited in United States v. Patrick, 54 Fed. 348, right of search by revenue officers is a right secured by national laws; United States v. Wong Kim Ark, 169 U. S. 727, 42 L. 918, 18 S. Ct. 487, dissenting opinion, arguendo; Marshall v. Donovan, 10 Bush, 689, arguendo.

Constitutional law.— Louisiana statute giving slaughtering business of New Orleans to a monopoly and prohibiting it to others, is not void as a deprivation of property without due process of law, pp. 80, 81.

Cited, arguendo, in Caldwell v. Wilson, 121 N. C. 459, 28 S. E. 558, and Davidson v. New Orleans, 96 U. S. 100, 24 L. 618; also State v. Sponaugle, 45 W. Va. 424, 32 S. E. 287, 43 L. R. A. 732, holding what was due process of law in a State before the amendment, continued so; People v. Budd, 117 N. Y. 13, 15 Am. St. Rep. 468, 22 N. E. 674, 5 L. R. A. 565, and n., remarking that prior to fourteenth amendment this was not a Federal question. Miscited in Lawton v. Steele, 152 U. S. 138, 38 L. 389, 14 S. Ct. 501, on this point.

Constitutional law.— Guaranty of equal protection of laws in fourteenth amendment, was designed to protect the newly-emancipated negroes from discrimination, and probably no State action

not directed against negroes will be construed to be within this limitation, unless very clearly so, p. 81.

Cited and relied upon in Strauder v. West Virginia, 100 U. S. 307, 310, 25 L. 665, 666, reversing S. C., 11 W. Va. 810, 813, 816, 817, 27 Am. Rep. 614, 617, 619, 620, holding law prohibiting negro jurors, void; Fitzgerald v. Allman, 82 N. C. 494, holding negro defendant not entitled to removal to Federal court, because of local prejudice; State Board of Assessors v. Central R. R., 48 N. J. L. 319, 4 Atl. 612, upholding State tax on railways and canals under which they paid less than other property; Northampton v. County Commrs., 145 Mass. 111, 13 N. E. 391, upholding tax law apportioning certain property for taxation; civil rights bill, 1 Hughes, 550, F. C. 18,258, in charge to grand jury; State v. Broadbelt, 89 Md. 579, 43 Atl. 773, 45 L. R. A. 435, upholding law for regulation and inspection of dairymen and dairies; State v. Jackson, 80 Mo. 177, 50 Am. Rep. 501, sustaining law prohibiting marriage of blacks and whites; Allen v. Wyckoff, 48 N. J. L. 92, 57 Am. Rep. 549, 2 Atl. 660, game law is not invalid because providing greater penalty against non-resident defendants; Broadfoot v. Fayetteville, 121 N. C. 422, 61 Am. St. Rep. 670, 28 S. E. 516, 39 L. R. A. 246, upholding act providing greater penalty against resident owners of stock running at large; State v. Ah Chew, 16 Nev. 58, 40 Am. Rep. 491, alien Mongolian has no right to serve on jury; Bittenhaus v. Johnston, 92 Wis. 595, 66 N. W. 806, 32 L. R. A. 382, upholding game and fish law containing special provisions.

United States.— First eleven amendments to Federal Constitution were restraints upon Federal power, p. 82.

Cited on this point in State v. Duke, 42 Tex. 458, and Crane v. Reeder, 28 Mich. 533, 15 Am. Rep. 228.

Constitutional law.— Police power extends to regulations affecting health, good order, morals, peace and safety of society; but under pretense of police regulations, State may not encroach upon just rights of the citizen, secured by the Constitution, per Field, J., dissenting, p. 87.

Cited and principle applied in Waterbury v. Newton, 50 N. J. L. 540, 14 Atl. 608, upholding act prohibiting sale of oleomargarine, colored with annotto; Miller v. Valparaiso, 10 Ind. App. 25, 37 N. E. 419, upholding ordinance regulating city fire limits; Cleveland, etc., R. R. v. St. Bernard, 15 Ohio C. C. 595, ordinance requiring railroad lights on its track of a certain size, held unreasonable and void; Electric Imp. Co. v. San Francisco, 45 Fed. 594, upholding ordinance prohibiting electric-light wires over buildings; In re Jacobs, 98 N. Y. 109, 50 Am. Rep. 642, annulling statute prohibiting manufacture of cigars in tenement-houses; First Nat. Bank v. Sarlls, 129 Ind. 212, 28 Am. St. Rep. 194, 28 N. E. 437, 13 L. R. A. 486, and n., annulling ordinance prohibiting repairs of more than $300 on

wooden buildings, within the fire limits; dissenting opinion in State v. Peel Splint Coal Co., 36 W. Va. 850, 15 S. E. 1016, 17 L. R. A. 401, majority upholding act prohibiting payment of miners in scrip. Cited, arguendo, in People v. Ewer, 141 N. Y. 132, 38 Am. St. Rep. 789, 36 N. E. 5, 25 L. R. A. 796, sustaining law prohibiting exhibition of children on stage. See note, 1 Am. St. Rep. 645.

Explained in concurring opinion in Bartemeyer v. Iowa, 18 Wall. 138, 21 L. 932, stating that dissenting judge in principal case never contended that the fourteenth amendment interfered with the State's police power; and see also State v. Burgdoerfer, 107 Mo. 36, 17 S. W. 656, 14 L. R. A. 857, and n., and Virginia Dev. Co. v. Crozer Iron Co., 90 Va. 129, 44 Am. St. Rep. 896, 17 S. E. 807, on this point.

Monopolies.— State may validly create exclusive grants of franchises of a public character, such as bridges or ferries, but not of a right to pursue one of the ordinary trades or callings of life, per Field, J., dissenting, p. 88.

Followed in Patterson v. Wollmann, 5 N. Dak. 617, 67 N. W. 1044, 33 L. R. A. 539, upholding law authorizing exclusive ferry franchises.

Monopolies.— Grants of monopolies, respecting any known trade or manufacture, are void at common law, per Field, J., dissenting, p. 102.

Cited in dissenting opinion in Commonwealth v. Vrooman, 164 Pa. St. 323, 30 Atl. 221, 25 L. R. A. 256, majority upholding act prohibiting fire insurance business to all save corporations. See also 44 Am. St. Rep. 612, note.

Constitutional law.— Privileges and immunities guaranteed by fourteenth amendment, defined and stated, dissenting opinions, pp. 97, 114, 122, 127.

Cited and relied upon in In re Tie Loy, 11 Sawy. 476, 477, 26 Fed. 613, 614, annulling ordinance prohibiting laundries within a city; Parrott's Chinese Case, 6 Sawy. 373, 374, 386, 1 Fed. 505, 506, 518, annulling law prohibiting employment of Chinese by corporations.

Constitutional law.— Guaranty of right to life and property comprehends right to choose freely one's calling, profession or trade, dissenting opinions, pp. 97, 106, 113, 116, 122.

Cited and principle applied in Old Dominion S. S. Co. v. McKenna, 24 Blatchf. 247, 30 Fed. 50, 59 Am. Rep. 721, inciting laborers to quit work is an actionable wrong; State v. Goodwill, 33 W. Va. 183, 25 Am. St. Rep. 867, 10 S. E. 287, 6 L. R. A. 623, and n., declaring void a law prohibiting manufacturers issuing orders or paper in payment of employees; State v. Scougal, 3 S. Dak. 74, 44 Am. St. Rep. 771, 51 N. W. 865, 15 L. R. A. 486, and n., annulling statute restricting banking to corporations; People v. Gillson, 109

N. Y. 399, 4 Am. St. Rep. 469, 17 N. E. 345, annulling law prohibiting sale of articles of food induced by accompanying gift, prize or premium; Consolidated, etc., Co. v. Murray, 80 Fed. 821, enjoining strikers from unlawful interference with corporate business; Low v. Rees Printing Co., 41 Neb. 146, 43 Am. St. Rep. 683, 59 N. W. 367, 24 L. R. A. 709, annulling eight-hour labor law; Barr v. Essex Trades Council, 53 N. J. Eq. 112, 30 Atl. 885, enjoining labor union from inciting boycott of newspaper; People v. Marx, 99 N. Y. 386, 52 Am. Rep. 40, 2 N. E. 33, annulling State law prohibiting sale of butter or cheese substitutes; Braceville Coal Co. v. People, 147 Ill. 71, 37 Am. St. Rep. 209, 35 N. E. 63, 22 L. R. A. 342, annulling statute compelling corporations to pay employees weekly; Parrott's Chinese Case, 6 Sawy. 378, 1 Fed. 510, as also law prohibiting employment of Chinese by corporations.

Distinguished in People v. Phippin, 70 Mich. 16, 37 N. W. 893, upholding law regulating practice of medicine.

Citizen of a State is ipso facto citizen of United States, per Swayne, J., dissenting, p. 126.

Followed in Boyd v. Thayer, 143 U. S. 159, 36 L. 109, 12 S. Ct. 381.

Constitutional law.— Life, liberty and property, and the equal protection of the laws as guaranteed by fourteenth amendment, defined and stated, per Swayne, J., dissenting, p. 127.

Cited in Mills v. Green, 67 Fed. 829, holding South Carolina registration law an unreasonable restraint on right of suffrage; In re Tie Loy, 11 Sawy. 476, 26 Fed. 613, 614, avoiding ordinance prohibiting laundries within city; Harbison v. Knoxville Iron Co., — Tenn. —, 53 S. W. 957, 958, and Dayton, etc., Co. v. Barton, — Tenn. —, 53 S. W. 971, both upholding law requiring corporation to redeem its scrip orders in cash.

Miscellaneous.— Cited in following for description of disabilities of negroes in south after the war and before fourteenth amendment: Ex parte Virginia, 100 U. S. 364, 25 L. 685, Civil Rights Cases, 109 U. S. 37, 27 L. 848, 3 S. Ct. 40, Railroad Tax Cases, 13 Fed. 738, Cory v. Carter, 48 Ind. 335, 17 Am. Rep. 743, and Railroad Tax Case, 8 Sawy. 258, 13 Fed. 738. Cited in Ah Lim v. Territory, 1 Wash. 169, 24 Pac. 591, 9 L. R. A. 398; incidentally also in State v. Railroad, 24 W. Va. 794, 49 Am. Rep. 296, and Topeka v. Boutwell, 53 Kan. 37, 35 Pac. 824, 27 L. R. A. 611, and n. Miscited in Weber v. Yancy, 7 Wash. 89, 34 Pac. 474.

16 Wall. 130–142, 21 L. 442, BRADWELL v. THE STATE.

Constitutional law.— Federal guaranty, entitling citizens of each State to privileges and immunities of citizens of several States, does not protect citizen of State whose laws are complained of, p. 138.

See note to following syllabus.

Constitutional law.— Right to admission to practice in courts of a State is not an immunity or privilege of national citizen of United States; hence action of State court in refusing to admit a woman to practice does not violate fourteenth amendment, pp. 138, 139.

Cited and principle applied in In re Lockwood, 154 U. S. 117, 38 L. 930, 14 S. Ct. 1083, holding that it was for the State court to determine whether women are admitted to practice law in that State; Holden v. Hardy, 169 U. S. 383, 42 L. 788, 18 S. Ct. 385, holding valid State statute regulating hours of labor in mines; United States v. Anthony, 11 Blatchf. 206, F. C. 14,459, holding that right of voting is one arising under State Constitution; United States v. Sanges, 48 Fed. 84, holding right to testify before a Federal grand jury without interference from private individuals is not conferred by the United States Constitution; Philbrook v. Newman, 85 Fed. 142, holding that judgment of State court, disbarring an attorney, does not deprive him of any privilege or immunity secured by the Constitution of the United States; People ex rel. Col. Bar. Assn. v. Weeber, — Colo. —, 57 Pac. 1080, holding that attorney convicted of crime may be disbarred, though he paid his fine; Cory v. Carter, 48 Ind. 345, 346, 17 Am. Rep. 749, 750, and Lehew v. Brummell, 103 Mo. 550, 23 Am. St. Rep. 897, 15 S. W. 766, 11 L. R. A. 829, both holding valid statute providing separate schools for colored children; In the Matter of Charles Taylor, 48 Md. 31, 32, 33, 30 Am. Rep. 453, 454, 455, holding same as cited case; Short v. State, 80 Md. 401, 31 Atl. 323, 29 L. R. A. 414, and n., holding valid statute imposing compulsory labor on roads; Robinson's case, 131 Mass. 377, 41 Am. Rep. 240, holding unmarried woman not entitled to be examined for admission to the bar; Ricker's Petition, 66 N. H. 253, 29 Atl. 583, 24 L. R. A. 762, holding that a woman may be an attorney-at-law; France v. The State, 57 Ohio St. 22, 25, 47 N. E. 1044, holding that State may impose reasonable conditions on those desiring to practice medicine; State v. Davidson, 92 Tenn. 534, 22 S. W. 204, 20 L. R. A. 312, holding woman not eligible to office of notary public; Frasher v. The State, 3 Tex. App. 273, 30 Am. Rep. 138, holding that marriage is not a "privilege or immunity" within the fourteenth amendment; Harland v. Territory, 3 Wash. Ter. 141, 13 Pac. 456, holding women not competent to serve as jurors; State v. Strauder, 11 W. Va. 815, 817, 27 Am. Rep. 618, 620, holding negro not entitled to have case removed to Federal court, because only white men could sit on jury in State court; Baker v. State, 54 Wis. 375, 12 N. W. 16, holding constitutional statute imposing criminal liability upon banker taking deposits with knowledge of his insolvency. Cited in 53 Am. Rep. 325, note of case of Supreme Court of New York, refusing to admit a woman to the bar; 25 Am. St. Rep. 872, note on privileges and immunities

of citizens, collecting authorities. Cited, without particular application, in Crane v. Reeder, 28 Mich. 533, 15 Am. Rep. 228.

Distinguished in Morris v. Powell, 125 Ind. 315, 25 N. E. 228, 9 L. R. A. 333, holding that constitutional qualification of voters may not be added to by legislative enactment; In the Matter of Eldridge, 82 N. Y. 166, holding that order of Supreme Court, punishing attorney for professional conduct not committed in the presence of the court, is reviewable in Court of Appeals.

16 Wall. 143–147, 21 L. 307, MAHAN v. UNITED STATES.

Frauds, statute of.— Parol agreement that party should take cotton as payment upon a mortgage, there being no payment indorsed on mortgage, nor receipt given, nor memorandum made, nor present consideration paid, nor any change of possession or delivery, is unenforceable and does not transfer title, pp. 146–147.

Gift.— Delivery is essential to a gift inter vivos, p. 147.

Rule reasserted in Donnell v. Wylie, 85 Me. 147, 26 Atl. 1094.

16 Wall. 147–156, 21 L. 426, CARLISLE v. UNITED STATES.

Treason.— Furnishing of saltpetre by parties who knew it was to be used by Confederates in manufacturing powder, was an act of aid and comfort to the Rebellion, p. 150.

Pardon of president releases offender from punishment, and in legal contemplation obliterates the offense, p. 151.

This principle has been applied without limitation in the following cases: Osborn v. United States, 91 U. S. 478, 23 L. 390, holding that condition annexed to pardon was only intended to protect purchasers at judicial sale under confiscation laws; Knote v. United States, 95 U. S. 153, 24 L. 443, holding that pardon did not entitle recipient to proceeds of property previously condemned and sold; Cowan v. Prowse, 93 Ky. 172, 19 S. W. 411, and Jones v. Bd. of Registrars, 56 Miss. 768, 31 Am. Rep. 386, both holding that pardon by president restores right of suffrage to one convicted in a Federal court; Knapp v. Thomas, 39 Ohio St. 381, 48 Am. Rep. 462, holding that pardon could not be impeached because given on fraudulent certificate of physician; Easterwood v. State, 34 Tex. Cr. Rep. 409, 31 S. W. 296, holding pardon of convict who has served out his sentence, revives his competency as a juror; Edwards v. The Commonwealth, 78 Va. 43, 49 Am. Rep. 379, holding pardon of first offense relieves party of additional punishment by reason thereof for the second; State v. Page, 60 Kan. 670, 57 Pac. 516, holding power given board of managers of State Reform School to mitigate punishment is merely administrative and not an infringement upon pardoning power of governor. Cited, without particular application, in Jenkins v. Collard, 145 U. S. 556, 36 L. 815, 12 S. Ct. 872.

HEARING BEFORE THE UNITED STATES SENATE COMMITTEE ON WOMAN SUFFRAGE, HELD IN THE MARBLE ROOM OF THE UNITED STATES SENATE ON THE 13TH DAY OF FEBRUARY, 1900, AT 10 O'CLOCK A. M.

The members of the committee present were Senators Daniel (chairman), Berry, Wetmore, and Foster.

The CHAIRMAN. I beg leave to state that this meeting of the Committee on Woman Suffrage of the Senate has been called at the instance of the ladies who favor that movement. The committee has been requested by ladies who are opposed to the movement to give them a hearing, which will be done at such time and place as may be convenient to them and to the committee, but to-day has been accorded to the ladies who favor the movement for woman suffrage, and the committee is now in session to hear those ladies. The chair recognizes Miss Anthony.

Miss SUSAN B. ANTHONY. Mr. Chairman and gentlemen, it is with great pleasure that we are here to-day. This is the first time we ever assembled in the Marble Room of the Senate.

A VOICE. Two years ago we were here.

Miss ANTHONY. I have been coming here for the last thirty-two years, and this is the first time I was ever in the Marble Room. We consider it a great honor that we are able to get even a committee of five of the honorable members of the Senate to listen to our arguments. We have from year to year during the last thirty years made earnest applications for an opportunity to get our appeal before the entire Congress—members of the House and Senate—and we are always very thankful for even the opportunity to speak before a committee, however large or small, of either House.

Now, Mr. Chairman, we are here to begin this morning with an historical statement. This hearing is to present the historical department of our movement, and the first speaker in order will discuss the work which Congress has done for the women during the last thirty years. Just think of it, Senators. Suppose any of you men had to plead for any of your rights for thirty years and not get them.

I will introduce Mrs. Clara B. Colby, the editor of the Woman's Tribune, formerly of Nebraska, but now a nonvoting citizen, as good as a man, in the District of Columbia.

OUR WORK WITH CONGRESS.

Mrs. CLARA B. COLBY. Mr. Chairman and gentlemen of the committee, when it was sought to settle the political status of the negro by the fourteenth amendment the word "male" was for the first time

introduced in the Federal Constitution. The combined wisdom of Congress could not open the door wide enough to let the black man into the political fold without putting up a bar to keep women out. Charles Sumner, who had come most in contact with the petition work, said he spent sleepless nights over it, and wrote 19 pages of foolscap to try to get around it, but it could not be done.

The woman suffragists at once remonstrated against this proposition, and sent out forms for a petition that the resolution might be amended by striking out the word "male." Before the session was over they had secured and presented 10,000 names. The Republican leaders could not controvert claims based on the same line of argument by which they sought to confer suffrage upon the negro, but they said: "You are right, but you must wait. This is the negro's hour."

The first vote on the question of woman suffrage took place the following session, in December, 1866. A bill being before the Senate to amend the franchise law of the District of Columbia so as to allow colored men to vote, Senator Cowan, of Pennsylvania, moved to amend by striking out the word "male." The debate lasted three days, and is of great historic importance as being the first time this question was discussed in so grave a body. Mr. Cowan said he was not afraid of negro suffrage if female suffrage went hand in hand with it.

In the arguments of the opposition he found, he said, only "the same ancient footprints, the same things that satisfied men thousands of years ago and which never did satisfy any woman that I know of." Mr. Wilson, of Massachusetts, afterwards Vice-President of the United States, opposed the amendment, as did a number of others favorable to woman suffrage but who wished to keep the questions of negro and woman suffrage entirely separate. He, however, made an eloquent speech for the principle involved, saying that every year had confirmed his conviction that our legislation would be more humane, more for liberty, more for a higher civilization, if women were permitted to vote.

Mr. Gratz Brown, of Missouri, in taking issue with the claim that suffrage is a concession and not a principle, used this sublime language: "Whenever you establish that doctrine; whenever you crystallize that idea in the public mind of this country, you ring the death knell of American liberties."

Senator Buckalew, of Pennsylvania, was a true prophet in saying: "This is not the last we shall hear of this subject. It will come to us again, and I am persuaded that one reason why it will come again is that the arguments against the proposed extension of suffrage have been inadequate; they have been based upon grounds which will not endure debate."

After three days' discussion 9 Senators voted for the bill and 37 against it. Among the latter were some who wanted woman suffrage, but wanted negro suffrage more and therefore would not jeopardize the bill. Those who wanted woman suffrage just as much as they wanted negro suffrage, and perhaps more, were: Senators Anthony of Rhode Island, Brown of Missouri, Foster of Connecticut, Nesmith of Oregon, Patterson of New Hampshire, Buckalew and Cowan of Pennsylvania, Riddle of Delaware, and Benjamin F. Wade of Ohio.

In the House the same question was brought up by Mr. Noell of Missouri and without debate it stood 49 yeas, 74 nays.

When it was found that the fourteenth amendment did not sufficiently protect the negro, a fifteenth amendment was introduced in the Senate by Mr. Pomeroy of Kansas, and in the House by Mr. George W. Julian of Indiana, in December, 1868. As framed at first it made citizenship the basis of suffrage, and would have made women legal voters. This failed and the amendment, as it now stands, was passed in 1870.

In December, 1868, a bill to enable women to vote in the District of Columbia was introduced in the Senate by Mr. Wilson and in the House by Mr. Julian.

The next move was by Mr. Julian to try to extend the suffrage to women in the Territories, and this was almost simultaneous with the legislative enactment of woman's suffrage in the Territory of Wyoming in 1869.

On March 15, 1869, Mr. Julian submitted a joint resolution for a sixteenth amendment to the Federal Constitution, prohibiting the States from disfranchising citizens because of sex. Worded a little differently, this amendment has been introduced in every succeeding Congress.

Addresses on behalf of the rights of women citizens were sent to Congress in 1866 and 1867, and hearings before Congressional committees began with the first Washington convention, thirty-one years ago. In January, 1870, Mrs. Stanton, Miss Anthony, Paulina Wright Davis, Charlotte B. Wilbour, and Madame Arneke spoke before committees for the bill enfranchising the women of the District of Columbia.

In December, 1870, Victoria C. Woodhull sent a memorial to Congress praying for the passage of such laws as might be necessary and proper for carrying into execution the right vested by the Constitution in the citizens of the United States without regard to sex. This was presented in the Senate by Mr. Harris and in the House by Mr. Julian. The memorial was referred to the Judiciary Committees, which appointed a hearing for Mrs. Woodhull on January 11, 1871. An opportunity was also given to Isabella Beecher Hooker and Hon. A. G. Riddle to address the committee, the latter making a legal argument on the right of women to vote under the fourteenth and fifteenth amendments.

Judge Bingham, on behalf of the majority, reported adversely on January 30, and on February 1 a favorable minority report was made by Mr. Loughridge and Benjamin F. Butler. In this report it was maintained that the right of women to vote was embodied by ancient precedents in the common law of England. Decisions of our Supreme Court were cited to show that the elective franchise is a right fundamental to citizenship. This right is also recognized by the first clause of the fifteenth amendment, which says: "The right of citizens of the United States to vote shall not be denied or abridged," etc. Here is stated, first, the existence of a right. What right? The right to vote. Whose right? The right of citizens of the United States. And this right the States are forbidden to deny or abridge. The denial of the power to abridge a right recognizes the existence of that right. The report extended over 34 closely printed pages and covers the whole question of the constitutionality of woman's right to vote as a citizen of the United States.

In view of this new phase of the movement and the impetus resulting from the hearing, it was decided to appoint as a committee for Congressional work during the session Isabella Beecher Hooker, Josephine S. Griffing, Mrs. M. B. Bowen, Miss Anthony, Paulina Wright Davis, and Ruth C. Dennison, of Washington. The chairman of the House Committee on Education and Labor (Mr. Arnell, of Tennessee) tendered the use of his room as headquarters. Later this was exchanged for the larger room used by the House Committees on Agriculture and Manufactures, whose chairmen (General Smith and Mr. Wilson) generously proffered the use of it. Here books were opened for signatures, literature was distributed, petitions sent all over the country, and conferences were held. This was indeed a woman suffrage committee room.

On the closing day of Congress Mrs. Hooker, on behalf of the committee, thanked the members who had rendered signal service to the suffrage cause. To Mr. Arnell double thanks were due, not only because he was the first to admit women to the Capitol as citizens having any right there in the use of public buildings, but because he had secured the passage of a bill to give to employees of the Government equal pay for the same work without distinction of sex. Mr. Arnell replied that he welcomed the committee as the advance guard of American women.

Judge Loughridge strongly urged the women to continue to appeal to Congress rather than the courts, for, he said, "Courts are generally in the rear rank," which the suffragists found to be true in the suits which they subsequently brought.

Mr. Julian closed his response with this immortal sentiment: "Who will venture to judge the future by any political almanac of bygone times? I can only say with old Thomas Carlyle, 'One strong thing I find here below—the just thing, the true thing,' and no man or party is strong enough to stay the grand march of events through which the hand of God is visibly guiding the Republic to universal liberty, and through that to enduring prosperity and peace."

During this session Mr. Julian again made an effort to have the word "male" stricken out of the suffrage clause in a bill that had been introduced to provide for the better government of the District of Columbia. Mr. Cook, of Illinois, moved the previous question, thus cutting off debate. But Mr. Julian called for the ayes and noes, thus obtaining a test vote, which stood 55 for and 117 against.

Under date of January 21, 1871, Mrs. Belva A. Lockwood and Drs. Caroline B. Winslow and Susan A. Edson had memorialized both Senate and House on behalf of this bill, and on July 14 of the same year Mrs. Lockwood appeared before the House Judiciary Committee, making an able argument in support of the woman suffrage bills and presenting a large petition for their passage.

In January, 1872, an attempt was made to get a hearing before the Senate and House in defense of the suffrage measures. The request was in the Senate referred to the Judiciary Committee, which replied through its chairman, Lyman Trumbull, that this would not be consistent with the rules of the Senate, but that the committee would give the memorialists a hearing on the following Friday. At that time four of the strongest men in the Senate—Mr. Trumbull, of Illinois; Mr. Conkling, of New York; Mr. Frelinghuysen, of New Jersey, and Matt. Carpenter, of Wisconsin—listened to a masterly constitutional argument by Mrs. Hooker and Mrs. Stanton. The latter urged that

it should not be taken for granted that the Revolutionary heroes, after a struggle with despotism, studied how to use their new-found freedom for the purpose of robbing women of their inalienable rights. Women were voting at the time the Constitution was written, and if the framers of that document had not wanted women to vote they would have said so. "It is not safe," Mrs. Stanton said, "to leave the intentions of the Pilgrim fathers or of the Heavenly Father wholly to masculine interpretation."

Miss Anthony reminded the committee that by the fourteenth and fifteenth amendments the question of suffrage for men had been lifted above State control. Therefore women turned to Congress praying first that the word "male" should not be inserted in the fourteenth amendment, then for the insertion of "sex" in the fifteenth amendment, so that it might read that the States should not abridge the right of suffrage on account of race, color, sex, etc., but they were told to wait until the negro was cared for. Then when they came asking protection under the new guarantees of the Constitution they were told their only plan was to wait until Congress should adopt an amendment to make null and void the word "male" in the fourteenth and supply the want of the word "sex" in the sixteenth amendment.

In the House, on January 24, 1872, General Butler introduced a suffrage petition containing the names of 35,000 women asking for protection in their right to vote.

The next hearing was given by the Senate Judiciary Committee in 1874 to Mrs. Sara A. Spencer, Miss Frances Ellen Burr, Miss Phoebe W. Couzins, and Mr. Francis Miller, in connection with 600 women of the District, asking for legislation enabling them to vote.

On May 28, 1874, when the bill to establish the Territory of Pembina was pending in the Senate, Mr. A. A. Sargent, of California, moved to amend it so that women could not be disfranchised. He supported his motion with an earnest speech, in which he reminded the Senate that women voting and holding office in Wyoming had rescued that Territory from a state of comparative lawlessness and made it one of the most orderly in the Union. Those speaking for the measure were Senators Sargent, Stewart, Morton, Carpenter, Ferry, and Anthony; those against were Senators Boreman, Merriman, Morrill of Maine, Edmunds, and Bayard. The vote stood 19 to 27; this was a gain of 10 votes over that of eight years previous.

The arguments for the measure were long and able. Matt Carpenter, of Wisconsin, said: "I believe it is not one of woman's rights, but one of man's rights that the franchise should be extended to woman."

The question being taken by yeas and nays, resulted as follows:

Yeas—Messrs. Anthony, Chandler, Carpenter, Conover, Ferry, of Michigan, Flannagan, Gilbert, Harvey, Mitchell, Morton, Patterson, Pratt, Sargent, Sprague, Stewart, Tipton, Washburn, West, and Windom—19.

Nays—Messrs. Allison, Bayard, Boreman, Boutwell, Buckingham, Clayton, Conkling, Cooper, Davis, Edmunds, Frelinghuysen, Hager, Hamilton, of Maryland, Hitchcock, Jones, Kelly, McCreery, Merrimon, Morrill, of Vermont, Norwood, Ramsey, Ransom, Saulsbury, Scott, Sherman, Wadleigh, and Wright—27.

The centennial year was ushered in with a memorial to Congress from this association asking to have women made voters in the District.

This was presented in the Senate by Hon. A. A. Sargent and in the House by Hon. S. S. Cox, of New York. Mr. Banks in supporting it recalled the fact that it was one hundred years ago that day that Abigail Adams had written to her husband at that time in the Continental Convention, asking him to give women the power to protect their own rights and predicting a general revolution if justice was denied them.

A hearing was granted in this connection to Matilda Joslyn Gage, Sara A. Spencer, Rev. Olympia Brown, Belva A. Lockwood, and Phoebe W. Couzens:

The Supreme Court having, by its final decision in the case of Virginia L. Minor, in 1875, made hopeless all attempts to secure the protection of women in their citizen's rights under the fourteenth and fifteenth amendments, the policy of asking for a sixteenth amendment was vigorously resumed in 1877. Mrs. Sara A. Spencer, chairman of work with Congress, received the petitions, and in one day placed 10,000 from 23 States in the hands of the respective members from those States. At the special request of the chairman, Senator Morton, of Indiana, the petitions were sent to the Committee on Privileges and Elections, although heretofore they had been referred to the Judiciary Committee.

In 1878 another effort was made to get a hearing before Congress itself. Mr. Sargent in the Senate and Mr. Kelley in the House offered the request that the motion be granted. It was voted down in the Senate by 31 nays to 13 yeas. The champions of the resolution were Senators Sargent, Anthony, Burnside, and Davis; those speaking against it were Senators Edmunds, Thurman, and Conkling. Those voting for it were Senators Anthony, Bruce, Burnside, Cameron of Wisconsin, Davis, Ferry, Hoar, Matthews, Mitchell, Rollins, Sargent, Saunders, and Teller. In the House Mr. Kelley's request to offer the resolution could not be entertained because Mr. Crittenden of Missouri objected. This refusal to grant women an opportunity to plead for their own freedom was more noticeable from the fact that the floor of the House was shortly after granted to Charles Stuart Parnell, that he might plead the cause of oppressed Ireland.

A hearing before the Senate Committee on Privileges and Elections was, however, given to 12 women, representing States from Maine to Oregon, in favor of the amendment. Two hearings were given by the House committee in January, and the Committee on Privileges and Elections gave another hearing to Mrs. Isabella Beecher Hooker on February 22.

In 1878 a bill to enable women lawyers to practice before the Supreme Court passed the House by a vote of 169 to 87, under the championship of Hon. John M. Glover, of Missouri, but was defeated in the Senate because reported adversely by Senator Edmunds. This was, however, passed in February of the following year, and a week later, March 3, 1879, Mrs. Belva A. Lockwood was admitted to practice before the Supreme Court.

In 1878 Senator Wadleigh made an adverse report for the Committee on Privileges and Elections, basing his action upon the small number of women who had asked for the franchise, although at that very session petitions had been received signed by 70,000 and individual letters from 500 women asking to be relieved from political disabilities.

The minority of the committee gave the first favorable report the question received in the Senate. It was dated February 1, 1879, and

bore the distinguished names George F. Hoar, of Massachusetts; John H. Mitchell, of Oregon, and Angus Cameron, of Wisconsin.

Two other points were gained in 1878. The memorial of Mrs. Stanton, Miss Anthony, and Mrs. Gage, asking for a sixteenth amendment, was read in open Senate.

Mrs. Emeline B. Wells and Mrs. Zena D. Young, of Utah, presented a memorial to Congress setting forth the injury done to Mormon women and children by the law of 1862, which had made 50,000 women outcasts and their children homeless. The result was a law legitimatizing the offspring of plural marriages prior to a certain date.

Miss Anthony, after her famous trial for voting in Rochester, appealed to Congress for remission of the fine which had been imposed on her. Her petition was presented by Senator Sargent January 12, 1874. Senator Edmunds, for the Committee on the Judiciary, submitted an adverse report, and Senator Matt. Carpenter made a comprehensive legal argument for the minority. The same was done in the House by Benjamin F. Butler when Mr. Tremaine, of the judiciary, reported unfavorably. Miss Anthony's fine was never remitted and never paid, and thus it stands to this day. The fine imposed upon the inspectors of elections for receiving her vote was remitted by President Grant.

They who claim that women have only to express their desire for the ballot to receive it at the hands of willing men should take note of the petitions which have been thus far referred to. One more great effort was to be made in this line. By an early date in January, 1880, so many petitions had been received that in one week 47 Senators presented petitions signed by over 12,000 women. In the House unanimous consent could not be obtained, therefore 65 Representatives presented their petitions at the clerk's desk.

In 1880 and 1881 the subject of a special committee in the Senate to look after matters pertaining to woman suffrage had been broached. In 1882 the committee, after the morning hour for eight days had been spent in the discussion of the question, was established in the Senate by a vote of 35 to 23.

A Select Committee on Woman Suffrage was established in the House the same year by a vote of 115 to 84. A lively debate on woman suffrage occurred the following year in connection with the motion by Mr. Warren Keifer, of Ohio, to reestablish it, which was supported by Mr. Belford, of Colorado. Later Mr. John D. White, of Kentucky, moved that the House have a standing committee on the subject. In an able speech supporting his motion he illustrated the disadvantage under which disfranchised woman rests by the case of Anna Ella Carroll, who, with political influence, he said, "would long ago have received every dollar advanced by her to save the nation, and her name would have been honored as Sherman's and Grant's." The motion was lost, and matters relating to woman suffrage in the House have since, as before, gone to the Judiciary Committee.

At every Congress for the last thirty-two years hearings have been had before these committees, and the remarks have been printed and franked by the thousands and sent over the country. The value of this direct work with Congress lies chiefly in its reflex influence over the States. Every favorable report and speech being thus sent broadcast over the nation is made impressive by the fact that this subject

has thus received dignified and courteous attention at the seat of government.

Reports by committees of Congress have been as follows:

IN THE SENATE.

1879. Committee on Privileges and Elections. Majority unfavorable; minority favorable.
1882. Woman Suffrage Committee. Majority favorable. Signed by Senators Lapham, Ferry, Blair, and Anthony.
1884. Woman Suffrage Committee. Signed by Senators Palmer, Blair, Lapham, and Anthony.
1886. Woman Suffrage Committee. Signed by Senators Blair, Palmer, Chace, and Bowen.
1888–1890. Woman Suffrage Committee. Signed by Senator Blair for the committee.
1893. Woman Suffrage Committee. Signed by Senators Warren, Hoar, Allen, and Quay.
1884. Woman Suffrage Committee. Unfavorable. Minority by Senator Brown.
1888. Woman Suffrage Committee. Unfavorable. Minority by Senator Cockrell.
1896. Woman Suffrage Committee. Unfavorable. Minority only by Senators Call and George.

IN THE HOUSE.

1883. House Select Committee. Favorable report by Mr. White.
1884. House Judiciary Committee. Favorable, minority. Signed by Thomas Brackett Reed, of Maine.
1886. House Judiciary Committee. Signed by Ezra B. Taylor, of Ohio; W. P. Hepburn, of Iowa; L. B. Caswell, of Wisconsin, and A. A. Ranney, of Massachusetts.
1890. House Judiciary Committee. Favorable. Majority report. Ezra B. Taylor, chairman.
1894. House Judiciary Committee. Unfavorable. Signed by Mr. Goodnight.

In the reports of 1890, favorable alike from both committees, the sixteenth amendment was for the first time in good standing in both Houses of Congress.

On February 6, 1885, the bill for the sixteenth amendment was taken from the calendar to allow Senator Palmer to speak on it. The masterly argument made on this occasion has been distributed by the tens of thousands all over the country, and is still one of our best documents. In that Congress Senators Palmer, of Michigan; Bowen, of Colorado; Manderson, of Nebraska, and Pike, of New Hampshire, sat on seats a little raised at the extreme end of the Senate. This corner was dubbed Pike's Peak. These Senators had agreed to vote together on various subjects, but Mr. Pike said they would have to count him out on woman suffrage. However, after Mr. Palmer's speech, Mr. Pike was the first to congratulate him and to acknowledge himself converted. Henceforth Pike's Peak was solid for woman suffrage.

The sixteenth amendment was for the last time the direct subject of debate in the Forty-ninth Congress, on December 8, 1886, and January 25, 1887, being advocated by Senators Blair, Dolph, and Hoar, and opposed by Senators Brown and Vest. On this occasion Mr. Blair had incorporated in his remarks and printed in the Record the arguments made by representatives of this association at the hearings of 1880 and 1884. The bill was defeated by a two-thirds vote.

But the question has come up at different times in various ways, showing the watchfulness of the woman-suffrage leaders and their determination to attack Congress at every point.

When the bill for the admission of Washington was pending, Mr. Hoar secured the signatures of 22 Republican Senators, asking the conference committee to provide that all persons who had enjoyed the right of suffrage under any act of the Territorial legislature should be allowed to vote for delegates to the constitutional convention and on the adoption of the constitution. This was for the benefit of the women citizens of Washington, who, having been voters, had been disfranchised by the courts. Although ably advocated by Mr. Hoar and Mr. Blair, this point could not be gained.

In this same year (1889) General Manderson presented two bills in the Senate. One asked for an act of Congress protecting women in their right to vote for Representatives or Delegates to Congress; the other asked for an amendment of the enforcement act of 1870 by inserting the word "sex" before that of "color."

The most important action on woman suffrage was in connection with the admission of Wyoming in 1890. Its admission was opposed nominally on the ground of it having woman suffrage in its constitution. For a long time the bill hung trembling in the balance. Judge Cary, the Wyoming Delegate, did not flinch in the least on the question, although it threatened to delay their statehood. The men of Wyoming telegraphed him the message that they would wait, if need be; that they would not go in as a State without their women. The final vote stood 139 for to 127 against, and in the Senate, after a two days' similar discussion, by a vote of 29 for to 18 against.

The subject of Federal suffrage was taken up in earnest in this association in 1892, appointing a special committee, with Mrs. Colby chairman, to push this phase of the question. Bills were introduced for it April, 1892, by Clarence D. Clark, of Wyoming, and in February, 1894, by Lafe Pence, of Colorado. Memorials asking for this measure were sent in from 87 organizations, including many thousands of people, and a hearing on this subject was given in February, 1894, to Mrs. Sarah Clay Bennett and Mrs. Colby by the Committee on Election of President and Vice-President. Since 1896 this work has been under the chairmanship of Mrs. Bennett, who continually lays before members of Congress memorials and arguments on this subject.

Everything that a disfranchised class could do has been done by women, and never in the long ages in which the love of freedom has been evolving in the human heart has there been such an effort by any other class of people as this here outlined. Surely it ought to win the respect and support of every man in this Republic who has a brain to understand the blessings of liberty and a heart to beat in sympathy with a struggle to obtain it.

While we will work in both State and nation to get such legislation as we may, and to educate public opinion as fast as we can, we will never concede that our right is not embodied in the document which says "Governments derive their just powers from the consent of the governed."

Miss SUSAN B. ANTHONY: Mr. Chairman, I want to ask leave to have printed in the report of this hearing certain pages which Mrs. Colby left out in her reading, as the historical record of Congressional action upon this subject is of great importance. I remember ten years ago, when we had a hearing, a gentleman from Ohio, a judge, said to me: "Now, Miss Anthony, if you had only begun this kind of talk before our committees ten years ago you would have the suffrage."

Now, I want to say that I have been delegated to tell what has been done by the different legislatures of the whole 45 States. It is impossible to detain the committee to listen to that long array of the hardest kind of work, of tramping through slush and mud and snow and rain, and appearing before the different State legislatures to submit a proposition for the striking out of that little monstrous word "male" from the suffrage clause. Now, that little word is good everywhere under the sun except in the suffrage clause, but it is very obnoxious there. I want to ask leave to print the speech in full.

We have just one State in the Union where the experiment of woman's suffrage in the States, what is termed municipal suffrage, has been in existence for the past ten or twelve years, and that State is Kansas. The former president of the State association and the vice-president at large of the Kansas association has prepared a report for presentation, but at the last moment she was unable to be present, and our corresponding secretary, Mrs. Rachael Foster Avery, will read that report. We do not wish to bother the committee with these long reports, but we do wish to put them on record in this the last year of the nineteenth century. It is very important that we should make a landmark now at the close of the nineteenth century, to see where we stand and where our young women will have to start in the twentieth century.

Mrs. Rachael Foster Avery read as follows:

MUNICIPAL WOMAN SUFFRAGE IN KANSAS.

LAURA M. JOHNS, SALINA, KANS.

Just thirteen years ago Kansas celebrated Miss Anthony's birthday after a fashion that delighted her soul more than did the regal banquet at the Riggs House, ten years ago, when she was 70 years young; and even more than the splendid demonstration that marks her 80th birthday. It was on the 15th day of February, 1887, that the governor of Kansas signed the bill which conferred upon the women of the cities of Kansas the privilege of voting in municipal elections. This was a jubilee Miss Anthony herself had helped to prepare, for she had spent many months going up and down in the State, stirring suffrage sentiment that had smoldered for seventeen years, and directing the efforts of the then young Equal Suffrage Association toward the end that women might vote for city officials on the same terms as men. This memorable and fruitful achievement was her first work after a retirement of several years, enforced by her labors on the History of Woman Suffrage.

At the time of the municipal enfranchisement of the women of Kansas no other States had advanced so far along this line. Kansas had given all her women school suffrage eight years before that brave young Territory, Wyoming, gave the full ballot to her women.

These thirteen years of experience of woman's vote in municipal elections has brought to this measure new friends and new enemies. Its old friends love it more and its old enemies, of the baser sort, hate it harder for what women voters have done and have sought to do. Curiously enough women's ballot is not hated most for the reasons so long exploited by our opposers, namely, neglect of homes and children, loss of moral influence, damage to womanliness, incapacity, bad women to the fore, et al., but for reasons far different. They are,

in the main, these three: (1) The expression at the ballot box of woman's uncompromising enmity to those city institutions built up and maintained by the vices of men; (2) woman's steady opposition to city revenue from institutions that degrade humanity, and (3) the bitterness of defeat at the hands of women. These characteristics of woman suffrage in operation are irritating to many classes of men, and bring down their anathema upon woman's enfranchisement. The baser sort look upon woman voters as unwarrantably meddling with their personal liberty; many business men are angered when we succeed in cutting off the revenue that we consider "blood money," but which they hold dear in the delusion that it lowers taxes and makes the city prosperous; while another large class of men grow furious and forswear woman suffrage when woman's votes defeat them, or their friends, or their pet schemes.

On the other hand we have made friends for our cause among the advocates of good government, for many of those who never loved us before love us now for the enemies we have made.

So evident is it that women voters seek to elect men of character, and to bar out men of low morality, that when a defeated candidate has a "bar sinister" on his escutcheon, the general comment is: "The women did it!" And the baser element joins in this cry, and thus does our most ancient enemy testify to woman's effort to use the elective franchise for the correction of municipal evils.

In an important city of the State a strong fight was being made to determine whether or not law should be enforced and government clean and honest. The editor of the leading daily was the leader in this struggle for order, sobriety, and decency. He was unloved by the women because he had opposed woman's enfranchisement, but when his paper came out for civic rightness the women voters came to his support, and on election day, when it was clear that the difficult victory was being won by women, and clearly would have been impossible without them, and them enfranchised, he said: "I think we must let these women have the full suffrage. I never saw better organization nor better work. It was as quiet as it was effective, and not the least suggestion of unwomanliness, either. They've been practical in their political work, and without trickery or mudthrowing. I have to confess that in every election when I've tried to make things better, I've had better support from the women voters than from the men."

I should add that there was no question as to the effect of woman's vote to change results in the election in question, because, as in all our larger cities, separate ballot boxes were used to receive the women's ballots; and in this case the men's votes had been counted first and found to give the election to the antilaw and order faction, and a bonfire was lighted. But when the votes of the women were counted the result was reversed—and the bonfire went out. Such incidents are common in most towns of the State.

Women rarely make nominations. That is, they rarely present a "woman's ticket," generally preferring to join with men in securing nominees. There are always to be found men with whom they can work, and who are glad to work with them. Women may have as much to do with nominations as men have. They are themselves to blame if they have not equal voice in choice of nominees; and under our laws, amended since women became voters, we may effect nominations and elections without conspicuousness or "rude jostling at the polls."

It must be said, however, and it is the Jeremiad of all women who have endeavored to better municipal conditions, that we have not been able to provide spinal columns for the invertebrates who get into office in spite of, and even by the help of, women's votes. But it must be remembered that in Kansas municipal offices confer small honor and no legitimate emoluments, except to clerks and treasurers in the larger cities. Most of those men for whom women would most delight to vote are busy men. They see no recompense for the time and trouble required by the thankless task of running a city government, and no entreaties can prevail upon them to accept nominations for these places. The truth is that our city offices go begging for better grade men to fill them. Therefore, women must choose candidates from a very limited supply of eligible material. This, in the main, is why municipal woman suffrage has not every time put a man of force and high purpose into every city office in Kansas.

Municipal woman suffrage has proven as much of a success as has manhood suffrage; it serves the highest governmental needs as fully. It is no longer an "experiment," but has passed into a matter of course. It has lost its novelty. The press oftenest mentions the vote in the city elections without making any distinctions as to the male or female vote. We no longer tabulate statistics of the woman vote. During the first half dozen years after we came into this fraction of our rightful heritage the State Historical Society and the State Equal Suffrage Association sent to the city clerks to find out what number of women registered and voted. We found several things to be true: (1) That women voted when they got the chance, whether they had ever asked for the privilege or not; (2) that women came nearer voting their full registration than men did; (3) that the woman voters, taking the State by and large, gained steadily in numbers, notwithstanding that the "novelty" wore off in the same ratio; (4) that the most representative women, viz, the church, club, school, society, and home women, were in the lead in the movement to the polls and constituted the major part of the body of woman voters; (5) that not even those most opposed to the principle per se have been able to point to any damage done to the family, to womanliness, or to the city government; (6) that women have not found the duty burdensome and have no mind to relinquish the privilege of exercising their modicum of the suffrage.

The woman vote in several of our larger cities, in the first three regular elections in which women participated, compared with that of the last election, may prove interesting as showing gain, and also that women vote most numerously when the issue is most important. When both tickets are objectionable from their point of view, many women will not vote at all. This accounts for the fact that one year the woman vote in a given city may be 2,000, and the next year in the same city be only 1,000, though the registration be larger than it was the previous year, when the vote was larger. To their other peculiarities as voters, Kansas women add ticket "scratching." They began that at the beginning, and they hereby challenge Wyoming, Utah, Idaho, and Colorado to show that they are not the champion "ticket scratchers" of the earth.

In Atchison in 1887 the woman vote was 300; in 1889, 600; in 1891, 217; in 1899, 1,385.

In Fort Scott in 1887 it was 425; in 1889, 1,250; in 1891, 769; in 1899, 553.

In Topeka in 1887 it was 1,049; in 1889, 2,400; in 1891, 2,791; in 1899, 1,471.

In Leavenworth in 1887 it was 2,467; in 1889, 3,500; in 1891, 2,177; in 1899, 2,981.

In Wichita in 1887 it was 328; in 1889, 645; in 1891, 1,308; in 1899, 3,379.

In Kansas City in 1887 it was 1,042; in 1889, 154; in 1891, 1,435; in 1899, 3,863.

We are indebted to the Hon. S. S. King, commissioner of elections in Leavenworth, for the following careful analysis of the last municipal vote in that city:

The total male and female registration and vote at the city election April 4, 1899, was as follows:

Male registration	10,419
White male registration	9,077
White male votes	6,586
Colored male registration	1,342
Colored male votes	722
Female registration	4,804
White female registration	3,920
White female votes	2,666
Colored female registration	884
Colored female vote	397

The foregoing table furnishes an interesting study of the voting disposition and the voting power of our colored population. I know of no authentic statement of the proportion of white and colored population in the city since the United States census of 1890. At that time it was given as 33,312 white and 5,004 colored. While the city has grown to about 50,000 it is fair to presume that this proportion has been maintained. Then we have a colored population of 13.1 per cent.

Of our total male and female registration of 15,225, the colored registration was 2,226, equal to 14.6 per cent.

Of 10,419 male registration, 1,342 were colored, equal to 12.9 per cent.

Of 4,804 female registration, 884 were colored, equal to 18.4 per cent.

Of our total number of men and women voting of 10,371, the colored vote was 1,119, equal to 10.8 per cent.

Of 7,308 male vote, 397 were colored, equal to 9.9 per cent.

Of 3,063 male vote, 397 were colored, equal to 12.9 per cent.

Thus it will be seen that the colored vote is not nearly as potent a factor in controlling our elections as is generally supposed. The colored people register much more largely than they vote. The vote in proportion to their registration is much less than the white is. Thus the white male vote is 72.6 per cent of the white male registration; colored male vote is 52.8 per cent of colored male registration; white female vote is 67.7 per cent of white female registration; colored female vote is 44.9 per cent of colored female registration. This great falling off from the colored registration to the colored vote may be accounted for in the fact that the Republican party here uses the Crawford County primary election system in nominating candidates for office who use very persuasive arguments to induce colored men and women to register and attend the primaries. After the nomination, by reason of party strength, these candidates feel so secure that less effort is made to get voters out at the election. It has been suggested that the great discrepancy between the colored registration and the colored vote this year is owing to their failure to get a colored candidate on the ticket. This explanation would be more satisfactory only for the fact that the discrepancy always appears.

Attention is called to an interesting phase of this question. As shown in the above table, 7,308 men and 3,063 women voted, making a total of 10,371. By reference to the official canvass we find that of those voting 273 men and 269 women refused to vote for either candidate for mayor; 745 men and 692 women; refused to vote for either candidate for city clerk; 857 men and 844 women refused to vote for either candidate for city attorney; 996 men and 776 women refused to vote for either candidate for city treasurer—one of the candidates being a woman. As the women who voted were less than half as many as men, yet were almost equal to the men in the number dissatisfied with party candidates, it follows that they are more particular than men in their choice of officers, or less bound by partisan fealty.

What class of women voted? [he says.] The opponents of woman suffrage insist that the lower classes freely exercise the franchise, while the higher classes generally refrain from voting. I will not undertake to designate which are the lower and which are the higher classes, as that must be left for each individual judgment. As women in registering usually give their vocation as "housekeeper," it is impossible to learn from their record which particular ledge of the social strata they stand upon. Therefore, in order to locate women as to trades, business, etc., I give them the positions occupied by their husbands and fathers. I take the seventeenth voting precinct (there are 34 precincts in the city) as a typical one. It is about an average in voting population, in the proportion of white and colored men and women, in the diversified industries. The 149 white women who registered in this precinct, as indicated by the vocations of their husbands, fathers, etc., would be classified thus: the trades (all classes of skilled labor), 32; the professions, 26; merchants (all manner of dealers), 16; laborers (unskilled), 15; clerks, 10; public officers, 8; bankers and brokers, 7; salesmen, 5; contractors, 2; bookkeepers, 2; foremen, 2; paymaster, 1; unclassified, 16. These 16 are largely widows occupying their own homes, and by no rule could be designated as among the lower classes. Thus, if the opponents of woman suffrage, by the term "lower classes," mean to classify according to some ill-defined rule of elite society, the example given above would be a complete refutation. If by "lower classes" they mean the immoral and dissolute, the refutation appears to be still more complete, for the seventeenth precinct is particularly free from these elements, and its female registration considerably above the average.

During thirteen years women have been elected to fill all the offices in some dozen and a half cities. Our women mayors have been remarkably successful and satisfactory. They have nearly always been elected for some specified purpose, and have never yet failed to make good their promises to their constituents. But there seem to be but few aspirants to office among our women. That kind of a bee troubles our bonnets but little. We have now here and there a few women serving on city councils, or as city clerks and treasurers. In the larger cities these offices are salaried, and are much sought after by men. Miss Elliot, daughter of an old soldier who lost his life in the Philippines, is city clerk of Coffeyville; Miss Cora Wales is city clerk of Lincoln—it is said it took a "baker's dozen" of years to elect her. She is the first woman ever elected to any of the offices of that county seat. Many women serve on school boards, and of our 105 county superintendents of public instruction we have had as many as 26 women. Several counties have elected women as registers of deeds. At present Miss Bertha Picket is treasurer of Lane County, and Miss Kate E. Johnson holds the same office in Norton County; and so we have demonstrated (1) that women may and do hold offices for which no woman can vote, and (2) that enfranchisement of women does not defraud the home nor depopulate the country by thrusting the mothers into office.

One of the delegates to the Woman Suffrage Convention now assembled in Washington is an ex-mayor of one of our cities. She was twice elected, and could have broken the record by serving a third term had she not declined the honor.

The very honorable office of State librarian, is, for the first time in the history of the State, filled by a woman, the distinguished Mrs. Annie L. Diggs, also in attendance at the convention aforementioned.

I dare affirm that women exhibit more independence in voting than men do. This is particularly noticeable whenever unpopular moral issues are at stake, and is due, doubtless, to woman's devotedness to what she deems duty, and to her desire to make the municipality a safe place for the bringing up of her children. There is no great number of women snared by the entanglement of business, or allured by political ambition, or swayed by party power. Women are freer than men as voters and always will be.

Our women voters evidence as much political sagacity as men do, and often more purpose. It does not appear that women voters are more often deceived as to the integrity or fitness of candidates. They are equally as quick to interest themselves in public improvements. They often make a spirited campaign for better lighting, waterworks, paving, etc. Sanitary measures always rouse the interest of the "housekeeping" voters. Questions of the betterment of public schools and school buildings always sets the woman voter to work. Appropos of this the Topeka State Journal had the following to say:

> The proposition to vote $30,000 to pay a public school deficit was also carried by the vote of the female suffragists. From start to finish it was a glorious victory for the women of Topeka, and to-day they are quietly celebrating in their homes. They combat the idea that they were in any way influenced by their husbands or that political prejudices in any way affected them in their vote for city officials.

Woman's enfranchisement, though only partial in Kansas, has helped to round out and complete her education. Kansas women could not pass through thirteen years' experience of municipal suffrage and remain the "exquisite infants" of tradition. Responsibility has developed them as citizens. Experience has enriched and enlightened them. They have learned much about the springs of political action, and if their respect for lawmakers and executives has not increased, their judgment has ripened; so that they are not now, by any means, "innocents abroad" when they act in the political arena. Their outlook is widened; the scope of their activities is larger; their world is bigger, and so are they because of their ballots. If there is one thing more noticeable than another to one who has studied Kansas women for seventeen years, it is the fact of their marvelous broadening. I think these realities create an atmosphere distinctly felt by those conservative women who are constantly coming into the State to make their homes here. The studies pursued by our woman's clubs are significant. It would be safe to say that there's scarce a town in the State but has its one to thirty woman's literary or reform clubs. Besides much purely literary work and work for woman's enfranchisement and her enforcement of the prohibitory law, beautifying of schoolrooms and grounds, street cleaning, kindergartens and charities, these clubs study political economy, history, and sociology. They try to get at the principles of government and from them to reason out the solution of municipal problems. Who can measure how much it is to the State to have those who are the heart of the home thinking, learning, and building along these lines? Who can tell what it will be to every interest when this force makes its inevitable mark upon the citizen of to-morrow?

To sum it up in brief: The women of the cities of Kansas have entered the partially opened door of the suffrage to the credit of woman suffrage.

That door will never be shut. It only waits the ripeness of time to open wide.

Miss SUSAN B. ANTHONY. Allow me to say to the committee that the Kansas woman who was expected to be here to read this paper has been twice elected mayor, and she would have been elected the third time but she refused to allow her name to stand for office again. I wanted to show you a woman who had really been the mayor of a city, and I am very much disappointed that she did not come this morning.

Now, we have given you something of the result of partial suffrage,

and I am very happy to say that we have with us a woman who possesses the full right to vote, and who at the last Presidential election cast her ballot for or against one or the other of the candidates for the Presidency, or their electors. I present to you, Mr. Chairman and gentlemen, Mrs. Mary C. Bradford, of Denver, who will present to us something that has been done by the women in that Centennial State.

Mrs. MARY C. BRADFORD. Perhaps no greater compliment has ever been paid by man to woman than that of expecting her to transform imperfection into perfection, and to neutralize the evil effects of centuries of mistakes in the decades that have passed since real civilization has been possible. Perfect conditions presuppose a complete basis. The masculine half of humanity has expressed itself through governmental forms, and the resulting civilization has naturally been a success along the lines in which men are strongest. Equally naturally the defects of their virtues have embodied themselves in the social structure. This half civilization is not a human civilization. Humanity is dual—man and woman—and the true civilization must express the complete humanity. Feminine self-expression, not masculine, but human, should be the aim.

At last the world has grown to see this. Ever increasing opportunities of feminine expression have been given, until across the sea in South Australia and New Zealand women live on terms of perfect equality with men, and in four States of the Union their nature and their view point is beginning to be incorporated into civil institutions.

The questions are often asked, "What have you done with the ballot? Have you purified politics? Have you bettered public service? Have abuses been abolished?" and a series of inquiries follow that, were each to be answered in the affirmative, the implication would be that a woman's suffrage State was little short of heaven on earth.

No, the enfranchised States do not exhibit paradisical conditions. Man and woman are still human. Being such they can not equal politically the feat of the Indian magician, who causes a tree to come to full growth while you wait. The tree of life, politically speaking, is of small stature yet. Indeed, only a few healthy shoots show that the seed lately planted has been of a better order than that formerly employed for this kind of forestry.

Metaphors aside, conditions are beginning to improve in the enfranchised States. The story of Wyoming is so familiar that to retell it here is unnecessary, but the results in my own State are not quite so well known, and even when reported by those who know most about them have sometimes been nullified in the public mind by the irresponsible statements of disappointed politicians, men who have realized lost prestige and power through the changed constituency, and that class possessed of atrophied intellects, to whom every new truth or new aspect of affairs comes as a painful shock.

What have we done? We have made the polls fit places for decent men as well as decent women to go to, and if all that the men tell us about the conditions of the polls on election day, before women had the ballot, be true, they are fit places for neither men nor women who believed that an election was in essence the sacrament of citizenship; the renewing of the oath of obligation that unifies the people of a community and makes them understand what it is to deserve the name of citizens. Exactly that has happened in Colorado and the other enfran-

chished States that any student of history would have looked for. Wherever the influence of woman has been extended, whenever she has taken her place side by side with man, wherever and whenever, in fact, the Turkish idea of seclusion has given way to the American idea of participation, the things that were dreaded for her have been banished by the simple fact of her presence. The same thing has happened on election day, at the polls, in the primaries, at the conventions, and in the holding of office, that happens in a mining camp when women first came in; that happens on the frontier when the wives and children begin to make their appearance and homes are set up. The whole atmosphere changes.

It is a fact in nature that men are at their best in the presence of women, and woman most truly feminine when associated with men, and so I have seen many polling places where, owing to the presence of the women judges and clerks of election who shared such positions and duties with men, the walls have been bright with bunting and the air fragrant with flowers. I have seen a mother standing in line, many of them, holding by the hand a little child, with whom, after the duty of expressing her political convictions has been performed, she would go to school. I have seen gray haired mothers assisted from a carriage by grown sons, and the young husband and wife going to the polls and rejoicing that even here they need not be separated.

I have been in the primaries in the parlors of some of the loveliest homes in Denver, and I have watched proceedings of this sole survival of the Saxon folk-mote and the New England town meeting, the last remnant of purely democratic government that exists, conducted in places not so lovely and where the voters belonged to Lincoln's well-beloved "plain people," and I have heard rough voices softened and have seen burly forms courteously arise when the woman voters at the primary appear. Now, if you even partially purify the primary, you have gone a long way toward leavening the political light of the community, for, as you gentlemen well know, strictly speaking, most matters are settled in the primary, and all that afterwards appears is but the flowering of the purpose there conceived.

With two exceptions the conventions in Denver have been orderly and enjoyable assemblies to visit since 1893, when women first had the right of serving in them. Twice since then, at the last moment, it had been necessary to remove the name of a candidate because the women candidates have heard of his proposed nomination and demanded that his place be filled by someone possessing higher standards of public morality.

There is nothing of the anarchist about the woman voter as I know her in my own or any of the other enfranchised States. She does not condone even that phase of practical anarchy which submits without protest to the violation of law. Is the law good? Enforce it, and give the community the full benefit of all its possibilities. Is the law bad? Nevertheless, enforce it until public opinion shall have realized that its repeal should become a fact.

When the little son of a woman voter looks up at her and asks, "Mamma, didn't you say there was a law against the shops being open on Sunday?" And she answers "Yes," and he looks at the open door and says, "Then it isn't a bad thing to disobey the law, is it? It doesn't make any difference whether you mind the law or not?" she is very apt to go home and do some hard thinking, call on a lot of other

women, and inform them of her predicament. The probability is, that the next day the particular officials intrusted with the enforcement of that particular law will receive a visit from a sufficient number of mothers to make them realize that woman's suffrage is a condition and not a theory. And this kind of practical anarchy is beginning to die out. Laws are broken in Colorado, my friends, plenty of them, but they are better enforced than they used to be. The public conscience is more responsive to the sacredness of law. We have taken a few steps forward.

As to new laws, good laws, wise laws, not a few have been passed since 1893 as a direct result of suffrage. Some of them have originated solely in the women's organizations, having been introduced at the request of women by women legislators in Colorado. Before 1893 we had no State home for dependent children. Senate bill No. 1 of the very first session of the legislature convened after the enfranchisement of women, was a bill entitled, "An act to create a State home for dependent children." In a few weeks the bill was a law, and for years the home has been a divine fact of the Commonwealth of Colorado, a place where the children have not only been fed and clothed, and cared for, but loved and mothered, because the mothers of Colorado had decreed that the great State whose robes are of snow and gold, whose crown is the vast hallowed sapphire that we call the sky, and whose soul is freedom, should be a mother to every child who needed the shelter of her great heart. The State Industrial School for Girls is another product of the "I will" of Colorado women. Since then those words have meant that, in addition to the influence she possessed before, she has added power, and that in addition to being the power behind the throne, she has become the power that shares the throne.

The first bill in the history of the world to be introduced in a law-making body by a woman law maker was a bill to raise the age of protection of girls to 18 years. Until the men of Colorado said to their mothers, wives, daughters, and sisters, "Stand with us in all things; as we have been heart high let us now be brain high, and share with us the right to have your opinion counted," the Colorado woman was not the joint guardian of her husband, of her own child, now she is. The women have stood for civil-service reform and have succeeded in educating public opinion on this point sufficiently to justify the belief that in the near future the merit system may prevail. The woman voter has often been accused of taking herself too seriously, and it is true that she did not enter lightly upon her new duties. The average woman, when enfranchised, had reached that supreme height of knowledge beyond which the philsopher said we can not go, she knew that she knew nothing at all. And she set to work to study. The leading bookseller of Denver is authority for the statement that in the first few months succeeding the enfranchisement of woman he sold fifteen times as many books upon political history, political science, political economy, parliamentary law, and kindred topics than he had disposed of during the preceding ten years.

The woman voter has really tried to fit herself for her duties. Scientific municipalism, despite its terrifying name, is a favorite subject of study in Colorado organizations of women, and many ordinances relating to the health of Denver are directly traceable to the efforts of the women, notably the ordinance compelling the use of smoke consumers in the principal buildings and the antispitting ordi-

nance. In proportion to the number of women voters in my State a larger percentage of women than men vote. At the two elections, with the details of which I am most conversant, one a State and the other a county election, the percentage of the woman vote was as follows: In the State, 51 per cent; in the county of Arapahoe, 52 per cent; yet, taking the whole State, there are 30,000 more men than women voters.

Before the granting of suffrage to women there were three counties in Colorado, which, under the workings of the local option law, had secured prohibition, now there are twenty-three.

There has been no great lust for office among the women, there never having been more than three women at a time in the house of representatives nor more than one woman State official—the superintendent of public instruction. Thirty of the counties have women superintendents of schools. One county has possessed a woman county clerk, and the first woman county treasurer has just entered upon the duties of her office. In none of the positions that she has occupied has the Colorado woman failed either in ability or integrity. Said a member of the last legislature at a public meeting, in reference to a certain bill involving a marked distinction between right and wrong, "There were only three members in the house about whose votes there was never a shadow of a doubt, and those three were the women. Every man of us knew that they would keep their anteelection pledges and vote on the side of righteousness." But, when all is said, the most marked results are to be found in the character of the women themselves. The Colorado woman is stronger to-day than she was six years ago. She is broader, deeper, truer in every relation of life. She knows that, speaking scientifically, speaking absolutely, no mother's girl is safe, no mother's boy is safe, until every mother's boy and girl are safe, and she tries to hasten the day when such governmental conditions may obtain in the larger homes, the city, the county, the State, as will not completely neutralize the teachings she gives within the four walls of her individual home. She has learned to know that veritably those who live in one community are members one of another. She keeps abreast of the times because responsibility is the supreme educator, and she is more helpful to her child in his student life, to her husband in his business life, because she is also faithful to her country.

Of mothers like these there will not in the future be born men so illy adapted to their environments that they can not make a success in life. The true republic is simply the expression of absolute freedom, and the true republic will never have to answer the question that is asked of our half Republic to-day, Will it live? When we incarnate the love of the woman, as well as the wisdom of the man, when we add her subtlety, tenderness, patience, dexterity, and mastery of detail to his splendid volition, generalizing scope, and creative energy, we shall have the human civilization, we shall be mothered as well as fathered. And the beginnings of this day of freedom may be seen on the heights where freedom, now as of old, loves to dwell. It is only sunrise, it is true, but it is the dawn of a day that when its sun shall have reached the zenith will show us the full possibility of a humanity that will express the meaning of the Holy City, a humanity that, because completely unified, will know itself divine. [Applause.]

Miss SUSAN B. ANTHONY. We have now had a presentation of the workings of municipal suffrage and of full suffrage in this country.

I will next present to you the subject of women in English politics, and though the person who is to address you was not born in England, but in this country, and is the daughter of the woman who signed the first proclamation of freedom and equality for women, Elizabeth Cady Stanton, she by marriage is an English subject; by birth she is a citizen of this Republic. Mrs. Harriet Stanton Blatch will tell us of women in English politics, and there is no native-born English woman who has studied English politics more thoroughly than Mrs. Blatch.

Mrs. HARRIET STANTON BLATCH. Mr. Chairman and gentlemen: Miss Anthony introduced me as partly English and partly American. There was an English friend of mine who on one occasion was listening to me speak, and he said that I mixed my pronouns so that he could not make out whether I considered myself as belonging to the land of my marriage or the land of my birth, so I watched myself after that and I found that this was my rule of grammar, that whenever I spoke of the virtues of America or England I said "our;" and whenever I spoke of the vices of England or America I said "your." Now, as I have a chance to stand in the position of claiming the virtues of both countries and of disclaiming their vices, why should I not do it?

We have heard about the suffrage in the West in America, and the reply always is: "Oh, that is all very well for that thinly populated country." But now I am going to tell you a little of the suffrage question in England, which is not a thinly populated country, with its 20,000,000 of people crowded in that small space.

Gentlemen of the committee, I would like to draw your attention to one thing, which is true in America as well as in England, and that is that nothing has been given to women gratuitously. They have had at each step to prove their ability before you gave them anything else. For the first time, in 1870, England passed a law, the education act of that year, which gave women the right to sit on the school boards and to vote for the school boards. It was the first time they had had elective school boards in England; before that all the education in England had been controlled by the church organizations, and there had been appointed boards of managers. Now, the women had been appointed to those boards of managers by the church organizations. So admirable had their work been that when the law was passed in 1870 many women stood for election on the elective boards and were elected, and in three cases they came in at the head of the polls. Five years after that a verdict was passed upon the work of those women as school officials. In that year, 1875, women were allowed to go on the poor-law boards. In 1894 the poor law was further modified so that it contemplated the possibility of a larger circle of guardians. Before that, in 1875, there had been a high qualification—occupation of a house of a certain rental, etc. In 1894 that was all pushed aside. What was the result? Nearly one thousand women are now sitting on the poor-law boards of England; 94 on the great board of London itself.

Now, those of you who are familiar with the unfortunate history of the poor law in England know what an immense army there is in the pauper class, and can realize what responsibility rests upon the members of those local boards. They deal with the great asylums, the county asylums; they deal with the great pauper schools; they deal with the immense poorhouses, and, more than that, they deal with one of the largest funds in England, the outdoor and indoor relief. What has been the verdict of England upon the work of

those women on the poor-law board? In 1896 there was the question, when this law was extended to Ireland, whether women should be put on those boards. The vote in Parliament was 272 for the women being on the boards and only 8 against. Eight men only, so unwise, so foolish, left in the great English Parliament, who said it was not for women to deal with those immense bodies of pauper children, not for women to deal with this outdoor relief fund, not for women to deal with the unfortunate sisters or mothers of illegitimate children. Only eight unwise men left in Parliament! I think really that those eight men must have belonged to the great grumbling class, like the husband of a friend of mine. She was telling me about an earthquake that had knocked her house all to pieces—the terrible experience she had had—and she said it was the most delightful day of her life. In some surprise I asked her why, and she said, "Because it was the first time that anything happened in my home that my husband did not hold me responsible for it." [Laughter.]

Now, those eight men looked about and held women responsible for everything that had gone wrong on that school board, or any board, and therefore they voted against the women, but 272 men of the English Parliament voted in their favor. [Applause.]

In regard to the building up of local government in England, on the district councils and on the parish councils women have been added and allowed to sit there with the same qualifications as men. They at one time sat on the great county councils. In London three women were elected to the county councils, but the law had not definitely specified in 1888 that they might sit there, so Lady Sandhurst had the misfortune to defeat some cantankerous man, and he sued for his place and got it because the law had not mentioned women. But, gentlemen, those women had sat there already and had done such valuable work that the London county council, which really corresponds to one of our city governments—it governs a people of 5,000,000—petitioned Parliament to change the law, so they now have the women back again on the county council. [Applause.]

Now, I dare say, as members of a great representative body, you value the work of the quiet member, the silent member, the man who is not always talking on the floor of the House. There is room for such people, and I daresay there is more than enough room. It is not occupied at all. But where women go on these local boards they have proved themselves exactly that in English life—the silent members, the working members, the members who have been thorough in detail, who do admirable work in committees, every time.

Now, turn to the matter of voting. Women in England, qualified women, have every local vote, everything that would correspond with our State vote, our municipal vote, except the Parliament vote. I would like to repeat that with emphasis. Every qualified woman in England has every local vote, every vote except the Parliament vote. There is an impression here in America—and really among some people in England—that only spinsters and widows can vote in England, while the fact is that the qualification is such that often a wife can not get the vote. She is to be an occupier, and naturally, if she is living with her husband, of course he is the occupier, the recognized head of the house. But in many of the large industrial districts workingmen, skilled artisans, desiring to avoid jury duty, let the wife take the cottage in her name, so the wife becomes the voter and the man gets rid

of his jury duty. The idea that marriage and voting are in some way mixed up is very general in England.

I was canvassing in Hampshire at one of the Parliamentary elections not long ago, and I went to an old woman's house—I thought it was her house; I thought the son was the father; I did not know there was a husband—and I asked about the vote of the son. I wanted to canvass him and give him a little political instruction, and the woman said to me, "'E ain't got no vote; 'e ain't married"—the fact being that the son lived with the father and mother, and the rent of the house not being high enough to cover two votes, the son had no vote.

In England we have opponents, just as you have here, but I do not know whether they are more illogical or less so. But they certainly do one extraordinary thing—they are in favor of everything that has been won and take advantage of it. A large number of the 2,000 women who are sitting on the various local bodies in England are opposed to the Parliament vote for their sex. They are really in political life; and, gentlemen, if you want to have the women stop coming here, give us the vote and then we won't come; give the antis the vote and then they will have the political life that they are really longing for. [Applause.]

Surely, I think, almost always, if you analyze the antisuffrage idea in either a man or a woman, it is antidemocratic. I have begun to believe that I am the only good democrat left in America. I believe in the very widest possible suffrage. Why do I believe it? Because I have lived and seen the other thing in England, and I have seen that as democracy broadened in England politics purified every time. That has been the history right from the beginning of the century. No politics in the world were more currupt than English politics at the beginning of this century, but as democracy has come farther and farther into the political field England has become one of the politically purest nations in the world. [Applause.]

Miss SUSAN B. ANTHONY. We have a paper prepared by an English woman, the editor of the English Woman's Review, Miss Helen Blackburn, with regard to the British Isles, New Zealand, and South and West Australia, where women are voting, and I want to ask that that little part shall be added in the printed report of this hearing, as Mrs. Blatch did not want to take more time than to talk of English politics.

WOMEN'S SUFFRAGE IN THE BRITISH ISLES—THE LESSON OF A CENTURY.

Miss HELEN BLACKBURN. At the openingof the nineteenth century there was nothing in any act of Parliament, or in any local charters granting electoral privileges, which barred women from voting for members of Parliament. The qualifications of voters were always expressed in generic terms.

(The earliest statutes regulating the election of Knights of the Shire (7 Henry IV, c. 15) expressly mentions suitors as persons qualified to be electors, suitors being freemen who owed suit to the county court.

The next statute on the subject (10 Henry IV, c. 2) uses the words "people dwelling in the county and having freehold of 40 shillings."

The 7th and 8th William III, c. 25, uses the words "all freeholders there and then present." The act18 George II, c. 18, says no person shall vote without having a freehold estate of 40 shillings, while the old charters of boroughs used such terms as "inhabitants paying

scot and lot." "Burgesses, freemen, and inhabitants being householders and not receiving alms." "Citizens and freemen," and so forth.)

As regards parochial offices—vestries, by common law—consisted of minister and parishioners paying scot and lot. This was changed by later legislation to persons rated to relief of the poor (13 and 14 V, c. 41).[1]

Nevertheless, though there was no bar at law, custom had created a strong barrier and great discouragement to all women against their taking part in any public duties. Many influences had combined through the seventeenth and eighteenth centuries to bring this about, and the civic rights women had possessed from early times were suffered to pass into oblivion and disuse; so that the mere suggestion of a woman voting was looked on as a sort of absurdity.

Opportunities for university education, or even classes for higher education, did not exist for women when the nineteenth century began. Here and there the exceptionally able daughter of an exceptionally liberal-minded father might be found pursuing higher studies at home, along with her brothers, but even so they were taught to keep their attainments as hidden as possible, and for the mass of women there was no solid instruction of any kind available. The occupations of women outside domestic service were limited to needlework and teaching, and even for these no means of training were provided.

The property of a married woman was entirely in the hands of her husband unless fenced about by marriage settlements. In that case the management of her inheritance was intrusted, not to her, but to a trustee. Her earnings could be claimed by her husband, and she could not bequeath her property except with his authority. Her rights to the custody of her children were nil.

To ignore the duties and responsibilities of women to the state was not inconsistent with such a condition of affairs. When women were held to be incapable of following any serious pursuit which required education and training, and to be devoid of responsibility in regard to the management of their own family and their own property, there was a show of reason in refusing them the franchise on the ground that they were so placed as to have no wills of their own. The representation of the people act of 1832 really reflected the general attitude of public opinion of that day when it made the innovation of introducing the qualifying term "male person" in defining the new franchises enacted by its provisions. That act gave the force of law to a limitation which hitherto had received only the sanction of custom.

But if the nineteenth century learned that lesson from the spirit of the eighteenth, what lesson has the twentieth century to learn from the spirit of the nineteenth? Surely a very different one. How different may be to some degree estimated by a glance over the steps, which one by one have widened the energies and raised the status of women in their educational, industrial, legal, and political relations during the past fifty years; for it was not till toward the middle of the century that the undercurrent of discontent with the narrow scope of women's lives, which had gradually gained strength in the minds of many thoughtful persons, manifested itself in definite action.

[1] Women have been eligible as overseers since the act of Queen Elizabeth (43 Eliz, ch. 2), which enacted that overseers be appointed from "substantial householders."

The legislation of the first reformed Parliament was retrogressive as regards women. The ancient right of a widow to one-third of her husband's estate as dower was taken away in 1833 (3 and 4 William IV, c. 105). The municipal corporation act of 1835 (5 and 6 William IV, c. 76) followed the example of the representation of the people act, and, notwithstanding the generic terms used in all the old charters, restricted the municipal franchise to male persons.

The earliest legislative restriction of the industrial work of women was in the coal mines regulation act of 1842, when the manifest unsuitability of work in the mines for women obscured the disadvantage of dealing with industrial hardships by disabling legislation, and women's work underground was prohibited.[1]

The first statutory enactment of the century for the relief of women was the act commonly known as Talfourd's Act (2 and 3 V., c. 54), by which the lord chancellor is empowered to grant the custody of her child to the mother up to the age of 7 years.

It was at the close of the "forties" that the first colleges were opened for women, and Queen's College (opened in 1848), and Bedford College (in 1849), both in London, provided places of instruction where women received professional teaching. The schools of art, which were established throughout the country as a result of the great industrial exhibition of 1851, were everywhere open to women. The interest created by Miss Nightingale and her band of nurses in the Crimean war opened the way to a properly organized system of nursing and proper training for nurses.

Meantime the great hardships of the law relating to married women were arousing widespread attention, and in 1855 petitions, signed in large numbers all over the country, started the agitation for the improvement in the married women's property laws, which were effected in course of time by the acts of 1870, 1874, and 1882.

Side by side with this the necessity for more remunerative work for women was increasingly felt, owing in part to the development of the factory system, in part to the disparity between the numbers of men and women in the country, which was one of the results of the emigration of men to the colonies. In 1900, when every large town in England has its technical schools, open equally to men and women, besides domestic-economy schools and classes in connection with town or county councils, it seems striking to look back on the class for bookkeeping for girls, opened by the Society for the Employment of Women, in London, in 1860, and to remember that that was the only class in the Kingdom where girls could receive proper technical training in book keeping.

In 1866–67 the representation of the people bill for extending the franchise to householders in boroughs centered the attention of the pioneer workers for women on the effort to obtain the political voice, which lies at the root of any lasting improvement, and an organized movement was begun which has worked continuously from that time forward. The first fruits of that organized movement were visible in the municipal-reform act of 1869, when the lost right of women to the municipal franchise was restored (32, 33 Vic., c. 55). Then in the fol-

[1] Subsequent factory acts, consolidated and extended in 1878, and amended in 1891 and 1895, have enacted restrictions on women's labor as regards hours of work, and of overtime and prohibition of work at night, but these are rather disabling than enabling enactments.

lowing year the school-board system was inaugurated and women placed on the same footing as men, both in regard to electing and being elected. That year of 1870 also saw the first married women's property act (33, 34 Vic., c. 93), an act which fell short in many respects of the bill that had been proposed, but which, nevertheless, gave all married women complete control over their own earnings.

In 1875 the efforts of some earnest-minded women to improve the treatment of the poor in our workhouse led to the revival of their too long forgotten right to be elected as guardians of the poor. One lady was elected in that year; in this year (1900) the number of women guardians, though still few in comparison to the whole number, is just about 1,000.

In 1876 the medical-qualification act (39 and 40 V., c. 41) removed restrictions against granting women the qualifications necessary for registration as medical practitioners.

In 1878 London University obtained a new charter to enable it to confer degrees on women, and the best comment on that step is that now (in 1900) over 1,100 women are graduates of that university, while the Victoria University, the Royal Irish, the Welsh, and Scottish universities bring up the total of women who are university graduates in the British Isles to a little over 2,000, and 1,500 more hold certificates from Oxford and Cambridge universities.

In 1881 the Isle of Man gave women property holders votes for the election of its ancient legislature—the House of Keys. This was extended to woman ratepayers in 1892.

In 1882 the married women's property act (45 and 46 V., ch. 75) consolidated and amended the acts of 1870 and 1874 and enabled a married woman to acquire property, dispose of it by will, enter into contracts, sue and be sued, as fully as if she were unmarried.

In 1886 the guardianship of infants act (49 and 50 V., ch. 27) greatly improved the status of mothers by making the surviving mother joint guardian in addition to any appointed by the father, and also by enabling her to appoint a guardian to act in case of the father's death or incapacity.

In 1888 and 1894 the local government acts (51, 52 Vic., ch. 41, creating county councils, and 56 to 57 Vic., 73, which was supplementary thereto) added county, district, and parish councils to the local administrative bodies in which women could vote. The latter act rendered them eligible as members of district and parish councils.

In 1895 the first woman factory inspector was appointed and the number has been gradually increased to 6; moreover women have been increasingly appointed as sanitary inspectors, and in the educational department women are inspectors of needlework and cookery.

In 1896 women were made eligible as poor-law guardians in Ireland (59 Vic., ch. 5), while in 1898 the Irish local government act (61, 62 Vic., ch. 37), by which the system of local administration in Ireland was organized, gave to women in Ireland all the local franchises and rendered them eligible for rural and urban district councils, and already between eighty and ninety women are serving as district councilors and poor-law guardians.

Though the lesson the eighteenth century bequeathed was that women had no independent influence, and therefore were incapable of being intrusted with representation, the nineteenth century has gradually learned a quite different experience, and the lesson it bequeaths is that

women have a large amount of well-proved capacity for taking a proportionate share in the many-sided activities of civilized communities.

Therefore, unless representation in the twentieth century ceases to reflect the spirit of the time, women will be enfranchised, and that speedily.

WOMAN SUFFRAGE IN FOREIGN COUNTRIES.

JESSIE CASSIDY SAUNDERS.—In various forms and in different degrees woman suffrage is already established in the larger part of the Continent of Europe and in nearly all parts of the British colonies.

The women of Denmark, Holland, and Belgium are beginning organizations to agitate for the political franchise. In Greece and Italy, Spain and Portugal, education and the general development are not so far advanced, but the atmosphere is becoming affected by the conditions in more progressive countries, and the women of southern Europe will one day follow the example of their sisters farther north. The women of Turkey, of the harem, are indeed the only women in Europe who, as a whole, are entirely content with things as they are, but Turkey is more truly Asiatic than European.

The political agitation in Europe which marked the middle of the century just closing resulted in some cases in new constitutions being adopted or new laws being passed, and so effecting compromises between the ancient forms of government and the modern demand for individual representation. As property holders, in some cases, notably in the German and Austrian empires, women also have profited by these changes. In other cases direct agitation has secured women a greater or less degree of suffrage.

In both the German and Austrian empires while certain classes of women have some degree of suffrage, they can exercise it only by a masculine proxy, nor are they eligible to any elective office. As the proxy is free to cast the vote according to his judgment, neither empire shows any results due to woman suffrage.

Norway is rather more liberal. She grants woman school suffrage and permits her to vote in person, if she pays the school tax, and in the country districts also allows her to vote on school questions not involving expenditure, if she has children, even though she pays no school tax. Women may be elected members of school boards, and in this capacity are doing excellent work wherever elected.

Sweden allows women to vote on all questions in the rural communes, if they have the required property qualifications, so long as they remain unmarried. They also vote indirectly for the members of the Upper House of the Swedish Parliament. They are eligible to the municipal poor-relief committees and to the school board of Stockholm.

Finland goes one step further and allows women ratepayers to vote both in rural communes and town elections, if either unmarried, widowed, or divorced. They are eligible to the office of guardian of the poor.

Iceland also permits widows and unmarried women to vote in the rural communes. Information is not forthcoming regarding the eligibility of women in Iceland. Probably in that thrifty rural island schools are small and easily managed and poor-law guardians may be unnecessary.

Russia brings us back to a condition partly similar to that in Ger-

many and Austria. The women of the upper classes and of the nobility vote by masculine proxy, so that their suffrages have not produced any characteristic results. But a peasant woman, if she be the real or temporary head of a household, can vote and speak in the meeting of the rural assembly, or mir. The Coming Nation gives the following account of the effect of woman suffrage in one section of Russia:

A veritable little state, inhabited and governed almost entirely by women, exists in the province of Smolensk, in western central Russia. It is about 10 miles square and contains a large number of populous villages, and the region is one of the most fertile in the Czar's domain.

In that part of Russia it is called the "Women's kingdom," because the male population, almost to a man, emigrates en masse each springtime to Moscow and the other great cities not far distant in search of employment. The most remarkable feature of this "Women's kingdom" is that the government of the various villages is entirely in the hands of the sisters, wives, and mothers of the absent men, and remain so, in many cases, even after the men have returned. Each town has its "lady mayoress," who presides at all meetings of the village council, and whose members are likewise women.

Questions of public interest are debated and decided upon as in other legislative assemblies, and there is no more jealousy and bickering than is ordinarily the case when the legislative body is composed of men.

The political and financial condition of the "Women's kingdom" is as flourishing as that of any province in the Empire. It is a curious fact that in most other provinces in Russia there is said to be bribery and corruption on every hand, and a public office is considered a legitimate source of plunder. But among these women "purity in politics" is the rule.

France has recently given women engaged in trade or commerce on their own account, provided also they are not married or are widows, the right to vote for judges of the tribunals of commerce. The grant was made in 1898, and, considering the strength of French prejudice against political equality for women, the first election was most satisfactory.

The total number of persons in Paris whose names are on the register as qualified to vote for judges of the tribunals of commerce, taking men and women together, is 50,188. Of the whole number 14 per cent voted; but of the women entitled to vote 33 per cent voted.

In some towns, it is said, no women have registered; in others, a good many. Doubtless it will be found that in some towns there was a contest over the election of a judge of the tribunal of commerce, while in other towns there was none, there being perhaps only one candidate in the field.

The women voted most numerously in the mairies of the Halles and of the Louvre. At the latter the presiding officer remarked that the women voted as if they had been doing it all their lives.

At each mairie, besides the presiding officer, who is either the mayor or his delegate, four assessors are chosen from among the voters, the two oldest and two youngest present when the office is opened, and at Fontainebleau the arrangement resulted in four women being the assessors.—Alice Stone Blackwell.

Throughout England and her colonies there is unlimited and overwhelming evidence of the good effects of woman suffrage—rural, municipal, and even parliamentary.

In all of the British Isles—that is, England, Scotland, Wales, and Ireland—women, whether married or unmarried, now have the right to vote in the local parish meetings for poor-law guardians and members of the school boards. Resident owners and occupiers other than married women also have municipal suffrage and can vote for members of the county councils. Women are eligible as poor-law guardians, to the school boards, and to both urban and rural district councils. They have served most successfully in all these capacities. In England alone there are nearly 1,000 women serving as guardians, and in Ire-

land's first election, last January, 85 were elected. Over 160 women are serving in England as rural district councilors and a number were also elected last year in Ireland. Mrs. Percy Widdrington, a talented young Englishwoman, who lectured in this country recently, gave the following account of woman's work in English local government:

Guardians of the poor have much more to do in England than in the United States, because we have more pauper lunatics, the aged poor, the infirm, the tramps, and a vast number of pauper children. In 1894 the boards were reorganized, and a democratic suffrage was substituted for the old narrow one, and working men and women were enabled to vote and to serve. The service of women as poor-law guardians is admitted by all to have been pure gain. Men are not interested in the intricacies of domestic management, and, without meaning to be neglectful, they let many little abuses creep in. Woman's influence has everywhere tended to a more humane system, to abolish the pauper uniform, to give little outings, little treats, a more abundant and varied diet; to let aged couples stay together instead of parting husband and wife—small things to the ratepayers, but great ones to the poor.

Women on the boards have helped to revolutionize the treatment of pauper children. They used to be herded together by hundreds in bare buildings, fed on a meager diet, clad in a pauper uniform, taught at a separate pauper school, with no individual care and no effective means to prevent the spread of physical and moral diseases among them. When this system was recognized as unsatisfactory the children were boarded out in respectable poor families, in the country as much as possible, and inspectors were sent around to see that they were well treated. But this took a great deal of inspection, and even in respectable but rough workmen's families the children were not surrounded by the atmosphere of the best family life. Within the last three or four years this system has fallen into disfavor, and cottage homes are being substituted. From eight to sixteen children are placed in one cottage, with a matron to act as mother to them. We are able to pay pretty good salaries and to secure a superior class of matrons. In the case of the boys the matron is a married woman, whose husband shares the care with her. There is nothing outside of the cottage home to show that it is a pauper institution. The children wear no uniforms and they go to the public schools. Children of Roman Catholic parents are sent to the Catholic schools, those of Church of England parents to the voluntary (church) schools, etc. Medical and dental officers inspect them regularly. Children convicted of crimes are sent to industrial schools.

Women are serving on all our largest and most important school boards. It is looked upon as a mark of backwardness for any large town to be without one. The woman member of a school board always looks especially after the women teachers, tries to raise their social position, their qualifications, and their pay, and to increase the girls curricula and secure them all the privileges that are open to boys. When a swimming tank is provided for the schools, for instance, if there is a woman on the board she sees to it that the girls, too, are taught to swim; otherwise it is apt to be the boys only that are given the use of the tank.

Besides these elective offices there are many Government appointments open to women in England. They are factory inspectors, and a constant cry for more women inspectors goes up to the home secretary from the factory districts. Women serve as sanitary inspectors and medical officers, appointed sometimes by the State, sometimes by town or urban district councils.

Every year we find more women taking an intelligent and rational interest in public affairs, and realizing that good town government means happier homes for average women. We find that our women are broadened and strengthened by their interest in politics, and they are not robbed of any of their distinctively womanly qualities.

In answers to questions Mrs. Widdrington said that the women had been greatly interested in the housing of the poor. One woman of the St. Pancras vestry practically drew the plans for the municipal lodging houses and got several blocks of notoriously bad buildings torn down and replaced by model tenements.

The Hon. Daniel Tallon, lord mayor of Dublin, was also in Boston this autumn, and he published the following account of the Irish election:

In Dublin previous to the local government act we had only about 8,000 voters, none of whom were women. Now our voters' list numbers about 45,000, of whom about 15,000 are women.

Women in very large numbers availed themselves of their new privilege or rights

in January, and I have every reason to believe that their votes helped to secure the election of candidates pledged to important social reforms.

As regards the manner and conduct of the election, not alone in Dublin, but also in Ireland, they were most orderly and well conducted; no disorder of any kind took place at any of them. This was certainly unique, as it was the first occasion on which the masses of the people exercised the franchise, and the sudden enfranchisement of an entire people might not have been expected to work smoothly on the first occasion it was exercised.

Women can be elected members of the urban councils, rural councils, and boards of poor-law guardians, and the enactment did not remain a dead letter even on the first occasion of its application. The talented wife of a foremost merchant of Dublin, Mr. Maurice Dockrell, was elected a councilor of the urban district of Blackrock, and on the first meeting of the council she was unanimously elected deputy chairman. I have every reason to believe that the presence of Mrs. Dockrell in the Blackrock urban council is for the good of the council and that the womanly dignity of Mrs. Dockrell has in no way suffered, but, on the contrary, has been enhanced.

In Templemore Mrs. Bracken, a graduate of the Royal University of Ireland, was elected chairman. I think the lady was the only member of the council possessed of a university education.

But the bodies to which the largest number of women were elected were the boards of guardians. I myself nominated a lady long distinguished for her charitable and philanthropic work in Dublin for the position of poor-law guardian. She was elected. Eighty-five women were elected guardians. As the guardians control the poor houses, the poor hospitals, and the administration of medical relief to the poor, I am satisfied that the election of women on these boards is for the advantage of the community.

In conclusion, I have no reason to think that the women who voted or were elected councilors and guardians in any way suffered a loss of dignity or domesticity, but, on the contrary, I think the entire community is better and richer by the new powers accorded to women, who are so devoted to the social amelioration of the human race.

A correspondent says:

Throughout Ireland upward of 75 per cent of the women electors exercised the franchise intrusted to them for the first time. They almost invariably supported the candidates who advocated temperance, and took their privilege in a very serious, business-like spirit, showing a keen appreciation of the personal merits of the different candidates.

Between England and Ireland lies the Isle of Man, where all women who are rate payers have full suffrage, local and parliamentary.

As to the colonies, five provinces of Canada, namely, Nova Scotia, New Brunswick, Ontario, Manitoba, and British Columbia, give widows and unmarried women with property municipal suffrage. For school matters every taxpayer can vote, and women are eligible as school trustees.

In Australasia, Queensland, Victoria, New South Wales, and Tasmania likewise grant women municipal suffrage; and lastly, New Zealand, South Australia, and Western Australia grant women full suffrage and eligibility to the local parliaments. What has been the effect of granting woman the suffrage in these countries?

Mrs. Mary Lee writes from Adelaide, South Australia, that at an election which took place on January 22 the women voters "outnumbered the men, and showed greater interest in the proceedings." When we recall that in South Australia, as in all Australasian colonies, women are in the minority, this speaks much for the value of their recently acquired power of voting.

Mrs. K. W. Sheppard, writing from New Zealand, says:

Since the enfranchisement of women most of the boisterousness and horse play that formerly characterized elections has disappeared. Since September, 1893, I have witnessed two elections in New Zealand and one in England, and I must say that for quiet orderliness the former compared greatly to the advantage of the latter.

One of the results of woman suffrage in New Zealand has been to secure equitable divorce laws. Hitherto New Zealand law has followed English law, by which infidelity on the part of the wife entitles the husband to a divorce, but infidelity on the part of the husband does not entitle the wife to one unless gross cruelty can be proved in addition. New Zealand, where women have attained parliamentary suffrage, has now abolished this injustice, and has made the divorce law the same for husbands and wives.—(The Woman's Journal.)

Hon. W. P. Reeves, agent-general for New Zealand, lately gave an address in London on "The effect of woman suffrage in New Zealand and South Australia." He said in part:

Not many weeks' journey away woman suffrage is an institution to-day; not a story of Utopia, or of the planet of Mars, or of some coming race, but one of the ordinary, every-day facts of life among people who speak your language, who belong to your blood and race. It is true that these two venturesome colonies are young and are far away. They are young, but it does not follow because a colony is young that everybody is young in the community; young colonies have their share of old heads.

Awful pictures were drawn of neglected babies, uncooked dinners, judicial separations, a plentiful crop of divorce suits, deserted domestic hearths. We were told that women did not want the franchise, and yet it was said that no sooner did they get the franchise than they would be so enthralled, so enthusiastic, that they would neglect all the duties of domestic life.

In social life things are very much as they were. In fact, the complaint of the old prophets of evil now is, not that the skies have fallen or that the country is upside down, but that there is so little change. Well, if female suffrage had only proved that so great and important a constitutional change could come into being so smoothly and easily that the only complaint of its opponents was that it had not revolutionized the country, it would have proved a great deal; if it had only proved that women can go to the polls without being insulted, that when they get the franchise they use it, and that because they take an interest in the State they do not cease to take an interest in their homes and families, I think woman suffrage would have proved something. But it has proved more than that to anybody who has eyes to see or ears to listen.

It has distinctly affected legislation. Laws have been passed because of it; other laws have been modified; changes have been made in the administration of public service; changes are being made in public opinion outside of public service; altogether, people are beginning to look at customs and institutions with different eyes.

It is true that, for the most part, women do vote not against their husbands and families, but with them; that they usually do stand with their class interests. No one, except an anarchist, could have expected anything else. But it does not follow that they do not exercise a distinct influence in politics; they do, and they bid fair to influence politics still more.

In addition to that, it is not merely the influence of women upon public life that we have to look at; it is the influence of public life and fuller responsibilities upon women. No one can deny that already the possession of the right of citizenship has begun to influence women's life and thought and brain in New Zealand, and that that influence is altogether for good.

On the whole, the part they are taking is quiet, but it is none the less real. They do use the franchise; they do discuss, they do join associations; they do read, and listen, and reflect, and they do learn; and it is this that widens their lives, brightens their intellect, makes their lives fuller and more useful to the country, and none the less charming to their domestic circle.

One of the commonest à priori objections to woman suffrage is that it will cause family dissensions. "À priori now means," says Dr. McCosh, "proceeding from principles embedded in the mind and independent of experience." New Zealand has had the actual experience of woman suffrage for seven years, and the Hon. Hugh H. Lusk, formerly a member of the New Zealand parliament, has given this summary of the effects of equal suffrage in New Zealand:

We find that equal suffrage is the greatest family bond and tie—the greatest strengthener of family life. Under equal suffrage the family is taking the place of the individual. People are coming to vote as families. The persons whom they approve when they talk it over in the family are those whom they vote for when they go to the polls. The members of a family generally vote alike, though it is impossible to swear to this, as the ballot is absolutely secret. But we see it in the changed character of the men who are elected. The men who are successful now

are not the same sort that were successful before. Character is more regarded than cleverness. It is asked about every candidate, "Has he a good record? Is he above suspicion, an honorable man, a useful citizen?" That is the man who, under the combined suffrage of men and women, gets the largest number of votes and is elected.

This is the greatest benefit that comes from suffrage. I do not deify suffrage. I can see no use for the ward heeler in connection with ladies, no influence for the saloons and public houses. I have been shocked and disappointed by what I have seen in cities of the United States. The hope that it may be altered depends, in my mind, very much on the success of this movement. Suffrage for women would do more good here than in New Zealand, because there is a greater amount of evil to be removed.

Woman suffrage in foreign countries.

	Partial.							Full.
	Parish and district council or rural commune.	Poor-law guardians.	School board.	Municipalities.	County council or similar body.	Assembly of the nobility.	Imperial Parliament.	All offices and questions with same qualifications as for men.
Russia [1]	[2]	.....	.....	[3]	[3]	[3]	.....	.....
Austria [4]	1849	.....	.....	.....	[5]	.....	1873	.....
German Empire [6]	[5]	.....	.....	.....	1872	.....	.....	.....
Sweden [7]	1862	1889	1889	1862	1862	.....	1862	.....
Finland [8]	1865	1889	.....	1873	.....	.....	.....	.....
Norway [9]	.....	.....	1889	.....	.....	.....	.....	.....
Iceland [10]	1882	.....	.....	1882	.....	.....	.....	.....
England	[11] 1869, [12] 1894	[11] 1869, [12] 1894	[12] 1870	[11] 1882	[11] 1888	.....	.....	.....
Wales	[11] 1869, [12] 1894	[11] 1869, [12] 1894	[12] 1870	[11] 1882	[11] 1888	.....	.....	.....
Scotland	[12] 1894	[12] 1894	.....	[11] 1881	[11] 1889	.....	.....	.....
Ireland	[12] 1898	[12] 1898	[12] 1898	[12] 1898	[12] 1898	.....	.....	.....
Isle of Man [13]	.....	.....	.....	.....	.....	.....	.....	[1880, 1892]
Guernsey	[11] 1892, [12] 1894	.....	.....	.....	.....	.....	.....	.....
New South Wales	.....	.....	.....	[12] 1867	.....	.....	.....	.....
Victoria	.....	.....	.....	[12] 1869	.....	.....	.....	.....
West Australia	.....	.....	.....	[12] 1871	.....	.....	.....	[12] 1899
Queensland	.....	.....	.....	[12]	.....	.....	.....	.....
Tasmania	.....	.....	.....	[12] 1884	.....	.....	.....	.....
New Zealand	.....	.....	[12] 1877	[12] 1886	.....	.....	.....	[12] 1893
South Australia	.....	.....	.....	[12] 1880	.....	.....	.....	[12] 1894
Canada:								
Ontario	.....	.....	[12] 1850	[11] 1884	.....	.....	.....	.....
Nova Scotia	.....	.....	[12]	[12] 1887	.....	.....	.....	.....
New Brunswick	.....	.....	[12]	[12] 1886	.....	.....	.....	.....
Manitoba	.....	.....	[12]	[12] 1887	.....	.....	.....	.....
British Columbia	.....	.....	[12]	[12] 1888	.....	.....	.....	.....
Northwest Territory	.....	.....	[12]	[11] 1888	.....	.....	.....	.....
Quebec	.....	.....	[12]	[11] 1889	.....	.....	.....	.....

[1] *Russia.*—A peasant woman, if head of a household, can vote in person in the peasant assembly. Women above the peasant order, if possessed of sufficient property, vote by a proxy for the territorial assemblies, the city councils, and in the assembly of the nobility.

[2] Always.

[3] Eighteenth century.

[4] *Austria.*—Women of the large landed proprietor class vote by proxy for the provincial diets and the Imperial Parliament, and in many of the provinces in the rural communes. In 1891 women in Lower Austria obtained the right to vote in person in the rural communes.

[5] Various dates.

[6] *German Empire.*—Some provinces, viz, Brunswick in 1850, Prussia and Westphalia in 1856, Schleswig-Holstein in 1867, and Saxony in 1873, gave women possessed of sufficient property the right to vote by proxy in the rural communes and for the rural diets.

[7] *Sweden.*—Unmarried women ratepayers vote in person. Their vote is only indirect for Parliament. Stockholm did not give women municipal suffrage until 1872 and 1883. Women are eligible to all municipal poor relief committees and to the school board of Stockholm.

[8] *Finland.*—Widowed, divorced, and unmarried women ratepayers. Women are eligible as guardians of the poor.

[9] *Norway.*—All women who pay the school tax can vote on school matters. In the rural communes, women who have children can vote on some school questions even though they pay no tax. Women are eligible to town school boards and as school inspectors.

[10] *Iceland.*—Widows and unmarried women, with property, vote in person.

[11] Unmarried women and widows with property qualifications.

[12] All women who have individual property qualifications. In Great Britian women are eligible as poor law guardians, to school boards and to rural and urban district councils. In the colonies they are probably eligible to similar positions.

[13] *Isle of Man.*—In 1880 given to women property owners. In 1892 extended to all women ratepayers.

Miss ANTHONY. I now present to you Mrs. Carrie Chapman Catt, of New York City. She is the chairman of the national committee organization, and during the last five years she has traveled through every city, I think, in the United States, and has aided the women who are in favor of our cause to organize and to put themselves in shape to work with the respective legislatures, etc. So, whatever Mrs. Carrie Chapman Catt may say, I want you to feel that she speaks whereof she knows. She is to speak upon the latest phase of the woman's movement.

WHY WE ASK FOR THE SUBMISSION OF AN AMENDMENT.

CARRIE CHAPMAN CATT. A survey of the changes which have been wrought within the past hundred years in the status of woman—educational, social, financial, and political—fills the observing man or woman with a feeling akin to awe. No great war has been fought in behalf of their emancipation; no great political party has espoused their cause; no heroes have bled and died for their liberty; yet words fail utterly to measure the distance between the "sphere" of the woman of 1800 and that of the woman of 1900. No race, or people, or sex ever gained so much in rights and privileges in one century as have the women of the United States in the past one hundred years. How has the transformation come? What mysterious power has brought it?

On the whole, the men and women of 1900 rejoice at every right gained and every privilege conceded to women. Not one jot or tittle would they abate the advantage won; yet when the plea is offered that the free, self-respecting, self-reliant, independent, thinking women of this generation be given the suffrage, the answer almost invariably comes back, "When women as a whole demand it, men will consider it." This answer carries with it the apparent supposition that all the changes have come because women wanted them, and that further enlargement of liberty must cease because women do not want it. Alas, it is a sad comment upon the conservatism of the average human being that not one change of consequence was desired by women as a whole, or even by a considerable part. It would be nearer the truth to say women as a whole have opposed every advance.

The progress has come because women of a larger mould, loftier ambitions, and nobler self-respect than the average have been willing to face the opposition of the world for the sake of liberty. More than one such as these deserve the rank of martyr. The sacrifice of suffering, of doubt, of obloquy, which has been endured by the pioneers in the woman movement will never be fully known or understood. For sixty years and more a vigorous agitation has been waged in the United States to establish equal rights for women with men. Under its influence, and guided by the brave leadership of brave men and women, the evolution of the rights of women has moved on without a break. Though Congress and legislatures have turned deaf ears and unseeing eyes toward it, yet the people have listened, discussed, and considered. With the bold demand for perfect equality of rights in every walk of life the public have compromised. Not willing to grant all, they have conceded something; and by repeated compromises and concessions to the main demand the progress of woman's rights has been accomplished.

There may be two kinds of restriction upon human liberty—the re-

striction of law and the restraint of custom. No written law has ever been more binding than unwritten custom, well supported by popular opinion. At the beginning of our century both law and custom restricted the liberty of women. It was the edict of custom which prohibited women from receiving an education beyond the rudiments, engaging in occupations, speaking in public, organizing societies, or in other ways conducting themselves like free, rational human beings. It was law which forbade married women to control their own property or to collect their own wages, and which forbade all women to vote. Under the influence of the storm and the sunshine of agitation, custom has dissolved and melted away, leaving women at the end of the century individualized, self-reliant, human, thinking beings. The evolution stops only when it meets the opposition of constitutional law. The changes have not come because women wished them or men welcomed them. A liberal board of trustees, a faculty willing to grant a trial, an employer willing to experiment, a broad-minded church willing to hear a woman preach, a few liberal souls in a community willing to hear a woman speak, these have been the influences which have brought the changes.

There is no more elaborate argument or determined opposition to woman suffrage than there has been to each step of the progress of the rights of women. Scientists measured heads and weighed brains to prove that girls could not master a college education. Clergymen read the Scriptures to prove that they must not, and public opinion echoed the deductions of both. But girls did master the college curriculum. When the world recovered from its astonishment, scientists investigated anew and discovered that measurement and weight could determine little of the quality of the human brain; clergymen reinterpreted the Scriptures, and public opinion adjusted itself to the new conclusion. Each step of the way has been bitterly contested, and that there has been advancement in the rights of women at all is due entirely to the fact that the few, not the many, possessed the authority to insure the change. Had it been necessary to submit the question of coeducation to popular vote before the experiment had been tried there would not be 40,000 young women studying in our colleges and universities to-day. The consensus of public opinion in 1830 was that the brains of women were quite incompetent to receive a college education; that their physical health could not endure a four-years course of study, and that a college educated woman was an anomaly alike repulsive to men and women. Had a vote been taken, coeducation would have been overwhelmingly defeated.

In 1840, before women had studied or practiced medicine, had it been necessary to obtain permission to do so by a vote of men or women 8,000 graduated women physicians would not now be engaged in the healing art in our country.

In 1850, when vindictive epithets were hurled from press, pulpit, and public in united condemnation of the few women who were attempting to be heard on the platform as speakers, had it been necessary to secure the right of free public speech through legislatures or popular approval, the voices of women would still be silent. Audiences would never have been instructed by the logic of a Stanton or an Anthony, exalted by the eloquence of a Dickinson or a Livermore, charmed by the sweet appeal of a Stone, convulsed with laughter by

the wit of a Shaw, nor uplifted by the moral suasion of a Willard. The rights of women have come in direct opposition to the popular consensus of opinion. Yet, when they have once become established, they have been wanted by women and welcomed by men.

There are a few fanatics who, if they could, would force the women of this generation back into the spheres of their grandmothers. There are some pessimists who imagine they see all natural order coming to a speedy end because of the enlarged liberties and opportunities of women. There are sentimentalists who believe that the American home, that most sacred unit of society, is seriously imperiled by the tendencies of women to adopt new duties and interests. But this is not the thought of the average American. There are few intelligent men who would be willing to provide their daughters no more education than was thought proper for their grandmothers, or who would care to restrict their daughters to the old-time limited sphere of action. Thinking men and women realize the American home was never more firmly established than at the present time, and that it has grown nobler and happier as women have grown more self-reliant. The average man and woman recognize that the changes which have come have been in the interest of better womanhood and better manhood, bringing greater happiness to women and greater blessings to men. They recognize each step gained has rendered women fitter companions for men, wiser mothers, and far abler units of society.

The public acknowledges the wisdom, the common sense, and practical judgment of the woman movement until it asks for the suffrage. In other words, it approves every right gained because it is here, and condemns the one right not yet gained because it is not here.

Had it been custom or statutory law which forbade women to vote the suffrage would have been won by the same processes which have gained every other privilege. A few women would have voted, a few men and women would have upheld them, and, little by little, year after year, the number of women voters would have increased until it became as general for women to vote as it is for men. Had this been possible the women of the United States would be voting to-day in every State in the Union; and undoubtedly their appearance at the polls would now be as generally accepted as a matter of fact as the college education. But, alas, when this step of advancement was proposed, women found themselves face to face with the stone wall of constitutional law. Women could not vote until a majority of men should first give their consent. Indeed, the experiment was tried to gain this sacred privilege by easier means. The history of the voting of Susan B. Anthony, of Rochester, in 1872, is familiar to all, but the court decided that the Constitution must first be amended. It therefore becomes a necessity to convert to this reform a majority of the men of the United States.

It is for these reasons, gentlemen, that we appeal to you to aid in the submission of a sixteenth amendment. Such an amendment would go before the legislatures of our country where at least the grade of intelligence is higher than we should find in the popular vote. When we recall the vast amount of illiteracy, ignorance, selfishness, and degradation which exists among certain classes of our people the task imposed upon us is appalling. There are whole precincts of voters in this country whose intelligence united together does not equal that of one representative American woman. Yet to such classes as these we

are asked to take our cause as the court of final resort. We are compelled to petition men who have never heard of the Declaration of Independence, and who have never read the Constitution, for the sacred right of self-government; we are forced to appeal for justice to men who do not know the meaning of the word; we are driven to argue our claim with men who have never had a thought in logical sequence. We ask men to consider the rights of a citizen in a republic and get the answer in reply, given in all seriousness, "Women have more rights now than they ought to have;" and that, too, without the faintest notion of the inanity of the remark or the emptiness of the brain which conceives it.

When we present our cause to men of higher standing and more liberal opinion we find the interest of party and the personal ambition for place is an obstacle which prevents the better man from asserting the advocacy of a question concerning which there is the slightest doubt as to its popularity.

The way before us is difficult at best, not because our cause is not based upon unquestioned justice, not because it is not destined to win in the end, but because of the nature of the processes through which it must be won. In fact, the position of this question might well be used to demonstrate that observation of Aristotle that "A democracy has many striking points of resemblance with tyranny."

It will be remembered at the close of the war it was the desire of the Republican party to enfranchise the negro, and that all its political power was bent to accomplish this purpose; yet, with all its prestige, it was found to be impossible by any other method than this. State after State where abolition sentiment had been strong submitted the question to popular vote, and in no State was an amendment carried. It was only when this question was submitted to picked men, such as we may find in the legislatures, that it was found possible to carry it. It matters not at this day whether the enfranchisement of the negro was a mistake or not (there is a difference of opinion on this point), but certainly American women, the representatives of American homes, public schools, colleges, and institutions, should be entitled to as fair a chance to gain political liberty as was given to the negro.

By a Congressional act the way has been opened for the Indians on the reservations to gain the same right of citizenship, but no such easy process is open to women.

Gentlemen, though you yourselves may doubt the expediency of woman suffrage, though you may question the soundness of our claim, yet, in the name of democracy, which permits the people to make and amend their constitutions, and in the name of American womanhood, prepared by a century of unmeasured advance for political duties, we beg your aid in the speedy submission of this question. We ask this boon in the direct interest of the thousands of women who want to vote, who suffer pangs of humiliation and degradation because of their political servitude. We ask it equally in the indirect interest of the thousands of women who do not want to vote, believing their indifference or opposition to be the same natural conservatism which led other women to oppose the college education for women, the control of property, the freedom of public speech, and the right of organization.

Years ago George William Curtis pleaded for fair play for women. It is the same plea we are repeating. We are aware, gentlemen, that you have no power to grant the privilege we ask; therefore we only

petition for fair play. Fair play means the submission of our question to the most intelligent constituency which has power to act upon it.

If we shall win, the Constitution will have been amended by the American will. If we shall fail, we will abide by the decision. That is, we will wait till courage has grown stronger, reason more logical, justice purer; when we will again petition a future Congress to grant us another opportinity to test the growth of the American intellect. Since right will prevail, we rest content in the positive knowledge that our cause will eventually triumph. Now, we ask that the American people, through their legislatures, shall be given an opportunity to record their opinion upon the question. As the daughters of Zolophehad appealed to Moses and his great court for justice, so do the daughters of America appeal to you, gentlemen, for fair play. [Great applause.]

Miss SUSAN B. ANTHONY: In closing I would like to give a little object lesson of the two methods of gaining the suffrage. The one to which we have been recommended is by what is termed a popular vote of the State—that is, that the State legislature shall submit to the electors the question of the proposition to strike the little adjective "male" from the suffrage clause. We have already tried the experiment in that direction in seventeen different elections and in thirteen different States. Four States of the Union have had campaigns and voted on it twice over, and of those four that have voted twice over Colorado is one, showing that during the seventeen years intervening the two elections the men of Colorado have become sufficiently educated in the laws of justice, a good many of them, to vote for the measure. The other States have been one way and the other. We have had four where, as has been said, the question has been carried at the ballot box. I am going to illustrate by South Dakota.

South Dakota in 1890 submitted the question for the first time. That was just after there was an influx of Russians and foreigners who were not able to read or write a single word of the English language. We made the best possible campaign, an educational campaign, trying to show the men of the State why it was their duty to grant suffrage to their women. I will not speak of the hard work of going through that then new State. They had had droughts for three years. There was not a spear of grass to be seen anywhere nor scarcely a tree with a leaf on it anywhere in that State; every apple, every particle of fruit and grain upon which the people of that young State fed that year was brought from the outside; every chunk of coal was brought from the outside and in large quantities presented by the railroad corporations. It was a famine, you might say, the year of the canvass, and when the election day came the returns showed that there were 30,000 foreign-born men, just naturalized within the last few months, many of them, not to say years. There were 40,000 American-born men in that State. Of the 40,000 American-born men, 24,000, sir, voted in favor of the amendment and for the enfranchisement of the women, but, unfortunately, the American-born men divided and 16,000 voted no, yet you perceive that of a vote of 24,000 to 16,000 we should have had the privilege of voting granted to the women of that State, but when the 30,000 foreigners' votes were counted in they went over with the 16,000 opponents and lost us the victory.

Now, that is an extreme illustration, because at that moment there was a much larger ratio of foreigners and of newly come foreigners

than in any other State. In that young State there were hundreds and thousands of women teachers who had moved there and taken up their claims, widows and single women, because they felt it was to be a free State, and those foreign-born men just over from Russia could go to the ballot box and vote solidly that American-born, property holding, tax-paying women should have no right in that State, where very many of those men did not feel that they had performed their husbandly duty if they had not flogged their wives at least once a week.

Now, that was the condition in that State. It is next to impossible to carry a State by the popular vote.

Take New York. More than one-half of the voters are foreign-born men. You can hardly believe it, but if we should ever go to the ballot box with this question in New York, and even if the Democratic and Republican parties alike should put woman's suffrage in their planks, and should try to have those foreign-born men vote in favor of any equality of rights to women they could not be gotten to do it, because they came to this country not for liberty for anybody but themselves. Every man comes here to get more money, and more freedom, and more liberty, and he never dreams that his wife should have a particle more than she had at home, nor quite so much, and especially he never dreams that the women of America—the women who are born here—shall have equal rights with himself.

Let me give you a little illustration of the olden times, before you were a member of the Senate, Mr. Chairman, and before any of these women can remember. There used to be a distinguished person in the city of New York. His name was John Morrissey. He was the very king of gamblers. He had a most splendid and magnificent gambling palace at Saratoga Springs, where all of the Southerners, who had lots of money in those days before the war, used to come to have a good time. He was either a member of the New York State legislature or of the Congress of the United States. Since I have been coming to Congress I have stood and plead before John Morrissey, the king of gamblers, for my right—for him to vote to give Elizabeth Cady Stanton and all the great women of the State of New York as much right in the making and shaping and control of the governments of the cities as John Morrissey possessed.

Now, John Morrissey represented the Seventh Congressional district of New York, the very slums of New York City; the very district where gamblers and blacklegs and ignorance prevailed. By this process you will perceive, first, you have to pass the resolution submitting the question to the legislatures to be voted upon. Congress can not decide it. All Congress can do is to give to the women of the different States of this Union an opportunity to appeal to the big men of the States in their respective legislatures instead of going down in John Morrissey's Congressional district and pleading with every individual fisticuff there. And while in the early days Mrs. Stanton and I had our choice, and humiliating as it was to go before John Morrissey in Congress, to get the question presented before the legislature and get him to vote for the ratification of this proposition for a sixteenth amendment, it was nevertheless a thousand times less humiliating than it was to be compelled to go down into the saloons and slums of New York City and beg of every individual man there to give us a little chance in the making and continuance of society.

And here is all we ask of you gentlemen, not that you can do anything in the world, is to save us women from any more tramps over the States, such as we have made now seventeen times over. In nine of those State campaigns I myself, sir, have made a tramp from county to county. In my own State of New York at the constitutional convention in 1894 I visited every county of the sixty—and I was not then 80 years of age, sir, but 74—and I have been through Kansas, through every county in the State of Michigan when that State had its campaign, and also South Dakota.

Our last and most glorious campaign was in California. There, during that campaign, 110,000 of the big men of that State voted for the amendment, but unfortunately for us there were 137,000 who voted the other way. Now, that 137,000 was made up largely of the foreign-born men of the State of California. It is not the native-born men. It was not the men who understand our republican and democratic institutions. It was the men who cared for nothing but self.

I want to say to you, sir, that there is an army in this nation that stands out solidly against the enfranchisement of women in whatsoever State we go. In California, just ten days before election, they held what they called a liquor dealers' convention—the saloon men, the manufacturers, and all of the men interested in the sale of liquor, met together in San Francisco and passed resolutions against giving women the right to vote, and they issued a circular letter to every dealer, manufacturer, and drinker throughout the State begging of him to be at the polls early, so that he should not only vote himself, but to stand there all day and use his influence and get every other man to vote against "amendment 6," as it was called, against the enfranchisement of women, that was possible.

Now, they did that. They worked all the day long in that way, and all of that class of men voted solidly against us. There is an old saying of Napoleon's, I think, "Watch your enemy and see what he wants you not to do and go and do it."

There is an enemy of the homes of this nation, and that enemy is drunkenness. Every one connected with the gambling house, the brothel, and the saloon has voted solidly against the enfranchisement of women, and, I say, if you believe in chastity, if you believe in honesty and integrity, then do what your enemy wants you not to do, which is to take the necessary steps to put the ballot in the hands of the women of this country. I know there are some men and some women who are not gamblers or liquor dealers or low-down people, who are not yet sufficiently educated in the principles of government to believe that if you have a woman's opinion counted at the ballot box it will destroy her womanliness, and we all know from the women we have had presented to us to-day, Mrs. Bradford, who is from a voting country, Mrs. Blatch, who is here from England, and if we had with us the wives of some of your Senators here this morning from Utah and Idaho, our youngest State, and from Wyoming, you would see that voting does not make women less lovely. It simply makes them more self-respecting. Oh, I love to meet a woman who comes from Colorado or Wyoming. I used to be in olden times with the grangers. They were the first class of workingmen who ever granted to women equal rights in their granges and lodges. Away back in 1877, when I traveled in Iowa, I could tell a granger woman the moment she stepped in. How did I tell her? She walked with head erect, and

with self-respect, and looked as if she felt just as good as a man—and there is nothing in the world so desirable to a woman as to feel that she is as good as a man; that her opinions will count just as much when weighed in the ballot box.

As you know, every election in this country is the solution of a mathematical problem. You put into one political scale all the many, many interests of railroad monopolies, salt monopolies, coal combines, the great liquor interests of the country—if you put all those material interests in one of your political scales, then you put into the other political scale the religious interests of the country, the charitable interests of the country, the educational interests of the country——

A VOICE. And morals.

Miss ANTHONY. And the moral institutions, you know, Mr. Chairman, that have the repairing of the damages to society are all turned over to women, and consequently when we speak of the church, of the home, of the school, and of the charities we simply mean that nine out of ten of the people who are at work to repair the damages to society or to mold the conditions of society would make them higher and better if in the hands of women.

Now, when you put all those elements, religion, home, church, charity, into one political scale, without a vote, and all the other material interests of the country into the other political scale, with votes, what is the result? Why, the material interests pull down the scale as against the moral, the charitable, and the religious, and everything which is for the spiritual uplift of the nation kicks the beam every time, and there is no alternative. Ever since the close of the war, ever since the reconstruction, this nation has been in a perfect deadlock in morals, and you see for yourselves men on the floors of both Houses who are growing worse and worse all the time. I do not believe it, but I have to take your word for it. [Laughter.]

Here is a philosophical fact that I present to you. It is just as impossible for this nation to go forward in the way of morals, or an uplift, until women are enfranchised as it was impossible in the war. Nations never do anything from pure love of justice. I am sorry for it, but they never do. Governments never do, whether England or America, or where it is. There must be some practical reason given, some practical end to be obtained by the doing of the justice. But as we all know, there was a military necessity during the war that compelled Lincoln and Congress to declare the abolition of slavery, and everybody knows that this Government could never have put down that rebellion in all the years of the world if the South had been left with its slaves to have supplied the sinews of war, to furnish the bread and keep the homes and supply the armies. The only possible military necessity or tactics that could be resorted to by the Government was to take away their supplies or their means of supply, and that was by the abolition of slavery.

Then at the close of the war we were at a perfect political deadlock. The election was to come off in 1867 and something had to be done to insure the success of the Republican party. Now, I do not say that some did not work to bring this about from principle, but the vast army of the men who favored the fourteenth and fifteenth amendments to the Constitution cared no more for the negroes' rights to vote than most of them care now for the women's right to vote. [Laughter.]

But it was a political necessity, and so those amendments were put in the Constitution, right or wrong, as Mrs. Chapman Catt has said. Those two great acts of justice to the negro race were brought about by a military necessity and a political necessity.

Now, I appeal to you gentlemen of the committee that you will present your report in favor of this amendment to the Senate at the earliest possible opportunity; that you will do it because you feel and see with us that there is no hope of solving this problem except by the enfranchisement of the women of this country, and I pray you, sir, that you will give this matter your serious consideration. I pray you to think of it as you would if one-half of the people who are disfranchised were men; if we women had absolute power to control every condition in this country and you were obliged to obey the laws and submit to whatever arrangements we made. I want you to speak and act and report on this question exactly as if your half of the people were the ones who were deprived of this right to a vote and voice in governmental affairs. You would not be long in knowing how you would bring in your report if you were the ones who were disfranchised and denied voice in this Government. I say to you if instead of these being the women, the mothers, sisters, wives, and daughters of the men who compose the Government of this nation; if it had not been women, but any class of men; if it had been the farmers of this country, the manufacturing class, or any class of men who had been robbed of their inalienable rights, then, sir, we would have seen that class of men rising in rebellion and the Government, perhaps, shaken to its very foundation; but being women, being the mothers, daughters, wives, and sisters of the men who make the aristocracy we have to accept.

Now, Mr. Chairman, I am through. All we ask is that you will present this proposition to the Senate, and that you will move a discussion and have a vote upon the question, and we will then find out at least how many friends we have on the floor of the Senate.

Before I take my seat, and before I say we are through, I want to say that I hold in my hand a little pamphlet that contains the essence of all the reports that have been made on the floors of the two Houses of Congress in favor of a sixteenth amendment. It commences with the report of Benjamin F. Butler and comes down to Senator Lapham, of New York, and Senator Hoar, of Massachusetts, all the way through both Houses. I think there are nine or ten favorable reports. These take no notice of the adverse reports that have been generally presented, for we have not sufficient funds to print all that our opposition says. It is all we can do to get money enough to print what is said in our favor. I present these this morning. They embrace the reports that have been made by Congress, and I brought them this morning in order that they might be distributed among the members of the committee and our friends who have come here.

I thank you, Mr. Chairman, for this courteous hearing, individually and on behalf of our entire association. We have present about three hundred voting delegates from the different States of the United States, and I thank you in behalf of all of them for your patient and courteous hearing. [Applause.]

The CHAIRMAN. The committee has been much pleased to hear the views of you ladies, which have been so ably and eloquently expressed, and will take your wishes under consideration.

Miss ANTHONY. May I ask that you will, at your early convenience, make a motion on the floor of the Senate to print as large a number of these remarks as possible?

The CHAIRMAN. We will consider your wishes and will probably comply with your request.

Miss ANTHONY. I refer to the speeches that have been made here.

The CHAIRMAN. Oh, yes; that will be done. I desire to say that there are a few ladies present who desire to submit some remarks in opposition to the woman's suffrage movement, and I will recognize Mrs. Dodge. The hours between 10 and 12 o'clock to-day were accorded to the ladies who favored this proposed amendment. At some future time that will be convenient to the members of our committee we will accord a hearing to the ladies in opposition.

Mrs. ARTHUR M. DODGE said: Gentlemen, we appear before your honorable committee by direction of the "Associations opposed to the extension of the suffrage to women" to protest in their behalf against the proposed amendment of the Constitution of the United States, advocated by the petitioners who have appeared before you. We oppose the amendment on the ground that it is unnecessary. The object sought can be accomplished without any amendment whatever to the Constitution whenever public opinion in the several States shall be pronounced in its favor.

Any amendment to the Constitution requires the approval of three-fourths of the States of the Union. If that proportion is in favor of the extension of suffrage to women it can be indicated by their action at any time without applying to Congress for Constitutional amendments. While it is probable that if three-fourths of the States should enact the desired legislation, the remaining one-fourth might fall into line; still, if any of them should refuse to extend the suffrage to women it would be manifestly impolitic and unjust for the other States to attempt to coerce the minority on a question dependent upon the expression of public opinion alone.

There would seem therefore to be no possible justification for the effort now being made to secure Federal interference with the reserved rights of the several States. So far as the reasons given by the petitioners are purely sentimental, they should have no weight in so serious a matter as amending the Constitution of the United States. The mere fact that this amendment is asked as a compliment to the leading advocate of woman suffrage; on the attainment of her eightieth birthday is evidence of the emotional frame of mind which influences the advocates of the measure, and which is scarcely favorable to the calm consideration that should be given to fundamental political principles. With all the admiration which is felt for the vigorous character and consistant effort of Miss Anthony, it is absurd to suppose that the complicated machinery required to be put in motion in order to amend the Constitution of the United States should be started because this venerable woman has achieved length of days and enjoys the respect of so many persons.

The question of suffrage is dealt with in the first article of the Constitution, which was adopted after long and patient discussion, in which various limitations were advocated and rejected. The convention wisely left the qualifications for suffrage with the several States. This regulation of the suffrage was regarded as a sovereign right of the States, of which they could not be deprived without destroying repub-

lican institutions. It is in fact the very essence of home rule, which is ingrained in our institutions as the palladium of civil liberty. During more than a hundred years, in which we have lived and prospered under the Constitution, no effectual attempt has ever been made to limit the suffrage in any respect whatever. The fifteenth amendment, which deals with the subject, simply registered the result of the greatest conflict in our history, by which slavery perished and the involuntary servitude specified in the Constitution ceased to exist. It did not extend the suffrage in any way, but it prevented its restriction by reason of a condition which no longer existed.

If the view here presented commends itself to your committee it will be a waste of time to present any arguments either for or against the granting of suffrage to women, because this is a question not in issue at this time or upon this occasion. The proper sphere of discussion of this question is in the several States, and there is nothing whatever to prevent suitable legislation whenever public opinion shall demand it. It may be proper to add, however, that so far as we can judge there is no general demand for such legislation. We are convinced that if the proposition to enlarge the suffrage were submitted to the votes of the women of the United States it would be rejected by an overwhelming majority. We are convinced that what is termed a "right" of suffrage is rather a duty to be performed, and a duty of such a nature that women are disqualified for many reasons from assuming this responsibility. We feel that the exemption of women from the performance of this duty is a privilege which they are not prepared to surrender, and which has been conferred upon them as a compensation for limitations and duties imposed upon them by their sex, and which can not by any possibility be transferred to the domain of masculine service. We know that women are physically unable to perform the duties which men are compelled to perform under every well-regulated government. The enforcement of law involves not only the performance of jury duty, but in the last emergency the employment of military force, in neither of which can women discharge the responsibility of actual service.

No better illustration of the difficulties which would arise in case women were endowed with the duties of suffrage can be presented than the situation which has so lately existed in the State of Kentucky. Imagine women taking part in the strife of that State, involving insurrection, riot, bloodshed, and assassination as the consequences of a political dispute. If either one of the claimants of the office of governor had been a woman, it is perfectly obvious that confusion would have been worse confounded, and that in the last resort, under the Constitution, the Federal authorities would have been paralyzed by the necessity for using military force against the women of the State. The word "chaos" alone gives adequate expression to the state of affairs which would have existed in Kentucky if the women, as well as the men, had been compelled to take part in the unhappy controversy which has convulsed that State and might have entangled the General Government in its solution.

Further consideration will serve to show that the proposed amendment would in no respect promote the objects of the Constitution, which are declared in the preamble, "to form a more perfect union, establish justice, encourage domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The "union" referred to was one of States, but if the phrase could be strained so as to refer to the union or harmony between men and women, it seems evident that the suffrage would not tend to perfect this union, but would produce strife that would render "domestic tranquillity" a by-word among the people, and would be far from promoting the general welfare. Women could not take part in the "common defense," which is essential to establish justice. The extension therefore of the suffrage so as to include women would not merely be an invasion of the sovereign right of the State, but would tend to disrupt society.

It seems only necessary to present this brief statement of the actual condition of the question to convince your committee that the proposition to give the suffrage to women is a departure from the traditional conditions of the Constitution not justified by any compensating advantages whatsoever—a change not desired by a majority of the women of this country, and a measure liable to produce intolerable confusion, leading to the destruction of social order.

You will notice, Mr. Chairman, that we base this paper that I have read—and we are willing to rest it there—on the proposed change in the Constitution of the United States, which I observe was only mentioned once by any of the speakers who have appeared before your committee on the other side.

Miss EMILY P. BISSELL, of Wilmington, Del., of the opposition, spoke as follows:

Mr. Chairman and Gentlemen, it is not the tyranny, but the chivalry of men that we American women have to fear. The men of America want to give us everything we really need, and the danger is that they will mistake a minority for a majority. That is why we are here to-day. We hold a brief for the silent majority who do not want the ballot. There are no doubt thousands of women who wish the ballot, and wish it earnestly, but there are millions who do not desire it.

The proof that we represent this majority may be asked for. It lies in this—that the suffrage movement must be against the opinions of most of our sex, since it has been pushed for fifty years by as able a woman and as popular a one as Miss Anthony, and yet still remains a minority movement. In these fifty years every other woman's movement really desired by women has succeeded. The educational movement (not necessarily the coeducational) is a magnificent success. And, by the way, I may mention here that the presidents of four of the most prominent women's colleges are all antisuffragists. The movement for property rights is so successful that even married women now have more property rights than married men. The entrance of women into all occupations and professions has been so great that out of a possible 369 occupations over 360 had been conquered for our sex, according to the census of 1890, while a suffragist speaker at the conference this week claims that we are now represented in over 400 trades and occupations. And the club movement—well, gentlemen, wherever there are two women nowadays there is a club. The remotest hamlet is no exception to this rule. These movements have had no trouble in winning their way, and they have not taken half a century to do it, either. The woman-suffrage movement is the only woman's movement in existence that after fifty years' hard work finds itself not only in the minority, but with strong associations of women banded against it.

The suffrage movement is a minority movement even where it has succeeded. In Colorado, where I have been twice since the equal-suf-

frage law was passed, and where I have friends who are old residents, I have been assured that the majority of women did not desire to vote, and have been indifferent ever since as to casting their ballots. When I was going to Oregon last year, I had a most interesting talk with an Oregon suffragist, who sought to dissuade me from opposing suffrage. I asked her if she did not think that I represented the majority, and she said: "Why, of course; the majority of women here in the East are against us, and you will find the majority out there against us, too; but when they have to vote, they will vote." And when I reached Oregon I found that she was right in her first remark, at least. The great majority of all the women I met there did not care a button for the ballot, and a strong organization has been formed there against it. In this connection I may add, as the success of municipal suffrage in Kansas is often spoken of by the suffragist, that one of the members of the standing committee of this Oregon State association opposed to the extension of the suffrage to women, came upon that committee because, as she said, she had been living in Kansas under municipal suffrage, and was so disgusted with it that when she moved to Oregon she wanted no more suffrage.

The suffrage movement is a minority movement, too, in that the four States which have accepted suffrage are not representative of our large communities. Colorado by the census of 1890 had less inhabitants in the whole State than the city of Baltimore; by the last estimate, made by its governor, it had just about 20,000 inhabitants in the whole State more than Baltimore, which is not much of a margin. Wyoming's total population is less than the foreign population of Maryland, and Maryland is not a land of immigrants by any means. The population of Idaho is far below the number of colored people in Maryland. Utah (where the admission of women to the suffrage can hardly be said, in view of the recent events, to have elevated the character of the candidates) has less population than there are negroes in Arkansas; and altogether the four States that have equal suffrage, all put together, have fewer people in them (700,000 fewer) than Chicago and not half as many as New York City. Gentlemen, results from such States, even if they were conclusive and positive, would still be minority results.

But even in these States the results are negative.

Colorado has no advance in legislation to speak of, no purification of politics, no improvement of municipal conditions, no raising of working women's wages, no tokens of the millennial dawn whatever. Utah has sent Mr. Brigham Roberts here, but he has been returned with thanks (through the efforts of the women without the ballot), so that Utah's effort to uplift the country goes for nothing.

Wyoming has had equal suffrage for thirty years, yet nothing important has happened any more than in Idaho, which has just begun the experiment. Negative results such as these speak powerfully against suffrage to our mind.

I may be asked by what authority I speak for Colorado. I have here letters from Colorado men, signed with their names and giving their opinion as to the negative or evil results of suffrage in Colorado. It may be said that you would prefer to hear from the women, and I also have a letter from a Denver woman who signs her name to it and who shows up the same evils.

I will read extracts from some of the letters I have received. I

have here a letter from R. S. Morrison, of Colorado, in which he says:

> The most important question to-day in the local politics of Denver is how much of a popular uprising will it take to remove the present political control of this city, holding, as it does, the large vote of 2,000 women who vote under police surveillance. * * *
>
> I have conversed with a large portion of the politicians of this city and they are unanimously against it. Still in public utterances and in private letters they are not willing to commit themselves to that view. They have talked with me fully because they know I will reveal no names, but they recognize the danger of provoking a vindictive vote when there is no issue on the subject to bring out the vote on the other side. * * *
>
> The phrase "purity in politics," as produced by the woman vote, will raise a laugh wherever mentioned. They have quickly brought to the polls the power to ape the vices of men and have produced no countervailing virtues. They have been indicted for ballot stuffing and charged with repeating, and when the subject is mentioned to that class of women who still advocate the right, because to them the right means power, the common answer is "we are no worse than the men."
>
> This answer is doubtless true, yet, madam, it is a fearful fall from the promises they made when they appealed for the ballot, that they would elevate and purify the polls.
>
> If the question were to be resubmitted to-day, it would be overwhelmingly defeated.
>
> Yours, respectfully,
>
> R. S. MORRISON.

Now, they will say that that is a Denver man. I have just one word to read from a Denver woman's letter to me—Mrs Joel T. Vail. She says:

> He would be a bold man indeed who should claim that the municipal affairs of the city of Denver are to-day in the hands of cleaner or more disinterested politicians than before the days of woman's suffrage.

In conclusion, gentlemen, if you will excuse a personal detail, I wish to say that if any woman in the United States needs a vote, I ought to be that woman. The suffragists ask for the ballot in the name of the self-supporting woman, who must be a bread winner, not only for herself but often for others; they ask it for the property-owning woman, who needs it on account of taxation; they ask it for the temperance woman, so that she can save those nearest and dearest to her from the saloon; they ask it for the club woman, because her intelligence and interest in public affairs deserve it. And above all, they ask it for the poor downtrodden single woman, who has no one to look out for her or take care of her interests. Well, gentlemen, by a freak of coincidence I happen to be a single woman myself, a club woman, a temperance woman (though not a prohibitionist), a small property owner, and a self-supporting woman these many years. And yet, though I ought to have thus a fivefold longing for suffrage, I have never yet been so situated that I could see where a vote could help me. If I felt that it would, I might become a suffragist, *perhaps*, but as it is I remain with the majority of my sex, and I beg you to believe that we do not want to vote and that Miss Anthony, whose courage, whose devotion, whose interest, whose de termined perseverance we sincerely admire, is nevertheless not backed by the women of America, but is leading a minority movement only.

Without hearing further remarks at this time, at the hour of 12 o'clock m. committee adjourned.

1875.

United States v. Reed,

It will be readily conceded, from what we 89*] have here stated, *that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.

If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the General Government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money he must do it. He cannot, after the decision is rendered against him, protract the time within which he can contest that decision in the courts by his own delay in paying the money. It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid, and drawbacks speedily adjusted; and the rule prescribed in this class of cases is neither arbitrary nor unreasonable. That such was the intention of Congress, in the 16th section, is further shown by the provision, that even the delay of the commissioner in deciding the appeal shall not enlarge the time for suit beyond twelve months from the date of taking the appeal.

The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. So, after the decision, he can pay at once and commence suit within the six months; or he can have such delays in payment as he can obtain; and, if this 90*] *carries him beyond the six months, it is his own fault, and he should not complain. Braun v. Sauerwein, 10 Wall. 218, 19 L. ed. 895; The Collector v. Hubbard, 12 Wall. 1, 20 L. ed. 272. We find no error in the record, and the judgment of the Circuit Court is affirmed.

UNITED STATES, Plff. in Err.,
v.
HIRAM REESE and Matthew Foushee.

(See S. C. Reporter's ed. 214–256.)

Voters, protection of—15th Constitutional Amendment—suffrage—penal statute—form of judgment.

1. The Act of May 31, 1870, cannot be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States having all the qualifications of voters, because of their race, color or previous condition of servitude.

2. Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress shall provide.

3. The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude.

4. The Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude, which Congress may enforce by "appropriate legislation."

5. Congress has not as yet provided by "appropriate legislation" for the punishment of the said offense.

6. A penal statute must be construed strictly. This court cannot introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

7. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (R. S. sec. 650), this court, if it finds that the judgment as rendered is correct, need not do more than affirm. If, however, this court reverses, all questions certified, which may be considered in the final determination of the case, should be answered.

[No. 145.]

Argued Jan. 13, 14, 1875. Decided Mar. 27, 1876.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Messrs. **G. H. Williams**, Atty. Gen. and **S. F. Phillips**, Solicitor Gen. for United States.

Messrs. **B. F. Buckner** and **H. Stanbery**, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This case comes here by reason of a division of opinion between the judges of the Circuit Court in the District of Kentucky. It presents an indictment containing four counts, under sections 3 and 4 of the Act of May 31, 1870, 16 Stat. at L. 140, against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

*In this court the United States aban- [*216
don the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the Act under

---

NOTE.—Federal control of elections under 15th amendment—see note, 53 L.R.A. 668.

Fifteenth Amendment to U. S. Constitution; its construction and effect.

Women are not entitled to vote by virtue of the Fourteenth or Fifteenth Amendments to the Constitution of the United States. Van Valkenburgh v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

The elective franchise is not a natural right, but rests upon the authority of law defining the qualifications of those who may exercise it. The Federal Constitution makes women citizens and capable of becoming voters; yet that provision does not execute itself, but requires legislative action to authorize them to vote; and where the Legislature has only enacted that male citizens may vote, women have no right to vote. Spencer v. Board of Registration, 1 McArthur, 169, 29 Am. Rep. 582.

which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color or previous condition of servitude.

If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such. U. S. v. Hudson, 7 Cranch, 32. It is not claimed that there is any statute which can reach this case, unless it be the one in question.

Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, etc., shall be entitled and allowed to vote thereat, without distinction of race, color or previous condition of servitude, any constitution, etc., of the State, to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation.

The 2d section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any Act, which, by the Constitution or laws of any State, is made a prerequisite or qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite, and become qualified on account of the race, color or previous condition of servitude, of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens, designated by law as voters, who have already become qualified to vote at the election.

The 3d section is to the effect, that, whenever by or under the Constitution or laws of any State, etc., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the Act required to be done 217*] "as aforesaid" shall, if it *fail to be carried into execution by reason of the wrongful act or omission "aforesaid" of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner, and to the same extent, as if he had, in fact, performed such act; and any judge, inspector or other officer of election whose duty it is to receive, count, etc., or give effect to, the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, etc., the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offense, forfeit and pay, etc.

The 4th section provides for the punishment of any person who shall, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, etc., or shall combine with others to hinder, delay, prevent or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election.

The second count in the indictment is based upon the 4th section of this Act, and the fourth upon the 3d section.

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc.; as it was on account of age, property* or education. [*218 Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the 2d section of the Amendment, Congress may enforce by "appropriate legislation."

This leads us to inquire whether the Act now under consideration is "appropriate legislation" for that purpose. The power of Congress to

---

The Fifteenth Amendment takes away the authority of the State to discriminate, so far as the right to vote is concerned, against citizens of the United States on account of either race, color or previous condition of servitude, and colored persons equally with whites are citizens of the United States. U. S. v. Reese, supra; U. S. v. Cruikshank, 92 U. S. 542, post, 588, 1 Woods, 308; Wood v. Fitzgerald, 3 Or. 568; U. S. v. Petersburg Judges, 14 Am. L. Reg. 105; Van Valkenburgh v. Brown, 43 Cal. 43, 13 Am. Rep. 136; In re Turner, 1 Abb. U. S. 88.

But the power of the States upon all other grounds, including that of sex, remains intact. Van Valkenburgh v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

It does not, however, confer the right of suffrage on anyone. Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; U. S. v. Cruikshank, 92 U. S. 542, post, 588, 1 Woods, 308; Anthony v. Haldeman, 7 Kan. 50; U. S. v. Petersburgh Judges, 14 Am. R. Leg. 105; Hedgman v. State, 26 Mich. 51.

It does not invest citizens of the United States with a new right within the protecting power of Congress. U. S. v. Reese, supra; U. S. v. Cruikshank, 92 U. S. 542, post, 588, 1 Woods, 308.

It does not include persons who have merely declared their intentions to become citizens. McKay v. Campbell, 2 Sawy. 129; Hedgman v. State, 26 Mich. 51.

The Fifteenth Amendment leaves to the States, as before, the regulation of suffrage and of the qualification of electors within their limits, with the single restriction that they shall not make color or race or previous condition of servitude, a reason of discrimination. U. S. v. Given, 17 Int. Rev. Rec. 189.

legislate at all upon the subject of voting at state elections rests upon this Amendment. The effect of article 1, § 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color or previous condition of servitude, that Congress can interfere, and provide for its punishment. If, therefore, the 3d and 4th sections of the Act are beyond that limit, they are unauthorized.

The 3d section does not, in express terms, limit the offense of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, etc. This is conceded; but it is urged, that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is, that the only wrongful act, on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the state laws, and substitute the prescribed affidavit therefor, is that mentioned and prohibited in section 2, to wit: discrimination on account of race, etc.; and that, consequently, § 3 is confined in its operation to the same wrongful discrimination.

219*] *This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. U. S. v. Wiltberger, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the Act, we cannot give it that effect.

The statute contemplates a most important change in the election laws. Previous to its adoption, the States, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge. This Act interferes with this practice and prescribes rules not provided by the laws of the States. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the state law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction, if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning and the inspector upon another.

The elector under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been *wrongfully prevented by the [*220 officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

But when we go beyond the 3d section and read the 4th, we find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment. That section has for its object the punishment of all persons, who by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say that, in our opinion, the language of the 3d and 4th sections does not confine their operation to unlawful discriminations on account of race, etc. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition *against any wrongful act or [*221 unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and

punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment; and that the circuit court prop- 222*] erly *sustained the demurrers and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (R. S. sec. 650) if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

The judgment of the Circuit Court is affirmed.

Mr. Justice Clifford:

I concur that the indictment is bad, but for reasons widely different from those assigned by the court.

States, as well as the United States, are prohibited by the Fifteenth Amendment of the Constitution from denying or abridging the right of citizens of the United States to vote on account of race, color or previous condition of servitude; and power is vested in Congress, by the second article of that Amendment, to enforce that prohibition "by appropriate legislation."

Since the adoption of that Amendment, Congress has legislated upon the subject; and, by the 1st section of the Enforcement Act, it is provided that citizens of the United States, without distinction of race, color or previous condition of servitude, shall, if otherwise qualified to vote in state, territorial or municipal elections, be entitled and allowed to vote at all such elections, any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Beyond doubt, that section forbids all discrimination between white citizens and citizens of color in respect to their right to vote; but the section does not provide that the person or officer making such discrimination shall be guilty of any offense, nor does it prescribe that the person or officer guilty of making such discrimination shall be subject to any fine, penalty or *punishment whatever. None of [*223 the counts of the indictment in this case, however, are framed under that section; nor will it be necessary to give it any further consideration, except so far as it may aid in the construction of the other sections of the Act. 16 Stat. at L. 140.

Section 2 of the Act will deserve more examination, as it assumes that certain acts are or may be required to be done by or under the authority of the Constitution or laws of certain States, or the laws of certain Territories, as a prerequisite or qualification for voting, and that certain persons or officers are or may be, by such Constitution or laws, charged with the performance of duties in furnishing to such citizens an opportunity to perform such prerequisites to become qualified to vote; and provides that it shall be the duty of every such person or officer to give all such citizens, without distinction of race, color or previous condition of servitude, the same and equal opportunity to perform such prerequisites to become qualified to vote.

Equal opportunity is required by that section to be given to all such citizens, without distinction of race, color or previous condition of servitude, to perform the described prerequisite; and the further provision of the same section is, that if any such person or officer charged with the performance of the described duties shall refuse or knowingly omit to give full effect to the requirements of that section, he shall for every such offense forfeit and pay $500 to the person aggrieved, and also be deemed guilty of a misdemeanor, and punished as therein provided. Other sections applicable to the subject are contained in the Enforcement Act, to which reference will hereafter be made. 16 Stat. at L. 141.

1. Four counts are exhibited in the indictment against the defendants; and the record shows that the defendants filed a demurrer to each of the counts, which was joined in behalf of the United States. Two of the counts, to wit: the first and the third, having been abandoned at the argument, the examination will be confined to the second and the fourth. By the record, it also appears that the defendants, together with one William Farnaugh, on the 30th of January, 1873, were the lawful inspectors of a municipal election held on that day in the City of Lexington, in the State of Kentucky, pursuant to *the Constitution [*224 and laws of that State, and that they, as such inspectors, were then and there charged by law

with the duty of receiving, counting, certifying, registering, reporting and giving effect to the vote of all citizens qualified to vote at said election in Ward 3 of the city; and the accusation set forth in the second count of the indictment, is, that one William Garner, at said municipal election, offered to the said inspectors at the polls of said election in said Ward 3 to vote for members of the said city council, the said poll being then and there the lawful and proper voting place and precinct of the said William Garner, who was then and there a free male citizen of the United States and of the State, of African descent, and having then and there resided in said State more than two years, and in said city more than one year, next preceding said election, and having been a resident of said voting precinct and ward in which he offered to vote more than sixty days immediately prior to said election, and being then and there, at the time of such offer to vote, qualified and entitled, as alleged, by the laws of the State, to vote at said election.

Offer in due form to vote at the said election having been made, as alleged, by the said William Garner, the charge is that the said William Farnaugh consented to receive, count, register and give effect to the vote of the party offering the same; but that the defendants, constituting the majority of the inspectors at the election and, as such, having the power to receive or reject all votes offered at said poll, did then and there, when the said party offered to vote, unlawfully agree and confer with each other that they, as such inspectors, would not take, receive, certify, register, report or give effect to the vote of any voters of African descent, offered at said election, unless the voter so offering to vote, besides being otherwise qualified to vote, had paid to said city the capitation tax of one dollar and fifty cents for the preceding year, on or before the 15th of January prior to the day of the election; which said agreement, the pleader alleges, was then and there made with intent thereby to hinder, prevent and obstruct all voters of African descent on account of their race and color, though lawfully entitled to vote at said election, from so voting. Taken separately, that allegation 225*] would afford some support to the *theory of the United States; but it must be considered in connection with the allegation which immediately follows it in the same count, where it is alleged as follows: that the defendants, in pursuance of said unlawful agreement, did then and there, at the election aforesaid, wrongfully and illegally require and demand of said party, when he offered to vote as aforesaid, that he should, as a prerequisite and qualification to his voting at said election, produce evidence of his having paid to said city or its proper officers the said capitation tax of one dollar and fifty cents for the year preceding, on or before the 15th of January preceding the day of said election; and the averment is to the effect that the party offering his vote then and there refused to comply with that illegal requirement and demand, or to produce the evidence so demanded and required.

Offenses created by statute, as well as offenses created at common law, with rare exceptions, consist of more than one ingredient, and in some cases, of many; and the rule is universal, that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. U. S. v. Cook, 17 Wall. 174, 21 L. ed. 539.

Matters well pleaded, it is true, are admitted by the demurrer; but it is equally true, that every ingredient of the offense must be accurately and clearly described, and that no indictment is sufficient if it does not accurately and clearly describe all the ingredients of which the offense is composed.

Citizens of the United States, without distinction of race, color or previous condition of servitude, if otherwise qualified to vote at a state, territorial or municipal election, shall be entitled and allowed to vote at such an election, even though the Constitution, laws, customs, usages or regulations of the State or Territory do not allow, or even prohibit, such voter from exercising that right. 16 Stat. at L. 140, § 1.

Evidently the purpose of that section is to place the male citizen of color, as an elector, on the same footing with the white male citizen. Nothing else was intended by that provision, as *is evident from the fact that it does not [*226 profess to enlarge or vary the prior existing right of white male citizens in any respect whatever. Conclusive support to that theory is also derived from the 2d section of the same Act, which was obviously passed to enforce obedience to the rule forbidding discrimination between colored male citizens and white male citizens in respect to their right to vote at such elections.

By the charter of the City of Lexington, it is provided that a tax shall be levied on each free male inhabitant of twenty-one years of age and upwards, except paupers, inhabiting said City, at a ratio not exceeding $1.50 each. Sess. L. 1867, p. 441.

Such citizens, without distinction of race, color or previous condition of servitude, in order that they may be entitled to vote at any such election, must be free male citizens "over twenty-one years of age, have been a resident of the city at least six months, and of the ward in which he resides at least sixty days prior to the day of the election, and have paid the capitation tax assessed by the city on or before the fifteenth of January preceding the day of election." 2 Sess. L. 1870, p. 71.

White male citizens not possessing the qualifications to vote required by law, find no guaranty of the right to exercise that privilege by the 1st section of the Enforcement Act; but the mandate of the section is explicit and imperative, that all citizens, without distinction of race, color or previous condition of servitude, if otherwise qualified to vote at any state, territorial or municipal election, shall be entitled and allowed to vote at all such elections, even though forbidden so to do, on account of race, color or previous condition of servitude, by the Constitution of the State, or by the laws, custom, usage or regulation of the State or Territory where the election is held.

Disability to vote, of every kind, arising from race, color, or previous condition of servitude, is declared by the 1st section of that Act to be removed from the colored male citizen; but, unless otherwise qualified by law to vote at

such an election, he is no more entitled to enjoy that privilege than a white male citizen who does not possess the qualifications required by law to constitute him a legal voter at such an election.

227*] *Legal disability to vote at any such election arising from race, color or previous condition of servitude, is removed by the Fifteenth Amendment, as affirmed in the 1st section of the Enforcement Act; but the Congress knew full well that cases would arise where the want of other qualifications, if not removed, might prevent the colored citizen from exercising the right of suffrage at such an election; and the intent and purpose of the 2d section of the Act is to furnish to all citizens an opportunity to remove every such other disability to enable them to become qualified to exercise that right, and to punish persons and officers charged with any duty in that regard who unlawfully and wrongfully refuse or wilfully omit to co-operate to that end. Hence it is provided, that where any act is or shall be required to be done as a prerequisite or qualification for voting, and persons or officers are charged in the manner stated with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of every such person and officer to give all citizens, without distinction of race, color or previous condition of servitude, the same and equal opportunity to perform such prerequisite, and to become qualified to vote.

Persons or officers who wrongfully refuse or knowingly omit to perform the duty with which they are charged by that clause of the 2d section of the Enforcement Act commit the offense defined by that section, and incur the penalty, and subject themselves to the punishment prescribed for that offense.

Enough appears in the second count of the indictment to show, beyond all question, that it cannot be sustained under the 2d section of the Enforcement Act, as the count expressly alleges that the defendants, as such inspectors, at the time the complaining party offered his vote, refused to receive and count the same because he did not produce evidence that he had paid to the city the capitation tax of $1.50 assessed against him for the preceding year, which payment, it appears by the law of the State, is a prerequisite and necessary qualification to enable any citizen to vote at that election, without distinction of race, color or previous condition of servitude; and the express allegation of the count is, that the party offering his vote then and there refused to comply with that pre-
228*] requisite, *and then and there demanded that his vote should be received and counted without his complying with that prerequisite.

Argument to show that such allegations are insufficient to constitute the offense defined in the 2d section of the Enforcement Act, or any other section of that Act, is quite unnecessary, as it appears in the very terms of the allegations that the party offering his vote was not, irrespective of his race, color or previous condition of servitude, a qualified voter at such an election by the law of the State where the election was held.

Persons within the category described in the 1st section of the Enforcement Act, of whom it is enacted that they shall be entitled and allowed to vote at such an election, without distinction of race, color or previous condition of servitude, are citizens of the United States otherwise qualified to vote at the election pending; and inasmuch as it is not alleged in the count that the party offering his vote in this case was otherwise qualified by law to vote at the time he offered his vote; and, inasmuch as no excuse is pleaded for not producing evidence to establish that prerequisite of qualification, it is clear that the supposed offense is not set forth with sufficient certainty to justify a conviction and sentence of the accused.

2. Defects also exist in the fourth count; but it becomes necessary, before considering the questions which those defects present, to examine with care the 3d section of the Enforcement Act. Section three of that Act differs in some respects from the 2d section; as, for example, section three provides that whenever, under the Constitution and laws of a State or the laws of a Territory, any act is or shall be required to be done by any such citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed the said act. By that clause of the section, it is enacted that the offer of the party interested to *perform the prerequisite [*229 act to qualify or entitle him to vote shall, if it fail for the reason specified, have the same effect as the actual performance of the prerequisite act would have; and the further provision is, that any judge, inspector or other officer of election, whose duty it is or shall be to receive, count, certify, register, report or give effect to the vote of such citizen, upon the presentation by him of his affidavit, stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offense forfeit and pay the sum of $500 to the person aggrieved, and also be guilty of a misdemeanor.

Payment of the capitation tax on or before the 15th of January preceding the day of the election is, beyond all doubt, one of the prerequisite acts, if not the only one, referred to in that part of the section; and it is equally clear that the introductory clause of the section is wholly inapplicable to a case where the citizen, claiming the right to vote at such an election, has actually paid the capitation tax as required by the election law of the State. Voters who have seasonably paid the tax are in no need of any opportunity to perform such a prerequisite to qualify them to vote; but the 3d section of the Act was passed to provide for a class of citizens who had not paid the tax, and who had offered to pay it, and the offer had failed to be carried into execution by reason of the wrongful act or omission of the person or

officer charged with the duty of receiving or permitting the performance of such prerequisite.

Qualified voters, by the law of the State, are male citizens over twenty-one years of age, who have been residents of the city at least six months, and of the ward in which they reside at least sixty days, immediately prior to the day of the election, and who have paid the capitation tax assessed by the city on or before the 15th day of January preceding the day of the election. Obviously, the payment of the capitation tax on or before the time mentioned is a prerequisite to qualify the citizen to vote; and the purpose of the 2d section is to secure to the citizen an opportunity to perform that prerequisite, and to punish the persons and officers 230*] charged with the duty of *furnishing the citizen with such an opportunity to perform such prerequisite, in case such person or officer refuses or knowingly omits to do his duty in that regard. Grant that; still it is clear that the punishment of the offender would not retroact and give effect to the right of the citizen to vote, nor secure to the public the right to have his vote received, counted, registered, reported and made effectual at that election.

3. Injustice of the kind, it was foreseen, might be done; and, to remedy that difficulty, the 3d section was passed, the purpose of which is to provide that the offer of any such citizen to perform such prerequisite, if the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such act and prerequisite; and the person so offering to perform such prerequisite, and so failing by reason of the wrongful act or omission of the person or officer charged with such duty, if otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such prerequisite act. Nothing short of the performance of the prerequisite act will entitle any citizen to vote at any such election in that State, if the opportunity to perform the prerequisite is furnished as required by the Act of Congress; but if those whose duty it is to furnish the opportunity to perform the act refuse or omit so to do, then the offer to perform such prerequisite act, if the offer fails to be carried into execution by the wrongful act or omission of those whose duty it is to receive and permit the performance of the prerequisite act, shall have the same effect in law as the actual performance.

Such an offer to perform can have the same effect in law as actual performance, only in case where it fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance; from which it follows that the offer must be made in such terms and under such circumstances that, if it should be received and carried into execution, it would constitute a legal and complete performance of the prerequisite act. What the law of the State requires in that regard is, that 231*] *the citizen offering to vote at such an election should have paid the capitation tax assessed by the city, which in this case was $1.50, on or before the 15th of January preceding the day of election. Unless the offer is made in such terms and under such circumstances that, if it is accepted and carried into execution, it would constitute a legal and complete performance of the prerequisite act, the person or officer who refused or omitted to carry the offer into execution would not incur the penalty nor be guilty of the offense defined by that section of the Act; for it could not be properly alleged that it failed to be carried into effect by the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Viewed in the light of these suggestions, it must be that the offer contemplated by the 3d section of the Act is an offer made in such terms, and under such circumstances, that, if it be accepted and carried into execution by the person or officer to whom it is made, it will constitute a complete performance of the prerequisite, and show that the party making the offer, if otherwise qualified, is entitled to vote at the election.

Evidence is entirely wanting to show that the authors of the Enforcement Act ever intended to abrogate any state election law, except so far as it denies or abridges the right of the citizen to vote on account of race, color or previous condition of servitude. Every discrimination on that account is forbidden by the Fifteenth Amendment; and the 1st section of the Act under consideration provides, as before remarked, that all citizens, otherwise qualified to vote, . . . shall be entitled and allowed to vote, . . . without distinction of race, color or previous condition of servitude, any constitution, law, etc., to the contrary notwithstanding. State election laws creating such discriminations are superseded in that regard by the Fifteenth Amendment; but the Enforcement Act furnishes no ground to infer that the law-makers intended to annul the state election laws in any other respect whatever. Had Congress intended by the 3d section of that Act to abrogate the election law of the State creating the prerequisite in question, it is quite clear that the 2d section would have been wholly unnecessary, as it would be a useless regulation to provide the *means to enable citizens to [*232 comply with a prerequisite which is abrogated and treated as null by the succeeding section. Statutes should be interpreted, if practicable, so as avoid any repugnancy between the different parts of the same, and to give a sensible and intelligent effect to every one of their provisions; nor is it ever to be presumed that any part of a statute is supererogatory or without meaning. Pott. Dwarris, 145.

Difficulties of the kind are all avoided if it be held that the 2d section was enacted to afford citizens an opportunity to perform the prerequisite act to qualify themselves to vote, and to punish the person or officer who refuses or knowingly omits to perform his duty in furnishing them with that opportunity, and that the intent and purpose of the 3d section is to protect such citizens from the consequences of the wrongful refusal or willful omission of such person or officer to receive and give effect to the actual offer of such citizen to perform such prerequisite, if made in terms, and under such circumstances, that the offer, if accepted and carried into execution, would constitute an actual and complete performance of the Act made a prerequisite to the right of voting by the state

law. Apply these suggestions to the fourth count of the indictment, and it is clear that the allegations in that regard are insufficient to describe the offense defined by the 3d section of the Enforcement Act.

4. Beyond all doubt, the general rule is, that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and it is safe to admit that that general rule is supported by many decided cases of the highest authority; but it is equally certain that exceptions to the rule exist, which are as well established as the rule itself, most of which result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal application; that every ingredient of the offense must be accurately and clearly expressed; or, in other words: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. U. S. v. Cook, supra.

Speaking of that principle, Mr. Bishop says 233*] it pervades the *entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Proc. 2d ed. § 81; Archb. Cr. Pl. 15th ed. 54; 1 Stark. Cr. Pl. 236; 1 Am. Cr. L. 6th rev. ed. § 364; Steel v. Smith, 1 Barn. & Ald. 99.

Examples of the kind, where it has been held that exceptions exist, to the rule that it is sufficient in an indictment founded upon a statute to follow the words of the statute, are very numerous, and show that many of the exceptions have become as extensively recognized, and are as firmly settled as any rule of pleading in the criminal law. Moreover, says Mr. Bishop, there must be such an averment of facts as shows prima facie guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible nonexistence of some fact not mentioned, room to escape from the prima facie conclusion of guilt, the indictment is insufficient, which is the exact case before the court. 1 Bishop, Cr. Proc. 2d ed. § 325.

It is plain, says the same learned author, that if, after a full expression has been given to the statutory terms, any of the other rules relating to the indictment are left uncomplied with, the indictment is still insufficient. To it must be added what will conform also to the other rules. Consequently, the general doctrine, that the indictment is sufficient if it follows the words of the statute creating and defining the offense, is subject to exceptions requiring the allegation to be expanded beyond the prohibiting terms. I Bishop, Cr. Proc. 2d ed. § 623.

In general, says Marshall, Ch. J., it is sufficient in a libel (being a libel of information) to charge the offense in the very words which direct the forfeiture; but the proposition is not, we think, universally true. If the words which describe the subject of the law are general, . . . we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the Legislature. The Mary Ann, 8 Wheat. 389.

Similar views are expressed by this court in U. S. v. *Gooding, 12 Wheat. 474, in [*234 which the opinion was given by Mr. Justice Story. Having first stated the general rule, that it is sufficient certainty in an indictment to allege the offense in the very terms of the statute, he proceeds to remark: "We say, in general; for there are, doubtless, cases where more particularity is required, either from the obvious intention of the Legislature or from the application of known principles of law. Known principles of law require more particularity in this case, in order that all the ingredients of the offense may be accurately and clearly alleged; and it is equally clear that the intention of the Legislature also requires the same thing, as it is obvious that the mere statement of the party that he offered to perform the prerequisite was never intended to be made equivalent to performance, unless such statement was accompanied by an offer to pay the tax, and under circumstances which show that he was ready and able to make the payment. Authorities are not necessary to prove that an indictment upon a statute must state all such facts and circumstances as constitute the statute offense, so as to bring the party indicted precisely within the provisions of the statute defining the offense.

Statutes are often framed, says Colby, to meet the relations of parties to each other, to prevent frauds by the one upon the other; and in framing such statutes, the language used is often elliptical, leaving some of the circumstances expressive of the relation of the parties to each other, to be supplied by intendment or construction. In all such cases, the facts and circumstances constituting such relation must be alleged in the indictment, though not expressed in the words of the statute. 2 Colby, Cr. L. 114; People v. Wilber, 4 Park, Cr. Cas. 21; Com. v. Cook, 13 B. Mon. 149; Pearce v. State, 1 Sneed, 63; People v. Stone, 9 Wend. 191; Whiting v. State, 14 Conn. 487; Anthony v. State, 29 Ala. 27; 1 Am. Cr. L., 6th rev. ed., sec. 364 n. d., and cases cited.

Like the preceding counts, the preliminary allegations of the fourth count are without objection; and the jury proceed to present that the party offering to vote, having then and there all the qualifications as to age, citizenship and residence, required by the state law, did, on the 30th day of January, 1873, in order that he might become qualified to vote at said election, *offer to the collector at his [*235 office in said city, to pay any capitation tax due from him to said city, or any capitation tax that had been theretofore assessed against him by said city, or which could be assessed against him by said city, or which said city or said collector claimed was due from him to said city; and that the said collector then and there wrongfully refused, on account of his race or color, to give the said party an opportunity to pay said capitation-tax for the preceding year, and then and there wrongfully refused to receive said tax from the said party in order that he might become qualified to vote at said election, the said collector having then and there given to citizens of the white race an opportunity to pay such taxes due from them to said city, in order that they might become qualified for that purpose.

All that is there alleged may be admitted; and yet it may be true that the complaining

party never made any offer at the time and place mentioned, to pay the capitation tax of $1.50 due to the city at the time and place mentioned, in such terms, and under such circumstances, that if the offer as made had been accepted by the person or officer to whom the offer was made, and that such person or officer had done everything which it was his duty to do, or everything which it was in his power to do, to carry it into effect, the offer would have constituted performance of the prerequisite act.

Actual payment of the capitation tax on or before the 15th of January preceding the day of election is the prerequisite act to be performed to qualify the citizen, without distinction of race, color or previous condition of servitude, to vote at said election. Such an offer, therefore, in order that it may be deemed and held as a performance in law of such prerequisite, must be an offer to pay the amount of the capitation tax; and the party making the offer must then and there possess the ability and means to pay the amount to the person or officer to whom the offer is made; for, unless payment of the amount of tax is then and there made to the said person or officer, he would not be authorized to discharge the tax, and could not carry the offer into execution without violating his duty to the city.

5. Readiness to pay, therefore, is necessarily 236*] implied from *the language of the 3d section, as it is only in case the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, that the offer can be deemed and held as performance in law of such prerequisite act. Where the party making the offer is not ready to pay the tax to the person or officer to whom the offer is made, and has not then and there the means to make the payment, it can not be held that the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer to whom the offer is made, as it would be a perversion of law and good sense to hold that it is the duty of such a person or officer to carry such an offer into execution by discharging the tax without receiving the amount of the tax from the party making the offer of performance.

Giving full effect to the several allegations of the count, nothing approximating to such a requirement is therein alleged, nor can anything of the kind be implied from the word "offer" as used in any part of the indictment. Performance of that prerequisite, by citizens otherwise qualified, entitles all such, without distinction of race, color or previous condition of servitude, to vote at such an election; and the offer to perform the same, if the offer is made in terms and under such circumstances that, if it be accepted and carried into execution, it will constitute performance, will also entitle such citizens to vote in the same manner and to the same extent as if they had performed such prerequisite, provided the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Judges, inspectors and other officers of elections, must take notice of these provisions, as they constitute the most essential element or ingredient of the offense defined by the 3d section of the Act. Officers of the elections, whether judges or inspectors, are required to carry those regulations into full effect; and the provision is, that any judge, inspector or other officer of election, whose duty it is or shall be to receive, count, certify, register, report or give effect to the vote of such citizens, who shall wrongfully refuse or omit to receive, count, certify, *register or give effect to [*237 the vote of any such citizen upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act on such offer, and that he, the citizen, was wrongfully prevented by such person or officer from performing such prerequisite act, shall for every such offense forfeit and pay the sum of $500 to the person aggrieved, and also be guilty of a misdemeanor, and be fined and imprisoned as therein provided.

6. Of course it must be assumed that the terms of the affidavit were exactly the same as those set forth in the third count of the indictment; and, if so, it follows that the word "offer" used in the affidavit must receive the same construction as that already given to the same word in that part of the section which provides that the offer, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such prerequisite act. Decisive confirmation of that view is derived from the fact that the complaining party is only required to state in his affidavit the offer, the time and the place thereof, the name of the person or officer whose duty it was to act thereon, and that he, the affiant, was wrongfully prevented by such person or officer from performing such prerequisite act.

None will deny, it is presumed, that the word "offer" in the affidavit means the same thing as the word "offer" used in the declaratory part of the same section; and, if so, it must be held that the offer described in the affidavit must have been one made in such terms and under such circumstances that, if the offer had been accepted, it might have been carried into execution by the person or officer to whom it was made; or, in other words, it must have been an offer to do whatever it was necessary to do to perform the prerequisite act; and it follows that if the word "offer" as used in the Act of Congress, necessarily includes readiness to pay the tax, it is equally clear that the affidavit should contain the same statement. Plainly it must be so; for unless the offer has that scope, if it failed to be carried into execution, it could not be held that the failure was by *the wrongful act or omission of [*238 the person or officer to whom the offer was made. Such a construction must be erroneous; for, if adopted, it would lead to consequences which would shock the public sense, as it would require the collector to discharge the tax without payment, which would be a manifest violation of his duty. Taken in any point of view, it is clear that the third count of the indictment is too vague, uncertain and indefinite in its allegations to constitute the proper foundation for the conviction and sentence of the defendants. Even suppose that the significa-

tion of the word "offer" is sufficiently comprehensive to include readiness to perform, which is explicitly denied, still it is clear that the offer, as pleaded in the fourth count, was not in season to constitute a compliance with the prerequisite qualification, for the reason that the state statute requires that the capitation tax shall be paid on or before the 15th day of January preceding the day of the election.

Having come to these conclusions, it is not necessary to examine the 4th section of the Enforcement Act, for the reason that it is obvious, without much examination, that no one of the counts of the indictment is sufficient to warrant the conviction and sentence of the defendants for the offense defined in that section.

From Opinion Record, No. 145.

Points of the dissenting opinion of Mr. Justice Hunt:

1. The fourth count of the indictment charges, in substance, that the two defendants, inspectors of election, rejected the vote of Garner at a municipal election of the City of Lexington, on account of his race and color, he being a citizen of the United States, of African descent and a qualified voter.

2. The argument that the 3d and 4th sections of the Statute of May 30, 1870, 16 Stat. at L. 140, are invalid, because they do not use the words "race or color," is not sound, for the reason that they are to be understood as having incorporated into them by reference, by the use of the words "as aforesaid," the words "without distinction of race or color." Refusing a qualified vote by the "wrongful act aforesaid," means a wrongful act on account of race, color or previous condition of servitude.

3. The right of voting secured by the 15th Amendment is to a particular class of persons, to wit: citizens of the United States, and not to any particular class of elections. Wherever the right to vote exists in such a person, its denial or abridgment on account of race, color or previous condition, at any election, national, state or municipal, is forbidden by this Amendment.

4. A denial by the inspectors of a municipal election, on account of his race or color, of the right of a citizen of the United States to vote at such election, he being qualified in other respects, is a denial by the State within the 15th Amendment; and this, although such denial is illegal and in violation of a statute of a State. The word "State" in this Amendment includes the agencies and instrumentalities of the State. The inspectors of elections are the agents of the State, having jurisdiction over the subject of receiving and rejecting votes, and certifying the results of elections. Although they act illegally and in excess of authority, their certificates are conclusive and their acts are binding upon all parties until vacated by judicial proceedings. For these purposes they are the State.

5. It is competent to Congress to protect and secure this right, by providing for the punishment, by fine and imprisonment, of those who violate it. The power of enforcing the Amendment is not limited to giving an appeal or writ of error to the United States Courts, from the erroneous decisions of the state courts made upon the subject.

6. If an indictment contains counts that are good and counts that are bad, a judgment of guilty upon the whole indictment will be sustained.

7. In the present case the judgment has been entered discharging the defendants from the whole indictment. As the indictment contains some good counts, this judgment is erroneous. It should be reversed, and a trial upon the indictment ordered.

Mr. Justice Hunt, dissenting:

I am compelled to dissent from the judgment of the court in this case.

The defendants were indicted in the Circuit Court of the United States for the District of Kentucky. Upon the trial, the defendants were, by the judgment of the court discharged from the indictment on account of its alleged insufficiency.

The fourth count of the indictment contains the allegations concerning the election in the City of Lexington; that, by the statute of Kentucky, to entitle one to vote at an election in that State, the voter must possess certain qualifications recited, and have paid a capitation tax assessed by the City of Lexington; that James F. Robinson was the collector of said city, entitled to collect said tax; that Garner, in order that he might be entitled to vote, did offer to said Robinson, at his office, to pay any capitation tax which had been or could be assessed against *him, or which was [*239 claimed against him; that Robinson refused to receive such tax on account of the race and color of Garner; that at the time of the election, having the other necessary qualifications, Garner offered his vote, and at the same time presented an affidavit to the inspector stating his offer aforesaid made to Robinson, with the particulars required by the statute, and the refusal of Robinson to receive the tax; that Farnaugh consented to receive his vote, but the defendants, constituting a majority of the inspectors, wrongfully refused to receive the same, which refusal was on account of the race and color of the said Garner.

This indictment is based upon the Act of Congress of May 31, 1870, 16 Stat. at L. 140.

The first four sections of the Act are as follows:

"Sec. 1. That all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Sec. 2. That if, by or under the authority of the Constitution or laws of any State or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting and, by such Constitution or laws, persons or officers are or shall be charged with the performance of duties, in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color or previous condition of servitude; and, if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, *or be imprisoned not less [*240 than one month and not more than one year or both, at the discretion of the court.

Sec. 3. That whenever, by or under the au-

thority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such act; and any judge, inspector or other officer of election, whose duty it is or shall be to receive, count, certify, register, report or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report or give effect to the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act thereon; and that he was wrongfully prevented by such person or officer from performing such act, shall. for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

Sec. 4. That if any person, by force, bribery, threats, intimidation or other unlawful means, shall hinder, delay, prevent or obstruct, or shall combine and confederate with others to hinder, delay, prevent or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court."

241*] *It is said, in opposition to this indictment and in hostility to the statute under which it is drawn, that while the 2d section makes it a penal offense for any officer to refuse an opportunity to perform the prerequisite therein referred to, on account of the race and color of the party, and therefore, an indictment against that officer may be good as in violation of the Fifteenth Amendment, the 3d section, which relates to the inspectors of elections, omits all reference to race and color and, therefore, no indictment can be sustained against those officers. It is said that Congress has no power to punish for violation of the rights of an elector generally, but only where such violation is attributable to race, color or condition. It is said, also, that the prohibition of an act by Congress in general language is not a prohibition of that act on account of race or color.

Hence it is insisted that both the statute and the indictment are insufficient. This I understand to be the basis of the opinion of the majority of the court.

On this I observe:

1. That the intention of Congress on this subject is too plain to be discussed. The Fifteenth Amendment had just been adopted, the object of which was to secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition. The Act is entitled "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of the Union, and for Other Purposes." The 1st section contains a general announcement that such right is not to be embarrassed by the fact of race, color or previous condition. The 2d section requires that equal opportunity shall be given to the races in providing every prerequisite for voting, and that any officer who violates this provision shall be subject to civil damages to the extent of $500, and to fine and imprisonment. To suppose that Congress, in making these provisions, intended to impose no duty upon, and subject to no penalty, the very officers who were to perfect the exercise of the right to vote, to wit: the inspectors who receive or reject the votes, would be quite absurd.

2. Garner, a citizen of African descent, had offered to the collector of taxes to pay any capitation tax existing or claimed *to exist [*242 against him as a prerequisite to voting at an election to be held in the City of Lexington on the 30th day of January, 1873. The collector illegally refused to allow Garner, on account of his race and color, to make the payment. This brought Garner and his case within the terms of the 3d section of the statute, that "the person so offering and failing as aforesaid;" that is, who had made the offer which had been illegally rejected on account of his race and color, shall be entitled to vote "as if he had, in fact, performed such act." He then made an affidavit setting forth these facts, stating, with the particularity required in the statute, that he was wrongfully prevented from paying the tax, and presented the same to the inspector, who wrongfully refused to receive the same, and to permit him to vote, on account of his race and color.

A wrongful refusal to receive a vote which was, in fact, incompetent only by reason of the Act "aforesaid;" that is, on account of his race and color, brings the inspector within the statutory provisions respecting race and color. By the words "as aforesaid," the provisions respecting race and color of the 1st and 2d sections of the statute are incorporated into and made a part of the 3d and 4th sections.

To illustrate: section 4 enacts, that if any person by unlawful means shall hinder or prevent any citizen from voting at any election "as aforesaid," he shall be subject to fine and imprisonment. What do the words "as aforesaid" mean? They mean, for the causes and pretenses or upon the grounds in the 1st and 2d sections mentioned; that is, on account of the race or color of the person so prevented.

All those necessary words are by this expression incorporated into the 4th section. The same is true of the words "the wrongful act or omission as aforesaid," and "the person so offering and failing as aforesaid," in the 3d section.

By this application of the words "as aforesaid," they become pertinent and pointed. Unless so construed, they are wholly and absolutely without meaning. No other meaning can possibly be given to them. "The person (Garner) so offering and failing as aforesaid shall be entitled to vote as if he had performed the act." He failed "as aforesaid" on account 243*] of his *race. The inspectors thereupon "wrongfully refused to receive his vote" because he had not paid his capitation tax. His race and color had prevented that payment. The words "hindered and prevented his voting as aforesaid," in the 4th section, and in the 3d section the words "wrongfully refuse" and "as aforesaid," sufficiently accomplish this purpose of the statute. They amount to an enactment that the refusal to receive the vote on account of race or color shall be punished as in the 3d and 4th sections is declared.

I am the better satisfied with this construction of the statute, when, looking at the Senate debates at the time of its passage, I find: 1. That attention was called to the point whether this Act did make the offense dependent on race, color or previous condition; 2. That it was conceded by those having charge of the bill that its language must embrace that class of cases; 3. That they were satisfied with the bill as it then stood, and as it now appears in the Act we are considering.

The particularity required in an indictment or in the statutory description of offenses has at times been extreme, the distinctions almost ridiculous. I cannot but think that in some cases good sense is sacrificed to technical nicety, and a sound principle carried to an extravagant extent. The object of an indictment is to apprise the court and the accused of what is charged against him, and the object of a statute is to declare or define the offense intended to be made punishable. It is laid down, that "When the charge is not the absolute perpetration of an offense, but its primary characteristic lies in the intent, instigation or motives of the party towards its perpetration, the acts of the accused, important only as developing the mala mens, and not constituting of themselves the crime, need not be spread upon the record." U. S. v. Almeida, Whart. Prec. 1060–1, n. 1 Whart. C. L., § 285 n.

In the case before us, the acts constituting the offense are all spread out in the indictment, and the alleged defects are in the facts constituting the mala mens. The refusal to receive an affidavit as evidence that the tax had been paid by Garner, and the rejection of his vote, are the essential acts of the defendants which constitute their guilt. The rest is matter of motive or instigation only. As to these, 244*] the extreme particularity and *the strict construction expected in indictments and penal statutes would seem not to be necessary. In Sickles v. Sharp, 13 Johns. 497, it is said, "The rule that penal statutes are to be strictly construed admits of some qualification. The plain and manifest intention of the Legislature ought to be regarded." In U. S. v. Hartwell, 6 Wall. 385, 18 L. ed. 830, it is said, "The object in construing penal as well as other statutes is, to ascertain the legislative intent. The words must not be narrowed to the exclusion of what the Legislature intended to embrace, but that intention must be gathered from the words. When the words are general and embrace various classes of persons, there is no authority in the court to restrict them to one class, when the purpose is alike applicable to all." In Ogden v. Strong, 2 Paine, C. C. 584, it is said, "Statutes must be so construed as to make all parts harmonize, and give a sensible effect to each. It should not be presumed that the Legislature meant that any part of the statute should be without meaning or effect."

In U. S. v. Morris, 14 Pet. 474, the statute made it unlawful for a person "voluntarily to serve on a vessel employed and made use of in the transportation of slaves from one foreign country to another." No slaves had been actually received or transported on board the defendant's vessel; but the court held that the words of the statute embraced the case of a vessel sailing with intent to be so employed. The court say, "A penal statute will not be extended beyond the plain meaning of its words; . . . yet the evident intention of the Legislature ought not to be defeated by a forced and overstrict construction."

In the case of The Donna Marianna, 1 Dods. 92, the vessel was condemned by Sir William Scott under the English statute condemning vessels in which slaves "shall be exported, transported, carried," etc., although she was on her outward voyage, and had never taken a slave on board. "The result is that, where the general intent of a statute is to prevent certain acts, the subordinate proceedings necessarily connected with them and coming within that intent are embraced in its provisions." Id.

In Hodgman v. People, 4 Den. 235; People v. Safford, 5 Den. 116, an Act subjecting an offender *to "the penalties" of a prior Act [*245 was held to subject him to an indictment, as well as to the pecuniary penalties in the prior statute provided for. Especially should this liberal rule of construction prevail, where, though in form the statute is penal, it is, in fact, to protect freedom.

An examination of the surrounding circumstances, a knowledge of the evil intended to be prevented, a clear statement in the statute of the acts prohibited and made punishable, a certain knowledge of the legislative intention, furnish a rule by which the language of the statute before us is to be construed. The motives instigating the acts forbidden, and by which those acts are brought within the jurisdiction of the federal authority, need not be set forth with the technical minuteness to which reference has been made. The intent is fully set forth in the 2d section; and the court below ought to have held that, by the references in the 3d and 4th sections to the motives and instigations declared in the 2d section, they were incorporated into and became a part of the 3d and 4th sections, and that a sufficient offense against the United States authority was therein stated.

I hold, therefore, that the 3d and 4th sections of the statute we are considering do provide

for the punishment of inspectors of elections who refuse the votes of qualified electors on account of their race or color. The indictment is sufficient, and the statute sufficiently describes the offense.

The opinion of the majority of the court discusses no subjects except the sufficiency of the indictment and the validity of the Act of May 31, 1870. 16 Stat. at L. 140. Holding that there was no valid law upon which the crime charged could be predicated, it became unnecessary that the opinion should discuss other points. If it had been held by the court that the indictment was good, and that the statute created the offense charged, the question would have arisen, whether such statute was constitutional; and it was to this question that much the larger part of the argument of the counsel in the cause was directed. If the conclusions I have reached are correct, this question directly presents itself; and I trust it is not unbecoming that my views upon the constitutional points thus arising should be set forth. I have no warrant to say that those views are or are 246*] not, entertained *by any or all of my associates. The opinions and the arguments are those of the writer only.

The question of the constitutionality of the Act of May 31, 1870, arises mainly upon the Fifteenth Amendment to the Constitution of the United States. It is as follows:

"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation."

I observe, in the first place, that the right here protected is in behalf of a particular class of persons, to wit: citizens of the United States. The limitation is to the persons concerned, and not to the class of cases in which the question shall arise. The right of citizens of the United States to vote, and not the right to vote at an election for United States officers, is the subject of the provision. The person protected must be a citizen of the United States; and, whenever a right to vote exists in such person, the case is within the Amendment. This is the literal and grammatical construction of the language; and that such was the intention of Congress will appear from many considerations. As originally introduced by Mr. Senator Henderson, it read, "No State shall deny or abridge the right of its citizens to vote and hold office on account of race, color or previous condition." Globe, 1868–69, pt. i., p. 542, Jan. 23, 1869.

The Judiciary Committee reported back the resolution in this form: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State, on account of race, color or previous condition of servitude. The Congress, by appropriate legislation, may enforce the provisions of this article." Globe, 1868–69, pt. i., p. 542, Jan. 23, 1869. Omitting the words "and hold office," this is the form in which it was adopted. The class of persons indicated in the original Resolution to be protected were described as citizens of a State, in the Resolution when reported by the committee as citizens of the United States. In neither resolution was there any limitations as to the character of the elections at which the vote was to be given. If there was a right to vote, and the person offering *the vote was a citizen, [*247 the clause attached. It is both illiberal and illogical to say that this protection was intended to be limited to an election for particular officers, to wit: those to take part in the affairs of the Federal Government.

Congress was now completing the third of a series of amendments intended to protect the rights of the newly emancipated freedmen of the South.

In the adoption of the Thirteenth Amendment: that slavery or involuntary servitude should not exist within the United States, or any place subject to their jurisdiction, it took the first and the great step for the protection and confirmation of the political rights of this class of persons.

In the adoption of the Fourteenth Amendment: that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside," and that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," another strong measure in the same direction was taken.

A higher privilege was yet untouched; a security, vastly greater than any thus far given to the colored race, was not provided for; but, on the contrary, its exclusion was permitted. This was the elective franchise; the right to vote at the elections of the country, and for the officers by whom the country should be governed.

By the 2d section of the Fourteenth Amendment, each State had the power to refuse the right of voting, at its elections, to any class of persons; the only consequence being a reduction of its representation in Congress, in the proportion which such excluded class should bear to the whole number of its male citizens of the age of twenty-one years. This was understood to mean, and did mean, that if one of the late slave-holding States should desire to exclude all its colored population from the right of voting, at the expense of reducing its representation in Congress, it could do so.

The existence of a large colored population in the Southern *States, lately slaves and [*248 necessarily ignorant, was a disturbing element in our affairs. It could not be overlooked. It confronted us always and everywhere. Congress determined to meet the emergency by creating a political equality, by conferring upon the freedmen all the political rights possessed by the white inhabitants of the State. It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty, and the pursuit of happiness, by giving to them that greatest of rights among freemen, the ballot. Hence the Fifteenth Amendment was passed by Congress, and adopted by the States. The power of any State to deprive a citizen of the right to vote on account of race, color or previous condition of servitude, or to impede or to obstruct such right on that account, was ex-

pressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.

The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for specified officers, not for federal officers, or for state officers, but the right to vote in its broadest terms.

The citizen of this country, where nearly everything is submitted to the popular test and where office is eagerly sought, who possesses the right to vote, holds a powerful instrument for his own advantage. The political and personal importance of the large bodies of emigrants among us, who are intrusted at an early period with the right to vote, is well known to every man of observation. Just so far as the ballot to them or to the freedmen is abridged, in the same degree is their importance and their security diminished. State rights and municipal rights touch the numerous and the everyday affairs of life; those of the Federal Government are less numerous and, to most men, less important. That Congress, possessing, in making a constitutional amendment, unlimited power in what it should propose, intended to confine this great guaranty to a single class of elections, to wit: elections for United States officers, is scarcely to be credited.

I hold, therefore, that the Fifteenth Amendment embraces the case of elections held for state or municipal as well as for federal officers; and that the 1st section of the Act of 249*] May 31, 1870, *wherein the right to vote is freed from all restriction by reason of race, color or condition, at all elections by the people; state, county, town, municipal, or of other subdivision, is justified by the Constitution.

It is contended also, that, in the case before us, there has been no denial or abridgment by the State of Kentucky of the right of Garner to vote at the election in question. The State, it is said, by its statute authorized him to vote; and, if he has been illegally prevented from voting, it was by an unauthorized and illegal Act of the inspectors.

The word "State" "describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory and government. It is not difficult to see that, in all these senses, the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the State. . . . In the Constitution, the term 'State' most frequently expresses the combined idea just noticed, of people, territory and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. It is the union of such States under a common Constitution which forms the distinct and greater political unit which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country." Texas v. White, 7 Wall. 720, 721, 19 L. ed. 236.

That the word "State" is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited, but from a reference to the various places in which it is used in the Constitution of the United States. A few only of these will be referred to.

The power of Congress to "regulate commerce among the *several States" (§ 8, sub. 3), [*250 refers to the commerce between the inhabitants of the different States, and not to transactions between the political organizations called "States." The people of a State are here intended by the word "State." The numerous cases in which this provision has been considered by this court were cases where the questions arose upon individual transactions between citizens of different States, or as to rights in, upon or through the territory of different States.

"Vessels bound to or from one State shall not be obliged to enter, clear or pay duties in another." Sec. 9, sub. 5. This refers to region or locality only.

So "The electors (of President and Vice-President) shall meet in their respective States, and vote," etc. Art. 2, § 1, sub. 3.

Again; when it is ordained that the judicial power of the United States shall extend "To controversies between two or more States, between a State and the citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects," art. 3, § 2, sub. 1, we find different meaning attached to the same word in different parts of the same sentence. The controversy "between two or more States" spoken of, refers to the political organizations known as States; the controversy "between a State and the citizens of another State" refers to the political organization of the first named party, and again to the persons living within the locality where the citizens composing the second party may reside; the controversy "between citizens of different States, between citizens of the same State claiming lands under grants of different States," refers to the local region or territory described in the first branch of the sentence, and to the political organization as to the grantor under the second branch.

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings, of every other State." Art. 4, § 1. Full faith shall be given in or throughout the territory of each State. By whom? By the sovereign State by its agencies and authorities. To what is *faith and credit to be [*251 given? To the acts of the political organization known as the State. Not only this, but to all its agencies, to the acts of its Executive, to the acts of its courts of record. The expression "State," in this connection, refers to and includes all these agencies; and it is to these agencies that the legislation of Congress under this authority has been directed, and it is to

the question arising upon the agencies of the courts that the questions have been judicially presented. Hampton v. McConnel, 3 Wheat. 234; Green v. Sarmiento, 3 Wash. C. C. 17; Bk. v. Dalton, 9 How. 528. The judicial proceedings of a State mean the proceedings of the courts of the State. It has never been doubted that, under the constitutional authority to provide that credit should be given to the records of a "State," it was lawful to provide that credit should be given to the records of the courts of a State. For this purpose, the court is the State.

The provision, that "The United States shall guarantee to every State a republican form of government," is a guaranty to the people of the State, and may be exercised in their favor against the political power called the "State."

It seems plain that when the Constitution speaks of a State, and prescribes what it may do or what it may not do, it includes, in some cases, the agencies and instrumentalities by which the State acts. When it is intended that the prohibition shall be upon legislative action only, it is so expressed. Thus, in art. 1, § 10, sub. 1, it is provided that "No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." The provision is: not that no State shall impair the obligation of contracts, but that no State shall pass a law impairing the obligation of contracts.

The word "State" in the Fifteenth Amendment is to be construed as in the paragraph heretofore quoted respecting commerce among the States, and in that which declares that Acts of a State shall receive full faith and credit in every other State; that is, to include the acts of all those who proceed under the authority of the State. The political organization called the "State" can act only through its agents. It may act through a convention, through its Legislature, its Governor, or its magistrates and officers of lower degree. Who-
252*] ever is authorized to *wield the power of the State, is the State, and this whether he acts within his powers or exceeds them. If a convention of the State of Kentucky should ordain or its Legislature enact that no person of African descent, or who had formerly been a slave, should be entitled to vote at its election, such ordinance or law would be void. It would be in excess of the power of the body enacting it. It would possess no validity whatever. It cannot be doubted, however, that it would afford ground for the jurisdiction of the courts under the Fifteenth Amendment. It is the State that speaks and acts through its agents; although such agents exercise powers they do not possess, or that the State does not possess, and although their action is illegal. Inspectors of elections represent the State. They exercise the whole power of the State in creating its actual government by the reception of votes and the declaration of the results of the votes. If they willfully and corruptly receive illegal votes, reject legal votes, make false certificates by which a usurper obtains an office, the act is in each case the act of the State, and the result must be abided by until corrected by the action of the courts. No matter how erroneous, how illegal or corrupt may be their action, if it is upon the subject which they are appointed to manage, it binds all parties, as the action of the State, until legal measures are taken to annul it. They are authorized by the State to act in the premises; and if their act is contrary to their instructions or their duty, they are, nevertheless, officers of the State, acting upon a subject committed to them by the State, and their acts are those of the State. The Legislature speaks; its officers act. The voice and the act are equally those of the State.

I am of the opinion, therefore, that the refusal of the defendants, inspectors of elections, to receive the vote of Garner, was a refusal by the State of Kentucky, and was a denial by that State, within the meaning of the Fifteenth Amendment, of the right to vote.

It is contended, further, that Congress has no power to enforce the provisions of this Amendment by the enactment of penal laws; that the power of enforcement provided for is limited to correcting erroneous decisions of the state court, when presented to the Federal Courts by appeal or writ of error. "For example *(it is said), when it is declared [*253 that no State shall deprive any person of life, liberty or property without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery or other crimes committed by individual malefactors, so as to give Congress power to pass laws for the punishment of such crimes in the several States generally."

So far as the Act of May, 1870, shall be held to include cases not dependent upon race, color or previous condition, and so far as the power to impose pains and penalties for those offenses may arise, I am not here called upon to discuss the subject.

So far as this argument is applied to legislation for offenses committed on account of race or color, I hold it to be entirely unsound. If sound, it brings to an impotent conclusion the vigorous amendments on the subject of slavery. If there be no protection to the ignorant freedman against hostile legislation and personal prejudice other than a tedious, expensive and uncertain course of litigation through state courts, thence by appeal or writ of error to the Federal Courts, he has practically no remedy. It were as well that the amendments had not been passed. Of rights infringed, not one in a thousand could be remedied or protected by this process.

In adopting the Fifteenth Amendment, it was ordained as the 2d section thereof, "The Congress shall have power to enforce this article by appropriate legislation." This was done to remove doubts, if any existed, as to the former power; to add, at least, the weight of repetition to an existing power.

It was held in the U. S. Bk. Cases and in the Legal Tender Cases (McCullough v. Maryland, 4 Wheat. 416; Gibbons v. Ogden, 9 Wheat. 204; New York v. Miln, 11 Pet. 102; Knox v. Lee, 12 Wall. 457, 20 L. ed. 287; Dooley v. Smith, 13 Wall. 604, 20 L. ed. 547,) that it was for Congress to determine whether the necessity had arisen which called for its action. If Congress adjudges that the necessities of the country require the establishment of a bank, or the issue of legal tender notes, that judgment is conclusive upon the court. It is not within their power to review it.

If Congress, being authorized to do so, desires to protect the freedman in his rights as a citizen and a voter, and as against *those [*254 who may be prejudiced and unscrupulous in their hostility to him and to his newly conferred rights, its manifest course would be to enact that they should possess that right; to provide facilities for its exercise by appointing proper superintendents and special officers to examine alleged abuses, giving jurisdiction to the Federal Courts, and providing for the punishment of those who interfere with the right. The statute-books of all countries abound with laws for the punishment of those who violate the rights of others, either as to property or person, and this not so much that the trespassers may be punished as that the peaceable citizen may be protected. Punishment is the means; protection is the end. The arrest, conviction and sentence to imprisonment, of one inspector, who refused the vote of a person of African descent on account of his race, would more effectually secure the right of the voter than would any number of civil suits in the state courts, prosecuted by timid, ignorant and penniless parties against those possessing the wealth, the influence and the sentiment of the community. It is certain that, in fact, the legislation taken by Congress, which we are considering, was not only the appropriate, but the most effectual means of enforcing the Amendment.

That the legislation in this respect is constitutional is also proved by the previous action of Congress and of this court.

Article IV., § 5, subdivision 3, of the Constitution provides as follows: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

At the time of the adoption of the Constitution containing this provision, slavery was recognized as legal in many States. The rights of the slaveholder in his slave were intended to be protected by this clause. To enforce this protection, Congress, from time to time, passed laws providing not only the means of restoring the escaped slave to his master, but inflicting punishment upon those who violated that master's rights. Thus, as early as 1793, Congress enacted not only that the master or his agent might seize and arrest such fugitive slave, and upon obtaining a certificate from a judge or 255*] magistrate, carry him back *to the State from whence he escaped and return him into slavery, but that every person who hindered or obstructed such master or agent or who harbored or concealed such fugitive, after notice that he was such, should be subject to damages not only, but to a penalty of $500, to be recovered for the benefit of the claimant in any court proper to try the same. 1 Stat. at L. 302. By the Act of 1850, 9 Stat. at L. 462, the circuit courts were ordered to enlarge the number of commissioners, "With a view to afford reasonable facilities to reclaim fugitives from labor."

The 9th section of the Act provided that any person who should willfully obstruct or hinder the removal of such fugitive, either with or without process, or should rescue or aid or abet an attempt to escape, or should harbor or conceal the fugitive, having notice, should for either of said offenses be subject to a fine not exceeding $1,000, and imprisonment not exceeding six months, by indictment and conviction in the United States Court, "And shall pay and forfeit, by way of civil damages to the party injured by such illegal conduct, the sum of $1,000 for each fugitive so lost as aforesaid, to be recovered by action of debt," etc.

In Prigg v. Pa., 16 Pet. 539, the legislation of 1793 was held to be valid.

It was held in Sims' case, 7 Cush. 285, that the Act of 1850 was constitutional, and that the state tribunals cannot by writ of habeas corpus interfere with the federal authorities when acting upon cases arising under that Act.

In Ableman v. Booth, 21 How. 506, 16 L. ed. 169, it was held by this court that the Fugitive Slave Act of 1850 was constitutional in all its provisions, and that habeas corpus under the state laws must be obeyed, but the authority of the United States must be executed.

The case of Prigg, decided under the Act of 1793, and that of Booth, under the Act of 1850, are pertinent to the present question.

In the former case, it was held that the Act of 1793, so far as it authorized the owner to seize and recapture his slave in any State of the Union, was self-executing, requiring no aid from legislation, either state or national. The clause relating to fugitive slaves, it is there said, is found in the National and not *in [*256 the State Constitution. It was said to be a necessary conclusion, in the absence of all positive provision to the contrary, that the National Government is bound through its own departments, legislative, judicial or executive, to carry into effect all the rights and duties imposed upon it by the Constitution. This doctrine is useful at the present time, and is pertinent to the point we are considering. The clause protecting the freedmen, like that sustaining the rights of slaveholders, is found in the Federal Constitution only. Like the former, it provides the means of enforcing its authority, through fines and imprisonments, in the Federal Courts; and here, as there, the National Government is bound, through its own departments, to carry into effect all the rights and duties imposed upon it by the Constitution. In connection with the clause of the Constitution just quoted, there was not found, as here, an express authority in Congress to enforce it by appropriate legislation; and yet the court decide not only that Congress had power to enforce its provisions by fine and imprisonment, but that the right to legislate on the subject belongs to Congress exclusively. Courts should be ready, now and here, to apply these sound and just principles of the Constitution.

This provision of the Constitution and these decisions seem to furnish the rule of deciding the constitutionality of the law in question, rather than that which provides that life, liberty or property shall not be interfered with except by due process of law. It is not necessary to consider how far Congress may legislate upon individual crimes under that provision. If I am right in this view, the legislation we are considering, to wit: the enforcement of the Fifteenth Amendment by the means of penalties and indictments, is legal.

It is a well settled principle, that, if an indictment contain both good counts and bad counts, a judgment of "guilty" upon the whole indictment will be sustained.

The record shows that the court below considered each and every count of the indictment as insufficient, and that judgment was entered discharging the defendants without day; i. e., from the whole indictment. Upon the view I have taken of the validity of the fourth count, this judgment was erroneous. It should be reversed, and a trial ordered upon the indictment.

484*] *TOWN OF COLOMA, Plff. in Err.,
v.
DAVID W. EAVES.

(See S. C. Reporter's ed. 484–494.)

Municipal bonds, recitals in.

Where a state statute confers authority to issue municipal bonds upon a certain condition, upon the corporation, and certain officers are invested with power to decide whether the condition precedent has been complied with and to issue the bonds, their recital in the bonds issued by them that it has been complied with, will, in favor of the bond holder for value, bind the corporation, and be conclusive of the fact.

[No. 825.]

Submitted Jan. 11, 1876. Decided Mar. 27, 1876.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This suit was brought by the defendant in error, David W. Eaves, against the Town of Coloma, to recover the amount alleged to be due upon a number of coupons or interest warrants attached to certain bonds, purporting to have been issued by the Town of Coloma, through its proper officers, to the Chicago and Rock Island Railroad Company, in payment of a subscription by the Town to the capital stock of the railroad company, to the amount of $50,000.

The case is stated by the court.

Mr. C. M. Osborn, for plaintiff in error:

Upon a review of all the authorities, including the decisions of courts, and the text writers who have treated the subject, it will be found that they establish the following points:

1. Mere irregularities in the issuing of the bonds, or non-compliance with preliminary requirements, not going to the question of power to contract, afford no defense as against the innocent holder of the bonds or coupons.

2. A municipal corporation may successfully defend against this class of securities, in whosesoever hands they may be, if the officers or agents who assume to issue them, had no power so to do.

3. Where the officers or agents of a corporation are authorized by the statute to issue the bonds, but only upon conditions of the happening of which they are made the judges, or of which, from the nature of the case, they must be presumed to have a knowledge superior to that of the public generally; then a recital in the bonds, of the happening of such condition, is binding on the corporation, in favor of a bona fide holder for value.

But where the officers have no power to issue the bonds at all, until after the occurring of conditions precedent to the existence of the power, and the happening of which conditions is made a matter of public record, of which the public is presumed to take notice; then the recitals in the bonds, of the happening of such conditions, are not binding upon the corporation.

Cooley, Const. Lim. 215; Dill. Mun. Corp. 416–426; Clark v. Des Moines, 19 Ia. 199; Starin v. Town of Genoa, 23 N. Y. 439; Veeder v. Town of Lima, 19 Wis. 280; McWhorter v. People, 65 Ill. 290; Marsh v. Fulton Co. 10 Wall. 676, 19 L. ed. 1040; Mayor v. Ray, 19 Wall. 468, 22 L. ed. 164.

In no case has a municipal corporation ever been held liable upon this class of securities, where there was a want of power on the part of the officers of the corporation to issue them, and more especially is this true where such want of power appeared as a matter of public record, as it does in this case.

In the case at bar, the law authorizes the Town, upon a vote of a majority of its legal voters in favor of the proposition, to subscribe to the capital stock of the whole enterprise. This is the power and authority given to the Town. This power it can exercise. It can exercise none other. Instead of this authority being acted upon, it submits a vote authorizing a subscription to the capital stock of one division of the road, a division not authorized by the charter.

The objection to the bonds is, that the Town had no power or authority to submit the vote to subscribe for stock in the first division of said road. The only power or authority it possesses in the premises, is found in the charter of this railroad company. The power they have attempted to exercise is not there given to or conferred upon them. And the defect or want of power complained of, not only appeared on the town records, but it also appeared by the record filed in the office of the county clerk, as required by the provisions of the charter of the railroad company, the only law authorizing the subscription to be made, or the bonds to be issued.

Messrs. James Grant and Grant & Smith, for defendant in error:

Mr. Justice Strong delivered the opinion of the court:

It appears by the record that the plaintiff is a bona fide holder and owner of the coupons upon which the suit is founded, having obtained them before they were due, and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of $50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the Town received in return, certificates of five hundred shares, of $100 each, in the stock of the company. That stock the Town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defense while the consideration for

NOTE.—Recitals in negotiable bonds or securities, evidence of the facts recited; estoppel by recitals in—see notes, 17 L. ed. U. S. 548; 37 L. ed. U. S. 145.

which the bonds were given is retained, we come at once to the question, whether authority was shown for the stock subscriptions, and 486*] for the *consequent issue of the bonds. At the outset, it is to be observed that the question is not between the Town and its own agents; it is rather between the Town and a person claiming through the action of its agents. The rights of the Town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an Act of the Legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of about one hundred and thirty miles. The 10th section of the Act enacted that, "To aid in the construction of said road, any incorporated city, town or township, organized under the township organization laws of the State, along or near the route of said road, might subscribe to the capital stock of said company." That the Town of Coloma was one of the municipal divisions empowered by this section to subscribe fully appears, and also that the railroad was built into the Town before the bonds were issued. But it is upon the 11th section of the Act that the defendant relies. That section is as follows:

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town or township, in which the subscription is proposed to be made. And the clerk of such city, town or township, is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and tax payers in such city, town or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town or township, voting at such election, have voted 'for subscription,' it shall be the duty of the President of the Board of Trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town or township, the amount so voted to be subscribed, and to receive from such company the proper certificates 487*] *therefor. He shall also execute to said company, in the name of such city, town or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor or other executive officer, and be attested by the clerk of the city, town or township, in whose name the bonds are issued."

Section 12 provides, "It shall be the duty of the clerk of any such city, town or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the 11th section of the Act, made dependent upon the result of the submission of the question, whether the Town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the Town voting at the election, a preliminary inquiry must be: how is it to be ascertained whether the directions have been followed? Whether there has been any popular vote, or whether a majority of the legal voters present at the election, did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued? Or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad, by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered, that the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to *the object [*488 the Legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire, before their purchase or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued; contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the Legislature had in view, namely: aid in the construction of the road. Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided.

At some time or other, it is to be ascertained whether the directions of the Act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption therefore, that the Legislature intended that those officers, or one of them at least, should determine whether the requirements of the Act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the pro-

visions of the 12th section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town clerk or 489*] executive officer of the municipality; *to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The 11th section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the Act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for; but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In Comrs. of Knox Co. v. Nichols, 14 Ohio St. 260, it was said that "A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners: and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the Town for the amount of the subscription. The bonds were required 490*] to be signed by *the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the State, in accordance with an Act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the Act incorporating the railroad company," approved March 24, 1869, "And in accordance with the vote of the electors of said Township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a bona fide holder of the bonds and the Township whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others —to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone further. In the leading case of Knox Co. v. Aspinwall, 21 How. 544, 16 L. ed. 210, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative Act, was a sufficient basis for an assumption by the purchaser that the conditions *on which [*491 the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to Roy. Brit. Bk. v. Turquand, 6 Ell. & Bl. 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in Knox Co. v. Aspinwall has been more than once reaffirmed in this court. It was in Moran v. Miami Co. 2 Black, 732, 17 L. ed. 347; in Mercer Co. v. Hacket, 1 Wall. 83, 17 L. ed. 548; in Supervisors v. Schenck, 5 Wall. 784, 18 L. ed. 559; and in Meyer v. Muscatine, 1 Wall. 384, 17 L. ed. 564. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in Knox Co. v. Aspinwall. That, we think, has been so firmly seated

in reason and authority, that it cannot be shaken. What it is has been well stated in section 419 of Dillon on Municipal Corporations. After a review of the decisions of this court, the author remarks, "If, upon a true construction of the legislative enactment conferring the authority, viz.: to issue municipal bonds upon certain conditions: the corporation, or certain officers, of a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter in pais, which they are authorized to decide, will, in favor of the bond holder for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote, favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital 492*] is itself a decision of the fact *by the appointed tribunal. In Bissell v. Jeffersonville, 24 How. 287, 16 L. ed. 664, it appeared that the common council of the city were authorized by the Legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed The bonds recited that they were issued by authority of the common council, and that three fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in Van Hostrup v. Madison City, 1 Wall. 291, 17 L. ed. 538; and in Mercer Co. v. Hackett, 1 Wall. 83, 17 L. ed. 548.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In St. Joseph Township v. Rogers, 16 Wall. 644, 21 L. ed. 328, it is stated thus:

"Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification, which it is alleged was not fulfilled."

There is nothing in the case of Marsh v. Fulton Co. 10 Wall. 676, 19 L. ed. 1040, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

*What we have said disposes of the [*493 present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and, even if it had been admissible, the effort to assimulate the case to Marsh v. Fulton would fail. There the subscription was for the stock of a different corporation from that for which the people had voted; here it was not.

The judgment of the Circuit Court is affirmed.

Mr. Justice **Bradley** delivered the following concurring opinion:

I dissent from the opinion of the court in this case, so far as it may be construed to reaffirm the first point asserted in the case of Knox Co. v. Aspinwall, to wit: that the mere execution of a bond by officers charged with the duty of ascertaining whether a condition precedent has been performed is conclusive proof of its performance. If, when the law requires a vote of tax payers, before bonds can be issued, the supervisor of a township, or the judge of probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute and who does execute the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the bona fide purchaser of the bonds need go back no further. He has a right to rely on the statement as a determination of the question. But a mere execution and issue of the bonds without such recital is not, in my judgment, conclusive. It may be prima facie sufficient, but the contrary may be shown. This seems to me to be the true distinction to be taken on this subject; and I do not think that the contrary has ever been decided by this court. There have been various dicta to the contrary; but the cases, when carefully examined, will be found to have had all the prerequisites necessary to sustain the bonds, according to my view of the case. This view was distinctly announced by this court in the case of Lynde v. Winnebago Co. 16 Wall. 13, 21 L. ed. 274. In the case now under consideration, there is a sufficient recital in the bond to show that the proper election was held and the proper vote given; and the bond was executed by the officers whose duty it *was to ascertain [*494 these facts. On this ground, and this alone, I concur in the judgment of the court.

Dissenting, Mr. Justice **Miller**, Mr. **Justice Davis**, and Mr. Justice **Field**.

TOWN OF VENICE, Plff. in Err.,
v.
EVANDER MURDOCK.

(See S. C. Reporter's ed. 494–502.)

Municipal bonds, recitals in—state decisions, when not followed—bona fide purchaser.

1. Where, by a state statute conferring authority to issue municipal bonds upon certain conditions, certain officers of the corporation are invested with power to decide whether the condition precedent has been complied with and to issue the bonds, then their recital in the bonds issued by them that it has been complied with will, in favor of the bond holder for value, bind the corporation.

2. One who purchased the bonds subsequently to their delivery to the railroad company, and at any time prior to the time fixed for their final payment, must be regarded as a bona fide purchaser.

3. This court will not follow state decisions which do not present a clear case of construction of a state statute, but only assert general principles.

[No. 53.]

Argued Nov. 30, 1875. Decided Mar. 27, 1876.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

This is an action brought in the court below, by the defendant in error against the plaintiff in error, upon ten bonds, alleged to have been issued by the plaintiff in error, pursuant to an Act of the Legislature of New York, passed Apr. 16, 1852. See, N. Y. L. 1852, p. 593, ch. 375.

The trial resulted in verdict and judgment for the plaintiff below, and defendant brought the case to this court by writ of error.

The proviso contained in the 1st section of the above Act, the alleged non-compliance with which was the defense chiefly relied upon, is as follows:

Provided, always, that the said supervisor and commissioners shall have no power to do any of the acts authorized by this Act, until the railroad company has been duly organized according to the requirements of the General Railroad Law, for the purpose of constructing the aforesaid described railroad, and the written assent of two thirds of the resident persons taxed in said Town as appearing on the assessment roll of such Town, made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two thirds of all the resident tax payers of said Town on its assessment roll next previous thereto.

The principal question in the case related to the effect of the affidavit of the supervisor or commissioners filed as above.

The case further appears in the opinion.

Messrs. **Warren T. Worden**, H. L. Comstock and Warren A. Worden for the plaintiff in error, relied principally upon the statement that the courts of N. Y. have repeatedly decided that, until it was shown that the written assent of the required number of tax payers had been obtained pursuant to the Act, there could be no recovery upon the bonds, and that the affidavit by the supervisor or commissioners was not sufficient or conclusive evidence of the fact.

Gould v. Sterling, 23 N. Y. 464; Starin v. Genoa, 23 N. Y. 439; People v. Mead, 24 N. Y. 114, 36 N. Y. 224.

Mr. **D. Wright**, for defendant in error, cited People v. Morgan, 55 N. Y. 590; Bk. v. Elmira, 53 N. Y. 49.

*Mr. Justice **Strong** delivered the opin- [*496
ion of the court:

It would be worse than useless for us to discuss separately each of the twenty-two assignments of error filed in this case; for the questions involved that are of any importance are very few in number. The leading one is, whether sufficient authority was shown at the trial for the issue of the town bonds. The Act of the Legislature empowered the supervisor and the railroad commissioners of the Town to borrow money, and to execute bonds therefor to an amount not exceeding $25,000. It directed that all moneys borrowed under its authority should be paid over to the president and directors of such railroad company (then organized, or that might thereafter be organized, under the provisions of the general railroad law), as might be expressed by the written assent of two thirds of the resident tax payers of the Town, to be expended by said president and directors in grading, constructing and maintaining a railroad or railroads passing through the City of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad.

The Act provided, however, that said supervisor and commissioners should have no power to do any of the Acts authorized by the statute until a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing a railroad between the termini above mentioned and through the Town, and until the written assent of two thirds of the resident persons taxed in said Town, as appearing on the assessement-roll of such Town made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprised two thirds of all the resident tax payers of said Town on its assessment roll next previous thereto.

This Act was passed on the 16th day of April, 1852; and, on the 23d of August next following, a railroad company was organized to construct a railroad through the Town between the *termini mentioned in the Act. [*497
On the 3d of November, 1852, there was filed in the office of the county clerk of Cayuga County a written assent that the supervisor and assessors of the Town (the assessors being rail-

NOTE.—Recitals in negotiable bonds or securities, evidence of the facts recited; estoppel by recitals in.—see Notes, 17 L. ed. U. S. 548; 37 L. ed. U. S. 145.

When U. S. courts do not follow state decisions. See note, 19 L. ed. U. S. 490.

road commissioners) might borrow such sum of money as they might deem necessary, not exceeding $25,000, giving town bonds therefor; and that the money might be paid to the railroad company organized to construct the railroad. Two hundred and fifty-nine names were signed to the assent, the persons signing representing themselves to be resident tax payers of the Town of Venice. Upon this instrument was indorsed the affidavit of the supervisor and one of the commissioners that the persons whose names were subscribed to the assent comprised two thirds of all the resident tax payers of the said Town of Venice on its assessment roll next previous to the date of the affidavits, namely: next previous to Oct. 30, 1852; and, on the 2d of March next following, the supervisor and the commissioners executed the bonds now in suit. Evidence of these facts was given at the trial; but the defendant objected to the admission in evidence of this assent, and of the bonds, on the ground that the plaintiff must first prove that the signatures to the assents were the genuine signatures of those persons whose names purported to be signed. The circuit court overruled this objection; and whether rightfully or not, is the primary and almost the only material question in the case.

It is very obvious that if the Act of the Legislature which authorized an issue of bonds in aid of the construction of the railroad, on the written assent of two thirds of the resident tax payers of the Town, intended that the holder of the bonds should be under obligation to prove by parol evidence that each of the two hundred and fifty-nine names signed to the written assent was a genuine signature of the person who bore the name, the proffered aid to the railroad company was a delusion. No sane person would have bought a bond with such an obligation resting upon him whenever he called for payment of principal or interest. If such was the duty of the holder, it was always his duty. It could not be performed once for all. The bonds retained in the hands of the company would have been no help in the 498*] construction of the road. It was only *because they could be sold that they were valuable. Only thus could they be applied to the construction. Yet it is not to be doubted that the Legislature had in view and intended to give substantial aid to the railroad company, if a sufficient number of the tax payers assented. They must have contemplated that the bonds would be offered for sale; and it is not to be believed that they intended to impose such a clog upon their salableness as would rest upon it if every person proposing to purchase was required to inquire of each one whose name appeared to the assent whether he had in fact signed it.

The Act of the Legislature manifests a contrary intent. It created a tribunal to determine whether two thirds of the resident tax payers had assented. That tribunal was the supervisor and the commissioners, empowered, also, to execute the bonds in case such an assent were given. They were the appointed agents to obtain the assent; and, when acquired, they or any two of them were to make an affidavit that the persons whose written assents were attached to the statement comprised two thirds of the resident tax payers. That statement, with the affidavits, was required to be filed in the county clerk's office. All this indicates unmistakably that it was their appointed province to decide whether the condition precedent to the exercise of their authority to issue the bonds had been complied with. Comrs. of Knox Co. v. Nichols, 14 Ohio St. (N. S.) 260. They did decide the question before they issued the bonds. Their statement, verified by their affidavit, filed in the county clerk's office, was a decision, and the recital in the bonds was a declaration of the decision. That such a decision concludes the Town against denying that the condition precedent had been performed, that it relieves the holder of the bonds from the obligation to look beyond it, is too firmly settled in this court to admit of question. In Dillon on Municipal Corporations, sec. 418, the author, after reviewing the decisions, states this conclusion: "If, upon a true construction of the legislative enactment conferring the authority, the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their recital of their determination of a matter in pais, which they are *authorized to decide, will, in favor [*499 of the bond holder for value, bind the corporation." Here there was more than a recital. There was, in addition, proof of an actual decision, verified by oath. Without citing the numerous decisions which sustain this statement of the law, we refer only to St. Joseph Township v. Rogers, 16 Wall. 644, 21 L. ed. 328, and Town of Coloma v. Eaves, ante, 579, decided at this Term, which unequivocally assert it. And the rule has additional reason in its favor, where, as in the present case, the authority of the municipal officers to bind the municipality is made dependent upon a precedent condition of fact; and the fact is not of a nature to be ascertained by purchasers in the market, to whom it was contemplated the bonds might be sold. Dillon, in section 419, states this as another exception to the rule that an unauthorized representation by a municipal officer that he has power, is not binding on the corporation. His language is: "The only exception to this rule (the rule above stated), to wit: where it is the sole province of the officers who issued the bonds to decide whether conditions precedent have been complied with, is where both parties have not equal means of knowledge as to the extent and scope of their powers, and where the particular character of their commission and authority is, from its nature and circumstances, peculiarly known to the officer or agent; in which case the principal will or may be bound by the false representations of the agent respecting its authority and its extent and scope." The present is exactly such a case. The town officers had means of knowledge which the purchaser had not. They procured the signatures to the assent, and they knew whether or not they were genuine. They had knowledge which, from the nature of the case, the purchaser could not have.

We are aware that in the State of New York it has been held adversely to the opinions we have expressed. It was so held in Starin v. Town of Genoa, 23 N. Y. 439, and in Gould v. Town of Sterling, 23 N. Y. 456. In the for-

War.— Joint resolution of July 17, 1862, was intended for exclusive benefit of heirs of one whose lands had been confiscated under act of same date therewith, to enable them to take the inheritance after his death, p. 213.

Cited and applied in Pike v. Wassell, 94 U. S. 714, 24 L. 310, N. Y. Guaranty, etc., Co. v. Tacoma Ry., etc., Co., 03 Fed. 56, and Shields v. Shiff, 36 La. Ann. 651, all holding fee was held from confiscation exclusively for benefit of heirs.

War.— Proclamations of amnesty at close of war could not give back property which had been sold, nor any interest in it, either in possession or expectancy, p. 214.

Reaffirmed in Beard v. Lufrui, 46 La. Ann. 879, 881, 15 So. 208, 209, and Newby v. Brownlee, 23 Fed. 321, both holding the United States has no title nor interest in land sold under confiscation acts after sale has been consummated.

92 U. S. 214, 23 L. 478, CHAFFRAIX v. SHIFF.

War.— Title of purchaser at sale of confiscated property, supplemented by release without warranty by former owner, embraces no more than a life estate and does not cover fee, p. 214.

Approved and relied upon in Menges v. Carruthers, 3 Kan. App. 83, 44 Pac. 1098, where property is sold under confiscation acts the fee remains in the offender but without power of alienation; Shields v. Shiff, 36 La. Ann. 650, holding, after property is sold under confiscation acts, the fee remains in the government in trust for the heirs-at-law of the offender; Beard v. Lufrui, 46 La. Ann. 879, 15 So. 207, holding, if after property has been confiscated and sold under confiscation acts, offender alienates the remainder by deed of warranty, accompanied by covenant of seisin, he and those claiming under him are estopped from asserting title to premises; Ill. Cent. R. R. v. Bosworth, 133 U. S. 100, 33 L. 553, 10 S. Ct. 233, holding further as to effect of pardon or amnesty on rights of offender in confiscated property.

92 U. S. 214–256, 23 L. 563, UNITED STATES v. REESE.

Constitutional law.— If Congress has not declared an act done within a State to be a crime against the United States, courts have no power to treat it as such, p. 216.

Cited and applied in Green v. Elbert, 63 Fed. 309, 27 U. S. App. 325, holding Federal court has no jurisdiction of action for damages for conspiracy to disbar an attorney from practice in State courts; Brechbill v. Randall, 102 Ind. 529, 52 Am. Rep. 696, 1 N. E. 363, and State v. Indiana, etc., Min. Co., 120 Ind. 580, 22 N. E. 779, 6 L. R. A. 583, and n., both holding police powers not delegated to Federal government resides in States as inherent attribute of sovereignty;

Western Union Tel. Co. v. Pendleton, 95 Ind. 15, 48 Am. Rep. 695, New v. Walker, 108 Ind. 368, 58 Am. Rep. 42, 9 N. E. 388, and Bohon v. Brown, 101 Ky. 358, 41 S. W. 273, 72 Am. St. Rep. 422, 38 L. R. A. 504, all holding police powers in local matters must be exercised by the State and not Federal government.

Constitutional law.— Rights and immunities, created by, or dependent upon, the Federal Constitution, can be protected by Congress in any manner which, in the legitimate exercise of its legislative discretion, it may provide, p. 217.

Cited and applied in Strauder v. West Virginia, 100 U. S. 311, 25 L. 666, holding an act providing for the removal of causes, a mode of protecting rights and immunities conferred by Federal Constitution; United States v. Munford, 16 Fed. 227, 228, 229, holding Congress has power to regulate Federal elections; United States v. Goldman, 3 Woods, 195, F. C. 15,225, holding Congress has constitutional power to regulate the time, place and manner of holding elections for representatives in Congress, and to protect electors in expressing their choice at such elections; Ex parte Reynolds, 3 Hughes, 570, F. C. 11,720, affirming power of Congress to enact legislation to enforce provisions of the Constitution; United States v. Lancaster, 44 Fed. 895, 10 L. R. A. 322, holding Federal courts have jurisdiction of a proceeding against parties for conspiring to intimidate a party from prosecuting contempt proceedings in Federal court; Ex parte Kinney, 3 Hughes, 13, F. C. 7,825, as recognizing that citizens have privileges under laws of States, separate and distinct from those which they have as citizens of the United States; dissenting opinions in Civil Rights Cases, 109 U. S. 34, 50, 27 L. 847, 852, 3 S. Ct. 38, 49, and In re Neagle, 135 U. S. 87, 34 L. 80, 10 S. Ct. 676, in discussing the implied powers of the government. Cited, arguendo, in Logan v. United States, 144 U. S. 286, 36 L. 437, 12 S. Ct. 623, in reviewing authorities; In re Baldwin, 11 Sawy. 536, 27 Fed. 188, without special application.

Constitutional law.— Fifteenth amendment does not confer right of suffrage upon anyone, p. 217.

Cited and applied in McPherson v. Blacker, 146 U. S. 38, 36 L. 878, 13 S. Ct. 12, holding fifteenth amendment does not secure to every male citizen of the United States the right, from time of his majority, to vote for presidential electors; United States v. Sanges, 48 Fed. 84, holding the amendments to the Constitution were not intended to confer new rights; Gougar v. Timberlake, 148 Ind. 47, 62 Am. St. Rep. 494, 46 N. E. 341, 37 L. R. A. 650, holding women are not entitled to right of suffrage under fifteenth amendment; Stone v. Smith, 159 Mass. 415, 34 N. E. 521, holding valid, State act requiring citizens to pass an educational test before they shall be qualified voters; Brown v. Phillips, 71 Wis. 247, 36 N. W. 245, holding question of right of suffrage is left with several States, sub-

ject to certain conditions. Cited, arguendo, in State v. County Court, etc., 90 Mo. 598, 2 S. W. 790, holding women are citizens as fully as men; United States v. Harris, 106 U. S. 637, 27 L. 293, 1 S. Ct. 607, without special application. See notes, 97 Am. Dec. 263, 264, 45 Am. Rep. 247, and 25 Am. St. Rep. 872.

Qualified and explained in Ex parte Yarbrough, 110 U. S. 665, 28 L. 278, 4 S. Ct. 159, holding there are cases in which the amendment substantially confers the right to vote.

Constitutional law.— Fifteenth amendment exempted citizens from discrimination in exercise of elective franchise, on account of race, color, or previous condition of servitude, p. 217.

Reaffirmed in United States v. Cruikshank, 92 U. S. 555, 23 L. 592, and State v. Newark, 39 N. J. L. 387, as an instance of a self-executing constitutional provision. Cited, arguendo, in dissenting opinion in Civil Rights Cases, 109 U. S. 49, 27 L. 852, 3 S. Ct. 49, Baldwin v. Franks, 120 U. S. 699, 30 L. 775, 7 S. Ct. 666, and United States v. Barnhart, 10 Sawy. 500, 22 Fed. 292, without particular application.

Constitutional law.— Power of Congress to legislate at all upon the subject of voting at State elections, rests upon the fifteenth amendment, and can be exercised only when a qualified voter is denied the right to vote because of race, color, or previous condition of servitude, p. 218.

Cited and applied in Ex parte Perkins, 29 Fed. 906, holding mere fact that a representative in Congress is voted for at an election, does not authorize Congress to regulate such elections in matters which nowise affect the United States. Cited incidentally in Logan v. United States, 144 U. S. 288, 36 L. 437, 12 S. Ct. 624, in reviewing authorities.

Distinguished in Le Grand v. United States, 12 Fed. 579, and United States v. Amsden, 10 Biss. 286, 6 Fed. 822, both holding authority of Congress, under fifteenth amendment, does not extend to punishment of individuals acting upon their own responsibility, and not under color of law.

Statutes.— A penal act, broad enough in its general language, to cover acts without as well as within constitutional powers of Congress, cannot be limited to apply only to that which is a proper subject of legislation, p. 221.

Cited and applied in Trade-Mark Cases, 100 U. S. 98, 25 L. 553, holding legislation void for want of constitutional authority, which is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to control of Congress; United States v. Harris, 106 U. S. 641, 27 L. 294, 1 S. Ct. 611, and Baldwin v. Franks, 120 U. S. 686, 687, 688, 691, 30 L. 768, 769, 770, 7 S. Ct. 659, 660, 662, both holding section 5519, revised statutes, is

unconstitutional as a provision for the punishment of a conspiracy, within a State, to deprive an alien of rights guaranteed to him therein by a treaty of the United States; Bolles v. Outing Co., 175 U. S. 265, construing law punishing infringement of copyright; Logan v. United States, 144 U. S. 290, 36 L. 438, 12 S. Ct. 625, holding section in revised statutes, that laws of State in which Federal court is held shall be rules of decision as to competency of witnesses in trials at common law, and in equity and admiralty, has no application to criminal trials; Le Grand v. United States, 12 Fed. 581, similar to principal case; United States v. Huggett, 40 Fed. 638, holding reasonable doubt in the construction of a penal statute, is not always to be resolved in favor of the accused; Manhattan Tr. Co. v. Dayton, 59 Fed. 333, 16 U. S. App. 588, holding, under act authorizing municipalities to contract for a period not exceeding ten years, contracts for twenty years, or for an indefinite period, cannot be sustained; Logan v. Stogsdale, 123 Ind. 375, 24 N. E. 136, 8 L. R. A. 60, and n., in construing act relating to establishment of highways; Supervisors v. Stanley, 105 U. S. 312, 26 L. 1050, affirming 12 Fed. 88, holding, where part only of provisions in a statute are unconstitutional, if valid provisions are separable, they may stand; Stewart v. Adams, 50 Kan. 572, 32 Pac. 913, where court, in interpreting city ordinance, refused to give it a different meaning than appeared on face thereof. Cited, arguendo, in Chamberlain v. Cranbury Township, 57 N. J. L. 614, 31 Atl. 1036, and State v. Indiana, etc., Min. Co., 120 Ind. 579, 22 N. E. 779, 6 L. R. A. 582, and n., in discussion as to when courts are authorized to accept part and reject part of a statute; dissenting opinions in United States v. Cruikshank, 92 U. S. 564, 23 L. 596, and Northern Pac. R. R. v. Barnes, 2 N. Dak. 377, 51 N. W. 407, as to duty of courts in construing statutes; The Katie, 40 Fed. 482, 7 L. R. A. 58, and n., United States v. Chase, 135 U. S. 261, 34 L. 120, 10 S. Ct. 758, and Paragon Paper Co. v. State, 19 Ind. App. 326, 49 N. E. 604, without special application.

Distinguished in Chicago, etc., R. Co. v. Jones, 149 Ill. 386, 41 Am. St. Rep. 293, 37 N. E. 254, 24 L. R. A. 148, where statute relating to rates of transportation was held valid, so far as it related to charges wholly within State.

Constitutional law.— Act of May 31, 1870, providing penalties for depriving a qualified voter of his right to vote, being too general in its terms to be upheld as "appropriate legislation," to protect voters from being deprived of their rights, on account of race, color, or previous condition of servitude, is invalid, and will not justify an indictment of an inspector at a municipal election, for refusing negro votes, p. 221.

Cited in Cully v. Baltimore, etc., R. Co., 1 Hughes, 539, 540, F. C. 3,466, holding act of March 1, 1875, so far as it seeks to inflict penalties for violation of rights which belong to citizens of a State,

was without the power of Congress; arguendo, in Ferguson v. Allen, 7 Utah, 276, 26 Pac. 574, and United States v. Sanges, 48 Fed. 82, incidentally; State v. Strauder, 11 W. Va. 816, 27 Am. Rep. 619, as authority for holding the act of May 31, 1870, was unconstitutional.

Distinguished in United States v. Belvin, 46 Fed. 382, 383, holding act of 1870 applicable to congressional elections; United States v. Munford, 16 Fed. 230, 232, holding Congress has power to regulate Federal elections.

Miscellaneous.— United States v. Sanges, 144 U. S. 321, 36 L. 449, 12 S. Ct. 613, holding writ of error does not lie in behalf of United States in criminal cases; Twin City Gas Works v. People, 156 Ill. 391, 40 N. E. 952, People v. Lœffler, 175 Ill. 610, 51 N. E. 793, and dissenting opinion in People v. Gallagher, 93 N. Y. 458, not in point.

92 U. S. 257–259, 23 L. 656, MONTGOMERY v. BUCYRUS MACHINE WORKS.

Bankruptcy.— Settlement made with bankrupt firm less than four months before decree, whereby goods fraudulently obtained were returned, cannot be set aside by assignee, p. 259.

Cited in Sleeper v. Davis, 64 N. H. 62, 10 Am. St. Rep. 380, 6 Atl. 203, holding purchaser of goods from one who obtained possession by fraudulent purchase cannot hold them against the original vendor when consideration of sale to him was an antecedent debt which he held against fraudulent vendee. Cited, arguendo, in Wallace v. Cohen, 111 N. C. 107, 15 S. E. 893, without special application.

92 U. S. 259–275, 23 L. 543, HENDERSON v. MAYOR OF NEW YORK.

Constitutional law.— Constitutionality of a statute must be determined by its natural and reasonable effect, and not by the language in which framed, p. 268.

The following citing cases have reaffirmed this principle: Morgan v. Louisiana, 118 U. S. 462, 30 L. 241, 6 S. Ct. 1118, Williams v. Mississippi, 170 U. S. 225, 42 L. 1016, 18 S. Ct. 588, In re Parrott, 6 Sawy. 364, 383, 1 Fed. 496, 515, Ex parte Thornton, 4 Hughes, 232, 12 Fed. 547, Railroad Tax Cases, 8 Sawy. 308, 13 Fed. 778, Donald v. Scott, 74 Fed. 861, Joseph v. Randolph, 71 Ala. 506, 46 Am. Rep. 350, State v. Express Co., 60 N. H. 262, and Norfolk, etc., R. Co. v. Commonwealth, 88 Va. 103, 29 Am. St. Rep. 711, 13 S. E. 342, 13 L. R. A. 110, and n., dissenting opinion in United States v. Freight Assn., 166 U. S. 354, 41 L. 1032, 17 S. Ct. 564, and dissenting opinion in New York v. Roberts, 171 U. S. 681, 19 S. Ct. 76. Other citing cases have approved the syllabus rule in construing Chinese exclusion acts, and holding unjust and absurd construction should be avoided; Yick Wo v. Hopkins, 118 U. S. 374, 30 L. 227, 6 S. Ct. 1073, Lau Ow Bew v. United

States, 144 U. S. 59, 36 L. 344, 12 S. Ct. 520, In re Leong Yick Dew, 10 Sawy. 46, 19 Fed. 495, In re Chew Heong, 21 Fed. 799, 10 Sawy. 374, and Lee Kan v. United States, 62 Fed. 918, 15 U. S. App. 516. Approved also in Groves v. County Court, 42 W. Va. 593, 26 S. E. 462, holding act in question a special law and invalid.

Commerce.— State statute which operates to compel shipowners to pay a per capita tax on each immigrant landed, in effect imposes a tax on the passenger himself, and when applied to passengers from foreign countries is a regulation of commerce and void, pp. 269, 271.

Cited and relied on in Chy Lung v. Freeman, 92 U. S. 276, 23 L. 551, a case very similar; Hall v. De Cuir, 95 U. S. 497, 24 L. 551, holding invalid State statute requiring steamboat companies engaged in interstate business to provide like compartments for passengers, irrespective of color; Cook v. Pennsylvania, 97 U. S. 572, 24 L. 1017, holding State act requiring auctioneer to pay tax on all goods sold by him is invalid as to imported goods sold in original package; Telegraph Co. v. Texas, 105 U. S. 465, 26 L. 1068, holding invalid State statute imposing tax on each message sent by telegraph company; Gloucester Ferry Co. v. Penn., 114 U. S. 213, 29 L. 165, 5 S. Ct. 833, holding interstate transportation not subject to State exactions; Robbins v. Shelby Tax. Dist., 120 U. S. 492, 30 L. 696, 7 S. Ct. 594, and Brennan v. Titusville, 153 U. S. 300, 38 L. 722, 14 S. Ct. 832, where law imposing tax on all agents soliciting orders on behalf of manufacturers of goods was held invalid as to agents representing manufacturers outside of State; W. U. Tel. Co. v. Pendleton, 122 U. S. 357, 30 L. 1189, 7 S. Ct. 1128, where State statute, compelling telegraph companies to promptly deliver dispatches, was held invalid as to dispatches to be delivered outside of State; People v. Compagnie, etc., 107 U. S. 60, 27 L. 384, 2 S. Ct. 88, affirming 20 Blatchf. 300, 302, 305, 10 Fed. 360, 361, 364, where New York statute, imposing tax of $1 on each alien passenger coming into the port of New York, was held void; In re Ware, 53 Fed. 783, holding, in absence of proof that alum in baking powder is deleterious to health, statute making it misdemeanor to sell baking powder containing alum cannot apply to sales of original packages imported from other States; Jervey v. The Carolina, 66 Fed. 1017, holding act declaring any boat, with certain exceptions, transporting liquors at night, liable to seizure and confiscation, void; State v. Indiana, etc., Min. Co., 120 Ind. 579, 22 N. E. 779, 6 L. R. A. 583, and n., where statute, purpose of which was to prevent transportation of natural gas from one State to another, was held void; State v. Saunders, 19 Kan. 130, 27 Am. Rep. 100, where statute prohibiting the exportation from State of birds lawfully killed was held void. Cited, argu-endo, in Brown v. Houston, 114 U. S. 631, 29 L. 260, 5 S. Ct. 1096, collecting authorities, and holding, in absence of congressional legislation, States may regulate matters of local interest, even if inter-

1883.

Ex Parte Yarbrough.

son Day and *T. J. Durant*, for appellant.
Mr. **S. F. Phillips,** *Solicitor-Gen.*, **for appellee.**

Mr. Justice **Field delivered the opinion of the court:**

[631] In March, 1865, the plaintiff purchased for the sum of $7,400 certain real property in New Orleans at a sale upon a decree rendered by the District Court of the United States in proceedings for its confiscation under the Act of July 17, 1862 [12 Stat. at L., 589], and subsequently obtained a deed of the property from the marshal. The proceedings were instituted in the usual form by a libel of information filed on the 7th of August, 1862, by the district attorney of the eastern district of Louisiana on behalf of the United States, against ten lots of ground alleged to be the property of Charles M. Conrad. The libel sets forth that the marshal of the district, under authority from the district attorney, given pursuant to instructions of the Attorney-General, had seized the lots of ground, which are fully described, as forfeited to the United States; that they were owned by Conrad then, and on the 17th of July, 1862, and previously; that after that date he had acted as an officer of the army or navy of the rebels in arms against the Government of the United States, or as a member of Congress, or as a judge of a court, or as a cabinet officer, or as a foreign minister, or as a commissioner, or as a consul of the so-called Confederate States. Indeed, many other official positions he is charged in the alternative with holding, the district attorney evidently regarding him as a person of so much consequence that he must have been called to some official position by the Confederate Government, in which he gave aid and comfort to the enemies of the United States and, therefore, his right, title and estate in the property was forfeited and ought to be condemned. Publication of monition followed and, no one appearing to answer, judgment by default was entered, declaring that the lots of land, the property of Conrad, were condemned as forfeited to the United States, and a decree for their sale was entered. In the writ issued to the marshal and in his deed of sale the lots are described as the property of Conrad. Under the Act of Congress no other interest than that of Conrad was forfeited, and no other interest was sold. It was for his alleged offenses that the libel was filed and the forfeiture sought. It was undoubtedly in the power of Congress to provide for the confiscation of the

[632] entire property as being within the enemy's country, without restricting it to the estate of the defendant, but Congress did not see fit to so enact; and as we said in speaking of the proceedings in this case: "The court cannot enlarge the operations of the stringent provisions of the statute. The plaintiff had notice of the character and legal effect of the decree of condemnation when he purchased and is, therefore, presumed to have known that if the alleged offender possessed no estate in the premises at the time of their seizure, nothing passed to the United States by the decree or to him by his purchase." *Burbank* v. *Conrad*, 96 U. S., 291 [XXIV., 731].

This would be true with reference to any layman who might have been the purchaser, but with special force may it be applied to the plaintiff, who, as the district attorney, directed the seizure and conducted the proceedings to the decree.

It turned out in the other litigation that at the time of the seizure Conrad possessed no estate in the premises. He had transferred the property by a public act of sale before a notary on the 31st of May, 1862, before the confiscation statute was passed, which applied only to the property of persons thereafter guilty of acts of disloyalty and treason. In express terms it withheld from its application the property of persons who before its passage may have offended in those respects. Conrad's power of disposition when he made his sale to his sons was not impaired by anything he may previously have done. This was expressly adjudged by this court in the case of *Conrad*, the son, *against the plaintiff*. 96 U. S., 279 [XXIV., 721].

But because of the general language used in the description of the property in the libel of information and in the deed of the marshal, it is contended that something more than the estate of the offender Conrad was warranted by the United States to the purchaser and, the warranty having failed, that he is entitled to a return of the purchase money; but this position is without even plausible foundation. As already stated, the plaintiff was presumed to know the law on the subject, and that by his purchase under the decree he could only acquire such an estate as the alleged offender possessed, to hold during the offender's life; and that if the offender had no estate, none was forfeited to the United States nor sold under the decree of the court. So no false assurance could have been made to the purchaser which could be [633] suggested as a possible ground for the return of the money; nor could there have been any mistake of fact which would be recognized as a ground for relief even in equity, for the fact suggested as having been misunderstood was declared by the law.

Besides, the title to property sold under judicial process is not warranted by the party obtaining the judgment of the court. Whatever title the law gives, the purchaser takes, no more and no less; and he must govern himself accordingly. Any different rule prevailing on this subject in Louisiana or any other State by statute, cannot change the position of the United States with respect to judicial sales in proceedings instituted by them.

Nor is this position at all affected by the doctrine that upon the reversal of a judgment, under which a sale has been had, the purchaser is entitled to a return of his money. There has been no reversal of the judgment in the confiscation proceedings against Conrad. On the contrary it has been affirmed.

Judgment affirmed.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Ex parte:

[651] **In the Matter of JASPER YARBROUGH ET AL., *Petitioners.***

(See S. C., Reporter's ed., 651–667.)

Review of criminal case—excess of jurisdiction—errors of law, when not reviewable—Revised Statutes punishing conspiracy—valid indictment—construction of Constitution—powers of Congress over elections for members of Congress—right of negro to vote.

1. This court has no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction.
2. When a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority, but it is the duty of this court to inquire into the cause of commitment and to discharge him from confinement.
3. Errors of law committed by the court that passed the sentence cannot be reviewed here on *habeas corpus*; whether the indictment sufficiently sets forth the offense which the statute describes and forbids, is in every case a question of law.
4. Sections 5508 and 5520 of the Revised Statutes, prescribing punishments for conspiring to intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, and for conspiring to prevent from voting by force, intimidation or threat, any citizen who is lawfully entitled to vote, are valid and constitutional.
5. An indictment charging a conspiracy to intimidate a citizen of African descent, in the exercise of his right to vote for a member of Congress, and, in the execution of that conspiracy, a beating and wounding of him, is good, under said sections. Because there is no express power given to Congress by the Constitution to provide for preventing violence exercised on the voter as a means of controlling his vote at such an election, it does not follow that no such law can be enacted.
6. In construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed.
7. Congress can by law protect the act of voting for members of Congress, the place where it is done and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud. Such powers are not annulled because an election for state officers is held at the same time and place.
8. The right to vote for members of Congress is fundamentally based upon the Constitution of the United States, and was not intended to be left within the exclusive control of the States.
9. In all cases where the former slave holding States had not removed from their Constitutions the words "white man" as a qualification for voting, the 15th Amendment to the Constitution does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

[No. 151. Orig.]

Argued Jan. 23, 24, 1884. Decided Mar. 3, 1884.

PETITIONS for writs of *habeas corpus* and *certiorari*.

The history and facts of the case appear in the opinion of the court.

Messrs. **Henry B. Tompkins** and *J. L. Pugh*, for petitioner.

Mr. **S. F. Phillips**, *Solicitor-Gen., contra.*

Mr. Justice **Miller** delivered the opinion of the court:

This case originates in this court by an application for a writ of *habeas corpus* on the part of Jasper Yarbrough and seven other persons, who allege that they are confined by the jailer of Fulton County, in the custody of the United States Marshal for the Northern District of Georgia, and that the trial, conviction and sentence in the Circuit Court of the United States for that District, under which they are held, were illegal, null and void.

The court, on the filing of this petition, issued a rule on the marshal, or on any person in [653] whose custody the prisoners might be found, to show cause why the writ of *habeas corpus* should not issue for their release.

It appears, by the returns made to this rule, that the sentence of the court, which ordered their imprisonment in the Albany Penitentiary, in the State of New York, at hard labor for the term of two years, has been so far executed that they are now in that prison. The rule having been served on John McEwan, superintendent of the penitentiary, he makes return that he holds the prisoners by virtue of the sentence of the Circuit Court for the Northern District of Georgia, and annexes to his return a transcript of the proceeding in that court.

As this return is precisely the same that the superintendent would make if the writ of *habeas corpus* had been served on him, the court here can determine the right of the prisoners to be released on this rule to show cause, as correctly and with more convenience in the administration of justice, than if the prisoners were present under the writ in the custody of the superintendent; and such is the practice of this court.

That this court has no general authority to [655 review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement. *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Wells*, 18 How., 307 [59 U. S., XV., 421]; *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872]; *Ex parte Parks*, 93 U. S., 18 [XXIII., 787].

It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and of the offense for which he was tried and has not exceeded its powers in the sentence which it pronounced, this court [654] can inquire no further.

This principle disposes of the argument made before us on the insufficiency of the indictments under which the prisoners in this case were tried.

Whether the indictment sets forth, in comprehensive terms, the offense which the statute describes and forbids and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the

NOTE.—*Fifteenth Amendment to U. S. Constitution; its construction and effect.* See *note* to U. S. v. Reese, 92 U. S., XXIII., 563.

court in which the case originates and is, therefore, clearly, within its jurisdiction.

Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court.

653

This principle is decided in *Ex parte Watkins*, 3 Pet., 203, and *Ex parte Parks*, 93 U. S., 21 [XXIII., 788].

This, however, leaves for consideration the more important question, the one mainly relied on by counsel for petitioners, whether the law of Congress, as found in the Revised Statutes of the United States, under which the prisoners are held, is warranted by the Constitution or, being without such warrant, is null and void.

If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged.

Though several different sections of the Revised Statutes are brought into the discussion as the foundation of the indictments found in the record, we think only two of them demand our attention here, namely, sections 5508 and 5520. They are in the following language:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same, or if

[655]

two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"Sec. 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; each of such persons shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

The indictments, four in number, on which

654

petitioners were tried, charge in each one, all of the defendants with a conspiracy under these sections, directed against a different person in each indictment. On the trial the cases were consolidated, and as each indictment is in the identical language of all the others, except as to the name of the person assaulted and the date of the transaction, the copy which is here presented will answer for all of them:

"We, the grand jurors of the United States, chosen, selected and sworn in and for the Northern District of Georgia, upon our oaths, present: that heretofore, to wit: on the 25th day of July, in the year of our Lord 1883, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green, all late of said Northern District of Georgia, did, within the said Northern District of Georgia, and within the jurisdiction of this court, commit the offense of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did then and there, at the time and place aforesaid, combine, conspire and confederate together, by force, to injure, oppress, threaten and intimidate Berry Saunders, a person of color and a citizen of the United States of America of African descent, on account of his race, color and previous condition of servitude, in the full exercise and enjoyment of the right and privilege of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States of America, and because the said Berry Saunders had so exercised the same, and on account of such exercise, which said right and privilege of suffrage was secured to the said Berry Saunders by the Constitution and laws of the United States of America, the said Berry Saunders being then and there lawfully entitled to vote in said election, and having so then and there conspired the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did unlawfully, feloniously and willfully beat, bruise, wound and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[656]

Second Count. And the jurors aforesaid, upon their oaths aforesaid, do further present: that heretofore, to wit: on the 25th day of January, in the year of our Lord 1883, Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green, all late of said Northern District of Georgia, within the said Northern District of Georgia and within the jurisdiction of this court, did commit the offense of conspiracy, for that the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green, having then and there conspired together, by force, to injure, oppress, threaten and intimidate Berry Saunders, a person of color and a citizen of the United States of America of African descent, on account of his race, color and previous condition of servitude, did then and there unlawfully, willfully and feloniously go in disguise on the highway and on the premises of Berry Saunders, with the intent to prevent and hinder his free exercise and enjoyment of the right to vote at

[657]

an election for a lawfully qualified person as a member of the Congress of the United States of America, which said right had then and there been guarantied to the said Berry Saunders by the Constitution and laws of the United States of America, the said Berry Saunders being then

and there lawfully qualified to vote at said election; and having so conspired, with intent as aforesaid, the said Jasper Yarbrough, James Yarbrough, Dilmus Yarbrough, Neal Yarbrough, Lovel Streetman, Bold Emory, State Lemmons, Jake Hayes and E. H. Green did then and there beat, bruise, wound and maltreat the said Berry Saunders, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Emory Speer, *U. S. Atty.*

A true bill. Oct. 12, 1883.

J. C. Kirkpatrick, *Foreman.*"

Stripped of its technical verbiage, the offense charged in this indictment is, that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States, and in the execution of that conspiracy they beat, bruised, wounded and otherwise maltreated him; and in the second count that they did this on account of his race, color and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises.

If the question were not concluded in this court, as we have already seen that it is by the decision of the circuit court, we entertain no doubt that the conspiracy here described is one which is embraced within the provisions of the Revised Statutes which we have cited.

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the Legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption. [658]

If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.

The proposition that it has no such power is supported by the old argument often heard, often repeated and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers: a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution. Art. I., sec. 8, clause 18.

We know of no express authority to pass laws to punish theft or burglary of the Treasury of the United States. Is there, therefore, no power in Congress to protect the Treasury by punishing such theft and burglary?

Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail because the Constitution contains no express words of power in Congress to enact laws for the punishment of those offenses? The principle, if sound, would abolish the entire criminal jurisdiction of the courts of the United States and the laws which confer that jurisdiction.

It is said that the States can pass the necessary law on this subject, and no necessity exists for such action by Congress. But the existence of state laws punishing the counterfeiting of the coin of the United States has never been held to supersede the Acts of Congress passed for that purpose, or to justify the United States in failing to enforce its own laws to protect the circulation of the coin which it issues. [659]

It is very true that while Congress at an early day passed criminal laws to punish piracy with death, and for punishing all ordinary offenses against person and property committed within the District of Columbia, and in forts, arsenals and other places within the exclusive jurisdiction of the United States, it was slow to pass laws protecting officers of the government from personal injuries inflicted while in discharge of their official duties within the States. This was not for want of power but because no occasion had arisen which required such legislation, the remedies in the state courts for personal violence having proved sufficient.

Perhaps the earliest attempt of Congress to protect government officers while in the exercise of their duty in a hostile community, grew out of the nullification Ordinance of South Carolina, and is found in the "Act further to provide for the collection of duties on imports." That Act gave a right of action in the courts of the United States to any officer engaged in the collection of customs who should receive any injury to his person or property for or on account of any act done by him under any law of the United States for the protection of the revenues. And where any suit or prosecution should be commenced against him in a state court on account of any act done under the revenue laws of the United States or under color thereof, the case might, on his petition, at any time before trial, be removed into the Circuit Court of the United States. Act, March 2, 1833, 4 Stat. at L., 632. [66

When early in the late Civil War the enforcement of the Acts of Congress for obtaining soldiers by draft, brought the officers engaged in it into hostile neighborhoods, it was found necessary to pass laws for their protection. Accordingly, in 1863, an Act was passed making it a criminal offense to assault or obstruct any [660]

officer while engaged in making the draft or in any service in relation thereto. 12 Stat. at L., 731. And the next year the Act was amended by making it applicable to the enrollment and resistance made thereto, and adding that if any assault on any officer or other person engaged in making such enrollment shall result in death, it shall be murder and punished accordingly, 13 Stat. at L., p. 8, sec. 12. Under this statute, Scott was found guilty of murder in the Circuit Court of the United States for the District of Indiana, and the case was brought here by a certificate of division of opinion.

It was not doubted for a moment by court or counsel that Congress had the power to pass these statutes, but it was held that serving notice of a draft, in doing which the man was killed, was not a service in the enrollment as charged in the indictment. *U. S.* v. *Scott*, 3 Wall., 642 [70 U. S., XVIII., 218].

In the case of *U. S.* v. *Gleason*, Woolw., 128, the defendant was convicted and sentenced to death for the murder of an enrolling officer while engaged in making the enrollment, and his sentence being commuted to imprisonment for life, he died in the Iowa Penitentiary while undergoing the modified sentence. It was never suggested that Congress had no power to pass the law under which he was convicted.

So, also, has the Congress been slow to exercise the powers expressly conferred upon it in relation to elections by the 4th section of the 1st article of the Constitution.

This section declares that: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time make or alter such regulations, except as to the place of choosing Senators."

It was not until 1842 that Congress took any action under the power here conferred, when, conceiving that the system of electing all the members of the House of Representatives from a State by general ticket, as it was called, that is, every elector voting for as many names as the State was entitled to representatives in that house, worked injustice to other States which did not adopt that system, and gave an undue preponderance of power to the political party which had a majority of votes in the State, however small, enacted that each member should be elected by a separate district, composed of contiguous territory. 5 Stat. at L., 491.

And to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States, Congress, by the Act of February 2, 1872 [17 Stat. at L., 28], thirty years later, required all the elections for such members to be held on the Tuesday after the first Monday in November in 1876, and on the same day of every second year thereafter.

The frequent failures of the Legislatures of the States to elect Senators at the proper time, by one branch of the Legislature voting for one person and the other branch for another person, and refusing in any manner to reconcile their differences, led Congress to pass an Act which compelled the two bodies to meet in joint convention, and fixing the day when this should be done, and requiring them so to meet on every day thereafter and vote for a Senator until one was elected.

In like manner Congress has fixed a day, which is to be the same in all the States, when the electors for President and Vice-President shall be appointed.

Now the day fixed for electing members of Congress has been established by Congress without regard to the time set for election of state officers in each State, and but for the fact that the State Legislatures have, for their own accommodation, required state elections to be held at the same time, these elections would be held for Congressmen alone at the time fixed by the Act of Congress.

Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? To provide, if necessary, the officers who shall conduct them and make return of the result? And especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done and the man who votes, from personal violence or intimidation and the election itself from corruption or fraud?

If this be so, and it is not doubted, are such powers annulled because an election for state officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors because state officers are to be elected at the same time? *Ex parte Siebold*, 100 U. S., 371 [XXV., 717].

These questions answer themselves; and it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted.

But when, in the pursuance of a new demand for action, that body, as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons.

It is said that the parties assaulted in these cases are not officers of the United States, and their protection in exercising the right to vote by Congress does not stand on the same ground.

But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States.

In both cases it is the duty of that government to see that he may exercise this right freely and to protect him from violence while so doing or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

[659] [660] [661] [662]

This proposition answers also another objection to the constitutionality of the laws under consideration, namely: that the right to vote for a member of Congress is not dependent upon [663] the Constitution or laws of the United States, but is governed by the law of each State respectively.

If this were conceded, the importance to the General Government of having the actual election, the voting for those members, free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes. It equally affects the government; it is as indispensable to the proper discharge of the great function of legislating for that government, that those who are to control this legislation shall not owe their election to bribery or violence, whether the class of persons who shall vote is determined by the law of the State, or by the law of the United States, or by their united result.

But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States.

The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely: by election.

Its language is: "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the same qualifications requisite for electors of the most numerous branch of the State Legislature." Article I, section 2. The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the [664] state law in any sense which makes the exercise of the right to depend exclusively on the law of the State.

Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor* v. *Happersett*, 21 Wall., 178 [88 U. S., XXII., 631], that "the Constitution of the United States does not confer the right of suffrage upon anyone," without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote in any sense to that instrument.

But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men.

In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of [666] Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.

The 15th Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States. It is in the following language:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

While it is quite true, as was said by this court [665] in *U. S.* v. *Reese*, 92 U. S., 218 [XXIII., 564], that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave holding States had not removed from their Constitutions the words "white man" as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. *Neal* v. *Del.*, 103 U. S., 370 [XXVI., 567].

In such cases this 15th article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the [667] power to protect and enforce that right.

In the case of *U. S.* v. *Reese*, so much relied on by counsel, this court said in regard to the 15th Amendment, that "It has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude." This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

The exercise of the right in both instances is guarantied by the Constitution and should be kept free and pure by congressional enactments whenever that is necessary.

The reference to cases in this court in which the power of Congress under the 1st section of
[666] the 14th Amendment has been held to relate alone to acts done under state authority, can afford petitioners no aid in the present case. For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by anyone exercising its authority, are not within the scope of that Amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.

But it is a waste of time to seek for specific sources of the power to pass these laws. *Chancellor* Kent, in the opening words of that part of his commentaries which treats of the government and constitutional jurisprudence of the United States, says:

"The Government of the United States was created by the free voice and joint will of the people of America for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for
665] their protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness." 1 Kent, Com., 201.

It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption.

In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.

Such has been the history of all republics and,
[667] though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.

If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.

If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger and its best powers, its highest purposes, the hopes which it inspires and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

The rule to show cause in this case is discharged and the writ of habeas corpus *denied.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Cited—112 U. S., 77, 80, 180; 114 U. S., 421.

ROBERT MITCHELL ET AL., *Plffs. in Err.*

v.

WILLIAM G. CLARK.

(See S. C., Reporter's ed., 633–651.)

Federal question, what is—Act of indemnity—state Statute of Limitations—when valid—confiscation of rents—valid plea—Act of Congress.

1. In an action in a State Court where defendant sets up as a defense, an immunity under a state law or State Constitution, and not under a law of the United States, no federal question arises and this court has no jurisdiction.

2. An Act of indemnity by Congress, passed after the event, which in effect ratifies what has been done and declares that no suit shall be sustained against the party acting under color of authority from the United States during the rebellion, is valid, so far as Congress could have conferred such authority before.

3. Where a suit is one which, by law can be removed into the courts of the United States, Congress can prescribe for it the law of limitations, not only for those courts but for all courts; and a plea of the Statute of Limitations prescribed by Congress is good in a State Court.

4. A statute of limitations which reduces materially the time within which suit may be commenced, although passed after the contract was made, is not void if a reasonable time is left for the enforcement of the contract by suit before the statute bars that right.

5. In an action to recover of the defendant the rents which are due from him to the plaintiff on a contract in writing, it is a good defense that the rents were confiscated by military order and paid over to the United States.

6. A plea in such action is not bad because it does not set out a copy of the military order on which the defense is founded, where it does not appear that the order was in writing and the substance of it is given.

7. The question whether a plea sets up a sufficient defense, when the defense relied on arises under an Act of Congress, is one of federal law.

[No. 68.]

Argued Dec. 14, 17, 1883. Decided Mar. 3, 1884.

IN ERROR to the Supreme Court of the State of Missouri.

The history and facts of the case fully appear in the opinion of the court.

Mr. **Geo. P. Strong,** for plaintiff in error.

Messrs. **Geo. F. Edmunds,** *S. T. Glover* and *J. R. Shepley,* for defendant in error.

Mr. Justice **Miller** delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri.

The plaintiff below sued the plaintiffs in error for rent due on a lease of two storehouses in St. Louis for the months of August, September and October, 1862, at the rate of $583.33 per month. The defendants answered with four pleas, as follows:

"And now come said defendants, by leave of court, for amended answer to plaintiff's pe-

tition, admit the execution of said lease and the occupancy of said premises under and by virtue of the same as alleged in said petition; and defendants say that after the making of said lease, to wit: on or about the first day of May, A. D. 1861, certain evil-disposed and wicked persons in the State of Missouri, and in other of the United States, did raise an insurrection and rebellion against the lawful Government of the United States, and did seek by force and arms to overthrow said government, and for this purpose did raise a large force of armed men, and did incite and carry on a Civil War with said Government of the United States; that during all the year 1862, and for a long time prior and subsequent thereto, Civil War prevailed throughout the State of Missouri, where said premises were located and where defendants and plaintiff resided; that, in order to suppress said insurrection and rebellion and maintain the lawful authority of the Government of the United States, said government was compelled to raise and did raise, equip and put into the field in said State of Missouri, where said war was raging, a large army, and did place said State of Missouri and the City of St. Louis, where said premises were located and defendants resided, under military law; and the said City and County of St. Louis were under military law and under the military control of J. M. Schofield, a Major-General of the Army of the United States, as the military commander of the District of Missouri, which em-
[635] braced the entire State of Missouri aforesaid; that, by reason of said Civil War the courts of said State of Missouri were suspended and unable to perform their ordinary functions and administer the law of the land, except as they were protected and allowed to do so by the said military authorities thus in control of said State; that, in order to prosecute said Civil War on behalf of the Government of the United States and put down and suppress said insurrection and rebellion and overpower the insurgents and rebels and protect the loyal citizens of the said State of Missouri, it became and was necessary for the military authorities in control of said State of Missouri as aforesaid to take, seize and appropriate to the public use the private property of the citizens of Missouri; and the said military authorities who were in lawful command and control in said State, by order of said Schofield, then the lawful commanding general in said State, did seize and appropriate to the public use in suppressing said rebellion the private property of divers citizens of said State, and among other things did levy upon, seize and appropriate to such public use the property, credits and effects of said plaintiff; especially the rents due and owing from defendants under and by virtue of said lease of defendants in their hands for said months of August, September and October, 1862; and the said defendants were compelled by the overpowering military force then in lawful control of said State to pay, and did pay long before the commencement of this suit, to wit: on or about the 24th day of November, 1862; the said rents for said months of August, September and October, 1862, and every part thereof, to said military authorities, for and on account and as the property and effects of said plaintiff so seized and appropriated to the public use as aforesaid; that said seizure and appropriation were necessary means for carrying on said war for the suppression of said insurrection and rebellion and for the defense and protection of the loyal citizens of Missouri. Wherefore defendants say that plaintiff ought not to have or maintain his aforesaid action against them, and they pray judgment, etc.

And for a further defense defendants say that the said rents reserved in said lease and due and owing for said months of August, September and October, 1862, were seized in the hands of defendants and appropriated as the property of plaintiff for public use in the City of St. Louis, while said city was under military law, under the authority, or color of authority, exercised by [636] said General Schofield, who was then and there duly vested with the military command of said City, by the President of the United States and under his authority; and said payment was made by defendants for and on account of plaintiff, as aforesaid, under said authority; and defendants plead and set up as a defense to this action the Act of Congress entitled 'An Act Relating to *Habeas Corpus*, and Regulating Judicial Proceedings in Certain Cases,' approved March 3, 1863, and say that by reason thereof and of the payment aforesaid plaintiff ought not to have and to maintain this action, and they pray judgment, etc.

And for a further defense defendants say that they paid the said rent for and on account of said plaintiff in the manner and for the purposes in their first plea hereinbefore stated, after the first day of January, 1861, by and in pursuance of orders received by them from the said General J. M. Schofield, who was vested with military authority by the said Government of the United States to make said order and to seize and to apply to the public use the said property and effects and credits of said plaintiff; and defendants plead in bar of said action the 4th section of article 11 of the Constitution of the State of Missouri, and pray judgment, etc.

And for a further defense to said action, defendants say that the cause of action in plaintiff's petition alleged, if any such does or ever did exist, arose out of certain acts done, that is to say, out of or from an alleged failure or omission to pay the rent reserved in said lease for the months of August, September and October, A. D. 1862, to the said plaintiff, and from a payment thereof made for and on account of plaintiff by defendants to the provost-marshal of said district of Missouri, for the public use, under and by virtue of the order and command of General J. M. Schofield, who was then in military command of the military district of Missouri, which embraced the State of Missouri; that said payment was omitted to be made to the plaintiff, and was in fact made for and on account of the plaintiff, for the public use as aforesaid, as a necessary means of carrying on the military operations of the Government of the United States against the insurgents, who were then seeking to overthrow said government in said State of Missouri, by virtue or under color of authority derived from and exercised under the President of the United States; and said cause of action, if any such there be or ever was, arose more than two years before [637] the commencement of this action, and said action was commenced more than two years after the passage of an Act by the Congress of the

to United States with respect to sales in proceedings instituted by them, although different rule may prevail in State where property was sold, p. 633.

110 U. S. 633–651, 28 L. 279, MITCHELL v. CLARK.

Courts.— Judgment in State court, overruling plea of defense under State Constitution, presents no question for review by Supreme Court on writ of error, p. 638.

Constitutional law.— Acts passed after event ratifying what has been done, e. g., acts of military officers during Civil War, and declaring that suits shall not be sustained against parties acting under color of authority, are valid so far as Congress could have conferred such authority before event, p. 640.

Limitations of actions.— Congress may prescribe rule of limitations for actions removable from State to Federal courts, and rule so prescribed is binding in both courts, p. 641.

Approved in Brown v. Walker, 161 U. S. 607, 40 L. 825, 16 S. Ct. 651, holding immunity from prosecution, guaranteed by act of 1893, extends to State courts.

Distinguished in Butler v. Poole, 44 Fed. 586, holding actions by national bank receivers against stockholder, subject to State limitations.

Limitations of actions.— Statute of limitations materially reducing time within which suit may be commenced, though passed after contract was made, is not void as an impairment of obligation thereof, if reasonable time be left for its enforcement by suit before statute bars right, p. 643.

Reaffirmed in Wheeler v. Jackson, 137 U. S. 255, 34 L. 663, 11 S. Ct. 78, People v. Turner, 117 N. Y. 233, 15 Am. St. Rep. 501, 22 N. E. 1023, and Merchants' Nat. Bank v. Braithwaite, 7 N. Dak. 372, 66 Am. St. Rep. 661, 75 N. W. 248, latter holding "reasonable time" computable from date of passage, not of going into effect, of act.

Limitations of actions.— Suit by lessor to recover from lessee rents seized during Civil War by military order, and appropriated to government use, is within acts of March 5, 1863, and May 11, 1866, prescribing period of limitation for suits to recover for seizures made during Rebellion under color of authority of president or Congress, p. 643.

Approved in Cutler v. Kouns, 110 U. S. 729, 28 L. 308, 4 S. Ct. 278, holding action for cotton seized during Rebellion, within above limitations.

Removal of causes.— Question whether plea sets up sufficient defense, when defense relied on arises under act of Congress, is one of Federal law, p. 645.

Approved in Boyd v. Nebraska, 143 U. S. 180, 36 L. 116, 12 S. Ct. 389, reaffirming rule; Covington, etc., Co. v. Sandford, 164 U. S. 595,

41 L. 566, 17 S. Ct. 205, holding determination of such plea cannot be controlled by State court's judgment.

Limitations of actions.— In pleading defense of limitation prescribed by acts of 1863 and 1866, for suits to recover for seizures made during Rebellion, under color of authority of president or Congress, exact language of order commanding seizure need not be set out if substance thereof is given with sufficient clearness to enable plaintiff to deny its existence, p. 646.

110 U. S. 651–667, 28 L. 274, EX PARTE YARBROUGH.

Courts.— Supreme Court has no general authority to review judgments of Circuit Courts in criminal cases, on error or appeal, p. 653.

Reaffirmed in United States v. Sanges, 144 U. S. 319, 36 L. 449, 12 S. Ct. 612, holding writ of error does not lie in behalf of government in criminal cases.

Courts.— When prisoner is held under sentence of any Federal court, in regard to a matter wholly beyond or without its jurisdiction, it is Supreme Court's duty to inquire into cause of commitment when matter is properly brought to its attention, and to order release if commitment be illegal, p. 653.

Approved in Ex parte Royall, 117 U. S. 248, 29 L. 870, 6 S. Ct. 738, upholding Federal jurisdiction to release on habeas corpus person unconstitutionally restrained of liberty, although held under State process for offense against State laws; In re Mayfield, 141 U. S. 116, 35 L. 658, 11 S. Ct. 941, upholding power to inquire with regard to jurisdiction of inferior court, even when inquiry goes to facts outside of record; In re McVey, 50 Neb. 483, 70 N. W. 52, holding jurisdiction to pronounce particular sentence essential; Ex parte Rosenblatt, 19 Nev. 442, 3 Am. St. Rep. 903, 14 Pac. 299, holding constitutionality of act under which defendant was convicted, reviewable on habeas corpus; generally in Wood v. Drake, 70 Fed. 883, holding Federal courts proper tribunals for adjudicating questions as to validity of their process; Ex parte Perkins, 29 Fed. 911, arguendo. See also 23 Am. St. Rep. 110, extended note.

Habeas corpus cannot be used as writ of error to review errors of law committed by court which passed sentence, p. 654.

Reaffirmed in Ex parte Bigelow, 113 U. S. 331, 28 L. 1007, 5 S. Ct. 544, In re Frederich, 149 U. S. 75, 37 L. 656, 13 S. Ct. 795, In re Boyd, 49 Fed. 49, 4 U. S. App. 73, and In re Rowe, 77 Fed. 166, 40 U. S. App. 516. Approved in Ex parte Crouch, 112 U. S. 180, 28 L. 691, 5 S. Ct. 97, holding habeas corpus cannot be used to prevent possible future errors in violation of Constitution; Ex parte Wilson, 114 U. S. 421, 29 L. 90, 5 S. Ct. 937, holding lack of jurisdiction only ground for releasing person under criminal sentence of District Court; In re Delgardo, 140 U. S. 588, 35 L. 580, 11 S. Ct. 875, holding attack on contempt proceedings by habeas corpus involves question

of jurisdiction only; In re Chapman, 156 U. S. 215, 39 L. 402, 15 S. Ct. 332, refusing to interfere by habeas corpus with proceedings pending in courts of District of Columbia; In re Debs, 158 U. S. 600, 39 L. 1108, 15 S. Ct. 912, holding findings of fact, court having jurisdiction, not reviewable on habeas corpus; Ex parte Ulrich, 43 Fed. 663, In re King, 51 Fed. 436, and Ex parte Degener, 30 Tex. App. 575, 17 S. W. 1114, holding want of jurisdiction only ground for granting relief on habeas corpus to one convicted by another court; In re Jordan, 49 Fed. 244, refusing to inquire whether evidence sufficed to support verdict and judgment; State v. Neel, 48 Ark. 289, 3 S. W. 633, People v. District Court, 22 Colo. 428, 45 Pac. 404, and Ex parte Rollins, 80 Va. 317, refusing habeas corpus as remedy for errors in court having jurisdiction; Ex parte Brandon, 49 Ark. 144, 4 S. W. 452, holding prisoner denied jury trial in Mayor's Court cannot test legality of conviction by habeas corpus; In re Thompson, 9 Mont. 389, 23 Pac. 934, holding objection that verdict is contrary to decision of trial court that evidence is insufficient, not maintainable on habeas corpus; In re Ream, 54 Neb. 669, 75 N. W. 24, holding mere irregularities in trial not reviewable on habeas corpus; In re Peraltareavis, 8 N. Mex. 32, 41 Pac. 539, holding commitment will not be reviewed on habeas corpus where court had jurisdiction of defendant and offense; In re Nolan, 21 Wash. 398, 58 Pac. 223, denying habeas corpus where court had jurisdiction, although act under which convicted was declared invalid subsequent to conviction; dissenting opinions in In re Neagle, 135 U. S. 77, 34 L. 76, 10 S. Ct. 673, majority holding habeas corpus proper remedy where marshal is held in State custody for act authorized by Federal laws; Spaf v. United States, 156 U. S. 176, 39 L. 387, 15 S. Ct. 321, arguendo.

Distinguished in Ex parte Buskirk, 72 Fed. 22, 25 U. S. App. 613, releasing person imprisoned for contempt in committing act not forbidden by order of court when committed.

Conspiracy.— Indictment charging that defendants conspired to intimidate a negro citizen in exercise of right to vote for Congressman, and that in pursuance of said conspiracy they beat, etc., him, and that they did this on account of his race, color, and previous condition of servitude, by going disguised and assaulting him on public highway, sufficiently describes offense provided against by R. S., §§ 5508, 5520, p. 657.

Approved in United States v. Waddell, 112 U. S. 77, 28 L. 673, 5 S. Ct. 36, upholding indictment for conspiracy to prevent compliance with homestead laws; Logan v. United States, 144 U. S. 296, 36 L. 440, 12 S. Ct. 627, holding consolidation of several indictments against different persons for one conspiracy cannot be objected to after verdict; United States v. Lancaster, 44 Fed. 893, 10 L. R. A. 321, holding conspiracy to intimidate from prosecuting contempt proceedings in Federal court for violation of its injunction, within

R. S., § 5508; United States v. Patrick, 54 Fed. 345, holding indictment alleging killing of revenue officers while making seizure, in pursuance of conspiracy, sufficient under § 5509, R. S.

Constitutional law.— Rule of construction that what is implied is as much part of instrument as what is express, applies expressly to Federal Constitution by reason of inherent inability to put into words all derivative powers, p. 658.

Approved in Fong Yue Ting v. United States, 149 U. S. 713, 37 L. 913, 13 S. Ct. 1022, holding act requiring Chinese laborers to obtain certificates of residence under pain of deportation constitutional; Irrigation Co. v. Canal Co. 14 Utah, 164, 46 Pac. 826, holding provision for appeals from final judgments impliedly denies appeals from other judgments.

Elections.— Although Federal Constitution, § 4, art. 1, adopts State qualifications of voters as qualifications for voters for members of Congress, right of persons thus ascertained to vote therefor is based upon Constitution, and not upon State law; hence, Congress may enact laws protecting right to vote for Congressmen, p. 664.

Approved in United States v. Waddell, 112 U. S. 80, 28 L. 674, 5 S. Ct. 37, holding exercise of right to make homestead entry on public land guaranteed by Constitution; In re Coy, 127 U. S. 743, 759, 32 L. 281, 8 S. Ct. 1272, 1273, affirming S. C., 31 Fed. 804, upholding Congress' power to make failure of State election officers to perform duties imposed by State, at congressional election, an offense against United States; Logan v. United States, 144 U. S. 291, 36 L. 438, 12 S. Ct. 625, holding citizen in marshal's custody under lawful commitment, has right to government protection against lawless violence; In re Quarels, 158 U. S. 535, 536, 39 L. 1081, 1082, 15 S. Ct. 960, 961, holding right of private citizen to inform marshal of violation of revenue laws secured by Constitution; In re Baldwin, 11 Sawy. 535, 536, 27 Fed. 188, 189, opinion divided as to constitutionality of § 5519, R. S., embracing conspiracy to deprive Chinese of treaty rights; Ex parte Morrill, 13 Sawy. 329, 332, 35 Fed. 266, 268, holding special deputy marshal at congressional election may arrest without process for abetting illegal voting; United States v. Lancaster, 44 Fed. 894, 10 L. R. A. 322, holding right to proceed by contempt in Federal court against defendant violating its injunction, secured by Constitution; In re Appointment of Suprs., 52 Fed. 262, upholding power to appoint supervisor of congressional elections; generally in United States v. Patrick, 54 Fed. 348, holding conspiracy to hinder revenue officer, directed against citizen as well as official; Woodruff v. New York, etc., R. R., 59 Conn. 85, 20 Atl. 20, holding law ordering removal of grade crossings, a constitutional exercise of State police power; Boyd v. Mills, 53 Kan. 604, 42 Am. St. Rep. 310, 37 Pac. 18, 25 L. R. A. 489, upholding constitutional provision prohibiting persons engaged in rebellion from voting.

Distinguished in Baldwin v. Franks, 120 U. S. 690, 30 L. 770, 7 S. Ct. 661, holding § 5519, R. S., punishing conspiracy within a State to deprive aliens of treaty rights, unconstitutional; United States v. Sanges, 48 Fed. 84, 88, 89, 90, holding right to testify before Federal grand jury without interference, not conferred by Constitution.

Constitutional law.— While fifteenth amendment gives negroes no affirmative right to vote, it may, in some cases, operate as the immediate source of their right to do so, p. 665.

Cited generally in Green v. Elbert, 63 Fed. 309, 27 U. S. App. 325, denying jurisdiction of action for damages for conspiracy to disbar in State court, because of statements made in Federal; Stone v. Smith, 159 Mass. 415, 34 N. E. 521, upholding provision of educational qualifications for voters.

110 U. S. 667-686, 28 L. 291, ATCHISON, ETC., R. R. v. DENVER, ETC., R. R.

Carriers.— Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination in charges or facilities; hence, Colorado constitutional prohibition against railroad discrimination merely takes from legislature power to abolish rule as applied to railroads, p. 675.

Approved in Samuels v. Louisville, etc., R. Co., 31 Fed. 61, holding railroad cannot discriminate against one of two competing steamboat lines having same relations to railroad; Cutting v. Florida, etc., Nav. Co., 43 Fed. 750, holding receiver of railroad cannot discriminate in favor of one of two rival steamship companies; Peoria, etc., Ry. v. United States, etc., Stock Co., 136 Ill. 652, 27 N. E. 61, holding railroad transporting and controlling cars of another company, liable as carrier therefor; Atlantic Exp. Co. v. Wilmington, etc., Co., 111 N. C. 479, 32 Am. St. Rep. 811, 16 S. E. 395 18 L. R. A. 397, and n., holding railroad not compelled to furnish facilities to express company to conduct business over its road; dissenting opinion in Delaware, etc., R. R. v. Central Stock, etc., Co., 46 N. J. Eq. 283, 19 Atl. 186, 6 L. R. A. 864, and n., majority holding stockyard companies not obliged to receive cattle from railroads.

Distinguished in Gatton v. Chicago, etc., Ry., 95 Iowa, 139, 63 N. W. 598, 28 L. R. A. 565, holding discriminatory overcharges for freight on interstate shipment, not recoverable prior to interstate commerce act.

Railroads.— Colorado constitutional provision that every railroad may "intersect, connect with, or cross any other railroad," merely implies a physical connection of tracks, not the right of connecting business with business; hence, refusal of one road to agree with another for through checking, interchange of cars, etc., gives equity no jurisdiction, on suit of latter, to arrange terms of intercourse, p. 679.

Approved in Express Cases, 117 U. S. 29, 29 L. 803, 6 S. Ct. 556, holding railroads not obliged to furnish independent express companies equal facilities upon their passenger trains; Louisville, etc., R. R. v. Kentucky, 161 U. S. 684, 40 L. 853, 16 S. Ct. 717, holding charter power to connect or unite with other roads, does not authorize purchase thereof; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 620, 2 L. R. A. 320, holding charter provision that future roads may "connect and join with," merely authorizes physical connection; Little Rock, etc., R. Co. v. St. Louis, etc., Ry., 59 Fed. 409, holding court cannot compel receiving company to transport freight in cars other than its own; Detroit, etc., Ry. v. Interstate, etc., Commission, 74 Fed. 838, 43 U. S. App. 308, holding commission cannot lawfully order railroad to discontinue custom of furnishing cartage to consignees in particular city; Southern, etc., Exp. Co. v. United States Exp. Co., 88 Fed. 663, holding Indiana statute, regulating duties of intersecting railroads, has no application to express companies; Paxton, etc., Irr. Co. v. Farmers, etc., Irr. Co., 45 Neb. 900, 50 Am. St. Rep. 596, 64 N. W. 348, 29 L. R. A. 858, denying right of one irrigating company to connect with another's ditches, without latter's consent; State v. Sioux City, etc., R. Co., 46 Neb. 701, 65 N. W. 772, 31 L. R. A. 54, holding court cannot make for carriers such business arrangements as, in its opinion, should be made; Altoona, etc., R. R. v. Railroad Commrs., 177 Pa. St. 447, 35 Atl. 735, holding act permitting railroads to connect with others, refers to mechanical connection of tracks of like gauge; Ex parte Kœhler, 12 Sawy. 451, 31 Fed. 318, arguendo.

Distinguished in Jacobson v. Wisconsin, etc., R. R., 71 Minn. 532, 70 Am. St. Rep. 364, 74 N. W. 895, 40 L. R. A. 392, holding legislature may compel interchange of cars between connecting roads; Inman v. St. Louis, etc., Ry., 14 Tex. Civ. App. 52, 37 S. W. 42, holding, under Texas statutes, railroads interchange business with connecting lines on rates prescribed by commission.

Constitutional provisions intended as securities for rights of people may also operate as limitations on legislative power, p. 679.

Carriers.— At common law, a carrier is not bound to carry except on his own line; hence, carrier contracting to go beyond may, in absence of contrary statutory regulations, determine for himself what route to employ, p. 680.

Approved in Little Rock, etc., R. Co. v. St. Louis, etc., Ry., 41 Fed. 563, denying power to compel railroad to contract with another for joint through rate; St. Louis, etc., Co. v. Louisville, etc., R. R., 65 Fed. 41, and Gulf, etc., Ry. v. Miami S. S. Co., 86 Fed. 419, 52 U. S. App. 756, holding carrier may make exclusive contract with one of several connecting carriers for through transportation; Post v. Southern Ry., 103 Tenn. 203, 52 S. W. 306–307, holding initial carrier cannot be compelled to make through shipment beyond its line over particular route.

1874.

Minor v. Happersett.

VIRGINIA L. MINOR, and Francis Minor, Her Husband, *Plffs. in Err.*,

v.

REESE HAPPERSETT.

(See S. C., 21 Wall., 162-178.)

Fourteenth constitutional Amendment—meaning of "citizen"—right of Suffrage not necessary privilege of citizen—women not voters, under the Constitution—state laws which confer the right of suffrage upon men alone, valid.

1. Under the Fourteenth Amendment to the United States Constitution, a woman, who is a citizen of the United States and of the State of Missouri, is not a voter in that State, inasmuch as the Constitution and laws of the State confine the right of suffrage to men alone.

2. The word "citizen" in the Constitution of the United States conveys the idea of membership of a nation and nothing more; women are citizens of the United States.

3. The right of suffrage is not one of the necessary privileges of a citizen of the United States.

4. The Fourteenth Amendment did not add to the privileges and immunities of a citizen. The United States Constitution did not add the right of suffrage to the privileges and immunities of citizenship as they existed at the time the Constitution was adopted.

5. Suffrage was not coextensive with the citizenship of the States at the time of its adoption. It was not intended to make all citizens of the U. S. voters.

6. A State Government is republican in form, within the meaning of the guaranty in that behalf, contained in the United States Constitution, notwithstanding women are not made voters.

7. The Constitution of the United States does not confer the right of suffrage upon anyone, and the constitutions and laws of the several States which commit that important trust to men alone, are not necessarily void.

[No. 182.]

Argued Feb. 9, 1875. Decided Mar. 29, 1875.

IN ERROR to the Supreme Court of the State or Missouri.

This was an action brought in the Circuit Court of St. Louis County, Missouri, by the plaintiffs in error, against the defendant, a registering officer, for refusing to register Virginia L. Minor as a lawful voter. The defendant demurred, and the court sustained the demurrer, and rendered judgment against the plaintiffs. On appeal, this judgment was sustained by the General Term, and the plaintiffs sued out a writ of error and removed the cause to the Supreme Court of the State, where the judgment of the circuit court was affirmed.

The case in the Supreme Court of the State was heard upon an agreed statement, which was substantially as follows:

The defense, in substance, was based upon the Constitution of Missouri, which provides, art. 2, sec. 18, that "Every male citizen of the United States, etc., . . . shall be entitled to vote;" and also upon the Registration Law of said State, approved March 10, 1871, to the same effect; and it is claimed, therefore, that the defendant was justified in refusing to register the plaintiff on account of her sex. The plaintiff, however, denies the validity of this clause of the Missouri Constitution and the Registration Act based thereon, and contends that they are in violation of and repugnant to the Constitution of the United States, and particularly to those articles and clauses thereof which she has specified in her petition.

It is admitted by the pleadings that the plaintiff is a native born, free, white citizen of the United States and of the State of Missouri; that the defendant is a registrar, qualified and acting as such; that the plaintiff, in proper time and in proper form, made application to him to be registered, and that the defendant refused to register the plaintiff, solely for the reason that she is a female; and that she possesses the qualifications of an elector in all respects, except as to the matter of sex, as before stated.

The question is thus broadly presented, of a conflict between the Constitution of the State of Missouri and that of the United States, as contemplated by the 25th section of the Judiciary Act of 1789, and 5th February, 1867.

Messrs. John K. Krum, John B. Henderson and **Francis Minor,** for plaintiff in error.

Smith P. Galt, for defendant.

*Mr. Chief Justice **Waite** delivered [*165 the opinion of the court:

The question is presented in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the Constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the Constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States and, therefore, void. The argument is, that as a woman, born and naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or Constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the Fourteenth Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this Amendment to give them that position. Before its adoption, the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an *association of persons for [*166 the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this

NOTE.—*Right of women to vote*—see note, 21 L. R. A. 662.

connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant" and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more.

To determine, then, who were citizens of the United States before the adoption of the Amendment, it is necessary to ascertain what persons originally associated themselves together to form the nation, and what were afterwards admitted to membership.

Looking at the Constitution itself, we find that it was ordained and established by "the people of the United States" (Preamble, 1 Stat. at L., 10), and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Dec. of Ind., 1 Stat. at L., 1), and that had by Articles of Confederation and Perpetual Union, in which they took the name of "the United States of America," en- **167*** tered into a firm league of *friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever. Art. Confed., § 3, 1 Stat. at L., 4.

Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship if they were.

Additions might always be made to the citizenship of the United States in two ways: first, by birth and second, by naturalization. This is apparent from the Constitution itself, for it provides, art. 2 § 1, that "no person except a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President," and (art. 1, § 8), that Congress shall have power "to establish a uniform rule of naturalization." Thus new citizens may be born or they may be created by naturalization.

The Constitution does not, in words, say who shall be natural born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their *par- [*168 ents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiff proceeds upon that idea.

Under the power to adopt a uniform system of naturalization Congress, as early as 1790, provided "that any alien, being a free white person," might be admitted as a citizen of the United States, and that the children of such persons so naturalized, dwelling within the United States, being under twenty-one years of age at the time of such naturalization, should also be considered citizens of the United States, and that the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens. 1 Stat. at L., 103. These provisions thus enacted have, in substance, been retained in all the naturalization laws adopted since. In 1855, however, the last provision was somewhat extended, and all persons theretofore born or thereafter to be born out of the limits of the jurisdiction of the United States, whose fathers were or should be at the time of their birth citizens of the United States, were declared to be citizens also. 10 Stat. at L., 604.

As early as 1804 it was enacted by Congress that when any alien who had declared his intention to become a citizen in the manner provided by law died before he was actually naturalized, his widow and children should be considered as citizens of the United States, and entitled to all rights and privileges as such upon taking the necessary oath (2 Stat. at L., 292); and in 1855 it was further provided that any woman who might lawfully be naturalized under the existing laws, married or *who [*169 should be married to a citizen of the United States should be deemed and taken to be a citizen. 10 Stat. at L., 604.

From this it is apparent that, from the commencement of the legislation upon this subject, alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necesary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the

country. Thus, by the Constitution, the judicial power of the United States is made to extend to controversies between citizens of different States. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist, the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again; at the time of the adoption of the Constitution, in many of the States (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

In the Legislative Department of the Gov- [*170] ernment, similar *proof will be found. Thus, in the preemption laws (5 Stat. at L., 455, § 10), a widow, "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified, and women, "being citizens of the United States," is are permitted to avail themselves of the benefit of the homestead law. 12 Stat. at L., 392.

Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the State, of which she is a citizen from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of *the States, and the elec- [*171] tors in each State must have the qualifications requisite for electors of the most numerous branch of the State Legislature. Const., art. 1, § 2. Senators are to be chosen by the Legislatures of the States, and necessarily the members of the Legislature required to make the choice are elected by the voters of the State. Const., art. 1, § 3. Each State must appoint in such manner as the Legislature thereof may direct, the electors to elect the President and Vice-President. Const., art., 2, § 2. The times, places and manner of holding elections for Senators and Representatives are to be prescribed in each State by the Legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. Const., art. 1, § 4. It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the state laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. *But if it [*172] was not, the contrary may with propriety be assumed.

When the Constitution of the United States was adopted, all the several States, with the exception of Rhode Island, had Constitutions of their own. Rhode Island continued to act under its charter from the Crown. Upon an examination of those Constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, "Every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request," were its voters; in Massachusetts "Every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds;" in Rhode Island "Such

as are admitted free of the company and society" of the Colony; in Connecticut such persons as had "Maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate," if so certified by the selectmen; in New York "Every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State;" in New Jersey "All inhabitants . . . of full age who are worth fifty pounds, proclamation money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;" in Pennsylvania "Every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a state or county tax which shall have been assessed at least six **173***] months before the election;" in *Delaware and Virginia "as exercised by law at present;" in Maryland "All freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;" in North Carolina, for Senators, "All freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election," and for members of the House of Commons "All freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes;" in South Carolina "Every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot on which he hath been legally seised and possessed at least six months before such election, or (not having such freehold or town lot) hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;" and in Georgia "Such citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county."

In this condition of the law in respect to suffrage in the several states, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

174*] *But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By article 4, § 2, it is provided that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily apart of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the Amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the Legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the appropriation is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been *se- [*175
lected to express the idea here indicated, if suffrage was the absolute right of all citizens.

And still again; after the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a fifteenth, as follows; "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude." The Fourteenth Amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc? Nothing is more evident than that the greater must include the less, and if all were already protected, why go through with the form of amending the Constitution to protect a part?

It is true that the United States guaranties to every State a republican form of government. Const., art. 4, § 4. It is also true that

no State can pass a bill of attainder (Const. art. 1, § 10), and that no person can be deprived of life, liberty or property without due process of law. Const. Amend., 5. All these several provisions of the Constitutions must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guarantied, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the **176***] manner specially provided. *These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men, and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their Constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So, also, of the Amendment which declares that no person shall be deprived of life, liberty or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective. The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a Constitution which conferred the right of suffrage only upon men of the full age of **177***] twenty-one years, having resided *in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a Constitution confining the right of suffrage to free male citizens of the age of twenty-one years who had resided in the State two years, or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State, or freemen being inhabitants of any one county in the State, six months immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been re-organized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new Constitutions, republican in form. In no one of these Constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the Constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If *uniform practice, [***178** long continued, can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may, perhaps, be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we can find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the Constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, *we affirm the judgment of the court below.*

241*] *HENRY A. TILDEN *et al., Plffs. in Err.,*

v.

CHAUNCEY B. BLAIR.

(See S. C., 21 Wall., 241–249.)

Acceptor of bill, liability of—Illinois contract—judgment for less than due, when affirmed.

1. The liability of an acceptor does not arise from merely writing his name on the bill, but commences with the subsequent delivery to a *bona fide* holder, or with notice of acceptance given to such holder.

2. Where defendants resided in New York, and there wrote their acceptance upon a draft and then sent it to Illinois to have it negotiated there, the contract is an Illinois contract and draws interest according to the law of that State, although made payable in New York.

3. Where the circuit court gave plaintiff a judgment for the principal of the draft without interest, the judgment was only too favorable to defendant. It should have been for the full amount of the acceptance, with interest from the time it fell due. But the case having been brought here by the defendants, this court can only affirm the judgment.

[No. 207.]

Argued Mar. 4, 1875. Decided Mar. 29, 1875.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error, residents of the State of New York, were sued in the court below by the defendant in error, a resident of the State of Illinois, as the acceptors of a draft drawn in Illinois on the acceptors, and accepted and payable in New York. The draft and acceptance are as follows:

$5,000. CHICAGO, August 4th, 1869.

Sixty days after date, pay to the order of myself $5,000, value received, with exchange, and charge to account of

WILLIAM T. PELTON.

To Messrs. Tilden & Co.,
New Lebanon, N. Y.

(Written across the face): Accepted; payable at the Bank of North America, New York.

TILDEN & Co.

(Indorsed): Pay to the order of A. C. Coventry.

W. T. PELTON.
A. C. COVENTRY."

The acceptors interposed the defense that the acceptance was made without funds, for the accommodation of the drawer, and was negotiated in Illinois, at a rate of interest exceeding twenty-five per cent. per annum, in violation of the statute against usury of the State of Illinois and of the State of New York.

The issue was tried by the court, a jury having been waived.

The court found, as facts, that the draft was accepted in New York, without funds and for the drawer's accommodation; that it was sent to the drawer, who resided at Chicago, the acceptors knowing that it was there to be negotiated; that it was negotiated to the plaintiff at a rate of interest exceeding twenty-five per cent. per annum, he having no knowledge that the acceptance was for the drawer's accomodation, that the statutes of Illinois allow the taking of ten per cent. for the loan and forbearance of money, and forfeit the interest when more than ten per cent. is exacted, but do not forfeit the principal; and found, as a conclusion of law and decided that the transaction was governed by the law of Illinois; that the negotiation of the draft was unlawful as to the interest and lawful as to the principal sum loaned or advanced; and rendered judgment accordingly.

Whereupon the defendants sued out this writ of error.

Mr. **Joshua M. Van Cott,** for plaintiff in error:

The acceptance had no inception or validity as a contract while in the hands of the drawer. It could not acquire validity through a usurious contract.

Catlin v. *Gunter,* 11 N. Y., 368; *Jewell* v. *Wright,* 30 N. Y., 259.

This acceptance is a contract made and to be performed in New York, and is governed by the law of New York.

By the law of New York, exacting greater interest than seven per cent. renders the contract illegal and void. If this acceptance had been negotiated in New York, it could not be enforced there.

By the law of Illinois, exacting greater interest than ten per cent., is illegal.

The fact that the acceptors knew that the draft was to be negotiated in Illinois is, legally, inconsequential. Such a draft is negotiable anywhere, and nothing is derived from consent where no consent is needed.

That the draft was accepted and was payable in New York, appeared on its face and was notice to all the world.

A contract for the payment of money depends, for its validity, upon the law of the place where it is stipulated to be paid.

It is an exercise of comity by the State of New York when it permits its citizen to be sued in its courts to enforce a contract made in another State, to pay a higher rate of interest than its own policy and law allow. In the case of such a contract, both States punish the illegality, the courts of one inflicting the milder penalty of a forfeiture of the interest; the courts of the other inflicting a severer retribution of a forfeiture of both principal and interest. While the sterner penalty of the New York law has no extraterritorial operation in the State and in the courts of Illinois, so the milder penalty of the Illinois law has no extraterritorial operation in the State of New York, and will not be imported there, by a strained comity, to mitigate the penal severity of its own law.

Confessedly, the contract for the indorsement of this acceptance to the defendant in error violated the *lex loci contractus,* the *lex loci solutionis* and the *lex fori.*

Messrs. **John E. Burrill** and *Jno. D. Niles,* for defendant in error:

Although the signature of the defendants was affixed to the draft in this State, it was not delivered here, but was sent to Pelton, the drawer, at Chicago, by letter, and it was there received and there negotiated by Pelton, in accordance with the intention of the defendants.

NOTE.—*Bills drawn in one State and payable in another are foreign bills*—see note, 7 L. ed. U. S. 528. Lex loci *and* lex fori *as to bills and notes; as to interpretation, effect and validity of, and usury*—see note, 3 L. ed. U. S. 205.

Who is deemed to have acted in good faith in taking bills and notes. What is notice to prevent holder from recovery—see note, 10 L. ed. U. S. 473.

Conflict of laws as to interest—see note, 62 L. R. A. 33.

Appeal and error.— Exceptions to be of avail must present distinctly and specifically the ruling objected to, p. 162.

Cited and applied in Hanna v. Maas, 122 U. S. 26, 27, 30 L. 1118, 7 S. Ct. 1056, 1057, holding excepting party must present to judge distinct and specific exceptions in writing; Jones v. East Tennessee, etc., R. R., 157 U. S. 683, 39 L. 858, 15 S. Ct. 719, holding general exception to whole charge to jury, refusal of new trial and rulings on evidence insufficient; Bard v. Elston, 31 Kan. 276, 1 Pac. 567, holding general exception to all instructions given jury insufficient; Barnhardt v. Smith, 86 N. C. 479, refusing to entertain exception not directly pointing out excepted parts of testimony; Adams v. State, 25 Ohio St. 588, holding exceptions to general charge, not pointing out specifically portions objected to, insufficient; Fitzgerald v. Cross, 30 Ohio St. 450, refusing to examine errors not specifically objected to; McDonough v. Great Northern Ry., 15 Wash. 261, 46 Pac. 338, refusing to consider exception not specific as to part of charge excepted to.

21 Wall. 162–178, 22 L. 627, MINOR v. HAPPERSETT.

Citizens.— Irrespective of fourteenth amendment, women born or naturalized in United States are citizens thereof, p. 165.

Cited and relied upon in Dorsey v. Brigham, 177 Ill. 256, 69 Am. St. Rep. 232, 52 N. E. 305, 42 L. R. A. 810, holding alien women, lawfully subject to naturalization, become naturalized by virtue of marriage with citizens; State v. County Court, 90 Mo. 598, 2 S. W. 790, holding women must be counted in determining whether petition for dramshop license has been signed by majority of citizens in district; State v. Hostetter, 137 Mo. 649, 59 Am. St. Rep. 520, 39 S. W. 272, 38 L. R. A. 217, and n., holding women citizens of Missouri and eligible to certain office therein, collecting authorities; arguendo, in Ritchie v. People, 155 Ill. 112, 46 Am. St. Rep. 325, 40 N. E. 458, 29 L. R. A. 84, holding law limiting work hours of females void, as restriction on citizens' right to contract; dissenting opinion in Lyman v. Martin, 2 Utah, 155, arguing that act containing requirement of different qualifications in female voters, void.

Citizens.—Word "citizen," as used in Constitution, means a member of the nation, owing allegiance thereto and entitled to protection therefrom, p. 166.

Cited and principle applied in United States v. Wong Kim Ark, 169 U. S. 654, 655, 680, 42 L. 893, 902, 18 S. Ct. 459, 469, affirming S. C., 71 Fed. 386, holding Chinese born in America, of parents subjects of China, a citizen by virtue of American birth, reviewing cases on citizenship; Blair v. Silver Peak Mines, 93 Fed. 335, holding proof of residence for seventy years in State evidence of citizenship for purpose of removal of cause; Minneapolis v. Reum, 56 Fed.

577, 12 U. S. App. 446, holding citizenship conferred by birth is presumed to continue until change of nationality is proved; dissenting opinion in United States v. Wong Kim Ark, 169 U. S. 724, 42 L. 917, 18 S. Ct. 485, majority holding Chinese born in America, of alien parents, a citizen; arguendo, in Cronly v. Tucson, — Ariz. —, 56 Pac. 877.

Citizens.—All people of original States, at adoption of Constitution, became ipso facto citizens of United States, p. 167.

Cited in Boyd v. Nebraska, 143 U. S. 176, 36 L. 114, 12 S. Ct. 387, holding all citizens of Nebraska became, upon its admission, citizens of United States; dissenting opinion in State v. Boyd, 31 Neb. 749, 48 N. W. 759, applying rule to admission of new States, majority contra.

Distinguished in State v. Boyd, 31 Neb. 718, 719, 48 N. W. 749, holding rule inapplicable to subsequently-admitted States.

Citizens.— Fourteenth constitutional amendment merely furnished an additional guaranty for protection of existing rights of citizenship without adding to them, p. 171.

Cited and applied in McPherson v. Blacker, 146 U. S. 38, 36 L. 878, 13 S. Ct. 11, holding State law, providing for election of presidential electors by districts, not unconstitutional as depriving each voter from voting for all candidates for electorship; People v. Lœffler, 175 Ill. 611, 51 N. E. 793, upholding State civil service law, as not depriving municipal officers of privileges guaranteed by amendment; Stone v. Smith, 159 Mass. 415, 34 N. E. 521, holding constitutional educational requirement for suffrage not contrary to amendment; McPherson v. Secretary of State, 92 Mich. 390, 31 Am. St. Rep. 596, 52 N. W. 473, 16 L. R. A. 480, holding provision for election of presidential electors by districts not contrary to fourteenth and fifteenth amendments; State v. Jackson, 80 Mo. 178, 50 Am. Rep. 501, holding constitutional prohibition of intermarriage between whites and negroes not in conflict with fourteenth amendment; McCandless v. Railroad Co., 38 S. C. 113, 16 S. E. 432, 18 L. R. A. 444, holding State law, making railroads liable for fires communicated by its engines, not in conflict with fourteenth amendment; State v. Atkinson, 40 S. C. 371, 42 Am. St. Rep. 884, 18 S. E. 1024, holding admission of papers taken from room of accused not violative of Constitution; Frasher v. State, 3 Tex. App. 271, 30 Am. Rep. 136, holding law prohibiting intermarriage between whites and blacks not violative of fourteenth and fifteenth amendments: Holden v. Hardy, 169 U. S. 383, 42 L. 788, 18 S. Ct. 385, upholding Utah law limiting labor hours of miners, as not an abridgment of citizens' privileges; Brown v. Phillips, 71 Wis. 247, 36 N. W. 245, upholding law extending right of suffrage at school elections to women. See 25 Am. St. Rep. 872, note on fourteenth amendment.

Elections.— Right of suffrage is not co-extensive with citizenship, p. 178.

Cited and principle applied in Blanck v. Pausch, 113 Ill. 64, holding petition for election contest should aver that petitioner is elector; averment of citizenship insufficient; Morris v. Powell, 125 Ind. 315, 25 N. E. 228, 9 L. R. A. 333, holding suffrage a political right, not one of property, and declaring act providing certain residence qualifications invalid; Gougar v. Timberlake, 148 Ind. 41, 62 Am. St. Rep. 489, 46 N. E. 339, 37 L. R. A. 648, holding suffrage not a natural right of citizenship, but a privilege granted by Constitution; State v. Fairlamb, 121 Mo. 151, 25 S. W. 899, holding resident debarred from voting through insufficient length of residence, eligible as juror; Blair v. Silver Peak Mines, 93 Fed. 336, defining citizenship necessary to confer Federal jurisdiction; Washington v. State, 75 Ala. 584, 51 Am. Rep. 480, arguendo, State prohibition of persons convicted of crime from voting not unconstitutional.

Elections.— Federal Constitution confers right of suffrage on no one, p. 178.

Cited and applied in United States v. Cruikshank, 92 U. S. 555, 23 L. 592, holding indictment for conspiracy to hinder citizens from voting, alleged no Federal offense; In re Appointment of Supervisors, 52 Fed. 257, holding State laws determine qualifications of voters; Gougar v. Timberlake, 148 Ind. 47, 62 Am. St. Rep. 494, 46 N. E. 341, 37 L. R. A. 650, holding suffrage not granted by Federal Constitution but regulatable by States. See 97 Am. Dec. 263, note.

Distinguished in Ex parte Yarbrough, 110 U. S. 664, 28 L. 278, 4 S. Ct. 158, holding right of elector to vote for congressman based upon Constitution.

Constitutional law.— Provision of State Constitution conferring right of suffrage on men, alone does not violate Federal Constitution, p. 178.

Cited and principle applied in Gongar v. Timberlake, 148 Ind. 46, 62 Am. St. Rep. 493, 46 N. E. 341, 37 L. R. A. 650, upholding like provision in Indiana Constitution; Boyd v. Mills, 53 Kan. 604, 42 Am. St. Rep. 310, 37 Pac. 18, 25 L. R. A. 489, upholding constitutional provision denying suffrage to those having borne arms against government; Atchison v. Lucas, 83 Ky. 465, holding women ineligible to office under Kentucky Constitution; Robinson's case, 131 Mass. 377, 41 Am. Rep. 240, denying woman admission as attorney; State v. Davidson, 92 Tenn. 534, 22 S. W. 204, 20 L. R. A. 312, holding women ineligible as notary publics in absence of express statutory provision conferring eligibility; Bloomer v. Todd, 3 Wash. Ter. 622, 19 Pac. 143, 1 L. R. A. 117, holding act conferring suffrage upon women in conflict with organic act of territory; In re Lockwood, 154 U. S. 117, 38 L. 930, 14 S. Ct. 1083, arguendo; in United States v. Goldman, 3 Woods, 195, F. C. 15,225, holding Con-

stitution confers right upon qualified State elector to vote for congressmen. See notes in 29 Am. Rep. 586, 39 Am. Rep. 38, and 62 Am. St. Rep. 496.

Miscellaneous.— Cited incidentally in City of Minneapolis v. Blum, 56 Fed. 581, 12 U. S. App. 446, Board of Commissioners v. Bunting, 111 Ind. 145, 12 N. E. 151, Weaver v. Templin, 113 Ind. 301, 14 N. E. 601, State v. Harrison, 116 Ind. 309, 19 N. E. 150, Hovey v. State, 119 Ind. 389, 21 N. E. 890, and Commissioners v. Gwin, 136 Ind. 572, 36 N. E. 241, 22 L. R. A. 409. See 13 Am. St. Rep. 145, note.

21 Wall. 178–185, 22 L. 482, MARSH v. WHITMORE.

Attorney cannot be charged with negligence when he accepts as the law a decision of the Supreme Court of his State, p. 183.

Cited and relied upon in Citizens' Loan, etc., Co. v. Friedly, 123 Ind. 147, 18 Am. St. Rep. 323, 23 N. E. 1076, 7 L. R. A. 670, holding attorney not liable for erroneous advice on doubtful point prior to its decision by Supreme Court; Isham v. Parker, 3 Wash. 780, 29 Pac. 843, holding attorney liable for reasonable amount of skill but not a guarantor of results. See 34 Am. Dec. 91, lengthy note on attorney's liability for negligence, collecting cases.

Principal and agent.— The law prohibits one selling on another's account from buying on his own, at the sale, p. 184.

Cited and principle applied in Wardell v. Railroad Co., 103 U. S. 658, 26 L. 511, holding agreement of directors of railroad to form auxiliary company to contract with road illegal; Memphis, etc., R. R. v. Woods, 88 Ala. 642, 16 Am. St. Rep. 92, 7 So. 112, 7 L. R. A. 610, and n., restraining directors of railroad from so voting their stock as to injure road in interests of another of which they were directors; Higgins v. Lansingh, 154 Ill. 365, 40 N. E. 380, setting aside agreement between corporation by its directors and individual directors, when injurious to corporation; Appleton v. Turnbull, 84 Me. 80, 24 Atl. 595, holding purchase of pledged property by pledgee voidable unless ratified or permitted by pledgor; Currie v. School District, 35 Minn. 165, 27 N. W. 923, holding contract between school trustees and individual trustee, for latter's employment, voidable; Pearson v. Railroad, 62 N. H. 543, 13 Am. St. Rep. 596, holding action of common directors of two railroads, prejudicial to one, may be enjoined by stockholders thereof; Feamster v. Feamster, 35 W. Va. 13, 13 S. E. 57, holding trustee purchasing trust land from himself and reselling at profit must account to beneficiary for difference; Cullen v. Blimm, 37 Ohio St. 238, deciding case upon other grounds. See note, 17 Am. St. Rep. 302.

Distinguished in Leavenworth v. Chicago, etc., R. R., 134 U. S. 708, 33 L. 1073, 10 S. Ct. 715, holding foreclosure sale valid notwithstanding trust relations of parties, there being no collusion or fraud; Durlacher v. Frazer, — Wyo. —, 55 Pac. 309, holding no contract existed between corporation and individual director.

1819.

McCulloch v. The State of Maryland.

The Attorney-General, contra.

315*] *Marshall, Ch. J., delivered the opinion of the court: The question decided in the Supreme Court for the state of Pennsylvania respect only the construction of a law of that state. It does not appear, from the record, that either the constitutionality of the law of Pennsylvania, or any act of Congress was drawn into question.

It would not be required that the record should, in terms, state a misconstruction of an act of Congress, or that an act of Congress was drawn into question. It would have been sufficient to give this court jurisdiction of the cause, that the record should show that an act of Congress was applicable to the case. That is not shown by this record. The act of Congress which is supposed to have been disregarded, and which, probably, was disregarded by the state court, is that which gives the United States priority in cases of insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the Supreme Court of Pennsylvania. But that fact does not appear. No other question is presented than the correctness of the decision of the state court, according to the laws of Pennsylvania, and that is a question over which this court can take no jurisdiction.

The writ of error must be dismissed.

Writ of error dismissed.

316*] *[Constitutional Law.]

M'CULLOCH
v.
THE STATE OF MARYLAND et al.

Congress has power to incorporate a bank.

The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are to be exercised directly on them, and for their benefit.

The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, when made in pursuance of the constitution, form the supreme law of the land.

There is nothing in the constitution of the United States, similar to the articles of confederation, which exclude incidental or implied powers.

If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The act of the 10th April, 1816, c. 44, to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The state, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.

*The states have no power, by taxation, [*317 or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government.

This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state may hold in this institution, in common with other property of the same description throughout the state.

ERROR to the Court of Appeals of the state of Maryland.

This was an action of debt brought by the defendant in error, John James, who sued as well for himself as for the state of Maryland, in the County Court of Baltimore county, in the said state, against the plaintiff in error, M'Culloch, to recover certain penalties under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the Court of Appeals of the state of Maryland, the highest court of law of said state, and the cause was brought, by writ of error, to this court:

It is admitted by the parties in this cause, by their counsel, that there was passed on the 10th day of April, 1816, by the Congress of the United States, an act, entitled, "An act to incorporate the subscribers to the Bank of the United States;" and that there was passed, on the 11th day of February, 1818, by the general Assembly of Maryland, an act, entitled, "An act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature," *which said acts are [*318 made part of this statement, and it is agreed may be read from the statute books in which they are respectively printed. It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of Congress aforesaid, did organize themselves, and go into full operation in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did on the day of eighteen hundred and seventeen, establish a branch of the said bank, or an office of discount and deposit in the city of Baltimore, in the state of Maryland, which has from that time until the first day of May, eighteen hundred and eighteen, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank notes and discounting promissory

---

NOTE.—As to the power of Congress to charter a United States Bank, see 2 Story on the constitution, secs. 1,259 to 1,271, and the notes thereto, especially Hamilton's argument at pages 143, et seq.; 1 Kent's Comm. 248 to 255; Osborne v. Bank of U. S. 9 Wheat. 738.

notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said president, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch or office of discount and deposit at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union. It is further admitted, that James William M'Culloch, the defendant below, being the cashier of the said branch or office of **319***] discount and *deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank notes were not, nor was either of them, so issued on stamped paper in the manner prescribed by the act of assembly aforesaid. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch or office of discount and deposit have not, nor has either of them, paid in advance, or otherwise, the sum of fifteen thousand dollars, to the treasurer of the Western Shore for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the governor and council of the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the court for their decision in this case, is as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of Congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the plead- **320***] ings in this cause (all errors in *which are hereby agreed to be mutually released), if the court should be of opinion that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for twenty-five hundred dollars, and costs of suit. But if the court should be of opinion that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of non pros shall be entered, with costs to the defendant.

It is agreed that either party may appeal from the decision of the County Court, to the Court of Appeals, and from the decision of the Court of Appeals to the Supreme Court of the United States according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had if a jury had been sworn and empaneled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon.

Copy of the act of the legislature of the state of Maryland, referred to in the preceding statement:

An act to impose a tax on all banks or branches thereof in the state of Maryland, not chartered by the legislature.

Be it enacted by the General Assembly of Maryland, That if any bank has established or shall, without authority from the state first had and obtained, establish any branch, office of discount and *deposit, or office of pay [*321 and receipt, in any part of this state, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note upon a stamp of twenty cents; every twenty dollar note upon a stamp of thirty cents; every fifty dollar note upon a stamp of fifty cents; every one hundred dollar note upon a stamp of one dollar; every five hundred dollar note upon a stamp of ten dollars; and every thousand dollar note upon a stamp of twenty dollars; which paper shall be furnished by the treasurer of the Western Shore, under the direction of the governor and council, to be paid for upon delivery. Provided always, That any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the treasurer of the Western Shore, for the use of the state, the sum of fifteen thousand dollars.

And be it enacted, That the president, cashier, each of the directors and officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of five hundred dollars for each and every offense, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding one hundred *dollars; every penalty aforesaid [*322 to be recovered by indictment, or action of debt, in the county court of the county where the offense shall be committed, one-half to the informer, and the other half to the use of the state.

And be it enacted, That this act shall be in full force and effect from and after the first day of May next.

Mr. **Webster**, for the plaintiff in error,[1] 1. Stated, that the question whether Congress constitutionally possesses the power to incorporate a bank, might be raised upon this record; and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped

1.—This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party.

that it was not now to be considered as an open question. It is a question of the utmost magnitude, deeply interesting to the government itself, as well as to individuals. The mere discussion of such a question may most essentially affect the value of a vast amount of private property. We are bound to suppose that the defendant in error is well aware of these consequences, and would not have intimated an intention to agitate such a question, but with a real design to make it a topic of serious discussion, and with a view of demanding upon it the 323*] solemn judgment of this court. *This question arose early after the adoption of the constitution, and was discussed, and settled, as far as legislative decision could settle it, in the first Congress. The arguments drawn from the constitution in favor of this power, were stated, and exhausted, in that discussion. They were exhibited, with characteristic perspicuity and force, by the first Secretary of the Treasury, in his report to the President of the United States. The first Congress created and incorporated a bank.[1] Nearly each succeeding Congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government. Individuals, it is true, have doubted, or thought otherwise; but it cannot be shown that either branch of the legislature has, at any time, expressed an opinion against the existence of the power. The executive government has acted upon it; and the courts of law have acted upon it. Many of those who doubted or denied the existence of the power, when first attempted to be exercised, have yielded to the first decision, and acquiesced in it, as a settled question. When all branches of the government have thus been acting on the existence of this power nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. Congress, by the constitution, is invested with certain powers; and, as to the objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the 324*] constitution, *empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So it has the power to raise a revenue, and to apply it in the support of the government, and defense of the country. It may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of Congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and *fitted to the object; such as are best [*325 and most useful in relation to the end proposed. If this be not so, and if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the states. It is not for this court to decide whether a bank, or such a bank as this, be the best possible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them in the two houses of Congress. Here, the only question is, whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government as to be fairly within the discretion of Congress, when selecting means and instruments to execute its powers and perform its duties. A bank is not less the proper subject for the choice of Congress, nor the less constitutional, because it requires to be executed by granting a charter of incorporation. It is not, of itself, unconstitutional in Congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; and, as *means, take their character generally [*326 from their end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. The state governments create corporations to execute powers confided to their trust, without any specific authority in the state constitutions for that purpose. There is the same reason that Congress should exercise its discretion as to the means by which it must execute the powers conferred upon it. Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed. Among other means, it has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.

2. The second question is, whether, if the bank be constitutionally created, the state governments have power to tax it. The people of the United States have seen fit to divide sov-

1.—Act of February 5th, 1791, c. 84.

ereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, 327*] therefore, declares, that the *constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

The only inquiry, therefore, in this case is, whether the law of the state of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it. If it be not, then it is void; if it be, then it may be valid. Upon the supposition that the bank is constitutionally created, this is the only question; and this question seems answered as soon as it is stated. If the states may tax the bank, to what extent shall they tax it, and where shall they stop? An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the stables may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state governments for its existence. This consequence is inevitable. The object in laying this tax may have been revenue to the state. In the next case, the object may be to expel the bank from the state; 328*] but *how is this object to be ascertained, or who is to judge of the motives of legislative acts? The government of the United States has itself a great pecuniary interest in this corporation. Can the states tax this property? Under the confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that "no impositions, duties, or restrictions, should be laid by any state on the property of the United States." Is it supposed that property of the United States is now subject to the power of the state governments, in a greater degree than under the confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and must have, property locally existing in all the states; and may the states impose on this property, whether real or personal, such taxes as they please? Can they tax proceedings in the federal courts? If so, they can expel those judicatures from the states. As Maryland has undertaken to impose a stamp tax on the notes of this bank, what hinders her from imposing a stamp tax also on permits, clearances, registers, and all other documents connected with imposts and navigation? If by one she can suspend the operations of the bank, by the other she can equally well shut up the custom-house. The law of Maryland, in question, makes a requisition. The sum called for is not assessed on property, nor deducted from profits or income. It is a direct imposition on the power, privilege, or franchise of the corporation. The act purports, also, to restrain *the circulation of the paper of the [*329 bank to bills of certain descriptions. It narrows and abridges the powers of the bank in a manner which, it would seem, even Congress could not do. This law of Maryland cannot be sustained but upon principles and reasoning which would subject every important measure of the national government to the revision and control of the state legislatures. By the charter, the bank is authorized to issue bills of any denomination above five dollars. The act of Maryland purports to restrain and limit their powers in this respect. The charter, as well as the laws of the United States, makes it the duty of all collectors and receivers to receive the notes of the bank in payment of all debts due the government. The act of Maryland makes it penal, both on the person paying and the person receiving such bills, until stamped by the authority of Maryland. This is a direct interference with the revenue. The legislature of Maryland might, with as much propriety, tax treasury notes. This is either an attempt to expel the bank from the state, or it is an attempt to raise a revenue for state purposes by an imposition on property and franchises holden under the national government, and created by that government for purposes connected with its own administration. In either view there cannot be a clearer case of interference. The bank cannot exist, nor can any bank established by Congress exist, if this right to tax it exists in the state governments. One or the other must be surrendered; and a surrender on the part of the government of the United States would be a giving *up of [*330 those fundamental and essential powers without which the government cannot be maintained. A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government that Congress should be able to exercise its constitutional powers at its own discretion, without being subject to the control of state legislation. The question is not whether a bank be necessary, or useful, but whether Congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the state governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of Congress establishing the bank be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare that Congress can only exercise its constitutional powers subject to the controlling discretion, and under the sufferance of the state governments.

Mr. Hopkinson, for the defendants in error, proposed three questions for the consideration of the court. 1. Had Congress a constitutional power to incorporate the bank of the United States? 2. Granting this power to Congress, has the bank, of its own authority, a right to establish its branches in the several states? 3. Can the bank, and its branches thus established, claim to be exempt from the ordi- 331*] nary *and equal taxation of property, as assessed in the states in which they are placed?

1. The first question has, for many years, divided the opinions of the first men of our country. He did not mean to controvert the arguments by which the bank was maintained on its original establishment. The power may now be denied, in perfect consistency with those arguments. It is agreed, that no such power is expressly granted by the constitution. It has been obtained by implication; by reasoning from the 8th section of the 1st article of the constitution; and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution. If the bank be not "necessary and proper" for this purpose, it has no foundation in our constitution, and can have no support in this court. But it strikes us at once, that a power, growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circumstances which change; in a state of things which may exist at one period and not at another. The argument might have been perfectly good to show the necessity of a bank for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then. That some of the powers of the constitution are of this fluctuating character, existing, or not, according to extraneous circumstances, has been fully recognized by this court at the present term, in the case of Sturges v. Crowninshield.[1] Necessity was the 332*] plea and justification *of the first bank of the United States. If the same necessity existed when the second was established, it will afford the same justification; otherwise, it will stand without justification, as no other is pretended. We cannot, in making this inquiry, take a more fair and liberal test than the report of General Hamilton, the father and defender of this power. The uses and advantages he states, as making up the necessity required by the constitution, are three: 1. The augmentation of the active and productive capital of the country; by making gold and silver the basis of a paper circulation. 2. Affording greater facility to the government, in procuring pecuniary aids; especially in sudden emergencies. This, he says, is an indisputable advantage of public banks. 3. The facility of the payment of taxes, in two ways—by loaning to the citizen, and enabling him to be punctual; and by increasing the quantity of circulating medium, and quickening circulation by bank bills, easily transmitted from place to place. If we admit that these advantages, or conveniences, amount to the necessity required by the constitution, for the creation and exercise of powers not expressly given; yet it is obvious they may be derived from any public banks, and do not call for a bank of the United States, unless there should be no other public banks, or not a sufficiency of them for these operations. In 1791, when this argument was held to be valid and effectual, there were but three banks in the United States, with limited capitals, and contracted spheres of operation. Very different is the case now, when we have a banking capital to a vast amount, vested in *banks of good credit, and so spread [*333 over the country, as to be convenient and competent for all the purposes enumerated in the argument. General Hamilton, conscious that his reasoning must fail if the state banks were adequate for his objects, proceeds to show they were not. Mr. Hopkinson particularly examined all the objections urged by General Hamilton to the agency of the state banks then in existence, in the operations required for the revenue; and endeavored to show that they had no application to the present number, extent, and situation of the state banks; relying only on those of a sound and unquestioned credit and permanency. He also contended, that the experience of five years, since the expiration of the old charter of the bank of the United States, has fully shown the competency of the state banks to all the purposes and uses alleged as reasons for erecting that bank in 1791. The loans to the government by the state banks, in the emergencies spoken of; the accommodation to individuals, to enable them to pay their duties and taxes; the creation of a circulating currency; and the facility of transmitting money from place to place, have all been effected, as largely and beneficially by the state banks as they could have been done by a bank incorporated by Congress. The change in the country, in relation to banks, and an experience that was depended upon, concur in proving that whatever might have been the truth and force of the bank argument in 1791, they were wholly wanting in 1816.

*2. If this bank of the United States [*334 has been lawfully created and incorporated, we next inquire, whether it may, of its own authority, establish its branches in the several states, without the direction of Congress, or the assent of the states. It is true that the charter contains this power, but this avails nothing, if not warranted by the constitution. This power to establish branches, by the directors of the bank, must be maintained and justified by the same necessity which supports the bank itself, or it cannot exist. The power derived from a given necessity, must be co-extensive with it, and no more. We will inquire. 1. Does this necessity exist in favor of the branches? 2. Who should be the judge of the necessity, and direct the manner and extent of the remedy to be applied? Branches are not necessary for any of the enumerated advantages. Not for pecuniary aids to the government; since the ability to afford them must be regulated by the strength of the capital of the parent bank, and cannot be increased by scattering and spreading that capital in the branches. Nor are they necessary to create a circulating medium; for they create nothing; but issue paper on the faith and responsibility of the parent bank, who could issue the same quantity on the same

1.—Ante, p. 122.

foundation; the distribution of the notes of the parent bank can as well be done, and, in fact, is done, by the state banks. Where, then, is that necessity to be found for the branches, whatever may be allowed to the bank itself? It is unodubtedly true that these branches are established with a single view to trading, and the profit of the stockholders, and not for the 335*] convenience *or use of the government; and, therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. If this is the case, can it be contended that the state rights of territory and taxation are to yield for the gains of a money-trading corporation; to be prostrated at the will of a set of men who have no concern, and no duty, but to increase their profits? Is this the necessity required by the constitution for the creation of undefined powers? It is true that, by the charter, the government may require a branch in any place it may designate, but if this power is given only for the uses or necessities of the government, then the government only should have the power to order it. In truth, the directors have exercised the power, and they hold it without any control from the government of the United States; and, as is now contended, without any control of the state governments. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage! A state will not suffer its own citizens to erect a bank without its authority, but the citizens of another state may do so, for it may happen that the state thus used by the bank for one of its branches, does not hold a single share of the stock. 2. But if these branches are to be supported, on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power 336*] *shall be exercised, which the necessity requires. Assuredly, the same tribunal which judges of the original necessity on which the bank is created, should also judge of any subsequent necessity requiring the extension of the remedy. Congress is that tribunal; the only one in which it may be safely trusted; the only one in which the states to be affected by the measure are all fairly represented. If this power belongs to Congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens; if this doctrine of necessity is without any known limits, but such as those who defend themselves by it, may choose for the time to give it; and if the powers derived from it are assignable by the Congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers. The establishment of a bank in a state, without its assent, without regard to its interests, its policy, or institutions, is a higher exercise of authority than the creation of the parent bank, which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states than those wide-spreading branches, planted everywhere, and influencing all the business of the community. Such an exercise of *sov- [*337 ereign power should, at least, have the sanction of the sovereign legislature to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignty of the state; enter it without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

3. If, however, the states of this Union have surrendered themselves in this manner, by implication, to the Congress of the United States, and to such corporations as the Congress, from time to time, may find it "necessary and proper" to create; if a state may no longer decide whether a trading association, with independent powers and immunities, shall plant itself in its territory, carry on its business, make a currency and trade on its credit, raising capitals for individuals as fictitious as its own; if all this must be granted, the third and great question in this cause presents itself for consideration; that is, shall this association come there with rights of sovereignty, paramount to the sovereignty of the state, and with privileges possessed by no other persons, corporations or property in the state? In other words, can the bank and its branches, thus established, claim to be exempt from the ordinary and equal taxation of property, as assessed in the states in which they are placed? As this overwhelming invasion of state sovereignty is not warranted by any express clause or grant in the constitution, and never was *imagined [*338 by any state that adopted and ratified that constitution, it will be conceded that it must be found to be necessarily and indissolubly connected with the power to establish the bank, or it must be repelled. The court has always shown a just anxiety to prevent any conflict between the federal and state powers; to construe both so as to avoid an interference if possible, and to preserve that harmony of action in both on which the prosperity and happiness of all depend. If, therefore, the right to incorporate a national bank may exist, and be exercised consistently with the right of the state, to tax the property of such bank within its territory, the court will maintain both rights; although some inconvenience or diminution of advantage may be the consequence. It is not for the directors of the bank to say, you will lessen our profits by permitting us to be taxed; if such taxation will not deprive the government of the uses it derives from the agency and operations of the bank. The necessity of the government is the foundation of the charter; and beyond that necessity it can claim nothing in derogation of state authority. If the power to erect this corporation were expressly given in the constitution, still it would not be construed to be an exclusion of any state right, not absolutely incompatible and repugnant. The states need no reservation or acknowledgment of their right; all remain

that are not expressly prohibited, or necessarily excluded; and this gives our opponents the broadest ground they can ask. The right now assailed by the bank, is the right of taxing 339*] property within the territory of *the state. This is the highest attribute of sovereignty, the right to raise revenue; in fact, the right to exist; without which no other right can be held or enjoyed. The general power to tax is not denied to the states, but the bank claims to be exempted from the operation of this power. If this claim is valid, and to be supported by the court, it must be, either, 1. From the nature of the property. 2. Because it is a bank of the United States. 3. From some express provision of the constitution; or, 4. Because the exemption is indispensably necessary to the exercise of some power granted by the constitution.

First. There is nothing in the nature of the property of bank stock that exonerates it from taxation. It has been taxed, in some form, by every state in which a bank has been incorporated; either annually and directly, or by a gross sum paid for the charter. The United States have not only taxed the capital or stock of the state banks, but their business also, by imposing a duty on all notes discounted by them. The bank paid a tax for its capital; and every man who deals with the bank, by borrowing, paid another tax for the portion of the same capital he borrowed. This species of property, then, so far from having enjoyed any exemption from the calls of the revenue, has been particularly burthened; and been thought a fair subject of taxation both by the federal and state governments.

Second. Is it then exempt, as being a bank of the United States? How is it such? In name only. Just as the Bank of Pennsylvania, 340*] or the Bank of Maryland, *are banks of those States. The property of the bank, real or personal, does not belong to the United States only as a stockholder, and as any other stockholders. The United States might have the same interest in any other bank, turnpike, or canal company. So far as they hold stock, they have a property in the institution, and no further; so long and no longer. Nor is the direction and management of the bank under the control of the United States. They are represented in the board by the directors appointed by them, as the other stockholders are represented by the directors they elect. A director of the government has no more power or right than any other director. As to the control the government may have over the conduct of the bank, by its patronage and deposits, it is precisely the same it might have over any other bank, to which that patronage would be equally important. Strip it of its name, and we find it to be a mere association of individuals, putting their money into a common stock, to be loaned for profit, and to divide the gains. The government is a partner in the firm, for gain also; for, except a participation of the profits of the business, the government could have every other use of the bank without owning a dollar in it. It is not, then, a bank of the United States, if by that we mean an institution belonging to the government, directed by it, or in which it has a permanent, indissoluble interest. The convenience it affords in the collection and distribution of the revenue, is collateral, secondary, and may be transferred at pleasure to any other bank. It forms no part of the construction *or character [*341 of this bank; which, as to all its rights and powers, would be exactly what it now is if the government was to seek and obtain all this convenience from some other source; if the government were to withdraw its patronage, and sell out its stock. How, then, can such an institution claim the immunities of sovereignty; nay, that sovereignty does not possess? for a sovereign, who places his property in the territory of another sovereign, submits it to the demands of the revenue, which are but justly paid, in return for the protection afforded to the property. General Hamilton, in his report on this subject, so far from considering the bank a public institution, connected with, or controlled by the government, holds it to be indispensable that it should not be so. It must be, says he, under private, not public, direction; under the guidance of individual interest, not public policy. Still, he adds, the state may be holder of part of its stock; and, consequently, (what! it becomes public property? no!) a sharer of the profits. He traces no other consequence to that circumstance. No rights are founded on it; no part of its utility or necessity arises from it. Can an institution, then, purely private, and which disclaims any public character, be clothed with the power and rights of the government, and demand subordination from the State government, in virtue of the federal authority, which it undertakes to wield at its own will and pleasure? Shall it be private in its direction and interests; public in its rights and privileges; a trading money-lender in its business; and uncontrolled sovereign in its powers? If the whole bank, with all its property and business, *belonged to the [*342 United States, it would not, therefore, be exempted from taxation of the States. To this purpose, the United States and the several states must be considered as sovereign and independent; and the principle is clear, that a sovereign, putting his property within the territory and jurisdiction of another sovereign, and, of course, under his protection, submits it to the ordinary taxation of the state, and must contribute fairly to the wants of the revenue. In other words, the jurisdiction of the state extends over all its territory, and everything within or upon it, with a few known exceptions. With a view to this principle, the constitution has provided for those cases in which it was deemed necessary and proper to give the United States jurisdiction within a state, in exclusion of the state authority; and even in these cases, it will be seen, it cannot be done without the assent of the state. For a seat of government, for forts, arsenals, dockyards, etc., the assent of the state to surrender its jurisdiction is required; but the bank asks no consent, and is paramount to all state authority, to all the rights of territory, and demands of the public revenue. We have not been told whether the banking houses of this corporation, and any other real estate it may acquire, for the accommodation of its affairs, are, also, of this privileged order of property. In principle, it must be the same; for the privilege, if it exists, belongs to the corporation, and must cover equally all its property. It is understood that a case was lately decided by the Supreme

Court of Pennsylvania, and from which no appeal has been taken, on the part of the United 343*] *States to this court, to show that United States property, as such, has no exemption from state taxation. A fort, belonging to the federal government, near Pittsburg, was sold by public auction; the usual auction duty was claimed, and the payment resisted, on the ground that none could be exacted from the United States. The court decided otherwise. In admitting Louisiana into the Union, and so, it is believed, with all the new states, it is expressly stipulated, "that no taxes shall be imposed on lands, the property of the United States." There can, then, be no pretense that bank property, even belonging to the United States, is, on that account, exonerated from state taxation.

Third. If, then, neither the nature of the property nor the interest the United States may have in the bank, will warrant the exemption claimed, is there anything expressed in the constitution to limit and control the state right of taxation, as now contended for? We find but one limitation to this essential right, of which the states were naturally and justly most jealous. In the 10th section of the 1st article, it is declared, that "no state shall, without the consent of Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." And there is a like prohibition to laying any duty of tonnage. Here, then, is the whole restriction, or limitation, attempted to be imposed by the constitution, on the power of the states to raise revenue, precisely in the same manner, from the same subjects, and to the same extent, that any 344*] sovereign and independent *state may do; and it never was understood by those who made, or those who received the constitution, that any further restriction ever would, or could be imposed. This subject did not escape either the assailants or the defenders of our form of government; and their arguments and commentaries upon the instrument ought not to be disregarded in fixing its construction. It was forseen, and objected, by its opponents, that, under the general sweeping power given to Congress, "To make all laws which shall be necessary and proper, for carrying into execution the foregoing powers," etc., the states might be exposed to great dangers, and the most humiliating and oppressive encroachments, particularly in this very matter of taxation. By referring to the Federalist, the great champion of the constitution, the objections will be found stated, together with the answers to them. It is again and again replied, and most solemnly asserted, to the people of these United States, that the right of taxation in the states is sacred and inviolable, with "the sole exception of duties on imports and exports;" that "they retain the authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution." With the exception mentioned, the federal and state powers of taxation are declared to be concurrent; and if the United States are justified in taxing state banks, the same equal and concurrent authority will justify the state in taxing the bank of the United States, or any *other bank.[1] The author begins (No. [*345 34) by saying: "I flatter myself it has been clearly shown, in my last number, that the particular states, under the proposed constitution, would have co-equal authority with the Union, in the article of revenue, except as to duties on imports." Under such assurances from those who made, who recommended, and carried the constitution, and who were supposed best to understand it, was it received and adopted by the people of these United States; and now, after a lapse of nearly thirty years, they are to be informed that all this is a mistake, all these assurances are unwarranted, and that the federal government does possess most productive and important powers of taxation, neither on imports, exports, or tonnage, but strictly internal, which are prohibited to the states. The question then was, whether the United States should have any command of the internal revenue; the pretension now is, that they shall enjoy exclusively the best portion of it. The question was then quieted by the acknowledgment of a co-equal right; it is now to be put at rest by the prostration of the state power. The federal government is to hold a power by implication and ingenious inference from general words in the constitution, which it can hardly be believed would have been suffered in an express grant. If, then, the people were not deceived when they were told that, with the exceptions mentioned, the state right of taxation is sacred and inviolable; and it be also true *that the bank of the [*346 United States cannot exist under the exercise of that right, the consequence ought to be, that the bank must not exist; for if it can live only by the destruction of such a right—if it can live only by the exercise of a power which this court solemnly declared to be a "violent assumption of power, unwarranted by any clause in the constitution"—we cannot hesitate to say, let it not live. But in truth this is not the state of the controversy. No such extremes are presented for our choice. We only require that the bank shall not violate state rights, in establishing itself or its branches; that it shall be submitted to the jurisdiction and laws of the state, in the same manner with other corporations and other property; and all this may be done without ruining the institution, or destroying its national uses. Its profits will be diminished by contributing to the revenue of the states; and this is the whole effect that ought, in a fair and liberal spirit of reasoning, to be anticipated. But, at all events, we show, on the part of the state, a clear, general, absolute, and unqualified right of taxation (with the exception stated); and protest against such a right being made to yield to implications and obscure constructions of indefinite clauses in the constitution. Such a right must not be defeated by doubtful pretensions of power, or arguments of convenience or policy to the government; much less to a private corporation. It is not a little alarming to trace the progress of this argument. 1. The power to raise the bank is founded on no provision of the constitution that has the most

1.—Letters of Publius, or the Federalist, Nos. 31–36.

347*] distant allusion to such an *institution; there is not a word in that instrument that would suggest the idea of a bank to the most fertile imagination; but the bank is created by implication and construction, made out by a very subtle course of reasoning; then, by another implication, raised on the former, the bank, this creature of construction, claims the right to enter the territory of a state without its assent; to carry on its business when it pleases, and where it pleases, against the will, and perhaps in contravention of the policy, of the sovereign owner of the soil. Having such great success in the acquirement of implied rights, the experiment is now pushed further; and not contented with having obtained two rights in this extraordinary way, the fortunate adventurer assails the sovereignty of the state, and would strip from it its most vital and essential power. It is thus with the famous fig tree of India, whose branches shoot from the trunk to a considerable distance; then drop upon the earth, where they take root and become trees, from which also other branches shoot, and plant and propagate and extend themselves in the same way, until gradually a vast surface is covered, and everything perishes in the spreading shade.

What have we opposed to these doctrines, so just and reasonable? Distressing inconveniences ingeniously contrived; supposed dangers; fearful distrusts; anticipated violence and injustice from the states, and consequent ruin to the bank. A right to tax is a right to destroy, is the whole amount of the argument, however varied by ingenuity or embellished by eloquence. It is said the states will abuse the 348*] power; and its exercise will *produce infinite inconvenience and embarrassment to the bank. Now, if this were true, it cannot help our opponents; because, if the states have the power contended for, this court cannot take it from them, under the fear that they may abuse it; nor, indeed, for its actual abuse; and if they have it not, they may not use it, however moderately and discreetly. Nor is there any more force in the argument that the bank property will be subjected to double or treble taxation. Each state will tax only the capital really employed in it; and it is always in the power of the bank to show how its capital is distributed. But it is feared the capital in a state may be taxed in gross; and the individual stockholders also taxed for the same stock. Is this common case of a double taxation of the same article to be a cause of alarm now? Our revenue laws abound with similar cases; they arise out of the very nature of our double government. So says the Federalist; and it is the first time it has been the ground of complaint. Poll taxes are paid to the federal and state governments; licenses to retail spirits; land taxes; and the whole round of internal duties, over which both governments have a concurrent, and, until now, it was supposed, a co-equal right. Were not the state banks taxed by the federal, and also by the state governments; in some by a bonus for the charter; in others directly and annually? The circumstance, that the taxes go to different governments in these cases, is wholly immaterial to those who pay; unless it is that it increases the danger of excess and oppression. It is justly remarked on this subject, by *the Federalist, that our security from [*349 excessive burdens on any source of revenue, must be found in mutual forbearance and discretion in the use of the power; this is the only security, and the authority of this court can add nothing to it. When that fails, there is an end to the confederation, which is founded on a reasonable and honorable confidence in each other. It has been most impressively advanced, that the states, under pretense of taxing, may prohibit and expel the banks; that in the full exercise of this power, they may a tax munitions of war; ships about to sail and armies on their march; nay, the spirit of the court is to be aroused by the fear that judicial proceedings will also come under this all-destroying power. Loans may be delayed for stamps and the country ruined for the want of the money. But whenever the states shall be in a disposition to uproot the general government, they will take more direct and speedy means; and until they have this disposition, they will not use these. What power may not be abused; and whom or what shall we trust, if we guard ourselves with this extreme caution? The common and daily intercourse between man and man; all our relations in society, depend upon a reasonable confidence in each other. It is peculiarly the basis of our confederation, which lives not a moment after we shall cease to trust each other. If the two governments are to regard each other as enemies, seeking opportunities of injury and distress, they will not long continue friends. This sort of timid reasoning about the powers of the government, has not escaped the authors so often alluded *to; who, in their 31st [*350 number, treat it very properly. Surely the argument is as strong against giving to the United States the power to incorporate a bank with branches. What may be more easily, or more extensively abused; and what more powerful engine can we imagine to be brought into operation against the revenues and rights of the states? If the federal government must have a bank for the purposes of its revenue, all collision will be avoided by establishing the parent bank in its own district, where it holds an exclusive jurisdiction; and planting its branches in such states as shall assent to it; and using state banks where such assent cannot be obtained. Speaking practically, and by our experience, it may be safely asserted, that all the uses of the bank to the government might be thus obtained. Nothing would be wanting but profits and large dividends to the stockholders, which are the real object in this contest. Whatever may be the right of the United States to establish a bank, it cannot be better than that of the states. Their lawful power to incorporate such institutions has never yet been questioned; whatever may be in reserve for them, when it may be found "necessary and proper" for the interest of the national bank to crush the state institutions, and curtail the state authority. Granting, that these rights are equal in the two governments, and that the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States, and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been *expressly and exclusively transferred [*351 to the United States, the sovereign power of

taxation (except on foreign commerce) being, in the language of the Federalist, co-equal in the two governments, it follows, as a direct and necessary consequence, that having equal powers to erect banks, and equal powers of taxation on property of that description, being neither imports, exports or tonnage, whatever jurisdiction the federal government may exercise in this respect, over a bank created by a state, any state may exercise over a bank created by the United States. Now, the federal government has assumed the right of taxing the state banks, precisely in the manner in which the state of Maryland has proceeded against the bank of the United States; and as this right has never been resisted or questioned, it may be taken to be admitted by both parties; and must be equal in common to both parties, or the fundamental principles of our confederation have been strangely mistaken, or are to be violently overthrown. It has also been suggested that the bank may claim a protection from this tax, under that clause of the constitution which prohibits the states from passing laws, which shall impair the obligation of contracts. The charter is said to be the contract between the government and the stockholders; and the interests of the latter will be injured by the tax which reduces their profits. Many answers offer themselves to this argument. In the first place, the United States cannot, either by a direct law or by a contract with a third party, take away any right from the states not granted by the consti- 352*] tution; they *cannot do collaterally and by implication what cannot be done directly. Their contracts must conform to the constitution, and not the constitution to their contracts. If, therefore, the states have, in some other way, parted with this right of taxation, they cannot be deprived of it by a contract between other parties. Under this doctrine, the United States might contract away every right of every state; and any attempt to resist it would be called a violation of the obligations of a contract. Again, the United States have no more right to violate contract than the states, and surely they never imagined they were doing so, when they taxed so liberally the stock of the state banks. Again, it might as well be said that a tax on real estate, imposed after a sale of it, and not then perhaps contemplated, or new duties imposed on merchandise after it is ordered, violates the contract between the vendor and the purchaser, and diminishes the value of the property. In fact, all contracts in relation to property, subject to taxation, are presumed to have in view the probability or possibility that they will be taxed; and the happening of the event never was imagined to interfere with the contract, or its lawful obligations.

The Attorney-General, for the plaintiff in error, argued, 1. That the power of Congress to create a bank ought not now to be questioned, after its exercise ever since the establishment of the constitution, sanctioned by every department of the government: by the legislature, in the charter of the bank, and other laws connected with the incorporation; by the 353*] *executive, in its assent to those laws; and by the judiciary, in carrying them into effect. After such a lapse of time, and so many concurrent acts of the public authorities, this exercise of power must be considered as ratified by the voice of the people, and sanctioned by precedent. In the exercise of criminal judicature, the question of constitutionality could not have been overlooked by the courts, who have so often inflicted punishment for acts which would be no crimes, if these laws were repugnant to the fundamental law.

2. The power to establish such a corporation is implied, and involved in the grant of specific powers in the constitution, because the end involves the means necessary to carry it into effect. A power without the means to use it is a nullity. But we are not driven to seek for this power in implication; because the constitution, after enumerating certain specific powers, expressly gives to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." If, therefore, the act of Congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to Congress by the constitution. We contend that it was necessary and proper to carry into execution several of the enumerated powers, such as the power of levying and collecting taxes throughout this widely extended empire; of paying *the public debts, both [*354 in the United States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several states; of raising and supporting armies and a navy, and of carrying on war. That banks, dispersed throughout the country, are appropriate means of carrying into execution all these powers, cannot be denied. Our history furnishes abundant experience of the utility of a national bank as an instrument of finance. It will be found in the aid derived to the public cause from the bank of North America, established by Congress, during the war of the revolution; in the great utility of the former bank of the United States; and in the necessity of resorting to the instrumentality of the banks incorporated by the states, during the interval between the expiration of the former charter of the United States Bank in 1811, and the establishment of the present bank in 1816; a period of war, the calamities of which were greatly aggravated by the want of this convenient instrument of finance. Nor is it required that the power of establishing such a moneyed corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution so strict and literal, would render every law which could be passed by Congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted tending to the same object, though *not equally [*355 well adapted to attain it. As the inevitable consequence of giving this very restricted sense to the word "necessary," would be to annihilate the very powers it professes to create; and

as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected. Another not less inadmissible consequence of this construction is, that it is fatal to the permanency of the constitutional powers; it makes them dependent for their being on extrinsic circumstances, which, as these are perpetually shifting and changing, must produce correspondent changes in the essence of the powers on which they depend. But surely the constitutionality of any act of Congress cannot depend upon such circumstances. They are the subject of legislative discretion, not of judicial cognizance. Nor does this position conflict with the doctrine of the court in Sturges v. Crowninshield.[1] The court has not said, in that case, that the powers of Congress are shifting powers, which may or may not be constitutionally exercised, according to extrinsic or temporary circumstances; but it has merely determined, that the power of the state legislatures over the subject of bankruptcies is subordinate to that of Congress on the same subject, and cannot be exercised so as to conflict with the uniform laws of bankruptcy throughout the Union which Congress may establish. The power, in this instance, resides permanently in Congress, whether it chooses to exercise it or not; but its exercise on the part **356***] of the states *is precarious, and dependent, in certain respects, upon its actual exercise by Congress. The convention well knew that it was utterly vain and nugatory to give to Congress certain specific powers, without the means of enforcing those powers. The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end. "Necessary and proper" are, then, equivalent to needful and adapted. Such is the popular sense in which the word necessary is sometimes used. That use of it is confirmed by the best authorities among lexicographers. Among other definitions of the word "necessary," Johnson gives "needful;" and he defines "need," the root of the latter, by the words "want, occasion." Is a law, then, wanted; is there occasion for it, in order to carry into execution any of the enumerated powers of the national government, Congress has the power of passing it. To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to Congress. This is the only interpretation which can give effect to this vital clause of the constitution; and, being consistent with the rules of the language, is not to be rejected because there is another interpretation equally consistent with the same rules, but wholly inadequate to convey what must have been the intention of the convention. Among the multitude of means to carry into execution the powers expressly given to the national government, Congress is to select, from time to time, such as are most fit for the purpose. It would have been impos- **357***] sible *to enumerate them all in the constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether Congress has made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end. It cannot be denied that this is the character of the bank of the United States. But it is said, that the government might use private bankers, or the banks incorporated by the states, to carry on their fiscal operations. This, however, presents a mere question of political expediency, which, it is repeated, is exclusively for legislative consideration; which has been determined by the legislative wisdom, and cannot be reviewed by the court. It is objected that this act creates a corporation; which, being an exercise of a fundamental power of sovereignty, can only be claimed by Congress, under their grant of specific powers. But to have enumerated the power of establishing corporations among the specific powers of Congress, would have been to change the whole plan of the constitution, to destroy its simplicity, and load it with all the complex details of a code of private jurisprudence. The power of establishing corporations is not one of the ends of government; it is only a class of means for accomplishing its ends. An enumeration *of this particu- [***358** lar class of means, omitting all others, would have been a useless anomaly in the constitution. It is admitted that this is an act of sovereignty, and so is any other law. If the authority of establishing corporations be a sovereign power, the United States are sovereign, as to all the powers specifically given to their government, and as to all others necessary and proper to carry into effect those specified. If the power of chartering a corporation be necessary and proper for this purpose, Congress has it to an extent as ample as any other sovereign legislature. Any government of limited sovereignty can create corporations only with reference to the limited powers that government possesses. The inquiry then reverts, whether the power of incorporating a banking company be a necessary and proper means of executing the specific powers of the national government. The immense powers incontestably given, show that there was a disposition, on the part of the people, to give ample means to carry those powers into effect. A state can create a corporation, in virtue of its sovereignty, without any specific authority for that purpose, conferred in the state constitutions. The United States are sovereign as to certain specific objects, and may, therefore, erect a corporation for the purpose of effecting those objects. If the incorporating power had been expressly granted as an end, it would have conferred a power not intended; if granted as a means, it would have conferred nothing more than was before given by necessary implication. Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government; since, if the argument be, that the *implied powers of the con- [***359** stitution may be assumed and exercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the

1.—Ante, p. 122.

abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government; and that whatever may be the magnitude of the danger from this quarter, it is not equal to that of annihilating the powers of the government, to which the opposite doctrine would inevitably tend.

3. If, then, the establishment of the parent bank itself be constitutional, the right to establish the branches of that bank in the different states of the Union follows, as an incident of the principal power. The expediency of this ramification Congress is alone to determine. To confine the operations of the bank to the District of Columbia, where Congress has the exclusive power of legislation, would be as absurd as to confine the courts of the United States to this district. Both institutions are wanted, wherever the administration of justice or of the revenue is wanted. The right, then, to establish these branches, is a necessary part of the means. This right is not delegated by Congress to the parent bank. The act of Congress for the establishment of offices of discount **360***] *and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. When established, they rest, not on the authority of the parent bank, but on the authority of Congress.

4. The only remaining question is, whether the act of the state of Maryland, for taxing the bank thus incorporated, be repugnant to the constitution of the United States? We insist that any such tax, by authority of a state, would be unconstitutional, and that this act is so, from its peculiar provisions. But it is objected, that, by the 10th amendment of the constitution, all powers not expressly delegated to the United States, nor prohibited to the states, are reserved to the latter. It is said, that this being neither delegated to the one nor prohibited to the other, must be reserved. And it is also said, that the only prohibition on the power of state taxation which does exist, excludes this case, and thereby leaves it to the original power of the states. The only prohibition is, as to laying any imposts or duties on imports and exports, or tonnage duty, and this not being a tax of that character, is said not to be within the terms of the prohibition; and, consequently, it remains under the authority of the states. But, we answer, that this does not contain the whole sum of constitutional restrictions on the authority of the states. There is another clause in the constitution which has the effect of a prohibition on the exercise of their authority in numerous cases. The 6th article of the constitution of the United States declares, that the laws made in pursuance of it, "shall be the supreme law of the land, anything in the constitution or **361***] laws of *any state to the contrary notwithstanding." By this declaration, the states are prohibited from passing any acts which shall be repugnant to a law of the United States. The court has already instructed us in the doctrine, that there are certain powers, which, from their nature, are exclusively vested in Congress.[1] So we contend here, that the only ground on which the constitutionality of the bank is maintainable, excludes all interference with the exercise of the power by the states. This ground is, that the bank, as ordained by Congress, is an instrument to carry into execution its specified powers; and in order to enable this instrument to operate effectually, it must be under the direction of a single head. It cannot be interfered with, or controlled in any manner, by the states, without putting at hazard the accomplishment of the end, of which it is but a means. But the asserted power to tax any of the institutions of the United States, presents directly the question of the supremacy of their laws over the state laws. If this power really exists in the states, its natural and direct tendency is to annihilate any power which belongs to Congress, whether express or implied. All the powers of the national government are to be executed in the states, and throughout the states; and if the state legislatures can tax the instruments by which those powers are executed, they may entirely defeat the execution of the powers. If they may tax an institution of finance, they may tax the proceedings in the courts of the United States. If they may *tax to one [***362** degree, they may tax to any degree; and nothing but their own discretion can impose a limit upon this exercise of their authority. They may tax both the bank and the courts, so as to expel them from the states. But, surely, the framers of the constitution did not intend that the exercise of all the powers of the national government should depend upon the discretion of the state governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. It is a direct collision of powers between the two governments. Congress says, there shall be a branch of the bank in the state of Maryland. That state says, there shall not. Which power is supreme? Besides, the charter, which is a contract between the United States and the corporation, is violated by this act of Maryland. A new condition is annexed by a sovereignty which was no party to the contract. The franchise, or corporate capacity, is taxed by a legislature, between whom and the object of taxation there is no political connection.

Mr. **Jones**, for the defendants in error, contended: 1. That this was to be considered as an open question, inasmuch as it had never before been submitted to judicial determination. The practice of the government, however inveterate, could never be considered as sanctioning a manifest usurpation; still less could the practice, under a constitution of a date so recent, be put in competition with the cotemporaneous exposition of its illustrious authors, as recorded for our instruction in the "Letters of Publius," *or the Federalist. The interpretation [***363** of the constitution, which was contended for by the state of Maryland, would be justified from that text book, containing a commentary, such as no other age or nation furnishes, upon its public law.

2. It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states. To suppose that the mere

1.—Vide Sturges v. Crowninshield, ante, p. 122.

proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it are reserved to the states. We admit that the 10th amendment to the constitution is merely declaratory; that it was adopted ex abundanti cautela; and that with it nothing more is reserved than would have been reserved without it. But it is contended, on the other side, that not only the direct powers, but all incidental powers, partake of the supreme power, which is sovereign. This is an inherent sophism in the opposite argument, which depends on the conversion and ambiguity of terms. What is meant by sovereign power? It is modified by the terms of the grant under which it was given. They do not import sovereign power generally, but sovereign power limited to particular cases; and the question again recurs, whether sovereign power was given in this particular case. It is true, that by conferring sovereign powers on a limited, delegated government, sovereign means are also granted? Is **364***] there no restriction *as to the means of exercising a general power? Sovereignty was vested in the former confederation as fully as in the present national government. There was nothing which forbade the old confederation from taxing the people, except that three modes of raising revenue were pointed out, and they could resort to no other. All the powers given to Congress under that system, except taxation, operated as directly on the people as the powers given to the present government. The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished. "To levy and collect taxes," "to borrow money," "to pay the public debts," "to raise and support armies," "to provide and maintain a navy," are not the ends for which this or any other just government is established. If a banking corporation can be said to be involved in either of these means, it must be as an instrument to collect taxes, to borrow money, and to pay the public debts. Is it such an instrument? It may, indeed, facilitate the operation of other financial institutions; but in its proper and natural character, it is a commercial institution, a partnership incorporated for the purpose of carrying on the trade of banking. But we contend that the government of the United States must confine themselves, in the collection and expenditure of revenue, to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means. But what natural connection **365***] is there between *the collection of taxes and the incorporation of a company of bankers? Can it possibly be said, that because Congress is invested with the power of raising and supporting armies, that it may give a charter of monopoly to a trading corporation as a bounty for enlisting men? Or that, under its more analogous power of regulating commerce, it may establish an East or a West India company, with the exclusive privilege of trading with those parts of the world? Can it establish a corporation of framers of the revenue, or burden the internal industry of the states with vexatious monopolies of their staple productions? There is an obvious distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity. For example: the power of coining money implies the power of establishing a mint. The power of laying and collecting taxes implies the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation, branching out into every district of the country, and inundating it with a flood of paper money. To derive such a tremendous authority from implication, would be to change the subordinate into fundamental powers; to make the implied powers greater than those which are expressly granted; and to change the whole scheme and theory of the government. It is well known that many of the powers which are expressly *granted [***366** to the national government in the constitution, were most reluctantly conceded by the people, who were lulled into confidence by the assurances of its advocates, that it contained no latent ambiguity, but was to be limited to the literal terms of the grant: and in order to quiet all alarm, the 10th article of amendments was added, declaring "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It would seem that human language could not furnish words less liable to misconstruction. But it is contended that the powers expressly granted to the national government in the constitution are enlarged to an indefinite extent by the sweeping clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers. Now, we insist that this clause shows that the intention of the convention was, to define the powers of the government with the utmost precision and accuracy. The creation of a sovereign legislature implies an authority to pass laws to execute its given powers. This clause is nothing more than a declaration of the authority of Congress to make laws, to execute the powers expressly granted to it and the other departments of the government. But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language more absolutely excluding a general and unlimited discretion than *these. [***367** It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient, fit, adapted, proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper which are not necessary; because the end may be attained without them. The word "necessary" is said to be a synonym of "needful." But both these words are defined, "indispensably requisite;" and most certainly this is the sense in which the word "necessary" is used in the constitu-

tion. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision. The only question, then, on this branch of the argument, will be, whether the establishment of a banking corporation be indispensably requisite to execute any of the express powers of the government? So far as the interest of the United States is concerned as partners of this company of bankers, or so far as the corporation may be regarded as an executive officer of the government, acquiring real and personal property in trust for the use of the government, it may be asked, what right the United States have to acquire property of any kind, except that purchased by the consent of the legislature of the state in which such property may be, for the erection of forts, magazines, etc.; and ships or munitions **368***] *of war, constructed or purchased by the United States, and the public treasure? Their right of acquiring property is absolutely limited to the subjects specified, which were the only means, of the nature of wealth or property, with which the people thought it necessary to invest them. The people never intended they should become bankers or traders of any description. They meant to leave to the states the power of regulating the trade of banking, and every other species of internal industry; subject merely to the power of Congress to regulate foreign commerce, and the commerce between the different states, with which it is not pretended that this asserted power is connected. The trade of banking within the particular states would then either be left to regulate itself, and carried on as a branch of private trade, as it is in many countries, or banking companies would be incorporated by the state legislatures to carry it on, as has been the usage of this country. But in either case, Congress would have nothing to do with the subject. The power of creating corporations is a distinct sovereign power, applicable to a great variety of objects, and not being expressly granted to Congress for this, or any other object, cannot be assumed by implication. If it might be assumed for this purpose, it might also be exercised to create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by this dangerous doctrine of implied powers. Or it might be exercised to establish great trading **369***] monopolies, *or to lock up the property of the country in mortmain, by some strained connection between the exercise of such powers and those expressly given to the government.

3. Supposing the establishment of such a banking corporation, to be implied as one of the means necessary and proper to execute the powers expressly granted to the national government, it is contended by the counsel opposed to us, that its property is exempted from taxation by the state governments, because they cannot interfere with the exercise of any of the powers, express or implied, with which Congress is invested. But the radical vice of this argument is, that the taxing power of the states, as it would exist, independent of the constitution, is in no respect limited or controlled by that supreme law, except in the single case of imposts and tonnage duties, which the states cannot lay, unless for the purpose of executing their inspection laws. But their power of taxation is absolutely unlimited in every other respect. Their power to tax the property of this corporation cannot be denied, without at the same time denying their right to tax any property of the United States. The property of the bank cannot be more highly privileged than that of the government. But they are not forbidden from taxing the property of the government, and therefore cannot be constructively prohibited from taxing that of the bank. Being prohibited from taxing exports and imports, and tonnage, and left free from any other prohibition, in this respect they may tax everything else but exports, imports, and tonnage. The authority of *"the Federalist" is express, [***370** that the taxing power of Congress does not exclude that of the states over any other objects except these. If, then, the exercise of the taxing power of Congress does not exclude that of the states, why should the exercise of any other power by Congress exclude the power of taxation by the states? If an express power will not exclude it, shall an implied power have that effect? If a power of the same kind will not exclude it, shall a power of a different kind? The unlimited power of taxation results from state sovereignty. It is expressly taken away only in the particular instances mentioned. Shall others be added by implication? Will it be pretended that there are two species of sovereignty in our government? Sovereign power is absolute as to the objects to which it may be applied. But the sovereign power of taxation in the states may be applied to all other objects, except imposts and tonnage. Its exercise cannot, therefore, be limited and controlled by the exercise of another sovereign power in Congress. The right of both sovereignties are co-equal and co-extensive. The trade of banking may be taxed by the state of Maryland; the United States may incorporate a company to carry on the trade of banking, which may establish a branch in Maryland. The exercise of the one sovereign power cannot be controlled by the exercise of the other. It can no more be controlled in this case than if it were the power of taxation in Congress, which was interfered with by the power of taxation in the state, both being exerted concurrently on the same object. In both *cases, mutual confidence, dis- [***371** cretion and forbearance, can alone qualify the exercise of the conflicting powers, and prevent the destruction of either. This is an anomaly, and perhaps an imperfection in our system of government. But neither Congress nor this court can correct it. That system was established by reciprocal concessions and compromises between the state and federal governments. Its harmony can only be maintained in the same spirit. Even admitting that the property of the United States (such as they have a right to hold), their forts and dock-yards, their ships and military stores, their archives and treasures, public institutions of war, or revenue or justice, are exempt by nec-

essary implication from state taxation; does it therefore follow that this corporation, which is a partnership of bankers, is also exempt? They are not collectors of the revenue, any more than any state bank or foreign bankers, whose agency the government may find it convenient to employ as depositaries of its funds. They may be employed to remit those funds from one place to another, or to procure loans, or to buy and sell stock; but it is in a commercial, and not an administrative character, that they are thus employed. The corporate character with which these persons are clothed, does not exempt them from state taxation. It is the nature of their employment as agents or officers of the government, if anything, which must create the exemption. But the same employment of the state bank or private bankers would equally entitle them to the same exemption. Nor can the exemption 372*] of the stock of this *corporation from state taxation be claimed on the ground of the proprietary interest which the United States have in it as stockholders. Their interest is undistinguishably blended with the general capital stock; if they will mix their funds with those of bankers, or engage as partners in any other branch of commerce, their sovereign character and dignity are lost in the mercantile character which they have assumed; and their property thus employed becomes subject to local taxation, like other capital employed in trade.

Mr. **Martin**, Attorney-General of Maryland, 1. Read several extracts from the Federalist, and the debates of the Virginia and New York conventions, to show that the cotemporary exposition of the constitution by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the counsel for the plaintiff in error. That it was then maintained by the enemies of the constitution, that it contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence. This apprehension was treated as a dream of distempered jealousy. The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the 10th amendment was added to the constitution. This, however, could be considered as nothing more than declaratory of the sense of the people, as to the extent of the 373*] powers *conferred on the new government. We are now called upon to apply that theory of interpretation which was then rejected by the friends of the new constitution, and we are asked to engraft upon it powers of vast extent, which were disclaimed by them, and which, if they had been fairly avowed at the time, would have prevented its adoption. Before we do this, they must, at least, be proved to exist, upon a candid examination of this instrument, as if it were now for the first time submitted to interpretation. Although we cannot, perhaps, be allowed to say that the states have been "deceived in their grant," yet we may justly claim something like a rigorous demonstration of this power, which nowhere appears upon the face of the constitution, but which is supposed to be tacitly inculcated in its general object and spirit. That the scheme of the framers of the constitution intended to leave nothing to implication, will be evident from the consideration that many of the powers expressly given are only means to accomplish other powers expressly given. For example: The power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a navy, to prosecute the war then declared. So, also, as money is the sinew of war, the powers of laying and collecting taxes, and of borrowing money, are involved in that of declaring war. Yet all these powers are specifically enumerated. If, then, the convention has specified some powers, which, being only means to accomplish the ends of government, might have been taken *by impli- [*374 cation; by what just rule of construction are other sovereign powers, equally vast and important, to be assumed by implication? We insist, that the only safe rule is the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed, in the 10th amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. The power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states, or to the people. It is not expressly delegated, either as an end or a means of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated. We still insist, that the authority of establishing corporations is one of the great sovereign powers of government. It may well exist in the state governments, without being expressly conferred in the state constitutions; because those governments have all the usual powers which belong to every political society, unless expressly forbidden, by the letter of the state constitutions, from exercising them. The power of establishing corporations has been constantly exercised by the State governments, and no portion of it has been ceded by them to the government of the United States.

2. But, admitting that Congress has a right to incorporate a banking company, as one of the means *necessary and proper to ex- [*375 ecute the specific powers of the national government, we insist that the respective states have the right to tax the property of that corporation, within their territory; that the United States cannot, by such an act of incorporation, withdraw any part of the property within the state from the grasp of taxation. It is not necessary for us to contend that any part of the public property of the United States, its munitions of war, its ships, and treasure, are subject to state taxation. But if the United States hold shares in the stock of a private banking company, or any other trading company, their property is not exempt from taxation, in common with the other capital stock of the company; still less can it communicate to the shares belonging to private stockholders an immunity from local taxation. The right

of taxation by the state is co-extensive with all private property within the state. The interest of the United States in this bank is private property, though belonging to public persons. It is held by the government, as an undivided interest with private stockholders. It is employed in the same trade, subject to the same fluctuations of value, and liable to the same contingencies of profit and loss. The shares belonging to the United States, or of any other stockholders, are not subjected to direct taxation by the law of Maryland. The tax imposed, is a stamp tax upon the notes issued by a banking house within the state of Maryland. Because the United States happen to be partially interested, either as dormant or active partners, in that house, is no reason why the state should refrain from laying a tax [*376 which they have, otherwise, *a constitutional right to impose, any more than if they were to become interested in any other house of trade, which should issue its notes, or bills of exchange, liable to a stamp duty, by a law of the state. But it is said that a right to tax, in this case, implies a right to destroy; that it is impossible to draw the line of discrimination between a tax fairly laid for the purposes of revenue and one imposed for the purpose of prohibition. We answer, that the same objection would equally apply to the right of Congress to tax the state banks; since the same difficulty of discriminating occurs in the exercise of that right. The whole of this subject of taxation is full of difficulties, which the convention found it impossible to solve in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the state and the national government. This being found impracticable or inconvenient, the state governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the states a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance. The debates in the state conventions show that the power of state taxation was understood to be absolutely unlimited, except as to imposts and tonnage duties. The states would not have adopted the constitution upon any other understanding. As to the judicial proceedings, and the custom-house pa- [*377 pers of the United States, they are *not property, by their very nature; they are not the subjects of taxation; they are the proper instruments of national sovereignty, essential to the exercise of its powers, and in legal contemplation altogether extraterritorial as to state authority.

Mr. **Pinkney,** for the plaintiff in error, in reply, stated: 1. That the cause must first be cleared of a question which ought not to have been forced into the argument—whether the act of Congress establishing the bank was consistent with the constitution? This question depended both on authority and on principle. No topics to illustrate it could be drawn from the confederation, since the present constitution was as different from that as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the states, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the constitution acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country is divided. The federal powers are just as sovereign as those of the states. The state sovereignties are not the authors *of the constitution of the United [*378 States. They are preceding in point of time, to the national sovereignty, but they are postponed to it in point of supremacy, by the will of the people. The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end; fitted to promote, and having a natural relation and connection with the objects of that government. The constitution, by which these authorities, and the means of executing them, are given, and the laws made in pursuance of it, are declared to be the supreme law of the land; and they would have been such, without the insertion of this declaratory clause. They must be supreme, or they would be nothing. The constitutionality of the establishment of the bank, as one of the means necessary to carry into effect the authorities vested in the national government, is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive, and judicial. A legislative construction, in a doubtful case, persevered in for a course of years, ought to be binding upon the court. This, however, is not a question of construction merely, but of political necessity, on which Congress must decide. It is conceded, that a manifest usurpation cannot be maintained in this mode; but, we contend that this is such a doubtful case that Congress may expound the nature and extent of the authority under which it acts, and that this practical interpretation has become incorporated into the constitution. There are two distinguishing points which entitle it to great respect. The first is, that it was a *cotemporan- [*379 eous construction; the second is, that it was made by the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first Congress, by which the new government was organized. They must have understood their own work. They determined that the constitution gave to Congress the power of incorporating a banking company. It was not required that this power should be expressed in the text of the constitution; it might safely be left to implication. An express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted; we do not claim an authority in this respect, beyond the sphere of

the specific powers. The grant of an authority to erect certain corporations, might have been equally dangerous, by omitting to provide for others, which time and experience might show to be equally, and even more necessary. It is a historical fact of great importance in this discussion, that amendments to the constitution were actually proposed, in order to guard against the establishment of commercial monopolies. But if the general power of incorporating did not exist, why seek to qualify it, or to guard against its abuse? The legislative precedent established in 1791, has been followed up by a series of acts of Congress, all confirming the authority. Political considerations alone might have produced the refusal to renew the charter in 1811; at any rate, we know that they mingled themselves in the debate, 380*] and the determination. *In 1815, a bill was passed by the two houses of Congress, incorporating a national bank; to which the President refused his assent, upon political considerations only, waiving the question of constitutionality as being settled by cotemporaneous exposition, and repeated subsequent recognitions. In 1816, all branches of the legislature concurred in establishing the corporation, whose chartered rights are now in judgment before the court. None of these measures ever passed sub silentio; the proposed incorporation was always discussed, and opposed, and supported, on constitutional grounds, as well as on considerations of political expediency. Congress is, prima facie, a competent judge of its own constitutional powers. It is not, as in questions of privilege, the exclusive judge; but it must first decide, and that in a proper judicial character, whether a law is constitutional, before it is passed. It had an opportunity of exercising its judgment in this respect, upon the present subject, not only in the principal acts incorporating the former, and the present bank, but in the various incidental statutes subsequently enacted on the same subject; in all of which, the question of constitutionality was equally open to debate, but in none of which was it agitated.

There are, then, in the present case, the repeated determinations of the three branches of the national legislature, confirmed by the constant acquiescence of the state sovereignties, and of the people, for a considerable length of time. Their strength is fortified by judicial authority. The decisions in the courts, affirm- 381*] ing the constitutionality of these *laws, passed, indeed, sub silentio; but it was the duty of the judges, especially in criminal cases, to have raised the question; and we are to conclude, from this circumstance, that no doubt was entertained respecting it. And if the question be examined on principle, it will be found not to admit of doubt. Has Congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the constitution, and have no limits but the constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defense provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude. Congress has power to lay and collect taxes and duties, imposts and excises; to pay the debts, and provide for the common defense and general welfare of the United States; to borrow money on the credit of the nation; to regulate commerce; to establish uniform naturalization and bankrupt laws; to coin money, and regulate the circulating medium, and the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science and the useful arts, by granting patents and copyrights; to constitute tribunals inferior to the Supreme Court, and to define *and punish offenses against the law of [*382 nations; to declare and carry on war; to raise and support armies, and to provide and maintain a navy; to discipline and govern the land and naval forces; to call forth the militia to execute the laws, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia; to exercise exclusive legislation in all cases, over the district where the seat of government is established, and over such other portions of territory as may be ceded to the Union for the erection of forts, magazines, etc.; to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and to make all laws which shall be necessary and proper for carrying into execution these powers and all other powers vested in the national government or any of its departments or officers. The laws thus made are declared to be the supreme law of the land; and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Yet it is doubted whether a government invested with such immense powers has authority to erect a corporation within the sphere of its general objects, and in order to accomplish some of those objects. The state powers are much less in point of magnitude, though greater in number; yet it is supposed the states possess the authority of establishing corporations, whilst it is denied to the general government. It is conceded to the state legislatures, though not specifically granted, because it is said to be an incident of state sovereignty; but it *is refused to Con- [*383 gress, because it is not specifically granted, though it may be necessary and proper to execute the powers which are specifically granted. But the authority of legislation in the state government is not unlimited. There are several limitations to their legislative authority. First, from the nature of all government, especially of republican government, in which the residuary powers of sovereignty, not granted specifically, by inevitable implication, are reserved to the people. Secondly, from the express limitations contained in the state constitutions. And, Thirdly, from the express prohibitions to the states contained in the United States constitution. The power of erecting corporations is nowhere expressly granted to the legislatures of the states in their constitutions; it is taken by necessary implication;

but it cannot be exercised to accomplish any of the ends which are beyond the sphere of their constitutional authority. The power of erecting corporations is not an end of any government; it is a necessary means of accomplishing the ends of all governments. It is an authority inherent in, and incident to, all sovereignty. The history of corporations will illustrate this position. They were transplanted from the Roman law into the common law of England, and all the municipal codes of modern Europe. From England they were derived to this country. But, in the civil law, a corporation could be created by a mere voluntary association of individuals.[1] And, in Eng- 384*] land, the authority of parliament *is not necessary to create a corporate body. The king may do it, and may communicate his power to a subject;[2] so little is this regarded as a transcendent power of sovereignty in the British constitution. So, also, in our constitution it ought to be regarded as but a subordinate power, to carry into effect the great objects of government. The state governments cannot establish corporations to carry into effect the national powers given to Congress, nor can Congress create corporations to execute the peculiar duties of the state governments. But so much of the power or faculty of incorporation as concerns national objects has passed away from the state legislatures, and is vested in the national government. An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government—the felicity of the people. All powers are given to the national government, as the people will. The reservation in the 10th amendment to the constitution, of "powers not delegated to the United States," is not confined to powers not expressly delegated. Such an amendment was indeed proposed; but it was perceived that it would strip the government of some of its most essential powers, and it was rejected. Unless a specific means be expressly prohibited to the general government, it has it within the sphere of its specified powers. Many particular means are, of course, involved in the general means necessary to carry into effect the powers expressly granted, and, in that case, the general 385*] means become *the end, and the smaller objects the means. It was impossible for the framers of the constitution to specify prospectively all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances in such an unexampled state of political society as ours, forever changing and forever improving. How unwise would it have been to legislate immutably for exigencies which had not then occurred, and which must have been forseen but dimly and imperfectly. The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure. The statute book of the United States is filled with powers derived from implication. The power to lay and collect taxes will not execute itself. Congress must designate in detail all the means of collection. So, also, the power of establishing post-offices and post-roads involves that of punishing the offense of robbing the mail. But there is no more necessary connection between the punishment of mail robbers and the power to establish post-roads than there is between the institution of a bank and the collection of the revenue and payment of the public debts and expenses. So, light-houses, beacons, buoys and public piers, have all been established under the general power to regulate commerce. But they are not indispensably necessary to commerce. It might linger on without these aids, though exposed to more perils and losses. So, Congress has authority to coin money, and to guard the purity of the circulating medium, by providing for the punishment *of counterfeiting the current [*386 coin; but laws are also made for punishing the offense of uttering and passing the coin thus counterfeited. It is the duty of the court to construe the constitutional powers of the national government liberally, and to mould them so as to effectuate its great objects. Whence is derived the power to punish smuggling? It does not collect the impost, but it is a means more effectually to prevent the collection from being diminished in amount, by frauds upon the revenue laws. Powers, as means, may then be implied in many cases. And if so, why not in this case as well as any other? The power of making all needful rules and regulations respecting the territory of the United States, is one of the specified powers of Congress. Under this power, it has never been doubted that Congress had authority to establish corporations in the territorial governments. But this power is derived entirely from implication. It is assumed as an incident to the principal power. If it may be assumed in that case, upon the ground that it is a necessary means of carrying into effect the power expressly granted, why may it not be assumed in the present case, upon a similar ground? It is readily admitted that there must be a relation in the nature and fitness of things, between the means used and the end to be accomplished. But the question is, whether the necessity which will justify a resort to a certain means must be an absolute, indispensable, inevitable necessity? The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a political power; it *is a [*387 matter of legislative discretion, and those who exercise it have a wide range of choice in selecting means. In its exercise, the mind must compare means with each other. But absolute necessity excludes all choice; and, therefore, it cannot be this species of necessity which is required. Congress alone has the fit means of inquiry and decision. The more or less of necessity never can enter as an ingredient into judicial decision. Even absolute necessity cannot be judged of here; still less can practical necessity be determined in a judicial forum. The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people. For this purpose, it must inquire whether the means assumed have a connection, in the nature and

1.—1 Bl. Com. 471.
2.—1 Bl. Com. 474.

fitness of things, with the end to be accomplished. The vast variety of possible means excludes the practicability of judicial determination as to the fitness of a particular means. It is sufficient that it does not appear to be violently and unnaturally forced into the service, or fraudulently assumed, in order to usurp a new substantive power of sovereignty. A philological analysis of the terms "necessary and proper" will illustrate the argument. Compare these terms as they are used in that part of the constitution now in question, with the qualified manner in which they are used in the 10th section of the same article. In the latter, it is provided that "no state shall, without the consent of Congress, lay any im- **388*]** posts or duties on imports *or exports, except what may be absolutely necessary for executing its inspection laws." In the clause in question, Congress is invested with the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. There is here, then, no qualification of the necessity. It need not be absolute. It may be taken in its ordinary grammatical sense. The word necessary, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject. This, like many other words, has a primitive sense, and another figurative and more relaxed; it may be qualified by the addition of adverbs of diminution or enlargement, such as very, indispensably, more, less, or absolutely necessary; which last is the sense in which it is used in the 10th section of this article of the constitution. But that it is not always used in this strict and rigorous sense, may be proved by tracing its definition and etymology in every human language.

If, then, all the powers of the national government are sovereign and supreme; if the power of incorporation is incidental, and involved in the others; if the degree of political necessity which will justify a resort to a particular means, to carry into execution the other powers of the government, can never be a criterion of judicial determination, but must be left to legislative discretion; it only remains to inquire, whether a bank has a natural and obvious connection with other express or implied powers, so as to become a necessary and proper means of carrying them into execution. **389*]** A bank *might be established as a branch of the public administration without incorporation. The government might issue paper upon the credit of the public faith, pledged for its redemption, or upon the credit of its property and funds. Let the office where this paper is issued be made a place of deposit for the money of individuals, and authorize its officers to discount, and a bank is created. It only wants the forms of incorporation. But, surely, it will not be pretended, that clothing it with these forms would make such an establishment unconstitutional. In the bank which is actually established and incorporated, the United States are joint stockholders, and appoint joint directors; the Secretary of the Treasury has a supervising authority over its affairs; it is bound, upon his requisition, to transfer the funds of the government wherever they may be wanted; it performs all the duties of commissioners of the loan-office; it is bound to loan the government a certain amount of money on demand; its notes are receivable in payment for public debts and duties; it is intimately connected, according to the usage of the whole world, with the power of borrowing money, and with all the financial operations of the government. It has, also, a close connection with the power of regulating foreign commerce, and that between the different States. It provides a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated. It is true, there are state banks by which a circulating medium to a certain extent is provided. But that only diminishes the quantum of necessity, *which is no [***390** criterion by which to test the constitutionality of a measure. It is also connected with the power of making all needful regulations for the government of the territory, "and other property of the United States." If they may establish a corporation to regulate their territory, they may establish one to regulate their property. Their treasure is their property and may be invested in this mode. It is put in partnership; but not for the purpose of carrying on the trade of banking, as one of the ends for which the government was established, but only as an instrument or means for executing its sovereign powers. This instrument could not be rendered effectual for this purpose but by mixing the property of individuals with that of the public. The bank could not otherwise acquire a credit for its notes. Universal experience shows, that, if altogether a government bank, it could not acquire, or would soon lose, the confidence of the community.

2. As to the branches, they are identical with the parent bank. The power to establish them is that species of subordinate power, wrapped up in the principal power, which Congress may place at its discretion.

3. The last, and greatest, and only difficult question in the cause, is that which respects the assumed right of the states to tax this bank, and its branches, thus established by Congress. This is a question, comparatively of no importance to the individual states, but of vital importance to the Union. Deny this exemption to the bank as an instrument of government, and what is the consequence? There is no express provision *in the [***391** constitution which exempts any of the national institutions or property from state taxation. It is only by implication that the army, and navy, and treasure, and judicature of the Union are exempt from state taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of Congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the states, as that contended for on the other side, is manifestly repugnant to the power of Congress; since a power to establish implies a power to continue and preserve. There is a manifest repugnancy between the power of Maryland to

tax, and the power of Congress to preserve, this institution. A power to build up what another may pull down at pleasure is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operations of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion cannot be controlled by the national councils. Whenever the local councils of Maryland will it, the bank must be expelled from that state. A right to tax without limit or control, is essentially a power to destroy. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. If this power to tax the national property and institutions **392***] *exists in the state of Maryland, it is unbounded in extent. There can be no check upon it, either by Congress or the people of the other states. Is there, then, any intelligible, fixed, defined boundary of this taxing power? If any, it must be found in this court. If it does not exist here, it is a nonentity. But the court cannot say what is an abuse, and what is a legitimate use of the power. The legislative intention may be so masked as to defy the scrutinizing eye of the court. How will the court ascertain, a priori, that a given amount of tax will crush the bank? It is essentially a question of political economy, and there are always a vast variety of facts bearing upon it. The facts may be mistaken. Some important considerations belonging to the subject may be kept out of sight. They must all vary with times and circumstances. The result, then, must determine whether the tax is destructive. But the bank may linger on for some time, and that result cannot be known until the work of destruction is consummated. A criterion which has been proposed, is to see whether the tax has been laid, impartially, upon the state banks, as well as the bank of the United States. Even this is an unsafe test; for the state governments may wish, and intend, to destroy their own banks. The existence of any national institution ought not to depend upon so frail a security. But this tax is leveled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other. It is a fundamental article of the state **393***] *constitution of Maryland, that taxes shall operate on all the citizens impartially, and uniformly, in proportion to their property, with the exception, however, of taxes laid for political purposes. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the state constitution, as not being laid uniformly on all the citizens, in proportion to their property. So that the legislature cannot disavow this to be its object, without, at the same time, confessing a manifest violation of the state constitution. Compare this act of Maryland with that of Kentucky, which is yet to come before the court, and the absolute necessity of repressing such attempts in their infancy, will be evident. Admit the constitutionality of the Maryland tax, and that of Kentucky follows inevitably. How can it be said that the office of discount and deposit in Kentucky cannot bear a tax of sixty thousand dollars per annum, payable monthly? Probably it could not; but judicial certainty is essential; and the court has no means of arriving at that certainty. There is, then, here, an absolute repugnancy of power to power; we are not bound to show that the particular exercise of the power in the present case is absolutely repugnant. It is sufficient that the same power may be thus exercised.

There certainly may be some exceptions out of the taxing power of the states, other than those created by the taxing power of Congress; because, if there were no implied exceptions, then the navy, and other *exclusive [**394** property of the United States, would be liable to state taxation. If some of the powers of Congress, other than its taxing power, necessarily involve incompatibility with the taxing power of the states, this may be incompatible. This is incompatible; for a power to impose a tax ad libitum upon the notes of the bank, is a power to repeal the law by which the bank was created. The bank cannot be useful, it cannot act at all, unless it issues notes. If the present tax does not disable the bank from issuing its notes, another may; and it is the authority itself which is questioned as being entirely repugnant to the power which established, and preserves the bank. Two powers thus hostile and incompatible cannot co-exist. There must be, in this case, an implied exception to the general taxing power of the states, because it is a tax upon the legislative faculty of Congress, upon the national property, upon the national institutions. Because the taxing powers of the two governments are concurrent in some respects, it does not follow that there may not be limitations on the taxing power of the states, other than those which are imposed by the taxing power of Congress. Judicial proceedings are practically a subject of taxation in many countries, and in some of the states of this Union. The states are not expressly prohibited in the constitution from taxing the judicial proceedings of the United States. Yet such a prohibition must be implied, or the administration of justice in the national courts might be obstructed by a prohibitory tax. But such a tax is no more a tax on the legislative faculty of Congress than this. The branch *bank in Maryland is as [**395** much an institution of the sovereign power of the Union as the Circuit Court of Maryland. One is established in virtue of an express power; the other by an implied authority; but both are equal, and equally supreme. All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual states, in every respect, and for every purpose, including that of taxation. This immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction. The immunity of foreign public vessels from the local jurisdiction, whether state or national, was established in the case of The Exchange,[1] not upon

1.—7 Cranch, 116.

positive municipal law, nor upon conventional law; but it was implied, from the usage of nations, and the necessity of the case. If, in favor of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations, for the security of our own national government? So, also, the jurisdiction of a foreign power, holding a temporary possession of a portion of national territory, is nowhere provided for in the constitution; but is derived from inevitable implication.[1] These analogies show that there may be exemptions from state jurisdiction, not detailed in the constitution, but arising out of general considerations. If Congress has power [*396] to do a particular act, *no state can impede, retard, or burthen it. Can there be a stronger ground to infer a cessation of state jurisdiction?

The bank of the United States is as much an instrument of the government for fiscal purposes as the courts are its instruments for judicial purposes. They both proceed from the supreme power, and equally claim its protection. Though every state in the Union may impose a stamp tax, yet no state can lay a stamp tax upon the judicial proceedings or custom-house papers of the United States. But there is no such express exception to the general taxing power of the states contained in the constitution. It arises from the general nature of the government, and from the principle of the supremacy of the national powers, and the laws made to execute them, over the state authorities and state laws.

It is objected, however, that the act of Congress, incorporating the bank, withdraws property from taxation by the state, which would be otherwise liable to state taxation. We answer that it is immaterial, if it does thus withdraw certain property from the grasp of state taxation, if Congress had authority to establish the bank, since the power of Congress is supreme. But, in fact, it withdraws nothing from the mass of taxable property in Maryland, which that state could tax. The whole capital of the bank belonging to private stockholders, is drawn from every state in the Union, and the stock belonging to the United States, previously constituted a part of the public treasure. Neither the stock belonging to citizens of other states, nor the privileged [*397] treasure *of the United States mixed up with this private property, were previously liable to taxation in Maryland; and as to the stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all the other private property in the state. The establishment of the bank, so far from withdrawing anything from taxation by the state, brings something into Maryland which that state may tax. It produces revenue to the citizens of Maryland, which may be taxed equally and uniformly with all their other private property. The materials of which the ships of war, belonging to the United States, are constructed, were previously liable to state taxation. But the instant they are converted into public property, for the public defense, they cease to be subject to state taxation. So here the treasure of the United States, and that of individuals, citizens of Maryland, and of other states, are undistinguishably confounded in the capital stock of this great national institution, which, it has been before shown, could be made useful as an instrument of finance in no other mode than by thus blending together the property of the government and of private merchants. This partnership is, therefore, one of necessity on the part of the United States. Either this tax operates upon the franchise of the bank, or upon its property. If upon the former, then it comes directly in conflict with the exercise of a great sovereign authority of Congress; if upon the latter, then, it is a tax upon the property of the United States, since the law does not, and *cannot, in imposing a [*398] stamp tax, distinguish their interest from that of private stockholders.

But it is said that Congress possesses and exercises the unlimited authority of taxing the state banks; and, therefore, the states ought to have an equal right to tax the bank of the United States. The answer to this objection is, that, in taxing the state banks, the states in Congress exercise their power of taxation. Congress exercises the power of the people. The whole acts on the whole. But the state tax is a part acting on the whole. Even if the two cases were the same, it would rather exempt the state banks from federal taxation than subject the bank of the United States to taxation by a particular state. But the state banks are not machines essential to execute the powers of the state sovereignties, and, therefore, this is out of the question. The people of the United States, and the sovereignties of the several states, have no control over the taxing power of a particular state. But they have a control over the taxing power of the United States, in the responsibility of the members of the House of Representatives to the people of the state which sends them, and of the senators to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other states of the Union. The people of other states are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to the people of that state. The national *gov-[*399] ernment can withdraw nothing from the taxing power of the states which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the states are in perpetual conflict with the interests of the Union; which shows the danger of adding power to the partial views and local prejudices of the states. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property; and it must, consequently, be a tax on the faculty, or franchise. It is, then, a tax on the legislative faculty of the Union, on the charter of the bank. It imposes a stamp duty upon the notes of the bank, and thus stops the very source of its circulation and life. It is as much a direct interfer-

1.—The United States v. Rice, ante, p. 246.

ence with the legislative faculty of Congress as would be a tax on patents, or copyrights, or custom-house papers, or judicial proceedings.

Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety, and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them must be taken by implication; since the sovereign powers of the Union are supreme, and, wherever they come in direct conflict and repugnancy with those of the state governments, the latter must give way; since it has been proved that this is the case as to the institution of the bank, and the general power of taxation by the states; since this power, unlimited and unchecked, as it necessarily must 400*] be, by the *very nature of the subject, is absolutely inconsistent with, and repugnant to, the right of the United States to establish a national bank; if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.

Marshall, Ch. J., delivered the opinion of the court:

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided 401*] peacefully, or remain a source of *hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present constitution. *The bill for incorporat- [*402 ing the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

*It would be difficult to sustain this [*403 proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner

in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure 404*] *the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the 405*] case), is, *emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge, That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, *"this [*406 constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles *of con- [*407 federation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st

article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended 408*] *that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of 409*] a corporation, *if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed *to select [*410 the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which *maintains that a [*411 power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is

conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is 412*] added that of making "all *laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of Congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After al- 413*] lowing each house to prescribe *its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to *produce the end, and not [*414 as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially *the meaning [*415 of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of

human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legis- [*416 lation to circumstances. *If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with more plausibility because it is expressly given in some cases. Congress is empowered "to provide for the pun- [*417 ishment *of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute *impracticabil- [*418 ity of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would re-instate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?"

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of *Maryland contend, it would be an ex- [*419 traordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straightened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that without it Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, Congress would have some choice of means. That it might employ

those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

420*] *2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting

421*] *the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it *would have found a place [*422 among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing the importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions *against it had been confirmed by every [*423 circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended perhaps its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers,

pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

424*] *After this declaration, it can scarcely be necessary to say that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious; the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the 425*] bank itself *may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely *re- [*426 peals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument seldom, if ever, surpassed, have been displayed.

*The power of Congress to create, and [*427 of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate

governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the state of Maryland is, not that the states may directly resist a law of Congress, but that they may ex- 428*] ercise their *acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of 429*]all the states. They are given by all *for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable *to every [*430 case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised *by the respective states, [*431 consistently with a fair construction of the constitution.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to

which they have confided the most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

432*] *If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. This did not design to make their government dependent on the states.

Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between 433*] property and *other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, The Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power which the argument seeks to remove, is stated with fullness and clearness. It is, "that an indefinite power of taxation in the latter (the government *of the Union) might, and [*434 probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for state objects, upon the pretense of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenue; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of The Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they *mean to [*435 prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constitutents, but by people over

whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a *part, [*436 and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument 437*] employed by the government *of the Union to carry its powers into execution. Such a tax must be unconstitutional.

Judgment.—This cause came on to be heard on the transcript of the record of the Court of Appeals of the state of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the act of the legislature of Maryland is contrary to the constitution of the United States, and void; and, therefore, that the said Court of Appeals of the state of Maryland erred in affirming the judgment of the Baltimore County Court, in which judgment was rendered against James W. M'Culloch; but that the said Court of Appeals of Maryland ought to have reversed the said judgment of the said Baltimore County Court, and ought to have given judgment for the said appellant, M'Culloch. It is, therefore, adjudged and ordered, that the said judgment of the said Court of Appeals of the state of Maryland in this case, be, and the same hereby is, reversed and annulled. And this court, proceeding to render such judgment as the said Court of Appeals should have rendered; it is further adjudged and ordered, that the judgment of the said Baltimore County Court be reversed and annulled, and that judgment be entered in the said Baltimore County Court for the said James W. M'Culloch.

*[Instance Court.] [*438

THE GENERAL SMITH.

Hollins et al., Claimants.

The admiralty possesses a general jurisdiction in cases of suits by material men, in personam, and in rem.

Where, however, the proceeding is in rem, to enforce a specific lien, it is incumbent upon the party to establish the existence of such lien in the particular case.

Where repairs have been made, or necessaries furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may maintain a suit in rem in the admiralty, to enforce his right.

But, as to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law; and no lien is implied unless by that law.

By the common law, material men furnishing repairs to a domestic ship, have no particular lien upon the ship itself for their demand.

A shipwright who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs. But if he parts with the possession (of a domestic ship), or has worked upon it without taking possession, he has no claim upon the ship itself.

The common law being the law of Maryland, on this subject, it was held, that material men could not maintain a suit in rem in the District Court of Maryland, for supplies furnished to a domestic ship, although they might have maintained a suit in personam in that court.

APPEAL from the Circuit Court of Maryland.

This was a libel filed on the 4th day of October, 1816, in the District Court of Maryland, setting forth that James Ramsay, the libelant, had supplied and furnished for the use, accommodation, and equipment of the ship General Smith, at Baltimore, in the district of *Maryland, to equip and prepare her for [*439 a voyage on the high seas, various articles of cordage, ship chandlery, and stores, amounting in the whole to the value of $4,599.75, for no part of which he had received any compensation, payment, or security. That the said ship was then owned by a certain George Stevenson, to whom he had applied for payment of said materials furnished, but without effect. And praying the usual process against the ship, and that she should be sold under the decree of the court, to pay and satisfy the libelant his claim.

NOTE.—The above case (The General Smith) is a leading one in the admiralty courts. Its doctrine has been constantly acted upon in the courts of the United States. Peyroux v. Howard, 7 Pet. 324; The Steamer St. Lawrence, 1 Black, 522; Schooner Marion, 1 Story, C. C. 68; Wick v. Schooner Samuel Strong, 6 McLean, 587.

The rule of the English common law is the same (Buxton v. Snee, 1 Vesey, 154; Knapp's reports of cases before the Privy Council on Appeals, Vol. III. 95), that material men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself, or its proceeds, in court, under a decree and sale, for the recovery of their demands, with the exception of the shipwright who has possession of the ship. As long as he retains possession, he has a lien for repairs. The distinction is, that if repairs have been made, or necessaries furnished, to a foreign ship, or to a ship in the port of a state to which she does not

A claim was given for the ship by John Hollins and James W. M'Culloch, merchants of Baltimore.

On the hearing of the cause in the court below, it was proved, or admitted by the parties, that the ship was an American ship, and formerly was the property of George P. Stevenson, a merchant of Baltimore, and a citizen of the United States; and that whilst the ship so belonged to Stevenson, the libelant, a ship chandler of Baltimore, furnished for her use various articles of ship chandlery to equip and furnish her, it being her first equipment to perform a voyage to a foreign country, to wit, to Rotterdam and Liverpool, and back to Baltimore. That Stevenson was also the owner of several other vessels, for which the libelant from time to time furnished articles for their equipment for foreign voyages, and that payments were made by Stevenson to the libelant, at different times, on their general account, without application to any particular part of the account. That the ship soon afterwards sailed, etc. That 440*] the ship departed *from Baltimore, on the voyage, without any express assent or permission of the libelant, and also, without objection being made on his part, and without his having attempted to detain her, or enforce any lien which he had against her for the articles furnished. That the ship continued to be the property of said Stevenson, during the said voyage, and after her return, and was not sold or disposed of in any way by him, until the 3d day of October, 1816, when, finding himself embarrassed in his pecuniary affairs, and obliged to stop payment, he executed an assignment to the claimants of his property, including the ship General Smith, in trust for the payment of all bonds for duties due by said Stevenson to the United States, and for the payment and satisfaction of his other creditors, etc.

Another libel was filed on the 11th of November, 1816, against the same ship, by Rebecca Cockrill, administratrix of Thomas Cockrill, deceased, alleging that the said Thomas, in his life-time, at Baltimore, in the said district, did furnish a large amount of iron materials, and bestow much labor and trouble by himself, and those hired and employed by him, in working up and preparing certain iron materials for building and preparing the said ship for navigating the high seas, all of which materials, and work and labor, were in fact applied and used in the construction and fitting said ship, according to a bill of particulars annexed. That the libelant has been informed, and believes, that said ship is owned and claimed by various persons in certain proportions, but in what proportions, and who are the several owners, she *does not know, and cannot, [*441 therefore, state. That neither the said Thomas, in his life-time, nor the libelant, since his decease, have ever received any part of said account, or any security or satisfaction for the same. Concluding with the usual prayer for process, etc.

A claim was given for the same parties, and at the hearing, the same proofs and admissions were made as in the suit of James Ramsey; except that it did not appear that Thomas Cockrill had furnished any other vessels belonging to Stevenson with materials, or that any payments on account had been made by said Stevenson to said Cockrill, or to the libelant as his administratrix.

The District Court ordered the ship to be sold, and decreed that the libelants should be paid out of the proceeds the amount of their demands for materials furnished. In the Circuit Court this decree was affirmed, pro forma, by consent, and the cause was brought by appeal to this court.

Mr. **Pinkney**, for the appellants and claimants admitted the general jurisdiction of the District Court, as an instance court of admiralty, over suits by material men in personam and in rem, and over other maritime contracts; but denied that a suit in rem could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. In the case of materials furnished or repairs done

---

belong, the general marine law, following the civil law, gives the party a lien on the ship itself for its security, and he may maintain a suit in rem, in the admiralty, to enforce his right. 3 Kent's Comm. 169, 170; The Ship Fortitude, 3 Sumn. 228; 5 Conn. R. 631; 6 Dana. (Ky.) 27, 28; The Brig Nestor, 1 Sumn. 74, 79; The Schooner Marion, 1 Story, 68; Read v. The Hull of a Brig, 1 Story, 246; Davis v. Child, 3 N. Y. Leg. Obs. 147; Zane v. The Brig President, 4 Wash. C. C. 453; Davis v. A New Brig, Gilp. 473; The Jerusalem, 2 Gall. 345; Stevens v. The Sandwich, Pet. Adm. 233, note; Maguire v. Card, 21 How. 248; The St. Lawrence, 1 Black, 522; The St. Jago de Cuba, 9 Wheat. 409; The Jerusalem, 2 Gall. 345; Woodruff v. The Levi Dearborne, 4 Am. Law J. N. S. 97, 98; Sarchet v. The Davis, Crabbe, 185; The Hull of a New Brig, 3 Law Rep. 69; Nall v. The Illinois, 6 McLean, 413; Carroll v. The Leathers, Newb. 432; Leland v. The Medora, 2 Wood. & M. 92; The Sea Lark, 1 Sprague, 571; Whitlock v. The Thales, 20 How. Pr. (N. Y.) 447; The City of N. Y. 3 Blatchf. 187; S. C. 12 N. Y. Leg. Obs. 300; The Cabarga, 3 Blatchf. 75; The Gustavia, Blatchf. & H. 189; Tull v. The Wash. Irving, 7 Int. Rev. Rec. 109; Buddington v. Stewart, 14 Conn. 404.

A person who furnishes supplies to a foreign vessel has no lien on the vessel therefor, unless he show that such supplies could not have been obtained upon the personal credit of the owner. Pratt v. Reed, 19 How. 359; The Sarah Starr, 1 Sprague, 453; The Sea Lark, 1 Sprague, 571; The James Guy, 5 Int. Rev. Rec. 68.

Vessels belonging to one state when in the ports of another are deemed so far foreign that the lien for necessaries attaches. The Hull of a New Brig, 3 Law Rep. 69; The Chusan, 1 Sprague, 39; Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38; Whitlock v. Thales, 20 How. Pr. (N. Y.) 447; Levering v. Bk. of Columbia, 1 Cranch, C. C. 152, 207.

As to whether the vessel is deemed foreign or not, on this subject, depends on the residence of her owners, not on the port of her enrollment. Hill v. The Golden Gate, Newb. 308; S. C. 5 Am. Law Reg. 142; Thomas v. The Kosciusko, 11 N. Y. Leg. Obs. 38; Tree v. The Indiana, Crabbe, 479; The St. Jago de Cuba, 9 Wheat. 409.

For repairs and necessaries furnished in a port or state to which the ship belongs, the case is governed by the local law of the state, and no lien exists except by such law. Boone v. The Hornet, Crabbe, 426; The Eliza Jane, 1 Sprague, 152; The Lillie Mills, 1 Sprague, 307; 8 Law Rep. N. S. 494; The Brig Nestor, 1 Sumn. 74, 79; The Schooner Marion, 1 Story, 246; Buddington v. Stewart, 14 Conn. 404; Harper v. A New Brig, 1 Gilp. 536.

The legislature of New York has specially provided for the collection of demands against ships and vessels, and when liens attach thereon. Act of New York of 24th April, 1862, chap. 482; 2 N. Y. R. S. 500; Act of New York of May 19, 1879, chap. 334. Other states, as Illinois, Indiana, Pennsylvania, Missouri, and Maine, have passed laws regulating liens, and the collection of debts against boats and vessels.

Miscellaneous citations.— Erroneously cited in Gifford v. Livingston, 2 Den. 400, and Rohrbacher v. Jackson, 51 Miss. 752.

4 Wheat. 311–315, 4 L. 578, MILLER v. NICHOLLS.

Jurisdiction of Federal courts — Appellate.— It is sufficient to give Federal court jurisdiction of writ of error to State court, if record show that an act of congress was applicable to case, p. 315.

This rule has been applied in Willson v. Blackbird, etc., Marsh Co., 2 Pet. 251, 7 L. 414, where State court has asserted right of State to regulate commerce in absence of legislation by congress; Satterlee v. Matthewson, 2 Pet. 409, 7 L. 468, where it appeared from record that State court had passed upon question as to whether law making valid void contracts was repugnant to Federal Constitution; Harris v. Dennie, 3 Pet. 302, 7 L. 687, where question as to lien of United States was presented in special verdict in State court; Craig v. Missouri, 4 Pet. 429, 7 L. 910, ruling similarly where record of agreed case raised question as to what constituted "bills of credit," Fisher's Lessee v. Cockerell, 5 Pet. 257, 8 L. 117, holding, however, that certificate of clerk that document was read at trial is not sufficient to make document part of record; Davis v. Packard, 6 Pet. 48, 8 L. 315, where record showed plaintiff to be a foreign consul; likewise in Beaston v. Bank, 12 Pet. 134, 9 L. 1029, where it appeared from record that action was maintainable originally in Federal courts by reason of diverse citizenship; United States v. Eliason, 16 Pet. 301, 10 L. 972, ruling similarly where jurisdictional fact appeared upon record of agreed case; dissenting opinion, Gill v. Oliver, 11 How. 549, 13 L. 808, majority denying jurisdiction, although record showed that party relied upon rights under treaty; Neilson v. Lagow, 12 How. 109, 13 L. 914, as to question involving title of United States to land; McCullough v. Virginia, 172 U. S. 118, where decision of State court was against party claiming protection of constitutional prohibition against impairing obligation of contracts. Cited also in Derby v. Jacques, 1 Cliff. 433, F. C. 3,817, as instance where Federal court allowed writ of error to decision of State court upon agreed state of facts.

Distinguished in Williams v. Norris, 12 Wheat. 124, 6 L. 573, denying jurisdiction where question to which act of congress was applicable was not raised in State court; so also in Crowell v. Randall, 10 Pet. 394, 395, 396, 9 L. 468, 469, where authorities collected and discussed. Criticised and qualified in Maxwell v. Newbold, 18 How. 515, 15 L. 508, holding that the record must show that the question was in fact raised, and further, that the decision was against the right claimed under the act. Distinguished in Columbia Water Power Co. v. Columbia Ry., etc., Co., 172 U. S. 488, where right claimed under Federal law was only incidental to main question decided.

4 Wheat. 316–437, 4 L. 579, McCULLOCH v. STATE OF MARYLAND.*

PAGE.
Established construction of Constitution controls..... 870
Rule for construing Constitution..... 870
United States government one of enumerated powers..... 871
Implied powers of congress 871
Congress may choose means in executing its powers..... 872
States cannot tax national banks..... 877
States cannot control operation of Federal laws..... 879
Remedy for abuse of power of taxation..... 883
Limitation on States' power of taxation..... 885
State power, when conclusive 890
Miscellaneous citations. 892

Stare decisis.— An exposition of the Constitution deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded, p. 401.

This rule has been applied in the following citing cases: Wheeler's Appeal, 45 Conn. 315, holding that where the legislature had long been accustomed to exercise quasi-judicial functions, it could pass a law allowing an appeal, where such right was already barred by statute; Fall v. Hazelrigg, 45 Ind. 585, 15 Am. Rep. 282, applying the principle in construing a statute of frauds; Justice's Opinion, 126 Mass. 594, construing a State Constitution and holding that the exclusive privilege of the house of representatives to issue "money bills," was limited to bills that transferred money from the people to the State and did not include bills appropriating money from the State treasury; Clark v. Mowyer, 5 Mich. 468, construing a statute regulating proceedings at tax sales; Payne v. County, 8 Mo. 476, applying the doctrine of stare decisis, where the action involved a statute regulating the sale of school lands, which had long been acquiesced in and held valid in a similar case. The rule is approved in the following cases, discussing the general subject of construction: Baltimore v. Board of Police, 15 Md. 458, 74 Am. Dec. 580; People v. Blodgett, 13 Mich. 139; Faribault v. Misener, 20 Min. 401; Sears v. Dewing, 14 Allen, 428.

Distinguished upon this point in State v. Fry, 4 Mo. 172, where it was held that although the States generally had not questioned the constitutionality of acts granting divorce, the court was not bound by such acquiescence and would declare a similar act void as impairing the obligation of a contract.

Construction.— In construing a Constitution, the subject, the context and the intention of framers are all to be considered, p. 415.

This rule was quoted and applied in Rhode Island v. Massachusetts, 12 Pet. 723, 9 L. 1260, construing the judiciary act and holding that the jurisdiction of the Supreme Court extended to "controversies of a civil nature" between the States.

---

* Note by W. A. Sutherland.

Constitutional law.— The United States government is one of enumerated powers; it can exercise only the powers granted to it by the Constitution, p. 406.

This elementary principle has been applied in several cases. In the dissenting opinion in In re Neagle, 135 U. S. 87, 34 L. 79, 10 S. Ct. 676, it was argued that where the jurisdiction asserted by a Federal court conflicts with that of a State court, such jurisdiction must be shown to exist by positive law. The majority held, however, that an assault upon a Federal justice was a breach of the peace of the United States, and a marshal who killed a person in repelling such an assault could not be arrested and committed under a State law. So in United States v. Harris, 106 U. S. 636, 27 L. 292, 1 S. Ct. 606, the court denied the power of congress to make it a penal offense under Federal laws for two or more persons in any State to "go in disguise upon the highway or the premises of another for the purpose of depriving persons of the equal protection of the laws." And in In re Barry, 42 Fed. 119, 121, F. C. 1,059 (see also 136 U. S. 605, 608, n., 34 L. 506, 507), it was held that a Federal court could not issue habeas corpus to review the decree of a State court in divorce proceedings awarding the custody of a minor child.

Constitutional law.— In the exercise of its power to make "all laws which shall be necessary and proper" for carrying into execution its enumerated powers, congress may incorporate a bank, pp. 411, 424.

The foregoing rule has been cited and applied in Magill v. Parsons, 4 Conn. 321, holding that as an act incorporating a national bank is constitutional, congress may provide that such bank may sue in any Federal Circuit Court; Luxton v. North River Bridge Co., 153 U. S. 529, 38 L. 810, 14 S. Ct. 892, asserting the power of congress to create a bridge corporation for the purpose of erecting a bridge across navigable waters between two States. In a discussion of the general subject of implied powers two cases have approved the rule — Robinson v. Turrentine, 59 Fed. 555; Thayer v. Hedges, 22 Ind. 285. A Maine case has applied the principle in overruling a motion to set aside a verdict against a person arrested for having in his possession counterfeit bills of a national bank, on the ground that the court admitted a copy of the act establishing the bank as proof of incorporation. The Supreme Court held the act of incorporation to be a public act; that its public nature arose from the fact that such a bank was an agency of the Federal government. In re Rogers, 2 Me. 304.

The court, in Commonwealth v. Morrison, 2 A. K. Marsh. 99, although recognizing the authority of the principal case, criticise the rule in arguing against the constitutionality of an act establishing an "office of discount" in a State. The rule that this power

is to be exercised as an incident to the granted powers of congress excludes the idea that congress may create purely private corporations within the limits of the States, and this is recognized in Williams v. Creswell, 51 Miss. 822, where the court held, however, that congress, by reason of its exclusive jurisdiction over the District of Columbia, could incorporate a savings society there and that such society was entitled to establish an agency in the State on the same terms as any foreign corporation.

Constitutional law.— In order to carry into execution the powers granted by the Constitution, congress may employ those means, in its judgment, the most advantageous. Where such means are really calculated to effect the object instrusted to congress, the courts cannot inquire into the degree of their necessity, pp. 419, 423.

This principle has been invoked in numerous cases to sustain the validity of various acts of congress. Thus Miller, Swayne and Davis, JJ., dissenting in Hepburn v. Griswold, 8 Wall. 629, 631, 19 L. 528, 529, argued that the power of congress to make treasury notes legal tender could be implied from the power to raise and support an army. (See also 2 Duv. [Ky.] 55.) The majority, however, affirmed the decision of the State court in Griswold v. Hepburn, 2 Duv. (Ky.) 26, where the principal case was distinguished on this point. See 8 Wall. 614, 615, 19 L. 523. But Hepburn v. Griswold was overruled in The Legal Tender Cases, 12 Wall. 532, 537, 538, 539, 542, 568, 20 L. 306, 308, 309, 317, where the authority to pass such an act was held to be implied from the grant of power to regulate the currency. See, however, the dissenting opinion of Chase, C. J., Id. pp. 570, 573, 575, 612, 626, 631, 642, 20 L. 318, 319, 320, 332, 336, 338, 341. Again in Lick v. Faulkner, 25 Cal. 418, 419, 421, 432, and George v. Concord, 45 N. H. 438, 440, 442, the legal tender acts have been held valid as incident to the power to declare and carry on war; and in Metropolitan Bank v. Van Dyck, 27 N. Y. 409, 410, 413, 416, 438, 449, 450, 469, 470, 476, 497, 505, 521, 525, and Schollenberger v. Brinton, 52 Pa. St. 35, 59, 63, as incident to power to borrow money on the credit of the United States. But see dissenting opinion in Bank v. Van Dyck, 27 N. Y. 537. In Maynard v. Newman, 1 Nev. 278, and Milliken v. Sloat, 1 Nev. 585, they have been uphold as incident to the general powers of congress. Juilliard v. Greenman, 110 U. S. 438, 439, 441, 442, 445, 450, 28 L. 211, 212, 213, 215, 4 S. Ct. 125, 126, 127, 128, 131, asserts probably the sound rule and holds that the authority to pass such acts is to be implied from the power to regulate the currency.

Several cases apply the principle in sustaining the validity of certain acts, as implied from the general power of congress to regulate interstate and foreign commerce: Interstate Commerce Commission v. Brimson, 154 U. S. 472, 473, 38 L. 1055, 1056, 14 S. Ct. 1131, 1132, affirming the constitutionality of the interstate

commerce act; In re Debs, 158 U. S. 578, 39 L. 1100, 15 S. Ct. 904, holding that congress may provide penalty for obstructing interstate commerce; The City of Salem, 13 Sawy. 612, 37 Fed. 850, upholding an act prescribing the limit of capacity of passenger steamers; Benner v. Dredging Co., 134 N. Y. 163, 30 Am. St. Rep. 654, 31 N. E. 330, denying right of a person injured by operations of a company employed by congress to dredge a navigable river to set up want of authority in such company in an action for damages. See also the dissenting opinion of Harlan, J., in United States v. E. C. Knight Co., 156 U. S. 33, 39, 40, 39 L. 336, 338, 339, 15 S. Ct. 261, 264. The principal case is distinguished in United States v. Boyer, 85 Fed. 429, 430, where it was held that packing-houses engaged in slaughtering cattle for interstate shipment were not instruments of interstate commerce, and that congress could not provide for the inspection of cattle about to be slaughtered. As aiding the execution of the revenue laws the courts have held that congress may provide for the punishment of persons for interfering, by threats or otherwise, with the right to inform a United States marshal of a violation of such laws, In re Quarles, 158 U. S. 537, 39 L. 1082, 15 S. Ct. 961; to provide that persons chargeable with revenue tax shall submit disputed cases to a supervisor of revenue, In re Meador, 1 Abb. (U. S.) 334, F. C. 9,375; to make it a penal offense to destroy papers relating to merchandise which is liable to duty, In re Platt, 7 Bened. 272, F. C. 11,212, and to apply the provisions of the civil service act to the revenue service, Butler v. White, 83 Fed. 581, 582. So also as an incident to its power to levy and carry on war, congress had power to suspend the operation of statute of limitations during the existence of the rebellion, Stewart v. Kahn, 11 Wall. 507, 20 L. 179; to pass the "nonintercourse acts," Hamilton v. Dillin, 21 Wall. 93, 22 L. 532; to enact pension laws and provide penalty for frauds committed in the execution thereof; United States v. Fairchilds, 1 Abb. (U. S.) 77, F. C. 15,067; United States v. Marks, 2 Abb. (U. S.) 535, F. C. 15,721; to provide for compulsory enlistment, Antrim's Case, 1 Fed. Cas. 1063; Ex parte Coupland, 26 Tex. 417; to confiscate enemies' property and provide that it should be a sufficient bar to an action for the recovery of such property, to prove that the plaintiff was a "rebel" within the meaning of the act of congress, Norris v. Doniphan, 4 Met. (Ky.) 409, 429; to provide for the removal to the Federal courts of suits instituted in State courts for acts done under authority of the president during the rebellion, Tod v. Court of Common Pleas, 15 Ohio St. 387; and to authorize the president to suspend the privilege of the writ of habeas corpus in cases contemplated by the Constitution, McCall v. McDowell, 1 Abb. (U. S.) 229, 230, 231, Deady, 254, F. C. 8,673. In aid of a national bankrupt law, congress may provide for the punishment of persons guilty of fraud in the disposition of a debtor's goods, United States v. Pusey, 6 Bank. Reg. 288, 27 Fed. Cas.

632; and provide for compositions with creditors, In re Reiman, 7 Bened. 466, F. C. 11,673, 11 Bank Reg. 33. On the same principle congress may, under a national bankruptcy law, provide that District Courts may transfer franchises of insolvent railroad companies, Sweatt v. Railroad Co., 3 Cliff. 352, F. C. 13,684.

A variety of cases have applied the syllabus principle in sustaining laws passed in aid of other granted powers; In re Jackson, 14 Blatchf. 250, F. C. 7,124, holding that as incident to the power to establish post-offices and post-roads, congress may prohibit the mailing of letters or circulars concerning lotteries; Rhode Island v. Massachusetts, 12 Pet. 721, 9 L. 1259, sustaining the validity of an act providing that the jurisdiction of the Supreme Court shall extend to controversies between two or more States; United States v. Gratiot, 14 Pet. 537, 10 L. 578, holding that the power to "dispose of" public lands includes the power to lease for the purpose of mining; Kohl v. United States, 91 U. S. 373, 23 L. 451, asserting the power of congress to condemn land within the limits of a State for the purpose of erecting Federal buildings; likewise in Cherokee Nation v. Railway Co., 33 Fed. 911, asserting power to condemn land on an Indian reservation to provide a right of way for a railroad; Springer v. United States, 102 U. S. 593, 25 L. 256, holding that the United States in order to enforce payment of an income tax may distrain the real and personal property of the debtor; Fong Yue Ting v. United States, 149 U. S. 713, 37 L. 913, 13 S. Ct. 1022, holding the Chinese registration law valid; Schenck v. Peay, 21 Fed. Cas. 682, holding that if a tax levied by congress is constitutional, provision may be made for absolute forfeiture of property in case of nonpayment; Logan v. United States, 144 U. S. 283, 36 L. 435, 12 S. Ct. 622, upholding an act providing for punishment of persons conspiring to injure prisoners in the custody of a United States marshal; United States v. Gettysburg, etc., Ry. Co., 160 U. S. 681, 40 L. 581, 16 S. Ct. 429, denying jurisdiction of Supreme Court to determine limit to amount of land congress may condemn for the purpose of laying out a national park; Bloomer v. Stolley, 5 McLean, 161, F. C. 1,559, asserting the power of congress to grant an extension of a patent right; Minturn v. Brower, 24 Cal. 663, holding that congress could require that persons who had held land under another government, should, upon the acquisition of the territory by the United States under treaty, submit their titles to a court provided to determine their validity. See also the dissenting opinion of McLean, J., in Dred Scott v. Sandford, 19 How. 542, 15 L. 757.

A Virginia case, testing the validity of an act of congress by the rule laid down in the principal case, held that an act authorizing the sale of land en masse for nonpayment of taxes was not an "appropriate" means for collecting such taxes, if the amount due could be realized by a sale of part. Martin v. Snowden, 18 Gratt. 146. Following the principal case also, several cases have applied

the rule in holding that congress is the exclusive judge as to what is "appropriate" legislation to enforce the provisions of the thirteenth and fourteenth amendments. The constitutionality of the "civil rights" act was thus sustained in United States v. Rhodes, 1 Abb. (U. S.) 48, 50, 51, 56, F. C. 16, 151, and People v. Washington, 36 Cal. 669, where State statutes prohibiting negroes and mongolians from testifying against white persons were held to be void. The Supreme Court, however, uniformly held such legislation void. The power to enact such laws, they declared, is not to be implied from the language of the amendments. The prohibitions contained therein operated directly on the States, and if State statutes were repugnant they were ipso facto void. See, however, the dissenting opinions in these cases: United States v. Reese, 92 U. S. 253, 23 L. 577; Baldwin v. Franks, 120 U. S. 701, 30 L. 776, 7 S. Ct. 667; Civil Rights Cases, 109 U. S. 51, 27 L. 853, 3 S. Ct. 50. The Civil Rights Cases denied the power of congress to prohibit individuals from discriminating against negroes in refusing them admittance to inns and public conveyances in certain cases.

The remaining cases under this head show an extension of the principle: Slaughter House Cases, 10 Wall. 64, 21 L. 405, holding that where a legislature is clothed with power to pass laws to protect the safety and health of the citizens, it may create a monopoly for the purpose of slaughtering cattle and confine its operations to a particular place; Tilley v. Commissioners, 4 Woods, 444, 5 Fed. 656, denying jurisdiction of courts to determine the question as to what is a reasonable regulation of freights and tariffs, where the legislature has power to so regulate; Nicol v. Ames, 89 Fed. 149, asserting power of congress to choose means for collecting revenue tax; Chicago, etc., Ry. Co. v. Attorney-General, 5 Fed. Cas. 597, holding that a provision in the charter of a railroad company that the company should be subject to such regulations as might be enacted by the legislature, gave the legislature a right to provide a schedule of rates; State v. Gleason, 12 Fla. 260, holding that a grant of power in a State Constitution to issue writs of quo warranto, included the power to institute proceedings by information in the nature of quo warranto; Hancock v. Yaden, 121 Ind. 373, 16 Am. St. Rep. 401, 23 N. E. 255, and Martin v. Martin, 20 N. J. Eq. 428, 430, 434, holding that States in the exercise of their power to regulate contracts may prescribe that contracts shall be satisfied in gold or silver coin; Arbenz v. Railroad Co., 33 W. Va. 7, 10 S. E. 16, holding that a grant of power to a city to grant a franchise to a railroad company implies a grant of power to allow the company to establish its own grade, provided the use of streets is not unnecessarily impaired; Union Bank v. Jacobs, 6 Humph. 522, holding that a corporation created to construct a road has power to borrow money to accomplish that object; Ellerman v. Chicago, etc., Stockyards Co., 49 N. J. Eq. 242, 23 Atl. 295, denying right of individual stock-

holders to question acts of directors of a corporation, done in good faith and to accomplish the objects of the corporation; Atkinson v. Railroad Co., 2 Fed. Cas. 110, holding that where the legislature has empowered a corporation to bridge a stream the courts cannot inquire as to whether such action was a discreet exercise of its power; In re Pearson, 8 Fla. 511, where a grant of power to courts to provide for contempt was held to embrace power to punish a member for nonattendance; Joy v. Simpson, 2 N. H. 183, sustaining the power of referees to determine the cost of a reference, holding such determination to be incident to the cause submitted; Groner v. City Council, 77 Va. 490, holding that harbor commissioners appointed by a governor to supervise the dredging of a harbor may appoint an inspector to supervise the disposition of matter excavated. But see the dissenting opinions in Low v. Railroad Co., 52 Cal. 63, and People v. Hoge, 55 Cal. 624. The following cases cite the principal case approvingly upon this point, but without particular application: United States v. Haun, 26 Fed. Cas. 232; Ex parte Selma, etc., R. R. Co., 45 Ala. 728, 6 Am. Rep. 728; Ex parte Henderson, 6 Fla. 294; Davis v. School District, 44 N. H. 405; Armington v. Barnet, 15 Vt. 749, 40 Am. Dec. 706; dissenting opinion; People v. Pullman's P. C. Co., 175 Ill. 167, 170, 51 N. E. 679.

The definition of the term "necessary" as deduced from this rule has been applied in the following cases: Montague v. Richardson, 24 Conn. 348, 63 Am. Dec. 175, holding that a statute exempting from execution property "necessary" to sustain life should be construed to embrace property requisite to enable persons to live in a convenient and comfortable manner; Cotton v. Leon, 6 Fla. 644, 645, defining the term as used in a State Constitution and holding it to mean "appropriate;" Lancaster County v. Green, 54 Neb. 101, 74 N. W. 431, holding necessary powers of a board of county commissioners embrace only those powers "reasonably required by the exigencies of each case;" State v. Hancock, 35 N. J. L. 546, holding that an exemption from taxation of property of a railroad, necessary to accomplish the end for which it was incorporated, embraces all things "suitable and proper" and extends to gravel land purchased to supply material for the repair of roadbeds; Olmstead v. Proprs., etc., 47 N. J. L. 328, construing an act empowering an aqueduct company to condemn lands necessary for its purposes; likewise in National, etc., Co. v. Railroad Co., 54 N. J. Eq. 155, 33 Atl. 865, in determining amount of land necessary for a railroad company; State ex rel. v. Regents, 54 Wis. 170, 11 N. W. 477, holding that under a grant to the regents of a university of all powers "necessary or convenient to accomplish the objects prescribed by law," the regents may impose a fee upon each student for heat and light, although statutes provide that students shall not pay any fees for tuition. See also In re Steele, 2 Flipp. 329, F. C. 13,346. The court, in Moale v. Cutting, 59 Md. 522, however, while citing

the principal case as an instance where the term was construed, held that where an executor was empowered to sell property of an estate when necessary, such term meant absolutely or imperatively necessary. In Leisse v. Railroad Co., 2 Mo. App. 114, the principal case is criticised on this point, the court holding that nothing can be necessary to the accomplishment of an object which can be dispensed with without abandoning the object itself. Accordingly it was held that where land was not indispensable to the enjoyment of a railroad charter, an appropriation of it was unjustifiable. The rule was still further limited in In re Jacobs, 98 N. Y. 112, 50 Am. Rep. 645, where the court held that the question as to whether the means is appropriate is not final for the legislature but may be inquired into by the courts. Here an act "to improve the public health by prohibiting the manufacture of cigars in tenement-houses," although ostensibly a health regulation, was held void. Such an act, it was declared, was inappropriate as a health regulation and destroyed property and interfered with the rights of citizens.

Constitutional law.— The States have no power, by taxation or otherwise, to control in any manner the operations of a bank chartered by the United States, p. 439.

This principle, for which McCulloch v. Maryland is the leading authority, has been applied in holding void numerous State and municipal statutes. Thus a general license tax imposed upon foreign banking corporations has been held inoperative as to national banks or branches thereof. Osborn v. United States Bank, 9 Wheat. 859, 860, 868, 6 L. 233, 235; Owensboro Bank v. Owensboro, 173, U. S. 667; Second National Bank v. Caldwell, 13 Fed. 433; Mayor v. First Nat. Bank, 59 Ga. 648; Carthage v. Bank, 71 Mo. 509, 36 Am. Rep. 495; Pittsburg v. Bank, 55 Pa. St. 48. So also where a State law required banks chartered by the State to pay a bonus for the privilege of doing business, the right to such bonus ceased upon a surrender of its charter by the bank and a reorganization under the acts of congress. State v. Bank, 33 Md. 84. State statutes fixing a maximum rate of interest do not apply to national banks, Farmers', etc., National Bank v. Dearing, 91 U. S. 33, 34, 23 L. 199; Central National Bank v. Pratt, 115 Mass. 545, 15 Am. Rep. 145; Barker v. Bank, 59 N. H. 310; First National Bank v. Garlinghouse, 22 Ohio St. 504, 10 Am. Rep. 759; Bank v. Boylen, 26 W. Va. 557, 53 Am. Rep. 115. Nor can a statute prescribing the form for transferring corporate stock control the transfer of stock in a national bank, Doty v. Bank, 3 N. Dak. 16, 53 N. W. 80. On the same principle the court in State v. Curtis, 35 Conn. 380, 95 Am. Dec. 266, denied a writ of quo warranto to try the right to office of a director in a bank organized under the national currency act. As approving the rule in discussing the general subject, see Citizens' Bank v. Bonny, 32 La. Ann. 242; Commercial Bank v. Nolan, 7 How. (Miss.)

526; First National Bank v. Gruber, 87 Pa. St. 476; note, 96 Am. Dec. 291. The principal case has been distinguished on this point in Bank v. Peterborough, 56 N. H. 45, 46, 22 Am. Rep. 425, 426, where it was held that a general law subjecting the surplus capital of banks to taxation was applicable to national banks, on the ground that a tax upon surplus capital beyond the amount obliged to be carried by the act of congress was but a tax upon bank property and did not impair the operations of the bank. So also in State v. Fields, 98 Iowa, 750, 62 N. W. 654, it was held that an officer of a national bank was amenable to a State law providing a penalty for receiving deposits with a knowledge that the bank was insolvent. Such a law the court declared was a police regulation designed to prevent frauds by banks generally and not an interference with the right of congress to regulate national banks.

This general rule has been modified by act of congress (Rev. Stat., § 5219), and the States may now tax the shares of national banks in the hands of individual stockholders, providing, however, that such taxation does not exceed the rate imposed upon shares of banks organized under State laws. A number of cases distinguishing the principal case do so under this act. Pollard v. State, 65 Ala. 630, 631; Bank of Albia v. Albia, 86 Iowa, 37, 52 N. W. 336; Stetson v. Bangor, 56 Me. 278, 283, 285; Austin v. Boston, 14 Allen, 361; State v. Haight, 31 N. J. L. 402, 403; Salt Lake, etc., Bank v. Golding, 2 Utah, 5, 7, 8, 10. And the act thus empowering the States to levy such tax extends to the Territories, Talbot v. Silver Bow County, 139 U. S. 440, 445, 35 L. 210, 212, 11 S. Ct. 595, 597; People v. Moore, 1 Idaho, 507. The fact that there are no State banks in existence in a particular State does not impair the right of the State to tax the shares of national banks in the hands of individuals. Smith v. Webb, 11 Minn. 507. But where there are such banks and they are exempt from taxation or are taxed in some other manner than on their shares, the tax on national bank shares is invalid. City Bank v. City of Paducah, 2 Flipp. 66, F. C. 2,743; McHenry v. Downer, 116 Cal. 25, 47 Pac. 780; Utica v. Churchill, 33 N. Y. 231, 234. So also where a general law allows taxpayers to deduct bona fide debts from credits subject to taxation, but denies such privilege to owners of national bank stock, there is sufficient discrimination to render the tax void as applied to national bank shares. Mercantile Bank v. Shields, 59 Fed. 954; Wasson v. Bank, 107 Ind. 213, 8 N. E. 100; Bank of Albia v. Albia, 86 Iowa, 37, 52 N. W. 336; Bressler v. Wayne County, 25 Neb. 472, 41 N. W. 357. And the provisions of the act cannot be avoided by assessing the shares of national banks at an excessive value. People v. Weaver, 100 U. S. 543, 25 L. 706. Whether a State may require a national bank to pay on behalf of its respective stockholders the amount assessed against their shares, seems not to have been determined by the Federal courts. The Alabama courts have held that such a requirement is not in conflict with the act of

congress. National Bank v. Mobile, 62 Ala. 291, 34 Am. Rep. 17; Sumter County v. National Bank, 62 Ala. 468, 34 Am. Rep. 32. Stapylton v. Thaggard, 91 Fed. 95, and Boston v. Beal, 51 Fed. 308, however, while not expressly recognizing the power of the States to require such payment, held, that where the tax is levied upon owners of bank shares, to be paid in the first instance by the bank, which shall have a lien upon the shares for reimbursement, no suit can be maintained against the receiver of an insolvent bank where the property represented by shares has disappeared, for there being nothing from which the bank can be reimbursed, the tax will fall upon the assets of the bank. In a Kansas case, where the question arose, this power attempted to be asserted by the State was expressly denied. Bank of Leoti v. Fisher, 45 Kan. 728, 26 Pac. 483.

Constitutional law.— The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government, p. 439.

This principle has, in numerous cases, been made the criterion of the constitutionality of State legislation. United States securities are clearly instruments of the Federal government and not subject to State control. So a State cannot tax such bonds in any way. Such was the holding in Weston v. Charleston, 2 Pet. 466, 467, 469, 7 L. 487, 488, the leading case upon this point, which has been followed in Bank of Commerce v. New York City, 2 Black, 632, 634, 17 L. 455, 456; Van Allen v. Assessors, 3 Wall. 590, 594, 597, 18 L. 237, 238, 239; Grether v. Wright, 75 Fed. 753, 43 U. S. App. 770; State v. City of Newark, 39 N. J. L. 382; State v. Hart, 31 N. J. L. 436; People v. Hoffman, 37 N. Y. 14, 15. Nor can a State, under a general income tax, tax the income derived from interest on United States securities. Bank of Kentucky v. Commonwealth, 9 Bush (Ky.), 48; Opinion of Justices, 53 N. H. 638. The dissenting opinion in Coite v. Society for Savings, 32 Conn. 191, cites the principal case in denying the assertion of the majority that where a State statute provided for a tax upon State banks to be levied on a basis of the total assets of the bank, such tax was upon the corporation as such, and the bank was not entitled to deduct the amount of deposits invested in United States securities. It has been held, however, that where shares of national banks in the hands of stockholders are taxable by the States under the act of congress, regardless of the fact that they are invested in United States bonds, State bank shares so invested are also taxable. People v. Commissioners, 35 N. Y. 447. So also in Home Ins. Co. v. New York, 134 U. S. 598, 33 L. 1029, 10 S. Ct. 594, the Supreme Court held that as a State could tax the franchises of its own corporations, it could take as a basis for such taxation the capital stock of a corporation, although it was invested in United States securities.

The question as to the power of the States to tax United States lands has also been the subject of many decisions where this principle has been universally applied. Thus a State cannot impose a tax upon such lands whether held by the United States for military posts or other strictly Federal purposes, or merely as Indian reservations. Van Brocklin v. Tennessee, 117 U. S. 156, 157, 158, 170, 177, 29 L. 846, 847, 852, 854, 6 S. Ct. 673, 674, 680, 684; United States v. Weise, 2 Wall. Jr. 74, F. C. 16,659; Fagan v. Chicago, 84 Ill. 233; Foster v. Commissioners, 7 Minn. 147; People ex rel. v. United States, 93 Ill. 36, 37, 34 Am. Rep. 158, 159. And even where lands have been granted to a railway company, but the title remains in the United States as a lien for surveyor's fees, they are not subject to taxation by a State. Wisconsin, etc., R. R. Co. v. Taylor Co., 52 Wis. 51, 60, 8 N. W. 833, 838. And this is true, although such company has sold its interest to a third person, in whom title is apparently complete. Tyler v. Cass County, 1 N. Dak. 382, 48 N. W. 233. Upon this principle also temporary buildings erected by the United States upon land leased for a short term have been held to be personal property of the Federal government and not taxable with the land. Andrews v. Auditor, 28 Gratt. 121, 123, 125. See also, on this subject, note in 33 Am. St. Rep. 401. But the principal case is distinguished on this point in Burlington, etc., Ry. Co. v. Hayne, 19 Iowa, 140, where lands granted to a railroad company were held to be taxable by the State after the company became possessed of an unconditional title in fee.

The question as to the constitutionality of State laws conflicting with the power of congress to regulate commerce and impose duties on imports, has been the subject of many decisions, and the extent to which the McCulloch Case has been applied in determining their validity is shown by the following citing cases: Brown v. Maryland, 12 Wheat. 449, 457, 6 L. 689, 692, holding void a State law imposing upon an importer of goods in the original package a license tax for the privilege of selling such goods; Passenger Cases, 7 How. 407, 12 L. 754, holding void a law requiring the master of a vessel to pay a per capita tax upon immigrant passengers (but see dissenting opinion, pp. 532, 534, 538, 12 L. 806, 807, 809); Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 206, 29 L. 163, 5 S. Ct. 829, holding that the privilege of receiving and landing passengers is an incident of interstate commerce and the States cannot restrict it by a tax; Sinnot v. Commissioners, 22 How. 243, 16 L. 247, denying right of a State to require steamboats navigating State waters to register before leaving port, such enrollment having been provided for by act of congress; Minot v. Railroad Co., 2 Abb. (U. S.) 341, F. C. 9,645, holding that a tax upon rolling stock involves a tax upon passengers and freight carried, and is thus void as interfering with interstate commerce; so also in Pullman Co. v. Nolan, 22 Fed. 280, denying the validity of a tax upon Pullman cars on the same ground;

American Fertilizing Co. v. Board of Agriculture, 43 Fed. 610, 612, denying the validity of a license tax exacted for the privilege of selling imported fertilizers; Lin Sing v. Washburn, 20 Cal. 571, holding that a law which prescribes conditions upon which Chinese can reside in a State, is a law restricting immigration and is void; Wood v. Stockwell, 55 Me. 84, holding that where congress has provided for registration of title of enrolled vessels, an act providing for recording of chattel mortgages is inoperative as to such enrolled vessels; State v. North, 27 Mo. 479, holding void a discriminatory law requiring merchants dealing in importations from other States, to take out license; People v. Brooks, 4 Den. 479, holding that a statute taxing officers and crews of vessels engaged in coasting and foreign trade, for the support of a marine hospital, was in conflict with the commerce power of congress and so void. Christiancy, J., dissenting in Walcott v. People, 17 Mich. 93, cited the principal case in denying the majority holding that an act requiring express companies to pay a tax upon the gross amount of business done within the State was not repugnant to the commerce power of congress. In Crandall v. Nevada, 6 Wall. 45, 47, 18 L. 747, 748, a law imposing upon railroads a tax for each passenger carried out of the State was held void, not because it was a regulation of interstate commerce, but on the ground that citizens of the United States, as members of the same community, have a right to pass and repass through any State and such a tax is restrictive of this right. On the same ground also, Joseph v. Randolph, 71 Ala. 507, 46 Am. Rep. 351, denied the validity of a license tax exacted from persons engaged in inducing laborers, by contract or otherwise, to leave the State.

Following this reasoning also it has been uniformly held that the States cannot tax franchises granted by the Federal government: California v. Railroad Co., 127 U. S. 41, 32 L. 158, 8 S. Ct. 1081; San Benito Co. v. Railroad Co., 77 Cal. 521, 522, 19 Pac. 828, 829; San Francisco v. Telegraph Co., 96 Cal. 143, 144, 145, 147, 148, 152, 31 Pac. 11, 12, 14; also in dissenting opinion, People v. Railroad Co., 105 Cal. 598, 599, 38 Pac. 911, 912, where the majority held that the State could tax a franchise given by it to a railway company, such franchise not having become merged in a Federal franchise empowering the company to extend its lines beyond the State. So also in N. P. R. R. Co. v. Carland, 5 Mont. 175, 176, 188, 3 Pac. 149, 156, it was held to be competent for congress to include in a grant of a right of way an exemption of such way from taxation, and a tax imposed by a territory was declared invalid. And Field, J., dissenting, in C. P. R. R. Co. v. California, 162 U. S. 128, 142, 143, 147, 148, 150, 40 L. 916, 920, 921, 922, 923, 16 S. Ct. 780, 785, 787, cites the principal case in arguing that the subsidization of a railroad by congress makes such railroad an instrument of the Federal government and so exempts it from taxation by the States. And

see dissenting opinion, Railroad Co. v. Peniston, 18 Wall. 48, 21 L. 797.

Likewise also the granting of patent rights is an exclusive power of the Federal government, and any interference with it, by taxation or otherwise, on the part of the States is unconstitutional and void. In re Sheffield, 64 Fed. 835; Hollida v. Hunt, 70 Ill. 112, 113, 22 Am. Rep. 65, 66; Commonwealth v. Petty, 96 Ky. 458, 29 S. W. 293. In Commonwealth v. Westinghouse, etc., Co., 151 Pa. St. 271, 24 Atl. 1109, the court went to the extent of holding that the capital of a corporation invested either in the assignment or grant of a patent right, was not taxable by the State. Federal officers also are so far considered to be instruments of the Federal government that their salaries are exempt from taxation by the States under general income tax laws. Dobbins v. Commissioners, 16 Pet. 449, 10 L. 1027. And on this principle the Supreme Court annulled a State statute taxing messages transmitted by a telegraph company so far as it purported to operate upon messages sent or received by the Federal government, Telegraph Co. v. Texas, 105 U. S. 466, 26 L. 2068. Again, a Confederate court held that an officer appointed by the Confederate congress under the revenue laws and actually engaged in the duties of his office was not subject to enrollment in the militia under a call from the governor of a State. Cobb v. Stallings, 34 Ga. 77. The dissenting opinion in Searight v. Stokes, 3 How. 178, 11 L. 550, distinguished the principal case upon this point in arguing that a toll was not a tax and that United States mail coaches were not exempt from payment, but the majority held otherwise, and declared the act providing for collection of toll on State bridges void as operating on Federal agencies. Western Union, etc., Co. v. New York, 38 Fed. 554, also distinguished the principal case in holding that in the exercise of its police power, a State could compel a telegraph company to put its wires under ground in cities of a certain size. The principal case is also cited approvingly but without particular application to the point at issue in dissenting opinion, West River Bridge Co. v. Dix, 6 How. 548, 12 L. 552, and in King v. Hunter, 65 N. C. 613, 6 Am. Rep. 758; dissenting opinion, People v. Dibble, 16 N. Y. 226.

The remaining cases under this head are of a miscellaneous nature. Upon the principle that the Federal government is supreme within its sphere they have denied the validity of various State laws: Haas v. Misner, 1 Idaho, 173, holding void an act of territorial legislature requiring payment of taxes in gold or silver coin, congress having provided that treasury notes should be legal tender in payment of all debts; Globe Ins. Co. v. Cleveland Ins. Co., 14 Bank. Reg. 311, 10 Fed. Cas. 491, denying validity of an assignment under a State law while a national bankruptcy law was in force; so also in In re Brinkman, 7 Bank. Reg. 424, 426, 4 Fed. Cas. 146, denying jurisdiction of a State court to administer the estate of a

bankrupt; Wood v. Drake, 70 Fed. 883, holding that an action against a United States marshal for false imprisonment may be removed to a Federal court, although the complaint is so worded as to conceal the fact that the defendant is a Federal officer; United States v. Cathcart, 1 Bond, 561, F. C. 14,756, holding that articles of secession did not operate to release citizens of seceding States from their obligations of loyalty to the United States, and a person joining in the rebellion was held liable to indictment for treason; People ex rel. v. Assessors, 156 N. Y. 419, 420, 51 N. E. 270, denying power of a State to tax patent rights. The following cases cite the principal case approvingly in discussing generally the subject of sovereignty: United States v. Texas, 143 U. S. 646, 36 L. 293, 12 S. Ct. 494; The Hiawatha, Blatchf. Pr. 12, F. C. 6,451; Hawkins v Filkins, 24 Ark. 300, 301; dissenting opinion, Munn v. Illinois, 69 Ill. 99. See also dissenting opinion, Ex parte Clarke, 100 U. S. 413, 25 L. 730.

Taxation.—The power of taxation may be exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it, and the remedy for the abuse of this power is political and not judicial, p. 428.

This dictum of Chief Justice Marshall has been applied in numerous cases in which the plenary power of the State legislatures is asserted. Thus it has been held that the amount of the tax to be levied is exclusively within the discretion of the legislature. Spencer v. Merchant, 125 U. S. 355, 31 L. 767, 8 S. Ct. 926; Emery v. Gas Co., 28 Cal. 354; New Orleans v. Duncan, 2 La. Ann. 186, 187; Bordelon v. Lewis, 8 La. Ann. 472; People v. Fitch, 148 N. Y. 78, 42 N. E. 520; Henry v. Chester, 15 Vt. 467. The basis of assessment and the manner in which the assessment shall be made is also determinable by the legislature, or the municipality to which it has granted the power of taxation. Van De Griff v. Haynie, 28 Ark. 278; Daily v. Swope, 47 Miss. 380, 389; Porter v. Railroad Co., 76 Ill. 573; King v. Portland, 2 Or. 154; Winona, etc., Ry. Co. v. Watertown, 1 S. Dak. 56, 44 N. W. 1075. So also it is the function of the legislative power to determine the objects on which the power is to be exercised, and the purpose for which it is to be applied. Harrison v. Willis, 7 Heisk. 41, 45, 19 Am. Rep. 607, 610; Thompson v. State, 17 Tex. App. 257; Cheney v. Jones, 14 Fla. 610; People v. Brooklyn, 4 N. Y. 426, 55 Am. Dec. 271; Guest v. Brooklyn, 69 N. Y. 516; State ex rel. v. Toledo, 48 Ohio St. 132, 26 N. E. 1066; Norfolk v. Chamberlain, 89 Va. 226, 227, 229, 230, 16 S. E. 739, 740, 741; Langhorne v. Robinson, 20 Gratt. 668. See also dissenting opinion, State v. Mann, 76 Wis. 497, 46 N. W. 56. The question as to whether the legislature may levy a tax for the purpose of subsidizing a quasi-public corporation, has arisen in several cases which have affirmed the power in denying the jurisdiction of the courts to consider the policy of such a law. People v.

Pacheco, 27 Cal. 224; S. & V. R. R. Co. v. Stockton, 41 Cal. 166; Leavenworth v. Miller, 7 Kan. 519, 527, 12 Am. Rep. 449, 455; Hallenbeck v. Hahn, 2 Neb. 414; Railroad Co. v. Commissioners, 1 Ohio St. 103; Sharpless v. Philadelphia, 21 Pa. St. 187, 59 Am. Dec. 773. And see dissenting opinions in Treadway v. Schnauber, 1 Dak. Ter. 267, 46 N. W. 475, and Hanson v. Vernon, 27 Iowa, 85; see also note, 15 Am. Rep. 60. In Pullan v. Kinsinger, 2 Abb. (U. S.) 112, F. C. 11,463, it was even asserted that in exercising this power the legislature could provide that a tax authorized could not be the subject of a suit in any court. The principle has also been applied in holding that where the legislature has power under the Constitution to lease a railroad, the courts cannot question the wisdom of its act. Georgia v. Railroad Co., 66 Ga. 567. And in Dover v. Portsmouth Bridge, 17 N. H. 227, it was held that where the legislature had authorized the erection of a bridge across a navigable stream, it was not for the courts to determine whether public convenience required such bridge. The rule is also approved in State v. B. & O. R. R. Co., 48 Md. 86, and Raton, etc., Co. v. Town of Raton, 49 Pac. 906, in discussing the general subject of exemption from taxation.

Upon the principle that the power of taxation is a purely legislative function, several cases have held that it cannot be delegated by the legislature to any other body. Houghton v. Austin, 47 Cal. 654; State v. Des Moines, 103 Iowa, 85, 64 Am. St. Rep. 163, 72 N. W. 642; Pope v. Phifer, 3 Heisk. 699. See also note, 74 Am. Dec. 591, where cases are collected. In Wells, Fargo & Co. v. Board of Equalization, 56 Cal. 202, however, the court upheld the power of the legislature to so delegate its authority, but held that the assessment in question was void for other reasons.

The Ohio courts, while admitting that the power to tax is unlimited, have denied the power of the legislature to yield it up entirely, and have held that acts of one legislature exempting corporations from taxation could be repealed by a subsequent legislature. De Bolt v. Insurance Co., 1 Ohio St. 589; Knoup v. Piqua Bank, 1 Ohio St. 610, 618. When the latter case came before the Federal Supreme Court on appeal, however, this was denied, and the act chartering a bank and exempting it from taxation held to be a contract and not revocable by the legislature. In two later cases the authority of the Supreme Court was recognized, but Bartley, J., dissented in both, declaring that a "surrender of the essential functions of the sovereign authority of the State" could not be made the subject of contract. Matheny v. Golden, 5 Ohio St. 407, 434; Piqua Bank v. Knoup, 6 Ohio St. 423. In other cases it has been held that exemption from taxation can never be presumed, and where bonds of the State were not expressly exempted, a tax upon them was valid. Champaign Bank v. Smith, 7 Ohio St. 57; Trustees v. Ellis, 38 Ind. 5. See also the dissenting opinions in State Bank v. Knoop, 16 How. 398, 409, 14 L. 989, 994, and Dodge v. Woolsey, 18 How. 376, 15 L.

420, the majority in both cases holding that where a corporation is exempt from taxation by charter, the courts will declare an act repealing such exemption void. To the same effect is Farrington v. Tennessee, 95 U. S. 687, 688, 24 L. 560. In People v. Roper, 35 N. Y. 634, however, the court held that where a statute has, from motives of public policy, exempted a certain class from taxation, without any consideration, the legislature may repeal it.

A number of cases distinguish the principal case upon this point, in holding it to be within the power of the courts to determine whether the tax in question is repugnant to the Constitution; Loan Association v. Topeka, 20 Wall. 663, 22 L. 461; San Mateo County v. Railroad Co., 8 Sawy. 249, 13 Fed. 731; Beebe v. State, 6 Ind. 516, 63 Am. Dec. 404; Hanson v. Vernon, 27 Iowa, 49, 1 Am. Rep. 230; Deal v. County, 107 Mo. 470, 18 S. W 26; Chauvin v. Valiton, 8 Mont. 462; State v. Assessors, 48 N. J. L. 11, 57 Am. Rep. 524, 2 Atl. 795; McCullough v. Brown, 41 S. C. 250, 19 S. E. 473 (but see dissenting opinion, p. 262, 19 S. E. 478); McBean v. Chandler, 9 Heisk. 358, 24 Am. Rep. 312; Danville v. Sheldon, 76 Va. 328. See also the dissenting opinion in Speer v. School Directors, 50 Pa. St. 177. In the dissenting opinion in State v. Nemaha County, 7 Kan. 558, 560, it was acknowledged that the courts could not inquire as to the excessiveness of the levy, but that was the extent to which the rule in the principal case was to be applied, and it was in the power of the judiciary to determine whether the object of the tax was legitimate. There is authority also for holding that where a city has extended its limits to embrace land used for purely agricultural purposes, a city tax imposed upon such land by the authority of the legislature, merely for the purpose of increasing the city revenue, is void, as being in effect a taking of private property without compensation. Morford v. Unger, 8 Iowa, 91; Buell v. Ball, 20 Iowa, 293; dissenting opinion in Kelly v. Pittsburg, 85 Pa. St. 184. But in Linton v. Athens, 53 Ga. 594, the court held that a person purchasing such lands after the extension of the city limits could not object to a city tax upon the ground that he derived no benefit from it. The principal case is cited, arguendo, upon this point in Pollock v. Farmers' Loan & Trust Co., 158 U. S. 621, 39 L. 1120, 15 S. Ct. 914, remarking that a safeguard against abuse of the taxing power was to be found in the Federal constitutional provision that direct taxation and representation in the lower house of congress should be adjusted upon the same measure. It is also cited in the dissenting opinion, Pennsylvania v. Wheeling Bridge Co., 18 How. 445, 15 L. 443, on the point "that the power to tax involves the power to destroy," but the application is not apparent.

Taxation is an incident of sovereignty, and all subjects over which the sovereign power of a State extends, are objects of its taxation, p. 429.

This rule, for which McCulloch v. Maryland is the leading au-

thority, has been cited in numerous cases as a test in determining the validity of various State laws on the subject of taxation. In some of these cases it was argued that railroads subsidized and employed by the Federal government, constituted instruments of that government, and as such were exempt from taxation by the States. But the courts, drawing a distinction between instruments, or agencies, and mere agents, held such railroads to be the latter, and so taxable by the States for so much of their property as lay within the territory of the States. Thompson v. Pacific R. R. Co., 9 Wall. 588, 589, 590, 19 L. 797, 798; Railroad Co. v. Peniston, 18 Wall. 34, 35, 21 L. 792, 793; Central Pacific R. R. Co. v. California, 162 U. S. 121, 125, 40 L. 913, 914, 16 S. Ct. 777, 778; Union Pacific R. R. Co. v. Lincoln Co., 1 Dill. 320, 321, F. C. 14,378; People v. Central Pacific R. R. Co., 43 Cal. 426, 627, 428, 429; Central Pacific R. R. Co. v. Board of Equalization, 60 Cal. 61, 62. But see dissenting opinion, Railroad Co. v. Peniston, 18 Wall. 38, 43, 45, 21 L. 794, 796, 797, arguing contra. The fact that a railroad is engaged in interstate commerce and extends its lines beyond the limits of the State, does not exempt it from taxation by the State. And in assessing such company the State may adopt as a basis the gross receipts or gross tonnage carried within the State or the value of property owned by the company within the State, State v. Baltimore & O. R. R. Co., 34 Md. 372; State v. Philadelphia, etc., R. R. Co., 45 Md. 378, 24 Am. Rep. 513; Board of Assessors v. Railroad Co., 48 N. J. L. 146, 4 Atl. 578, reversing 48 N. J. L. 11, 57 Am. Rep. 524, 2 Atl. 795; Tonnage Tax Cases, 62 Pa. St. 292, 294, 298, 1 Am. Rep. 403, 406, 410. See, however, the dissenting opinion in State v. Railroad Co., 30 N. J. L. 492. Express companies doing an interstate business are likewise taxable. Adams Express Co. v. Ohio, 165 U. S. 194, 41 L. 683, 17 S. Ct. 305 (dissenting opinion, however, citing principal case in declaring tax void as interfering with interstate commerce, p. 230, 41 L. 698, 17 S. Ct. 312); Osborn v. Mobile, 44 Ala. 499; Southern Express Co. v. Hood, 15 Rich. L. 75, 82, 94 Am. Dec. 141, 147. Pullman and refrigerator cars, also, which are used on lines extending through two or more States, have been held to have a situs in each State, and to be subject to taxation on a fair proportion of their value. Pullman Co. v. Twombley, 29 Fed. 663, 664; Carlisle v. Pullman Co., 8 Colo. 327, 7 Pac. 168; Union Refrigerator, etc., Co. v. Lynch, 55 Pac. 641. Telegraph companies are also held to be within this rule. Western Union Telegraph Co. v. Mayer, 28 Ohio St. 533. And a State case has asserted the authority of the State to tax a toll-bridge erected by authority of congress. Louisville Bridge Co. v. Lousiville, 81 Ky. 196. In Ex parte Crandall, 1 Nev. 304, the State court held valid, a law exacting a capitation tax from railroad and stage companies for each passenger carried out of the State, declaring that such a tax did not conflict with the commerce power of congress.

This decision was, however, reversed in Crandall v. Nevada, 6 Wall. 45, 47, 18 L. 747, 748, upon the ground that the tax operated as a restriction upon the right of citizens of other States to pass through that State.

Similar cases are those which hold that as part of the property of a steamboat company, a State may tax steamboats plying between different States. Battle v. Mobile, 9 Ala. 237, 44 Am. Dec. 439; New Orleans v. Eclipse, etc., Co., 33 La. Ann. 648, 39 Am. Rep. 280; Perry v. Torrence, 8 Ohio, 524, 32 Am. Dec. 728; Howell v. State, 3 Gill, 21, 23, 26, 29. And the Supreme Court has held this to be true, although such vessels are licensed and enrolled under United States laws. Transportation Co. v. Wheeling, 99 U. S. 279, 281, 283, 25 L. 414, 415. Where, however, the company has its place of business in another State, where the boats are also taxed, a State wherein such boats are simply registered cannot tax them as property. St. Louis Ferry Co., 11 Wall. 429, 20 L. 194. And see dissenting opinion in Commonwealth v. Ferry Co., 98 Pa. St. 121. And while the States may so tax steamboats, they cannot do so at a rate per ton, in violation of the constitutional prohibition against laying a tonnage duty. State Tonnage Tax Cases, 12 Wall. 224, 20 L. 377.

The question, as to whether a license tax which operates upon goods which have been imported into the States is void as being a regulation of commerce or a duty upon imports, has frequently arisen. Such laws have been held valid upon the ground that when importations become incorporated into the mass of other property within a State they become subject to the State's unlimited power of taxation. So a tax upon liquor sold is not necessarily a tax upon liquor imported. License Cases, 5 How. 593, 619, 12 L. 296, 308; State v. Wheeler, 25 Conn. 294; State v. Allmond, 2 Houst. 635; Santo v. State, 2 Iowa, 199, 63 Am. Dec. 498; Anderson v. Brewster, 44 Ohio St. 581, 9 N. E. 686. It was even held in Davis v. Dashiell, Phill. (N. C.) 116, that such a tax was valid, although it discriminated against imported liquors by taxing them at a higher rate, but the correctness of this decision is doubtful, as the Supreme Court in Ward v. Maryland, 12 Wall. 427, 20 L. 451, has established the rule that the validity of such laws is conditioned upon their uniform operation. See also upon this point, Nashville, etc., Ry. Co. v. Taylor, 86 Fed. 186, 187; State v. Pennoyer, 65 N. H. 117, 18 Atl. 881; also note, 23 Am. St. Rep. 28. Upon this principle, a State may impose a tax upon drummers, and such a tax will operate, although it may in certain cases affect drummers dealing solely in imported goods. Padelford v. Savannah, 14 Ga. 484, 496, 501; Ex parte Robinson, 12 Nev. 275, 28 Am. Rep. 802; Wynne v. Wright, 1 Dev. & B. 21. And see dissenting opinion, Atkins v. Randolph, 31 Vt. 246. The dissenting opinion in State v. Cumberland, etc., R. R. Co., 40 Md. 60, cites the principal case in arguing that

a State could impose a tax upon coal transported from mines to points within the State or elsewhere for sale. The majority, however, held such a tax to be a restriction upon interstate commerce, and, therefore, void.

Although, as was noted under another head, the courts have established the rule that national bank shares are not taxable by the States in absence of congressional authorization, there is authority for holding such shares to be distinguishable from the capital stock of the bank proper, and taxable in the hands of individual holders. National Bank v. Commonwealth, 9 Wall. 361, 19 L. 703; National Commercial Bank v. Mobile, 62 Ala. 291, 34 Am. Rep. 17; Berney v. Tax Collector, 2 Bailey L. 683, 684, 685, 686, 687, 688; Charleston v. Weston, Harper L. (S. C.), 343, 349 (reversed on appeal by Supreme Court, but see dissenting opinion, 2 Pet. 473, 479, 7 L. 490, 491). Other cases have held that while Federal securities are not taxable as such by the States, deposits in a bank which are invested in such securities are taxable as any other property provided they are not discriminated against. Society for Savings v. Coite, 6 Wall. 605, 18 L. 902; People v. Commissioners, 23 N. Y. 203, 205; People v. Bradley, 39 Ill. 133, 134. The real property of national banks is expressly declared in the principal case, to be subject to State taxation, and the validity of such a tax was sustained in State v. First National Bank, 4 Nev. 351.

Other authorities in applying the doctrine here under consideration have held that bonds of a foreign corporation are taxable in the hands of persons resident in the taxing State. State v. Bentley, 23 N. J. L. 542; McKeen v. County of Northampton, 49 Pa. St. 524, 88 Am. Dec. 516; Webb v. Burlington, 28 Vt. 192. And this is true, although the corporation is exempt from taxation in the State where it was created. Appeal Tax Court v. Paterson, 50 Md. 369; State v. Branin, 23 N. J. L. 495, 507. On the other hand, a South Carolina case is authority for holding that dividends received by stockholders in a corporation are not taxable by a State which has exempted the corporation itself from taxation. State v. Charleston, 5 Rich. L. 570, 571, 574, 575. Bonds issued by a State or by a State corporation are not taxable by the State in the hands of nonresidents, according to State v. Ross, 23 N. J. L. 521; Singer, etc., Co. v. Heppenheimer, 58 N. J. L. 639, 34 Atl. 1063. To the same effect is the dissenting opinion of Field, J., in United States v. Erie Ry. Co., 106 U. S. 334, 27 L. 155, 1 S. Ct. 231, arguing that bonds issued by a railway company are not taxable in the hands of nonresident aliens. Credits, generally, are held to have a situs for taxation in the State where the creditor resides, and are taxable there, although the debt is secured by mortgage on property elsewhere. Kirtland v. Hotchkiss, 100 U. S. 497, 25 L. 561; Mackay v. San Francisco, 113 Cal. 399, 45 Pac. 698; Redmond v. Commissioners, 106 N. C. 125, 10 S. E. 846; Catlin v. Hull, 21 Vt. 160. The Supreme Court, in

Nevada Bank v. Sedgwick, 104 U. S. 111, 26 L. 704, affirmed the power of a State to tax the capital of a bank chartered by it, although part of such capital is invested in foreign countries. To the same effect is Faxton v. McCosh, 12 Iowa, 531. And a State may tax mortgages, irrespective of the residence of the mortgagees. Savings Society v. Multnomah County, 169 U. S. 427, 42 L. 805, 18 S. Ct. 394; Mumford v. Sewall, 11 Or. 68, 50 Am. Rep. 463, 4 Pac. 586.

Several cases assert the right of the States to impose license taxes upon occupations. Jones v. Page, 44 Ala. 658; Young v. Thomas, 17 Fla. 171, 35 Am. Rep. 94; Langville v. People, 4 Tex. App. 324; Ould v. Richmond, 23 Gratt. 467, 14 Am. Rep. 140. In Ex parte Williams, 31 Tex. Cr. 272, 20 S. W. 581, it was argued that such a tax was inoperative as applied to lawyers, on the ground that they were State officers, and the State would thus be imposing a tax upon its instruments, but the court held otherwise. A North Carolina case has held that the tax applied to persons licensed under the laws of the United States, denying the contention that a Federal license rendered the licensee a Federal officer. State v. Bell, Phill. (N. C.) 85, 90.

As an incident of this unlimited power of taxation, several cases have affirmed the power of the States to provide for summary process to collect taxes in case of default in payment. Gibson v. Mason, 5 Nev. 306; Rhinehart v. Schuyler, 2 Gilm. 507. Or to provide that taxes due the State shall constitute a lien upon all the property of the debtor. Doe v. Gledney, 8 Ga. 482. Or to provide for the disfranchisement of delinquents. Frieszleben v. Shallcross, 9 Houst. (Del.) 98, 19 Atl. 592. And in State v. Central Pacific R. R. Co., 21 Nev. 264, 30 Pac. 690, the court went to the extent of holding valid a law providing that a former recovery should not constitute a defense to an action to recover taxes.

The remaining cases under this head are of a miscellaneous nature, and cite the principal case in affirming and denying the validity of various State laws: Providence Bank v. Billings, 4 Pet. 563, 7 L. 956, and Macon v. Bank, 60 Ga. 137, holding that a bank chartered by a State is subject to taxation by the State, unless expressly exempted; Henderson Bridge Co. v. Henderson City, 173 U. S. 622, holding State power to tax a bridge was not affected by the fact that the building of the bridge was authorized by congress; Forbes v. Gracey, 9 Fed. Cas. 404, holding that the States may tax ore taken from mines, although such mines are on United States lands; People v. Naglee, 1 Cal. 236, 52 Am. Dec. 316, is to the same effect; In re Strawbridge, 39 Ala. 387, 388, 390, holding that an act exempting agriculturists from military service in the Confederate States, did not restrict the right of the States to subject such person to service in the militia; Kellogg v. Union Co., 12 Conn. 25, asserting the power of a State to grant to a

private corporation the right to take tolls from persons passing up and down a navigable river within its territory; Anderson v. Van Brocklin, 15 Lea, 36, holding land acquired by United States at tax sale, not to be exempt from taxation, where such land is not used for government purposes; North Missouri, etc., R. R. Co. v. Maguire, 49 Mo. 500, 8 Am. Rep. 146, holding valid, a law providing that a tax levied upon the gross earnings of a railroad company should be applied upon the indebtedness due the company on bonds issued by the State; People v. Equitable Trust Co., 96 N. Y. 394, holding that franchise taxes levied by a State must be confined to corporations created by it; Pullen v. Commissioners, 66 N. C. 362, sustaining the validity of a tax upon legacies and collateral descents; Commonwealth v. Standard Oil Co., 101 Pa. St. 145, holding that the purchase in Pennsylvania of crude petroleum by an Ohio corporation, did not constitute "doing business," within the meaning of a statute requiring payment of a business license; Ex parte Hunter, 2 W. Va. 152, holding that a State may require lawyers to take an oath to support the Constitution before being allowed to practice.

The principal case is cited approvingly upon this point, in the following cases, which, however, give the rule no particular application; East Saginaw, etc., Co. v. East Saginaw, 19 Mich. 280, 2 Am. Rep. 90; dissenting opinion, Savings Bank v. Nashua, 46 N. H. 404; Northern Pacific R. R. Co. v. Barnes, 2 N. Dak. 322, 329, 51 N. W. 387, 389; Mills v. Charleton, 29 Wis. 412, 417, 9 Am. Rep. 585, 589; Macon v. Patty, 57 Miss. 388, 34 Am. Rep. 456. See also the notes in 27 Am. Rep. 640, and 32 Am. Rep. 538.

Constitutional law.— The sovereignty of a State extends to everything that exists by its own authority or is introduced by its permission, p. 429.

That the States are supreme within their respective spheres is a principle deducible from the rule thus stated in the principal case. As has been noted, the instruments of the Federal government are exempt from control by the States, so by a parity of reasoning, a number of cases have declared that the Federal government can exercise no control over the means adopted by the States to carry into effect their sovereign power. Thus it has been held that congress cannot tax the process of State courts requiring such process to be stamped to insure its validity. Smith v. Short, 40 Ala. 388; Fifield v. Close, 15 Mich. 508; Union Bank v. Hill, 3 Cold. 335; Jones v. Keep, 19 Wis. 374, 375. Nor can congress provide rules of evidence for State courts. Upon this ground the courts have held that an internal revenue act of congress, requiring notes and mortgages and other evidences of debt to be stamped before being admitted as evidence, was inoperative as to State courts. Bumpass v. Taggart, 26 Ark. 402, 7 Am. Rep. 625; Latham v. Smith, 45 Ill. 30; Craig

v. Dimock, 47 Ill. 314. Likewise official bonds given to a State by its officers cannot be avoided because not stamped as provided by such act of congress. State v. Garton, 32 Ind. 4, 5, 2 Am. Rep. 318. To the same effect is Davis v. Richardson, 45 Miss. 503, 7 Am. Rep. 734, where the court in denying that failure to affix a revenue stamp rendered an instrument void, nevertheless admitted that such failure rendered the person amenable to the penalty provided by congress. In the dissenting opinion in Jones v. Keep, 19 Wis. 381, 386, supra, it was argued that an act requiring process to be stamped did not impair such process, and there could be no objection to it by the States. And following the same reasoning, Muscatine v. Sterneman, 30 Iowa, 529, 530, 6 Am. Rep. 687, affirmed a decision refusing to admit an official bond as evidence, because not stamped. It has been held also that an internal revenue tax cannot operate upon mortgages held by a city as security for a debt due from a railroad company. U. S. v. Baltimore & O. R. Co., 24 Fed. Cas. 979. To the same effect also is United States v. Railraod Co., 17 Wall. 322, 21 L. 597, although Clifford and Miller, JJ., dissenting, cited McCulloch v. Maryland in arguing contra, 17 Wall. 334, 21 L. 602. The dissenting opinion in Veazie Bank v. Fenno, 8 Wall. 551, 19 L. 488, argues in favor of this rule, but the majority held that under its power to regulate the currency, congress could impose a tax upon the notes of a State bank, even though such tax were prohibitive and operated to drive the notes out of circulation. Upon the same principle the United States courts have denied the right of congress to impose a tax upon the salary of a State judicial officer. Collector v. Day, 11 Wall. 123, 127, 20 L. 125, 127; Day v. Buffinton, 3 Cliff. 387, 388, 392, 394, F. C. 3,675. See also dissenting opinion, Pollock v. Trust Co., 158 U. S. 693, 39 L. 1145, 15 S. Ct. 942. The principal case is distinguished upon this point, however, in Manhattan Co. v. Blake, 148 U. S. 426, 37 L. 509, 13 S. Ct. 645, where it was held that a tax by congress upon the deposits in a bank was not void, because such deposits consisted, in part, of State funds, for the safekeeping of which the bank was paid by the State.

The rule has received a still wider application in those cases which deny the power of the legislature, or municipalities to which it has granted the power of taxation, to impair the instruments of the State. So in Commonwealth v. Mann, 5 Watts & Serg. 417, it was held that where the State Constitution provided that the salary of a judge should not be reduced during his term, the legislature could not tax it as income. To the same effect also is New Orleans v. Lea, 14 La. Ann. 194. And in Newark Bank v. Assessor, 30 N. J. L. 17, it was denied that State bonds were taxable by a city in the hands of an individual. In a Louisiana case also it was held that municipal bonds were not taxable by the State, but the dissenting opinion citing the principal case on the point that taxation is an incident of State sovereignty, argued that as the State Constitution did not

exempt such bonds from taxation, the tax was valid. State v. Assessors, 35 La. Ann. 660, 665. Again in Egerton v. New Orleans, 1 La. Ann. 436, it was held that taxes collected by a city for certain purposes were not subject to execution on a judgment rendered against the city. The principal case is distinguished upon this point in two cases. In New Orleans v. Insurance Co., 23 La. Ann. 62, the court declared that bonds issued by a corporation and owned by a city did not constitute part of the city franchise, and were not essential to the exercise of its functions, so a judgment creditor of the city could seize such bonds on execution. In Burton v. State, 3 Gill, 8, a bank chartered by the State was held not to be exempt from a State law requiring evidences of indebtedness to be stamped.

Upon the principle that a State is sovereign within its sphere, the Circuit Court in United States v. New Bedford Bridge, 1 Wood. & M. 435, 455, 503, F. C. 15,867, denied its jurisdiction to entertain an indictment for obstructing a navigable river by a bridge authorized by the State. Congress not having prohibited such obstructions, the court held it to be within the power of the State to authorize the erection of a bridge over waters within its borders. The principle is also approved in State v. Gibson, 36 Ind. 400, 10 Am. Rep. 51, in discussing the subject of sovereignty generally.

Miscellaneous citations.— United States v. Arredondo, 6 Pet. 729, 8 L. 561, cites the principal case as authority for holding that the legislative and judicial departments of government are supreme within their respective spheres, and in this it has been followed by several cases; Sabariego v. Maverick, 124 U. S. 282, 31 L. 439, 8 S. Ct. 472; United States v. California Land Co., 148 U. S. 44, 37 L. 360, 13 S. Ct. 463; Baring v. Erdman, 2 Fed. Cas. 790; Ryder v. Innerarity, 4 Stew. & P. 30; State ex rel. v. Porter, 1 Ala. 704; Borden v. State, 11 Ark. 548, 54 Am. Dec. 238; Salisbury Assn. v. County, 86 Md. 622, 39 Atl. 427. In Fertilizing Co. v. Hyde Park, 97 U. S. 666, 24 L. 1038, the principal case is cited upon the point that if the legislature may tax a corporation, it may also, in the exercise of its police power, abolish it, if it has become a nuisance. Pollock v. Farmers' Loan & Trust Co., 158 U. S. 617, 39 L. 1119, 15 S. Ct. 913, cites it as an instance where the Supreme Court exercised its power to construe the Federal Constitution. Campbell, J., in Swan v. Williams, 2 Mich. 434, quotes the statement that "the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else," in holding a railroad being a quasi-public corporation may have land condemned to it under the power of eminent domain. In McClanahan v. Western Asylum, 88 Va. 469, 13 S. E. 978, McCulloch v. Maryland is made authority for holding that a suit by or against a national bank is not a suit by or against the United States, and hence the maxim "nullum tempus occurrit regni," can have no application to such actions. Two cases cite it as an instance where the Supreme Court exercised its power

to determine the constitutionality of a State law — State Lottery Co. v. Fitzpatrick, 3 Woods, 264, F. C. 8,541; Baily v. Gentry, 1 Mo. 168, 13 Am. Dec. 487. And Worcester v. Georgia, 6 Pet. 537, 565, 8 L. 492, 503, as an instance of practice in a qui tam action. Edwards v. Kearzey, 96 U. S. 602, 24 L. 797, quoting the statement that "the power to tax is the power to destroy," held, that the power to modify, at discretion, the remedy for the enforcement of a contract is also the power to destroy that remedy, and denied the right of a State legislature to exempt property from execution to such an extent as to destroy the remedy. See also Long v. Walker, 105 N. C. 98, 10 S. E. 860, on the same point. And Noble v. Cullom, 44 Ala. 564, upon the principle that the "people of the United States constitute one nation and did not design to make the national government dependent upon the States," held that a judgment recovered in a State under the articles of secession was not enforceable after reconstruction. The principal case has been erroneously cited in the following cases: Bailey v. Railroad Co., 4 Harr. (Del.) 401, 44 Am. Dec. 603; Western, etc., R. R. Co. v. Georgia, 54 Ga. 431; Demoss v. Noble, 6 Iowa, 533; Danks v. Quackenbush, 1 N. Y. 132; Bissell v. Huntington, 2 N. H. 145.

4 Wheat. 438–444, 4 L. 609, THE GENERAL SMITH.

Maritime liens.— Admiralty has jurisdiction to enforce lien for repairs or necessities furnished at instance of master of vessel in foreign port or port of State other than that to which vessel belongs, p. 443.

This rule has been cited and applied in dissenting opinion, Thomas v. Osborn, 19 How. 38, 15 L. 541, majority refusing to enforce lien, and distinguishing principal case on this point; The Belfast, 7 Wall. 643, 646, 19 L. 272, denying jurisdiction of State court to enforce lien arising from contract of affreightment; The Grapeshot, 9 Wall. 136, 19 L. 654, holding ordering of supplies by master on credit of vessel to be sufficient proof of necessity to support implied hypothecation in favor of materialmen acting in good faith; so also in The Lulu, 10 Wall. 200, 19 L. 908, to the same effect; The Kalorama, 10 Wall. 211, 19 L. 943, holding that right to enforce such lien is not affected by fact that owner was present in such foreign port, provided supplies were actually furnished on credit of vessel; Insurance Co. v. Baring, 20 Wall. 163, 22 L. 252, holding that advances made to equip vessel in foreign port are presumed to be made on credit of vessel, and constitute insurable interest; The Lulu, 1 Abb. (U. S.) 193, Chase, 164, F. C. 8,604 (see 10 Wall. 200, 19 L. 908, supra); The William and Emmerline, Blatchf. & H. 70, 72, F. C. 17,687, enforcing bottomry bond given for supplies furnished; The Gold Hunter, Blatchf. & H. 306, F. C. 5,513, enforcing lien under contract for unloading vessel; Reeder v. The George's Creek, 3 Hughes, 586, F. C. 11,654, holding that lien for such necessities

cannot be displaced by mortgage on vessel recorded in home port; The Active, Olcott, 288, F. C. 34, holding lien for materials not waived by acceptance of promissory note; Remnants in Court, Olcott, 384, F. C. 11,697, on point that where credit is given expressly to owner, claims of materialmen cannot constitute lien on vessel; The Witch Queen, 3 Sawy. 202, F. C. 17,916, and The Barque Chusan, 1 Sprague, 39, F. C. 2,716, enforcing lien for supplies furnished in State other than that to which vessel belonged (see also same case on appeal, 2 Story, 461, 463, F. C. 2,717, reversing 1 Sprague, 39, F. C. 2,716, supra, on other grounds); The Brig Nestor, 1 Sumn. 74, 87, F. C. 10,126, holding that giving credit for fixed time does not extinguish lien for supplies; The Brig Draco, 2 Sumn. 178, F. C. 4,057, enforcing bottomry bond executed by owners, against bona fide purchaser of vessel in absence of laches on part of lender; Drinkwater v. The Spartan, 1 Ware, 153, F. C. 4,085, as instance where admiralty enforced maritime lien; The Scotia, 35 Fed. Rep. 909, holding that lien for supplies furnished takes precedence of prior mortgage; Chapman v. Engines of The Greenpoint, 38 Fed. 672, holding salvor entitled to lien upon property saved; The Susan G. Owens, 23 Fed. Cas. 448, holding that where vessel in course of construction is sold to person residing in another State, materialmen have lien for materials furnished prior to sale; Murphey v. Mobile, etc., Co., 49 Ala. 438, denying jurisdiction of State court to enforce, by admiralty process, materialman's lien; Thoms v. Southard, 2 Dana, 482, 26 Am. Dec. 473, holding decree of Federal court enforcing lien against vessel to be conclusive, and not attachable in State court; Hayford v. Cunningham, 72 Me. 131, denying jurisdiction of State court to enforce, by admiralty process, material lien provided for by its own State statutes; so also in Warren v. Kelley, 80 Me. 524, 526, 15 Atl. 50, 51; to same effect, The Petrel v. Dumont, 28 Ohio St. 610, 22 Am. Rep. 399, holding that such jurisdiction extends to enforcing lien occurring in port on Ohio river; The Willapa, 25 Or. 73, 34 Pac. 689, denying jurisdiction of State court to enforce, by admiralty procedure, a lien for supplies furnished. Cited approvingly in discussing general subject in The J. E. Rumbell, 148 U. S. 12, 37 L. 347, 13 S. Ct. 500; Fox v. Holt, 4 Ben. 296, F. C. 5,012; Cunningham v. Hall, 1 Cliff. 49, F. C. 3,481; Hill v. The Golden Gate, Newb. 310, F. C. 6,492; Crapo v. Allen, 1 Sprague, 185, F. C. 3,360; Zane v. Brig President, 4 Wash. 454, 456, F. C. 18,201; Fox v. Holt, 36 Conn. 572.

Distinguished in Thomas v. Osborn, 19 How. 28, 15 L. 537, refusing to enforce lien against vessel where there was no necessity for attaching lien and master was able personally to pay for supplies furnished; Burke Mfg. Co. v. The A. Saltzman, 42 Mo. App. 91, asserting exclusive jurisdiction of State court over lien enacted by statute.

Admiralty possesses general jurisdiction in cases of suits by materialmen, both in personam and in rem, p. 443.

Cited and principle applied in Andrews v. Wall, 3 How. 573, 11 L. 731, asserting jurisdiction over contract of consort ship, as a marine contract; The Wave, Blatchf. & H. 241, F. C. 17,297, holding that admiralty has jurisdiction over claims for salvage upon waters within ebb and flow of tide, although within body of State; Thatcher v. McCulloh, Olcott, 369, F. C. 13,862, holding that action in personam lies to recover freight in favor of master against consignee; The Calisto, 2 Ware (Dav.), 31, F. C. 2,316, under facts similar to principal case; Constantine v. The River Queen, 2 Fed. 731, holding that weighing and measuring of cargo constitutes a marine service and may be subject of action in personam; Enduer v. Greco, 3 Fed. 412, 413, holding that materialman, although he has no lien in domestic port, may sue in personam; Pelham v. The B. F. Woolsey, 3 Fed. 461, entertaining libel for wharfage; Marshall v. Bazin, 16 Fed. Cas. 837, entertaining action in personam to recover on contract for transportation of passengers. Cited approvingly, in discussing general subject, in State v. Thacher, 1 Ware, 97, F. C. 13,348.

Criticised in separate concurring opinion of Johnson, J., in Ramsay v. Allegre, 12 Wheat. 614, 635, 636, 639, 6 L. 747, 754, 755, 756, denying right of materialmen to proceed in personam where action in rem could not be maintained. Distinguished in Merritt v. Sackett, 17 Fed. Cas. 140, under "Rule 12."

Maritime lien.—Admiralty will enforce lien for repairs made or supplies furnished in home port of vessel, only in cases where such lien is expressly created by local law, p. 443.

The principal case is a leading authority on this point, and its rulings have been affirmed and applied as shown in the following citing cases: Peyroux v. Howard, 7 Pet. 341, 8 L. 706, holding lien of materialman on domestic vessel, provided for by statute, enforceable in admiralty; New Jersey, etc., Co. v. Merchants' Bank, 6 How. 390, 12 L. 485, as instance of difference between English and American admiralty practice; Hays v. Steamship Co., 17 How. 599, 15 L. 255, as showing distinction, in contemplation of admiralty, between vessels in home ports and those in foreign ports; The St. Lawrence, 1 Black, 529, 17 L. 183, enforcing lien given by State statute for repairs made in home port (cause was pending at time rule disclaiming jurisdiction to enforce such liens was adopted); Ex parte McNeil, 13 Wall. 243, 20 L. 627, asserting jurisdiction of Federal courts to enforce State laws regulating subject of pilotage; The Lottawanna, 21 Wall. 571, 579, 22 L. 660, 663, refusing to entertain jurisdiction where State statute regarding recording of lien had not been complied with; The Glide, 167 U. S. 609, 610, 611, 613, 614, 615, 619, 42 L. 297, 298, 299, 300, 17 S. Ct. 931, 932, 933, 934, enforcing

lien for repairs under State statute; so also in The Harrison, 2 Abb. (U. S.) 75, 84, 93, 1 Sawy. 354, 363, 373, F. C. 5,038; The Alida, Abb. Adm. 169, F. C. 199, refusing to enforce lien where it was not asserted within time prescribed by State statute; The Infanta, 1 Abb. Adm. 268, F. C. 7,030, declining to enforce lien not recognized by State law; The Circassian, 1 Ben. 141, F. C. 2,721, as showing distinction between foreign and domestic vessels; The Kate Hinchman, 7 Biss. 239, F. C. 7,621, holding that duly recorded mortgage of vessel is to be preferred to lien for supplies given by State law; The Circassian, 11 Blatchf. 473, 474, 475, F. C. 2,726, construing "new twelfth rule of admiralty;" Cole v. The Atlantic, Crabbe, 442, F. C. 2,976, holding that where lien given to mechanic for repairs made in home port, delay of two years in enforcing it will not defeat it, in absence of culpable neglect; The Young Mechanic, 2 Curt. 405, 406, F. C. 18,180, holding such lien not to be divested by death of owner, and representation by administrator of the insolvency of the estate; The Albany, 4 Dill. 442, 443, F. C. 131, refusing to enforce lien for supplies furnished, there being no State statute on the subject; Phillips v. The Thomas Scattergood, Gilp. 9, F. C. 11,106, enforcing lien for wages under State law; Davis v. Brig, Gilp. 478, F. C. 3,643, holding that lien vested under State law cannot be defeated by transfer of vessel to new owner; The Red Wing, 5 McCrary, 123, 14 Fed. 870, holding that where statute prescribes time within which lien must be enforced, equity will recognize such limitation; Wick v. The Samuel Strong, 6 McLean, 590, Newb. 190, F. C. 17,607, granting motion to dismiss libel where lien not recognized by State law; The Harriet, Olcott, 231, F. C. 6,097, enforcing statutory lien of watchman employed on board domestic vessel; The Eliza Ladd, 3 Sawy. 521, F. C. 4,364, enforcing lien for work given by State law; The City of Salem, 7 Sawy. 479, 10 Fed. 845, where statute provided that persons performing labor on vessel at request of contractor, should have lien for wages; The Richard Busteed, 1 Sprague, 442, 446, 447, F. C. 11,764, enforcing provisions of State statute regulating liens given for materials furnished in building ship; The Schooner Marion, 1 Story, 72, F. C. 9,087, refusing to enforce lien under facts identical with those in principal case; Reppert v. Robinson, Taney, 497, F. C. 11,703, enforcing lien under statute where, by law of State, acceptance of promissory note did not extinguish principal debt; Pickell v. Loper, Taney, 502, F. C. 11,119, dismissing libel where supplies were furnished in port where vessel licensed; Hull of a Ship, 2 Ware (Dav.), 201, F. C. 6,859, enforcing statutory mechanics' lien; Macy v. De Wolf, 3 Wood. & M. 203, F. C. 8,933, as showing distinction between foreign and domestic vessels.

Other citing cases affirm and follow the syllabus principle, as follows: Monongahela, etc., Co. v. The Bob Connell, 1 Fed. 219, holding that lien for lockage does not arise where services rendered vessel in home port; The E. A. Barnard, 2 Fed. 721, holding that

maritime lien is to be preferred to such statutory lien; but see The General Burnside, 2 Flipp. 148, 3 Fed. 231, where such liens are held to be entitled to equal rank with liens of foreign materialmen; Kretzmer v. The William A. Levering, 35 Fed. 784, holding that no lien arises by sale of supplies to cook of vessel; The Manhattan, 46 Fed. 798, entertaining suit to enforce lien for labor in building vessel in home port; The Samuel Marshall, 49 Fed. 756, arguing in favor of application of rule where one of several joint owners resides in town where credit given; Lighters Nos. 27 and 28, 57 Fed. 666, F. C. 15,236, refusing to enforce statutory lien against vessel where credit not given to vessel; so also in The Alvira, 63 Fed. 147, 155, to same effect; The Unadilla, 73 Fed. 351, holding that statutory liens are inferior to maritime liens, and holders are entitled to share only after maritime liens satisfied; The Electron, 74 Fed. 694, refusing to enforce lien for supplies, where credit not given to vessel; Spedden v. Koenig, 78 Fed. 506, 42 U. S. App. 267, holding that managing owner living in town with rest of owners, cannot charge vessel for supplies; The Augusta, 2 Fed. Cas. 210, 212, enforcing statute giving carpenter's lien on vessel for wages; Wickes v. The Circassian, 5 Fed. Cas. 689, under facts similar to those in principal case; Harrison v. The Anna Kimball, 11 Fed. Cas. 646, refusing to enforce lien under State statute allowing half-pilotage, in absence of provision in such statute; Haslett v. The Enterprise, 11 Fed. Cas. 784, where State statute allowed lien for repairs; Hill v. The Golden Gate, 12 Fed. Cas. 161, 164; Jenkins v. The Congress, 13 Fed. Cas. 456, holding lien lost by departure of vessel from port where supplies furnished and statutory lien attached; Ludington v. The Nucleus, 15 Fed. Cas. 1095, refusing to attach lien for labor in absence of State statute; so also in Marsh v. The Minnie, 16 Fed. Cas. 811; Schuchardt v. The Angelique, 21 Fed. Cas. 745, enforcing lien given by State statute, but refusing to give it priority claimed for it by such statute; Udell v. The Ohio, 24 Fed. Cas. 497, holding that lien will not attach under State law for materials furnished to builder after contract price paid to builder in full; Whittaker v. The J. A. Travis, 29 Fed. Cas. 1116, 1117, enforcing statutory lien for supplies furnished. Cited also in Steamboat Belfast v. Boon, 41 Ala. 63, in support of the validity of an act giving shipper a lien for loss of goods; Buddington v. Stewart, 14 Conn. 409, applying principle in State court and refusing to enforce lien for repairs made in home port, in absence of statute; Rees v. The General Terry, 3 Dak. Ter. 167, 13 N. W. 537, refusing to enforce mechanic's lien; Williamson v. Hogan, 46 Ill. 518, refusing to enforce lien for supplies; Tug Montauk v. Walker, 47 Ill. 337, on point that State statute giving lien for supplies and right to enforce it in State court, is valid if not in conflict with Federal jurisdiction; so also in Dorr v. Waldron, 62 Ill. 228, 14 Am. Rep. 91; Bauduc's Syndics v. Nicholson, 4 La. 85, applying principle in denying jurisdiction of United States court to

interfere with execution of decree of court in action to enforce statutory lien against domestic vessel; Urann v. Fletcher, 1 Gray, 128, where no lien given by statute for supplies furnished in domestic port; so also in Dever v. The Hope, 42 Miss. 723, 2 Am. Rep. 648, 649; Brookman v. Hamill, 43 N. Y. 560, 3 Am. Rep. 736, asserting right of State to provide for enforcement of such liens according to common-law rules; Waggoner v. St. John, 10 Heisk. 521, asserting power of State legislatures to create lien not recognized by maritime law; Price v. Frankel, 1 Wash. Ter. 39, holding that where State statute provides that lien shall not attach for supplies furnished in home port, until action commenced, territorial Admiralty Court has no jurisdiction to entertain suit. See also valuable note, 62 Am. Dec. 241, 243, on general subject.

Cited approvingly in general discussion, but without application of the rule, in the following cases: Dissenting opinion, Waring v. Clarke, 5 How. 491, 12 L. 250; The Lottawanna, 20 Wall. 217, 219, 22 L. 262; In re Surplus, etc., of The Ship Edith, 11 Blatchf. 460, 461, 462, F. C. 4,283; The Hilarity, Blatchf. & H. 92, F. C. 6,480; Hatton v. The Melita, 3 Hughes, 499, F. C. 6,218; The Robert Fulton, 1 Paine, 626, F. C. 11,890; Davis v. Child, 2 Ware (Dav.), 74, F. C. 3,628; The Dolphin, 1 Flipp. 584, F. C. 3,973; In re Long Island, etc., Co., 5 Fed. 609; The Samuel Marshall, 54 Fed. 399, 401, 6 U. S. App. 389; Davidson v. Baldwin, 79 Fed. 97, 47 U. S. App. 589; Moir v. Dubuque, 17 Fed. Cas. 570, 571; Zollinger v. The Emma, 30 Fed. Cas. 940; Bowen v. Peters, 71 Me. 465; Gould v. Jacobson, 58 Mich. 291, 25 N. W. 196.

Criticised in dissenting opinion, Ward v. Peck, 18 How. 271, 15 L. 385. Explained and distinguished in Maguire v. Card, 21 How. 251, 16 L. 118, denying jurisdiction of admiralty to enforce statutory liens for contracts of affreightment to be performed upon rivers wholly within a State, a prior rule of court having disclaimed jurisdiction to enforce liens given by State law. Criticised in dissenting opinion, The Lottawanna, 21 Wall. 592, 22 L. 667, arguing in favor of jurisdiction of admiralty to enforce lien, although requirements of State statute not strictly observed; The Kate Tremaine, 5 Ben. 67, F. C. 7,622, holding that contract for wharfage creates a maritime lien, enforceable in absence of State statute. Limited in The John Richards, 1 Biss. 108, F. C. 7,361, holding that general maritime lien is superior to lien recognized by State statute, and judgment and sale under latter cannot displace former. So also in The N. W. Thomas, 1 Biss. 214, 215, F. C. 10,386. Modified in Schultz v. Bosman, 5 Hughes, 101, F. C. 12,488, ruling otherwise, where port where supplies furnished is the home port, but owner resides at distance, and need for supplies is urgent. Distinguished in The George T. Kemp, 2 Low. 481, F. C. 5,341, where vessel was really owned by foreigner, and sailed under foreign flag, and lien was enforced for supplies furnished in port where equitable owner resided; The H. E. Willard, 52 Fed. 389, denying jurisdiction to

enforce statutory lien which is not maritime in its nature. Criticised in Jackson v. The Kinnie, 13 Fed. Cas. 219, holding that statutes providing for liens in home port, in effect attempt to confer jurisdiction upon Admiralty Courts, and are void. Criticised in The Josephine, 39 N. Y. 24, 26, 27, holding void an act of legislature creating statutory lien enforceable in Admiralty Courts.

Maritime lien.— Shipwright, making repairs in domestic port, has lien upon vessel in absence of statute, so long as she remains in his possession, but if he parts with possession or works on vessel without having possession, no lien exists, p. 443.

Cited and principle applied in Leland v. The Medora, 2 Wood. & M. 97, F. C. 8,237, holding that materialman waives lien by unreasonable delay in enforcing it; Jenkins v. Congress, 13 Fed. Cas. 456, holding that departure from port where supplies furnished, destroys lien given by State statute; Case v. Woolley, 6 Dana, 22, 23, 27, 32 Am. Dec. 59, 60, 63, where shipwright surrendered possession of vessel after building; Herrington v. The Chisholm, 8 Jones (N. C.), 8, holding that where such liens are regulated by statute, they are lost if not enforced as provided by statute.

Miscellaneous citations.— Explained in Waring v. Clarke, 5 How. 459, 12 L. 235, discussing general subject and holding that admiralty jurisdiction cannot, as intimated in principal case, be determined by common-law rules; so also in The Stephen Allen, Bl. & H. 177, F. C. 13,361. Cited in Packard v. Ship Louisa, 2 Wood. & M. 53, F. C. 10,652, but application doubtful; so also in Sheafe v. Kimball, 21 Fed. Cas. 1209; Cox v. Murray, Abb. Adm. 341, F. C. 3,304, on point that in admiralty remedy is to be sought in rem against vessel or in personam against owner.

4 Wheat. 444–452, 4 L. 611, McIVER'S LESSEE v. WALKER.

Decision in 9 Cr. 173–179, reaffirmed upon all the points then decided. See note to that case.

Wells v. Jackson, etc., Co., 47 N. H. 260, 90 Am. Dec. 589, and note, 90 Am. Dec. 592, cite both decisions on the point that where nothing exists to control calls for courses and distances, land must be bounded by courses and distances according to the magnetic meridian. The later decision is cited on this point in Bruckner's Lessee v. Lawrence, 1 Doug. (Mich.) 29, where authorities are collected and discussed.

On the point that monuments designated in a patent will control courses and distances, both decisions are cited in Higley v. Bidwell, 9 Conn. 452, and distinguished in Stanley v. Stanley, 2 N. H. 372. The following cases cite only the later decision upon this point: Sayers v. City of Lyons, 10 Iowa, 255, where monument called for was "low-water mark" on navigable stream and made longer line than that called for by distance; Wendell v. People, 8 Wend. 190, 22 Am. Dec. 639, applying rule to similar state of facts. The rule

is also cited, arguendo, in Opdyke v. Stephens, 28 N. J. L. 86, and Browning v. Atkinson, 37 Tex. 660.

The following cases cite both decisions on the point that if a patent refer to a plat annexed, resort may be had to such plat to correct repugnancies in patent: Brown v. Clements, 3 How. 672, 11 L. 778; United States v. Texas, 162 U. S. 37, 40 L. 879, 16 S. Ct. 733; Knowles v. Nichols, 2 Curt. 574, F. C. 7,897; Langdon v. New York, 93 N. Y. 148; Wolfe v. Scarborough, 2 Ohio St. 368; Waterman v. Andrews, 14 R. I. 598. The principle is applied in the following additional cases, citing simply this later decision: Noonan v. Lee, 2 Black, 504, 17 L. 280, where land was described as "southeast quarter" of certain section; Trapier v. Wilson, 2 McCord (S. C.), 197, holding that where land is described as being "an island" grant includes the whole island as designated by surveyor's plat. The principal case is also cited approvingly, but without particular application to the point at issue, in McManus v. Carmichael, 3 Iowa, 38.

4 Wheat. 453–465, 4 L. 613, ORR v. HODGSON.

Alien.— The sixth article of the treaty of peace of 1783 protected from forfeiture, by reason of alienage, lands then held by British subjects, p. 462.

This holding has been cited and applied in Society, etc. v. New Haven, 8 Wheat. 489, 5 L. 668, extending protection to corporations created by British crown; Hughes v. Edwards, 9 Wheat. 496, 6 L. 144, entertaining bill by alien mortgagee to have land sold which was conveyed to him as security for debt; Hauenstein v. Lynham, 100 U. S. 489, 25 L. 630, applying principle in construing similar treaty with Swiss Confederation; Hanrick v. Patrick, 119 U. S. 165, 30 L. 403, 7 S. Ct. 152, construing State statute confirming titles of British subjects; In re Parrott, 6 Sawy. 371, 1 Fed. 503, as instance where rights of aliens were held to be protected against State laws, holding void, provision in State Constitution prohibiting employment of Chinese, as repugnant to existing treaty; People v. Gerke, 5 Cal. 382, construing similar treaty with Prussia; Forbes v. Scannell, 13 Cal. 283, as instance of exercise of treaty-making power, in construing treaty regulating right to sue in consular courts in China. Cited, arguendo, in the following cases: Pollard v. Kibbe, 14 Pet. 412, 10 L. 519; Piper v. Richardson, 9 Met. 157.

Limited in Crane v. Reeder, 21 Mich. 63, 66, 68, 73, 4 Am. Rep. 436, 438, 439, 441, construing later treaty, and holding rule to apply only to valid titles existing at time treaty made.

Alien.— The ninth article of the treaty of 1794, under the word "heirs," did not include any other than British subjects or American citizens at time of descent cast, p. 464.

Cited and applied in Brown v. Sprague, 5 Den. 549, holding that

treaty securing aliens in possession of lands does not impliedly confer power to transmit such lands to aliens by descent.

Aliens are not heirs; the law casts the descent upon the next of kin having heritable blood, p. 465.

This rule is cited and applied in the following cases: McKinney v. Saviego, 18 How. 238, 15 L. 367, holding that citizen of Mexico could not transmit, by inheritance, title to land in Texas, to a person also a citizen of Mexico; Sullivan v. Burnett, 105 U. S. 338, 26 L. 1125, holding State statute allowing nonresident alien limited time to sell lands whereof intestate had died seized, applied only where there was no heritable blood; Smith v. Zaner, 4 Ala. 106, in action of trespass to try titles as between resident and alien descendants; Congregational Church v. Morris, 8 Ala. 188, applying principle in denying power of alien to transmit inheritable blood, and holding widow of an alien not entitled to dower in his lands; Wunderle v. Wunderle, 144 Ill. 54, 67, 33 N. E. 197, 201, construing term "kindred" in State statute regulating descents, and holding it to mean kindred capable of inheriting; Stemple v. Herminghouser, 3 G. Greene, 409, 410, reversing judgment of lower court, holding that alien children were entitled to notice of proceeding for partition of ancestor's lands; Jackson v. Green, 7 Wend. 340, denying right of citizen to inherit where he was obliged to trace descent through an alien; Orser v. Hoag, 3 Hill, 82, 83, 85, holding person who was born in this country, but removed prior to treaty and did not return, to be an alien and incapable of inheriting; Brown v. Sprague, 5 Den. 549, holding that treaty of 1783 did not include the right to transmit by descent to aliens the lands so secured; McLean v. Swanton, 13 N. Y. 539, construing statute removing disabilities of citizens obliged to trace descent through alien, and holding statute to be inoperative if such alien is living; Munro v. Merchant, 28 N. Y. 36, denying right of child born in this country of alien parents, to inherit, where, after birth, he removed with his parents to Canada and did not return until their death; Rutherford v. Wolfe, 3 Hawks, 276, holding that statute allowing nearest relation to inherit where there are nearer relations who are aliens, was not repealed by a statute providing a general system of descents; Ford v. Husman, 7 Rich. L. 166, holding alien widow of deceased citizen entitled to all his estate as against alien sisters; McClenaghan v. McClenaghan, 1 Strob. Eq. 322, 47 Am. Dec. 536, denying right of denizen to inherit; Hardy v. De Leon, 5 Tex. 240, 242, sustaining plea in abatement where suit brought for recovery of lands of ancestor, joined names of aliens and citizens; House of Mercy v. Davidson, 90 Tex. 534, 39 S. W. 926, on point that if corporation is prohibited from taking property under will in excess of certain amount, such excess descends to heirs; Barzizas v. Hopkins, 2 Rand. 285, a case involving same facts and same parties as principal case. See also note, 12 Am. St. Rep. 93, 95, on general subject.

Cited in general discussion, but without particular application of the rule, in Harley v. State, 40 Ala. 696; Jones v. Minogue, 29 Ark. 645.

Distinguished in Jackson v. Adams, 7 Wend. 368, holding that where, under statute, alien is allowed to purchase and hold land, such lands descend to his heirs, although aliens.

Miscellaneous citations.— Cited also in Trimbles v. Harrison, 1 B. Mon. 143, as having impliedly asserted right of British subjects during Revolution to elect as to allegiance. Erroneously cited in Gregorie v. Bulow, Rich. Eq. Cas. 245, and Union Bank v. Hill, 3 Cold. 329.

4 Wheat. 466–488, 4 L. 616, ASTOR v. WELLS.

Agency.— Notice of prior incumbrances given to agent constitutes constructive notice to his principal, p. 487.

Cited to this point, and affirmed and applied as follows: Bierce v. Red Bluff Hotel Co., 31 Cal. 165, holding in garnishment proceedings, that notice to attorney that debt due defendant was transferred prior to service of garnishment, is constructive notice to plaintiff, his client; Munce v. Byars, 11 Ga. 195, where notice to agent of vendor, that property was subject to lien, was held to be notice to vendor; Page v. Brant, 18 Ill. 39, sustaining plea in abatement because of nonjoinder of parties, where it appeared that plaintiff's agent knew of such defect; Tobin v. Helm, 4 J. J. Marsh. 293, holding notice of outstanding equity to agent of execution creditor is notice to his principal; Mayor v. Whittington, 78 Md. 238, 27 Atl. 985, where notice to attorney of tax collector of existence of leasehold estate was held to be notice to collector, and sale of property for taxes was void where statute provided that leasehold should be first sold.

Distinguished in Greer v. Higgins, 8 Kan. 522, where admissions upon which alleged notice was based, were made after term of agency had expired, and proof of notice was wanting.

Deed — Recording.— Where a county was divided, a deed of land lying in the new county, executed before the division, was not properly recorded in the registry of the old county after such division, p. 487.

This case has been cited in the following cases, as asserting the principle that in order to give notice to subsequent purchasers, deeds must be recorded in strict compliance with the law: Williams v. Logan, 32 Ga. 168, construing statute requiring registry of marriage settlements executed prior to its passage, and holding it to include all such settlements whether previously recorded or not; Barney v. Little, 15 Iowa, 536, holding that where statute is strictly complied with, presumption of notice thus raised is incontrovertible; Richardson v. Shelby, 3 Okl. 80, 41 Pac. 382, holding

chattel mortgage void as against mortgagor's creditors, where not recorded within time limited by statute; Adams v. Hayden, 60 Tex. 226, applying rule directly in holding that recording of deed in wrong county, under mistake as to true locality of property, is inoperative to charge subsequent purchaser. Cited approvingly but without particular application of the rule in Reed v. Kemp, 16 Ill. 451; Garrison v. Haydon, 1 J. J. Marsh. 223, 19 Am. Dec. 70.

Agency.— Person employed solely by grantor as scrivener to draw deed is not agent of a purchaser, and notice to him is not constructive notice to purchaser, p. 487.

Cited and principle applied in De Louis v. Meek, 2 G. Greene, 70, 50 Am. Dec. 504, holding party not bound by admissions or representations of attorney who represented him without authority in partition proceedings.

Deed.— A bona fide purchaser for a valuable consideration takes a good title, although the conveyance was made to defraud a creditor, who was a prior mortgagee by an unrecorded mortgage, p. 488.

This rule is cited and applied in Bean v. Smith, 2 Mason, 299, F. C. 1,174, holding that bona fide purchaser from grantee, to whom property was conveyed in fraud of creditors, may hold same against creditors of grantor; Howe Machine Co. v. Clayburn, 6 Fed. 441, 442, refusing to set aside conveyance in absence of proof that grantee was a party to fraud charged; Hollister v. Loud, 2 Mich. 313, holding that assignment for benefit of creditors is presumed to have been made bona fide, and fraud on both sides must be proven; so also in Worman v. Wolfersberger, 19 Pa. St. 63. See also note, 34 Am. St. Rep. 396. Cited, but without particular application of the rule in Howard v. Daniels, 2 N. H. 141; Porter v. Cocke, Peck (Tenn.), 40.

Distinguished in Swift v. Thompson, 9 Conn. 72, 21 Am. Dec. 726, under statute declaring such fraudulent deed to be void.

4 Wheat. 488-496, 4 L. 622, McARTHUR v. BROWDER.

Public lands.— In Ohio and Kentucky a patent is in general the foundation of title, and neither party can bring his entry before a court of law, but a junior patentee, claiming under an elder entry, may, in equity, support his equitable title, p. 491.

Cited and principle applied in Johnson v. Towsley, 13 Wall 86 (reprinted in 2 Neb. 490), 20 L. 487, asserting jurisdiction of equity to correct mistake of land department whereby patent is issued to wrong person; McAfee v. Kerin, 7 Smedes & M. 789, 45 Am. Dec. 333, holding that actual entry and compliance with all requirements will prevail over prior entry and patent where such requirements not strictly complied with.

Public lands.— An amended entry retains its original character, so far as it is not altered; so far as it is altered, it is a new entry, p. 495.

Public lands.— Entry must be made with such certainty that subsequent purchasers may be enabled to locate the adjacent residuum, p. 492.

Cited and applied in Harper v. Baugh, 9 Gratt. 520, holding that where first entry is void for uncertainty, a second entry calling for all lands within specified boundaries not covered by the first is also void for same reason; McNeel v. Herold, 11 Gratt. 314, dismissing caveat, where objects called for in elder entry were not of sufficient notoriety to give notice to subsequent locator.

Miscellaneous.— Erroneously cited in Pollard v. Kibbe, 14 Pet. 412, 10 L. 519.

4 Wheat. 497–502, 4 L. 624, THE NUESTRA SENORA DE LA CARIDAD.

War — Belligerent rights.— Where the belligerency of an insurrectionary government has been recognized, the United States courts cannot inquire into the legality of a capture as between such insurrectionary government and the power with which it is at war, p. 502.

Cited and applied in Dole v. Insurance Co., 2 Cliff. 427, F. C. 3,966, holding capture by rebel privateer not to be an act of piracy, the commander having acted under commission issued by rebel government. The following cases also cite the principal case as authority for holding that the recognition of belligerency is a political function and not exercisable by the courts: United States v. Packages, 27 Fed. Cas. 289; United States v. Cement, 27 Fed. Cas. 293; United States v. Cotton, 27 Fed. Cas. 328; Kelley v. State, 25 Ark. 398; Perkins v. Rogers, 35 Ind. 156, 9 Am. Rep. 664. Cited approvingly, but without particular application of the rule in Ford v. Surget, 97 U. S. 617, 24 L. 1025, and The Schooner Tilton, 5 Mason, 471, F. C. 14,054.

Distinguished in The Ambrose Light, 25 Fed. 429, holding void letters of marque issued by rebel government whose belligerent rights had not been recognized by any sovereign power.

Miscellaneous.— Erroneously cited in Sutton v. Askew, 66 N. C. 186.

4 Wheat. 503–508, 4 L. 626, WHEATON v. SEXTON.

Execution.— Sale under fi. fa., duly issued, is legal as respects the purchaser, provided the writ be levied upon the property before the return day, although the sale be made after and the writ never returned, p. 506.

The principle here involved has been affirmed and applied in the following citing cases: Voorhees v. Bank, 10 Pet. 477, 9 L. 501, hold-

ing that where execution is issued against property of an absent debtor, and sale under it is confirmed by court, it is immaterial to purchaser whether or not proceedings subsequent to execution were regular; McNitt v. Turner, 16 Wall. 365, 21 L. 347, holding that administrator's sale is not avoided by failure of administrator to make return after sale; Thompson v. Phillips, 1 Bald. 272, 273, F. C. 13,974, holding that if the court have jurisdiction of the case, the parties, and power to order a sale by venditioni exponas, a sale so made and deed acknowledged is not subject to collateral attack; Bank of United States v. Voorhees, 1 McLean, 224, 225, F. C. 939 (see 10 Pet. 477, 9 L. 501, supra), holding purchaser at judgment sale not bound to examine record and see if judgment is reversible for error; Sumner v. Moore, 2 McLean, 66, F. C. 13,610, holding sheriff's sale not avoided by uncertainty of description of land in levy, if description in deed be sufficient; Mason v. Bennett, 52 Fed. 345, a case in which facts were precisely similar to those in principal case; Ware v. Bradford, 2 Ala. 682, 36 Am. Dec. 429, holding statute requiring sheriff to advertise land thirty days before sale to be merely directory, and sale not avoided because of failure to do so; Wyatt v. Stewart, 34 Ala. 720, holding sheriff's return on execution, showing who was purchaser at sale, is not conclusive upon real purchaser; Byers v. Fowler, 12 Ark. 273, 54 Am. Dec. 275, holding judgment by default, upon return showing defective service of writ on defendant, although reversible on error, is not attackable collaterally; Newton v. Bank, 22 Ark. 28, holding that execution sale made after day stipulated is valid as to purchaser; Ritter v. Scannell, 11 Cal. 248, 70 Am. Dec. 778, where lien of attaching creditor taking effect immediately upon levy, was held not to be divested by failure of sheriff to make return; Brooks v. Rooney, 11 Ga. 427, 56 Am. Dec. 433, refusing to set aside deed executed by sheriff in conformity with sale by de facto deputy, although deputy acted without regular appointment; Overby v. Hart, 68 Ga. 496, ruling similarly where levy failed to clearly describe property; Swiggart v. Harber, 4 Scam. 374, 39 Am. Dec. 426, collecting and discussing authorities and holding execution issued upon erroneous judgment not subject to collateral attack; Phillips v. Coffee, 17 Ill. 157, 63 Am. Dec. 359, holding title not affected by misrecital of judgment in deed; Jackson v. Spink, 59 Ill. 409, holding sale not avoided by adjournment of sale after day fixed by notice; Splahn v. Gillespie, 48 Ind. 408, holding that in action for possession of real estate, bought at execution sale under decree of foreclosure, defendant cannot introduce evidence to show that debt was really less than judgment called for; Hopping v. Burnam, 2 G. Greene, 44, where defective description in levy held to be cured by correct description in sheriff's deed; Seely v. Reid, 3 G. Greene, 379, collecting authorities, and holding, however, that where court lacks jurisdiction, judgment is void, and sheriff's deed cannot pass title; dissenting opinion, Tiffany v. Glover, 3 Greene,

397, majority holding that where levy was defective as to description of property, sale under it was void and passed no title; Shaffer v. Bolander, 4 G. Greene, 203, denying right of defendant in proceedings to obtain possession of property sold, to show that law regulating appraisement was not strictly observed; Cavender v. Smith, 1 Iowa, 347, holding statute prescribing order in which property shall be levied upon to be merely directory and sale not void if statute not observed; Butterfield v. Walsh, 21 Iowa, 101, 89 Am. Dec. 560, under facts similar to those in principal case; so also in Moomey v. Maas, 22 Iowa, 386, 92 Am. Dec. 397; Hill v. Baker, 32 Iowa, 307, refusing to set aside sale because of defect in appraisement; Wright v. Howell, 35 Iowa, 295, holding regularity in issuance of venditioni exponas not necessary to validity of sale.

Elsewhere other citing cases make the following applications of the syllabus principle: Mills v. Ralston, 10 Kan. 212, holding sale not affected by error, even upon question of law, in judgment upon which it was based; Aubert v. Buhler, 3 Mart. (La.) (N. S.) 494, 497, under facts similar to those in principal case; so also in Caldwell v. Blake, 69 Me. 470; Crane v. Hardy, 1 Mich. 65, 66, holding that in order to pass good title by such sale, it is not necessary that return should show proper selection of appraisers; Blair v. Compton, 33 Mich. 424, quashing an order of lower court setting aside sale because of defective notice and description of property sold; Vroman v. Thompson, 51 Mich. 459, 16 N. W. 811, extending rule and holding that sale may be made by sheriff after expiration of his term of office, provided levy was made during term; Tillman v. Jackson, 1 Minn. 188, holding provision in statute that land shall be sold on execution in separate lots if possible, to be directory merely, and sale en masse not void; Barrett v. McKenzie, 24 Minn. 23, under facts similar to those in principal case; Minor v. Natchez, 4 Smedes & M. 624, 43 Am. Dec. 492, holding sale not avoided by failure to give notice in precise manner provided in statute; so also in Natchez v. Minor, 10 Smedes & M. 259, 260, 266; Buchanan v. Tracy, 45 Mo. 439, refusing to set aside deed because of error in sheriff's return as to date of sale; Hombs v. Corbin, 20 Mo. App. 511, reviewing authorities, and holding strict compliance with statute as to notice, not necessary to validity of deed as between debtor and purchaser; Johnson v. Bemis, 7 Neb. 226, under facts precisely similar to those in principal case; so also in Wyant v. Tuthill, 17 Neb. 496, 23 N. W. 343, holding that land appraised and advertised under order of sale before return day may be sold after; Thompson v. Leinard, Wright, 459, where statute provided expressly that sheriff's deed should be prima facie evidence of regularity of proceedings; Allen v. Parish, 3 Ohio, 191, holding that where statute provides for valuation of lands sold upon execution, sale of lands not so valued will not be set aside if objection to irregularity not made upon return of writ; Ewing v. Higby, 7 Ohio (pt. 1), 203, 28 Am. Dec. 639, applying principle in refusing to set aside adminis-

SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1914.

The United States, Plaintiff in Error, *vs.* Tom Mosley and Dan Hogan.	In Error to the District Court of the United States for the Western District of Oklahoma.

[June 21, 1915.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an indictment under § 19 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1092. It was demurred to and the demurrer was sustained by the District Court on the ground that the section did not apply to the acts alleged. As the judgment on the face of it turned upon the construction of the statute the United States brought the case to this Court.

The indictment contains four counts. The first charges a conspiracy of the two defendants, who were officers and a majority of the county election board of Blaine County, Oklahoma, to injure and oppress certain legally qualified electors, citizens of the United States, being all the voters of eleven precincts in the county, in the free exercise and enjoyment of their right and privilege, under the Constitution and laws of the United States, of voting for a Member of Congress for their district. To that end, it is alleged, the defendants agreed that irrespective of the precinct returns being lawful and regular they would omit them from their count and from their returns to the State election board. The second count charges the same conspiracy, a secret meeting of the defendants without the knowledge of the third member of their board for the purpose of carrying it out, and the overt act of making a false return, as agreed, omitting the returns from the named precincts although regular and entitled to be counted. The third count is like the first with the addition of some details of the plan, intended to deceive the third member of their board. The fourth charges the same conspiracy, but states the object as being to injure and oppress the same citizens for and on account of their having exercised the right described.

The section is as follows: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution and laws of the United States." It is not open to question that this statute is constitutional, and constitutionally extends some protection at least to the right to vote for Members of Congress. *Ex parte Yarbrough,* 110 U. S. 651. *Logan* v. *United States,* 144 U. S. 263, 293. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.

The only matter that needs argument is that upon which the District Court expressed its view—whether properly construed the statute purports to deal with such conduct as that of the defendants, assuming that there is no lack of power if such be its intent. Manifestly the words are broad enough to cover the case, but the argument that they have a different scope is drawn from the fact that originally this section was part of the Enforcement Act of May 31, 1870, c. 114, § 6, 16 Stat. 141, (later, Rev. Sts. § 5508,) and that by an earlier section of the same statute, § 4, (later, Rev. Sts. § 5506,) every person who by any unlawful means hindered or combined with others to hinder any citizen from voting at any election in any State, &c., was subjected to a much milder penalty than that under § 6. It may be thought that the Act of 1870 cannot have meant to deal a second time and in a much severer way in § 6 with what it had disposed of a few sentences before. The other sections have been repealed, but § 19, it may be said, must mean what it meant in 1870 when the Enforcement Act was passed, and what it did mean will be seen more clearly from its original words.

In its original form the section began "If two or more persons shall band or conspire together or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this Act, or to injure, oppress," &c. The source of this section in the doings of the Ku Klux and the like is obvious and acts of violence obviously were in the mind of Congress.

Naturally Congress put forth all its powers. But this section dealt with Federal rights and with all Federal rights, and protected them in the lump, whereas § 4, Rev. Sts. § 5506, dealt only with elections, and although it dealt with them generally and might be held to cover elections of Federal officers, it extended to all elections. It referred to conspiracies only as incident to its main purpose of punishing any obstruction to voting at any election in any State. The power was doubtful and soon was held to have been exceeded, *United States* v. *Reese*, 92 U. S. 214. See *Logan* v. *United States*, 141 U. S. 263. The subject was not one that called for the most striking exercise of such power as might exist. Any overlapping that there may have been well might have escaped attention, or if noticed have been approved, when we consider what must have been the respective emphasis in the mind of Congress when the two sections were passed.

But § 6 being devoted, as we have said, to the protection of all Federal rights from conspiracies against them, naturally did not confine itself to conspiracies contemplating violence, although under the influence of the conditions then existing it put that class in the front. Just as the Fourteenth Amendment, to use the happy analogy suggested by the Solicitor General, was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, § 6 had a general scope and used general words that have become the most important now that the Ku Klux have passed away. The change of emphasis is shown by the wording already transposed in Rev. Sts. § 5508, and now in § 19. The clause as to going in disguise upon the highway has dropped into a subordinate place, and even there has a somewhat anomalous sound. The section now begins with sweeping general words. Those words always were in the act, and the present form gives them a congressional interpretation. Even if that interpretation would not have been held correct in an indictment under § 6, which we are far from intimating, and if we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face § 19 most reasonably affords.

Judgment reversed.

Mr. Justice McReynolds did not sit in this case.

SUPREME COURT OF THE UNITED STATES.

No. 96.—October Term, 1914.

Frank Guinn and J. J. Beal,
vs.
The United States.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[June 21, 1915.]

Mr. Chief Justice White delivered the opinion of the Court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that State in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. The prosecution was directly concerned with Section 5508, Revised Statutes, now Section 19 of the Penal Code which is as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, thereafter be ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

We concentrate and state from the certificate only matters which we deem essential to dispose of the questions asked.

Suffrage in Oklahoma was regulated by Section 1, Article III of the Constitution under which the State was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this Amendment certain election officers in enforcing its provisions refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the Constitution under which the State was admitted, that is, before the amendment, and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the Fifteenth Amendment in denying the right to vote, this prosecution, as we have said, was commenced. At the trial the court instructed that by the Fifteenth Amendment the States were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude and that Congress in pursuance of the authority which was conferred upon it by the very terms of the Amendment to enforce its provisions had enacted the following (Rev. Stat. sec. 2004):

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, Territory, district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

It then instructed as follows:

"The State amendment which imposes the test of reading and writing any section of the State constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then residents in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it in so far as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed

a common design and cooperated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were enitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions.''

The questions which the court below asks are these:

''1. Was the amendment to the constitution of Oklahoma, heretofore set forth valid?

''2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?''

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

''The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote.''

And this is the amendment:

''No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the

registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866 should be held to be illegal as violative of the Fifteenth Amendment.

To avoid that which is unnecessary let us at once consider and sift the propositions of the United States on the one hand and of the plaintiffs in error on the other, in order to reach with precision the real and final question to be considered. The United States insists that the provision of the amendment which fixes a standard based upon January 1, 1866 is repugnant to the prohibitions of the Fifteenth Amendment because in substance and effect that provision, if not an express, is certainly an open repudiation of the Fifteenth Amendment and hence the provision in question was stricken with nullity in its inception by the self-operative force of the Amendment, and as the result of the same power was at all subsequent times devoid of any vitality whatever.

For the plaintiffs in error on the other hand it is said the States have the power to fix standards for suffrage and that power was not taken away by the Fifteenth Amendment but only limited to the extent of the prohibitions which that Amendment established. This being true, as the standard fixed does not in terms make any discrimination on account of race, color, or previous condition of servitude, since all, whether negro or white, who come within its requirements enjoy the privilege of voting, there is no ground upon which to rest the contention that the provision violates the Fifteenth Amendment. This, it is insisted, must be the case unless it is intended to expressly deny the state's right to provide a standard for

suffrage, or what is equivalent thereto, to assert: *a*, that the judgment of the State exercised in the exertion of that power is subject to Federal judicial review or supervision, or *b*, that it may be questioned and be brought within the prohibitions of the Amendment by attributing to the legislative authority an occult motive to violate the Amendment or by assuming that an exercise of the otherwise lawful power may be invalidated because of conclusions concerning its operation in practical execution and resulting discrimination arising therefrom, albeit such discrimination was not expressed in the standard fixed or fairly to be implied but simply arose from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote.

On the other hand the United States denies the relevancy of these contentions. It says state power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a state to exert judgment and discretion in fixing the qualification of suffrage is advanced and no right to question the motive of the state in establishing a standard as to such subjects under such circumstances or to review or supervise the same is relied upon and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand the argument of the Government in substance says: No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the state's power to judge on the subject or by testing its motive in enacting the provision. The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1st, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only

the determination to directly set at naught or by indirection avoid the commands of the Amendment. And it is insisted that nothing contrary to these propositions is involved in the contention of the Government that if the standard which the suffrage amendment fixes based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the other and literacy test is also void, since that contention rests, not upon any assertion on the part of the Government of any abstract repugnancy of the literacy test to the prohibitions of the Fifteenth Amendment, but upon the relation between that test and the other as formulated in the suffrage amendment and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be.

Looking comprehensively at these contentions of the parties it plainly results that the conflict between them is much narrower than it would seem to be because the premise which the arguments of the plaintiffs in error attribute to the propositions of the United States is by it denied. On the very face of things it is clear that the United States disclaims the gloss put upon its contentions by limiting them to the propositions which we have hitherto pointed out, since it rests the contentions which it makes as to the assailed provision of the suffrage amendment solely upon the ground that it involves an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the Fifteenth Amendment by creating a standard which it is repeated but calls to life the very conditions which that Amendment was adopted to destroy and which it had destroyed.

The questions then are: (1) Giving to the propositions of the Government the interpretation which the Government puts upon them and assuming that the suffrage provision has the significance which the Government assumes it to have, is that provision as a matter of law repugnant to the Fifteenth Amendment? which leads us of course to consider the operation and effect of the Fifteenth Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the Government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what if any effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard,

if legal, may survive the recognition of the fact that the other or 1866 standard has not and never had any legal existence. Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.* This is its text:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are coordinate and one may not destroy the other without bringing about the destruction of both.

(c) While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measureably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against

which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarborough,* 110 U. S. 651; *Neal* v. *Delaware,* 103 U. S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the state.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866, (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the amendment by creating a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is

immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

"But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life since it was void from the beginning because of the operation upon it of the prohibitions of the Fifteenth Amendment. And this brings us to the last heading:

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866 standard with which it is associated in the suffrage amendment.*

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the State, we must determine it for ourselves. We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal and therefore was lawfully enacted because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration involving the establishment of a right whose exercise lies at the very basis of government a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. Of course, rigorous as is this rule and imperative as is the duty not to violate it, it does not mean that it applies in a case where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intendment of the provision under consideration so compels, or where such a result is rendered necessary because to follow the contrary course would give rise to such

an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been upon any hypothesis whatever within the mind of the law-making power.

Does the general rule here govern or is the case controlled by one or the other of the exceptional conditions which we have just stated, is then the remaining question to be decided. Coming to solve it we are of opinion that by a consideration of the text of the suffrage amendment in so far as it deals with the literacy test and to the extent that it creates the standard based upon conditions existing on January 1, 1866, the case is taken out of the general rule and brought under the first of the exceptions stated. We say this because in our opinion the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be under any conditions subjected to the literacy test, a command which would be virtually set at naught if on the obliteration of the one standard by the force of the Fifteenth Amendment the other standard should be held to continue in force.

The reasons previously stated dispose of the case and make it plain that it is our duty to answer the first question, No, and the second, Yes; but before we direct the entry of an order to that effect we come briefly to dispose of an issue the consideration of which we have hitherto postponed from a desire not to break the continuity of discussion as to the general and important subject before us.

In various forms of statement not challenging the instructions given by the trial court concretely considered concerning the liability of the election officers for their official conduct, it is insisted that as in connection with the instructions the jury was charged that the suffrage amendment was unconstitutional because of its repugnancy to the Fifteenth Amendment, therefore taken as a whole the charge was erroneous. But we are of opinion that this contention is without merit, especially in view of the doctrine long since settled concerning the self-executing power of the Fifteenth Amendment and of what we have held to be the nature and character of the suffrage amendment in question. The contention concerning the inapplicability of Section 5508, Revised Statutes, now

Section 19 of the Penal Code, or of its repeal by implication, is fully answered by the ruling this day made in *United States* v. *Mosley,* No. 180, *ante,* p. —.

We answer the first question, No, and the second question, Yes.

And it will be so certified.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

I have 6 of the pamphlets.

SUPREME COURT OF THE UNITED STATES.

Nos. 8, 9 & 10.—October Term, 1914.

Charles E. Myers and A. Claude Kalmey, Plaintiffs in Error, *vs.* John B. Anderson.	In Error to the Circuit Court of the United States for the District of Maryland.
Charles E. Myers and A. Claude Kalmey, Plaintiffs in Error, *vs.* William H. Howard.	
Charles E. Myers and A. Claude Kalmey, Plaintiffs in Error, *vs.* Robert Brown.	

[June 21, 1915.]

Mr. Chief Justice White delivered the opinion of the Court.

These cases involve some questions which were not in the *Guinn* case, No. 96, just decided. The foundation question, however, is the same, that is, the operation and effect of the Fifteenth Amendment.

Prior to the adoption of the Fifteenth Amendment the privilege of suffrage was conferred by the constitution of Maryland of 1867 upon "every white male citizen", but the Fifteenth Amendment by its self-operative force obliterated the word white and caused the qualification therefore to be "every male citizen" and this came to be recognized by the Court of Appeals of the State of Maryland. Without recurring to the establishment of the City of Annapolis as a municipality in earlier days or following the development of its government, it suffices to say that before 1877 the right to vote for the governing municipal body was vested in persons entitled to vote for members of the General Assembly of Maryland, which standard by the elimination of the word white from the

constitution by the Fifteenth Amendment embraced "every male citizen". In 1896 a general election law comprising many sections was enacted in Maryland. (Laws of 1896, ch. 202, p. 327.) It is sufficient to say that it provided for a board of supervisors of elections in each county to be appointed by the governor and that this board was given the power to appoint two persons as registering officers and two as judges of election for each election precinct or ward in the county. Under this law each ward or voting precinct in Annapolis became entitled to two registering officers. While the law made these changes in the election machinery it did not change the qualification of voters.

In 1908 an act was passed "to fix the qualifications of voters at municipal elections in the City of Annapolis and to provide for the registration of said voters." (Laws of 1908, ch. 525, p. 347.) This law authorized the appointment of three persons as registers, instead of two, in each election ward or precinct in Annapolis and provided for the mode in which they should perform their duties and conferred the right of registration and consequently the right to vote on all male citizens above the age of twenty-one years who had resided one year in the municipality and had not been convicted of crime and who came within any one of the three following classes:

"1. All taxpayers of the City of Annapolis assessed on the city books for at least five hundred dollars. 2. And duly naturalized citizens. 2½. And male children of naturalized citizens who have reached the age of twenty-one years. 3. All citizens who prior to January 1, 1868, were entitled to vote in the State of Maryland or any other State of the United States at a State election, and the lawful male descendants of any person who prior to January 1, 1868, was entitled to vote in this State or in any other State of the United States at a State election, and no person not coming within one of the three enumerated classes shall be registered as a legal voter of the City of Annapolis or qualified to vote at the municipal elections held therein, and any person so duly registered shall, while so registered, be qualified to vote at any municipal election held in said city; said registration shall in all other respects conform to the laws of the State of Maryland relating to and providing for registration in the State of Maryland."

The three persons who are defendants in error in these cases applied in Annapolis to the board of registration to be registered as a prerequisite to the enjoyment of their right to vote at an election to be held in July, 1909, and they were denied the right by a vote

of two out of the three members of the board. They consequently were unable to vote. Anderson, the defendant in error in No. 8, was a negro citizen who possessed all the qualifications required to vote exacted by the law in existence prior to the one we have just quoted, and who on January 1, 1868, the date fixed in the third class in the act in question, would have been entitled to vote in Maryland but for the fact that he was a negro, albeit he possessed none of the particular qualifications enumerated by the statute in question. Howard, the defendant in error in No. 9, was a negro citizen possessing all the qualifications to vote required before the passage of the act in question, whose grandfather resided in Maryland and would have been entitled to vote on January 1, 1868, but for the fact that he was a negro. Brown, the defendant in error in No. 10, also had all the qualifications to vote under the law previously existing and his father was a negro residing in Maryland who would have been able to vote on the date named but for the fact that he was a negro. The three parties thereupon began these separate suits to recover damages against the two registering officers who had refused to register them on the ground that thereby they had been deprived of a right to vote secured by the Fifteenth Amendment and that there was liability for damages under Section 1979 Rev. Stat., which is as follows:

"Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaints were demurred to and it would seem that every conceivable question of law susceptible of being raised was presented and considered, and the demurrers were overruled, the grounds for so doing being stated in one opinion common to the three cases (182 Fed. Rep. 223). The cases were then tried to the court without a jury, and to the judgments in favor of the plaintiffs which resulted these three separate writs of error were prosecuted.

The non-liability in any event of the election officers for their official conduct is seriously pressed in argument, and it is also urged that in any event there could not be liability under the Fifteenth Amendment for having deprived of the right to vote at

a municipal election. But we do not undertake to review the considerations pressed on these subjects because we think they are fully disposed of by the ruling this day made in the *Guinn* case and by the very terms of Sec. 2004 Rev. Stat. when considered in the light of the inherently operative force of the Fifteenth Amendment as stated in the case referred to.

This brings us to consider the statute in order to determine whether its standards for registering and voting are repugnant to the Fifteenth Amendment. There are three general criteria. We test them by beginning at the third, as it is obviously the most comprehensive and, as we shall ultimately see, the keystone of the arch upon which all the others rest. In coming to do so it is at once manifest that barring some negligible changes in phraseology that standard is in all respects identical with the one just decided in the *Guinn* case to be repugnant to the Fifteenth Amendment and we pass from its consideration and approach the first and a subdivision numbered 2½. The first confers the right to register and vote free from any distinction on account of race or color upon all taxpayers assessed for at least $500. We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the Fifteenth Amendment and it is not susceptible of being assailed on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice and because as there is a reason other than discrimination on account of race or color discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the Fifteenth Amendment. And as in order to dispose of the case, as we shall see, it is not necessary to examine the constitutionality of the other standards, that is, numbers 2 and 2½ relating to naturalized citizens and their descendants, merely for the sake of argument we assume those two standards, without so deciding, to be also free from constitutional objection and come to consider the case under that hypothesis.

The result then is this, that the third standard is void because it amounts to a mere denial of the operative effect of the Fifteenth Amendment and, based upon that conception, proceeds to re-create and re-establish a condition which the Amendment prohibits and the existence of which had been previously stricken down in conse-

quence of the self-operative force of its prohibitions; and the other standards separately considered are valid or are assumed to be such and therefore are not violative of the Fifteenth Amendment. On its face, therefore, this situation would establish that the request made by all the plaintiffs for registration was rightfully refused since even if the void standard be put wholly out of view, none of the parties had the qualifications necessary to entitle them to register and vote under any of the others. This requires us therefore to determine whether the two first standards which we have held were valid or have assumed to be so must nevertheless be treated as non-existing as the necessary result of the elimination of the third standard because of its repugnancy to the prohibition of the Fifteenth Amendment. And by this we are brought therefore to determine the interrelation of the provisions and the dependency of the two first including the substandard under the second upon the third; in other words, to decide whether or not such a unity existed between the standards that the destruction of one necessarily leaves no possible reason for recognizing the continued existence and operative force of the others.

In the *Guinn* case this subject was also passed upon and it was held that albeit the decision of the question was in the very nature of things a state one, nevertheless in the absence of controlling state rulings it was our duty to pass upon the subject and that in doing so the overthrow of an illegal standard would not give rise to the destruction of a legal one unless such result was compelled by one or both of the following conditions: (a) Where the provision as a whole plainly and expressly established the dependency of the one standard upon the other and therefore rendered it necessary to conclude that both must disappear as the result of the destruction of either; and (b) where even although there was no express ground for reaching the conclusion just stated, nevertheless that view might result from an overwhelming implication consequent upon the condition which would be created by holding that the disappearance of the one did not prevent the survival of the other, that is, a condition which would be so unusual, so extreme, so incongruous as to leave no possible ground for the conclusion that the death of the one had not also carried with it the cessation of the life of the other.

That both of these exceptions here obtain we think is clear: First, because looking at the context of the provision we think that the obvious purpose was not to subject to the exactions of the first

standard (the property qualification) any person who was included in the other standards; and second, because the result of holding that the other standards survived the striking down of the third would be to bring about such an abnormal result as would bring the case within the second exception, since it would come to pass that every American born citizen would be deprived of his right to vote unless he was able to comply with the property qualification and all naturalized citizens and their descendants would be entitled to vote without being submitted to any property qualification whatever. If the clauses as to naturalization were assumed to be invalid, the incongruous result just stated would of course not arise, but the legal situation would be unchanged since that view would not weaken the conclusion as to the unity of the provisions of the statute, but on the contrary would fortify it.

But it is argued even although this result be conceded, there nevertheless was no right to recover and there must be a reversal since if the whole statute fell, all the clauses providing for suffrage fell and no right to suffrage remained and hence no deprivation or abridgment of the right to vote resulted. But this in a changed form of statement advances propositions which we have held to be unsound in the *Guinn* case. The qualification of voters under the constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that although the Fifteenth Amendment by its self-operative force without any action of the State changed the clause in the constitution of the State of Maryland conferring suffrage upon "every white male citizen" so as to cause it to read "every male citizen", nevertheless the Amendment was so supine, so devoid of effect as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the State and for the state officers to make the result of such action successfully operative.

There is a contention pressed concerning the application of the statute upon which the suits were based to the acts in question. But we think in view of the nature and character of the acts, of the self-operative force of the Fifteenth Amendment and of the legislation of Congress on the subject that there is no ground for such contention.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

True copy.

Test:

Clerk Supreme Court, U. S.

Been copied

SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1914.

The United States, Plaintiff in Error, *vs.* Tom Mosley and Dan Hogan.	In Error to the District Court of the United States for the Western District of Oklahoma.

[June 21, 1915.]

Mr. Justice Lamar, dissenting.

I dissent from the judgment that State election officers are subject to indictment in Federal courts for wrongfully refusing to receive and count election returns.

In this case the indictment charges a violation of R. S. 5508 (Penal Code 19) which makes it an offense to 'conspire to injure, oppress, threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the laws and Constitution of the United States.' And the indictment charges that these two defendants, '*being then and there members of the County Election Board of Blaine County, Oklahoma,*' did conspire to deprive certain unnamed voters of such right and in pursuance of that conspiracy threw out the returns from several election precincts.

The section under which the indictment is brought was originally a part of the Act of 1870, appearing as § 5508* in Chapter 7 of the Revised Statutes, headed "Crimes against the Elective Franchise and Civil Rights of Citizens." The Act and the Chapter contained many sections—ten of them (5506, 5511,

*"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." 16 Stat. 141, § 6.

5512, 5513, 5514, 5515, 5520, 5521, 5522, 5523) related to offenses by persons or officers against the elective franchise,—to crimes by the voter and against the voter, and specifically to offenses by Registrars, Deputy Marshals, Supervisors, and "every officer of an election." Taken together it is perfectly evident that in them Congress intended to legislate comprehensively and exhaustively on the subject of 'crimes against the franchise'. Under one or the other of them, these defendants would have been subject to indictment, but for the fact that all of those 10 sections were explicitly and expressly repealed by the Act of February 8, 1894 (28 Stat. 36).

Those ten election sections having been repealed, it is now sought to indict these officers under § 5508, which was not repealed. This is said to be justified on the ground that, in the original act, there was such an overlapping and doubling of offenses that even when those relating to election officers were repealed, a right to prosecute them for conspiracy was retained in § 5508. But this assumes that there was an overlapping when, in fact, the subject of *"crimes against the elective franchise"* and *"crimes against civil rights"* were treated as separate and distinct. The chapter heading (R. S. 5506-5523) indicates the difference; and though the two subjects were dealt with in the same Act, they were nevertheless treated as distinct. The sections of the original act ran parallel to each other but were separated from each other; and when all those dealing with offenses by election officers were repealed the legislative content of those sections was not poured into 5508.

The Act of 1870 imposing punishment upon election officers who were agents of the State, was passed in pursuance of the provisions of the Amendment which related to State action, and thus authorized Congress to provide for the punishment of State officers by Federal courts which, prior to that time, could not have been done. The Congressional will on that subject was fully and completely expressed in those parts of the statute which were afterwards repealed. Congress, having dealt so explicitly with offenses by State election officers in the ten repealed sections cannot be supposed to have referred to them indirectly in section 5508, which does not mention voters; or elections; or election officers, but deals with the deprivation of civil rights of a different nature.

As will appear by the Report of the Committee (House Report No. 18, 53rd Cong., 1st session) and debates in the House and

Senate during the discussion of the repealing act of 1894, Congress took the view that as elections were held under State laws, by State officers who were subject to punishment by the State for a violation of the election laws, they should not be subject to indictment in the United States courts. The express and avowed intent was to repeal all statutes which gave Federal courts jurisdiction over elections and over offenses committed by election officers. And to hold that while a single election officer is now immune from prosecution, two or more can be indicted under 5508, gives an enlarged operation to the theory that an act, not in itself criminal, may be punished if committed by more than one. Such construction also injects 5508 into a field from which it was excluded when passed in 1870 and into which it cannot now be forced by implication. For under Penal Code, (§ 339) 5508 means now exactly what it did when it was originally enacted.

To reverse the judgment of the lower court quashing this indictment means, in effect, that Congress failed in its avowed purpose to repeal all statutes relating to crimes against the franchise. To hold that by virtue of 5508 as a conspiracy statute all of these repealed election offenses are retained, when committed by two or more officers, will also lead to the conclusion that in 1870 Congress in the very same statute had included two sections both of which related to the same conspiracy and to the same overt act but which might be punished differently. For, if the District Attorney had indicted under 5506 for "*combining and confederating to prevent a qualified citizen from voting,*" the two defendants might have been punished by a fine of $500 and imprisonment for 12 months; while if the indictment for the very same conduct had been based on 5508, for "*conspiring to deprive the citizen of a right under the United States law,*" the punishment might be a fine of $5,000, imprisonment for 10 years and the loss of the right to hold office under the laws of the United States. Congress certainly never intended in the same breath to make the same act punishable under two different sections in different ways at the option of the prosecuting attorney. Similar anomalies could be pointed out if 5508 is to be construed as so all-embracing as to include acts by two in violation of the 10 election sections which have been repealed.

R. S. 5508 is highly penal and is to be strictly construed. And that ordinary rule is especially applicable when a statute is sought to be enforced against election officers. For the relation between the States and the Federal Government is such that the power of the

United States courts to punish State officers for wrongs committed by them as officers, should be clearly and expressly defined by Congress and not left to implication—especially so when Congress has given such an explicit expression of its intent that election officers should not be punished in the Federal courts.

The Fifteenth Amendment is self-executing in striking the word "white" from all laws granting the right of suffrage. It was not so far self-executing as to define crimes against the franchise or to impose punishments for wrongs against a voter. The amendment provided that Congress should have power to enforce its provisions by appropriate legislation. Congress did so legislate in 1870. In 1894 it expressly repealed the legislation relating to elections. Since that time no subsequent Congress has restored that legislation or anything like it to the statute books. If this be a hiatus in the law (*James* v. *Bowman,* 190 U. S. 127, 139) it cannot be supplied through the operation of a conspiracy statute (§ 5508) which did not contemplate furtive and fraudulent conduct, or a wrong to the public, or to the voters of an entire precinct, or to wrongs like those here charged. It related to conspiracies to *injure, oppress, threaten, intimidate*—to violence, oppression, injury, intimidation; to force on the premises, force on the highway. The nearest approach to a prosecution for an election offense under 5508 is the *Yarbrough* case (110 U. S. 656). But he was not an election officer and "the beating and wounding" there charged took place on the "highway" remote from the precinct. That form of intimidation and violence was in express terms dealt with in 5508 and in none of the repealed sections.

R. S. 5508 has been in force for 45 years. During those 45 years no prosecution has ever been instituted under it against a State election officer. That non-action but confirms the correctness of the construction that it was never intended to apply to offenses by State election officers. On the general subject see *James* v. *Bowman,* 190 U. S. 127; *Giles* v. *Teasley,* 193 U. S. 149; *Hodges* v. *United States,* 203 U. S. 1; *Green* v. *Miles,* 69 Fed. 863; *United States* v. *Harris,* 189 U. S. 629; *United States* v. *Cruikshank,* 92 U. S. 558; *Swafford* v. *Templeton,* 185 U. S. 487; *In re Coy,* 127 U. S. 731; *Wiley* v. *Sinkler,* 179 U. S. 58, 66, 67; *Karem* v. *United States,* 121 Fed. 250, 258 (2), 259; *Seeley* v. *Knox,* 2 Woods (C. C.) 368; *Reese* v. *United States,* 92 U. S. 214; *Holt* v. *Indiana,* 176 U. S. 68, 72, 73; *Wadley* v. *New Hall,* 136 U. S. —; *Baldwin* v. *Frank,* 120 U. S. 690; *United States* v. *Waddell,* 112 U. S. 76.

IN THE SURREME COURT OF THE STATE OF OKLAHOMA.

In the matter of the Objection and protest against Initiative petition No. 3. State Question No. 8.	))))	No. 1370.

Appeal from the action of Bill Cross, Secretary of State, in sustaining the Demurrer of petitioners and Overruling Motion for continuance of Remonstrator, Reuben M.Roddie.

Brief of Remonstrator Reuben M. Roddie, Appellant.

Statement of Nature and Result of Proceedings.

This suit grew out of Initiative Petition submitted to the Secretary of State, having for its purpose the initiating of the proposition to amend Section 1., Article 3, of the Constitution of the State of Oklahoma, by striking therefrom the word "male", the said petition having for its object the establishing of Female Suffrage in the State of Oklahoma. Said petition was duly presented to the Secretary of State, and Remonstrator , Reuben M. Roddie duly filed his verified objection and protest and the same is shown on pages Two, Three and Four of the Transcript. The Petitioners thereupon filed verified answer, but afterwards, by leave of the Secretary of State, withdrew said answer and filed their Demurrer or Motion to dismiss, as shown on pages Six and Seven of the Transcript.

Thereupon Remonstrator, Reuben M. Roddie, made motion for a continuance, which was duly overruled, and the Secretary of State thereupon sustained the Motion or Demurrer and granted the application of Petitioners, and filed said Petition, and rendered judgment in favor of Petitioners, that the question proposed should be certified to the Governor, and be submitted to the electors of the State as provided by law, to all of which the Remonstrator Reuben M.Roddie excepted and gave notice of appeal to this Court, and Remonstrator here submits his appeal upon Two Assignments:

First. The Secretary of State erred in sustaining Petitioner's Demurrer and Motion to dismiss the Remonstrance filed by Reuben M.Roddie and designated objections and protest.

Second. The Secretary of State erred in overruling remonstrator's Motion for a continuance.

Said assignments will be taken up in their order.

First Assignment of Error .

The Secretary of State erred in sustaining Petitioner's' Demurrer and Motion to dismiss the remonstrance filed by Reuben M.Roddie and designated objections and protest.

First Proposition under said First Assignment.

The Petitioners having first filed an answer, they thereby waived their rights as far as a demurrer or motion to dismiss was concerned, for the reason that said action was violative of the rules of due order of pleading.

Statement.

On page Five of the Transcript there appears an answer filed by the petitioners in reply to the protest or remonstrance of Reuben M.Roddie.

On page Six of the Transcript is found the Demurrer of Petitioners, which on page Seven shows to have been filed subsequent to the filing of said Answer.

On page Eight of the Transcript is found the following Statement:

> "The remonstrator to the petition excepts to the action of the Secretary of State permitting the petitioners to file a demurrer after filing the denial."

And the Secretary of State overruled the exception.

Argument.

The petitioners having filed their answer to remonstrator's charge of fraud, thereby waived all dilatory pleas and thereby joined issue and submitted the case upon the issued there made, and it was error for the Secretary of State to permit the withdrawal of said answer and the filing of said demurrer after withdrawal of same.

Second proposition under said
First Assignment.

The petitioners having filed their demurrer as shown on page Six of the Transcript, for the purpose of this suit, the allegations in remonstrator's protest, as shown on pages Two to Four were admitted to be true, and said protest of remonstrator alleges:

First. That the petition did not have a sufficient number of legal voters signed thereto as provided by law.

Second. That more than twenty-five per cent of the signatures attached to the petition were not signed by the persons whose names such signatures purported to be, but were signed by other persons and that no authority for such signatures appears.

Third. That said proposed amendment did not have attached thereto the signatures of any legal voters of the State of Oklahoma, or of any Precinct therein.
Said protest being duly sworn to and said three objections aforesaid being by the Demurrer admitted as true, then the Secretary of State unquestionably committed error in granting the petition and entering judgment that the same should be certified to the Governor.
The Statute does not require such pleadings to be sworn to, nor does it require remonstrator to file bond for costs.

Statement.

Said protest is set out on page Two to page Four of the Transcript. The Demurrer is set out on page Six to Seven of the Transcript. The action of the Secretary of State upon the pleadings is set out on page Ten to Twelve of the Transcript.

Argument

Section 5668 of Snyder's Compiled Laws of Oklahoma:

> "Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true;"

The Initiative Petition shall be signed only by legal voters of the State of Oklahoma, and at least fifteen per cent. of the legal voters must sign the petition before the same can be acted upon by the Secretary of State.

See Article 5, Section 2 of the Constitution.

The protest of remonstrator, Reuben M. Roddie, alleges that the parties signing said petition were not legal voters, and that the petition did not contain the signatures of a sufficient number of legal voters, that is fifteen per cent.

of the legal voters of the State of Oklahoma. These allegations being admitted to be true by the demurrer, then under the Constitution, the court should have dismissed the petition and refused to certify the same to the Governor.

See also Sec. 3678 Snyder's Compiled Laws.

Second Assignment of Error

The Secretary of State erred in overruling remonstrator's Motion for a continuance.

Statement.

The remonstrator filed the following motion for a continuance:

> " Comes now the remonstrator and moves the Secretary to grant a continuance in this cause for the reason that the filing of the demurrer is a surprise to the remonstrator , since it has been filed after the withdrawal of the general denial and raises a law question that the remonstrator should have time to prepare himself to meet, while the general denial raised only the question of fact. "

The Secretary thereupon overruled the motion for continuance and rendered his opinion in favor of petitioners, to all of which remonstrator objected and excepted.

Argument.

Section 5835 of Snyder's Compiled Laws reads as follows:

> " The court may, for good cause shown, continue an action at any stage of the proceeding upon such terms as may be just."

With reference to proceedings of this kind, there are very few precedents, and the procedure is very indefinite, and the Secretary of State having allowed the petitioners to withdraw their answer and having filed in lieu of the same a long extended demurrer, it seems to us that the application of remonstrator for a continuance in order to investigate the law of the propositions should have been granted, even though the continuance should not have been granted for more than one day. It is evident from the whole record presented to this court that the Secretary of State was in error in sustaining the demurrer, and that he was also in error in

refusing the application for a continuance.

It is true that the appeal is not in entire conformity with cases appealed from the District and County Courts, but from the Statute it seems that these appeals can be heard in an informal way before the Supreme Court when the petition applies to Statewide matters, and we insist that there is error in the record and that the action of the Secretary of State in rendering the judgment on page Ten to Twelve of the Transcript and in sustaining the Demurrer and in overruling the Application for a Continuance were erroneous , and that this petition should be referred back to the Secretary of State for further consideration, and his action in the premises reversed and the cause remanded.

Ledbetter, Stuart and Bell,

Attorneys for Reuben M. Roddie
Remonstrator.

No. 1370.

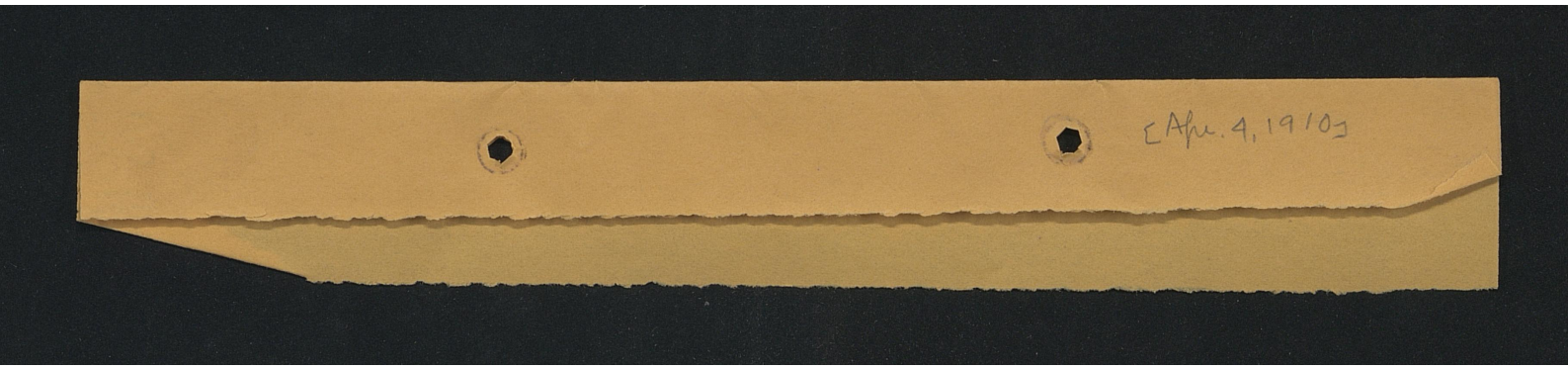
In the Matter of the Objection and Protest against Initiative Petition No. 3. State Question No. 8.

BRIEF OF REMONSTRATOR

REUBEN M. RODDIE, APPELLANT

Ledbetter, Stuart & Bell,

Attorneys for Reuben M. Roddie Remonstrator.


[Apr. 4, 1910]