State Citizens Service Center

Book 3

were subsequently convicted of a new offense.

54A Report of National Conference of State Trial Judges Committee on "The Sociopathic Offender and the Courts" The Honorable William K. Thomas, Chairman, 1964.

54B National Conference of State Trial Judges, Digest of the report of the committee on "The Sociopathic Offender and the Courts" 1964, The Honorable William K. Thomas, Chairman.

55 Report of Committee on "The Sociopathic Offender and the Courts," presented August 8, 1965, to National Conference of State Trial Judges. The Honorable William K. Thomas, Chairman.

56 Release record statistics as to patients committed to Patuxent from January, 1955 to June 30, 1965.

57A Excerpt from the second report of Maryland Self-Survey Commission—relating to Department of Correction, 1958, by Sanford Bates.

57B "Reports of Surveys, Maryland Department of Correction and Patuxent Institution," by Sanford Bates, October 30, 1959.

58A–L Photographs of Patuxent Institution.

59 Address on Defective Delinquency; delivered by Honorable Jerome Robinson, Maryland House of Delegates at the General Assembly of the States Council of State Governments. December 5, 1958.

60 Address by The Honorable Reuben Oppenheimer, "Criminal Defectives and The Maryland Law" Mid-Winter Meeting of the Maryland State Bar Association, 1949.

61A Statistics as to comparable average salaries of the Patuxent Institution personnel February 18, 1965.

61B Statistics comparing Maryland salaries of Patuxent professional staff with those of other states prepared by Robin J. Zee, Director, Classification and Compensation, September 20, 1965.

62 Patuxent Institution record of James Craig.

63 Parole experience of 135 paroled from opening of Patuxent through October 26, 1965.

64 Deposition of John Sas given August 16, 1965, and a certified copy of the court proceedings held in Baltimore City on Monday, November 8, 1965, wherein John Sas was released from Patuxent following a determination he was no longer a Defective Delinquent.

For the reasons given in this opinion and the opinion of the trial court just reproduced, the order releasing Daniels and the orders holding and declaring the Act constitutional on its face and in operation will be affirmed.

Order releasing Daniels and orders holding and declaring the Act constitutional on its face and in operation affirmed, the costs to be paid by Prince George's County.

243 Md. 353

St. George I. B. CROSSE, III

v.

BOARD OF SUPERVISORS OF ELECTIONS OF BALTIMORE CITY.

No. 223–Adv.

Court of Appeals of Maryland.

Order July 1, 1966.

Opinion July 21, 1966.

Mandamus action to compel board of supervisors of elections to accept and certify candidate's candidacy for sheriff. The

Superior Court of Baltimore City, Anselm Sodaro, J., denied the petition for writ of mandamus. The candidate appealed. The Court of Appeals held that candidate who had been resident of state for five years prior to date fixed for election was citizen of state within constitutional requirement that sheriff be citizen for five years and candidate was eligible to seek office of sheriff even though he had been naturalized as United States citizen only one month prior to filing his candidacy.

Order denying mandate reversed with directions.

1. Citizens ⇐11

It is not necessary for a person to be a citizen of the United States in order to be a citizen of his state. U.S.C.A.Const. Amend. 14.

2. Citizens ⇐11

Requirements for citizenship of a state depend upon context in which "citizen" is used in statute or constitution where United States citizenship has no reasonable relationship to the subject matter and purpose of the legislation in question. U.S.C.A. Const. Amend. 14.

3. Citizens ⇐2

A person does not have to be a voter to be a citizen of the United States or of the state. U.S.C.A.Const. Amend. 14.

4. Attorney General ⇐1
Judges ⇐4
States ⇐47

Only citizens of the United States may hold offices of governor, judge, and attorney general. Const. art. 2, § 5; art. 4, § 2; art. 5, § 4.

5. Sheriffs and Constables ⇐3

Constitutional qualification for office of sheriff that person elected shall have been citizen of the state for five years prior to his election is requirement that he should be domiciled within state and not that he be United States citizen. Const. art. 4, § 44.

6. Sheriffs and Constables ⇐1

Office of sheriff is ministerial in nature.

7. Sheriffs and Constables ⇐77

Sheriff's function and province is to execute duties prescribed by law.

8. Citizens ⇐11

That state cannot confer diversity jurisdiction on United States court by granting state citizenship to an unnaturalized alien does not mean that it cannot make an alien a state citizen for other purposes. U.S.C.A.Const. Amend. 14; art. 3, § 2.

9. States ⇐47

State has right to extend qualifications for state office to its citizens, even though they are not citizens of the United States. U.S.C.A.Const. Amend. 14.

10. Sheriffs and Constables ⇐3

Candidate who had been resident of state for five years prior to date fixed for election was citizen of state within constitutional requirement that sheriff be citizen for five years and candidate was eligible to seek office of sheriff even though he had been naturalized as United States citizen only one month prior to filing his candidacy. Const. art. 4, § 44.

St. George I. B. Crosse, III, in pro. per.

Edward L. Blanton, Jr., Asst. Atty. Gen. (Thomas B. Finan, Atty. Gen., Baltimore, on the brief), for appellee.

Before HAMMOND, HORNEY, MARBURY, OPPENHEIMER, and BARNES, JJ.

ORDER

PER CURIAM.

For reasons to be stated in an opinion to be hereafter filed, it is *ordered* by the Court of Appeals of Maryland this 1st day of July, 1966, that the order appealed from be, and it is hereby, reversed, with costs; and it is further

Ordered that the mandate, directing the granting of the writ of mandamus prayed for below be issued forthwith.

OPPENHEIMER, Judge.

After argument, by per curiam order, we reversed the order of the Superior Court of Baltimore City which denied the appellant's petition for a writ of mandamus to compel the Board of Supervisors of Elections of Baltimore City to accept and certify his candidacy for Sheriff of Baltimore City, and ordered that the mandate directing the writ of mandamus prayed for below be issued forthwith. The reasons for our order follow.

The question involved is whether the appellant is qualified to become a candidate under the provisions of Article IV Section 44 of the Maryland Constitution. The material provisions of that Section are as follows:

> "There shall be elected in each county and in Baltimore City * * * one person, resident in said county, or City, above the age of twenty-five years and at least five years preceding his election, a citizen of the State, to the office of Sheriff."

The facts are not in dispute. The appellant was born in the West Indies and immigrated to the United States in June of 1957. He and his family established their residence in Crisfield, Maryland. Upon reaching his eighteenth birthday, and upon signing his Declaration of Intention to become a citizen of the United States under the federal Naturalization law, he enlisted in the United States Army, served for approximately three years and was given an honorable discharge in 1960. He established his residence in Salisbury, Maryland, and matriculated at the Maryland State College from which he was graduated in 1964. He then entered the University of Maryland Law School and has successfully completed his first year. In May of 1964 he established his home in Baltimore City, where he has since resided. On April 29, 1966, he became a naturalized citizen of the United States and a registered voter of the State of Maryland. On May 26, 1966, the appellant filed his candidacy for the office of Sheriff of Baltimore City with the Board of Supervisors of Elections of Baltimore City. His Certificate of Nomination was notarized and accepted, as was his filing fee of $150. He received the usual material given to all candidates who file for public office. On June 4, 1966, he received a letter from the Board advising him that he did not qualify as a candidate for the office of Sheriff because he did not become a citizen of the United States until April 29, 1966, and that under the Fourteenth Amendment of the United States Constitution he did not become a citizen of the State of Maryland until that date. The Board acted on the advice of its counsel, the Attorney General of Maryland, and returned the application to the appellant together with the filing fee.

The court below held and the Board contends that the appellant did not become a citizen of Maryland, under the provisions of the Maryland Constitution, until he became a citizen of the United States, and is therefore ineligible to be Sheriff of Baltimore City because he was not a United States citizen at least five years preceding the election. We disagree.

[1, 2] Both before and after the Fourteenth Amendment to the federal Constitution, it has not been necessary for a person to be a citizen of the United States in order to be a citizen of his state. United States v. Cruikshank, 92 U.S. 542, 549, 23 L.Ed. 588 (1875); Slaughter-House Cases,

83 U.S. (16 Wall.) 36, 73–74, 21 L.Ed. 394 (1873); and see Short v. State, 80 Md. 392, 401–402, 31 A. 322 (1895). See also Spear, State Citizenship, 16 Albany L.J. 24 (1877). Citizenship of the United States is defined by the Fourteenth Amendment and federal statutes, but the requirements for citizenship of a state generally depend not upon definition but the constitutional or statutory context in which the term is used. Risewick v. Davis, 19 Md. 82, 93 (1862); Halaby v. Board of Directors of University of Cincinnati, 162 Ohio St. 290, 293, 123 N.E.2d 3 (1954) and authorities therein cited.

The decisions illustrate the diversity of the term's usage. In Field v. Adreon, 7 Md. 209 (1854), our predecessors held that an unnaturalized foreigner, residing and doing business in this State, was a citizen of Maryland within the meaning of the attachment laws. The Court held that the absconding debtor was a citizen of the State for commercial or business purposes, although not necessarily for political purposes. Dorsey v. Kyle, 30 Md. 512, 518 (1869), is to the same effect. Judge Alvey, for the Court, said in that case, that "the term citizen, used in the formula of the affidavit prescribed by the 4th section of the Article of the Code referred to, is to be taken as synonymous with inhabitant or permanent resident."

Other jurisdictions have equated residence with citizenship of the state for political and other non-commercial purposes. In re Wehlitz, 16 Wis. 443, 446 (1863), held that the Wisconsin statute designating "all able-bodied, white, male citizens" as subject to enrollment in the militia included an unnaturalized citzen who was a resident of the state. "Under our complex system of government," the court said, "there may be a citizen of a state, who is not a citizen of the United States in the full sense of the term." McKenzie v. Murphy, 24 Ark. 155, 159 (1863), held that an alien, domiciled in the state for over ten years, was entitled to the homestead exemptions provided by the Arkansas statute to "every free white citizen of this state, male or female, being a householder or head of a family * * *." The court said: "The word 'citizen' is often used in common conversation and writing, as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges; and we think it is so used in our constitution." Halaby v. Board of Directors of University, supra, involved the application of a statute which provided free university instruction to citizens of the municipality in which the university is located. The court held that the plaintiff, an alien minor whose parents were residents of and conducted a business in the city, was entitled to the benefits of that statute, saying: "It is to be observed that the term, 'citizen,' is often used in legislation where 'domicile' is meant and where United States citizenship has no reasonable relationship to the subject matter and purpose of the legislation in question."

Closely in point to the interpretation of the constitutional provision here involved is a report of the Committee of Elections of the House of Representatives, made in 1823. A petitioner had objected to the right of a Delegate to retain his seat from what was then the Michigan Territory. One of the objections was that the Delegate had not resided in the Territory one year previous to the election in the status of a citizen of the United States. An act of Congress passed in 1819, 3 Stat. 483 provided that "every free white male citizen of said Territory, above the age of twenty-one years, who shall have resided therein one year next preceding" an election shall be entitled to vote at such election for a delegate to Congress. An act of 1823, 3 Stat. 769 provided that all citizens of the United States having the qualifications set forth in the former act shall be eligible to any office in the Territory. The Committee held that the statutory requirement of citizenship of the Territory for a year before the election did not mean that the aspirant for office must also have been a United States citizen during that period. The report said: "It is the person, the individual, the man, who is

spoken of, and who is to possess the qualifications of residence, age, freedom, &c. at the time he offers to vote, or is to be voted for * * *." Upon the filing of the report, and the submission of a resolution that the Delegate was entitled to his seat, the contestant of the Delegate's election withdrew his protest, and the sitting Delegate was confirmed. Biddle v. Richard, Clarke and Hall, Cases of Contested Elections in Congress (1834) 407, 410.

[3] There is no express requirement in the Maryland Constitution that sheriffs be United States citizens. Voters must be, under Article I, Section 1, but Article IV, Section 44 does not require that sheriffs be voters. A person does not have to be a voter to be a citizen of either the United States or of a state, as in the case of native-born minors. In Maryland, from 1776 to 1802, the Constitution contained requirements of property ownership for the exercise of the franchise; there was no exception as to native-born citizens of the State. Steiner, Citizenship and Suffrage in Maryland (1895) 27, 31.

[4-7] The Maryland Constitution provides that the Governor, Judges and the Attorney General shall be qualified voters, and therefore, by necessary implication, citizens of the United States. Article II, Section 5, Article IV, Section 2, and Article V, Section 4. The absence of a similar requirement as to the qualifications of sheriffs is significant. So also, in our opinion, is the absence of any period of residence for a sheriff except that he shall have been a citizen of the State for five years. The Governor, Judges and Attorney General in addition to being citizens of the State and qualified voters, must have been a resident of the State for various periods. The conjunction of the requisite period of residence with state citizenship in the qualifications for sheriff strongly indicates that, as in the authorities above referred to, state citizenship, as used in the constitutional qualifications for this office, was meant to be synonymous with domicile, and that citizenship of the United States is not required, even by implication, as a qualification for this office. The office of sheriff, under our Constitution, is ministerial in nature; a sheriff's function and province is to execute duties prescribed by law. See Buckeye Dev. Corp. v. Brown & Schilling, Inc., Md., 220 A.2d 922, filed June 23, 1966 and the concurring opinion of Le Grand, C. J. in Mayor & City Council of Baltimore v. State ex rel. Bd. of Police, 15 Md. 376, 470, 488-490 (1860).

It may well be that the phrase, "a citizen of the State," as used in the constitutional provisions as to qualifications, implies that a sheriff cannot owe allegiance to another nation. By the naturalization act of 1779, the Legislature provided that, to become a citizen of Maryland, an alien must swear allegiance to the State. The oath or affirmation provided that the applicant renounced allegiance "to any king or prince, or any other State or Government." Act of July, 1779, Ch. VI; Steiner, op. cit. 15. In this case, on the admitted facts, there can be no question of the appellant's undivided allegiance.

The court below rested its decision on its conclusion that, under the Fourteenth Amendment, no state may confer state citizenship upon a resident alien until such resident alien becomes a naturalized citizen of the United States. The court relied, as does the Board in this appeal, upon City of Minneapolis v. Reum, 56 F. 576, 581 (8th Cir. 1893). In that case, an alien resident of Minnesota, who had declared his intention to become a citizen of the United States but had not been naturalized, brought a suit, based on diversity of citizenship, against the city in the Circuit Court of the United States for the District of Minnesota under Article III, Section 2 of the United States Constitution which provides that the federal judicial power shall extend to "Controversies between * * * a State, or the Citizens thereof, and foreign States, Citizens or Subjects." At the close of the evidence, the defendant moved to dismiss the action for want of jurisdiction, on the

ground that the evidence failed to establish the allegation that the plaintiff was an alien. The court denied the motion, the plaintiff recovered judgment, and the defendant claimed error in the ruling on jurisdiction. The Circuit Court of Appeals affirmed. Judge Sanborn, for the court, stated that even though the plaintiff were a citizen of the state, that fact could not enlarge or restrict the jurisdiction of the federal courts over controversies between aliens and citizens of the state. The court said: "It is not in the power of a state to denationalize a foreign subject who has not complied with the federal naturalization laws, and constitute him a citizen of the United States or of a state, so as to deprive the federal courts of jurisdiction * * *."

[8] *Reum* dealt only with the question of jurisdiction of federal courts under the diversity of citizenship clause of the federal Constitution. That a state cannot affect that jurisdiction by granting state citizenship to an unnaturalized alien does not mean it cannot make an alien a state citizen for other purposes. Under the Fourteenth Amendment all persons born or naturalized in the United States are citizens of the United States and of the state in which they reside, but we find nothing in *Reum* or any other case which requires that a citizen of a state must also be a citizen of the United States, if no question of federal rights or jurisdiction is involved. As the authorities referred to in the first portion of this opinion evidence, the law is to the contrary.

[9, 10] Absent any unconstitutional discrimination, a state has the right to extend qualification for state office to its citizens, even though they are not citizens of the United States. This, we have found, is what Maryland has done in fixing the constitutional qualifications for the office of sheriff. The appellant meets the qualifications which our Constitution provides.

Sainsevaines were, therefore, not bound to pay it. Nor do we find anything in the record to satisfy us that the item of one thousand eight hundred and fifty-one dollars paid to Madame Signe occupied a different position. If this sum was a lien on the "Aliso," which the Sainsevaines were bound to pay, the record fails to disclose the fact. The appellant also claims that the debt to Temple was also a lien on the property, to be paid by the Sainsevaines; but he has failed to direct our attention to the proof of the fact, and after a careful examination of the record we find no evidence of it. It is true that on the trial the contestants offered to prove by the witness Prudhomme that this claim was an incumbrance on the "Aliso," and the Court ruled out the evidence. But if it was an incumbrance, it was not competent to prove it by parol, and the Court properly rejected the evidence.

On the whole, we find no error in the record, and the judgment is affirmed.

THE PEOPLE OF THE STATE OF CALIFORNIA v. GEORGE WASHINGTON.

VALIDITY OF THE CIVIL RIGHTS BILL.—The provisions of the Act of Congress commonly known as the "Civil Rights Bill," (14 U. S. Stats. at Large, p. 27,) which provide that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens of every race and color * * * shall have the same right in every State and Territory of the United States * * * to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, * * * any law, statute, ordinance, regulation, or custom to the contrary notwithstanding," were not repugnant to the Constitution of the United States as it read prior to the adoption of the Fourteenth Amendment thereto, and are valid.

IDEM — EFFECT OF THE "CIVIL RIGHTS BILL" IN THE STATE OF CALIFORNIA.— The effect of the enactment of the "Civil Rights Bill" was to put all persons, irrespective of race or color, born within the United States and not subject to any foreign power, excluding Indians not taxed, upon an equality before the laws of this State in respect to their personal liberty.

IDEM — EFFECT ON ACT CONCERNING CRIMES AND PUNISHMENTS.— The fourteenth section of the statute of this State "concerning crimes and punishments," which provides that "no Indian, or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person," (Stats. 1863, p. 69,) so far as it discriminates against persons, on the score of race or color, born within the United States and not subject to any foreign power, excluding Indians not taxed, has, by the force and effect of the "Civil Rights Bill," become null and void.

IDEM.— W., who was a mulatto born within the United States and not subject to any foreign power, was indicted for the crime of robbing Ah Wang, a Chinaman. The indictment was found exclusively upon the testimony of Chinese witnesses. No other testimony against W. was procurable by the District Attorney for the purposes of a trial under said indictment. The Court below, on W.'s motion, set aside the indictment and discharged him without day. On appeal from said orders, taken by the People, this Court affirmed the judgment of the Court below.

APPEAL from the County Court of the City and County of San Francisco.

The facts are stated in the opinion of the Court.

Jo Hamilton, Attorney General, for the People.

[No brief on file for Respondent.]

By the Court, RHODES, J.:

The defendant was indicted for the crime of robbery. The person alleged to have been robbed was a Chinaman named Ah Wang. The indictment was found exclusively upon the testimony of Chinese witnesses, and for that reason counsel for the defendant moved to set it aside. Thereupon, for the purpose of disposing of the whole case, as well as the motion, it was stipulated between the District Attorney and counsel for the defendant, that the defendant was a mulatto, born within the United States, and not subject to any foreign power; that all the evidence in the case known to the District Attorney was the testimony of Chinese witnesses, who were born without the United States and within the Chinese Empire. In view of these facts the indictment was set aside, and the defendant discharged.

The case presents for our consideration the fourteenth section of the statute of this State in relation to crimes and

punishments, which provides that "no Indian or person having one half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person," as affected by the adoption of the Thirteenth Amendment to the Federal Constitution, which provides that "neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction," and that "Congress shall have power to enforce this Article by appropriate legislation;" and the first section of the Act of Congress passed in pursuance thereof, entitled "An Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," which provides that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and 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 or Territory of 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 person and property as is enjoyed by white citizens, shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding." (13 U. S. Stats, at Large, pp. 774, 775; 14 U. S. Stats. at Large, p. 27.)

In view of the foregoing constitutional and statutory provisions, we are asked to determine whether the Act of Congress of the 9th of April, 1866, commonly called the "Civil Rights Bill," so far as it bears upon the question before us, was repugnant to the Constitution of the United States as it read prior to the adoption of the Fourteenth Amendment;

and if not, what has been its effect upon the fourteenth section of the statute of this State in relation to crimes and punishments?

We regret that we are called upon to decide so important a question without any argument on the part of the defendant.

The nature and objects of the Act first claim our attention. The Attorney General claims "that it at least only extended and only could extend to the *political* rights of white persons and negroes, and no further." A slight examination of the Act would readily show this position to be untenable. The title of the Act is, "An Act to protect all persons in the United States in their *civil rights*, and furnish the means of their vindication." The first clause of the first section declares "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." It is the general, and we think the better, opinion that this provision, in view of the abolition of slavery, is only declaratory. One of the most distinguished and perhaps the leading opponent of the passage of the bill, entertained that view, but differed with the majority in respect to the extent of the operation of the rule; he holding that while it was true that by virtue of their birth the persons named became citizens of the United States, it did not follow that they became citizens of the State of their birth. If the latter position is tenable — if a person residing in one of the States can be a citizen of the United States and not, at the same time, a citizen of any particular State, it will make no difference in the result of the present inquiry.

Whether the clause of the section under consideration is merely declaratory, or whether it, in effect, makes citizens of those who before were not entitled to that appellation, it only declares or establishes the status of such persons. This does not directly confer political rights, or more accurately speaking, powers or privileges, nor do they necessarily result from such status. Native born infants and females are citizens of the State of their birth or residence, but possess no

political rights. Persons becoming citizens by naturalization do not, thereby, acquire political rights, but such rights are derived from the Constitution and laws of the State of their residence. "Civil rights," as defined by Bouvier, "are those which have no relation to the establishment, support or management of Government. These consist in the power of acquiring and enjoying property, of exercising the parental and marital power, and the like." They are the absolute rights of persons, the right of personal security, the right of personal liberty, and the right to acquire and enjoy property, as regulated and protected by law. They are the rights which, according to the fundamental principles of American Government, are inalienable.

"Political rights," says the same author, "consist in the power to participate directly or indirectly in the establishment or management of Government." The elective franchise and the right to hold public offices constitute the principal political rights of citizens of the several States.

The absolute rights of persons have no necessary connection with the establishment or management of Government. Females, infants, the Chinese and Indians are entitled to the benefit of the writ of *habeas corpus*, may sue, contract, hold property, etc., but it is preposterous to assert that the possession of those rights implies the possession of the elective franchise, or the right to discharge the duties of a public office. Did the Act in fact confer political rights, all the other provisions of the Act were unnecessary and useless, for the ballot is the safeguard of civil as well as political rights.

In the same section certain rights are secured to those who are declared to be citizens of the United States. It is provided that they shall have "the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, to *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 as is enjoyed by white citizens*,

and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Most of the rights here enumerated are such as are enjoyed by aliens as well as citizens, and, indeed, all the residents of the United States, except those laboring under the disabilities growing out of the condition of slavery. But some of the rights mentioned go beyond that line, as the right to inherit property, to give evidence, the right to the full and equal benefit of all laws for the security of person and property as is enjoyed by white citizens; and it is claimed that the regulation of these and the like matters belongs to the several States. If it be admitted that this was true before the adoption of the Thirteenth Amendment to the Constitution of the United States, yet upon the adoption of that amendment legislation of the character of the Civil Rights Bill became appropriate; and in order to confer full authority therefor, the second section of the amendment was adopted, which provides that "Congress shall have power to enforce this Article by appropriate legislation." At common law one of the usual divisions of persons was into the comprehensive titles of aliens and native born subjects. The term *citizen* is now nearly synonymous with that of *subject* at common law. But under our system of government there was a third class, the persons of which it was composed being neither aliens nor citizens. "Indians not taxed," and slaves, composed the main portion of this class. As most of the persons of African descent within the United States were introduced as slaves, or were the descendants of slaves, they were not regarded in some of the States as citizens, and in the midst of the great political conflicts which preceded the civil war, the Supreme Court of the United States (some of the Justices dissenting) held that a negro was not a citizen of the United States, and consequently could not sue in their Courts. (*Dred Scott v. Sandford*, 19 How. 393.) Persons of that race were, in several of the States, subject to disabilities, restrictions, and penalties

to which white persons were not liable, and others were being added by laws enacted for that purpose.

The object of the adoption of the first section of the Thirteenth Amendment to the Constitution was not only to effect the emancipation of all persons then held in slavery, but also to forever thereafter deprive both Congress and the respective States of any and all power to reduce either the persons so emancipated or any others within the jurisdiction of the United States to the condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted. And the object of the second section was to enable Congress, by appropriate legislation, to secure the persons so emancipated, as well as all others, while within the jurisdiction of the United States, in the full enjoyment of that personal liberty contemplated in the first section or, in other words, the Thirteenth Amendment was at least intended to make all men born in the United States, without reference to color, equal before the law with respect to *personal liberty*, one of the absolute rights of man. and to give Congress power to pass any and all laws necessary and proper to accomplish that end. Undoubtedly, to secure *personal freedom* to all within the purview of its provisions, was the first great and leading object of the Thirteenth Amendment. *Personal security*, and the right to acquire and enjoy private property — and these cover the remaining elements of one's civil rights — would certainly seem to be powerful auxiliaries to the maintenance of *personal liberty*. The continued enjoyment of *personal liberty* cannot well be assured without the enjoyment of *personal security*. And the right to acquire and enjoy private property would seem to be necessary to give that independence and freedom from want essential to the full enjoyment of personal liberty. Whatever, therefore, tends to maintain and assure to a person personal security, and to protect him in the acquisition and enjoyment of private property, would seem to aid in the maintenance of his personal liberty. Congress doubtless took this view in passing the Civil Rights Bill, and extended

its provisions to these auxiliary and cognate rights. But it is still apparent that the great and leading object was the maintenance of the persons provided for in their *personal liberty*, and it is *in this aspect only* that we are now called upon to consider it. If other and cognate or collateral objects, not strictly within the scope of its constitutional powers, were introduced, going beyond this, (in regard to which, however, we now express no opinion,) this will not affect the validity of the Act as to those provisions which bear directly upon the main object, the protection of personal liberty and enforcement of the amendment designed to secure it.

That the Civil Rights Bill, so far, at least, as it bears upon the question now under consideration, (and we have at present no concern with other provisions contained in it,) is appropriate legislation for the enforcement of the rights provided for in the first section of the Thirteenth Amendment, it seems to us there can be no serious question. The first section, being self-executing in the emancipation of the persons then held in slavery, and in providing for the inviolability of the personal liberty of all for the future, we can conceive of no legislation appropriate to enforce the rights thus conferred and guaranteed, except such as practically tend to facilitate the securing to all, through the aid of the judicial and executive departments of the Government, the full enjoyment of personal freedom.

In the administration of justice the subject of evidence occupies a large space. It is the means by which the judicial branch of the Government is informed of the violation of that personal liberty which this amendment of the Constitution guarantees to all persons within the jurisdiction of the Federal Government, and whereby it is enabled to perceive the wrong and apply the proper remedy for enforcing the right. It is ordinarily the proper function of the legislative department of Governments to prescribe rules as to the production and competency of evidence. It would seem,

as a general proposition, that a rule of evidence which is best adapted to elicit the truth, facilitate the administration of justice, and protect personal liberty as to one class of persons, ought to be the best adapted to accomplish the same end as to all living under the protection of the same Government. At all events, the establishment of different rules as to the competency of evidence applicable to different classes of persons may tend to the advantage of one class and to the oppression and encroachment upon the personal liberty of another. For example, it is not difficult to perceive, if the individuals of the entire class likely to be reduced to the condition of involuntary servitude are excluded from testifying against the class likely to attempt to deprive them of their liberty, or in any matter arising between the two classes, while the other class is at full liberty to testify in such cases, that the strong tendency of such a rule of evidence would be to obstruct the operation of the amendment in question, and overthrow that personal liberty guaranteed by it; and it would seem to be self-evident that a law providing that the same rule of evidence should apply to both parties, placing the class likely to be reduced to servitude upon an equal footing with the other in respect to the right to testify as to the encroachment upon their personal liberty, would strongly conduce to the enforcement of this constitutional provision. So, a law which, while it would not permit a class of persons deemed unworthy to testify against a white person in a matter where such white person's personal liberty is concerned, would yet allow them to testify against a black person in a similar case, would discriminate against the personal liberty of the latter, and also tend to obstruct, as to him, an equal enforcement of the amendment in question. Such discriminations might well tend to affect the security of that personal liberty which the amendment to the Constitution guarantees to all. This being so, it seems clear to us that under the provision in question Congress is fully authorized to judge of the necessity of legislation upon the subject, and, if found necessary, to prescribe that all alike,

black and white, shall be entitled to "give evidence;" and further, that the rules of evidence shall apply equally to all alike, in order that all may, in the language of the Civil Rights Act, have the "full and equal benefit of all laws and proceedings for the security of person," etc. This provision prescribing a uniform rule of evidence with reference to all classes embraced in the broad terms of the amendment, necessarily bears directly upon the great right of personal liberty which its adoption was expressly designed to secure. To secure the enforcement of this provision was the leading object of the Civil Rights Act, and this precise provision is the only one the constitutionality of which is involved in this case, or upon which we now express any opinion. If such legislation is not "appropriate" to enforce the provision for personal liberty in question, we are at a loss to know what would be appropriate.

The constitutionality of the Act need not be further discussed at this time, as it was fully considered by Mr. Justice Swayne, in the Circuit Court of the United States for the District of Kentucky, in *The United States* v. *John Rhodes et al.*, Am. Law. Reg., February, 1868, and by the Supreme Court of Indiana in the case of *Smith* v. *Moody*, 26 Ind. 299. In both cases the constitutionality of the Act was fully sustained, and it may be safely rested upon the authority of those cases. We may add, however, that in view of the universal practice of the Federal Government, from the commencement to the present time, there would seem to be little doubt, if any, as to the power of Congress to admit by law to the rights of American citizenship entire classes or races, not under the disabilities of slavery, who were born and continue to reside within the United States, or upon soil acquired by the General Government. Races, tribes and communities, irrespective of color, have been admitted in mass and by a single act of national sovereignty in repeated instances. This was done by the treaty of April 30th, 1800, by which the United States acquired the Territory of Louisiana; also, by the treaty of 1819, by which Florida was ac-

quired; also, by the treaty of 1848, by which California was added to the national domain; also, by the annexation of Texas and her admission into the Union; also, by the treaty of September 27th, 1830, by which certain heads of families of Choctaws were admitted to the rights of citizenship; also by the treaty of December 29th, 1855, by which the same thing was done in respect to the Cherokees; and also by the Act of March 3d, 1843, by which the Stockbridge tribe of Indians was admitted to full citizenship. In view of this repeated and continuous practice of the National Government in respect to persons not born upon American soil, a much stronger argument than has yet been adduced, so far as we are advised, must be brought forward, before we can feel justified in denying to Congress the power, by statute, to confer the rights of citizenship upon all native born persons, now that the disability of slavery has been removed. It would be a remarkable anomaly, as remarked by Mr. Justice Swayne, in the case already cited, if the National Government, without the Thirteenth Amendment, could confer citizenship on aliens of every race and color, and citizenship with both civil and *political* rights on the "inhabitants" of Louisiana, Florida and California, irrespective of *race or color*, and cannot with the help of that amendment confer on those of the African race who have been born and always lived upon American soil all that the Civil Rights Act seeks to give them. It is no answer to say that the acts referred to were done under the "treaty making power." A treaty is but a part of the 'law of the land," and what is forbidden by the Constitution can no more be done by a treaty than by an Act of Congress.

The Attorney General further contends, however, that the Act cannot be construed so as to affect the internal police of a State or the conduct of its Courts, without the total abolition of State sovereignty; and he asks, "if a sovereign State cannot conduct its own internal police regulations independent of the Federal Government, what element of sovereignty has a State? * * Can it be said she is sovereign for one purpose, but is not for another?" This position is answered by the Thirteenth Article, which, as we have seen, confers upon Congress the requisite power to pass all laws appropriate to the end in view. In *McCulloch* v. *Maryland*, 4 Wheat. 421, it was considered that under the authority granted to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc., Congress might pass such laws as were appropriate for the execution of the powers of Government; the phrase "appropriate" being used by the Court as equivalent to "necessary and proper." As to what would be appropriate legislation to enforce that Article, no suggestions are made by counsel, and it is difficult to conceive of any law more appropriate to that end than the portion in question of the first section of the Civil Rights Bill. The extreme State rights doctrine, shadowed forth by the counsel's proposition, may be dismissed with the remark that it is fully met by a further portion of his argument in which he says: "I acknowledge for the State her duty, her obligation to the sovereign power, and that whether the exercise of these sovereign powers which Congress possess, suit the State or not, she is bound to submit to them, as one sovereign submits to another in that in which it is his sovereign duty to submit. And in making this admission lies the strength of the position. While she, as sovereign, is bound to submit to the just exercise of power, and even to the unjust exercise of constitutional power, the Federal Government as sovereign cannot encroach upon reserved powers.

We do not read the Act as counsel does. He seems to apprehend that, if the Act is upheld, it will break down all the statutes of this State in respect to witnesses and testimony, which differ from the statutes of any other State — that as our statutes, which permit parties to civil actions, defendants in criminal prosecutions, etc., to testify in their own behalf, differ from those of other States, ours must yield, "or you destroy the equality of rights enjoyed by citizens of the different States." The Act does not purport to equalize the rights of all persons, or to declare that they are

of the same extent in all the States, nor is such its effect. It assures to all the citizens of any State the civil rights enjoyed by white citizens of the same State or, in other words, it prohibits all discrimination between citizens in the State of their residence, on the score of race or color, in respect to their civil rights, but leaves their political rights, which are the rights to vote and hold public offices in the gift of the State, with the power to confer or withhold them at pleasure. If in a given State the title to real property of any character may be conveyed by writing not under seal, then *all* citizens, of every race and color, may convey property of that character in the same mode. A statute providing that in a certain contingency the estate of a deceased person shall descend to the wife and children in equal shares is, by the Act, made applicable to all the citizens of the State. And so of the statutes regulating the competency of witnesses. The operation of the Act is to make them applicable alike to all the citizens of the State, without regard to race or color, and without regard to the rules upon that subject prevailing in other States.

It is due to the Attorney General to say that, at the time of the preparation of his brief, he had not the benefit of the very able and exhaustive opinion of Mr. Justice Swayne, mentioned already.

Our conclusion is that the portion of the Civil Rights Act now in question — and we are not called upon to consider any other — was not repugnant to the Constitution of the United States as it read prior to the adoption of the Fourteenth Amendment, and that its effect was to put all persons, irrespective of race and color, born within the United States and not subject to any foreign power, excluding Indians not taxed, upon an equality before the laws of this State in respect to their personal liberty and that the fourteenth section of the statute of this State in relation to crimes and punishments, so far as it discriminates against persons on the score of race or color, born within the United States and not subject to any foreign power, excluding Indians not taxed, has, by the force and effect of the Civil Rights Act, become null and void.

We deem it not out of place to suggest, in conclusion, that there may be a doubt as to the validity of the fourteenth section of the statute in relation to crimes and punishments when tested by the provisions of the Constitution of this State, irrespective of the Federal Constitution or the Civil Rights Act.

The provisions of the Constitution of this State to which we especially refer are sections eleven and seventeen of the First Article. The former provides that "All laws of a general nature shall have a uniform operation;" and the latter, that "Foreigners who are or who may hereafter become *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens." And perhaps an argument of much force might be drawn from the the first section of the same Article, which affirms the right of enjoying and defending life and liberty, and of acquiring, possessing and protecting property. Doubtless much could be said to show that a statute which permits a person to become a witness in certain cases and not in certain other cases, does not operate uniformly, and that the right to testify in our Courts is indispensable to aliens to enable them "to possess, enjoy and inherit property upon the same terms as native born citizens." But these points have not been made, and we do not feel that we are called upon, or that we would be justified in determining questions of so grave a character without argument, and without being called upon to do so, especially since the adoption of the Fourteenth Amendment to the Federal Constitution, which has been recently proclaimed, and which, as is claimed by some, may supersede all that our Constitution contains upon that subject. The Fourteenth Amendment goes one step further than the Civil Rights Act, and after declaring who are citizens of the United States, and securing them in the enjoyment of their privileges and immunities, contains a provision applicable to *all persons*,

whether citizens or not, in these words: "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.*"

Judgment affirmed.

Mr. Justice CROCKETT delivered the following dissenting opinion, in which Mr. Justice SPRAGUE concurred:

Being unable to agree with the majority of the Court, in the conclusions at which they have arrived in this case, I propose to state the reasons which have influenced my judgment.

Section fourteen of the statute of this State, concerning crimes and punishments, provides that "no Indian or person having one half or more of Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor or against any white person."

The defendant in this case is a negro, born within the United States, and is accused in the indictment of robbing a Chinaman; and it was proposed at the trial to support the indictment solely by the testimony of Chinamen born within the Chinese Empire. The Court below ruled out the evidence on the ground that the testimony of a Chinaman was not admissible against a negro, under the conditions stated, and the propriety of this ruling is the only question presented on the appeal.

The statute only disqualifies Indians, Mongolians and Chinese from testifying for or against "*any white person.*" It was never doubted that they were competent to testify for or against each other, and it has been the uniform practice of the Courts of this State to admit such testimony without any question of its propriety, so far as I am advised. Nor do I understand the majority of the Court as maintaining the contrary, except upon the grounds that by the Thirteenth Amendment of the Federal Constitution and the Act of

Congress of April 9th, 1866, generally known as the Civil Rights Bill, the statute of this State, before quoted, has been in so far superseded or modified as to place the negro, born in the United States, in respect to all his civil rights, on the same footing with the white man; and assuming this to be his *status*, the argument is, that inasmuch as a foreign born Chinaman cannot, under our statute, testify against a white person, *ergo*, he cannot testify against a native born negro, who, by the Act of Congress, is endowed with precisely the same civil rights that appertain to white persons. The first section of the Act of Congress provides "that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and 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 is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding."

It is said that under this section the native born negro is entitled to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens; and that in this State one of the laws of which white persons have the benefit, for the security of their persons and property, is the fourteenth section of the Act concerning crimes and punishments already quoted, whereby Mongolians and Chinese are prohibited from testifying against white persons, and from this the argument is deduced that the native born negro is entitled to the benefit

of that provision to the same extent as white persons. Without stopping to inquire into the soundness of this construction of the Act, I proceed to state why, in my opinion, the Act itself is in violation of the Constitution of the United States, and therefore void.

It may be safely assumed as a political and legal axiom, maintained by the Courts through an unbroken series of decisions, and by eminent statesmen of all shades of opinion, that the Government of the United States is one of limited and enumerated powers, and that Congress can exercise no powers except those expressly granted in the Constitution, and such others as "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 any department or officer thereof." (Art. I, Sec. 8, subdivision 19.) It is quite as well established by the same weight of authority, that the several States in their sovereign capacity retain all the mass of powers which a sovereign State can exercise, which are not, either expressly or by necessary implication, granted to the Federal Government. I am not aware that these propositions are questioned or denied by any respectable statesman or jurist at this day. It is not claimed by any one that the Constitution of the United States, prior to the adoption of the Thirteenth Amendment thereto, conferred upon Congress, either by express grant or by necessary implication, the power to declare by law, paramount in its obligation to all State laws, what persons or classes of persons in the several States should or should not be entitled 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 is enjoyed by white citizens," and that such persons "shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding." Prior to the adoption of the Thirteenth

Amendment, it was conceded on all sides that each State had the exclusive right to prescribe by its own Constitution and laws who should or should not be entitled to make and enforce contracts, sue and be sued, and give evidence in its Courts, inherit, purchase, lease, sell, hold and convey property, and to define the punishment, pains and penalties to be inflicted on any violator of its laws, subject, however, to the limitation contained in Article IV, section two of the Constitution, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Subject only to this limitation, it has been the practice from the earliest period of our existence as a nation, for each State, by its Constitution and laws, to exercise these powers unquestioned, often discriminating between classes of its own citizens, as its views of public policy dictated. The proceedings and debates of the Convention which framed the Constitution render it morally certain that the States which were represented in that august body would not have conceded to the Federal Government the power to interfere in such vital questions of their internal policy as those relating to the making and enforcement of contracts, the prosecution and conduct of suits in their Courts, the law of inheritance, the tenure of property, and the punishment of crime. These embraced the most important functions to be exercised by any Government for the protection of private rights and the preservation of public order. Deny to a Government the right to regulate, at its absolute discretion, the laws of inheritance, the tenure of property, the conduct of suits in its Courts, and the punishment of crime, and but little will remain which will be worth preserving. At an early period after the adoption of the Constitution, fears were entertained that there might, in the future, grow up such a latitude of construction as gradually to abridge the power of the States over their internal policy, and to absorb in the Federal Government important powers reserved to the States. Consequently, in 1789, only two years after the adoption of the

Constitution, Congress proposed ten amendments to it, which were afterward duly ratified, and now form a part of that instrument. The tenth amendment is in these words, to wit: "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."

In commenting upon this clause, Mr. Justice Story says: "This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerative powers, it follows irresistibly that what is not conferred is withheld, and belongs to the State authorities, if invested by their Constitutions of government respectively in them; and if not so invested, it is retained by the people as a part of their residuary sovereignty." And again he says: "Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted." (Story on the Constitution, Secs. 1,907, 1,908.)

Assuming this to be the true theory of the Constitution, as it unquestionably is, no clause can be found in that instrument, unless it be in the Thirteenth Amendment, proposed February 1st, 1865, which confers upon Congress, either expressly or by implication, the power to enact the Civil Rights Bill; and, as I understand the opinion of a majority of the Court, it maintains the constitutionality of the Act *solely* on the assumption that the Thirteenth Amendment conferred upon Congress the requisite authority to pass it.

That amendment is in these words:

"SECTION 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.

"SEC. 2. Congress shall have power to enforce this Article by appropriate legislation."

This amendment proposes to accomplish but one object, to wit: to abolish slavery and involuntary servitude, except as a punishment for crime, throughout the United States. No ingenuity or sophistry can infuse into it any other purpose than this.

The second section confers upon Congress "power to enforce this Article by appropriate legislation." The first question arising under this clause is, what was it which Congress was empowered to enforce? The answer is too obvious to admit of discussion, to wit: to enforce the prohibition or rule of law announced in the first section, that "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." Whatever legislation was necessary to render this prohibition effectual and to prevent the re-establishment of slavery or involuntary servitude, except as a punishment for crime, Congress was empowered to adopt. It might impose pains and penalties upon persons seeking to hold another in slavery, and provide appropriate remedies to enable persons held in servitude to assert and maintain their freedom. The complete abolishment of slavery or involuntary servitude, except for crime, being the sole purpose of that amendment, Congress was empowered to do whatsoever was necessary to render the emancipation effectual; but at this point its power in the premises ceased. Freedom from slavery or involuntary servitude being the ultimate fact and the only result proposed by the Thirteenth Amendment, Congress is authorized to do whatever is needful to secure that end; and if that were the only effect of the Civil Rights Bill, or if its provisions tended even remotely to promote that result, it would doubtless, to that extent, be a valid enactment. But the Act is not addressed to this purpose, and its provisions have a much broader scope than this. After declaring that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, shall be citizens of the United States it provides that such citizens, of every race and color, without regard to any previous condition of slavery, shall have the same right in every State and Territory to make and

enforce contracts, sue and be sued, give evidence, inherit, purchase, sell, lease, hold, and convey property, as is enjoyed by white citizens. Those who maintain the constitutionality of the Act insist that these rights and privileges are incident to and inseparable from citizenship and the state of freedom secured to all classes of native born citizens by the Thirteenth Amendment, and consequently, that legislation tending to secure these rights is "appropriate legislation" within the true sense of that amendment. In the opinion of a majority of the Court the proposition is thus stated:

"Undoubtedly, to secure personal freedom to all within the purview of its provisions, was the first great and leading object of the Thirteenth Amendment. Personal security and the right to acquire and enjoy private property — and these cover the remaining elements of one's civil rights — would certainly seem to be powerful auxiliaries to the maintenance of personal liberty. The continued enjoyment of personal liberty cannot well be assured without the enjoyment of personal security. And the right to acquire private property would seem to be necessary to give that independence and freedom from want essential to the full enjoyment of personal liberty. Whatever, therefore, tends to maintain and assure to a person personal security, and to protect him in the acquisition and enjoyment of private property, would seem to aid in the maintenance of his personal liberty. Congress doubtless took this view in passing the Civil Rights Bill, and extended its provisions to these auxiliary and cognate rights."

If I comprehend these propositions aright, they may be summed up as follows, to wit: First — That the object of the Thirteenth Amendment was to secure personal freedom to all native born citizens of the United States. Second — That the right to personal freedom and personal security, together with the right to acquire and enjoy private property, constitute the elements of one's *civil* rights. Third — That the right of

personal security, and the right to acquire and enjoy private property, are powerful auxiliaries to the maintenance of personal freedom. Fourth — That being such auxiliaries, whatever legislation tended to secure them was "appropriate legislation" within the true intent of the second section of the Thirteenth Amendment.

If this be the correct theory, and if the Thirteenth Amendment embraces so wide a scope as this, it results of necessity that Congress has supreme authority over all our civil rights, and may at its discretion change, modify, or abolish all State laws relating to personal security or the acquisition and enjoyment of private property, and substitute others in their stead, on the pretext that it is necessary to do so in order to secure personal freedom to all. On the plea that it is necessary to provide safeguards for personal security, as an auxiliary to personal freedom, it may regulate in detail, in every State, the actions of assault and battery or false imprisonment, and particularly the writ of *habeas corpus*, prescribing when and how it shall issue, and what shall or shall not be competent evidence in these and similar actions. On the pretext of securing to all the right to acquire and enjoy private property, as an auxiliary to the right of personal freedom, it may define the tenures of property, regulate the law of descents, provide appropriate remedies for violations of every right of property, and practically supersede all State laws on these important subjects. If Congress possesses these enormous powers, it only remains for it to put them into execution; after which the State Governments had as well be abolished, as a useless, expensive, and cumbersome machinery, no longer of any practical value.

Proceeding on the assumption that under the second section of the Thirteenth Amendment Congress has the authority to pass any law for the protection of personal security, as an auxiliary to the right of personal freedom, the majority of the Court maintains that Congress has the power to declare, and by the Civil Rights Bill has declared, that, in the matter of evidence in the Courts there shall be

no discrimination between native born citizens of any race or color. The argument is, that if a certain character of evidence be admissible for or against a certain class of citizens, and not admissible for or against a certain other class, the excepted class may thereby be endangered in the enjoyment of their personal freedom, and that, to avoid this peril, it was "appropriate legislation" for Congress to abolish the discrimination, and place both classes on the same footing.

There would be some force in the argument if the principle was confined only to cases wherein an attempt was made to reduce a citizen or class of citizens to slavery or involuntary servitude. If Congress had declared that in such cases (which is clearly the only class of cases contemplated by the first section of the amendment) there should be no discrimination between one citizen or class of citizens and any other citizen or class of citizens in the rules of evidence, such legislation might have been "appropriate," as having a tendency to maintain the provisions of the first section of the amendment. But the Civil Rights Bill goes far beyond this. It undertakes to abolish all distinctions between citizens of the United States, not only in the matter of making and enforcing contracts, inheriting, purchasing, or selling property, and in giving evidence in every class of cases, but also provides that they shall be entitled "to full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white persons." Whilst I can comprehend how it might be important to a person threatened with bondage to be entitled, in the vindication of his rights in that regard, to the benefit of the most liberal rules of evidence, I do not perceive on what reasonable ground it can be claimed that his freedom may be endangered if he is denied the same latitude in the rules of evidence in respect to matters which in no degree touch the question of his freedom. The case we are considering affords a striking illustration of this distinction. If the defendant was in danger of being reduced to bondage, he might justly claim that he was entitled to the benefit of the most liberal

rules of evidence, in order to secure the freedom which is guaranteed to him by the Thirteenth Amendment. But inasmuch as he is accused of a crime against the law, and the question of his freedom, in the sense contemplated by the Thirteenth Amendment, is in no manner involved, what authority has Congress to prescribe the rule of evidence which shall govern his trial? Or if it were an action of debt or assumpsit on a promissory note, how would the question of his freedom be affected, one way or the other, by the rule of evidence at the trial? To my mind nothing could be plainer than that Congress, under the second section of the amendment, has no power whatever to interfere in such a case.

The Thirteenth Amendment is entirely silent as to the *civil* rights of any class of persons, and does not assume to define how the civil rights of any one are to be affected, leaving such rights to be dealt with, as they had theretofore been, by the local laws of the States.

If this bill be a valid enactment, no State has the power to prohibit marriages between native born negro men and white women; because marriage is, in law, only a civil contract, and the bill provides that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are citizens, and that such citizens, *of every race and color*, shall have the same right to make and enforce contracts as is enjoyed by white persons. Marriage being in law only a civil contract, and every unmarried white man of lawful age having the right to marry a white woman, it follows as a logical sequence that every native born black man is entitled to the same right, if the Civil Rights Bill be a valid law; and that, too, in defiance of any State law to the contrary. It may also happen that a State may be influenced by considerations of public policy to deny to certain races or classes the right to inherit, purchase, or hold real estate. The State of California, for example, with a view to discourage emigration from China or Japan, might

see fit to deny to the descendants of those races born in this State the right to inherit, hold, or transmit real estate; but though the strongest considerations of State policy might dictate this course, all State laws enacted for that purpose would be void if the Civil Rights Bill be valid. So, too, there may be in a State a degraded, brutal, and vicious race, peculiarly addicted to crime and vice, and demanding more stringent regulations for their government than are required for the general mass of citizens; but the Civil Rights Bill forbids any discrimination, and the State would be powerless to protect itself against a great and perhaps growing evil. So, too, in perhaps every State of the Union, minors and married women, on grounds of public policy, are disabled by law from making valid contracts; but if Congress should decide that these restrictions are restraints on the state of freedom established by the Thirteenth Amendment, they might supersede all State laws on the subject, and this would be deemed to be "appropriate legislation" under the second section. Illustrations might be multiplied almost indefinitely to show that the Civil Rights Bill withdraws from the States a mass of powers essential to the maintenance of order and the administration of local government, and which the wise men who framed the Constitution jealously withheld from the Federal Government, conceding to it only such powers as were deemed essential to the proper conduct of national affairs, but reserving to the States the mass of powers pertaining to the administration of local government. Amongst these none were of so great importance as the right to regulate contracts, the administration of justice, the tenures of property, and the punishment of crime. The Civil Rights Bill infringes upon the power of the States over these subjects in many important particulars, and the theory on which it is founded is so repugnant to that on which the Constitution was originally based, that it should not be upheld on a doubtful construction merely. Nothing short of the most explicit language in an amendment to the Constitution would

justify legislation so entirely subversive of the theory on which the Government was originally founded.

But if it be true that the second section of the Thirteenth Amendment was adopted only to enable Congress to secure to those whose condition was changed from that of slavery to freedom, the full benefit and protection of the laws enjoyed by white persons, then it evidently can have no application to this case, inasmuch as it does not appear from the record that the defendant ever was a slave; but if the purpose of the amendment was to make all men born within the United States equal before the law in respect to their *civil* rights, it has utterly failed to indicate that purpose. The last proposition is not a correlative of the first. To secure to those whose condition was changed from that of slavery to freedom the full benefit and protection of the laws enjoyed by white persons, would apply only to the class of emancipated slaves; but to make all men born within the United States equal before the law, in respect to their *civil* rights, is a wholly different proposition, and of much wider scope. If the latter be the true purpose of the Civil Rights Bill, as it undoubtedly is, it follows of necessity that it was not designed simply to secure to slaves who were emancipated by the Thirteenth Amendment the full benefit and protection of the laws enjoyed by white persons, but also to operate upon those who never were slaves; as, for example, upon the descendants of Chinese, Malays or Japanese, born within the United States. If this be the purpose and scope of the Act, it is an attempt on the part of Congress, under the plea of legislation, designed to enforce the prohibition of slavery or involuntary servitude, contained in the Thirteenth Amendment, to supersede all State legislation on an important class of subjects, which do not, in any sense, fall within the purview of the Thirteenth Amendment. I do not perceive what necessary or even remote relation there is between the prohibition of slavery and the proposition that a son of Chinese parents, born within the United States, shall have the same right to inherit, purchase, sell, lease, hold and con-

rty property as is enjoyed by white persons; or the proposition involved in this case, to wit: that because a Chinaman is prohibited by law from testifying against a white person, therefore he shall not testify against a colored peson who never was a slave; or the proposition that because a white man has the lawful right to make a contract of marriage with a white woman, every colored man born within the United States shall have the right to contract marriage with a white woman, in defiance of any State law to the contrary. If all these propositions, and numerous others of a similar character, come within the purview of the Thirteenth Amendment, it is not difficult to demonstrate that, under the pretext of enforcing the prohibition of slavery by "appropriate legislation," Congress might practically absorb all the powers of the State Governments, in matters pertaining purely to the administration of local affairs. It might decide that discriminating taxes imposed by a State on its own citizens, though warranted by its Constitution, or the establishment of separate schools for white and colored children, or the enforcement of laws for the observance of the Sabbath by Chinese or Japanese residents, or police regulations intended to preserve order amongst a certain vicious class of the community, such as Chinese prostitutes or gamblers, or health regulations, applicable alone to a degraded class of colored population, all tended to infringe upon the prohibition of slavery contained in the Thirteenth Amendment, and were therefore void. Congress, it is claimed, is the sole judge of what is "appropriate legislation" to accomplish the end contemplated in the Thirteenth Amendment; and if the Civil Rights Bill be maintained by the Courts as a valid exercise of the constitutional powers of Congress, it is quite evident that the division of power between the State and Federal Governments, as originally established by the Constitution, has been abrogated by the Thirteenth Amendment; and instead of a National Government to administer purely national affairs, and State Governments to administer the local affairs of the several States, the power of local administration has been practically transferred to the Federal Government, and the State Governments have been emasculated of the chief portion of the mass of powers reserved to them originally.

All that Congress was authorized to do was to see that the prohibition of slavery was not infringed. But, instead of this, it has undertaken to define, not only the civil rights of emancipated slaves, but of all other persons born within the United States not subject to any foreign power, except Indians not taxed. This is done on the plea that, inasmuch as the Thirteenth Amendment establishes a condition of universal freedom in the United States, all legislation is appropriate to enforce that result, which secures to all persons the rights of freemen. If by the term "the rights of freemen" is to be understood the right not to be held in slavery or involuntary servitude, the proposition is sound; but if the term "rights of freemen" is intended to include all the social and civil rights which men enjoy under a free form of government, then it follows from this interpretation that Congress, by virtue of the second section of the amendment, may supersede all State laws on all subjects affecting the social or civil *status* of every individual citizen of the United States; and this would practically withdraw from the State Governments all that mass of powers by which they have hitherto defined the rights, duties and obligations of their citizens toward each other and to the State. It would practically annihilate the power of the State over its own citizens and within its own territory, and transfer to the Federal Government the authority to exercise the most important functions pertaining to a local government. In my opinion the Thirteenth Amendment contemplated nothing of the kind.

Nor can it escape observation that the same argument which attempts to uphold the Civil Rights Bill, if carried to its legitimate conclusion, would concede to Congress the right to regulate the ballot in the several States. If Congress has the power to enact this bill on the plea that in order to

nable a freeman to maintain his freedom, it is necessary to ecure to him the right to make and enforce contracts, sue nd be sued, testify in Courts, inherit, purchase, lease, sell, old, and convey real and personal property, it would seem to ollow as a logical result that it also has the power to confer pon him the ballot, as one of the most potent methods of naintaining his freedom. If it be "appropriate legislation" nder the Thirteenth Amendment to confer upon all native orn persons in the United States the civil rights which are numerated as a legitimate method of maintaining their reedom, why withhold from them the ballot, the most potent f all methods? It cannot be denied that it is competent or Congress to regulate the ballot in every State, provided t has the constitutional power to pass the Civil Rights Bill. f it can confer civil rights as a means of securing freedom, hy not political rights for the same purpose?

We should thus see concentrated in the Federal Govern- ent the power not only to regulate the local affairs of every tate, but also to define who should be entitled to the ballot. he Federal Government would no longer be a Government f limited and enumerated powers; and the State Govern- ents would scarcely retain a remnant of the mass of powers o jealously withheld by them when the Constitution was dopted.

I am aware that Mr. Justice Swayne, of the Supreme ourt of the United States, in the case of *The United States . Rhodes*, decided in the Circuit Court for the District of entucky, has maintained the constitutionality of the Civil ights Bill, upon a process of reasoning similar to that em- loyed in this case. But with all my respect for so learned jurist, his reasoning appears to me to be not only unsup- orted by authority, but wholly opposed to the fundamental rinciples on which the Constitution rests.

In the case of *Smith* v. *Moody*, 26 Ind. 299, the constitu- ionality of this bill was also affirmed. But the opinion on his point was only *dictum*, inasmuch as the point was not

involved in the case, and it is supported by no process of reasoning.

On the other hand, the Supreme Court of Kentucky, in the case of *Brown* v. *The Commonwealth*, held the Act to be unconstitutional for reasons which appear to me to be conclusive. It will be observed that the Fourteenth Amendment of the Federal Constitution, had not been proclaimed as adopted at the date of the judgment in this case, and its provisions can therefore have no application to the questions under discussion. It will be time enough to discuss that amendment when it shall come judicially before us.

In my opinion the judgment ought to be reversed.

IN THE MATTER OF THE ESTATE OF HENRY BENTZ.

PETITION OF ADMINISTRATOR TO SELL REAL ESTATE.—A petition for the sale of real estate by an administrator is sufficient if it shows that the personal estate is insufficient to pay the expenses of administration, etc., and for that purpose it may refer to and make the inventory a part of the petition.

SALE OF REAL ESTATE BY ADMINISTRATOR.—The Probate Court may order a sale of the real estate left by the deceased, upon petition of the administrator, to pay the expenses of administration, even if there are no debts, and there has been no family allowance.

APPEAL from the Probate Court of the City and County of San Francisco.

Henry Bentz, a resident of the City and County of San Francisco, died intestate in said city, July 1st, 1865, leaving a wife, Louise Bentz, and a posthumous child, being his heirs at law.

On November 14th, 1865, Louise Bentz, widow of deceased, filed her petition for letters of administration on the estate of deceased. Letters of administration were issued to her January 5th, 1866. On the same date orders were made directing publication of notice to creditors and appointing appraisers.

and times the IBEW agreement was signed and the employees were discharged was uncontradicted.

3. *Application of Law*

Section 158(f) provides that it is not an unfair labor practice to require union membership "*after* the seventh day *following* ... the effective date of the agreement." (Emphasis added.) The NLRB construed this language to mean that since the IBEW contract was signed on Friday, February 12, the Company had to wait until *after* Friday, February 19 to discharge employees who failed to join the IBEW.

The Board cites its own precedent to support this conclusion. In *J.W. Bateson Co.*, 134 N.L.R.B. 1654 (1961), for example, the Board held that a union security clause requiring membership "no later than" the seventh day following the beginning of employment violated federal law because it did not provide for the "full" seven day grace period. In *Tri-W Construction Co.*, 139 N.L.R.B. 1286 (1962), the Board found a violation from a union security clause requiring membership "as of the seventh day after the date of the contract" for workers already employed.

[6] Given the wording of the statute, the Board's authority construing it as strictly as possible in favor of employees, and the deference due the Board's expertise in interpreting federal labor statutes, we conclude that the Board's interpretation is at a minimum "reasonably defensible." See *NLRB v. Carpenters Local Union No. 35*, 739 F.2d at 482. Furthermore, the Company did not challenge the Board's construction of the statute, but only insisted that it "substantially complied" with the statute and that any violation was minor and did not prejudice the employees.

E. CONCLUSION

The Board's decision is affirmed and its order enforced.

William Anthony RICHARDS, Plaintiff-Appellant,

v.

SECRETARY OF STATE, DEPARTMENT OF STATE, United States of America, Defendants-Appellees.

No. 82-5991.

United States Court of Appeals, Ninth Circuit.

Argued Sept. 9, 1983.

Submitted Nov. 21, 1983.

Decided Feb. 4, 1985.

Plaintiff brought suit seeking declaratory judgment, arguing that procedures used in issuing certificate of loss of nationality were unconstitutional and declaration that he was United States citizen. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., concluded that plaintiff was not a United States citizen, and plaintiff appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) Department of State established voluntariness of plaintiff's acts, including his explicit renunciation of United States citizenship, by preponderance of evidence; (2) District Court's finding that plaintiff was under no economic hardship when he renounced his United States citizenship was not clearly erroneous; and (3) District Court did not abuse its discretion when it declined to consider plaintiff's request for declaration that procedures by which Secretary of State issued certificates of loss of nationality violated bill of attainder clause, due process clause of Fifth Amendment and equal protection clause of Fourteenth Amendment.

Affirmed.

1. Constitutional Law ⇐253.2(2)

Due process clause of the Fifth Amendment imposes on federal govern-

ment the limitations that equal protection clause of Fourteenth Amendment imposes on states. U.S.C.A. Const.Amends. 5, 14, 14, § 1.

2. Citizens ⇐13

United States citizens' constitutional right to remain a citizen unless he voluntarily relinquishes that right of citizenship applies at least to all persons born or naturalized in the United States.

3. Citizens ⇐19

There is no presumption that expatriating act was performed with intent to relinquish citizenship. Immigration and Nationality Act, § 349(c), 8 U.S.C.A. § 1481(c).

4. Citizens ⇐15

Voluntariness of acts demonstrating intent to renounce United States citizenship is necessary part of showing alleged expatriates' specific intent to relinquish his citizenship. Immigration and Nationality Act, § 349(c), 8 U.S.C.A. § 1481(c).

5. Citizens ⇐19

There is no presumption of voluntariness with respect to acts demonstrating specific intent to relinquish United States citizenship. Immigration and Nationality Act, § 349(c), 8 U.S.C.A. § 1481(c).

6. Citizens ⇐19

Because presumption of voluntariness extended to plaintiff's becoming a Canadian citizen and taking oath of allegiance to Canada, it also of necessity applied to act demonstrating specific intent, i.e., the explicit renunciation of United States citizenship under oath. Immigration and Nationality Act, § 349(a)(1, 2), (c), 8 U.S.C.A. § 1481(a)(1, 2), (c).

7. Citizens ⇐15

Expatriating act cannot be said to have been performed voluntarily if it was performed under conditions of economic duress; at the least, some degree of hardship must be shown.

8. Federal Courts ⇐855

District court's finding that plaintiff was under no economic hardship when he renounced his United States citizenship was not clearly erroneous; in short, the evidence amply supported district court's finding that plaintiff became Canadian citizen purely for purpose of career advancement.

9. Citizens ⇐15

Person loses his United States citizenship by voluntarily performing expatriating act only if expatriating act was accompanied by intent to terminate United States citizenship.

10. Citizens ⇐15

More is required for loss of citizenship than simply voluntary commission of act Congress has designated as expatriating act. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

11. Citizens ⇐15

Some expatriating acts may be so inherently inconsistent with United States citizenship that persons performing them may be deemed to intend to relinquish their United States citizenship even in absence of statements that they so intended the acts, or, indeed, even dispite contemporaneous denial that they so intended the acts. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

12. Citizens ⇐15

United States citizen effectively renounces his citizenship by performing act that Congress has designated as expatriating act only if he means the act to constitute renunciation of his United States citizenship; in absence of such intent, he does not lose his citizenship simply by performing expatriating act, even if he knows that Congress had designated the act an expatriating act. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

13. Citizens ⇐15

Person who performs expatriating act with intent to renounce his United States citizenship loses his United States citizenship whether or not he knew that act was expatriating act, and whether or not he knew that expatriation was possible under United States law. Immigration and Na-

tionality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

14. Citizens ⇐15

Intent to renounce United States citizenship may be expressed in words or found as fair inference from proved conduct. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

15. Citizens ⇐15

Voluntary taking of formal oath that includes explicit renunciation of United States citizenship is ordinarily sufficient to establish specific intent to renounce United States citizenship. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

16. Citizens ⇐15

Whether it is done in order to make more money, to advance career or other relationship, to gain someone's hand in marriage, or to participate in political process in country to which he has moved, United States citizen's free choice to renounce his citizenship results in loss of that citizenship. Immigration and Nationality Act, § 349(a)(1, 2), 8 U.S.C.A. § 1481(a)(1, 2).

17. Citizens ⇐13

United States citizens have right to become aliens.

18. Citizens ⇐15

Alleged expatriate's "specific intent" to renounce his citizenship does not turn on his motivation.

19. Constitutional Law ⇐52

Congress' interpretation of right of expatriation is not binding on courts.

20. Citizens ⇐15

Record supported district court's conclusions that plaintiff decided to become Canadian citizen and he would have liked also to remain a United States citizen, but because Canada required relinquishment of foreign citizenship as a part of its naturalization procedures, he chose to renounce his United States citizenship in order to obtain Canadian citizenship, and thereby lost his United States citizenship. Immigration and Nationality Act, § 349(1)(1, 2), (c), 8 U.S.C.A. § 1481(a)(1, 2), (c).

21. Declaratory Judgment ⇐91

District court did not abuse its discretion when it declined to consider plaintiff's request for declaration that procedures by which Secretary of State issued certificate of loss of nationality violated bill of attainder clause, due process clause of Fifth Amendment and equal protection clause of Fourteenth Amendment. U.S.C.A. Const. Art. 1, § 9, cl. 3; Amends. 5, 14, 14, § 1.

David Leung, Santa Ana, Cal., for plaintiff-appellant.

Ronald K. Silver, Asst. U.S. Atty., Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before HUG and REINHARDT, Circuit Judges, and PANNER,* District Judge.

REINHARDT, Circuit Judge:

[1] William Anthony Richards was issued a Certificate of Loss of Nationality by the Department of State ("the Department") on June 22, 1978. The Department found that he had expatriated himself on February 23, 1971, when he became a citizen of Canada and, in doing so, took an oath of allegiance to the Queen of England and expressly renounced allegiance to any other sovereign. Richards brought this suit seeking a declaration that the procedures the Department used in issuing the Certificate violated the due process, equal protection, and bill of attainder clauses of the Constitution. U.S. Const. amend. V;[1]

* Honorable Owen Murphy Panner, United States District Judge for the District of Oregon, sitting by designation.

1. The due process clause of the fifth amendment imposes on the federal government the limitations that the equal protection clause of the fourteenth amendment, U.S. Const. amend. XIV, § 1, imposes on the states. *See Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976); *Weinberger v. Wiesenfeld*, 420 U.S.

.S. Const. art. I, § 9, cl. 3. He also ought a declaration that he is a citizen of ie United States. The district court declined to reach the constitutional claims, inding that a *de novo* trial to determine whether or not he is a United States citizen would provide him full relief. The district court conducted such a trial and concluded hat Richards is not a United States citizen. Richards appeals. We affirm.

FACTS

William Anthony Richards acquired United States citizenship when he was born in San Luis Obispo, California, on September 3, 1938. He received a Bachelor of Arts degree from the University of Southern California in 1964, and, in 1965, he left the United States and established residence in Canada. He taught school in Vancouver, British Columbia, until 1969.

In 1969, Richards applied for employment with the Boy Scouts of Canada. He was informed that employees must either be Canadian citizens or have declared an intention to acquire Canadian citizenship upon becoming eligible. As Richards was not a Canadian citizen, he was employed only after he declared his intention to become one.

Less than two years later, Richards became eligible for Canadian citizenship. He applied for and was granted Canadian citizenship on February 23, 1971. On that date, he signed the following Declaration of Renunciation and Oath of Allegiance:

> I HEREBY RENOUNCE ALL ALLEGIANCE AND FIDELITY TO ANY FOREIGN SOVEREIGN OR STATE OF WHOM OR WHICH I MAY AT THIS TIME BE A SUBJECT OR CITIZEN. I SWEAR THAT I WILL BE FAITHFUL AND BEAR TRUE ALLEGIANCE TO HER MAJESTY QUEEN ELIZABETH THE SECOND, HER HEIRS AND SUCCESSORS, ACCORDING TO LAW, AND THAT I WILL FAITHFULLY OBSERVE THE LAWS OF CANADA AND FULFIL MY DUTIES AS A CANADIAN CITIZEN SO HELP ME GOD.

In March, 1971, Richards obtained a Canadian passport, which he used when he returned to the United States in 1972 for graduate study. He registered as a foreign student at the University of Southern California. In 1973, he returned to Canada where he worked as a school teacher until 1975. He then became a freelance writer and trail guide.

In March, 1976, he applied for and received a new Canadian passport, which he used when he travelled to Ireland later that year. He married a Canadian citizen in April, 1976, and the following month he visited the United States Consulate General at Vancouver ("the Consulate") to file visa petitions for his wife and step-children. It was at that point that United States authorities first became aware of Richards' naturalization in Canada.

After Canadian authorities confirmed that Richards had obtained Canadian citizenship, the Consulate prepared a Certificate of Loss of Nationality and forwarded it to the Department for approval. The Department instructed the Consulate to invite Richards to execute an "affidavit of expatriated person." It further instructed the Consulate that, if Richards refused to execute such an affidavit, the Consulate should send him by registered mail a "preliminary finding of loss of nationality letter." The letter was to inform Richards that he may have lost his United States nationality, and it was to notify him that he had 30 days in which to present any evidence to support any contention that he did not intend to relinquish his United States citizenship when he became a Canadian citizen. The Consulate prepared the letter but was unable to locate Richards. The Department then retired Richards' case to inactive status without approving the Certificate of Loss of Nationality.

On December 2, 1977, Richards visited the Consulate for the purpose of determin-

636, 638 n. 2, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975).

ng his citizenship status.[2] He was asked to complete questionnaires relating to his Canadian citizenship and his intent to relinquish his United States citizenship. He submitted the forms on December 6. He was also interviewed by a consular official. Based on the completed questionnaire and the interview, the Consulate determined that Richards had lost his United States citizenship. It sent the Department a letter summarizing the reasons behind its conclusion. The Department then approved the Certificate of Loss of Nationality, which was issued on June 22, 1978, and delivered to Richards in California, where he had returned in December of 1977. His marriage ended in divorce in July of 1978.

Richards appealed to the Department's Board of Appellate Review. He argued that the statutes and regulations authorizing the issuance of Certificates of Loss of Nationality are invalid and void because they deny him due process and equal protection of the laws. U.S. Const. amend. V; *see supra* note 1. He also argued that the statute authorizing the issuance of the Certificate without a prior judicial trial, 8 U.S.C. § 1501 (1982), constitutes a bill of attainder. U.S. Const. art. I, § 9, cl. 3. Finally, he argued that the Department's conclusion that he had lost his United States citizenship was erroneous. Richards waived his right to a hearing before the Board.

The Board determined that it lacked jurisdiction to consider Richards' constitutional arguments. It then rejected all of Richards' other arguments. It concluded that Richards had lost his United States citizenship upon becoming a Canadian citizen.

Richards then instituted this suit. Seeking a declaratory judgment, he again argued that the procedures used by the Department in issuing the Certificate violate the due process, equal protection, and bill of attainder clauses. He also sought a declaration that he is a United States citizen.

The district court declined to address the constitutional claims. It believed that Richards would receive full relief if the court conducted a *de novo* trial on whether he is or is not a United States citizen. The court then proceeded to conduct such a trial. It concluded that Richards lost his United States citizenship when he voluntarily and with specific intent to renounce his United States citizenship became a Canadian citizen and took an oath of allegiance to Canada.

DISCUSSION

I. *Richards' Citizenship Status*

Richards seeks a declaratory judgment under 8 U.S.C. § 1503(a) (1982). That section authorizes, with certain exceptions inapplicable here, any person within the United States who has been denied a right or privilege on the ground that he is not a national of the United States to institute a declaratory judgment action to determine whether he is a national of the United States. A suit under section 1503(a) is not one for judicial review of the agency's action. Rather, section 1503(a) authorizes a *de novo* judicial determination of the status of the plaintiff as a United States national. Because Richards has been issued a Certificate of Loss of Nationality, the district court had jurisdiction.

A. *Background*

[2] In *Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967), the Supreme Court held that the government has no power to take away United States citizenship. The Court overruled its hold-

2. There is some question concerning the purpose of Richards' 1976 visit to the Consulate. In the text, we have set forth the explanation he offered in his brief on appeal. During his trial, however, he testified that he had a dual purpose in visiting the Consulate in 1976: (a) he wished to inquire about visa petitions for his wife and step-children, and, (b) as a result of a discussion at a dinner party concerning the legal effect of his acquisition of Canadian citizenship, he wished to inquire about his United States citizenship status. It is irrelevant to the issue before us whether he inquired about his United States citizenship status in 1976 as well as in 1977.

ing in *Perez v. Brownell*, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958), that such a power is encompassed in the government's implied power to conduct the nation's foreign affairs. Recognizing that in other nations the government has the power to strip people of their citizenship, the Court held in *Afroyim* that "[i]n our country the people are sovereign and the government cannot sever its relationship to the people by taking away their citizenship." 387 U.S. at 257, 87 S.Ct. at 1662. The Court held that a United States citizen possesses "a constitutional right to remain a citizen ... unless he voluntarily relinquishes that citizenship." *Id.* at 268, 87 S.Ct. at 1668.[3]

In *Vance v. Terrazas*, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980), the Supreme Court elaborated on the "voluntary relinquishment" proviso. It rejected the Secretary of State's argument that a citizen loses his citizenship simply by voluntarily performing an act that Congress has designated an expatriating act. The Court stated that a person loses his citizenship only if he intends to relinquish his citizenship, "whether the intent is expressed in words or is found as a fair inference from proved conduct." 444 U.S. at 260, 100 S.Ct. at 545. "In the last analysis," the Court said, "expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct." *Id.*

[3] Under *Terrazas*, a person loses his United States citizenship if he voluntarily performs one of the expatriating acts enumerated by Congress *and* if, in performing that act, he intends to relinquish his citizenship. Under 8 U.S.C. § 1481(c) (1982), the government has to show voluntariness and specific intent only by a preponderance of the evidence. That section also provides that

> any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

There is thus a presumption of voluntariness. There is no presumption, however, that the expatriating act was performed with the intent to relinquish citizenship. *Vance v. Terrazas*, 444 U.S. 252, 268, 100 S.Ct. 540, 549, 62 L.Ed.2d 461 (1980). Both the preponderance of the evidence standard and the presumption of voluntariness have been held to be constitutionally permissible. *Id.* at 264–70, 100 S.Ct. at 547–50.

B. *Voluntariness*

[4] The district court below held that the Secretary was required to show the voluntariness not only of the expatriating acts—in this case, the obtaining of Canadian citizenship, *see* 8 U.S.C. § 1481(a)(1), and the taking of an oath of allegiance to Canada, *see* 8 U.S.C. § 1481(a)(2)[4]—but also of the acts demonstrating an intent to renounce United States citizenship. We agree. Showing the voluntariness of the latter acts is, we think, a necessary part of showing the alleged expatriate's specific intent to relinquish his citizenship.

[5] The district court also said that the statutory presumption of voluntariness applies not only to expatriating acts, but also to acts demonstrating specific intent to relinquish citizenship. That, we think, was erroneous. The statutory presumption of voluntariness by its terms applies only to

3. The constitutional protections described in *Afroyim* apply at least to all persons "born or naturalized in the United States." *See Rogers v. Bellei*, 401 U.S. 815, 834–35, 91 S.Ct. 1060, 1070–71, 28 L.Ed.2d 499 (1971).

4. Richards argues that we cannot rely on his taking of the oath in determining whether he has lost his citizenship because the Department relied only on his acquisition of Canadian citizenship when it issued the Certificate of Loss of Nationality. We think his argument lacks merit. As we have said, the district court was not reviewing the Secretary's action; it was conducting a *de novo* trial on whether Richards had or had not voluntarily relinquished his United States citizenship. *See supra* at 1417.

"any act of expatriation under the provisions of this Chapter or any other Act." 8 U.S.C. § 1481(c) (1982). Moreover, the Supreme Court held explicitly in *Terrazas* that there is no presumption of specific intent to relinquish citizenship. 444 U.S. at 268, 100 S.Ct. at 549. It follows, we think, that there is also no presumption of voluntariness with respect to the acts demonstrating a specific intent to relinquish United States citizenship.

[6] Nevertheless, the district court's application of the presumption in this case was not erroneous. Here, the act that the Secretary alleges demonstrates a specific intent to relinquish United States citizenship—i.e., the explicit renunciation of United States citizenship under oath—was an integral part of both of the alleged expatriating acts—i.e., becoming a Canadian citizen and taking an oath of allegiance to Canada. Because the presumption of voluntariness extended to both of those acts, it also of necessity applied to the act demonstrating specific intent.

Richards does not deny that he became a Canadian citizen or that he took an oath of allegiance to Canada containing an explicit renunciation of United States citizenship. He argues, however, that his acts were not voluntary because he was under economic duress when he performed them. The district court held that Richards failed to rebut the presumption that the acts were performed voluntarily. We think the district court's conclusions were amply supported. In the alternative, we conclude that even without the benefit of any presumption the Department established the voluntariness of Richards' acts, including his explicit renunciation of United States citizenship, by a preponderance of the evidence.

[7] We agree with Richards' argument that an expatriating act cannot be said to have been performed voluntarily if it was performed under conditions of economic duress. *See Stipa v. Dulles*, 233 F.2d 551 (3d Cir.1956); *Insogna v. Dulles*, 116 F.Supp. 473 (D.D.C.1953). Conditions of economic duress, however, have been found under circumstances far different from those prevailing here. In *Insogna v. Dulles*, for instance, the expatriating act was performed to obtain money necessary "in order to live." 116 F.Supp. at 475. In *Stipa v. Dulles*, the alleged expatriate faced "dire economic plight and inability to obtain employment." 233 F.2d at 556. Although we do not decide that economic duress exists only under such extreme circumstances, we do think that, at the least, some degree of hardship must be shown. The district court in this case found that Richards was under no hardship of any kind when he executed the documents containing the renunciation of United States citizenship. We can conclude that the Richards' renunciation of United States citizenship was involuntary only if the district court's finding in that regard was clearly erroneous.

[8] The district court's finding that Richards was not under any economic hardship when he renounced his United States citizenship was not clearly erroneous. Richards points out that the renunciation was a requirement for obtaining Canadian citizenship and that obtaining Canadian citizenship was, in turn, a requirement for retaining his job. However, Richards was employed as a school teacher when he decided to accept the Boy Scouts job and was fully aware of the fact that he would have to become a Canadian citizen in order to retain his new position. He had been a teacher for several years, and does not contend that he was forced to leave his teaching job. Moreover, it does not appear that, upon becoming aware that he would have to renounce his United States citizenship in order to acquire Canadian citizenship, Richards made any attempt to obtain employment that would not require him to renounce his United States citizenship. Nor does it appear, based on his past employment history in Canada, that such an attempt would have been futile. Finally, Richards was unmarried at the time he renounced his United States citizenship, and there was no evidence that he was under any particularly onerous financial

obligations. In short, the evidence in the record amply supports the district court's finding that Richards became a Canadian citizen purely for the purpose of career advancement. In any event, it falls far short of establishing economic duress.

C. *Specific Intent*

[9] As we have noted, a person loses his United States citizenship by voluntarily performing an expatriating act only if "the expatriating act was accompanied by an intent to terminate United States citizenship." *Vance v. Terrazas*, 444 U.S. at 263, 100 S.Ct. at 546. This case requires us to determine what state of mind is necessary to relinquish United States citizenship.

[10, 11] The Court in *Terrazas* did not define the "intent" that must accompany the expatriating act. The Court's reaffirmance of the principles of *Afroyim*, however, makes it clear that what is required is more than simply the voluntary commission of an act that one knows Congress has designated an expatriating act. In *Afroyim*, the Court stated that "the framers of the [Fourteenth] Amendment ... wanted to put citizenship beyond the power of any governmental unit to destroy." 387 U.S. at 263, 87 S.Ct. at 1665. It said that "[o]nce acquired ... Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit." *Id.* at 262, 87 S.Ct. at 1665. *Afroyim* thus established the principle that Congress is without power to provide that citizens shall lose their citizenship by performing specified acts.[5]

The *Afroyim* principle was reaffirmed in *Terrazas*, in which the Court stated that, "[i]n the last analysis, expatriation depends on the will of the citizen *rather than on the will of Congress and its assessment of his conduct.*" 444 U.S. at 260, 100 S.Ct. at 545 (emphasis added). If we were to hold that mere knowledge that Congress has designated an act an expatriating act is enough to make out specific intent, we would in effect be recognizing a congressional power to strip persons of their citizenship. Because, under *Afroyim* and *Terrazas*, Congress has no power to declare that the performance of particular acts shall automatically result in expatriation, mere knowledge that Congress has declared an act to be expatriating is not enough. Something more than knowledge that the act is an expatriating act under United States law must be shown.

[12, 13] As we read *Afroyim* and *Terrazas*, a United States citizen effectively renounces his citizenship by performing an act that Congress has designated an expatriating act only if he means the act to constitute a renunciation of his United States citizenship.[6] In the absence of such an intent, he does not lose his citizenship simply by performing an expatriating act, even if he knows that Congress has designated the act an expatriating act. By the same token, we do not think that knowledge of expatriation law on the part of the alleged expatriate is necessary for loss of citizenship to result. Thus, a person who performs an expatriating act with an intent to renounce his United States citizenship loses his United States citizenship whether

5. In *Terrazas*, the Court stated that "intent to renounce" may be evidenced not only through words but also through conduct. Some expatriating acts may be so inherently inconsistent with United States citizenship that persons performing them may be deemed to intend to relinquish their United States citizenship even in the absence of statements that they so intended the acts, or, indeed, even despite contemporaneous denials that they so intended the acts. *Cf. Terrazas*, 444 U.S. at 261, 100 S.Ct. at 545; *Perez v. Brownell*, 356 U.S. 44, 62–84, 78 S.Ct. 568, 578–89, 2 L.Ed.2d 603 (1958) (Warren, C.J., dissenting). If such is the case, however, there is tion set forth in the text: although performing the act could itself result in loss of citizenship, that would be a consequence of the inherent nature of the act, not the fact that Congress has designated it an expatriating act.

6. We need not decide whether United States citizenship can be effectively renounced *only* by performing an act that Congress has designated an expatriating act or, *per contra*, whether there are other, similarly formal, acts that can result in loss of citizenship if performed with specific intent to renounce citizenship.

or not he knew that the act was an expatriating act and, indeed, whether or not he knew that expatriation was possible under United States law.

[14] As the court stated in *Terrazas*, specific intent may be "expressed in words or ... found as a fair inference from proved conduct." 444 U.S. at 260, 100 S.Ct. at 545. The district court found Richards' intent to renounce his United States citizenship expressed in the words of the oath he executed upon becoming a citizen of Canada. Those words were the following:

> I HEREBY RENOUNCE ALL ALLEGIANCE AND FIDELITY TO ANY FOREIGN SOVEREIGN OR STATE OF WHOM OR WHICH I MAY AT THIS TIME BE A SUBJECT OR CITIZEN.

The district court found that Richards knew and understood the words in the documents he was signing. The court found that, at the time he signed the documents, "plaintiff would have preferred to retain American citizenship, and in his mind hoped to do so, but elected to sign the Canadian naturalization documents and accept the legal consequences thereof rather than risk loss of his job or career advancement." The court concluded that his intent to renounce his United States citizenship was "established by his knowing and voluntary taking of the oath of allegiance to a foreign sovereign which included an explicit renunciation of his United States citizenship."

[15] We agree with the district court that the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship. We also believe that there are no factors here that would justify a different result. Richards does not contend that he did not mean what he said. Rather, he argues that he lacked the necessary intent because he never had a desire to surrender his United States citizenship. He says, and we accept his statement, that he became a Canadian citizen and renounced allegiance to the United States only in order to retain his employment. He argues that the crucial question is "Would Richards have applied for Canadian citizenship but for his employment?" Because "there is no evidence that he harbored the desire to become a Canadian citizen independent of his employment," he argues, he lacked the requisite intent.

Richards contends in effect that specific intent is lacking if the person renouncing United States citizenship was motivated either principally or solely by a desire to gain an important advantage that would otherwise have been unavailable to him. His argument plainly lacks merit. Under Richards' theory, a renunciation of United States citizenship would be effective only if motivated by a principled, abstract desire to sever allegiance to the United States. That theory is contrary to all of the case law concerning voluntary expatriation.

[16] In *Terrazas*, the Court established that expatriation turns on the "will" of the citizen. We see nothing in that decision, or in any other cited by Richards, that indicates that renunciation is effective only in the case of citizens whose "will" to renounce is based on a principled, abstract desire to sever ties to the United States. Instead, the cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.

We cannot accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly. We know of no other context in which the law refuses to give effect to a decision made freely and knowingly simply because it was also made reluctantly. Whenever a citizen has freely and knowingly chosen to renounce his United States citizenship, his desire to retain his citizenship has been outweighed by his reasons for performing an act inconsistent with that citizenship. If a citizen

makes that choice and carries it out, the choice must be given effect.

[17–19] Moreover, expatriation has long been recognized as a *right* of United States citizens, not just as a limitation on citizens' rights. *See* Preamble to the Act of July 27, 1868, ch. 249, 15 Stat. 223 ("[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."). United States citizens have a right to become aliens. In *Afroyim*, the Court placed the right of voluntary expatriation solidly on a constitutional footing. Under Richards' theory, this constitutional right of voluntary expatriation would extend only to persons acting for public-spirited reasons. A renunciation would be ineffective, for instance, if it was motivated by a desire to avoid the duties of citizenship. We find no support in the cases for such a narrow interpretation of the right of expatriation. In fact, the cases are inconsistent with Richards' view. For instance, courts have generally given effect to expatriations even though their sole or primary purpose may have been the desire to avoid military conscription, *see Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971), or to avoid liability for United States taxes, *see United States v. Lucienne D'Hotelle de Benitez Rexach*, 558 F.2d 37, 43 (1st Cir.1977). In sum, we think the case law establishes that an alleged expatriate's "specific intent" to renounce his citizenship does not turn on his motivation.[7]

[20] The record supports the district court's conclusions that (a) Richards desired to become a Canadian citizen and (b) he would have liked also to remain a United States citizen, but because (c) Canada required a relinquishment of foreign citizenship as part of its naturalization procedures, (d) Richards chose to renounce his United States citizenship in order to obtain Canadian citizenship. Indeed, Richards so characterized his intentions in the questionnaire he completed and signed under oath at the Consulate on May 11, 1976:

> At the time I was an employee of the Boy Scouts of Canada and felt I should become a citizen of Canada. I didnot [sic] want to relinquish my U.S. citizenship but as part of the Canadian citizenship requirements did so.

Under *Afroyim* and *Terrazas*, we are required to give effect to Richards' free and knowing choice to acquire foreign citizenship and renounce his United States citizenship. Richards has lost his United States citizenship.

II. *Richards' Constitutional Claims*

[21] In addition to seeking a declaration of his status as a national, Richards sought a declaration that the procedures by which the Secretary issues Certificates of Loss of Nationality violate the bill of attainder clause, the due process clause of the fifth amendment, and the equal protection clause of the fourteenth amendment. Under the circumstances of this case we do not think the district court abused its discretion when it declined to consider Rich-

7. In addition, Congress has recognized that a renunciation of United States citizenship is effective even if motivated primarily in order to avoid payment of United States taxes. In 1966, Congress added a provision to the Tax Code to discourage expatriations for the purpose of avoiding United States taxes. The statute it enacted provides that, with some exceptions, a citizen who renounces his citizenship for the principal purpose of avoiding United States taxes will be treated as a citizen for tax purposes for ten years following his expatriation. *See* 26 U.S.C. § 877 (1982). The statute thus removes much of the incentive for tax-motivated renunciations. However, it does not provide that a tax-motivated renunciation will not result in expatriation. In fact, it expressly provides that citizens who renounce their citizenship in order to avoid United States taxes become aliens. 26 U.S.C. § 877(a) (1982). Although Congress' interpretation of the right of expatriation is not binding on the courts, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), the statute does contribute to what appears to be a general concensus that a renunciation of United States citizenship is not ineffective simply because it was motivated by a desire to avoid the duties of citizenship.

We express no opinion on whether the section 877 is constitutional or, *per contra*, whether it places too great a burden on the right of expatriation.

ards' request for declaratory relief as to his constitutional claims.

CONCLUSION

The district court correctly found that Richards was not a citizen of the United States. He lost his United States citizenship when he voluntarily became a citizen of Canada and took an oath of allegiance to Canada containing an explicit renunciation of his allegiance to the United States. Specific intent to relinquish his United States citizenship was clearly established by that renunciation, even though Richards' motivation was to retain a particular employment position.

AFFIRMED.

The CITY OF SPRINGFIELD, etc., Plaintiff-Appellee,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, etc.; City of Eugene; Bonneville Power Administration, etc.; Peter Johnson, etc.; et al., Defendants-Appellees,

v.

Peter DeFAZIO, et al., Intervening Defendants-Appellants.

Nos. 83-3927, 83-4024.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 10, 1984.

Decided Feb. 4, 1985.

As Amended April 18, 1985.

City filed action seeking a declaration that it had the authority to enter net billing arrangement with the Bonneville Power Administration and a power supply system. The United States District Court for the District of Oregon, James A. Redden, J., 564 F.Supp. 90, upheld the agreements. Appeal was taken. The Court of Appeals, Ferguson, Circuit Judge, held that: (1) the action presented a justiciable controversy involving all the parties; (2) the district court granted summary judgment on an adequate record, even though it denied discovery; (3) state law, not "federal common law," controlled; and (4) the city acted within its legal authority in entering the arrangement.

Affirmed as modified.

1. Federal Courts ⇐13

Action in which city sought declaration that it had authority to enter net billing arrangement with Bonneville Power Administration and power supply system presented justiciable controversy involving all signatories to arrangement where massive reshuffling of rights and obligations would result from invalidation of any agreement.

2. Federal Civil Procedure ⇐2535

In action by city seeking declaration that city had authority to enter net billing arrangement with Bonneville Power Administration and power supply system, district court granted summary judgment on adequate adversarial record, even though discovery was denied.

3. Federal Civil Procedure ⇐1269

Request for discovery may be denied when it is not relevant to issues presented on motion for summary judgment.

4. Electricity ⇐11(3)

As matter of contract interpretation, net billing arrangements involving Bonneville Power Administration, power supply system and multistate cities and public utility districts placed dry-hole risk on Administration, rather than on participating cities and utilities. Bonneville Project Act, § 1 et seq., 16 U.S.C.A. § 832 et seq.

5. Federal Courts ⇐413

Where there was no specific federal legislation mandating state or particular federal law control Bonneville Power Ad-

CASE 19—PETITION EQUITY—JANUARY 22.

Breckinridge and wife v. Denny & Faulkner.

APPEAL FROM GARRARD CIRCUIT COURT.

1. ESTATES-TAIL ARE CONVERTED INTO FEE-SIMPLE BY STATUTE.—L 1838 F. devised his estate to trustees "*and their successors forever*," i trust for the use of his three daughters "*and their posterity forever;*" and if either should die without lawful issue, her part to go in trus to the survivors, to be held in the same way. He expressed a hop that his wishes as to the manner in which the estate devised shoul be held and managed would be "*obeyed in all time to come.*" *Held* this devise created estates-tail, which under the act of 1796 of th legislature of this state were converted into estates in fee-simple.
2. Where from the language used an estate appears to have been devise contrary to law, if the law allows of any other construction nc involving the necessity of distorting or straining the obvious mean ing of the expressions used by the writer, the courts will be incline to adopt it as the correct one.
3. The word "*posterity*" embraces not only children, but descendants t the remotest generation.
4. Section 10 of the act of 1796 does more than declare the moder common law upon the subject of entailments. It not only provid that estates-tail shall not be created, but declares that every esta in lands which thereafter might be limited "so that, as the law afor time was, such estate would have been an estate in tail, shall also l deemed to have been and continue an estate in fee-simple."
5. When an estate-tail is converted under the statute into an estate i fee-simple it becomes a pure and absolute fee-simple, and not defeasible fee or executory devise. (Carter v. Tyler, 1 Call, Vi ginia, 182.)

WM. CHENAULT, . .
DURHAM & JACOBS,
J. S. VANWINKLE, .
OWSLEY & BURDETT, ... For Appellant

CITED

Act of 1796, sec. 13, Morehead & Brown's Digest, 443.
Bingham on Descents, 152, 228, 229, 192.
Revised Statutes, 2 Stanton, 123, 229, 230.

Ms. Opinion, September 17, 1867, Best v. Cochran.
Powell on Devises, 279. 1 Dana, 235.
16 B. Monroe, 637. 5 Littell, 312.
12 B. Monroe, 658, Moore v. Moore.
14 B. Monroe, 662, Daniel v. Thompson.
14 B. Monroe, 822, McRay v. Merrifield.
12 Wheaton, 153, Jackson v. Chase.
14 B. Monroe, 344, Armstrong v. Armstrong.
16 B. Monroe, 312, Carr and wife v. Estill.
14 B. Monroe, 450, Turman v. White's heirs.
3 Metcalfe, 584, Nunnelly v. White.
2 Redfield on Wills, 654, 655, 658.
1 Greenleaf on Evidence, section 24.
2 Smith's Leading Cases, 625.
4 Monroe, 204, Moore's trustee v. Howe's heirs.
3 B. Monroe, 487, Hart v. Thompson's adm'r.
7 B. Monroe, 614, Attorney-General v. Wallace's devisees.
2 Williams on Executors, page 933.
8 B. Monroe, 616, Deboe v. Lowen.
3 Burrows, 1634–5, Chapman v. Brown.
3 Vesey, jr., 336, Bristow v. Waide.
2 Brown's Chancery Cases, 55, Pitts v. Jackson.
1 Simons, 173, Burgough v. Edridge.

GEORGE R. McKEE, }
GEORGE W. DUNLAP, } . . . . . For Appellees,

CITED

Act of 1796, sec. 10, 1 Morehead & Brown's Digest, 442.
Smith on Executory Interests, sections 536, 709.
14 B. Monroe, 144, Brown v. Alden.
11 B. Monroe, 33, Lackland v. Downing.
11 B. Monroe, 58, Prescott v. Prescott.
2 Metcalfe, 334, Johnson v. Johnson.
2 Duvall, 547, True v. Nichols.
4 Monroe, 201, Moore's trustee v. Howe's heirs.
4 Russell, 403, Palmer v. Helford.
2 Haywood, 130, Jeffries v. Hunt.
2 Sergeant & Rawle, 509, Graves v. Wiley.
4 Comyn's Digest, title "Estates by Devise."
2 Sergeant & Rawle, 470, Clarke v. Baker.
2 Redfield on Wills, section 73, paragraph 21, page 851.
3 Call, 363, Tate v. Tally.
3 Call, 343, Hill v. Burrows.

3 Randolph, 230, Goodrich v. Harding, &c.
1 Call, 165, Carter v. Tyler.
2 Munford, 263, Snyder v. Snyder.
4 Munford, 331, McCintoc v. Manus.

JUDGE LINDSAY DELIVERED THE OPINION OF THE COURT.

John Faulkner died in the year 1838, having first made and published his last will and testament, which in due time was admitted to probate. This will, among others, contains the following provisions, viz.: "I will and bequeath my entire landed and personal estate, together with all my negroes and their future increase, equally to my three daughters, subject, however, to the provisions and conditions hereafter set out. For the purpose of the whole of my property of every description being equally and justly divided between my children, and that the same may be made perfectly safe and secure to them and their lawful issue forever, and with the additional desire that their education should be carefully attended to, a matter about which I feel great solicitude, I hereby appoint my friends, Oliver Terrill, James H. Letcher, and Robert P. Letcher, guardians and trustees, to hold for the use and benefit of my children and their lawful heirs forever the whole of the portion to which each is entitled under this will."

The testator then sets out specifically and minutely the manner in which he desires these guardians and trustees to discharge the trusts reposed in them, and continues: "In making these requisitions as to the mode in which I wish the trusts executed, I desire it clearly understood it is by no means to be inferred that it springs from any want of confidence in the integrity or fidelity of the gentlemen elected as guardians and trustees to my children; but it was suggested by one of the gentlemen chosen, and the only one with whom I have had an opportunity of consulting, that provision of the sort was desirable and proper in reference both to guardians and wards, more especially as I design the trusts to continue

in the persons appointed and their successors forever. My children are not at liberty to choose guardians at the age of fourteen. I have adopted that mode which I have deemed the most safe for the preservation of their estate by the appointment of guardians and trustees, and my wishes upon the subject I hope will be strictly obeyed in all time to come. Under no color, under no pretext, no device whatever, is my real estate to be sold by interposition of a chancellor or by an act of the legislature. My will is that the guardians and trustees and their successors shall hold the estate in trust for the use, support, education, and benefit of my children and their posterity forever. If one of them dies without lawful issue, then the property, or part to which she is entitled, is to go to the survivors, her two sisters, and to be held in trust in the same manner designated. If two should die without lawful issue, then the survivor is to have the whole of the estate, to be held under the same regulations and restrictions as have been already set forth and specified. Should either of my daughters, however, after she arrives at the age of twenty-one, desire to choose her own trustee, she is at liberty to do so, upon the party so chosen giving his consent, entered of record in the County Court of Garrard, to act as trustee; but when chosen he is to have no greater power than the one appointed under this will. He is to hold the estate in trust, and has no authority or power to sell in any way whatever."

By subsequent clauses the testator provides for filling the vacancies that may be caused by the failure or refusal of either of the guardians or trustees to act, or by their removal from the county of Garrard; also for the division of his lands and negroes; and then uses this language: "But after my property is divided in the manner I have directed, the trusteeship still continues, in the manner heretofore mentioned, in the trustees herein appointed and their successors forever."

A careful analysis of all the provisions of this will con-

strains us to conclude that it was the intention of the devisor, through the intervention of trustees, to secure his estate to his children and their descendants for all time to come. Inasmuch as such intention was contrary not only to the spirit but the letter of the law as it existed at the time the will was made and published, it should not be assumed, unless the language of the devisor leads naturally and legitimately to that conclusion. In fact, if the will allows any other construction, not involving the necessity of distorting or straining the obvious meaning of the expressions used by the writer, the courts will incline to adopt it as the correct one. The purpose of securing to the devisees "*and their lawful issue forever*" the estate devised, the expressed intention that the guardians and trustees should hold it "*for the use and benefit of my (his) children and their lawful heirs forever,*" and that after the property should be divided in the mode directed the trusteeships should still continue in the trustees appointed "*and their successors forever,*" are provisions which might not be held to be necessarily inconsistent with the idea that the testator intended that his children should take estates for life, or defeasible fees in the realty devised to them. Nor do we think it necessary to construe the dying "without lawful issue" as meaning an indefinite failure of issue. It is not necessary to resort to the canons of construction at all. The testator explains such language as would ordinarily admit of doubt by stating that he "*designs the trust to continue in the persons appointed and their successors forever,*" and that the guardians and trustees and their successors are to hold the estate in trust "for the use, support, education, and benefit of my (his) *children and their posterity forever.*" There is perhaps no broader or more comprehensive term in our language than that of "posterity." It embraces not only children, but descendants to the remotest generations; and as the trustees were to hold the estate for the support, education, and benefit

of the first takers "*and their posterity forever*," it was but natural that the devisor should express the hope that his wishes as to the manner in which the estate devised should be held and managed would "be strictly obeyed *in all time to come.*" The fact that the will provided that in case one or more of the devisees should die without lawful issue, the survivors or survivor should take their interests, does not rebut the idea of an intended entailment, for the survivors or survivor was then to hold under the same regulations and restrictions as the original devisees.

There is an essential difference between this will and that of Ebenezer Best.* In the latter no attempt was made to limit the estate beyond the heirs or issue of the first takers. No intention of creating perpetuities was manifested; but upon the contrary, from the general tenor of the instrument, it clearly appears that such was not the testator's intention.

The restriction imposed upon the estates devised to Faulkner's children, confining the descent to their issue, was inhibited by the tenth section of the act of 1796, and such estate must, according to the plain letter of the law, be decreed and held estates in fee-simple.

This statute does more than merely declare in concise terms the modern common law upon the subject of entailments. It not only provides that estates-tail shall not be created, but declares that every estate in lands which thereafter might be limited, "so that, as the law aforetime was, such estate would have been an estate in tail, shall also be deemed to have been and continue an estate in fee-simple."

This language is so clear that the intention of the legislature can scarcely be mistaken. Counsel, however, insist that General Faulkner's children in no event could take greater interests in the property devised than fees defeasible upon their dying without issue living at the time of their respective

* Manuscript Opinion, September 17, 1867, Best v. Cochran.

deaths, and that the devises over to the survivor or survivors may therefore be upheld as executory devises. They claim that "the whole purpose of the legislature is accomplished when a conveyance or devise which before the enactment would have created an estate-tail is converted into a fee-simple or defeasible fee, and that it was not designed to uproot and destroy the various remainders and executory devises often introduced into wills, by which testators are enabled to mold their testamentary gifts so as to meet and provide for such contingencies as often arise in human life."

This view of the law was substantially determined to be erroneous by the Virginia Court of Appeals in construing the Virginia statute of 1776, from which our statute was taken, in the case of Carter v. Tyler, 1 Call, 182.

The testator, Champe, gave to his son William an estate in fee-tail in certain lands and slaves. To his son John an estate in fee-tail in certain other lands and slaves. He also provided that if either of his said sons should die without issue the entire estate should go to the survivor; if both should die without issue, then after his wife's death the lands were to be sold, and the moneys arising therefrom to be equally divided between his daughters then living.

William sold and conveyed the lands devised to him to one Hooe. Both sons died without lawful issue, leaving a sister, Sarah Carter, the heir at law of the one last dying. She claimed that John took the lands sold to Hooe under her father's will, he having survived her brother William, and that the title thereto passed to her as heir at law of John upon his death.

The court held that William was indisputably tenant in tail in the lands devised to him; that the Virginia statute of 1776 converted this estate into an absolute fee-simple; that a fee-simple estate "includes an entire dominion over the property to *sell*, to *give*, or *transmit* to heirs general; and when an

instrument has disposed of that to one nothing remains to be given to others or to descend." The Virginia statute, from which our act of 1796 was taken, declares that the first taker in such cases "shall have the same power over the same estates as if they were pure and absolute fees." The Virginia court, in commenting upon this language, says that "the words *full and absolute* used by the legislature, the word *pure* by Lord Coke, and *pure and indefeasible inheritance* used by others, are epithets to distinguish them from bare and limited fees; unnecessarily indeed, as *fee-simple* alone would have the same effect."

The court concedes that a "devise in itself importing a fee-simple may admit of an executory devise afterward . . . by changing the supposed fee-simple into a contingent and limited fee from apparent intention;" but that neither the words nor spirit of the act admit of such an operation in the full and absolute estate which it vests in the first taker.

We have examined this decision with great care, and purposely set out at length the principles therein settled, because it is not only clear and satisfactory, but is the earliest case involving the construction of the Virginia statute of 1776 which we have been able to find reported. It was approved by the Virginia court in Hill v. Burrow, 3 Call, 297; Tate v. Talley, *ibid.* 307; and Bell v. Gillespie, 5 Randolph, 273; and we are satisfied that a careful examination will show that this court has not construed our statute differently.

In the case of Moore's trustee v. Howe's heirs it was held that the will did not create an estate-tail either in the testator's daughters or their issue, and hence the devise over was upheld.

In the case of Hart v. Thompson's adm'r (3 B. Monroe, 482) it was held that, according to the strictest rule of English interpretation, the devise did not constitute an estate-tail,

but was a limitation over upon a fee, and was therefore good as an executory devise, the court saying that there was a clear indication of an intention on the part of the devisor to pass a defeasible fee only to the first devisees. In such a case the statute of 1796 clearly did not apply.

In the case of Attorney-General v. Wallace (7 B. Monroe, 611) it was held that the devisor invested his daughter with a defeasible fee; but the doctrine was announced that if he had intended to provide that the devises over were still to take effect although his daughter should die leaving children, provided they should die without issue, then it was clear that the devise upon that contingency would be void. The opinion in this case, as well as that in the case of Armstrong v. Armstrong (14 B. Monroe, 333), seems to intimate that a devise over depending upon two alternative contingencies, one valid and the other too remote, although void so far as it depends upon the remote event, will be allowed to take effect on the alternative one. In each of these cases, however, there was held to be but one contingency, and that one valid. These intimations are therefore to be regarded as *dicta*.

In the case of Deboe v. Lowen (8 B. Mon. 616) the question was directly presented and adjudicated. The devisor gave to his son James, in conjunction with others of his children, in one general devise, certain estate, and if any one of them should die without lawful heir or heirs, the property willed to them to go to the survivors. This devise was held to vest each devisee with a defeasible fee. But it was further provided as to James that if he should die without issue his part was to go to the testator's unmarried daughters, and if he should die with heirs the testator willed it to them. The court held that, "taking the last clause, the devise may be considered as being to James and his heirs (of his body), if he has any at his death; if none, to his brothers and sisters, which is an

estate in tail, or to James (and his heirs forever); if he dies with heirs of his body, to them; and if he dies without heirs of his body, to his brothers and sisters. If the devise to the heirs (of his body) does not restrict the devise to James, he has a fee-simple, defeasible in favor of the remainder-men on his death without issue. . . . If his estate is restricted to an estate-tail by the devise to his heirs, confining the descent to his issue, then he has by the statute a fee-simple, and his alienation is good against the remainder-men as well as his issue."

This case has never been overruled. It accords with the intention and gives force to the language of the statute, and is in our opinion a correct exposition of that salutary enactment. As the devises to the children of General Faulkner are restricted to estates-tail by the devises to their issue, and by clearly and unmistakably confining the descent to such issue until it shall become extinct, we must, in obedience to the manifest intent of the legislature, hold that his children took under his will estates in fee-simple, "pure and absolute." Mrs. Breckinridge therefore had the legal right, in conjunction with her then husband, the late W. H. White, to sell and convey her estate to Denny, and her said conveyance passed to him an estate in fee in the lands conveyed.

The judgment of the circuit court quieting the title of the appellee, Faulkner, who purchased from Denny, and dismissing the cross-petitions of the remaining parties, must be affirmed.

pretends to another that he is accused of crime, and offers his good offices to prevent his conviction if he will pay a sum of money thereby to satisfy the prosecutor, and thus induces such party to sign a contract obligating himself to work to reimburse the amount paid out or pretended to be paid out for this purpose, and to submit to restraint and deprivation of his liberty while he is performing the contract, is guilty of holding such person or causing him to be held to a condition of peonage, whenever such person having so entered on performance of the contract desires to leave it, but is compelled to remain and perform it by threats or punishment subduing his freedom of will; and any third person for whose benefit such a contract is made, who, knowing such facts, becomes the custodian of the person so held to servitude and enforced performance of the contract is also guilty of the offense. If one person carries another before a magistrate, informing him that he is accused of crime, and the magistrate induces the accused, who is of weak mind, or little intelligence, or confiding, to believe that he has been sentenced to hard labor for a fine, when in fact no offense was charged, no warrant issued, and no judgment entered, and such person is induced by such fraudulent means to submit to restraint of his liberty, the persons so concerned are guilty of causing the accused to be held to a condition of peonage. Peonage Cases, 123 F. 671, 673.

PEONAGE SYSTEM

The statute punishing by fine, a part of which is to go to the injured party, an employé who, with intent to injure or defraud, contracts in writing to perform services and receives money or property, and, without refunding the same, fails to perform such services, or any person, who, with like intent, contracts in writing to rent land and thereby obtains any money or property, and without refunding the same, refuses to cultivate the land or comply with the contract, is not unconstitutional on the ground that it imposes on accused involuntary servitude similar to the "peonage system" once prevailing in New Mexico. Bailey v. State, 49 So. 886, 888, 161 Ala. 75.

PEOPLE

Cross References

Her People
Order Made after Judgment Affecting Substantial Rights of the People
Restraint of Princes, Rulers, and People
Restraints of Kings or Princes
State
Vote of the People

In general

The word "people," as used in Vernon's Ann.St.Const. art. 1, § 2, providing that all political powers are inherent in the people, means the aggregate or mass of the individuals who constitute the state. Solon v. State, 114 S.W. 349, 353, 54 Tex.Cr.R. 261.

The word "people," as used in the Constitution, means the political society considered as a unit comprising the entire population of all ages, sexes, and conditions. People ex rel. Elder v. Sours, 74 P. 167, 188, 31 Colo. 369, 102 Am.St.Rep. 34, dissenting opinion.

The word "people," in Bill of Rights, § 4, providing "that people have the right to bear arms for their defense and security," refers to the people as a collective body. City of Salina v. Blaksley, 83 P. 619, 620, 72 Kan. 230, 3 L.R.A.,N.S., 168, 115 Am.St.Rep. 196.

Sir Edward Coke's comment on the charter in the twenty-eighth year of Edward the First, providing that the Great Charter of the liberties of Englishmen granted to all the communality of the realm shall be observed, kept, and maintained in every point, is that here "commune" is taken for "people." Inhabitants of Township of Bernards v. Allen, 39 A. 716, 718, 61 N.J.L. 228, citing 2 Co.Inst. 540.

In general—Cont'd

Will bequeathing all testator's property to wife "to have, to hold and to use * * * for her support and maintenance during her natural life. Then I request that she divide the earnings * * * accumulated during our marriage between her 'people' and mine," held to create valid trust. Shaver v. Weddington, 56 S.W.2d 980, 247 Ky. 248.

It is the whole, and not a part, of the people who make the Constitution and speak its language, and wherever it employs the term "people" it means the whole, and not a fraction, of the people. This is the meaning of the term in a constitutional provision providing that all officers whose election is not otherwise specified shall be elected by the people or appointed as the Legislature may direct. People v. Draper, 15 N.Y. 532, 538.

Judge Cooley, in his work on Constitutional Limitations, after stating that the power to amend or revise our Constitution resides in the great body of the people of the states as an organized body politic, says: "The people, in a legal sense, must be understood to be those who, by the existing Constitution, are crowned with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic will be expressed." Koehler v. Hill, 15 N.W. 609, 615, 60 Iowa, 543.

The word "people" is a comprehensive one, and is subject to many different meanings, depending always upon the connection in which it is used and the subject-matter to which it relates. The definition given in Anderson's Law Dictionary is "ordinarily, the entire body of the inhabitants of a state; in a political sense, that portion of the inhabitants who are intrusted with political power"; and in Rap. & L.Law Dict., among other definitions, "the state or nation in its collective or political capacity." Lord Kenyon, in Nesbitt v. Lushington, 4 Term R. 787, said that the word "people" means the "ruling power of the country." The Itata, 56 F. 505, 511, 5 C.C.A. 608.

Citizen

The word "citizens" is a descriptive word; no broader, to say the least, than "people." A corporation is a citizen of a state for purposes of jurisdiction of the federal courts, and as a citizen it may locate mining claims under the laws of the United States, and is entitled to the benefit of the Indian depredation acts. Hale v. Henkel, 26 S.Ct. 370, 383, 201 U.S. 43, 50 L.Ed. 652.

Citizen—Cont'd

The words "the people," as used in a constitutional sense, although as precise and comprehensive as "population," do not include all of the inhabitants of the state in its broadest sense. "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican constitutions, have the sovereignty and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constitutent member of this sovereignty." If "the people" in a constitutional sense means "citizens," it is equally true that in a general sense "people" constitute "population." "People" is defined as "persons generally, an indefinite number of men and women, folks, population, or part of population." The word "population" as used in Const. art. 6, § 20, forbidding a surrogate of any county having a population exceeding 120,000 to practice as an attorney in any court of record, includes only the citizens of the county and not aliens. In re Silkman, 84 N.Y.S. 1025, 1030, 88 App.Div. 102, citing Scott v. Sandford, 19 How. 404, 60 U.S. 404, 15 L.Ed. 691; Webst.Dict.

Government

"People," as used in a policy insuring against the takings at sea, arrest, and detainments of all kings, princes, and people, means the governmental power of the country, according to the rule noscitur a sociis. Nesbitt v. Lushington, 4 Term R. 783, 787.

To come within the meaning of "people," as used in Rev.St. § 5283, 18 U.S.C.A. § 962, prescribing a punishment for any person concerned in furnishing, fitting out, or arming any vessel with intent that she shall be employed in the service of any foreign state or people to cruise or commit hostilities against any foreign state or people with whom the United States are at peace, the vessel must be intended to be employed in

Government—Cont'd

the service of some foreign prince, state, colony, district, or people to cruise or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace, and a party of insurgents in a foreign country, engaged in carrying on war against the government thereof, do not constitute a people. United States v. Trumbull, 48 F. 99, 106.

Act Cong. April 20, 1818, 3 Stat. 448, provides a punishment for the offense of knowingly fitting out a vessel for the service of any foreign prince or state, or of any colony, district, or people, to be used against another nation with whom the United States were at peace. "An indictment under the act charged the defendant with fitting out a vessel to be employed in the service of a foreign people. It was in evidence that the United Provinces of Rio de la Plata, for which the vessel was intended, had been regularly acknowledged as an independent nation by the executive department of the government of the United States prior thereto. It was argued that the word 'people,' as used in the indictment, was not properly applicable to that nation or power. The objection was one purely technical, and, we think, not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed, being one of the denominations applied by act of Congress to a foreign power." United States v. Quincy, 31 U. S. 445, 467, 6 Pet. 445, 467, 8 L.Ed. 458.

Heirs

Precatory trust created in husband's will by request that wife divide earnings accumulated during marriage "between her people and mine" held sufficiently definite as to beneficiaries, since "people" refers to "heirs." Shaver v. Weddington, 56 S.W.2d 980, 247 Ky. 248.

Inhabitants

"People" means inhabitants. Loi Hoa v. Nagle, C.C.A.Cal., 13 F.2d 80, 81.

The word "people," in 23 St. at Large, p. 1199, § 14, providing that courts and officers of old counties should have full jurisdiction and power in and over the people of

Inhabitants—Cont'd

the territory within the limits of a new county taken from their respective old counties until officers should be elected and qualified in the new county, is, in a comprehensive sense, clearly intended to embrace the inhabitants of the territory with respect to their personal and property rights and liabilities, and also all personal and property rights and liabilities over which the courts of the several old counties would have had jurisdiction, and concerning which the officers of the several old counties would have had power to act before the new county was created. Rushton v. Woodham, 46 S.E. 943, 944, 68 S.C. 110.

Public synonymous

"People" ordinarily means the entire body of the inhabitants of a state, and is synonymous with "public." Wyatt v. Larimer & W. Irr. Co., 20 P. 906, 911, 1 Colo. App. 480, citing Bouv.Law Dict.

State

"People," when not used as the equivalent of "state" or "nation," must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body. The Three Friends, 17 S. Ct. 495, 500, 166 U.S. 1, 41 L.Ed. 897.

Tenants

Term "people" as used in Act of 1850 relating to rights of people when landlords have taken allodial titles to their lands, is synonymous with term "tenants" as used in law relating to private fisheries. Act of 1850, § 7. Oni v. Meek, 2 Haw. 87.

Voters

The word "people" in the school law of 1857, providing that taxes for the erection of schoolhouses must be voted by the people, means voters. Beverly v. Sabin, 20 Ill. 357, 362.

In statute providing that any proposition submitted to vote of the people may be contested, word "people" means persons qualified to vote at election being held. Henley v. Elmore County, 242 P.2d 855, 857, 72 Idaho 374.

Voters—Cont'd

"People," as used in Const. art. 8, § 15, providing that in all elections by the people the vote shall be personally and publicly given viva voce, means those only who possess the qualification of voters required by Const. art. 2, § 8. Rogers v. Jacob, 11 S.W. 513, 514, 88 Ky. 502.

"People," as used in a proclamation stating that by order of the board of supervisors a special election will be held in a certain county for the purpose of submitting a certain question to the "vote of the people" of the county, means the vote of only those people who are qualified voters or electors. People v. Counts, 26 P. 612, 614, 89 Cal. 15.

"People," as used in Const. art. 4, § 13, requiring the consent of the people to the incurring of state debts over a certain amount, should be construed to include registry voters as well as taxpayers. In re Incurring of State Debts, 37 A. 14, 15, 19 R.I. 610.

The word "people," used in a city charter, providing for the submission of a question to a vote of "the people" of the city, means the qualified voters of such city. State v. City of Albuquergue, 240 P. 242, 247, 31 N.M. 576.

The word "people" in a will making a charitable bequest to a school district, and providing that the property bequeathed shall be under the control of one person, elected by the people of the district, must be understood in the political sense, and means those, and only those, with whom the elective power is deposited. Heuser v. Harris, 42 Ill. 425, 432.

The word "people," in Acts 1909, p. 425, providing for the creation of a board of commissioners for a county, defining their duties, and declaring that the act shall not go into effect until ratified by the "people" of the county, means the qualified voters of the county. Tolbert v. Long, 67 S.E. 826, 828, 134 Ga. 202, 137 Am.St.Rep. 222.

In St. 1916, c. 98, providing for constitutional amendment on submission to vote of people, the word "people," though in other circumstances it may include men, women, and children, refers to electorate and is confined to those entitled to enjoyment of the

Voters—Cont'd

elective franchise, or qualified voters. In re Opinion of the Justices, 115 N.E. 921, 922, 226 Mass. 607.

"People," as used in Comp.St. 1895, p. 208, c. 13a, art. 1, § 67, subd. 21, authorizing a city to issue bonds for funding indebtedness when the same shall have been authorized by a vote of the people, means electors or voters. Bryan v. City of Lincoln, 70 N.W. 252, 50 Neb. 620, 35 L.R.A. 752, citing Walnut v. Wade, 103 U.S. 603, 26 L.Ed. 526, where in a similar act the word "inhabitants" was held to mean voters.

"People," as used in Act Cong. May 30, 1850, authorizing the people of the territory of Nebraska, etc., to form for themselves the Constitution and state government, etc., means the free white male inhabitants above the age of twenty-one years, actual residents of the territory, citizens of the United States and those who have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States. State v. Boyd, 48 N.W. 739, 750, 31 Neb. 682.

"People," as used in the Declaration of Rights embodied in the Constitution, providing that all political power is vested in and derived from "the people," is not used in its ordinary sense as meaning the entire body of the inhabitants of the state, but is used in its political sense, in which it means that portion of the inhabitants of the state who are intrusted with political powers for political purposes. The word must be construed as synonymous with "qualified voters," and excludes those who have not the right of suffrage. Blair v. Ridgely, 41 Mo. 63, 64, 75, 97 Am.Dec. 248.

Laws 1925, c. 36, amending Laws 1923, c. 102, § 1, providing that only taxpayers or wives or husbands of owners of realty may vote at bond elections, is invalid so far as it relates to elections on propositions to create public debts, required to be submitted to "people" by Const. art. 16, § 4, notwithstanding article 13, § 3, commanding Legislature to restrict municipalities' power to borrow money, in view of article 16, §§ 2, 5, and article 6, § 2; "people" as used in Constitution meaning all electors, and Comp.St.1920, §§ 2182–2192, under which proposed bonds for

Voters—Cont'd

sewage system were to be issued, and which act in question does not purport to amend or repeal, in requiring that proposition be submitted to vote of electors, is legislative recognition of this definition. Simkin v. City of Rock Springs, 237 P. 245, 251, 33 Wyo. 166.

PEOPLE OF A TOWN

"People of a town," as used in town bonds reciting that they were issued in pursuance of a vote of the "people of a town," in popular signification is the same as "inhabitants of a town," as used in the statute under which the bonds were issued, requiring the approval of the "inhabitants of the town" to such issue. Walnut v. Wade, 103 U.S. 683, 693, 26 L.Ed. 526.

PEOPLE OF NEW ORLEANS

A dedication by the state to the "people of New Orleans for public use for a public park or amusement park purposes," of a parcel of land lying beneath the waters of Lake Pontchartrain, is none the less a dedication to the public because the words "people of New Orleans" are used, since those who are not so may become people of New Orleans; or may avail themselves of the dedication without becoming people of New Orleans. Saucier v. City of New Orleans, 43 So. 999, 1002, 119 La. 179.

PEOPLE OF THE AFRICAN RACE

The phrase "people of the African race" in conveyances, covenants and agreements providing that none of premises in certain city subdivision should be used or occupied by such people, included colored persons nomenclatured "negroes". Mrsa v. Reynolds, 27 N.W.2d 40, 41, 317 Mich. 632.

PEOPLE OF THE COUNTRY

"People of the country," when used in relation to the introduction of a custom, is "the union or assemblage of persons of all descriptions of the country where they are collected." Strother v. Lucas, 37 U.S. 410, 446, 12 Pet. 410, 446, 9 L.Ed. 1137.

PEOPLE OF THE COUNTY

"People of the county," as used in an act of the Legislature providing that the title to land condemned for a public park shall vest in the people of the county, means the county. St. Louis County Court v. Griswold, 58 Mo. 175, 201.

The "people of a county" have not the capacity to take by grant. They are not a corporate body known in law, and as a grant, to be valid, must be to a corporation, or some person certain must be named who can hold either in his own right or in his right as trustee, a grant of a lot to the people of the county is invalid. Jackson v. Cory, N. Y., 8 Johns. 385, 388.

Title of act providing for construction and improvement of drains affecting lands in state and adjoining state and providing for distribution of costs of constructing improvements between county or counties of state and county and counties in adjoining state held sufficiently broad to cover body of act authorizing assessment of benefits on lands of citizens benefited by work, since terms "county" and "people of the county" are or may be used interchangeably. Acts 1913, c. 331. Board of Com'rs of Adams County v. Fennig, 5 N.E.2d 639, 641, 211 Ind. 411.

PEOPLE OF THE PHILIPPINES

Under the Philippine Independence Act of 1934, Presidential Proclamation of Philippine independence, and treaty of July 4, 1946, with the Republic of the Philippines, contemplating that the United States would surrender all sovereignty "over the territory and people of the Philippines", quoted expression was all-inclusive, excepting only those Filipinos who have by their own volition taken authorized steps to separate themselves from a national relation to the government of the Philippines. Calebe v. Acheson, C. A. Hawaii, 183 F.2d 795, 801.

PEOPLE OF THE STATE

Cross References

Referred To People of The State

The "state" means the whole people united in one body politic, and the "state" and

the "people of the state" are equivalent expressions. Wiesenthal v. Wickersham, 28 N. E.2d 512, 514, 64 Ohio App. 124.

The statute making title of purchaser at tax sale subject to claims of the "people of this state" for taxes has been held to include a claim for city tax levied by city of Rochester. Laws 1884, c. 107, § 9. City of Rochester v. Bonded Municipal Corporation, 10 N.Y.S. 2d 524, 526, 256 App.Div. 462.

The word "state" in its most enlarged sense means the people composing a particular nation and community. In this sense the state means the whole state or community united into one body politic, and "state" and "people of the state" are synonymous expressions. Union Bank v. Hill, 43 Tenn. (3 Cold.) 325, 330.

The phrase "people of the state," as used in the Colorado statutes requiring certain proceedings to be brought in the name of the people of the state, should be construed as equivalent to "the state," so that a complaint brought in the name of the state of Colorado is, in effect, a suit in the name of the people of the state. Brown v. State, 5 Colo. 496, 499.

When the term "people of the state" is used to designate the beneficiaries of the trust in navigable waters, all the people who may choose to enjoy the same within the state are referred to, whether citizens of the state or persons who come within its territory for the purpose of enjoying such public rights. Rossmiller v. State, 89 N.W. 839, 844, 114 Wis. 169, 58 L.R.A. 93, 91 Am.St. Rep. 910.

The phrase "the people of the state," in a contract "between the people of the state of New York, represented by the Board of Managers of the New York State Reformatory" and a convict labor contractor, is used to signify the people as a body politic or as a political entity called the "state," and not as meaning the people as the sovereign power in the state. F. H. Mills Co. v. State, 97 N.Y.S. 676, 677, 681, 110 App.Div. 843.

In an action on an official bond the court said: "The first assignment of error is that the bond is payable to the people of the state of California, whereas it is insisted the act requires it to be made payable to the state of California. All that is requisite to constitute a good bond on this point is that it should have a good obligee, so that there will be no mistake as to the one to whom the service or duty is owing. Either of the names is descriptive of the same sovereignty, and may be indifferently used, as they are in various statutes." Tevis v. Randall, 6 Cal. 632, 635, 65 Am.Dec. 547; People v. Love, 19 Cal. 676, 681.

Laws 1902, c. 559, relating to the enforcement of taxes in Oneida county provides for the publication of notice of sale of lands for taxes, filing proof of due publication, the time and manner of redemption, and declares that no other or further or different notice of the expiration of the time to redeem shall be required to be published, served on, or given to any person whatever. Section 9 declares that if real estate is sold for taxes and any portion thereof is not redeemed, the county treasurer shall execute to the purchaser a conveyance which shall vest in the grantee an absolute estate in fee, free from all liens, claims, and incumbrances of every name and nature, subject only to such claims as "the state of New York" and county of Oneida may have thereon for taxes or other liens. Section 10 provides that the treasurer's deed shall vest in the grantee an absolute estate in fee subject to all claims that the state may have for taxes or other liens or incumbrances. Held, that the words "the state of New York" and "the state" were not used as equivalent to the "people of the state of New York" to designate the state in its sovereign capacity, including municipal subdivisions, and that the city of Utica being authorized by its charter as amended by Laws 1901, c. 577, to redeem from county taxes levied on land within the city on which the city also had a tax lien, and no such redemption having been accomplished, a sale of the land for subsequent county taxes freed the land from the lien of prior city tax certificates. Pickell v. City of Utica, 146 N.Y.S. 31, 32, 161 App.Div. 1.

PEOPLE OF UNITED STATES

The words "people of the United States" and "citizens" are synonymous. Dred Scott v. Sandford, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691.

The words "people of the United States" are synonymous with "citizens," both describing the political body who form the sovereignty, and who hold the power and conduct the government through their representatives. Boyd v. Nebraska, 12 S.Ct. 375, 381, 143 U.S. 135, 36 L.Ed. 103.

"In the federal Constitution the words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the sovereign people, and every citizen is one of these people, and a constituent member of this sovereignty." Dred Scott v. Sandford, 60 U.S. 393, 404, 19 How. 393, 404, 15 L.Ed. 691.

PEOPLES

As respects right to injunction, the word "peoples" could not have acquired secondary meaning as indicating plaintiff alone, where there were a large number of other stores in communities where plaintiff and defendant were which had been using such word as part of their trade-names. Ellay Stores v. Savitz, D.C.Pa., 30 F.Supp. 462, 463.

END OF VOLUME

The same subject was considered in *Paul v. Virginia*, 8 Wall. 168, from which we quote as follows: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States and egress from them; it insures to them in other States the same freedom possessed by citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of the laws. * * * But the privileges 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 citizens in the latter States, under their constitutions and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States."

Referring, in the *Slaughter-House Cases*, *supra*, to the language used in this case, the Supreme Court said: "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 their own citizens. Its sole purpose was to declare to the several States that, whatever these rights are, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restraints upon 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 power of the States, and without that of the Federal Government."

As to the question whether the Fourteenth Amendment was intended to transfer the security and protection of these rights "from the States to the Federal Government," and "bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," the court in this case, after stating the results of such a theory, especially in changing "the relations of the State and Federal governments to each other and of both these governments to the people," proceeded to say: "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." The theory would enable Congress to "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." It would "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." It would constitute the Supreme Court "a perpetual censor upon all the 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." Such is the picture of the consequences of a theory which the court expressly rejected.

We are now prepared to state as follows, the meaning of the constitutional clause relating to the privileges and immunities of citizens in the several States: 1. The clause applies simply to "the citizens of each State," considered as the persons to whom the guaranty is given. 2. The guaranty operates for their protection in other States, and not in the State of their residence. 3. The rights protected by it are the general and fundamental rights that belong to State citizenship as such, and not any special rights or privileges that may be founded on domicile in a particular State. 4. The measure of the guaranty in each State, with reference to the citizens of other States, is the rule which the State applies to its own citizens in virtue of their citizenship. 5. The limits within which this rule acts are the powers reserved to the States by not being granted to the United States, and not denied to the States.

These "privileges and immunities," except as State power may be limited or qualified by the Federal Constitution, must, in each State, look exclusively to the State government for their definition and protection. Their similarity in the several States is due to the fact that these States concur in recognizing and establishing them, and not to any power which one State has within the territorial limits of another. They were distinctly referred to in the Articles of Confederation, and hence preceded the adoption of the Constitution. The phrase

"privileges and immunities" was borrowed from these Articles, and passed into the Constitution with a definite and well understood meaning. That meaning Justice Washington explained at an early day, and ever since his exposition has generally been accepted by the courts.

This clause, however, by no means exhausts the provisions of the Constitution in respect to the rights of State citizens. There are other provisions relating to them, either actually bestowing rights or protecting them. We present the following enumeration of the rights which these other provisions either establish or guarantee: 1. The right of the citizen electors in each State, qualified by its constitution and laws, to vote for members of the most numerous branch of its legislature, to vote also for Representatives in Congress, subject to such rules as the legislature may prescribe in respect to "the times, places and manner of holding" such elections, or such as Congress may provide by law. 2. The right to seek judicial relief in the courts of the United States in controversies between citizens of different States, or between citizens of the same State claiming lands under grants of different States, or between citizens of a State and foreign States, citizens or subjects. 3. The right, under the provisions of law, to remove causes from State to Federal courts, in cases where the jurisdiction of the latter depends on the citizenship in different States of the parties thereto. 4. The right, by writ of error, to appeal to the Supreme Court of the United States, where the judgment has been rendered in the highest State court in which the suit could be tried, and where the nature of the matter involved brought into question the Constitution, laws or treaties of the United States, or any rights secured thereby. 5. The right to absolute immunity as against any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts enacted by State authority. 6. The right to freedom as opposed to slavery established by State authority, and as opposed to involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted. 7. The right to exemption from any deprivation of life, liberty or property, without due process of law. 8. The right to the equal protection of the laws. 9. The right not to be excluded by any State from the exercise of the elective franchise "on account of race, color or previous condition of servitude." 10. The right, in each State, to a republican form of government.

These rights the Constitution of the United States secures to every State citizen in the State of his residence. Some of them have their basis exclusively in this Constitution, and others are simply protected by it as against any abuses by State power. No State can abrogate or invade these rights, without coming into conflict with the fundamental law of the land.

While it is true that the Constitution places the States under certain restraints with reference to their own citizens, and that the recent amendments have added to these restraints, it is equally true that the States, except as thus restrained, are independent sovereignties within their respective territorial limits. It belongs to them, and not to Congress, to define the "privileges and immunities" of their own citizens, and enact laws to secure them. The power of Congress, whether express or implied, to enforce the restraints imposed on State power, is not a power to exercise State power, or to do what in its judgment the States ought but fail to do. It is not a power to establish a municipal code in the States, to be operative on *private* individuals, to be the basis of original proceedings in the Federal courts, to take the place of State laws, or supersede those laws. State powers do not vest themselves in Congress when they fail to be properly exercised by the States.

The Constitution, for example, provides that no State "shall deprive any person of life, liberty or property without due process of law," and authorizes Congress to enforce this restraint by appropriate legislation. Here are three fundamental rights of State citizenship protected as against any abuses by State authority. Does this give to Congress the power to establish a penal code for the trial and punishment of the offenses which the citizens of a State may commit against each other in respect to these rights? We cannot better answer this question than by quoting the language of Justice Bradley in the *Great Parish* case, who, in reference to this provision of the Constitution, said: "It is a constitutional security against arbitrary and unjust legislation by which a man may be proceeded against in a summary manner, and arbitrarily arrested and condemned, without the benefit of those time-honored forms of proceeding in open court and trial by jury, which is the clear right of every freeman both in the parent country and in this. It is a guaranty of protection against the acts of the State government itself. It is a guaranty against the exertion of arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offenses; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of ordinary crime within the States. This would be to clothe Congress with the power to pass laws for the general preservation of social order in every State. The enforcement of the guaranty does not require or authorize Congress to perform the duty which the guaranty itself supposes it to be the duty of the State to perform, and which it requires the State to perform. * * * No State may pass a law impairing the obligation of contracts. Does this authorize Congress to pass

laws for the general enforcement of contracts in the States? Certainly not."

There can be no greater or more dangerous mistake in the interpretation of the Constitution than the assumption that, where a restraint is imposed upon State power and Congress is authorized to enforce the same, the whole *subject-matter*, referred to for the purpose of describing the restraint, is thereby brought within the legislative jurisdiction of Congress. This one assumption, made in reference to the rights of life, liberty and property, all of which are fundamental, may be expanded in its application until it would logically vest nearly all the powers of the State governments in Congress, under color of enforcing a restraint upon State power. State citizenship, as defined, regulated and protected by State authority, would disappear altogether, except as Congress might choose to withhold the exercise of its powers. The tendency of Congress, especially since the adoption of the recent amendments, has been to overstep its own boundaries and undertake duties not committed to it by the Constitution. The omissions and failures of State governments cannot be safely corrected by any Federal legislation which assumes and exercises powers not granted to Congress. The remedy is the greater evil of the two.

THE NEW YORK SYSTEM OF PROCEDURE.

Its Theory, History and Progress in the United States, England and India.

(*Continued.*)

HAVING sufficiently discussed the subject of pleading, we proceed now to speak of the mode of trial under the civil action. It was, for a long time previous to the adoption of the Code, an open question whether there could be such an union of legal and equitable remedies as the Code proposed, unless at the same time there should be an absolute correspondence in the mode of trial of all causes.

That the trial by jury must continue was an absolute necessity. Section 2 of article I of the constitution of our State provided, that the trial by jury, "unless waived, in all cases in which it has been heretofore used, shall remain inviolate forever;" and article VII of the amendments of the constitution of the United States prescribed that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

With many persons these provisions of our constitutions formed a great, well-nigh insuperable difficulty in the application of the principle which blended legal and equitable procedure to the trial of causes under the civil action. To the minds of the commissioners, however, there seemed little doubt upon the subject; and Louisiana and Scotland were cited by them as examples of the feasibility of the blending of legal and equitable procedure, leaving the trial by jury intact. The mode of procedure in our United States courts also influenced them in their action. The Code then provides, that "an issue of fact for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived," or a reference be consented to by the parties, or ordered by the courts in the various cases set forth in sections 270 and 271. Let us now for a few moments see whether the commissioners were consistent in inaugurating their reforms, when the constitution of this State and of the United States demanded the retention of the trial by jury.

The chief ground upon which they based their argument who believed the trial by jury an impossibility under a common system of procedure was, that the abolition of the forms of pleading necessary to such an union, effectually did away with the production of an issue, and the separation of the issues of law and fact, thought to be so vital to the common-law system of procedure. In previous sections of this essay, however, we have shown, we think, that the production of an issue, according to the technical course of the common law, failed completely in diminishing the questions of fact and in disentangling them from questions of law, and served only to retard the parties in the preparation of a cause for trial and to confuse the judge and jury upon the trial itself. So then, if that system of jury trial continue to prevail, when what its chief defenders supposed to be its only support had never existed, or had entirely lost its original significance, surely when technical rules and forms had been abolished and the rubbish of procedure had been removed, it would flourish with all its pristine force and vigor.

That force and vigor, were examples necessary, were never lost in Louisiana and Scotland, where either petition and answer, or summons and defense, constitute the only pleadings known. Subsequent practice has proved the correctness of the commissioners' views; for, though the reform they inaugurated has never retrograded, with the exception of the cases where its adoption, under whatever system of practice, has been cumbrous or impossible, the trial by jury exists unimpaired.

Mr. Pomeroy, it is true, seems to hold to the view, that though an absolute unity in judicial methods for the enforcement of civil rights and duties as possible, such an absolute unity is practically impossible so long as the jury trial is required in certain classes of cases, and is dispensed with in others; since that institution creates an essential difference in the manner of conducting actions, and in their frame work, which cannot be obliterated by any statutory declaration. The remark is pregnant with thought; but we must first consider whether such an object of *absolute* unity in procedure was ever contemplated by the commissioners or the legislature. We must again refer to the principle, which we have before suggested, always actuated the codifiers in their work—the abolition of mere form, but the preservation intact of all substance of the common-law procedure. Now, when actions at law and suits in equity were abolished, it was proposed, we believe, that those arbitrary rules should be abolished, which demanded, without a shadow of reason, that actions should be divided into such and such forms, and rights enforced now in one court, now in another, not that thereafter there should be an absolute correspondence of procedure under the new civil action, but that, irrespective of technical forms, relief should be given, did the facts alleged constitute a good cause of action, whether formerly of legal or equitable cognizance, or of both. The commissioners

courts to enforce their rights. That they do possess this right is uncontroverted, but I am of opinion that when the United States bring suit against a citizen for the enforcement of any real or supposed right they can claim nothing which is not equally the right of the citizen against whom the suit is prosecuted, and that where a state is a party the same rule will be applied.

There is scarcely a conceivable case in which the United States have not ample redress in their own courts for the enforcement of any right, legal or equitable, without interfering with the jurisdiction of the state courts. The writ of replevin, provided by the law of this state, was not in force in this court until recently adopted by rule of this court. Before then, the United States were only entitled to an action of trover or trespass, and could not have seized this property until after judgment. These actions are still afforded to the United States, and may be prosecuted without any interference with the state court, or its possession of the property in controversy. If the person holding the property under such bond, or a purchaser under him, is about to remove the same from the jurisdiction of this court, upon bill filed alleging the right of the United States to the property, the pendency of the suit and the insolvency of the defendant, an injunction will be granted to prevent the removal of the property beyond the jurisdiction of the court. So soon as the litigation is ended in the state court, the property may be seized if the defendant is successful, or if the plaintiff succeed, it may still be pursued by the writ of replevin, or other remedy. Any risk which the United States may run by reason of not getting immediate possession, would not equal the injury that would result from the conflict of jurisdiction to which the doctrine contended for by the district attorney would lead. For it must be remembered that it would authorize the seizure of the property in the possession of the sheriff, as well as any one else.

It must be admitted that there are cases in which the ends of justice would be promoted by allowing property seized under one writ of replevin to be taken out of the possession of the seizing officer by virtue of another writ of replevin, as in case of attachment and fieri facias, especially as our act of replevin does not allow third parties, claiming the property, to interfere. To enable this to be done, in one or more states it is allowed by statute; but that it requires an enabling statute to permit it to be done, is a strong argument that without it it cannot be done, and none such exists in this state.

A very careful consideration of all the arguments and authorities adduced satisfies me that this seizure was unauthorized and void; therefore, the marshal will release the property and deliver it to the defendant, and it is so ordered.

Case No. 14,918.

UNITED STATES v. DARNAUD.

[3 Wall. Jr. 143.] [1]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1855.

SLAVE TRADE — ELECTION OF FELONIES — OWNERSHIP OF VESSEL — CITIZENSHIP — DISCHARGE OF SWORN JUROR — PRIVILEGE OF WITNESS — CUSTOM HOUSE REGISTRY — COMPARISON OF HANDWRITING.

1. In a prosecution under the act of May 15, 1820 [3 Stat. 600], for suppressing the slave trade, the act of receiving negroes on the coast of Africa, and of confining and detaining them on ship-board, and the aiding and abetting in confining, form one transaction, and may therefore be joined together in the indictment and prosecution, under different counts; but the selling and delivery of the negroes at the termination of the voyage, as on the coast of Cuba, seems to be a distinct transaction; and if this felony is charged in the same indictment with the other, the prosecution will be made to elect on what counts it will proceed.

2. Ownership of the vessel by a citizen of the United States, if the accused be not, himself, a citizen; or citizenship of the accused, if the ownership be not by such citizen, is an essential ingredient in maintaining a prosecution under the fourth and fifth sections of the act above named.

3. Citizenship, within the meaning of this act, is not what may be called citizenship of domicile, nor is it such citizenship as has been claimed by diplomatic assertion under our naturalization laws, for one who has formally declared his intention to become a citizen, without having proceeded further. But it is that citizenship which has a plain, simple, every-day meaning; that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection.

4. The custom house registry of a vessel, under the acts of congress, as a vessel of the United States, prior to which registry an oath must be taken by the person in whose favor it is made, that he is true and only owner, and a citizen of the United States, is evidence of her national character within the meaning of the acts of congress; and of the character under which she publicly appeared and acted; but in a criminal prosecution against a third person, it is very slight evidence indeed—if it be evidence at all—of the real fact of ownership, and whether or not the ownership be in a citizen of the United States. The case of U. S. v. Brune [Case No. 14,677], very slightly qualified, perhaps, but substantially confirmed and its correctness enforced. In such a prosecution the ownership must be proved distinctly, and as other facts are proved, by common law testimony. Purchasing the vessel, paying for her, repairing her and fitting her for sea, bargaining and paying for her ship stores, procuring her pilot, and shipping her crew, all these are proper evidence of ownership, as they also are, if ownership is disproved, that the vessel was navigated for or on behalf of the person doing these acts. But if in direct connection with these acts and alongside of them, it is proved as a fact that the funds which this person was using belonged to a third party, not a citizen; that he had no funds of his own, that he spoke of himself as an agent and was recognized as such by the banker who put him in funds, and by the third person whose funds they were—all this, which is proper evidence—is evidence to show that the ownership was not in a citizen but in a foreigner; and so far to defeat the prosecution.

[1] [Reported by John William Wallace, Esq.]

5. It is irregular for the court to instruct the witnesses generally, or even a single witness generally, that they were not bound, in answer to questions which might be put to them, to make any answers which would criminate themselves. The proper way is to wait until a question is asked, which, if answered in one way may criminate the witness, and for the court then to interfere.

6. Whether two or more signatures, which purport to be the signatures of different persons, are or are not written by the same person, is a proper subject of proof by an expert; though the testimony of an expert on such a subject is a dangerous kind of evidence.

A law of congress (Act of May 15, 1820, c. 113, §§ 4, 5 [3 Stat. 600]), designed for the suppression of the slave trade, enacts by one section, "that if any citizen of the United States, being of the crew or ship's company of any foreign vessel, engaged in the slave trade, or any other person whatever, being of the crew or ship's company of any vessel, owned in whole or in part, or navigated for, or in behalf of any citizen or citizens of the United States, shall land from any such vessel, and on any foreign shore, seize any negro or mulatto, with intent to make such negro or mulatto a slave, or shall receive such negro or mulatto on board any such vessel with intent as aforesaid, such citizen or person shall be adjudged a pirate; and suffer death." And by another, enacts that if any such person shall forcibly confine or detain, or aid and abet in forcibly confining or detaining on board such vessel, any negro or mulatto, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto as a slave, such citizen or person shall be adjudged a pirate; and suffer death. Under this law, Darnaud, the prisoner, who had been engaged in a slaving voyage on the Grey Eagle, was indicted. The indictment contained thirty-nine counts. The defendant's citizenship and the national character of the vessel were properly alleged. And five distinct charges were made in the bill: (1) Receiving negroes on board the vessel on the coast of Africa; (2) confining and detaining on board the vessel; (3) aiding and abetting in confining and detaining on board the vessel; (4) delivering on shore at Cuba from on board the vessel, having previously sold; (5) delivering on shore there from on board the vessel, with the intention of selling.[2]

One Marsden, of New York, a principal character in the case, and about whose American citizenship there was no doubt, was alleged in the indictment to be the person who owned the vessel when she was thus engaged, or if not the owner, then the person on whose account and for whose benefit she was navigated.

The prisoner having pleaded not guilty, and Mr. Vandyke, the district attorney, having opened his case, C. Gulliou and R. P. Kane, counsel of the prisoner, referring to several authorities,[3] moved that the prosecution should be made to elect on which of the counts

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[2] Slave vessels sail with two or three, or four captains. One captain clears her in a United States port, and swears he is an American citizen. Another, belonging to a different country, in connection with the first, when she arrives at the coast of Africa receives the slaves on board. Another, after the slaves are received, takes charge of them and commands the vessel, and makes one of the former captains the doctor, mate, steward, or something else. Another delivers the slaves on shore. This is done in order to enable the vessels to seek the protection of a flag which the cruiser hailing them will, under the treaties between different governments, respect and regard. If a vessel of this nature happens to be chased by a British cruiser, the practice is to run up the American flag; the American captain shows himself with his American papers, and the cruiser goes off without boarding. When an American cruiser comes in sight, the Portuguese or Spanish flag is run up, and the false Portuguese or Spanish papers are produced. In the present instance, when a British cruiser hove in sight, the American flag was run aloft and the American papers were ready to be shown, and when that flag was seen the cruiser went off. It was on these accounts that the indictment charged the prisoner in this separated way, (1) with receiving; (2) with confining and detaining on board, &c. The counts were essentially as follows:

Eleven counts, from first to eleventh, inclusive, charged the defendant with receiving on the coast of Africa on board a vessel called the Grey Eagle, negroes not held to service or labor, with intent to make slaves of them. The counts were drawn in various forms. Twelve counts, from twelfth to twenty-third, inclusive, with confining and detaining negroes on board the vessel Grey Eagle, etc., in various forms. Three, from twenty-fourth to twenty-sixth, inclusive, with "aiding and abetting" in confining and detaining in various forms. Six, from twenty-seventh to thirty-second, inclusive, with delivering on shore from on board vessel, with the following variations. Twenty-seventh charged vessel as owned, wholly and in part, by a citizen and citizens unknown and also charges the intent of defendant to sell said negroes as slaves. Twenty-eighth charged vessel as owned by a citizen, with intent to sell. Twenty-ninth charged defendant as master of vessel owned by a citizen unknown, intending to sell. Thirtieth charged defendant, a one of ship's company, with delivering at the Island of Cuba, negroes from vessel owned wholly and in part by a citizen and citizens, having previously sold such negroes as slaves. Thirty-first charged vessel as navigated for a citizen and citizens, and that negroes had previously been sold. Thirty-second charged vessel owned wholly and in part by a citizen and citizens unknown did on high seas deliver, &c., having previously sold. Thirty-third charged that defendant was a citizen, one of ship's company, of a foreign vessel and did receive on board five hundred negroes, said negroes having been seized on a foreign shore, with intent to make slaves of said negroes. Thirty-fourth, that defendant on high seas, being master of vessel owned, in whole and in part, by citizen and citizens, did receive on board, a number of negroes, who had been seized on a foreign shore. Thirty-fifth, that defendant was a citizen, and one of ship's company, of foreign vessel and did confine and detain a number of negroes, with intent to make them slaves.

[3] 1 Chit. Cr. Law, 253; Whart. Cr. Law 150; Com. v. Hope, 22 Pick. 1; Young v. Rex 3 Term R. 98; Weinzorpflin v. State, 7 Blackf. 186; Wright v. State, 4 Humph. 195; People v. Baker, 3 Hill, 159; Harman v. Com., 12 Serg. & R. 71; Com. v. Gillespie, 7 Serg. & R. 470; State v. Nelson, 29 Me. 329.

it would proceed; arguing that now was the proper time for this application, which if not allowed here could not be allowed hereafter in the shape of error, or in arrest of judgment. They contended that the indictment contained at least four distinct felonies: (1) Receiving the negroes on board the vessel; (2) confining and detaining them on board; (3) aiding and abetting in confining and detaining; (4) delivering on shore from on board the vessel. They were not part of the same transaction, nor were they distinct misdemeanors, merely part of one felony. Each was a distinct felony, alike punishable with death, nor was one an ingredient of the others.

Mr. Vandyke. The application is out of time. If the indictment charged distinct felonies, a motion should have been made to quash before plea pleaded. Having pleaded, the defendant should wait till the prosecution has closed its case. A joinder is allowed even by the common law in regard to all parts of the same transaction. But if it were otherwise, the act of congress of February 26, 1853, provides that "whenever there are or shall be several charges against any person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in several counts; and if two or more indictments shall be found in such cases, the court may order them consolidated." The words "which may be properly joined" do not refer to all the clauses that precede them, but only to the clause "two or more transactions of the same class." This is a statutory felony; and all the acts charged, even if each one is a felony, are parts of the same transaction, or acts or transactions connected together, and are properly joined.

Before GRIER, Circuit Justice, and KANE, District Judge.

GRIER, Circuit Justice. The transaction on the coast of Africa is one matter which may be charged in all the forms it will bear. The receiving of the negroes there, the confining and detaining of them, and the aiding and abetting in confining and detaining, form one transaction, though they are different offences. They may therefore be joined together. It might also in the same connection be charged that the act was done by a foreign citizen in an American vessel, or an American in a foreign vessel. Besides, the vessel might be charged as belonging to A. or B., or persons unknown. These are all parts of the transaction. The indictment, however, goes further, and charges the selling and delivering of negroes on the coast of Cuba, which forms a separate and distinct transaction. I am unwilling to say that the receiving, detaining, aiding and abetting in these acts, the man being an American, or being not an American; the vessel being an American vessel, or being not an American vessel, belonging to A., B., or C., or to people unknown, may not be allegations of the same transaction. But I think, as at present advised, that the selling and delivering of slaves on the Cuban coast is a distinct transaction. If the defence asks me to say more than this, I am not at present disposed to do so. But whatever may be the election of the prosecuting officer, he has a right to bring out the whole history of the matter as part of the res gestæ.

Mr. Vandyke, under this expression of opinion, then elected to try on those counts which charged with receiving on board and confining and detaining, and aiding and abetting in confining and detaining, striking out all which charged with crime on the coast of Cuba.

The Grey Eagle was an American built vessel; and had been owned by seven or eight American merchants engaged as partners in the pearl fishery. One Hollingsworth, of Philadelphia, a reputable merchant, was managing owner, and to him alone, as such, the vessel had been transferred by bill of sale, he taking an oath at the custom house that he was "true and only owner;" an oath required by law to be taken by a person when he is true and only owner; but not the proper oath where others are in any way interested with him. The pearl fishery proving unsuccessful, Hollingsworth gave orders to a house in New York to sell the vessel. Marsden called on them and inquired as to the terms of sale. The price fixed was $10,000. Marsden did not wish to give that amount for her, and he was told that he might go to Philadelphia and deal with the owners. He came to Philadelphia, saw Mr. Hollingsworth, and concluded a purchase of the vessel for $9,100, and took her to New York. The bill of sale from Hollingsworth to Marsden was dated March 4th, 1854. Marsden of course with that bill of sale took the register, which had been issued at the port of Philadelphia to Mr. Hollingsworth. A pilot took her to New York and delivered her to Marsden.

Previous to the arrival of the vessel at New York, Marsden employed a rigger to rig out the vessel. She arrived there, of course, some time after the 4th; the register and bill of sale were not deposited in the New York custom house until the 20th of March, but in the meantime the vessel arrived there, and Marsden, with two or three others, commenced the active preparation of the vessel for a voyage. Marsden employed the rigger, the carpenter, and sailmaker; bought the coppers which were put on board the vessel for cooking purposes; purchased 28,000 pounds, upwards of 10 tons, of rice; 12 or 14 barrels of beef, and half the number of pork; 24,000 gallons of water; in

short he, and he alone, had the vessel prepared for the voyage. He engaged the shipping master to ship the crew, in part by himself and in part in connection with the defendant. And thus on the 20th of March had the vessel partially prepared. He then deposited in the custom house the bill of sale from Mr. Hollingsworth to him, and surrendered the register.

Things remained in this way until the vessel was ready for clearing, which was not until the 25th of March. A majority of the bills which were incurred had not up to the time of clearing been paid by anybody. After she cleared, two or three of the parties having bills, went to the office of one Oaksmith, where Marsden had a desk for the purpose of conducting his business, and there received their pay. Some of them were paid by one Machado, hereafter mentioned.

The vessel, by the agency of Marsden, and by the assistance of Darnaud, who took part in receiving the stores on board, was ready on the 25th of March to be put afloat. At this juncture Marsden employed a broker to make a bill of sale to a person called Samuel S. Gray, and it was done. The register bond in the custom house is regularly signed by some person representing himself as Samuel S. Gray, in which signature the prisoner joined as master of the vessel. The law requires the master to make oath that he also is a citizen of the United States; and all the custom house proceedings and papers assume that he has done so, and that he is one. But for some reasons not properly explained, it appeared that at about this time the officers of the New York custom house violated their duty in this respect; not exacting this oath from masters. In the bond, which was signed by Darnaud, as master, Gray alleged himself to be a citizen of the United States. The broker procured a respectable man as surety, who did not know who Samuel S. Gray was, but went security simply because Marsden requested it, through his agent.

The vessel cleared with those papers, which the prisoner, as captain, was by law bound to take with him; but previous to the clearing, it went through another usual transaction—the shipping of the crew. A crew is shipped in this way: A shipping master is generally the agent of the owner, as well as the agent of certain boarding house keepers who have crews to ship. He opens a shipping office, and sailors go to him and sign the shipping articles, a large printed document prepared in accordance with an act of congress. Some of the sailors make their marks, and some write their names in such a way as to be illegible. This paper is not taken with the ship. It is sent to the custom house and is there deposited. This crew list has appended to it the oath of a notary public that he has received sufficient proof of the American character of the vessel and of the crew named on the shipping list. The law also requires that the owner or master shall deposit a copy, under oath, of these shipping articles, which shall be sworn to by the master before a notary public, as a true and exact copy of the original paper. Of this paper, which is deposited in the custom house, the master takes a copy certified under the seal of the collector. That copy goes with the vessel and forms the paper which is contemplated in the crew bond, and in relation to which the bond is given. All this was complied with. One Pentz, was employed by Marsden to ship the crew for this vessel. After the vessel had sailed, Marsden called and paid Pentz for the shipping of the crew.

Who the Samuel S Gray was did not at all appear. Marsden was not forthcoming. Nobody identified Gray; nobody knew him. The position of the prosecution was that the transfer from Marsden was a mere fraud; a device to get Marsden's name as owner from off the custom house registry. And the position therefore taken was that Marsden was still owner in whole; or in part with Machado.

On the other hand there was verbal evidence of people's belief that Marsden was a man of no property when he made the purchase and outfit, and evidence of the fact that all the funds came to him from one Machado, of New York, a Spaniard, naturalized here, as the prosecution proved by the production of his papers, and who in this matter, was, as appeared by his own oath, merely the agent of another Spaniard not naturalized, one Rivero, who he said had placed the funds in his hands. Who this Rivero was did not appear at all; nor was he shown to be a man of property. He had been on board the vessel during her voyage to Africa, as one of her two or three captains; but beyond this (see supra, note 2), nothing whatever appeared, Rivero had no written evidence of ownership, so far as appeared; nor was his ownership shown in any way but by the mere fact that Marsden and Rivero had told this Machado (so he swore), that he, Rivero, was owner of the vessel, and the fact that Machado received and paid the funds as Rivero's; doing it sometimes in a pretty loose way. How Marsden was paid for any of his services was not shown by anybody. That most if not all the funds which Marsden used in the matter passed through Machado's hands, was plain enough; but Machado's books were relied on by the prosecution to show that all this was but a form; and that, in part at least, the funds belonged to Marsden, or to Machado, or to both.

So far as concerned the citizenship of the prisoner—a matter important only in case the vessel was really not owned by an American—it appeared that this person was a native of France, and came to this country twelve or fourteen years before this voyage; that he then represented himself as a French-

man, as he also did when arrested under the warrant in this case; that he could speak little or no English, when he came here; that he lodged at French boarding houses, associated with French people; and when applying for a place on an American vessel was asked how he expected to get the place when he could speak nothing but French. On the other hand, he appeared to have in fact renounced his own country; had hailed for twelve or fourteen years as from the United States; had never used an American protection when shipping for foreign ports; had represented himself in fact, if not positively sworn, at the custom house, that he was a citizen of the United States; and had acted as captain of a vessel which he knew was registered as American; a privilege allowed by law to American citizens only.

Mr. Vandyke, for United States, to the jury:

The owners of vessels about to engage in the slave trade being certain of prosecution as pirates if discovered, and of the penalty of execution if convicted, make, invariably, and from the origin of their enterprise, arrangements as complete as possible, to defeat all prosecution. The highest efforts of their ingenuity, sharpened by experience of criminal courts, as to what is needed, are brought into action for this purpose. The arrangements consist in a substratum of agents and of foreigners and of men ready to swear to anything; all at first invisible; but in case of a prosecution to be projected upon the scene. The real actors are Americans; and so long as they are not overtaken by the justice of the Nation, we hear of no other actors in the enterprise. No foreigners, no false custom house oaths are necessary. But when a criminal is seen, then the stalking horse comes into view to hide him. The false fabric is raised to shut out from view the true one. All that was prearranged for the rear ground—agencies, foreigners, perjury—comes forth complete in every part.

In an indictment for slave stealing, the jury ought to look at facts rather than any testimony not clearly pure. That perjury will be committed by witnesses of the defence is certain. Pre-arrangements are made for perjury in all slave voyages. Unless this slave voyage is unlike every other, and an exceptional case merely, a matter not to be presumed, there will be, as of course, witnesses at hand from the start to show that the ownership is a different one from that which appears, had been sworn to and universally believed.

When, therefore, the jury sees an American citizen acting from beginning to end as owner; with all the muniments and indicia in his own name—treating, buying, rigging, equipping, shipping crew and sending out of the harbor a vessel which he swears is his alone; when in a most dangerous enterprise he declares himself from the beginning to the end of the enterprise to be owner; when the man who is now set forth as owner—a foreigner—a man confessedly engaged in cheating our government and in carrying on under false pretences an illegal and infamous traffic—cannot show that he ever had one written evidence of ownership, even of the most secret kind against an American, a stranger to him, a man of worse character even than himself; when the whole evidence of the Spanish ownership rests not upon even a secret written agreement, but rests on one Spaniard's or his clerk's testimony of what these two infamous characters once told him; and upon the simple fact that the money with which the ship was bought passed through his hands as the money of a foreigner—in such a case, on an indictment where that exact kind of evidence is almost certain to come forth, no matter what the truth may be, then, in such a case, the jury should look at facts, as much more likely evidence of truth than oral testimony. I mean of course than such oral testimony. Had Marsden died, to whom would this ship have belonged? Living or dead, what evidence had Rivero of ownership against Marsden, or against anybody? This is not the way in which merchants—Spanish slave merchants—deal, and is irresistible to show a lie, ex post facto. Marsden is said to have had no property. One witness believes so; knowing little about him. What evidence is there that Rivero had property either? Who is Rivero? He was no merchant. He was one of the captains of this voyage. Where did his property come from? Concede that he put money in point of fact into Machado's hands, and had the semblance of property. Marsden, as apparent owner of the vessel, had much better semblance of property. Who put the money into Rivero's hands? Let them show that. Was it American or was it Spanish capital? Let them show that. Rivero was a mere figure in the case; and used because he was a Spanish figure. How was Marsden paid? Let that be shown. Did he receive commissions? Or had he an interest as part-owner in the voyage? If he was a mere agent he received some compensation in money. Has an attempt been made to show that he received anything in that way? The inference is irresistible that if not owner by original purchase, he was paid by an interest of some kind in the voyage; and that the vessel in part was navigated in his behalf. That is enough. It is a matter of no importance how small may have been the interest which Marsden, or Machado, or any other American citizen may have had in the vessel; if one farthing, it is sufficient, because it is a part of an interest in the vessel. If from all the circumstances of the case as brought before us, as to the parol and paper title and the circumstances under which the vessel sailed, we should believe that any person belonging to this Nation had an interest in the vessel,

we are relieved from all difficulty, so far as the point of jurisdiction is concerned. Nor does it matter whether that interest be a legal or equitable one, whether it appear upon the face of the paper title, or has been covered up in fraud, to be inferred from the circumstances of the transaction, with the view of avoiding the responsibilities imposed by congress on those engaged in this unnatural and wicked traffic. If any person was so prominent in the management of the business connected with this vessel as to lead one to suppose that he owned it wholly or in part, it is enough for the purposes of this cause, even though his interest may have been attempted to be covered up and secreted, so that he might screen himself behind the responsibility which rested on the shoulders of all those engaged, and which now rests upon the shoulders of this unfortunate defendant, a fact which may be proved directly or indirectly, or which may be inferred from all the circumstances surrounding the transaction, just as we would infer any other conclusion to which our minds may be led upon a subject of fact involved in any cause. And all that is said in regard to the question of ownership, is applicable to the other question raised by the act of congress, whether—the ownership being foreign—the vessel was navigated for or in behalf of a citizen of the United States.

Then finally, supposing the Spaniard, Rivero, was owner, and that the vessel was not navigated in any way in behalf of any citizen of the United States, was the prisoner a citizen? The term citizen is capable of more meanings than one. Darnaud has renounced his country: he hails from here as a citizen. He is captain of a vessel registered as American; which under our laws presupposes citizenship in him. He has, no doubt, sworn that he was a citizen. The notary public certifies him as such: His domicile is here: Letters of naturalization are not necessary to convert a foreigner into a citizen in all meanings of the term. In the well known case of Martin Koszta, our government interposed and protected as its subject and citizen, against European monarchs, a man who had merely declared an intention of becoming a citizen. The word citizen has therefore other meanings than the one which it has under our naturalization laws. A man may be a citizen who is neither born here nor naturalized. The court will instruct you on this subject. But when a man enjoys peculiar privileges of citizenship, and renouncing in fact—much better than renouncing in form—his own country, adopts another as his home, it seems but natural that he should be deemed a citizen of that other, so far at least as to make him amenable to its laws, when they punish its "citizens" who engage in a traffic denounced by the voice of nearly every Christian nation of the earth.

C. Guillou and R. P. Kane having replied, the charge of the court—Judge GRIER, who had been present during most of the trial, being now absent—was thus delivered by—

KANE, District Judge. The thirty-nine counts of this indictment are included in two general propositions. The first, that the accused, being one of the ship's company, of a vessel which was at the time owned or employed by a citizen or citizens of the United States, did receive or did detain on board one or more negroes, with intent to make slaves of them; or that he did aid and abet others in doing so. The second, that the accused did some one or more of the acts, which are charged and as I have recited them, on board of a vessel; no matter by whom owned or employed; he being a citizen of the United States.

The first class, regarding his own national character as of no consequence; but making the character of the vessel, the national ownership of the vessel, the national character of the owners of the vessel, an indispensable criterion; the second, disregarding the nationality of the owners and employers, but fixing itself upon the national character of the captain, or member of the ship's company, represented by the defendant.

I have to say to you, in the first place, that every one of the elements of the charge, as I have recited them before you, must be proved by the United States before they can claim a verdict of guilty. That is to say: the United States must prove, that this accused prisoner was one of the ship's company of a vessel, which was at the time owned or employed by a citizen or citizens of the United States, and that he then and there received and detained on board one or more negroes with intent to make slaves of them; or did aid and abet others in doing so. Or else, the United States must satisfy you, that the defendant, being himself a citizen of the United States, did one or the other of these acts on board a vessel, without regard to her ownership, upon the high seas.

Among the elements which alternatively constitute the crime, is the citizenship of the accused, or that of the ship's owner. It is not merely a question of jurisdiction in the view of the court, according to the ordinary use of the term. It is a question of the essential elements of the crime. The offence is a statutory one. It not only describes the place where the offence may be committed, and the circumstances which shall go to make the offence, but it defines the persons who alone are capable of committing it. And the statute is as inapplicable to other persons as it is to other places or to other acts.

There is good reason for this, a reason sufficiently obvious. Every nation has absolute jurisdiction of crimes committed within its own territory; and may make whatever laws it chooses, declaring what acts shall be crimes if committed there. But no nation can legislate for others. And as the high seas are the common territory of nations, those laws only

which all nations recognize are the laws of that common territory by which all men are bound. No state can any more legislate for the high seas, than a corporator can legislate for the corporation of which he is a member, or an individual citizen for the county or state in which he lives. No nation can make or enforce special laws for the high seas, without infringing upon the rights of other nations. It was an effort on the part of England, like this, to declare what should be the law affecting neutrals, third persons, individuals of other nations, which led to our war of 1812. It was an effort on the part of France, to prescribe what should be the muniments of title borne by American vessels on the high seas, which embroiled us in hostilities with that country in the early part of the present century. It was an attempt of the same sort, or in the same spirit, by Spain, by Denmark, and by other foreign powers, which at different periods led to reclamations, stern and in the end successful, on the part of the American government, for the damage sustained by American citizens by reason of acts of unauthorized jurisdiction.

In a word, no state can make a general law applicable to all upon the high seas. Where an act has been denounced as crime by the universal law of nations, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing no allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught, may be punished by the first taker. And so too, if the nations of the so-called civilized world, who are fond of calling themselves the whole world, and of arrogating to themselves somewhat too readily all the rights that belong to the whole world, could for once unite in defining that some one act should be regarded as a crime by all, it may be that after such an agreement by all the world, the courts of any one nation might without reference to the nationality of the individual undertake to punish the offence he had committed.

But so soon as we leave these crimes of universal recognition, the jurisdiction of a state over the acts of men upon the high seas becomes circumscribed. It is no longer an exponent of the law of individual or international morals. The owner of a farm cannot legislate for the highway, however conscientious or wise he may be. All the jurisdiction which any nation exerts, or can properly affect to exert upon the high seas, except as the representative of the general sense of mankind, declared in the general law of nations, is founded on the control which every nation has over its own citizens, and their conduct wherever they may be found, or over the acts of others who for the time have subjected themselves to our jurisdiction by accepting the protection of our flag. If you or myself, entitled to the protection of our country, and with our country pledged to defend us wherever we go, not having yet passed within the territory of a foreign sovereign, but being on the common highway of nations, violate the laws of our government, we may be punished for violating them. And if we, being citizens owning vessels under the American flag, entitled, therefore, to protection as American vessels, engage others, whether foreigners or citizens, to be our voluntary associates in violating the laws of our country, and they are caught violating them upon the common highway of nations, they may be brought here and punished.

But it is only in the two cases, where the individual accused is himself a citizen, whose allegiance to his government continued while he was upon the common highway of nations, or where the property upon which the individual was found perpetrating a wrong was property recognized as American, owned by Americans, it is only in these two cases that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred. It is for this reason, then, that our government, in denouncing guilt, and punishment against acts like those charged upon this prisoner, denounces acts done by American citizens and by persons sailing under the sanction and auspices of American citizens on vessels owned by American citizens or in their employ.

That the offence is called in our particular statute piracy, does not vary the legal position and consequences of the case. Piracy is essentially an offence against the universal law of the sea. It assumes that the individual has thrown off his allegiance to mankind. He is the enemy of all who meet him. The slave trade, however horrible it may be, is not within that category. It has been recognized as lawful for many centuries by all the nations of the world. It is only within a few years, within the memory perhaps of every one whom I am addressing on the jury, that the first declaration was made by national authority that it was a crime. And up to the present moment there are nations professing to be civilized, Christian nations, that have refused peremptorily to unite in so recognizing it. It is not, therefore, piracy—such a piracy, no matter whether so called in our acts of congress or not—not such a piracy as constitutes a man the enemy of his race, and con-

fers upon every court of justice in every land the right to try and punish him for his acts. It is no further unlawful in the estimation of courts, it is no further unlawful in the estimation of jurors, considered as jurors, whatever it may be in the estimation of all of us as men and as Christians, than as it is distinctly declared by the laws of our own country to be prohibited to you and myself.

The element, therefore, of citizenship in the description of the crime, on the part of the ship's owner and of the master or member of the ship's company, is an essential condition and element of the crime with which this prisoner is charged; and it must be proved as such, or the accused cannot be convicted here.

Having said this, I have nearly got through with the legal propositions that have a bearing upon the case. I come to the consideration of questions of fact—questions peculiarly for you to decide; and in regard to which I desire to go no further than to gather together from my memory those portions of the evidence which bear upon particular points.

First, then, was this vessel owned by an American citizen, or navigated for or in behalf of an American citizen or citizens, at the time of the acts charged in this indictment? In the first place she was American built and her American character remained unchanged, of course, until in some way or other, she was divorced from it. It remained unchanged, when Mr. Hollingsworth, acting on behalf of a company of gentlemen, but acting in his own name, purchased her, and took out her register in his own name—all those gentlemen being American citizens. She was at that time a vessel owned by American citizens. Those citizens, through the instrumentality of Mr. Hollingsworth, sold her to Marsden, for the time being of New York, and a citizen of the United States, who paid for her and took title in his own name; whether as sole owner, or whether like Mr. Hollingsworth, owner with others, or whether as agent or representative of others, without personal interest on his part, does not appear.

It is to be lamented, and it may be a subject of lamentation not only among moralists, that the preliminaries of title which are prescribed by our laws, and which exact the solemn oath of the party as to the nature of his title, the extent of it, and the number and names of his associates in the purchase, and that the consequent records of title to American ships, are so often irregular and erroneous. You have had a single instance of it, in the case of a gentleman of unimpeached honor in our commercial circles, who makes or rather signs at the custom house a formal oath, that he is the sole and exclusive owner of the vessel, when, in point of fact, it was altogether otherwise; when he was neither the sole nor exclusive owner, but only one of six or seven or eight owners.

The title, the paper title, as between the persons who have themselves taken part in its fabrication, may be regarded as conclusive against them; that is to say, that if you, sir, have executed a bill of sale in my favor, and permitted me to take the register in my name, you shall not be permitted to deny afterwards that you had sold the vessel; and if I accept from you a bill of sale, and go and take out the register, and hold it in possession, I shall not hereafter deny that you sold me the vessel. So far the register may with safety be received as evidence of the transaction. But to say that the execution of a bill of sale by you to me, the surrender of the register by you, and the issuing of a new register in my name, is to be given as evidence against our learned friends who have argued this case before us, who neither could have known nor prevented what we were doing, who had no opportunity of interfering with us, who, if they knew that the whole transaction was a spurious one, an imaginary sale, intended merely as a disguise, and had gone into the custom house to protest against it, would not have been even listened to; to say that they should be bound by what we had done, would be to say that their rights would be at the mercy of our discretion, integrity and honor.

Still, the title, the apparent title, passed from Hollingsworth to Marsden, and it had something more of strength than would properly attach to its paper character, inasmuch as Marsden paid his money before he took it. And thus, at first glance, and till something was shown to the contrary, we should have reason to believe that he was the owner; and he being an American citizen, the vessel continued the property of an American citizen, after passing into his hands. Had, then, the case rested here, it would have been proper for us to require some directness of proof from the parties who should undertake to deny the American ownership of the vessel.

But the United States do not stop here. After showing the title of Marsden, they go on to show that the title, the paper title, the bill of sale title, the register title, passed afterwards to Gray. He, also, is alleged to be a citizen of the United States on the face of the papers. And thus the paper title, upon which, so far as it was worth anything, Marsden's ownership rested, passed altogether by the transfer of that same paper title to another man, described in like terms as a citizen of the United States.

But it is asserted on the part of the United States, that although some one in the name of Gray went through all the formalities at the custom house in the authentication and record of the bill of sale and in procuring the register, yet that this Gray was never the owner at all; and in thus asserting that Gray was never the owner, the United States denounce the truth and efficiency of that title to ownership which is disclosed by the papers of the custom house.

Passing, then, outside of the paper title, the title according to the custom house, whose records have only conducted us into a difficulty from which they fail to relieve

us, how stands the fact of ownership? Who was it that did own this vessel? The defendant says Marsden never owned it, just as the United States say Gray never owned it; and both of the paper titles being thus impeached, we must seek for the real ownership in the other evidence that is before us. How stands that evidence?

We had the cotemporary declarations of Marsden, that he bought the vessel and was fitting it out not for himself, but for a Spaniard named Rivero. We had also the declarations of Rivero, that Marsden had bought for him. We had the evidence of a witness called by the United States, Mr. Oaksmith, that Marsden had no means of his own, wherewith to buy the vessel; and we have the evidence of Mr. Machado, and of his clerks, one of them, if not both, that the funds disbursed by Marsden in the purchase of this vessel belonged to Rivero. I am not aware that there is any other direct evidence going to show whose funds purchased that vessel.

If you are satisfied from what the witnesses have said here, that in truth and in fact Marsden was not a man of adequate means to purchase this vessel; that he bought the vessel for a Spaniard, with funds obtained from that Spaniard; that Spaniard declared that the vessel had been bought for him; that he accompanied and controlled Marsden while the vessel was getting fitted out, and directed his correspondent and banker to make advances to Marsden from time to time for the payment of bills, the court says to you, that in the absence of some proof to the contrary, you are called to believe that Marsden was not really the owner of the vessel, but only the agent for the purchase. It is unnecessary for the court to say to you, conversant as some of you are with the everyday transactions of a business community, that the largest mercantile dealings are conducted and concluded in the names of brokers and agents, without declaring the names of their principals; and that large funds are every day in the year put in the hands of agents to negotiate the purchase of ships and cargoes, without an indication that there are third parties interested in the purchase.

On the other hand, to contradict these assertions you have the examination of books of account of Mr. Machado and of Marsden, the collation of entry with entry, and the argument ingeniously and very powerfully pressed by the district attorney, that the books show these stories to be false; that Marsden was really a man of adequate wealth; that Rivero never did buy the vessel; that the purchase was never made for him; that the funds which Marsden got from Machado were not Rivero's funds, but were Marsden's own, or Machado's own, or that at least they were not Rivero's.

You are to judge then, gentlemen, upon all the evidence; I make no further comment upon it, so far as regards this point of the case; whether the funds and ownership in point of fact—not according to the paper title, for that paper title fixes it on Gray—but whether the ownership in point of fact was in Marsden, or Rivero, or Machado, or any body else. You are to say whether Marsden's disbursements were of his own funds; whether he was in whole or in part the real beneficial owner of this ship; or whether it was Rivero or some one else who bought and owned her. If it was Rivero for whom Marsden acted, whose funds he disbursed, for whom he bought and held, then this vessel was not a vessel belonging to an American citizen, or navigated for or on behalf of an American citizen.

I feel the more confidence in putting this point to you strongly and clearly, because I see that were a different doctrine to be held by our courts, there would be scarcely any protection whatever against the arts of slave traders. If the paper title, the formalities of the custom house, the record of the bill of sale, and the issuing of the register, indicated what was the ownership of the vessel, no one American, base enough to engage in the slave trade, would ever be found on board a vessel with an American register, or an American bill of sale. However American her ownership in fact, she would be sold to some Rivero, or some anonymous Portuguese; the Portuguese flag would be hoisted, and the American owner stepping on board would exult under the protecting fraud of an alien flag, and a fabricated bill of sale.

I instruct you, gentlemen, that the law does n[o]t regard the semblance, but the fact. Was th[e] vessel in truth, owned by American citizens? If there was a mask, tear it off, and look at the reality. Did this vessel belong to the man who was on board, the Spanish captain as he was called, or did she belong to an American citizen?

Passing then from this point, I come to the other category under which the different counts of the indictment arrange themselves; merely reminding you that unless you are satisfied beyond a reasonable doubt, that this vessel at the time belonged to an American citizen in whole or in part, or was navigated for or on behalf of an American citizen, then all those counts of the indictment in which the charge is made, that the vessel was so owned, are not proved, and your verdict as to them must be not guilty.

Of all the charges in this second class, it is an essential element, that the accused was a citizen of the United States at the time of the acts. You have heard some discussion as to the meaning of this term, citizenship of the United States. It has a plain, simple, everyday meaning; and that meaning you may safely take without a definition. It is that unequivocal relation between every American and his country which binds him to allegiance and pledges

to him protection,—that goes with him wherever he goes, stamping him a traitor if he be found in the ranks of an enemy, as a criminal if violating her laws; but watching over him, and covering him with the shield of her power, though he traverses the sea under a stranger flag, or sojourns on a foreign shore. It is not the citizenship of domicile; the citizenship, if you may call it so, of the man who comes to be a guest upon your shores, and who is entitled to protection, just as the stranger becomes a member of your household when you invite him to stay for the night. That is not the citizenship the act refers to; for that subjects to no liability whatever, beyond the territorial limits of the country in which the domicile is. Nor is it what some law books have called judicial citizenship; for that has no relation to a subject like this, but applies only to the question whether the party can sue or be sued in the courts of the United States, or whether their litigation must go over to the state courts. Nor, gentlemen of the jury, is it what some might call diplomatic citizenship, for want of a better term; that grade of inchoate citizenship which may be claimed by one who has declared his intention to become a citizen hereafter; prospective in its allegiance, actual in its asserted rights; about which diplomatists have disputed somewhat, but which I believe our courts have not yet recognized; such is not the citizenship meant by the act of congress. It is citizenship, such as yours and mine—that citizenship which makes us constituent members of this country, and that binds us everywhere to obey its laws, because it protects us everywhere. The right and the duty are inseparable. They begin and end together.

How then stands the question as to this prisoner? In the first place, it appears that he was a Frenchman by birth and language. Such were his own declarations if you believe the witnesses who have been examined before you. The declarations of a man after he is arrested for a crime, or when he is about to commit a crime, may be of very little value; and the man who, to prepare himself for going on a slaving voyage, had taken care to announce to the world that he was not an American, would gain very little advantage from his cautionary declarations. But if, at a time when he was not interested in disguising or denying his true national character, he had declared himself either a Frenchman or an American, having no object in falsifying the truth—not meditating the violation of a law which might subject him to punishment in case he were a citizen of one nation rather than of the other—if by common reputation, in the ordinary converse of his fellowmen, his nationality was recognized as in accordance with his declarations—presenting thus the same sort of evidence of his national character that I have of yours, that you have of mine, that we both have of the gentlemen who surround us in this court—then surely his uncontradicted declarations are entitled to some credit. Just as in a question of pedigree; we speak of parentage and birthplace, on the authority of generally accepted opinion, which resolves itself at last into very little if anything else than the assertions of the party, or his household, or his neighbors. Seafaring men rarely travel with the family bible in their pockets.

If then, it be true, that this man did some fourteen or fifteen years ago arrive here, a Frenchman, apparently unable to speak English, that he did represent himself as born in France, that he did go to a French boarding house, that his associates were French, as this witness testified, that when he applied to one of them to get him a place on board a vessel, he was told it was useless for him to expect to get a place when he could not speak a word of English—having all this before us, and uncontradicted, we are to take him to have been a Frenchman or a foreigner fourteen years ago. If so, when or how did he become an American citizen? When was it? Where was it? We have had in the case of Mr. Machado, the proper proof by which the individual, foreigner by birth, is shown to be an American citizen now. The production of his letters of naturalization, and proof of his identity with the party named in them. We have had no such proof in regard to this man.

What then have we as a substitute? His assertion or admission that he had become one? Doubtful evidence, gentlemen, I may say to you. I should fear very much in a grave cause like this to determine upon the guilt of the prisoner, simply because he had said at a former time, that he was such a citizen as was amenable to our laws of the sea. I have seen too many of the oaths even, that pass through the custom house; I have seen too many good names signed to the papers that were received in that office as proofs of citizenship, and ownership, and identity of invoiced, with actual values, to be very anxious to begin the game of punishing capitally for a misrepresentation of fact at the custom house. Yet if a man has gravely asserted that he was an American citizen, still more if he swore that he was an American citizen, he cannot complain if we so far vindicate the principles of morality as to accept his oath for truth, until he gives us some better reason for believing that he lied. But in this case, did this defendant ever assert or admit that he was an American citizen? That he never carried a protection as an American citizen, as the district attorney has very truly observed, matters little; for very few American citizens carry protections now, and I trust the time may be very distant when they shall again be thought necessary.

But it is argued, that the custom house papers declare or rather assume the citizenship of this prisoner. If so, they would be of value just so far as he had been party to them, or

had recognized their correctness; and no further. Look then through all these documents, and say whether you find in them any assertion or recognition by the prisoner, of his being an American citizen. So far as I remember them, those papers from the custom house contained no proof at all as to the citizenship of the accused. In fact, the oath which the act of congress had required to be made, and which would have decided the question of his citizenship, so far as a custom house oath can attest anything, that oath prescribed by the act of congress, was for some years before this transaction, pretermitted as obsolete by the custom house at New York; and thus it happens there is no such oath taken by this accused, by which you can test the question whether he claimed to be a citizen or not. Then you have the crew list. So far as I remember that instrument, it is certified by a notary public that he received sufficient proof of the American character of the vessel, and of the crew named in the list itself. I may say to you gentlemen, that this certificate of that notary public, that he received sufficient proof, and his oath superadded to the instrument that he received such proof, are of little avail to the prosecution. It is this court, which has to judge of the legal relevancy of the proof; you are to judge of its sufficiency. But that crew list upon examining it, unless my recollection deceives me, does not contain any name by which it is alleged this prisoner has passed himself. There is, therefore, no admission, even supposing that he himself had made oath to the accuracy of the crew list, the oath being as to the American character of the vessel, and of the crew named in it. All these, however, like the other facts and circumstances which have been presented to you by the United States, are for you to consider of.

I have gone over two of the points; there is a third. If you are satisfied that the vessel belonged in whole or in part to American citizens, or that the prisoner was an American citizen; if you are satisfied that this prisoner was engaged on board as one of the ship's company, no matter whether as master or as mate, or as interpreter, or as doctor, if he was engaged on board in the prosecution of these acts, there remains still a point you are to be satisfied upon, of the intent on his part to reduce these people to slavery. I do not mean that it is a question whether this was really a slaving voyage or not; it seems to have been settled all around that it was a slaving voyage; but the character of the prisoner's intent as to the individuals who were on board is an essential topic of consideration by the jury. The seamen who shipped for the island of San Thomas, as probably supposing they were going to St. Thomas, in the West Indies, and who found out they were going to a little island on the coast of Africa, after they were on the high seas, bound to obedience by the maritime code, and such seamen cannot be said to have sailed with the intent to make or sell slaves.

We had a case of piracy before this court some years ago, which was presided over by my Brother GRIER, during the whole trial, and in which he made the charge. The evidence in some respects, not in a great many, but in some respects resembled that which has been before you. And I feel, that I shall do well to close the remarks I have to make upon this case by quoting some of the language of my eminent colleague. I adopt it entirely as my own; but I know that I shall secure for my own opinion greater weight by a reference to his. He said as follows:

"The United States can assume jurisdiction and a right to punish this offence committed on the high seas, only in consequence of the allegiance or citizenship of the offender, or because the act was done on board or by the crew or ship's company of a ship or vessel owned in whole or in part or navigated for or in behalf of a citizen or citizens of the United States. Hence it lies at the very foundation of this case, that the prosecution establish to your satisfaction the fact, either that the defendant is a citizen and owing allegiance to the United States and bound by her laws; or that not being such, the ship or vessel was owned in part or in whole by citizens. That the vessel assumed an American character abroad, is in evidence, that she was sent by the consul to an American port, that at Rio she applied to the American consul and held herself forth to the world as American; this affords a strong presumption of her American character, her national character. But it is not a necessary consequence therefrom that her owners were American citizens. Denizens or resident foreigners might have owned her. But then again, she sailed from New London as an American vessel. The testimony affords a strong probability that she was owned by Americans;—and as the test. ony is wholly for your consideration, the ··t will not say that it is insufficient, if it be satisfactory to your minds.

"But the court think it their duty to observe, in a case of such awful and solemn consequences to the defendant, that the jury should be cautious how they deal with mere probabilities. What hindered the government from sending to New London, and bringing here the register, and the very owners themselves, to establish this fact beyond a doubt? Have they a right to call on you to convict on doubtful or probable testimony, when they had it in their power to have removed the doubt and furnished certainty instead of probability? Without wishing to interfere with your prerogative as to the facts, I venture to say that you would not be unreasonable if you required it at their hands."

In a word, gentlemen, I ask you to take the spirit of these remarks, and apply them to this case. When the United States call upon a jury to give a verdict of guilty, they are a jury to give a verdict of guilty, they are [illegible] of the

of rights and privileges." Each State makes the rule for its own citizens; yet, having made it, then it must not exclude the citizens of other States from its benefits. See *Amy* v. *Smith*, 1 Litt. 338; *Campbell* v. *Morris*, 3 Har. & McHen. 554; *Murray* v. *McCarthy*, 8 Munf. 393; *Austin* v. *The State*, 10 Mo. 592; *Lemmon* v. *The People*, 20 N. Y. 608; *Abbott* v. *Bayley*, 6 Pick. 92; *Crandall* v. *The State*, 10 Conn. 340, and Serg. Con. Law, 2d ed., p. 393.

Judge Story, in his Com., sec. 1806, says: "The intention of this clause was to confer on them (the citizens of each State), if one may so say, a *general* citizenship, and communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances." If, for example, the citizens of a State have the right to hold property or sue in its courts, then the citizens of other States must in that State have the same right. Justice Curtis, in *Scott* v. *Sandford*, 19 How. 590, speaks of the privileges and immunities referred to in the clause, as being the "privileges and immunities of general citizenship." So, also, in the recent case of *McCready* v. *The State of Virginia*, Alb. Law Jour., vol. 15, p. 413, Chief-Justice Waite said that these privileges and immunities are those of "general," but not of "special citizenship" as united with and affected by domicile in a particular State. Hence, any privileges that depend on domicile in connection with the fact of citizenship in a given State, are not included in the privileges that relate simply to "general citizenship."

In *Conner* v. *Elliott*, 18 How. 591, Justice Curtis, in stating the opinion of the court, said: "It is sufficient for this case to say that, according to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to citizenship. Rights attached by law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen' within the meaning of the Constitution."

A very lucid statement on this subject was given many years since by Justice Washington in *Corfield* v. *Coryell*, 4 Wash. (C. C.) Rep. 371, from which we quote as follows: "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 principles 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 the purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of a State, to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes and impositions than are paid by 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, to which may be added the elective franchise, as regulated by the laws and constitution of the State in which it is to be exercised."

This language was, in *The Slaughter-House Cases*, 16 Wall. 36, made the subject of the following comment by the Supreme Court: "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. *The State of Maryland*, 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 this 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 *Ward* v. *Maryland*, 12 Wall. 418, above referred to, the Supreme Court held the following language: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes than are imposed by the State upon its own citizens."

OWN LAND IN ANOTHER STATE

ART II SEC 2 CL 1

(STATE CITIZENSHIP.)

STATE CITIZENSHIP.

BY SAMUEL T. SPEAR, D. D.

A STATE, in the sense in which this term is used in the Federal Constitution, is not only a political community having a defined territorial boundary, and living under an organized government sanctioned by a written, local constitution, and republican in its form, but also a member of the Union, or the greater political community designated as the United States. The Constitution takes no cognizance of a State, except in this relation. See *Hepburn & Dundas* v. *Ellzey*, 2 Cranch, 445; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Scott* v. *Jones*, 5 How. 343, and *Texas* v. *White*, 7 Wall. 700.

Political membership in such a State, is the essential idea of State citizenship; and as to the persons entitled thereto, and subject to the responsibilities thereof, the Fourteenth Amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens * * * * of the State wherein they reside." Simple residence in a State secures, under this provision, to such persons the status of State citizenship.

As to the position and powers of a State within the limits of its own territory, and over its own citizens, a fundamental principle of the Constitution is, 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." Within the limits of these powers the States are as independent of the General Government, and of each other, as they could be if they were foreign nations. In *Buckner* v. *Finley*, 2 Pet. 586, the Supreme Court of the United States said: "For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects the States are necessarily foreign to, and independent of, each other." The doctrine of the same court in *The City of New York* v. *Mills*, 11 Pet. 102, was, "that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States;" that "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained;" and "that, consequently, in relation to these the authority of a State is complete, unqualified and exclusive." So, also, in *The Collector* v. *Day*, 11 Wall. 113, the same court, in 1870, said: "The General Government and the States, though both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government, as that Government, within its sphere, is independent of the States."

It necessarily follows that the obligations, and also the privileges and immunities of State citizenship, except as modified by the Constitution of the United States, have their basis exclusively in State authority. They arise and exist under State constitutions and laws, and, with the above qualification, must be interpreted by them. Each state determines for itself the meaning of the word "citizen" in respect to its own citizen members; and so long as it does not come into conflict with the Federal Constitution, its determination is reviewable by no power on earth.

The phrase "privileges and immunities," used in application to State citizenship, occurs in that provision 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." The meaning of this language will be best ascertained by the comment of text-writers, and especially the judicial tribunals of the country.

Judge Jameson, in his work on The Constitutional Convention, p. 338, remarks that the words "in the several States" evidently qualify the word "entitled," rather than the nearer word "citizens." The sentence, according to this suggestion, would read thus: "The citizens of each State shall be entitled, in the several States, to all privileges and immunities of citizens." The object, certainly, was not to give to the constitution and laws of any State an extra-territorial operation, and thus enable the citizen of a State, when going into another, to carry with him into the latter State the constitution and laws of the former as the rule of his rights therein. The "privileges and immunities," as guaranteed to him in the latter State in virtue of his citizenship in the former, are those and those only which it accords to its *own* citizens as the consequence of their citizenship.

Daniel Webster, in his argument before the Supreme Court of the United States in *The Bank of the United States* v. *Primrose*, referring to this clause of the Constitution, said, that "for the purposes of trade, commerce, buying and selling, it is evidently not in the power of any State to impose any hindrance or embarrassment, or lay any excise, toll, duty or exclusion upon citizens of other States, or place them, coming there, upon a different footing from her own citizens." Webster's Works, vol. 6, p. 112. Mr. Webster's idea is, that the rule in respect to civil rights which the State adopts for her own citizens, she must apply to the citizens of other States whenever her jurisdiction acts upon them, and thus secure what he aptly terms a "community

tion. The attorneys for the defendants will submit the draft of a verdict in favor of the defendants for the signature of the judges.

[See Case No. 14,070.]

Case No. 14,070.

TOBIN v. WALKINSHAW et al.

[1 McAll. 180.][1]

Circuit Court, N. D. California. July Term, 1856.

ALIENS—CITIZENSHIP—ACTS AND DECLARATIONS—INTERNATIONAL LAW — CEDED TERRITORY — TREATY — FOREIGNER NATURALIZED IN MEXICO BEFORE CESSION OF CALIFORNIA.

1. Acts and declarations of a party as to his intention in remaining in or removing from a country, though not simultaneous with his act, are, under special circumstances, admissible to prove the intention with which he acted, if made ante litem motam.

[Cited in Doyle v. Clark, Case No. 4,053.]

2. Where the intention or knowledge of a party becomes a material fact, acts and declarations, although collateral to the main subject, still, having a bearing upon it, are admissible as evidence.

3. By a principle of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former government are changed, and new ones arise between them and the new government.

[Cited in State v. Boyd, 31 Neb. 721, 48 N. W. 739, and 51 N. W. 602.]

4. The manner in which this is to be effected, is ordinarily the subject of treaty.

5. The contracting parties have the right to contract to transfer and to receive respectively the allegiance of all native-born citizens, but the naturalized citizens, who owe allegiance purely statutory, when released therefrom, are remitted to their original status.

This action was ejectment, and defendants pleaded to the jurisdiction of the court, on the ground that Alexander Forbes, one of the defendants, was not an alien and subject of Great Britain, as alleged in the complaint. Issue was taken by replication, and submitted to the jury, who returned a verdict in which they found that James Alexander Forbes, one of the defendants in this case, was, at the time of the institution of this suit, an alien and subject of Great Britain. A motion is now made to set aside the verdict of the jury, on the grounds,—1. That testimony as to the acts and declarations of the party done and made ante litem motam, tending to show what country he elected to adopt, was improperly permitted to go to the jury. 2. That the verdict was contrary to the facts.

[For former proceedings, see Cases Nos. 14,008 and 14,009.]

Howard & Gould and E. W. F. Sloan, for complainant.

Peachy & Billings, for defendants.

McALLISTER, Circuit Judge. To sustain their plea, defendants relied on the admitted facts, that said Forbes, a native of Great Britain, was at the date of the treaty of Guadalupe Hidalgo a naturalized citizen of Mexico, that he has continued to reside in California since the execution of the treaty, and that he has never made any declaration of an intention to retain the rights of a Mexican citizen. These facts, it was contended, with the subsequent admission of California into the Union, fixed at once and by mere operation of law, the status of American citizenship upon the defendant Forbes. To disaffirm the plea, and sustain the allegation that defendant was an alien, plaintiff proved that in 1851 the defendant, against whom two actions at law had been instituted in the courts of this state, petitioned for their removal, and had them removed, from the state courts into the district court of the United States for the Northern district of the state of California (then exercising circuit-court powers), on the ground, that he was, at the time, an alien, and subject of the kingdom of Great Britain. That to accomplish that object, he executed bonds reciting that fact, and his attorney, under his instructions, swore to the fact. It was also in proof, that in the same year (1851), a suit was brought on the equity side of said district court; and to the bill filed the answer of defendant admitted that he was at that time an alien, and subject of Great Britain. Lastly, it was deposed by a witness whose testimony was not attempted to be impeached, that the defendant, in 1851, told him he was not a citizen of the United States, that he did not intend to become one at present, because he desired to be able to litigate in the courts of the United States. To the testimony sustaining the plea, objections were made by attorney for defendants, on the ground of incompetency, and were overruled by the court. This verdict is in the opinion of the court, fully sustained by the testimony given, and the only ground on which it can be set aside is, that the evidence was improperly admitted to go to the jury. In the view the court will hereafter take of this case, the question of the competency of the testimony might be dispensed with. But as it may not be inappropriate to allude to this testimony, the court will briefly advert to the objections made to its competency.

The argument of counsel is, that the provisions of the treaty of "Guadalupe Hidalgo," with the residence of defendant in California, being a naturalized citizen of Mexico, for a year after the date of that instrument; the fact that no evidence was produced to prove defendant ever made a declaration of his intention to retain the rights of a Mexican citizen, together with the admission of California into the Union, all fixed, once and forever, upon the defendant the status of an American citizen, which cannot be altered by the testimony. The consideration of this argument involves, to

[1] [Reported by Cutler McAllister, Esq.]

some extent, a construction of the article of the treaty of Guadalupe Hidalgo, upon which it is predicated. This article stipulates as to those Mexicans who should prefer to remain in the ceded territory, that they may either retain the title and rights of Mexican citizens, or acquire those of American citizens; but declares that they shall be under the obligation to make their election, within one year from the date of the exchange of the ratification of the treaty, and those who shall remain after the expiration of that year, without having declared their intention to retain the character of Mexican citizens, shall be considered to have elected to become citizens of the United States. We will first consider this article as giving a right of election. If he elected to retain the character of a Mexican, he was to manifest it by a declaration, whether in writing, verbally, or by matter of record, is not stated. The treaty is more indefinite as to the manner in which he is to manifest a contrary intention. In fact, it prescribes no way in which he is to manifest his intent not to become a citizen of the United States. The omission to make a declaration to continue a Mexican, and his residence for a year after the date of the treaty, would be prima-facie evidence of his election to become a citizen of the United States. There is also one rule of evidence prescribed by the treaty as to his intention, the fact of his remaining in the country without having made any declaration of his intention. This cannot be deemed conclusive testimony, for election presupposes intention; it is an operation of the will. If the legal conclusion be absolutely fixed upon him in despite of the intent or the purpose of his residence, what becomes of the right of election?

In Inglis v. Sailors' Snug Harbor, 3 Pet. [28 U. S.] 123, the court say, "How, then, is his father, Charles Inglis, to be considered?—was he an American citizen? He was here at the time of the Declaration of Independence, and, prima facie, may be deemed to have become thereby an American citizen. But this prima-facie presumption may be rebutted; otherwise there is no force or meaning in the right of election." Considering, then, for the present, that the right of election had been clearly given to the defendant, the question is, not what do his feelings or interests now prompt him to do, but what did he do within the year his right of election existed. On one side, we have the prima-facie evidence prescribed by the treaty, his continued residence, and the fact that in the year 1851 he had voted at a corporation election. To counteract these, we have solemn legal instruments executed by defendant, describing himself as an alien and subject of Great Britain. Availing himself of that allegation, he removed cases brought against him from the state to the federal courts, filing an answer in a court of equity, in which he swore to the fact—his attorney, under his instructions, swearing to the same fact, and himself not only stating that he was not a citizen of the United States, but did not intend to be, as he wished to be able to litigate in the courts of the United States. To all these acts and declarations, it is urged, they are incompetent evidence, because done and said after the expiration of the time within which the right of election was to have been exercised. The general rule of evidence undoubtedly is, that acts and declarations not done and made simultaneously with the factum probandum, and not forming part of the res gestæ are inadmissible. Yet if an alleged fact cannot exist together with other facts, the proof of the latter facts disproves the existence of the former. If the declarations and acts of Forbes in 1851 were established, they would necessarily disprove the alleged fact that he had previously elected to become a citizen of the United States. They were, therefore, to be left to the jury. It is settled, that the declarations and acts of a party are admissible to qualify and explain his intention in removing, or the character of his residence, in a question of domicil. And it is to be borne in mind that we are considering the admissibility of this testimony in view of a construction of the treaty, which gives to a party a right to elect whether he will retain the title and rights of a Mexican, or take those of a citizen of the United States. To exercise this right, there was no necessity, under the treaty, that there should have been an actual removal, nor is such actual removal the only evidence that the right of election has been exercised. In the case of Inglis v. Sailors' Snug Harbor, 3 Pet. [28 U. S.] 123, the court say, "It surely cannot be said that nothing short of actually removing from the country before the Declaration of Independence will be received as evidence of election." And the court proceeds to consider the acts of the party, adduced as evidence to qualify and characterize the remaining in the country. Now, inasmuch as other acts beside that of removal may be received as evidence of the manner in which the right of election was exercised, the court considers the testimony competent. In the case at bar, defendant remained in this country, and, with a view to ascertain his intention in remaining, his acts and declarations, though made subsequently to the time, were left to the jury to find in what manner he had elected.

But there is another aspect in which the testimony may be received. It constitutes by reason of its character an exception to the general rule, that declarations and acts not forming a part of the res gestæ are inadmissible. That exception applies to cases where the intention of a party becomes material, in which cases facts evidencing the intention, although collateral and foreign

to the main subject, still, as having a bearing upon the question of intent, are admissible. In Wood v. U. S., 16 Pet. [41 U. S.] 360, it is said, in questions "where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment." Now, if the right of election was awarded to the defendant, and it was not the intention by the rule of evidence the treaty creates, to force upon the party who remained in the country American citizenship contrary to his intent (which we think is not the case), then the intent of the party in remaining becomes a material question; and matter en pais—such as the acts and declarations of the party—although not forming a part of the res gestæ, are admissible so far as they serve to show the intent. In the Inglis Case, hereinbefore cited, the court went into the consideration of the acts and doings of the party for a series of years, to ascertain what election he had made at a particular time anterior to them; and say, "Those lead to the conclusion that it was the fixed determination of the party, at the Declaration of Independence, to adhere to his native allegiance." In fact, intent is best known to the party, is often secret until developed by acts and speech. "Acta exteriora indicunt interiora secreta." Lastly, this testimony is admissible as admissions made by a party through his declarations and acts spoken and done ante litem motam, and opposed to the right he now seeks to maintain.

But the court does not consider that the right of election was given to the defendant by the treaty of Guadalupe Hidalgo; and therefore the discussion as to the admissibility of testimony might have been dispensed with. The intention of the 9th article of that instrument was to fix the status of all Mexicans who should prefer to remain in the ceded territory. By a principle of international law, on a transfer of territory by one nation to another, the relations of the inhabitants towards each other undergo no change; but their relations with their former sovereign are dissolved and new ones between them and the government which has acquired their territory are created. The same act which transferred their territory, transfers the allegiance of those who remain in it, and the law which may be denominated political is changed. American Ins. Co. v. Canter, 1 Pet. [26 U. S.] 542. This right to change the political relations of the inhabitants of a ceded territory arises out of the character of those relations as recognized by the law of nature and nations. Birth binds man by the tie of natural allegiance to his native soil, and such allegiance gives, by the principles of universal law, to the country in which he was born rights unknown to mere voluntary or statutory allegiance. Upon the right to transfer this natural allegiance has been engrafted, this right of election in the party whether he will retain his allegiance to his old sovereign, or pay allegiance to the new. Should he elect to retain his allegiance, he must do so without injury to the new government; and such election is generally accompanied by removal from the country, unless regulated by treaty. The object of the treaty of "Guadalupe Hidalgo" was to regulate the exercise of this right of election by such parties as by the principles of international law were subject to their jurisdiction as contracting parties. The Mexican government stipulated for a right for Mexicans resident in the territory, to elect at any time within a year after the date of the treaty to retain their title and rights as Mexicans; the government of the United States guarded against the abuse of the right, by limiting the time within which it was to be executed, and stipulating that if the election was not made within the time limited, they should be considered as having elected to become citizens of the United States. The right of the two governments thus to stipulate in relation to native-born Mexicans, under the law of nations, is unquestionable. It was evidently proper that the status of all such should be fixed. If they were neither to continue Mexican citizens nor become citizens of the United States, a whole people would become disfranchised. They would have no status as citizens, owe no allegiance, and be left in the anomalous position of a people without a country. Not so with the defendant Forbes. So soon as he had been released from the voluntary allegiance to Mexico, he was remitted to his original status. No power existed in one government to transfer, or in the other to receive, the voluntary or statutory allegiance of a naturalized citizen. Neither had the right to say to such, "You shall continue your allegiance to Mexico, although she has conveyed it away; or you shall become a citizen of the United States." The allegiance of the naturalized citizen is the offspring of municipal law. Unlike natural allegiance, its support does not rest upon the law of nature and the code of nations. The only relations that Mexico or the United States could change, were those arising from those sources. Nor does the language of the treaty authorize the conclusion that the contracting parties intended to include within the word "Mexicans" naturalized citizens of foreign countries. The language of the treaty of Guadalupe Hidalgo, differs materially from that used in the treaty by which Florida was acquired in 1819, and the treaty of Paris, in 1803, by which Louisiana was ceded to the United States. In the 8th article of the treaty of Guadalupe Hidalgo, Mexicans are only mentioned as entitled to the rights of election. The whole of this arti-

cle refers to Mexicans; and the 9th article speaks of "Mexicans" only, and provides, that those who do not preserve the character of Mexican citizens shall be subsequently incorporated into, and become entitled to all the rights of citizens of the United States. Naturalized citizens are nowhere included eo nomine, within the provisions of the treaty; and in the opinion of the court, it was not intended to include them. This construction of the treaty is sought to be defeated by the assumption, that the change in the political relations of the inhabitants of the ceded territory was contemplated to be made by the treaty with their consent by giving to them the right of election; hence, that it is to be reasonably concluded that naturalized citizens were intended to be included in the term "Mexicans." The answer is, first, it is a violence to the language of the treaty so to construe it; secondly, the allegiance of the naturalized citizen was not a subject of transfer between the contracting parties; and thirdly, the argument surrenders the whole question; because if the defendant was included in the treaty, his consent was essential to entitle him to exercise the right of election. This is the very question found by the jury on the trial of the issue of election or no election, upon evidence the court considers competent on the trial of such an issue. In a word, if the defendant Forbes, a naturalized citizen of Mexico, is to be brought within the provisions of the treaty because he consented to them, then his consent, involving intention and election, is an issuable fact which has been found against defendants by the jury. But in the opinion of the court, the election was given only to Mexicans who remained in the ceded territory longer than one year after the date of the treaty, who were during that interval to select to retain Mexican rights, or be considered citizens of the United States. Both governments had the right so to negotiate in regard to Mexicans; but in relation to the defendant Forbes, a naturalized citizen, his voluntary allegiance might be released by Mexico—not transferred. On his release, he was remitted to his original status of a British subject, derived from his birth; and the courts know no principle of law which would authorize the government of the United States to compel the transfer of the defendant's voluntary allegiance from Mexico to themselves. The contracting parties did not intend to do so. The court considering the defendant without the provisions of the treaty, his claim to be a citizen of the United States under them cannot be sustained; and he stood at the execution of the treaty, and now stands, where his acts and declarations and original status have placed him—an alien, and subject of Great Britain.

The motion to set aside the verdict in this case, must be overruled.

TOBIN, The ELLEN. See Case No. 4,379.

TOBY (GOODYEAR v.). See Case No. 5,585.

Case No. 14,071.

TOBY v. RANDON.

[6 West. Law J. 218.]

District Court, D. Texas. 1849.[1]

SLAVERY IN TEXAS.

Thomas Toby sued David Randon on two promissory notes, amounting to $3,500. The defendant contended that the money was not justly due, as the property he received for the notes was slaves, natives of Africa, who were brought through Cuba contrary to the laws of Spain, and taken to Texas in 1835, in violation of the laws of Mexico. The plaintiff contended that at the time of the Revolution the negroes were held in slavery, their condition was fixed by the constitution of the republic of Texas of 17th March, 1846.

WATROUS, District Judge, sustained the plea of the defendant, and gave judgment in his favor.

[The cause was carried by writ of error to the supreme court, where the judgment of this court was affirmed, with costs. 11 How. (52 U. S.) 493.]

Case No. 14,072.

[Ex parte TOCHMAN.

[1 Hayw. & H. 268.][2]

Circuit Court, District of Columbia. May 22, 1847.

PRACTICE AT LAW—ORIGINAL PAPERS—LEAVE TO WITHDRAW—COPIES.

The general rule that the original papers filed in a suit shall not be withdrawn without leaving attested copies does not apply to a case in which there are no parties litigant before the court, and the court sees no use in retaining them.

At law.

Motion to withdraw papers filed with his answer to Mr. Bradley's information.

On the 19th of May, 1847, after THE COURT had given its opinion in regard to the information given by Mr. Bradley to the court containing certain charges against Mr. [Gaspard] Tochman, but not asking for any specific remedy or proceeding against him, Mr. Tochman moved for leave to withdraw the papers which he had filed with and referred to in his answer to those charges. THE COURT having decided that the case did not in his opinion call for the exercise of its summary jurisdiction. As the information did not ask for any specific remedy, but left the subject entirely to the discretion of the court, it seems to be a question between Mr. Tochman and the court only whether the court shall permit the papers filed by him

[1] [Affirmed in 11 How. (52 U. S.) 493.]

[2] [Reported by John A. Hayward, Esq., and George C. Hazleton, Esq.]

opinion that they are controlling and as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate determination of this and other litigation pending in the district and such certificate is included herein under the provisions of 28 U.S.C. § 1292 (b).

If there is any question that this jurisdictional question was covered by the original opinion and, therefore, subject to appeal, this order is issued in clarification thereof and the Clerk is directed to file the same as part of the original record in said case.

It is so ordered.

Morris Louis BAKER, Plaintiff,

v.

Dean RUSK, Secretary of State, Defendant.

Civ. A. No. 67-1611.

United States District Court
C. D. California.
March 17, 1969.

Action for judgment declaring plaintiff to be a national of the United States. The District Court, William P. Gray, J., held that evidence that plaintiff within year following his birth in North Dakota was taken to Canada where he lived throughout childhood and adolescence and that plaintiff as part of ceremony of admission to law profession in Alberta took oath to bear allegiance to the king and that plaintiff at no time intended to relinquish United States citizenship was insufficient to show that plaintiff had voluntarily relinquished citizenship.

Judgment for plaintiff.

1. Citizens ⇐3

Person born in the United States has constitutional right to remain a citizen unless he voluntarily relinquishes that citizenship. Act Mar. 2, 1907, § 2, 34 Stat. 1228; U.S.C.A.Const. Amend. 14.

2. Citizens ⇐13

Statute providing that any American citizen shall be deemed to have expatriated himself when he has taken oath of allegiance to any foreign state did not mean that plaintiff who was born in the United States and who took oath of allegiance to the king as part of ceremony for admission to law profession in Alberta lost United States citizenship as matter of law but rather raised question whether plaintiff in taking oath voluntarily relinquished United States citizenship. Act Mar. 2, 1907, § 2, 34 Stat. 1228.

3. Citizens ⇐10(2)

Secretary of State, as party claiming loss of citizenship by plaintiff, had burden of establishing such claim by preponderance of the evidence. U.S.C.A.Const. Amend. 14; Act Mar. 2, 1907, § 2, 34 Stat. 1228; Immigration and Nationality Act § 349(c) as amended 8 U.S.C.A. § 1481(c).

4. Citizens ⇐10(4)

Evidence that plaintiff within year following his birth in North Dakota was taken to Canada where he lived throughout childhood and adolescence and that plaintiff as part of ceremony of admission to law profession in Alberta took oath to bear allegiance to the king and that plaintiff at no time intended to relinquish United States citizenship was insufficient to show that plaintiff had voluntarily relinquished citizenship. U.S.C.A.Const. Amend. 14; Act Mar. 2, 1907, § 2, 34 Stat. 1228; Immigration and Nationality Act, § 349(c) as amended 8 U.S.C.A. § 1481(c).

Kwan, Cohen & Kwan by Arthur D. Cohen, Los Angeles, Cal., for plaintiff.

Wm. Matthew Byrne, Jr., Frederick M. Brosio, Jr., by James R. Dooley, Asst. U. S. Atty., Los Angeles, Cal., for defendant.

MEMORANDUM OF DECISION

WILLIAM P. GRAY, District Judge.

The plaintiff in this action, pursuant to the provisions of 8 U.S.C. § 1503 and 28 U.S.C. § 2201, seeks a judgment declaring him to be a national of the United States. The defendant, as Secretary of State of the United States, contends that the plaintiff has voluntarily relinquished his citizenship and therefore is no longer a national of this Country. On the basis of a trial of the issue thus presented, and for reasons set forth in this opinion, this court now concludes that the plaintiff is entitled to, and will be accorded, the declaratory judgment that he seeks.

None of the facts recited in this memorandum are in dispute. The plaintiff was born in 1905 at Fargo, North Dakota. Within the following year, his mother took him to Canada and there placed him in the care of an uncle, with whom he lived throughout childhood and adolescence. In due course, the plaintiff was graduated from the University of Alberta with a degree in law, and he was admitted to practice this profession in Alberta on June 17, 1926. The ceremony of admission consisted, in part, of the clerk of the court causing the successful applicants to raise their hands and repeat, phrase by phrase, the oath required of all candidates. At about the same time, the plaintiff also executed in writing the prescribed Barristers' and Solicitors' Oath, which presumably was the same oath that he took orally.

The first paragraph of such oath contained a provision that "* * * I will be faithful and bear true allegiance to His Majesty King George the Fifth * * and * * * will defend him to the utmost of my power against all traitorous conspiracies * * * against his person, Crown and dignity. * * *" In the remaining paragraph, the candidate promised to handle all professional matters to the best of his ability and to uphold and maintain "* * * the King's interest and my fellow citizens * * * according to the law in force in this Province."

The plaintiff thereafter practiced law in Canada for several years, and in 1944 he returned to the United States, intending to reside here permanently. The officials of the Immigration and Naturalization Service of the Department of State immediately took, and ever since have maintained, the position that the plaintiff had lost his citizenship in 1926 by taking the hereinabove mentioned oath.

Such challenge of the plaintiff's citizenship is based upon section 2 of the Act of March 2, 1907, 34 Stat. 1228, which was in effect in 1926 and provides as follows:

"[A]ny American citizen shall be deemed to have expatriated himself * * * when he has taken an oath of allegiance to any foreign state."

[1] The Fourteenth Amendment states that "All persons born or naturalized in the United States * * * are citizens of the United States * * *." This constitutional provision serves to "* * * protect every citizen of this Nation against a congressional forcible destruction of his citizenship * * *." It follows that the plaintiff, like any other citizen, has "* * * a constitutional right to remain a citizen * * * unless he voluntarily relinquishes that citizenship." Afroyim v. Rusk, 387 U.S. 253, 268, 87 S.Ct. 1660, 1668, 18 L.Ed.2d 757, 767 (1967).

[2] In light of this constitutional right of a citizen and the corresponding limitation upon the power of Congress, the provision in section 2 of the Act of March 2, 1907, 34 Stat. 1228, under which the plaintiff "* * * shall be deemed to have expatriated himself * * *", may not be interpreted to mean that, by tak-

ing the oath in 1926, he lost his United States citizenship as a matter of law. Instead, the question here concerned is whether in so doing the plaintiff voluntarily relinquished such citizenship.

[3] This question having been raised, 8 U.S.C. § 1481(c) places upon the defendant, as the party claiming that loss of citizenship occurred, the burden of establishing such claim by a preponderance of the evidence. And, as (the then) Attorney General Clark observed in his statement of interpretation of *Afroyim* (34 Fed.Register 1079, 1080, January 23, 1969) the opinion in that case suggests that this burden of proving such voluntary relinquishment is not an easy one to satisfy.

It would seem evident that any time a person takes an oath of allegiance to the sovereign of the country in which he is then residing, he gives substantial indication that he considers himself to be a national of that country and that he has relinquished any prior citizenship. However, this is not inevitably so, as is illustrated by the present case.

The plaintiff testified that from his earliest boyhood his mother reminded him that he was a United States citizen, a heritage that he always cherished and never intended to relinquish. He stated further that at no time prior to the ceremony of his admission to the bar had he been aware of the nature of the prescribed oath, and that, when such oath was administered to him, the excitement of the prospect of immediately becoming a lawyer was such that he did not advert to any collateral implications that might be involved in the undertaking. This is understandable.

It seems to me, also, that, even if the plaintiff had been vividly cognizant of the words of the oath that he took, he might thereby have intended to acknowledge allegiance and swear loyalty to King George V as the symbolic head of the legal system and institutions to which he was hoping to devote his professional life, without claiming the King as his national sovereign and turning his back on his native land.

In any event, the plaintiff, after taking the oath, did not at any time consider himself to be a citizen of Canada. He did not vote in any election in that country and, apart from the matter of the oath, there is no indication that he made any expression or performed any act that might be considered inconsistent with his United States citizenship.

In 1926, Canadian citizenship was no a requirement of admission to the bar o Alberta, and the defendant acknowledge (in the answer to the complaint) tha replies from Canada to inquiries by th United States Immigration Service " * indicated that the plaintiff was not a cit izen of Canada."

[4] Under all of these circumstances it is concluded that the defendant has no met the burden of establishing its clain that the plaintiff has abandoned his alle giance to the United States. The plain tiff remains a citizen of his native land and a judgment will be entered so declar ing.

The plaintiff asks that the defendan be ordered to honor his application for passport, which has heretofore been de nied him because of the defendant's con tention concerning his citizenship statu Such an order is withheld in the confi dence that it will be unnecessary, once th forthcoming declaratory judgment is is sued and becomes final.

This memorandum shall constitut findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules o Civil Procedure.

indicated very strongly, however, that, because of threatened foreclosure proceedings, plaintiff had not anticipated going to the expense of producing any crop other than the alfalfa already planted, during the year 1919.

This suit bears strongly the color of a speculative attempt to reap damages where none could justly be claimed. It seems unnecessary to review authorities cited in the briefs of either counsel. The main question is one of fact, as to the determination of which the decision of the trial court, made upon substantial evidence, is unassailable.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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57 Cal. App. 458

PROWD v. GORE et al. (Civ. 3805.)

(District Court of Appeal, Second District, Division 1, California. April 26, 1922.)

1. Citizens ⟸2—"Citizens of the United States" means person born in, or naturalized under laws of, the United States.

A citizen of the United States is a person of any race or color born within the limits of, or who has been naturalized under the laws of, the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. Citizens ⟸2—"Citizen of the state" means a citizen of the United States domiciled in the state.

By "citizen of the state" is meant a citizen of the United States whose domicile is in such state.

3. Citizens ⟸2—"Citizen" not convertible with "resident," but often used synonymously.

The word "citizen," while not convertible with the word "resident," is often used synonymously with it, without any implication of political privileges.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resident.]

4. Civil rights ⟸2, 6—Constitutional law ⟸216—"Citizen" entitled to privileges in theaters includes residents not citizens, in view of equal protection clause.

The term "citizen," as employed in Civ. Code, § 51, declaring "all citizens within the state entitled to the full and equal privileges of theaters," and section 52 thereof, making "whoever denies to any citizen privileges enumerated in section 51," etc., liable in damages for not less than $100, is not restricted to citizens of the United States or of any of the states, but includes unnaturalized residents of foreign birth, white or black, as otherwise these sections would deny equal protection of the laws, guaranteed by Const. U. S. Amend. 14.

5. Civil rights ⟸6—Theater proprietor liable for wrongful exclusion by manager of theater.

Whether Civ. Code, § 52, rendering liable in an action for damages any one who excludes a person from a theater because of race or color, is penal or not, a person so excluded by the manager of a theater can recover thereunder against the theater proprietor, who neither ordered nor knew of this or a like exclusion, as, by section 2338, and also by general law, a principal is liable for the wrongful acts committed by his agent in the transaction of the business of the agency.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by John Emery Prowd against A. L. Gore and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, for appellants.

E. Burton Cerutti, of Los Angeles, for respondent.

SHAW, J. Action to recover damages. It appears from the findings herein that defendants A. L. and M. Gore were, on March 7, 1921, the owners and proprietors of the Burbank Theater in Los Angeles, of which defendant Wolfe, as their employee, was manager; that on said date plaintiff, who is a member of the negro race and who was at said time a citizen of the United States and a resident of California, over the age of 21 years, purchased a ticket which entitled him to a seat on the lower floor of said theater; that, although upon presentation of his ticket, plaintiff was admitted to the theater, the defendants, their agents, and employees, solely on account of his race and color and for no other reason, refused to give plaintiff a seat on the lower floor of the theater, to which, as the purchaser of said ticket, he was entitled; that by reason of such discrimination on account of his race and color he was humiliated and damaged in the sum of $100.55. Judgment followed in accordance with these findings, from which defendants have appealed.

The ground relied upon by appellants for a reversal of the judgment is the insufficiency of the evidence to justify the finding that plaintiff was a citizen of the United States and of the state of California, or that defendants Gore, by direction or otherwise, participated in the act of their employees in discriminating against plaintiff.

The action is based upon the provisions of sections 51 and 52 of the Civil Code, the first of which sections provides that "all citizens within the jurisdiction of this state are entitled to the full and equal * * * privileges of * * * theaters * * * subject only to the conditions and limitations established by law, and applicable alike to all citizens"; and the second provides that

"whoever denies to any citizen, except for reasons applicable alike to every race or color, the full * * * advantages, facilities, and privileges enumerated in section fifty-one of this Code, * * * or whoever makes any discrimination, distinction or restriction on account of color or race, or except for good cause, applicable alike to citizens of every color or race whatsoever, in respect to * * * his treatment in, any * * * theater, * * * for each and every such offense is liable in damages in an amount not less than one hundred dollars, which may be recovered in an action at law brought for that purpose." The only evidence touching the question of citizenship was that of plaintiff, to the effect that he was at the time in question a resident of Los Angeles, living at 1382 East Fifteenth street. The contention of appellants is that this evidence fell short of showing that plaintiff was a citizen of the state of California, in the absence of which, they insist, plaintiff could not maintain the action. In support of their contention they cite numerous cases involving diversified citizenship as a condition of the right to invoke the jurisdiction of the federal courts.

[1-4] In our opinion, these cases are not applicable to the question here presented. Neither race nor color is involved in the term "citizen." When used alone and without words of qualification, the term may have different meanings, depending upon the context in which it is found. As said in Union Hotel Co. v. Hersee, 79 N. Y. 454, 35 Am. Rep. 530, "the word must * * * be taken in the sense which best harmonizes with the subject-matter in reference to which it is used." When we speak of a citizen of the United States we mean one who is born within the limits of or who has been naturalized by the laws of the United States; and when we speak of a citizen of a state we mean a citizen of the United States whose domicile is in such state. While the word is not convertible with "resident," nevertheless it is often used synonymously with such term without any implication of political privileges. As employed in sections 51 and 52 of the Civil Code, the term "citizen" is not used in a restricted sense—that is, a citizen of a state or citizen of the United States—but in the broad and unrestricted sense, implying that one is a resident of the state and as such entitled to invoke the jurisdiction of its courts to protect a right guaranteed to all, without reference to race or color, who reside within its jurisdiction. To hold otherwise would render the statute obnoxious to the Fourteenth Amendment of the federal Constitution, under which a state may not "deny to any person within its jurisdiction the equal protection of the laws." In our opinion, it was not the intent of the Legislature to restrict the operation of the statute to those only who were subjects of the United States government, and exclude therefrom unnaturalized residents of foreign birth, whether white or black. The evidence shows that plaintiff was a resident of the state, which fact entitled him to maintain the action. Whether or not he was a citizen of the United States, with all the rights implied by such term, is immaterial.

[5] It appears that neither defendant A. L. nor M. Gore was cognizant of the act of their employees in discriminating against plaintiff by refusing to permit him a seat on the lower floor of the house. Neither had they given any instruction to their employees to exclude or discriminate against patrons of the negro race; and hence appellants insist that the judgment as to defendants Gore should be reversed. This contention is based upon the claim that the statute is penal in character, and that defendants Gore cannot be held liable for a wrong committed by their employees. Conceding the statute to be penal, we are nevertheless of the opinion that defendants are liable for the acts of their manager, defendant Wolfe, in discriminating against plaintiff. Section 2338, Civil Code, declares:

"Unless acquired by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the * * * wrongful acts committed by such agent in and as a part of the transaction of such business."

In Otis Elevator Co. v. First National Bank, 163 Cal. 39, 124 Pac. 707, 41 L. R. A. (N. S.) 529, it is said:

"It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts or other wrongful acts committed by such agent in and as part of the transaction of such business."

Moreover, the provision does not purport to be a penal statute. No criminal offense is created thereby, and no provision is made for criminal prosecution nor the recovery by the state of any fine or the imposition of a penalty for a public wrong. It merely fixes a minimum measure of damages for a private tort, to be recovered by an aggrieved party for his own benefit. Gruetter v. Cumberland Tel. & Tel. Co. (C. C.) 181 Fed. 248.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

676; U. S. v. Peterson, 1 W. & M. 305; U. S. v. Stowell, 2 Curt. 153; Reg. v. Gray, 9 Cox, Cr. Cas. 417; 2 Bish. Cr. Proc. 1866, sec. 204, tit. "Menace;" 3 Chit. Cr. Pl. 807, 681.

Messrs. R. H. Marr, John A. Campbell, P. Phillips, David S. Byron, William R. Whitaker, E. John Ellis, Reverdy Johnson and David Dudley Field, for the defendants.

(The briefs for the defendants were largely devoted to the question of the constitutionality of the Enforcement Act. Mr. Field's argument was entirely on that subject.)

548*] *Mr. Chief Justice Waite delivered the opinion of the court:

This case comes here with a certificate by the Judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon section 6 of the Enforcement Act of May 31, 1870, 16 Stat. at L. 141. That section is as follows:

"That 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 provision of this Act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed $5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to and disabled from holding any office or place of honor, profit or trust created by the Constitution or laws of the United States." 16 Stat. at L. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether "The said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offenses provided for by the statute in question do not consist in the mere "banding" 549*] or "conspiring" of two or *more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress.

We have in our political system a Government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74, 21 L. ed. 408.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States, that they required a national government for national purposes. The separate governments of the separate States, bound together by the Articles of Confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States, "In order to form a more perfect union, establish justice, insure domestic tranquility, provide for *the common defense, [*550 promote the general welfare and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the Government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and

have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a Marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offense against the United States and the State: the United States, because it discredits the coin; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship [*551] *which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been, to hinder and prevent the citizens named in the free exercise and enjoyment of their "Lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is and always has been one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in Gibbons v. Ogden, 9 Wheat. 203, subject to state jurisdiction. *Only such existing rights [*552] were committed by the people to the protection of Congress as came within the general scope of the authority granted to the National Government.

The First Amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the Government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State Governments in respect to their own citizens, but to operate upon the National Government alone. Barron v. Baltimore, 7 Pet. 250; Livingston v. Moore, 7 Pet. 551; Fox v. Ohio, 5 How. 434; Smith v. Md. 18 How. 76, 15 L. ed. 272; Withers v. Buckley, 20 How. 90; 15 L. ed. 819; Pervear v. Com. 5 Wall. 479; 18 L. ed. 609; Twitchell v. Com. 7 Wall. 321, 19 L. ed. 223; Edwards v. Elliott, 21 Wall. 557, 22 L. ed. 492. It is now too late to question the correctness of this construction. As was said by the late Chief Justice in Twitchell v. Com. 7 Wall. 325, 19 L. ed. 224 "The scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular Amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the Amendment; neither was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship and, as such, under the protection of and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these *counts that the object of the de- [*553] fendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by

AUSTIN v. UNITED STATES.

No. 361.

District Court, E. D. Illinois.

Sept. 20, 1941

1. Courts ⇐405(14)

The provision in statute fixing as one of the requisites of an allowance to appeal is a poor person that applicant be a citizen is a "condition precedent" to allowance of the application. 28 U.S.C.A. § 832.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

2. Citizens ⇐2

"Citizens", within federal constitution, mean those who are entitled, upon terms prescribed by institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of society, and, to be a "citizen", it is necessary that one should be entitled to enjoyment of those privileges and immunities upon same terms upon which they are conferred upon other citizens.

See Words and Phrases, Permanent Edition, for all other definitions of "Citizen".

3. Courts ⇐405(14)

The permission to prosecute an appeal to the United States Circuit Court of Appeals as a poor person is a grant by grace of Congress to citizens of United States, and, in order to enjoy beneficence of the grant, the applicant must show that he or she is within class of persons whom Congress deemed deserving of grace. 28 U.S.C.A. § 832.

4. Courts ⇐405(14)

A convict in Illinois state penitentiary, in pursuance of a judgment of conviction for murder of her husband, was not a fully qualified "citizen" under constitution and laws of Illinois, and therefore was not entitled to prosecute her appeal, in an action on an insurance policy on life of husband in which she was beneficiary, to the United States Circuit Court of Appeals as a poor person. 28 U.S.C.A. § 832; Smith-Hurd Stats.Ill. c. 38, § 587.

5. Courts ⇐405(14)

A petition to prosecute an appeal from judgment of federal District Court to United States Circuit Court of Appeals as poor person, which failed to include a statement briefly setting forth the cause of action relied upon, was insufficient. 28 U.S.C.A. § 832.

Action by Alice G. Austin against the United States of America on a life policy, wherein a judgment for the defendant was entered. On plaintiff's application to appeal as a poor person.

Application denied.

Edward H. S. Martin, of Chicago, Ill., for plaintiff.

Ernest McHale, Asst. U. S. Atty., of East St. Louis, Ill., for defendant.

LINDLEY, District Judge.

[1] Plaintiff applies for leave to prosecute her appeal to the United States Circuit Court of Appeals as a poor person. She alleges that she is a citizen of the United States. However, the record discloses that she is a convict in the state penitentiary, in pursuance of a judgment of conviction for the murder of her husband. Inasmuch as the federal statute, 28 U.S.C.A. § 832, fixes as one of the requisites of an allowance to appeal as a poor person that the applicant be a citizen and such provision has been repeatedly held to be a condition precedent to allowance of the application, Volk v. B. F. Sturtevant Co., 1 Cir., 99 F. 532; Boyle v. Great Northern Ry. Co., C.C., 63 F. 539; Johnson v. Nickoloff, 9 Cir., 52 F.2d 1074; The Memphian, D.C., 245 F. 484; The Bennington, D.C., 10 F.2d 799; Quittner v. Motion Picture et al., 2 Cir., 70 F.2d 331; De Maurez v. Swope, Warden, 9 Cir., 100 F. 2d 530, it becomes essential to determine the status of the applicant under the constitution and laws of the State of Illinois.

Under 38 Smith-Hurd Illinois Annotated Statutes, Section 587, every person convicted of the crime of murder is deemed guilty of an infamous crime and forever thereafter rendered incapable of holding any office of honor, trust or profit, voting at any election, or serving as a juror, unless he or she shall be restored to such rights by pardon. In People of the State of Illinois v. Russell, 245 Ill. 268, 91 N.E. 1075, the Supreme Court held that a sentence to a penitentiary for an infamous crime constitutes only a part of the punishment; that the disqualifications effectuated by the section cited constitute an additional punishment. Concerning the status of one thus convicted, the court said: "There

follows from the judgment a loss of civil rights, which practically deprives the convict of his citizenship unless restored thereto by a pardon. There remain to him after the judgment of the court is satisfied only his mere personal rights, by virtue of which his life, his liberty, and his property are protected from deprivation. He has become an alien in his own country, and worse; for he can be restored only as a matter of grace, while an alien may acquire citizenship as a matter of right. The plaintiff in error is a woman, and the rights she has lost are more restricted than those of a man; but they are all she had, and a man could lose no more."

[2] "'Citizens,' [as used in the United States Constitution] * * *" mean those who are "entitled, upon the terms prescribed by the institutions of the state to all the rights and privileges conferred by those institutions upon the highest class of society. * * * To be a citizen, it is necessary that he should be entitled to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens; and unless he is so entitled, he cannot, in the proper sense of the term, be a citizen." Amy v. Smith, 11 Ky. 326, 331, 1 Litt. 326, 331. A citizen is an inhabitant of the state who by right may vote in the public assembly, and is a part of the sovereign power. Dictionaire L'Academie les Citoyen. He is an inhabitant who enjoys the freedom and privileges of the municipality in which he resides, including the right of franchise and the right to hold public office. When he may not enjoy these privileges, his status is necessarily something less than that of full citizenship.

[3, 4] Thus, by her conviction, plaintiff has been deprived of substantial rights of citizenship and is not a fully qualified citizen under the constitution and laws of Illinois. Accordingly she is not such a person as Congress contemplated might be allowed to appeal as a poor person. Such permission to appeal is a grant by grace of Congress to the citizens of the United States. In order to enjoy the beneficence of the grant, the applicant must show that she is within the class of persons whom Congress deemed deserving of grace. This plaintiff, upon the record, has not done and can not do.

The decision upon the merits in this cause was based upon the conclusion that plaintiff, a person convicted of an infamous crime, could not collect upon an insurance policy in which she was beneficiary, in view of the fact that she murdered the person whose life was insured in her favor. I find it difficult to believe that an appeal from such a conclusion is other than frivolous and not in good faith. However, I realize that other courts may conclude otherwise.

[5] But there is another defect in the petition. It fails to include the contents prescribed by the act. Kinney v. Plymouth Rock Squab Company, 236 U.S. 43, 35 S. Ct. 236, 238, 59 L.Ed. 457. There the Court said: "Under the assumption that the affidavit as to poverty is sufficient, we come to the merits, in other respects of the application. There is a failure, however, to comply with the requirement that a statement be made, briefly setting forth the cause of action relied upon."

For these reasons the application to appeal as a poor person is denied.

SMALL et al. v. FRICK.

No. 608.

District Court, E. D. South Carolina, Florence Division.

Sept. 22, 1941.

1. Courts ⇐280(5)

In determining the question of jurisdiction, the District Court is not bound by pleadings of parties but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into facts as they exist.

2. Courts ⇐328(4)

The interests of parties joined for purpose of convenience cannot be aggregated to confer jurisdiction on District Court.

3. Courts ⇐328(4)

When two or more plaintiffs having separate and distinct demands unite in a single action, it is essential that the demand of each be of the requisite jurisdictional amount.

case. We are satisfied that it must be taken as established in this state that, under our law as it now exists, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate will lie when the law expressly authorizes issues of fact to be framed in such proceeding, and that provisions authorizing written objections on the part of persons interested in the estate and providing for the hearing and determination of those objections do expressly authorize issues of fact to be framed.

Coming to a consideration of the statutory provisions concerning final distribution, we find what, in view of what we have already said, must be held to be express authorization for the framing of issues of fact. The order or decree may be made only on petition, and notice must be given of the time and place of hearing the same. Section 1668, Code Civ. Proc. provides in part: "At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by filing written objections thereto." This was added to the section by amendment in 1907, and clearly brings proceedings for distribution within those classes of probate proceedings as to which the framing of issues of fact is expressly authorized by the Code.

Respondent relies somewhat upon the provision of section 1666, Code Civ. Proc., that "such order or decree (of distribution) is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," as expressly excluding any remedy except direct appeal from the order or decree. This section is the one providing that in the decree the court must name the persons entitled to share in the estate, and the proportion or part to which each is entitled. It appears clear to us that the provision relied on should not be construed as intended to affect the general provisions of the title which authorize a motion for a new trial in probate proceedings wherever the framing of issues is authorized by the statute, and that its sole object was to make the determination of the court, as evidenced by the decree, final and conclusive as against collateral attack. The provision is reasonably susceptible of such a construction, and any other construction would create an exception to the general rule declared for probate proceedings, for which no reasonable ground could be found. It would certainly be difficult to give any reason whatever why a motion for a new trial should lie as to the proceeding to determine heirship provided for by section 1664, Code Civ. Proc., and at the same time should not lie as to the proceeding for final distribution, a proceeding always involving the questions that are involved in the heirship proceeding.

The only remaining question is whether issues of fact were actually made in this proceeding for distribution. That issues of fact were determined by the lower court upon evidence actually introduced by the respective parties is apparent. If the petitions for distribution presented by Ella Woodbury et al. and A. F. St. Sure constituted such "written objections" to the petition of petitioner here as are contemplated by section 1668, Code Civ. Proc., it would seem to follow that they sufficiently made issues of fact which were determined by the decree. If the papers so filed had been designated "answer" or "objections" to the petition of petitioner here, and had in terms denied the allegations of facts showing petitioner to be an heir of deceased and the other petitioners not to be heirs, it would have to be admitted, in view of what we have said, that issues of fact had been made under express authorization of law. If we wished to be exceedingly strict, we might be able to hold that to sufficiently raise an issue of fact as to any allegation of the original petition, an answer denying the same should have been presented, but to so hold, especially after judgment, it appears to us, would be to unnecessarily sacrifice substance to form. The three petitions were treated by the parties and the court below as creating issues of fact, and the hearing and determination in that court necessarily proceeded upon that theory. In substance they did create issues of fact on the question, who are the heirs of deceased, just as clearly as a formal answer containing express denials would have done. The matters set up in the subsequent petitions in support of the several claims, that the petitioners therein are respectively entitled to the whole estate of deceased, were necessarily in conflict with the allegations of the original petition.

We are of the opinion that petitioner is entitled to the relief sought.

Let a peremptory writ of mandate issue as asked in the petition.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

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14 Cal. App. 662

THOMAS v. JOPLIN, County Treasurer, et al.
(Civ. 928.)

(Court of Appeal, Second District, California. Nov. 23, 1910.)

1. COUNTIES (§ 196*)—PAYMENT OF PUBLIC MONEY—TAXPAYERS' SUIT.

Code Civ. Proc. § 526a, providing that an action to restrain any illegal expenditure of public funds may be maintained, either by a citizen resident therein or by a corporation which is assessed, or within one year has paid, a tax therein, enacted after the court had decided that any taxpayer might sue to restrain the illegal payment of public money, restricts the right to sue to resident citizens, or corpora-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tizens who are liable to a tax or who have paid a tax within a year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 106.*]

2. STATUTES (§§ 174, 175*) — CONSTRUCTION — EFFECT OF STATUTE.

Effect must be given to an act of the Legislature, whenever such effect is permitted on a reasonable interpretation of its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 254; Dec. Dig. §§ 174, 175.*]

3. COUNTIES (§ 106*)—RESTRAINING PAYMENT OF PUBLIC MONEY—RIGHT TO SUE—"RESIDENT"—"CITIZEN."

Under Pol. Code, § 51, defining citizens as persons born in the state and residing within it, and all persons born out of the state who are citizens of the United States and residing within the state, one suing to restrain an illegal payment of county funds, who describes himself as a "resident" of the county, does not show that he is entitled to sue, within Code Civ. Proc. § 526a, authorizing actions to restrain illegal expenditures of public funds, by a "citizen resident" therein: the words "resident" and "citizen" not being synonymous.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 106.*

For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, p. 7602; vol. 7, pp. 6161–6166; vol. 8, p. 7788.]

4. CONSTITUTIONAL LAW (§ 42*)—VALIDITY OF STATUTES—PARTY ENTITLED TO QUESTION.

The constitutionality of Code Civ. Proc. § 526a, providing that an action to restrain an illegal expenditure of public funds must be brought, either by a citizen resident therein or by a corporation, on the ground that it deprives nonresident citizens of other states of privileges equal with those of citizens of the state, cannot be raised by one who merely shows that he is a resident, but who does not show that he is not an alien, or that he belongs to the class of persons entitled to sue.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

Appeal from Superior Court, Orange County; Frank R. Willis, Judge.

Action by J. C. Thomas against J. C. Joplin, as Treasurer of the County of Orange, and others. From a judgment for defendants, rendered on sustaining a demurrer to the complaint, without leave to amend, plaintiff appeals. Affirmed.

S. M. Davis (E. E. Keech, of counsel), for appellant. Williams & Rutan and Montgomery & Tarver, for respondents.

JAMES, J. Plaintiff brought this action to secure an injunction restraining defendant Joplin, as treasurer of the county of Orange, from paying certain warrants threatened to be issued and presented on account of salaries for deputies appointed by several of the officers of that county. A demurrer was interposed in which general and special grounds of objection to the sufficiency of the complaint were stated. This demurrer was sustained without leave to amend, and judgment followed in favor of defendants, from which judgment an appeal has been taken.

The several county officers of Orange county were elected at the general election held in 1906, and their terms of office were for four years, commencing in January, 1907. In 1909 the Legislature amended the county government act as it affected that county, and provided for deputies for several county offices, to be paid by the county. In the act as it existed theretofore, no allowance for deputies for these officers had been made. Under the provisions of the amendment, deputies were appointed by the county clerk, sheriff, auditor, treasurer, tax collector, and superintendent of schools, and these deputies have since their appointment regularly drawn their salaries from the county treasury.

Plaintiff bases his suit for an injunction to prevent a further payment of salaries to these deputies on the claim that the amendment of 1909 could not be made operative during the terms of office of the then county officials who had theretofore been allowed no paid deputies, because the effect in that case would be to increase the compensation of such officers during their term of office in violation of section 9, article 11, of the state Constitution.

One of the grounds of demurrer was that plaintiff had no legal capacity to sue. In the complaint it is alleged, first: "That the plaintiff, at all the times herein mentioned, has been and still is a resident, owner of property, and a taxpayer of the county of Orange, state of California." Defendants insist that this statement is insufficient to show that plaintiff is such a person as is entitled to prosecute an action to restrain the payment of the demands of the deputies affected, and cite section 526a, Code of Civil Procedure. This section provides as follows: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer."

Section 526a above quoted was adopted in 1909 and placed in the chapter of the Code relating to injunctions. Prior to its adoption it had been plainly established by the decisions that any taxpayer might bring an action to restrain the payment of public money under a claim that such payment, if made, would be illegal. Winn v. Shaw, 87 Cal. 631, 25 Pac. 968. Section 526a declares what persons or corporations shall be entitled to maintain that kind of an action. The effect of the legislative act must be regarded as one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

intending to limit the right to prosecute such an action, to suitors of the kind mentioned therein, or it can be given no effect at all. The Legislature must be presumed to have acted with knowledge of the law as established by the decisions, which gave any taxpayer the right to maintain an action for injunction in a case like this, irrespective of his residence or citizenship; and with this knowledge present in the minds of the legislators, it must be further presumed that section 526a was enacted with a view of limiting this right and restricting it to citizens who are residents, or corporations who are liable to pay a tax within the county, or who have paid such a tax within one year prior to the bringing of the action. Otherwise, the section neither confers nor limits any right not existing prior to its adoption. The elementary rule of statutory construction, that effect must be given to an act of the Legislature whenever such effect is permitted upon a reasonable interpretation of its terms, requires neither argument nor authorities to illustrate its application here. It seems clear, therefore, that by section 526a, Code of Civil Procedure, the right to bring an action like the one plaintiff has here brought for an injunction is limited, in so far as it is conferred upon individuals, to citizens resident within the county. Plaintiff nowhere alleges in his complaint that he is a citizen. On his behalf it is argued that the terms "citizen" and "resident" are sometimes considered as synonymous, and refer merely, where not otherwise defined, to persons having an actual, permanent abode at a definite place. General definitions of the word "citizen" might be looked to to determine the sense in which the term is used in the statute, were it not for the fact that in the Political Code, at section 51, a complete definition is given. Citizens of the state are there defined to be: "(1) All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls; (2) all persons born out of this state who are citizens of the United States and residing within this state." It might be argued that a statute depriving nonresident citizens of other states of privileges equal with those of citizens of our own state would be obnoxious to the federal Constitution; but even though some force should be conceded to this contention, the provisions of the statute considered here would not be wholly inoperative. Estate of Johnson, 139 Cal. 532, 73 Pac. 424, 96 Am. St. Rep. 161. For aught that appears from plaintiff's complaint, he may be an alien, and unless he shows that he belongs to the class of persons entitled to prosecute this kind of an action, he cannot be heard at all, especially when he seeks to nullify the effect of an act of the Legislature by raising constitutional questions. He is not, then, a "party interested" in a legal sense. Davidson v. Von Detten, 139 Cal. 469, 73 Pac. 189.

Having determined that it does not appear from his complaint that plaintiff has the legal capacity to sue, it follows that the order sustaining the demurrer of defendants was rightly made. If it were profitable so to do, the merits of the constitutional question presented might also be considered, but any conclusion that might be announced upon that matter would have no binding effect upon the parties.

The judgment is therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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14 Cal. App. 864

CITIZENS' SECURITIES CO. v. HAMMEL et al. (Civ. 857.)

(Court of Appeal, Second District, California. Nov. 21, 1910. Rehearing Denied Dec. 21, 1910; denied by Supreme Court Jan. 16, 1911.)

1. SHERIFFS AND CONSTABLES (§ 128*) — WRONGFUL ATTACHMENT — NECESSITY OF POSSESSION BY PLAINTIFF.

In an action against a sheriff for damages for wrongfully levying upon property claimed to be in plaintiff's possession under a writ of attachment, plaintiff must show right of possession of the property, as well as possession.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 260–263; Dec. Dig. § 128.*]

2. CORPORATIONS (§ 404*) — OFFICERS — AUTHORITY—PLEDGE OF CORPORATE PROPERTY.

The managing officers of a corporation have not authority without instructions from the board of directors to pledge corporate property for antecedent corporate debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1626–1628; Dec. Dig. § 404.*]

3. CORPORATIONS (§ 477*)—ACTION BY DIRECTORS—NECESSITY OF MEETING.

While a corporate board of directors has power to mortgage corporate property for antecedent debts, it can only do so at a lawfully assembled meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1857; Dec. Dig. § 477.*]

4. CORPORATIONS (§ 477*) — OFFICERS—BOARD OF DIRECTORS—RESOLUTIONS—NECESSITY.

In mortgaging corporate property for antecedent corporate debts, the board of directors must act in a manner equivalent to a resolution, though such resolution need not be spread upon the minutes of the meeting if actually passed, and a conversation between four of the eleven members of the board, wherein such four decided to pledge the property, is not sufficient to bind the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1857; Dec. Dig. § 477.*]

5. LANDLORD AND TENANT (§ 275*)—RIGHTS OF LANDLORD — POSSESSION OF TENANT'S PROPERTY.

A landlord having no reserved lien for rent or the value of the use and occupation of the property cannot, by forcibly taking it, acquire a right of possession thereof.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1107; Dec. Dig. § 275.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tractus, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied."

Although this definition was given in a decision of the House of Lords upon an appeal from Scotch courts, most English and American decisions have generally been consistent with it,[19] and it appears that it might well cover the fact situation in the principal case.

It is true that the Illinois statute might possibly operate to bar a foreign wrongful death action although both parties may be resident of Illinois, and it must be conceded that this would not be typical of *forum non conveniens*. However this doctrine has been applied so broadly that the foreign origin of the cause of action, with the consequent likelihood of a local unavailability of witnesses, when coupled with the fact that the action can be prosecuted in a more natural forum, should probably be sufficient to make the doctrine applicable to the Illinois statute.

There remains, however, one possible objection. Conceding that *forum non conveniens* is a well established legal principle, and conceding that *Hughes v. Fetter* has no bearing upon its validity, the fact nevertheless remains that the constitutionality of the principle itself has never been tested directly against the full faith and credit clause, although it has successfully withstood many challenges based on the privileges and immunities clause.[20] Though *Hughes v. Fetter* did involve an attack based upon the full faith and credit clause, the decision in that case was rendered on grounds other than *forum non conveniens*. Therefore, the principal case was the first direct challenge to the doctrine of *forum non conveniens* upon the ground or full faith and credit.

It must be observed that the court did not squarely face this particular issue. It probably thought the constitutionality of this doctrine too well established to be questioned. However, in the light of the continuing evolution in this general field of law, as exemplified by the novel approach of the Supreme Court in *Hughes v. Fetter*, it is apparent that there is a need for a Supreme Court decision which will squarely determine whether the general principle of *forum non conveniens* is not, in itself, repugnant to the constitutional requirement of full faith and credit.—NEIL LEYTON.

CONSTITUTIONAL LAW—CITIZENSHIP—LOSS OF NATIONALITY ACQUIRED BY BIRTH.—Plaintiff was born in Hawaii of Japanese parents. Thus, he was a national of both the United States and Japan, according to the respective laws of these two countries. He was taken to Japan at an early age and remained there for educational purposes. His intention was, however, to return to the United States. During the last war, he was drafted into the Japanese Army under protest, and reported only because he feared reprisals from the Military Police. After the end of the war, he voted in a Japanese election, but only because he had heard General MacArthur direct everyone to vote, and because he had been told that non-voters would lose their rice rations. In 1949, plaintiff applied for a United States passport, but his application was denied on the ground that he had lost his United States nationality by serving in the Japanese Army, through the operation of Section 801(c) of Title 8, United States Code.[1] He then brought an action for the declaration of United States citizenship. *Held*: the plaintiff is entitled to a declaration of citizenship because both Section 801(c) and Section 801(e)[2] (loss of nationality

[19]Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col.L.Rev. 1 (1929).

[20]U.S.Const., Art.II, §2.

[1]Act of Oct. 14, 1940, c.876, §401, 54 Stat. 1168, 8 U.S.C. §801(c). This section provides that a national of the United States shall lose his American nationality by serving in the armed forces of a foreign state of which he has or acquires the nationality.

[2]Act of Oct. 14, 1940, c.876, §401, 54 Stat. 1168, 8 U.S.C. §801(e). This section was not stated as a ground for the plaintiff's loss of nationality. However, since the plaintiff had in fact voted in a foreign election, it could have been used as an alternative ground

Superior Court of Baltimore City, Anselm Sodaro, J., denied the petition for writ of mandamus. The candidate appealed. The Court of Appeals held that candidate who had been resident of state for five years prior to date fixed for election was citizen of state within constitutional requirement that sheriff be citizen for five years and candidate was eligible to seek office of sheriff even though he had been naturalized as United States citizen only one month prior to filing his candidacy.

Order denying mandate reversed with directions.

1. Citizens ⇐11

It is not necessary for a person to be a citizen of the United States in order to be a citizen of his state. U.S.C.A.Const. Amend. 14.

2. Citizens ⇐11

Requirements for citizenship of a state depend upon context in which "citizen" is used in statute or constitution where United States citizenship has no reasonable relationship to the subject matter and purpose of the legislation in question. U.S.C.A. Const. Amend. 14.

3. Citizens ⇐2

A person does not have to be a voter to be a citizen of the United States or of the state. U.S.C.A.Const. Amend. 14.

4. Attorney General ⇐1

Judges ⇐4

States ⇐47

Only citizens of the United States may hold offices of governor, judge, and attorney general. Const. art. 2, § 5; art. 4, § 2; art. 5, § 4.

5. Sheriffs and Constables ⇐3

Constitutional qualification for office of sheriff that person elected shall have been citizen of the state for five years prior to his election is requirement that he should be domiciled within state and not that he be United States citizen. Const. art. 4, § 44.

6. Sheriffs and Constables ⇐1

Office of sheriff is ministerial in nature.

7. Sheriffs and Constables ⇐77

Sheriff's function and province is to execute duties prescribed by law.

8. Citizens ⇐11

That state cannot confer diversity jurisdiction on United States court by granting state citizenship to an unnaturalized alien does not mean that it cannot make an alien a state citizen for other purposes. U.S.C.A.Const. Amend. 14; art. 3, § 2.

9. States ⇐47

State has right to extend qualifications for state office to its citizens, even though they are not citizens of the United States. U.S.C.A.Const. Amend. 14.

10. Sheriffs and Constables ⇐3

Candidate who had been resident of state for five years prior to date fixed for election was citizen of state within constitutional requirement that sheriff be citizen for five years and candidate was eligible to seek office of sheriff even though he had been naturalized as United States citizen only one month prior to filing his candidacy. Const. art. 4, § 44.

St. George I. B. Crosse, III, in pro. per.

Edward L. Blanton, Jr., Asst. Atty. Gen. (Thomas B. Finan, Atty. Gen., Baltimore, on the brief), for appellee.

Before HAMMOND, HORNEY, MARBURY, OPPENHEIMER, and BARNES, JJ.

ORDER

PER CURIAM.

For reasons to be stated in an opinion to be hereafter filed, it is *ordered* by the Court of Appeals of Maryland this 1st day of July, 1966, that the order appealed from be, and it is hereby, reversed, with costs; and it is further

Ordered that the mandate, directing the granting of the writ of mandamus prayed for below be issued forthwith.

OPPENHEIMER, Judge.

After argument, by per curiam order, we reversed the order of the Superior Court of Baltimore City which denied the appellant's petition for a writ of mandamus to compel the Board of Supervisors of Elections of Baltimore City to accept and certify his candidacy for Sheriff of Baltimore City, and ordered that the mandate directing the writ of mandamus prayed for below be issued forthwith. The reasons for our order follow.

The question involved is whether the appellant is qualified to become a candidate under the provisions of Article IV Section 44 of the Maryland Constitution. The material provisions of that Section are as follows:

> "There shall be elected in each county and in Baltimore City * * * one person, resident in said county, or City, above the age of twenty-five years and at least five years preceding his election, a citizen of the State, to the office of Sheriff."

The facts are not in dispute. The appellant was born in the West Indies and immigrated to the United States in June of 1957. He and his family established their residence in Crisfield, Maryland. Upon reaching his eighteenth birthday, and upon signing his Declaration of Intention to become a citizen of the United States under the federal Naturalization law, he enlisted in the United States Army, served for approximately three years and was given an honorable discharge in 1960. He established his residence in Salisbury, Maryland, and matriculated at the Maryland State College from which he was graduated in 1964. He then entered the University of Maryland Law School and has successfully completed his first year. In May of 1964 he established his home in Baltimore City, where he has since resided. On April 29, 1966, he became a naturalized citizen of the United States and a registered voter of the State of Maryland. On May 26, 1966, the appellant filed his candidacy for the office of Sheriff of Baltimore City with the Board of Supervisors of Elections of Baltimore City. His Certificate of Nomination was notarized and accepted, as was his filing fee of $150. He received the usual material given to all candidates who file for public office. On June 4, 1966, he received a letter from the Board advising him that he did not qualify as a candidate for the office of Sheriff because he did not become a citizen of the United States until April 29, 1966, and that under the Fourteenth Amendment of the United States Constitution he did not become a citizen of the State of Maryland until that date. The Board acted on the advice of its counsel, the Attorney General of Maryland, and returned the application to the appellant together with the filing fee.

The court below held and the Board contends that the appellant did not become a citizen of Maryland, under the provisions of the Maryland Constitution, until he became a citizen of the United States, and is therefore ineligible to be Sheriff of Baltimore City because he was not a United States citizen at least five years preceding the election. We disagree.

[1,2] Both before and after the Fourteenth Amendment to the federal Constitution, it has not been necessary for a person to be a citizen of the United States in order to be a citizen of his state. United States v. Cruikshank, 92 U.S. 542, 549, 23 L.Ed. 588 (1875); Slaughter-House Cases,

83 U.S. (16 Wall.) 36, 73–74, 21 L.Ed. 394 (1873); and see Short v. State, 80 Md. 392, 401–402, 31 A. 322 (1895). See also Spear, State Citizenship, 16 Albany L.J. 24 (1877). Citizenship of the United States is defined by the Fourteenth Amendment and federal statutes, but the requirements for citizenship of a state generally depend not upon definition but the constitutional or statutory context in which the term is used. Risewick v. Davis, 19 Md. 82, 93 (1862); Halaby v. Board of Directors of University of Cincinnati, 162 Ohio St. 290, 293, 123 N.E.2d 3 (1954) and authorities therein cited.

The decisions illustrate the diversity of the term's usage. In Field v. Adreon, 7 Md. 209 (1854), our predecessors held that an unnaturalized foreigner, residing and doing business in this State, was a citizen of Maryland within the meaning of the attachment laws. The Court held that the absconding debtor was a citizen of the State for commercial or business purposes, although not necessarily for political purposes. Dorsey v. Kyle, 30 Md. 512, 518 (1869), is to the same effect. Judge Alvey, for the Court, said in that case, that "the term citizen, used in the formula of the affidavit prescribed by the 4th section of the Article of the Code referred to, is to be taken as synonymous with inhabitant or permanent resident."

Other jurisdictions have equated residence with citizenship of the state for political and other non-commercial purposes. In re Wehlitz, 16 Wis. 443, 446 (1863), held that the Wisconsin statute designating "all able-bodied, white, male citizens" as subject to enrollment in the militia included an unnaturalized citzen who was a resident of the state. "Under our complex system of government," the court said, "there may be a citizen of a state, who is not a citizen of the United States in the full sense of the term." McKenzie v. Murphy, 24 Ark. 155, 159 (1863), held that an alien, domiciled in the state for over ten years, was entitled to the homestead exemptions provided by the Arkansas statute to "every free white citizen of this state, male or female, being a householder or head of a family * * *." The court said: "The word 'citizen' is often used in common conversation and writing, as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges; and we think it is so used in our constitution." Halaby v. Board of Directors of University, supra, involved the application of a statute which provided free university instruction to citizens of the municipality in which the university is located. The court held that the plaintiff, an alien minor whose parents were residents of and conducted a business in the city, was entitled to the benefits of that statute, saying: "It is to be observed that the term, 'citizen,' is often used in legislation where 'domicile' is meant and where United States citizenship has no reasonable relationship to the subject matter and purpose of the legislation in question."

Closely in point to the interpretation of the constitutional provision here involved is a report of the Committee of Elections of the House of Representatives, made in 1823. A petitioner had objected to the right of a Delegate to retain his seat from what was then the Michigan Territory. One of the objections was that the Delegate had not resided in the Territory one year previous to the election in the status of a citizen of the United States. An act of Congress passed in 1819, 3 Stat. 483 provided that "every free white male citizen of said Territory, above the age of twenty-one years, who shall have resided therein one year next preceding" an election shall be entitled to vote at such election for a delegate to Congress. An act of 1823, 3 Stat. 769 provided that all citizens of the United States having the qualifications set forth in the former act shall be eligible to any office in the Territory. The Committee held that the statutory requirement of citizenship of the Territory for a year before the election did not mean that the aspirant for office must also have been a United States citizen during that period. The report said: "It is the person, the individual, the man, who is

by voting in a political election in a foreign state), are unconstitutional in that they violate the First Section of the Fourteenth Amendment.[3] Although a citizen has a right to voluntarily expatriate himself, Congress cannot convert this right into a liability, so as to divest a native born citizen of his birthright. The only means of divesting one's self of United States citizenship is by voluntarily undergoing a naturalization process in a foreign state. *Kiyokuro Okimura v. Acheson*, 99 Fed.Supp. 587 (D. Hawaii 1951).

The issue in this case arises from a conflict between two fundamental principles of constitutional law; the right to citizenship embodied in Section 1 of the Fourteenth Amendment, and the well established right of voluntary expatriation.[4]

The Constitution of the United States provides 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."[5]

In the leading decision of *United States v. Wong Kim Ark*,[6] the Supreme Court has construed this language to mean that Congress has no power to interfere in any manner with American citizenship acquired by birth.

Although Congress has no power to divest a citizen of his nationality, it is well settled that a citizen may divest himself of his nationality by voluntarily exercising his right of expatriation. However, it may be difficult to determine what acts of a citizen amount to an exercise of that right. Clearly, a formal statement of renunciation of American nationality would be an unequivocal act of voluntary expatriation, but there may be other acts so inconsistent with the retention of American nationality as to be tantamount to a renunciation.

The issue is whether or not Congress may constitutionally declare certain acts of a citizen to be an expatriation resulting automatically in a loss of nationality. If Congress does so, is it not converting a "right" of a citizen into a Congressional power which is precisely the power denied to Congress by the *Wong Kim Ark* decision?

Congress decided this last question in the negative when it enacted Section 801. The court in the principal case decided it in the affirmative when it held that Congress cannot provide means of losing nationality, other than by way of a formal naturalization.

Prior to the enactment of Section 801, several judicial decisions had dealt with the issue of implied expatriation. They did not appear to have gone as far as Congress did in Section 801, but neither were they in accord with the broad restrictive rule of the principal case. Swearing allegiance to a foreign state[7] and deserting from the armed forces of the United States[8] were held to result in a loss of nationality, but involuntary service in a foreign army was held not to have such a result.[9] The Supreme Court has upheld the constitutionality of a federal statute[10] which provided that a woman citizen marrying an alien thereby lost her nationality.[11] This opinion emphasized the common

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against him. This is probably why the court chose to consider the constitutionality of this section together with that of §801(c).

[3]U.S.Const., Amend.XIV, §1.

[4]It has never been settled whether or not the right of expatriation was originally recognized in the United States. See 3 Moore, Digest of International Law (1906), 552. However Congress expressly declared the right of expatriation to be the law in Act of July 27, 1868, c.249, §1, 15 Stat. 223, Rev.Stat. §1999, now 8 U.S.C. §800.

[5]U.S.Const., Amend.XIV, §1.

[6]169 U.S. 649, 18 Sup.Ct. 456, 42 L.Ed. 890 (1898).

[7]McCampbell v. McCampbell, 13 Fed.Supp. 847 (W.D. Ky. 1936); United States ex rel. Fracassi v. Karnuth, 19 Fed.Supp. 581 (W.D. N.Y. 1937).

[8]See Kurtz v. Moffitt, 115 U.S. 487, 6 Sup.Ct. 148, 29 L.Ed. 458 (1885).

[9]State v. Adams, 45 Iowa 99, 24 Am.Rep. 760 (1876).

[10]Act of March 2, 1907, c.2534, §3, 34 Stat. 1228, repealed by Act of Sept. 22, 1922, c.411, §7, 42 Stat. 1022.

[11]Mackenzie v. Hare, 239 U.S. 299, 36 Sup.Ct. 106, 60 L.Ed. 297, Ann.Cas.1916E 645 (1915).

law doctrine of identity of husband and wife, and held that a wife may reasonably be deemed to intend to acquire her husband's nationality.

The pattern of these decisions seems to be that, although certain acts may cause a loss of nationality, these acts must be voluntary and free of duress, and must also be such as to reasonably indicate an intent to exercise an election of nationality.

Thus, it appears that the principal case could have been decided upon either of three distinct theories:

(1) The first theory is the one adopted by the court. Its weakness may lie in the necessity of overruling authoritative decisions. Also, the restriction upon Congressional power may be too broad to be reasonable. Under this view all the provisions of Section 801[12] would be unconstitutional, except 801(a) which relates to a formal naturalization in a foreign country, and probably 801(f) which relates to a formal renunciation of nationality.[13] Yet, it can hardly be said that Section 801(b), which provides for a loss of nationality by taking an oath of allegiance to a foreign state, is an arbitrary deprivation of nationality rather than a sanction of the citizen's own election.

(2) The court could also have avoided entirely the constitutional issue by construing Section 801 to apply only to voluntary acts. This was done in *Dos Reis ex rel. Camara v. Nicolls*,[14] upon the reasoning that any other construction would render the section unconstitutional, and that when a statute is reasonably susceptible of two possible constructions, of which only one would preserve its constitutionality, this construction should be given to it. This view has the merit of abiding by the general rule that constitutional issues should be avoided whenever a case can be decided on alternative grounds. However, since the *Dos Reis* case has not been reviewed by the Supreme Court, the court in the principal case may have felt that it was not bound so to construe Section 801.

(3) The third, and perhaps best, alternative was to apply to each of the two sections under consideration basically the same test as was applied in the cases prior to the statute. Thus the test would be: Are the acts enumerated by Congress of such a nature as to reasonably indicate an intention of expatriation, and of self-divestment of nationality? In other words, are these acts reasonably demonstrative of an intent to achieve the legal effect given to them by Congress? If they are, then the section merely provides a convenient means of exercising the right of expatriation. If they are not, then the section is an arbitrary assumption by Congress of a power to divest a native national of his nationality, and hence it is unconstitutional.

It is submitted that an application of this test would have also resulted in finding Sections 801(c) and 801(e) unconstitutional. Although Section 801(c) applies only to dual nationals, or to those who become nationals of a foreign state, Section 801(e) is not so restricted. As applied to non-dual citizens it cannot be constitutional because it would be unreasonable to impute to them an intention to become stateless. The problem appears more complex, when either section is considered in its application to dual citizens, but it is still apparent that they may well serve in the army or vote in the elections of their ancestral state without intending to relinquish their native nationality. Moreover, Congress would not be justified in declaring that they have a constructive intent to relinquish their nationality because, according to American legal theory, neither the

[12]Section 801 provides for a loss of nationality by the following means: (a) undergoing a formal naturalization in a foreign country; (b) swearing an oath of allegiance to a foreign state; (c) serving in the armed forces of a foreign state while having or acquiring the nationality of that state; (d) holding a government office in a foreign state, for which only nationals of that state are eligible; (e) voting in a political election of a foreign state; (f) making a formal renunciation of American nationality before an appropriate officer of the United States; (g) being convicted of desertion from the Armed Forces of the United States in time of war; (h) being convicted of treason, or of an attempt to forcibly overthrow the Government of the United States.

[13]It is unlikely that the court would have gone so far as to invalidate this section, although a literal interpretation of the court's language might so indicate.

[14]161 Fed.(2d) 860 (C.C.A. 1st 1947).

right to vote nor the duty to serve in the armed forces are exclusive attributes of citizenship. Our Selective Service Act provides for the drafting of resident-aliens,[15] and some states have allowed resident-aliens to vote.[16] If aliens may serve in the United States Army, or vote in American elections, and yet remain aliens, it does not appear reasonable for Congress to say that American nationals may not do so in a foreign country without constructively intending to lose their nationality.

It may be observed that, under either of the above mentioned three legal theories, the court could have arrived at the same decision in regard to the particular facts of the case. However, the general scope of the holding would have varied according to the theory used. It may well be that the broad restriction which this opinion imposes upon Congressional power to regulate means of expatriation will not be upheld in the future. As to the unconstitutionality of Sections 801(c) and 801(e), this decision appears to be good law.

However if Sections 801(c) and 801(e) were held invalid while the remaining provisions of Section 801 were held valid, a serious difficulty might arise, because the Court of Appeals for the Ninth Circuit has held, in the recent case of *Kawakita v. United States*[17] that the means of expatriation provided by Section 801 were exclusive of other means.[18] This was a treason trial of a dual national, in which Section 801 was held not to be a defense because the defendant had not done any of the acts set out therein. It may be observed that, in many treason cases, Section 801, and particularly Section 801(c), would be a defense because acts of treason are most often committed during military service in time of war. If Section 801 were held unconstitutional as a whole, then the defendant could still plead expatriation as a defense and, as in cases prior to Section 801, the jury would determine as a question of fact whether his acts had amounted to an election of nationality. His military service would at least be admissible evidence. Yet if some provisions of Section 801 remain valid while Section 801(c) is held invalid, then the rule of exclusiveness will operate to exclude military service, not only as a total defense, but even as evidence of an intent of expatriation.

Such a result would be unfair to the many dual nationals who consider themselves citizens of their ancestral country without being aware of the fact that they also owe allegiance to the United States. Often the principal evidence of their state of mind is their voluntary entry into military service. This evidence should be admissible to show an intent of expatriation as a defense against a charge of treason. The Supreme Court could solve this problem by reversing its holding that the means of expatriation provided in Section 801 are exclusive of other means.—NEIL LEYTON.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—COMPULSORY ASSIGNED RISK LAW IN AUTOMOBILE LIABILITY INSURANCE—.Plaintiff, an unincorporated association, was formed to write automobile insurance to a select group of members, at a lower cost than the prevailing rate. In 1947, the California Legislature passed the Compulsory Assigned Risk Law,[1] which provided that the California Insurance Commissioner should approve[2] a reasonable plan for the equitable apportionment among insurers of applicants who are in good faith[3] entitled, but unable, to procure insurance through ordinary methods. It is

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[15] Selective Service Act, Act of June 24, 1948, c.625, §4, 62 Stat. 605, 50 U.S.C. (1946 ed., Supp. III) 454.

[16] 2 Am. Jur., Aliens (1936), 472, §19.

[17] 190 Fed.(2d) 506 (C.A. 9th 1951).

[18] The constitutionality of Section 801 was not challenged in this case.

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[1] Cal.Stats.(1947), c.1205, p.2714; Cal.Ins.Code (1949), §§11620-11627.

[2] Cal.Adm.Code (1948), Title 10, §§2400-2498.

[3] Cal.Adm.Code (1948), Title 10, §§2430-2431.

CITIZENS

This Title includes persons within the allegiance of the United States or of any of the several states; nature and incidents of citizenship; and rights, privileges and immunities of citizens in general, as distinguished from mere residents or aliens.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Citizen Defined and Nature of Citizenship

a. Citizen
b. Citizenship

a. Citizen

The term "citizen" is derived from the Latin word "civis," and has been variously defined. In its primary sense, it refers to an individual in respect of his relation to, or connection with, a city. In a larger sense, it denotes one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to, and may claim reciprocal protection from, its government.

The term "citizen" is derived from the Latin word "civis."[1] It is not a term of exact meaning;[2] it is capable of more meanings than one,[3] and has been variously defined.[4] In its primary sense it signifies one who is vested with the freedom and privileges of a city,[5] a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises;[6] an inhabitant of a city; a townsman.[7] In a larger sense, the term denotes one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to, and may claim reciprocal protection from, its government;[8] and it is sometimes defined as one who is domiciled in a country, and who is a citizen, al-

1. Ga.—White v. Clements, 39 Ga. 232, 259.
11 C.J. p 772 note 1.

2. Mass.—Dillaway v. Burton, 153 N.E. 13, 17, 226 Mass. 568.

3. Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.
La.—Lepenser v. Griffin, 83 So. 839, 843, 146 La. 584, quoting Corpus Juris.
Tex.—Osbolt v. Lumbermen's Indemnity Exchange, Civ.App., 204 S.W. 252, 253.
11 C.J. p 774 note 16.

4. Iowa.—Civic Improvement League of Toledo, Iowa v. Hanson, 164 N. W. 752, 753, 181 Iowa 327.

5. Ga.—White v. Clements, 39 Ga. 232, 259.
11 C.J. p 772 note 1.

6. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 30 R.I. 212, 215, 136 Am.S.R. 953.
11 C.J. p 773 note 2.

"Inhabitant of a city or town, who enjoys its freedom and privileges, as distinguished from an alien, or one not entitled to political privileges."—Dillaway v. Burton, 153 N.E. 13, 17, 226 Mass. 568.

7. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 30 R.I. 212, 215, 136 Am.S.R. 953.
11 C.J. p 773 note 3.

8. U.S.—The Northern No. 41, D.C. Fla., 297 F. 343, 344.
Iowa.—Civic Improvement League of Toledo, Iowa v. Hanson, 164 N. W. 752, 753, 181 Iowa 327.
Mass.—Dillaway v. Burton, 153 N.E. 13, 17, 226 Mass. 568.

though neither native nor naturalized, in such a sense that he takes his legal status from such country.[9]

In English law a citizen has been defined as an inhabitant of a city;[10] a freeman who has kept a family in a city;[11] the representative of a city in parliament.[12]

In American law "citizen" is variously defined as one who has a right to vote for representatives in congress and other public officers, and who is qualified to fill offices within the gift of the people; one of the sovereign people; a constituent member of the sovereignty, synonymous with the people;[13] a member of the civil state, entitled to all its privileges;[14] free inhabitant born within the United States, or naturalized under the laws of congress;[15] in a political sense, one who has the rights and privileges of a citizen of a state or of the United States.[16]

The particular meaning of the word "citizen" is frequently dependent on the context in which it is found,[17] and the word must always be taken in the sense which best harmonizes with the subject matter in which it is used.[18] One may be considered a citizen for some purposes and not a citizen for other purposes, as, for instance, for commercial purposes, and not for political purposes.[19] So, a person may be a citizen in the sense that as such he is entitled to the protection of his life, liberty, and property, even though he is not vested with the suffrage or other political rights.[20]

Classes of citizens. There are two classes of citizens, native-born citizens and naturalized citizens.[21] A "natural-born American citizen" means an American citizen who has become such at the moment of his birth.[22]

Particular persons or entities as citizens. A state is not a citizen,[23] nor is a levee district,[24] nor is a joint-stock association.[25] The status of a corporation as a citizen is discussed in the C.J.S. title Cor-

Tex.—Orbolt v. Lumbermen's Indemnity Exchange, Civ.App., 204 S.W. 252, 253.

11 C.J. p 773 note 4.

Necessity to existence of state or nation see the C.J.S. title International Law § 4, also 33 C.J. p 412 notes 13, 14.

9. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 30 R.I. 212, 215, 136 Am.S.R. 953.

10. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 787, 30 R.I. 212, 215, 136 Am.S.R. 953, quoting Bouvier L.D.

11 C.J. p 773 note 6.

11. U.S.—U. S. v. Rhodes, C.C.Ky., 27 F.Cas.No.16,151, 1 Abb. 28.

11 C.J. p 773 note 7.

12. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 787, 30 R.I. 212, 215, 136 Am.S.R. 953, quoting Bouvier L.D.

11 C.J. p 773 note 8.

13. U.S. — In re McIntosh, D.C. Wash., 12 F.Supp. 177.

Iowa.—Civic Improvement League of Toledo, Iowa v. Hanson, 164 N.W. 752, 753, 181 Iowa 327.

11 C.J. p 773 notes 9–11.

14. R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 787, 30 R.I. 212, 215, 136 Am.S.R. 953, quoting Bouvier L.D.

11 C.J. p 774 note 12.

Obligations and rights

(1) "As a citizen, one sustains social, political, and moral obligation to the state and possesses social and political rights under the Constitution and laws thereof."—Baker v. Keck, D.C.Ill., 13 F.Supp. 486, 487.

(2) "Congress cannot exclude from the United States any citizen of the United States, unless convicted of a criminal offense, or unless he is a fugitive from justice of some foreign state which demands his extradition."—U. S. v. Todd, C.C.A.N.Y., 235 F. 523, 527, 26 A.L.R. 1316.

(3) "A citizen of a State is one who is entitled to every right enjoyed by any one, unless there be some affirmative declaration to the contrary, by some authority clothed with the power, under our form of government, to make the exception."—White v. Clements, 39 Ga. 232, 261.

15. U.S.—United States v. Morris, D.C.Ark., 125 F. 322, 325, quoting 1 Kent.Comm. 292.

16. U.S.—Baldwin v. Franks, Cal., 7 S.Ct. 656, 662, 120 U.S. 678, 30 L.Ed. 766.

In the constitution and laws of the United States, the word "citizen" is generally, if not always, used in a political sense, to designate one who has the rights and privileges of a citizen of a state or of the United States.—Baldwin v. Franks, supra—Harding v. Standard Oil Co., C.C.Ill., 182 F. 421, 424.

17. Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.

11 C.J. p 774 note 16.

18. Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.

La.—Lapeyrouse v. Grillin, 83 So. 839, 842, 146 La. 584.

N.Y.—Union Hotel Co. v. Hersee, 79 N.Y. 454, 461, 35 Am.R. 536.

11 C.J. p 774 note 21.

19. U.S.—The Friendschaft, N.C., 3 Wheat. 12, 4 L.Ed. 322—Murray v. Schooner Charming Betsy, 2 Cranch 64, 2 L.Ed. 208—U. S. v. Gillies, 25 F.Cas.No.15,206, 1 Pet. C.C. 159, 3 Wheel.Cr., N.Y., 308.

Md.—Riewick v. Davis, 19 Md. 82.

Mass.—Judd v. Lawrence, 1 Cush. 531.

R.I.—Greenough v. Tiverton Police Comrs., 74 A. 785, 30 R.I. 212, 136 Am.S.R. 953.

11 C.J. p 775 note 29.

20. Mass.—Dillaway v. Burton, 153 N.E. 13, 17, 226 Mass. 563.

21. N.Y.—Johansen v. Staten Island Shipbuilding Co., 5 N.E.2d 68, 70, 272 N.Y. 140, reversing 252 N.Y.S. 266, 245 App.Div. 887.

Citizen not born a citizen

A citizen who was not born a citizen is a naturalized citizen.—Johansen v. Staten Island Shipbuilding Co., 5 N.E.2d 68, 70, 272 N.Y. 140, reversing 252 N.Y.S. 266, 245 App.Div. 887.

Naturalization in general see Aliens §§ 121–170.

22. Philippine.—Roa v. Collector of Customs, 23 Philippine 315, 322.

23. U.S.—Minnesota v. Northern Securities Co., Minn., 24 S.Ct. 598, 194 U.S. 48, 48 L.Ed. 870.

11 C.J. p 774 note 13.

Status of state under statute

Authorizing removal of causes to federal courts because of diversity of citizenship see the C.J.S. title Removal of Causes § 109, also 51 C.J. p 262 note 8.

Conferring jurisdiction on federal courts because of diversity of citizenship see the C.J.S. title Federal Courts § 55, also 25 C.J. p 747 note 43.

24. Ark.—St. Louis, etc., R. Co. v. Jackson County Levee Dist. No. 2, 145 S.W. 892, 103 Ark. 127.

25. U.S.—Spencer v. Patey, N.Y., 243 F. 555, 156 C.C.A. 253.

rations § 8, also 14 C.J. page 67 notes 34 to 39.

Women may be citizens,[26] as may also minors;[27] t the term "citizens," as used in a statute, does it always include female citizens.[28]

Race or color is not in general involved in the finition or meaning of the term "citizen."[29]

"Citizen" compared with, and distinguished from, her terms. While the words "subject" and "citi- n" have been regarded as words of different im- rt,[30] and it has been stated broadly that the term citizen" is never used of the people in a monarchy, ace it involves an idea not enjoyed by subjects, wit, the inherent right to partake in the govern- ent,[31] the term "citizen," in the United States, is nalogous to the term "subject" in the common w;[32] the change of phrase has resulted from e change of government.[33] As used in a treaty, e term "subjects" when applied to persons owing legiance to a foreign country has been construed in the same sense as the term "citizens" or "inhabitants" when applied to persons owing allegiance to the United States.[34]

There is some confusion in legal nomenclature in respect of the terms "citizen," "inhabitant," and "resident."[35] "Citizen" is not necessarily synonymous, or a convertible term, with "inhabitant"[36] or "resident,"[37] and in some cases the distinction is important.[38] "Citizen" is, however, sometimes used synonymously with such terms[39] without any implication of political or civil privileges.[40] It may indicate a permanent resident,[41] or one who remains for a time, or from time to time.[42]

Citizen is not in general synonymous with "elector" or "voter,"[43] but it is sometimes said that "citizen" is the equivalent of elector, or a person entitled to vote and enjoy the general political privileges of the government under which he lives,[44] and the word is sometimes so used in statutes, constitutions, and city charters.[45] So, as a rule, one

1. Tex.—Koy v. Schneider, 221 S.W. 880, 904, 110 Tex. 369, denying rehearing 218 S.W. 479, 110 Tex. 369.
1 C.J. p 774 notes 24, 22 [b].

Even before adoption of the fourteenth amendment of the constitution of the United States, which expressly 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, women who had all the qualifications of citizen were citizens.—Minor v. Happersett, Mo., 21 Wall., U.S., 162, 22 L.Ed. 627.

7. Ga.—Wray v. Harrison, 42 S.E. 351, 352, 353, 116 Ga. 93.
1 C.J. p 774 notes 24, 22 [a].

22. Ga.—Wray v. Harrison, supra.
1 C.J. p 774 note 24.

23. Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 490, 57 Cal.App. 458.
1 C.J. p 775 note 28.

Privilege of naturalization as dependent on color or race see Aliens § 134.

30. Ky.—Amy v. Smith, 1 Litt. 326, 332.

31. Ga.—White v. Clements, 39 Ga. 232, 260.

32. N.C.—State v. Manuel, 122 N.C. 122, 139.
11 C.J. p 772 note 4 [c].

Relative nature of terms

The terms "subject" or "citizen" are relative; they refer to the sovereignty where the discussion arises. —Read v. Read, 5 Call., Va., 160, 190, per Roane, J.

33. N.C.—State v. Manuel, 20 N.C. 122, 129.

34. U.S.—The Pizarro, Ga., 2 Wheat. 227, 244, 4 L.Ed. 226.

35. Iowa.—Harris v. Harris, 215 N. W. 661, 663, 205 Iowa 108.

36. Iowa.—Harris v. Harris, supra.
La.—Lepenser v. Griffin, 83 So. 839, 843, 146 La. 584.
Tex.—Ozbolt v. Lumberman's Indemnity Exchange, Civ.App., 204 S.W. 252, 253—Ullman v. State, 1 Tex. App. 220, 222, 28 Am.R. 405, quoting Burrill L.D.
11 C.J. p 774 note 17.

37. U.S.—Travis v. Yale & Towne Mfg. Co., N.Y., 40 S.Ct. 228, 231, 252 U.S. 60, 64 L.Ed. 460, affirming 262 F. 576.
Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.
La.—Lepenser v. Griffin, 83 So. 839, 843, 146 La. 584, quoting Corpus Juris.
Pa.—In re Talat, 19 Pa.Dist. & Co. 498, 499.
S.C.—La Tourette v. McMaster, 89 S. E. 398, 400, 104 S.C. 501, affirmed 39 S.Ct. 160, 248 U.S. 465, 63 L.Ed. 362.
Tex.—Ozbolt v. Lumbermen's Indemnity Exchange, Civ.App., 204 S.W. 252, 253.
11 C.J. p 774 note 17.

Resident and not citizen

A person does not have to be a citizen in order to be a resident.—In re Talat, 19 Pa.Dist. & Co. 498, 499.

Nonresident may be a citizen.

Ky.—Curd v. Letcher, 3 J.J.Marsh. 443.
N.Y.—Union Hotel Co. v. Hersee, 79 N.Y. 454, 35 Am.R. 536.

38. U.S.—Travis v. Yale & Towne Mfg. Co., N.Y., 40 S.Ct. 228, 231, 252 U.S. 60, 64 L.Ed. 460, affirming 262 F. 576.

39. U.S.—Clark v. Doherty, D.C. Mich., 33 F.2d 123, 125.
Ark.—Jonesboro Trust Co. v. Nutt, 176 S.W. 322, 324, 118 Ark. 368.
Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.
Iowa.—Civic Improvement League of Toledo, Iowa v. Hanson, 164 N.W. 752, 753, 181 Iowa 327.
Tex.—Gallagher v. Gallagher, Civ. App., 214 S.W. 516, 517.
11 C.J. p 774 note 18.

Citizen of place where domiciled

It has been stated broadly that one is a citizen of the place where he has his domicile or home.—Stevens v. Larwill, 84 S.W. 113, 118, 110 Mo. App. 140.

40. Cal.—Prowd v. Gore, 207 P. 490, 491, 57 Cal.App. 458.
11 C.J. p 774 note 18.

41. La.—Lepenser v. Griffin, 83 So. 839, 843, 146 La. 584.
11 C.J. p 774 note 19.

42. N.Y.—Union Hotel Co. v. Hersee, 79 N.Y. 454, 461, 35 Am.R. 536.

43. Mo.—State v. Howard County, 2 S.W. 788, 90 Mo. 593.
Wis.—In re Wahlitz, 16 Wis. 443, 448, 89 Am.D. 700.
11 C.J. p 774 note 25.

44. Iowa.—Civic Improvement League of Toledo, Iowa v. Hanson, 164 N. W. 752, 753, 181 Iowa 327.

45. Ark.—School Dist. No. 11 v. School Dist. No. 20, 39 S.W. 850, 63 Ark. 542.
11 C.J. p 775 note 26.

who has the right to vote for civil officers and is himself qualified to fill elective offices is a citizen.[46]

"Taxpayer" has been distinguished from "citizen."[47]

Sometimes the words "town" and "citizens" are used synonymously in a statute.[48]

b. Citizenship

"Citizenship" is the status of being a citizen; the term refers to the relation of allegiance and protection, identification with the state, and a participation in its functions.

Citizenship is the status of being a citizen;[49] membership in a political society;[50] membership in the political civil community of a state;[51] the relation of allegiance and protection between individuals and their country.[52] The term carries with it or implies membership of a nation,[53] the idea of connection or identification with the state and a participation in its functions.[54] It is a term of municipal law.[55] Citizenship is a political status and may be defined and the privilege limited by Congress.[56]

The possession of political rights is not essential to citizenship;[57] although an early case is to the contrary.[58]

In view of the fact that the term "citizenship" carries with it the idea of connection or identification with the state and a participation in its functions, it implies much more than residence,[59] and "residence" and "citizenship" are not synonymous,[60] nor does one include the other.[61] In this connection, it has been pointed out that citizenship is a status or condition, and is the result of both act and intent,[62] and that a person may reside in one state and be a citizen of another.[63]

While it has been stated broadly that "domicile" and "citizenship" are substantially synonymous,[64] the terms are not always synonymous.[65] When used in a national sense, the terms are distinguishable,[66] but it has been held or recognized that "state

46. Ala.—Gardina v. Jefferson County, 48 So. 738, 160 Ala. 155.
11 C.J. p 775 note 27.

47. Fla.—Belmont v. Town of Gulfport, 122 So. 10.
Okl.—Domler v. State ex rel. Prunty, 66 P.2d 1081, 1086, 179 Okl. 532.

48. Ga.—Macon, etc., R. Co. v. Gibson, 11 S.E. 442, 85 Ga. 1, 21 Am. S.R. 135.

49. Pa.—Lesh v. Lesh, 13 Pa.Dist. 537.
11 C.J. p 775 note 31.

50. U.S.—Luria v. U. S., N.Y., 34 S. Ct. 10, 231 U.S. 9, 22, 58 L.Ed. 101—Pannill v. Roanoke Times Co., D. C.Va., 252 F. 910, 914.

51. U.S. — Pioneer Southwestern Stages v. Wicker, C.C.A.Cal., 50 F. 2d 581, 582.

Privileges

"Citizenship means membership in the political civil community of a state, and entitles one to its privileges."—Pioneer Southwestern Stages v. Wicker, supra.

52. U.S.—Harding v. Standard Oil Co., C.C.Ill., 182 F. 421.
11 C.J. p 776 note 33.

53. U.S.—Ex parte (Ng) Fung Sing, D.C.Wash., 6 F.2d 670.

54. U.S.—Baker v. Keck, D.C.Ill., 13 F.Supp. 486, 487—Pannill v. Roanoke Times Co., D.C.Va., 252 F. 910, 914—Harding v. Standard Oil Co., 182 F. 421, 424.

Absence

While a temporary absence may suspend the relation between a state and its citizens, his identification with the state remains where he intends to return.—Pannill v. Roanoke Times Co., D.C.Va., 252 F. 910.

55. Philippine.—Roa v. Collector of Customs, 23 Philippine 315, 332.

56. U.S.—Ex parte (Ng) Fung Sing, D.C.Wash., 6 F.2d 670.

57. U.S.—United States v. Morris, D.C.Ark., 125 F. 322, 325.
11 C.J. p 774 note 22.

58. Ky.—Amy v. Smith, 1 Litt. 326.
11 C.J. p 774 note 23.

59. U.S.—Baker v. Keck, D.C.Ill., 13 F.Supp. 486, 487.
11 C.J. p 776 note 35.

60. U.S.—Robertson v. Cease, Tex., 97 U.S. 646, 648, 24 L.Ed. 1057—Stadtmuller v. Miller, C.C.A.N.Y., 11 F.2d 732, 734—Baker v. Keck, D. C.Ill., 13 F.Supp. 486, 487—Collins v. City of Ashland, D.C.Ky., 112 F. 175, 177—Parker v. Overman, Ark., 18 How. 137, 141, 15 L.Ed. 318.

Ill.—State Public Utilities Commission v. Early, 121 N.E. 63, 65, 285 Ill. 469.

Miss.—Enochs v. State, 97 So. 534, 537, 33 Miss. 107, citing Corpus Juris.

Ohio.—Loftus v. Pennsylvania R. Co., 140 N.E. 94, 98, 107 Ohio St. 352, affirming 16 Ohio App. 371, and error dismissed 45 S.Ct. 97, 266 U. S. 629, 69 L.Ed. 483.

Pa.—Commonwealth v. De Sarlo, 62 Pa.Super. 184, 187.

S.C.—La Tourette v. McMaster, 89 S. E. 398, 400, 104 S.C. 501, affirmed 39 S.Ct. 160, 248 U.S. 465, 63 L.Ed. 362—Cummings v. Wings, 10 S.E. 107, 110, 31 S.C. 427.

Tex.—Ozbolt v. Lumbermen's Indemnity Exchange, Civ.App., 204 S.W. 252, 253.
11 C.J. p 776 note 35 [a].

As to jurisdiction of federal courts on ground of diversity of citizenship see the C.J.S. title Federal Courts § 56, also 25 C.J. p 748, note 49.

61. S.C.—La Tourette v. McMaster, 89 S.E. 398, 400, 104 S.C. 501, affirmed 39 S.Ct. 160, 248 U.S. 465, 63 L.Ed. 362.

62. U.S.—Sharon v. Hill, C.C.Cal., 26 F. 337, 342, 11 Sawy. 291—Kemna v. Brockhaus, C.C.Wis., 5 F. 762, 763, 10 Biss. 128.

Ill.—State Public Utilities Commission v. Early, 121 N.E. 63, 65, 285 Ill. 469.

Tex.—Ozbolt v. Lumbermen's Indemnity Exchange, Civ.App., 204 S.W. 252, 253.
11 C.J. p 776 note 35 [a].

Residence and intent

An adult person cannot become a citizen of a state by simply intending to, nor does anyone become such citizen by mere residence. The residence and the intent must coexist and correspond.—Elsele v. Oddie, C.C. Nev., 128 F. 941—Sharon v. Hill, C. C.Cal., 26 F. 337, 11 Sawy. 291.

63. Miss.—Enochs v. State, 97 So. 534, 537, 133 Miss. 107, citing Corpus Juris.
11 C.J. p 776 note 35 [a].

64. U.S.—Baker v. Keck, D.C.Ill., 13 F.Supp. 486, 487 — Harding v. Standard Oil Co., C.C.Ill., 182 F. 421, 423.

65. U.S.—Pannill v. Roanoke Times Co., D.C.Va., 252 F. 910, 913.

Mass.—Dillaway v. Burton, 153 N.E. 13, 17, 226 Mass. 568—Borland v. Boston, 132 Mass. 89, 98, 42 Am.R. 424.

66. Vt.—State v. Jackson, 66 A. 657, 79 Vt. 504, 516, 8 L.R.A.,N.S., 1145.
11 C.J. p 776 note 36.

citizenship" and "domicile" are substantially synonymous.[67] The view has been taken, however, that "domicile" and "state citizenship" are not synonymous where, no new domicile in fact having been acquired, domicile exists only by legal fiction and describes the state in which a citizen of the United States once had his home but to which he intends never to return.[68]

"Citizenship" in the sense that it describes the status of a citizen of the United States in terms of the unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection has been distinguished from "citizenship of domicile,"[69] "diplomatic citizenship,"[70] and "judicial citizenship."[71]

As distinguished from "alienage" the right of citizenship is a national right or condition and does not pertain to the individual states separately considered.[72]

International citizenship. There is no such thing as international citizenship.[73]

§ 2. —— Double Citizenship

In the United States there is usually a double or dual citizenship, that is citizenship in the nation and citizenship in the state in which the particular individual resides.

In the United States a double citizenship exists, for the term applies both to membership in the nation considered as a whole and to membership in the state in which the individual may reside. The citizens of the United States resident within any state are subject to two governments, one state and the other national. Every citizen owes allegiance to both of these governments, and, within their respective spheres, must be obedient to the laws of each. In return he is entitled to demand protection from each within its own jurisdiction.[74] There is a clear distinction between national citizenship and state citizenship.[75] By the provision of the fourteenth amendment of the constitution of the United States, which 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 is definitely settled that citizenship of the United States is paramount and dominant and not subordinate and derivative from state citizenship.[76]

A citizen of the United States is one who is born within the limits of, or who has been naturalized by the laws of, the United States.[77] Generally

67. U.S.—Baker v. Keck, D.C.Ill., 13 F.Supp. 486, 487.
Miss.—Enochs v. State, 97 So. 534, 537, 138 Miss. 107.
11 C.J. p 776 note 37.

Absence and intention to return
Where "domicile" means "home," and describes the state in which a citizen of the United States has his home, and to which he intends to return if absent, "domicile" is usually, if not always, equivalent to "state citizenship." — Pannill v. Roanoke Times Co., D.C.Va., 252 F. 910, 913.
As to jurisdiction of federal courts on ground of diversity of citizenship see the C.J.S. title Federal Courts § 56, also 25 C.J. p 748 note 47.

68. U.S.—Pannill v. Roanoke Times Co., supra.

69. U.S.—U. S. v. Darnaud, C.C.Pa., 25 F.Cas.No.14,918, 3 Wall.Jr. 143.
11 C.J. p 776 note 33 [a] (1).

Meaning of "citizenship of domicile"
"The citizenship, if you may call it so, of the man who comes to be a guest upon your shores, and who is entitled to protection, just as the stranger becomes a member of your household when you invite him to stay for the night."—U. S. v. Darnaud, supra.

70. U.S.—U. S. v. Darnaud, supra.
11 C.J. p 776 note 33 [a] (1).

Meaning of "diplomatic citizenship"
"That grade of inchoate citizenship which may be claimed by one who has declared his intention to become a citizen hereafter."—U. S. v. Darnaud, supra.

71. U.S.—U. S. v. Darnaud, supra.
11 C.J. p 776 note 33 [a] (1).

Meaning of "judicial citizenship"
(1) "Judicial citizenship . . . applies only to the question whether the party can sue or be sued in the courts of the United States, or whether their litigation must go over to the state courts."—U. S. v. Darnaud, supra.

(2) "Judicial citizenship, or that species of citizenship intended by the Constitution and law of Congress, in reference to the jurisdiction of the courts of the United States, is nothing more or less than residence or domicil in a particular state, the person claiming to be a citizen of such state being, at the same time, a citizen of the United States."—Read v. Bertrand, C.C.Pa., 20 F.Cas.No.11,-601, 4 Wash.C.C. 514.

72. Conn.—New Hartford v. Canaan, 5 A. 360, 54 Conn. 39.
N.Y.—Lynch v. Clarke, 1 Sandf.Ch. 583.
11 C.J. p 776 note 38.

73. Philippine.—Roa v. Collector of Customs, 23 Philippine 315.

74. U.S.—Scott v. Sandford, Mo., 19 How. 393, 405, 15 L.Ed. 691.
11 C.J. p 776 note 40.

75. Cal.—K. Tashiro v. Jordan, 256 P. 545, 201 Cal. 239, 58 A.L.R. 1279, certiorari granted Jordan v. K. Tashiro, 48 S.Ct. 527, 277 U.S. 580, 72 L.Ed. 997, and affirmed 49 S.Ct. 47, 278 U.S. 123, 73 L.Ed. 214.
11 C.J. p 776 note 41.

Distinctions in rights
The rights of a person, who is a citizen of the United States and also a citizen of a state, under one of these governments are different from his rights under the other.—U. S. v. Cruikshank, La., 92 U.S. 542, 23 L.Ed. 588.
Constitutional provisions as to rights, privileges, and immunities of citizens of United States and of states see the C.J.S. title Constitutional Law §§ 455–458, also 12 C.J. p 1108 note 48–p 1111 note 98.
Protection of civil rights by federal or state legislation in general see the C.J.S. title Civil Rights § 3, also 11 C.J. p 803 note 30 to p 805 note 56.

76. U.S.—Arver v. U. S., Minn., 4 N. Y., 38 S.Ct. 159, 245 U.S. 366, 62 L.Ed. 349, L.R.A.1918C 361, Ann. Cas.1918B 856—Butchers' Benevolent Assoc. v. Crescent City Live-stock Landing, etc., Co., La., 16 Wall. 36, 21 L.Ed. 394.

77. Cal.—Prowd v. Gore, 207 P. 496, 57 Cal.App. 458.

speaking, a person who is a citizen of the United States and a resident of, or domicile in, a particular state is necessarily a citizen of that state,[78] but, notwithstanding the provision of the fourteenth amendment of the constitution of the United States which declares that citizens of the United States are citizens of the state in which they reside, there may be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former.[79] A person may be a citizen of the United States, and not a citizen of any particular state.[80] This is the condition of citizens residing in the District of Columbia, and in the territories of the United States, or who have taken up a residence abroad.[81]

While it has been said that a citizen of a state is a citizen of the United States whose domicile is in such state,[82] in a certain sense a person may be a citizen of a particular state and not a citizen of the United States,[83] as, for example, an alien who has declared his intention to become a citizen, and who is by local law entitled to vote in the state of his residence, and there to exercise all other local functions of local citizenship, such as holding office, the right to poor relief, etc., but who is not a citizen of the United States.[84] Questions as to the power of a state to confer rights and privileges on aliens in general are considered in the title Aliens § 6 b.

Nothing which a state can do will invest a foreigner with the rights and privileges of a citizen of the United States.[85] While citizenship may be conferred by a nation or a state, it cannot be conferred by a political subdivision thereof, like a county.[86]

Effect of attempted dissolution of the union. The attempt to dissolve the union by force did not essentially change the fundamental relations of the citizens of those revolting states to the federal government, as established by its constitution. De jure they still owed paramount allegiance to the government, and continued to be citizens of the United States.[87]

§ 3. Acquisition of Citizenship

Subject to certain qualifications in the United States, the methods of acquiring citizenship are by birth in the United States and by naturalization therein.

The Fourteenth Amendment of the United States constitution indicates the two methods by which a person may become a citizen: (1) By birth in the United States. (2) By naturalization therein.[88] This classification is not exhaustive, however, as will be shown in following sections, although it has been stated broadly that citizenship can be acquired only by birth, or naturalization.[89]

Questions as to naturalization are considered in the title Aliens §§ 121–170.

It has been asserted that by Spanish law, a person may become a citizen of Spain by acquiring a domicile within its dominions.[90]

Aside from treaty provisions, considered in certain aspects infra § 11, there is no international law by which citizenship may be acquired.[91]

§ 4. —— By Place of Birth in General

Children born within a country, of parents who are subject to the jurisdiction of such country, are citizens of such country, and the fourteenth amendment of the constitution of the United States affirms this rule.

Children born within a country, of parents who are subject to the jurisdiction thereof, are citizens of such country.[92] The provision of the fourteenth

78. U.S.—Boyd v. Nebraska, Neb., 12 S.Ct. 375, 143 U.S. 135, 36 L.Ed. 103—Bradwell v. State of Illinois, Ill., 16 Wall. 130, 21 L.Ed. 442.
11 C.J. p 777 note 43.

Constitutional and statutory provisions
The provisions of the fourteenth amendment declaring persons born or naturalized in the United States citizens of the United States and of the state in which they reside, and of Gen.L. c 1 § 1, that all persons who are citizens of the United States and who are domiciled in this commonwealth are citizens thereof, describe persons who are entitled to political privileges and who owe allegiance to the nation and the commonwealth. —Dillaway v. Burton, 153 N.E. 13, 226 Mass. 568.

79. N.H.—State v. Stevens, 99 A. 723, 78 N.H. 268, L.R.A.1917C 523.

80. U.S.—Butchers' Benev. Assoc. v. Crescent City Livestock Landing, etc., Co., La., 16 Wall. 36, 21 L.Ed. 394.
11 C.J. p 777 note 44.

81. U.S.—Hepburn v. Ellzey, Va., 2 Cranch 445, 2 L.Ed. 332.

82. Cal.—Prowd v. Gore, 207 P. 490, 57 Cal.App. 458.

83. Ind.—Melsonel v. State, 90 Ind. 320.
11 C.J. p 777 note 46.

84. U.S.—Harding v. Standard Oil Co., C.C.Ill., 182 F. 421.

85. U.S.—Scott v. Sandford, Mo., 19 How. 393, 15 L.Ed. 691.
11 C.J. p 777 note 48.
Power to naturalize see Aliens § 123.

86. N.Y.—Peo. v. Scannell, 75 N.Y. S. 500, 37 Misc. 345.
W.Va.—Devanney v. Hanson, 53 S.E. 603, 60 W.Va. 3.

87. Ky.—Hoskins v. Gentry, 3 Duv. 255.
11 C.J. p 777 note 50.

88. U.S.—Elk v. Wilkins, Neb., 5 S. Ct. 41, 112 U.S. 94, 28 L.Ed. 643.
11 C.J. p 777 note 51.

89. U.S.—Yanusznuckas v. Mallory SS. Co., N.Y., 232 F. 132, 146 C.C.A. 324.

90. Porto Rico.—Battistini v. Belaval, 1 Porto Rico Fed. 213.

Acquisition of domicile in Puerto Rico during Spanish rule not shown
Porto Rico.—Battistini v. Belaval, supra.

91. Philippine.—Roa v. Collector of Customs, 23 Philippine 315.

92. U.S.—Blumen v. Haff, C.C.A.Cal., 78 F.2d 833, certiorari denied 56 S. Ct. 248, 296 U.S. 644, 80 L.Ed. 458.

amendment of the constitution of the United States declaring 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 affirms the ancient rule of citizenship by birth within the territory in the allegiance and under the protection of the country, including all children here born of resident aliens.[93] Subject to exceptions hereinafter stated, it includes the children of all persons, of whatever race or color, domiciled within the United States.[94] Hence, it includes children born, within the limits of the United States, of Chinese parents[95] or of Japanese parents,[96] domiciled and residing in the United States, notwithstanding the naturalization statutes do not permit the naturalization of Chinese and Japanese persons.[97] In view of such provision of the fourteenth amendment congress is without

—In re Siem, D.C.Mont., 284 F. 868.

Philippine.—Munoz v. Collector of Customs, 20 Philippine 494.

11 C.J. p 777 note 56.

Allegiance

Every person is a citizen or subject of the country of his birth, and owes allegiance to that country, unless and until his allegiance has been transferred with his country's consent.—In re Siem, D.C.Mont., 284 F. 868.

Basis of citizenship in the United States is the English doctrine under which nationality meant birth within allegiance of the king.—Petition of Sproule, D.C.Cal., 19 F.Supp. 995.

Election

When children have, during their minority, because of their residence, a citizenship forced on them, different from that which they might be entitled to because of the place of their birth, they may be vested with the right, after coming of age, to elect to which country they desire to adhere, especially if they are then residing in the country and under the sovereignty of their birth.—Martinez de Hernandez v. Casanas, 2 Porto Rico Fed. 519.

Persons born in United States

Ordinarily, persons residing in the United States are subject to its jurisdiction, and if born therein are citizens.—Anderson v. Mathews, 163 P. 902, 174 Cal. 537.

Person born in Puerto Rico during the period of Spanish rule, whose father was a German subject, was regarded as a citizen of Puerto Rico where his parents had properly registered him as a Spanish subject under the Spanish Code, and he had always denied that he was a German subject and had claimed Spanish nationality during Spanish rule, and, since American occupation of Puerto Rico, had claimed that he was a citizen of Puerto Rico.—Amedeo v. Riefkohl, 5 Porto Rico Fed. 420.

93. U.S.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382—Von Schwerdtner v. Piper, D.C. Md., 23 F.2d 862.

Minn.—Stadtler v. School Dist. No. 40, 73 N.W. 956, 71 Minn. 311.

11 C.J. p 777 note 56 [b].

English father

American-born son of English father and American born mother was American citizen.—State v. Murray, 292 S.W. 434, 316 Mo. 31.

Construction of constitutional provision

The statement by Miller, J., in Butchers' Benevolent Assoc. v. Crescent City Livestock Landing, etc., Co., 16 Wall., U.S., 36, 73, 21 L.Ed. 394, that the phrase "subject to the jurisdiction" in the provision of the fourteenth amendment here considered was intended to exclude citizens or subjects of foreign states born within the United States has been characterized as one wholly aside from the question in judgment and not formulated with the same care and exactness as would be required if the case before the court had called for an exact definition of the phrase.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 468, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382—11 C.J. p 779 note 66 [a].

94. U.S.—U. S. v. Wong Kim Ark, supra.

11 C.J. p 802 note [b] (1).

Negroes

One purpose of the Fourteenth Amendment was to confer the status of citizenship on a large class of persons domiciled in the United States who could not be brought within the operation of the naturalization laws because native-born, and whose birth, although native, had not at the same time invested them with citizenship; such persons were not white persons, but in the main were of African blood, who had been held in slavery in this country, or, having themselves never been held in slavery, were the native born descendants of slaves.—Van Valkenburg v. Brown, 43 Cal. 43, 13 Am.R. 136—11 C.J. p 775 note 28 [b], p 802 note 21 [a] (1).

Mexican parents

One born in United States of Mexican parents was citizen of United States, where there was no proof that he had changed his citizenship.—Ex parte Lopez, D.C.Tex., 6 F.Supp. 342.

95. U.S.—Soo Hoo Yee v. U. S., C.C.A.Vt., 3 F.2d 592—Young Ti v. U. S., Pa., 246 F. 110, 158 C.C.A. 336—Louie Lit v. U. S., Pa., 238 F. 75, 151 C.C.A. 151.

2 C.J. p 1094 note 2—11 C.J. p 778 note 63.

Chinese father and white mother

A person born in the United States, whose father was a Chinaman and whose mother, born in England, was white, was at birth a citizen of the United States.—Ex parte Ring, D.C. Wash., 22 F.2d 554.

Chinese person born in Hawaii

A Chinese person born in Hawaii in 1901 was a citizen of the United States, in view of the provision of the act of April 30, 1900, 31 U.S.St. at L. p 141 c 339, § 5, 48 U.S.C.A. § 495, that the constitution and, subject to certain exceptions, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the territory as elsewhere in the United States.—Lo Kee v. U. S., C.C.A.La., 31 F.2d 407, reversing, D.C., 28 F.2d 543.

96. U.S.—Morrison v. People of State of California, 54 S.Ct. 281, 291 U.S. 82, 78 L.Ed. 664, reversing People v. Morrison, 22 P.2d 718, 218 Cal. 287.

Cal.—In re Tetsubumi Yano's Estate, 206 P. 995, 188 Cal. 645.

Wash.—State v. Kosai, 234 P. 5, 133 Wash. 442.

Citizen of United States and of state

Son of Japanese parents born in this state was citizen of United States, and of this state, under the fourteenth amendment.—State v. Kosai, supra.

Rights and privileges

(1) Persons of Japanese blood born in the United States are entitled to all privileges to which a native-born citizen is entitled.—Shiba v. Chikuda, 7 P.2d 1011, 214 Cal. 786.

(2) A native-born child of Japanese parents is an American citizen and as such entitled to acquire and hold property, real and personal.

Cal.—In re Tetsubumi Yano's Estate, 206 P. 995, 188 Cal. 645.

Wash.—State v. Kosai, 234 P. 5, 133 Wash. 442.

97. U.S.—Morrison v. People of State of California, 54 S.Ct. 281, 291 U.S. 82, 78 L.Ed. 664, reversing People v. Morrison, 22 P.

power to restrict the effect of birth in the United States in this regard.[98]

Necessity for birth subject to jurisdiction or within allegiance. To be a citizen of the United States by reason of birth, a person must not only be born within its territorial limits but must also be born subject to its jurisdiction, that is, in its power and obedience.[99] A child born of alien enemies in a state of active warfare against the nation within whose territorial limits the birth occurs is not considered as having been born within the national allegiance, and hence is an alien.[1] Similarly, children of ambassadors and ministers are, in theory, born in the allegiance of the powers which the ambassadors or ministers represent, as shown below in § 7. So, there is excluded from the operation of the general rule, under the above provision of the fourteenth amendment, that children born here of alien parents are citizens of the United States, the children of foreign sovereigns,[2] the children of ministers and ambassadors of foreign states, as shown below in § 7, children born on foreign public ships, as shown below in § 5, the children of enemies during a hostile occupation,[3] and the children of Indian tribes owing direct tribal allegiance, where such Indian children are not taxed or naturalized, or otherwise recognized as citizens of the state or of the United States.[4]

§ 5. —— Law of the Flag

A child born of American parents on board an American vessel in foreign waters has been regarded as a citizen of the United States. A child born on the high seas on a vessel of a country other than that of which the parents are nationals is not a citizen or subject of the country to which the vessel belongs.

A child born on board an American vessel of American parents, while the vessel was in foreign waters in the course of a voyage, is a citizen of the United States.[5]

There are expressions to the effect that persons born on a public vessel of a foreign country while within the waters of the United States, consequently within their territorial jurisdiction, are not citizens of the United States. They are considered as born in the country to which the vessel belongs, and in the sense of public law are not born within the jurisdiction of the United States.[6] It has been held, however, that a child born on the high seas on a vessel of a country of which the parents are not nationals is not a citizen or subject of such country.[7]

§ 6. —— By Parentage in General

In the United States, by virtue of statutory provisions, foreign-born children of citizens of the United States are, subject to certain qualifications and limitations, themselves citizens.

It has been stated broadly that the test of nationality adopted by most nations is the nationality of

2d 718, 218 Cal. 287—Soo Hoo Yee v. U. S., C.C.A.Vt., 3 F.2d 592. 11 C.J. p 778 note 63 [b].

Race or color as affecting privilege of naturalization in general see Aliens § 124.

98. U.S.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382—Ex parte Hing, D.C.Wash., 22 F. 2d 554.

Refusal of congress to permit naturalization of Chinese persons cannot exclude Chinese persons born in this country from the operation of the constitutional declaration that all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.—U. S. v. Wong Kim Ark., Cal., 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382—Sing Tuck v. U. S., N.Y., 128 F. 592, 63 C.C.A. 199, reversing, C.C., 126 F. 386, and reversed on other grounds 24 S.Ct. 621, 194 U.S. 161, 48 L.Ed. 917—Lee Sing Far v. U. S., Cal., 91 F. 834, 35 C.C.A. 327—Gee Fook Sing v. U. S., Cal., 49 F. 146, 1 C.C.A. 211.

99. U.S.—McKay v. Campbell, D.C. Or., 16 F.Cas.No.8,840, 2 Sawy. 118.

1. U.S.—Inglis v. Sailor's Snug Harbour, N.Y., 3 Pet. 99, 155, 7 L. Ed. 617—10 Op.Atty.-Gen. 328.

What constitutes alien enemy see Aliens § 2.

11 C.J. p 778 note 65.

2. U.S.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382.

3. U.S.—U. S. v. Wong Kim Ark, supra.

4. U.S.—U. S. v. Wong Kim Ark, supra—Elk v. Wilkins, Neb., 5 S. Ct. 41, 112 U.S. 94, 28 L.Ed. 643. 11 C.J. p 778 note 61.

Citizenship of Indians in general see the C.J.S. title Indians § 4, also 31 C.J. p 482 notes 36 50.

5. U.S.—U. S. v. Gordon, C.C.N.Y., 25 F.Cas.No.15,231, 5 Blatchf. 18.

6. U.S.—U. S. v. Wong Kim Ark, Cal., 18 S.Ct. 456, 169 U.S. 649, 42 L.Ed. 890, affirming, D.C., 71 F. 382—In re Look Tin Sing, C.C.Cal., 21 F. 905, 10 Sawy. 353.

Minn.—Stadler v. School Dist. No. 40, 73 N.W. 956, 71 Minn. 311.

7. U.S.—Lam Mow v. Nagle, C.C.A. Cal., 24 F.2d 316, affirming, D.C. In re Lam Mow, 19 F.2d 951.

Pa.—Pollock's Case, 43 Pa.Co. 301.

Child born of Chinese parents on American vessel

A child of alien Chinese parents who was born on a merchant vessel of American registry, on the high seas, was not born in the United States within the meaning of the provision of the fourteenth amendment of the constitution of the United States declaring that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and such child was not a citizen notwithstanding the parents are domiciled in the United States.—Lam Mow v. Nagle, C.C.A. Cal., 24 F.2d 316, affirming In re Lam Mow, D.C., 19 F.2d 951.

Child born of Russian parents on German vessel

A child born of Russian parents on a German vessel in 1891 was a subject of the Czar of Russia and not of the Emperor of Germany, and the fact that at the time the parents were changing their domicile from Russia to the United States did not affect the status of the child at birth. —Pollock's Case, 43 Pa.Co. 301.

to the uncertainties of parol proof, depending on the fluctuating opinions of other persons as to the character and the value of the work, and to bind him against his will.

We do not say that a stipulation of this kind may not be waived in such manner as to render the party liable for extra work; but in the present case we do not discover any thing on the part of the appellants, or of any person authorized to act for them, to exclude them from the benefit of this clause in the contract. The witness was appointed merely to superintend the work according to the plan, with such alterations as the parties might have agreed upon. As such superintendent, he had no power to bind the company by promises in their name, whatever he may have thought of the extent of his authority. Indeed the inference from his testimony is, that the plaintiff looked to him and not to the company, for he no where says, that he promised that the defendants would pay for the work, but that he would see the plaintiff paid what the windows were worth, which he thought was $150.

From the view we have taken of the obligations of the parties under the contract, we are of opinion that the court erred in granting the plaintiff's *first* prayer, and that the judgment must be reversed. As a *procedendo* will not issue, it is unnecessary to express any opinion on the court's refusal to grant the defendants' *third* prayer.

Judgment reversed, and no procedendo.

CITIZEN

JOHN A. FIELD and others, *vs.* WILLIAM ADREON and others, Garnishees of JAMES KENNEDY.

A party may abscond, and subject himself to the operation of the attachment laws against *absconding debtors*, without leaving the limits of the State.

An unnaturalized foreigner, residing and doing business in this State, is, for commercial objects, in contemplation of our attachment laws, *a citizen of this State*, and liable to be proceeded against as an absconding debtor.

Field, *et al.*, vs. Adreon, *et al*, Garn. of Kennedy.

A party may be a citizen, for commercial or business purposes, and not for political purposes.

APPEAL from the Court of Common Pleas for Baltimore city.

This was an *attachment* on warrant procured by the appellants, and issued on the 17th of November 1851, out of the Superior Court for Baltimore city, against James Kennedy, as an absconding debtor; and on the same day laid in the hands of the appellees, as garnishees, who appeared and plead "*non assumpsit*" for Kennedy and "*nulla bona*" for themselves. The affidavit of the plaintiffs to their account before the magistrate states, that Kennedy "was a citizen of the State of Maryland at the time" the debt due them was contracted, and "that they are credibly informed, and verily believe, that the said James Kennedy is actually runaway and fled from justice, and removed from his place of abode with intent to injure and defraud his creditors."

Exception. At the trial the plaintiffs proved their claim, the absconding of Kennedy, funds belonging to him in the hands of garnishees, and that he had resided in the city of Baltimore for twelve months previous to his absconding, and for that period kept a dry goods store in said city. The garnishees then proved by a competent witness, that about nineteen years ago, witness knew Kennedy in Ireland, when he was seven or eight years old; that he next saw him in Baltimore, in 1850; that his parents were Irish and lived in Ireland. They then asked two instructions to the jury:

1st. If they believe that Kennedy was born in Ireland, of Irish parents, and did not come to America until 1850, being then twenty four or twenty-five years of age, then he was not a citizen of the State of Maryland within the meaning of the attachment laws of this State: there being no proof of his having made any declaration of his intention to become a citizen of the United States, or of his having been naturalized.

2nd. If they believe that Kennedy was only a resident alien, and not at any time a citizen of this State, then the plaintiffs are not entitled to recover.

The court (MARSHALL, J.,) granted these instructions, and

The first question for your consideration then is, whether the defendant, during his stay in New Orleans, was there with the intention of making it the place of his permanent residence? If he was not, then he continued a citizen of Pennsylvania up to the time when this suit was brought. If he was, then the next question is, whether his return to Philadelphia in May 1820, was for a temporary purpose merely, or with the intention of a permanent change of domicil. In the former case, he would be a citizen of Louisiana, and in the latter, a citizen of this state, when this suit was brought. The circumstances relied upon by the plaintiff to prove the latter proposition are the following: (1) That his only motive for visiting, opening a store, and residing in New Orleans, having been his connection with the plaintiff, in whose service he exclusively was, and that having been removed by the perfidy of his clerk, who had eloped with all, or nearly all the property left in his possession, the presumption is, that his return to Philadelphia in 1820 was with the intention to be reinstated in his former citizenship. (2) That in the account which, on such return, he presented to the plaintiff's agent, there was an item for his expenses during his last visit to New Orleans, waiting to hear from the plaintiff; which, it is said, he could not with any truth or justice assert, if he considered himself to be a permanent resident of New Orleans. (3) That he, or his stepfather, in his presence, stated to the plaintiff's agent, after his last return, that he had come home, for the purpose of being sued and imprisoned, in order to entitle him to the benefit of the insolvent law of this state, which, it is said, he could not have obtained, unless Pennsylvania was indeed his home, as he had called it.

To establish the former proposition, viz. that his return to Philadelphia was merely for a temporary purpose, the place of his domicil still continuing to be Louisiana, the defendant relies upon the following circumstances: (1) His letter of the 27th of May, 1820, showing the motive of his visit to Philadelphia. (2) His letter to the plaintiff from New Orleans, in 1820, before this return, in which he says that he is then in that city working for his living. (3) That as soon as he was discharged on common bail, he returned to New Orleans, thus showing that he considered that place as his home.

These circumstances, and on the others, the evidence to establish them are to be weighed by the jury. But it is to be remembered, that, as his change of domicil from Louisiana to Philadelphia is asserted by the plaintiff, and as it is quite clear that an intention to remove permanently from one state to another is never to be presumed, the burthen of proof to establish that point is upon the plaintiff; and that, unless you are entirely satisfied from the evidence that such was his intention, he ought to be considered as a citizen of Louisiana, provided you are also satisfied that he made himself a citizen of that state upon the principles before laid down.

2. If your opinion should be in favor of the plaintiff on the first point, your next inquiry will be whether the plaintiff is entitled to recover any thing and how much in this action? It is assumpsit, with three counts,—for goods sold and delivered, money had and received, and insimul computassent. There is clearly no evidence to support the first and last counts, since it is not pretended that the goods, for the value of which this action is brought, were sold by the plaintiff to the defendant, or that the parties had ever accounted together and struck a balance. To enable the plaintiff to succeed on the second count, the plaintiff must satisfy you not only that the defendant had sold the goods as stated in the account of sale which he rendered to the plaintiff, but that he had received the proceeds thereof, or that they had some way or other come to his use. He admits that he had received the sum of $2,674; but that he left the money with his clerk when he came from New Orleans to Philadelphia in 1819, with orders to procure for the same a bill to be remitted to the plaintiff, which money was totally lost, in consequence of the subsequent elopement of the clerk. But this, we think, furnishes no legal reason why the plaintiff should not recover that sum at least. By the contract between these parties, in 1818, the defendant was alone entrusted, and alone undertook to sell the goods at his own cost and charge; agreeing, in lieu of such, and of his trouble, to receive a certain commission. If he chose to employ a clerk to assist him in the business he had undertaken, it could only be at his own expense. If he chose to entrust the plaintiff's money in his hands, it was at his own risk. He had no power to delegate any part of his duties to the management of any other person.

The jury could not agree, and after being out a day and night, the counsel consented to their discharge.

[On the retrial the plaintiff recovered. Case No. 11,602.]

Case No. 11,602.

READ v. BERTRAND.

[4 Wash. C. C. 556.] [1]

Circuit Court, D. Pennsylvania. Oct. Term, 1825.

ACCOUNT—GOODS ON COMMISSION—PLEA.

Action of account. Plea, plene computavit. Plaintiff consigned to defendant a cargo of goods to sell on commission, and the agreement of defendant bound him to return those that should remain unsold. Defendant sold a part, and delivered to plaintiff an account current, in which he debits himself with all the goods, and credits the sales, leaving a large balance of

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them.[33] It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion.

Appellant relies upon Colgate v. Harvey[34] as a precedent to support his argument that the present statute is not within the limits of permissible classification and violates the privileges and immunities clause. In view of our conclusions, we look upon the decision in that case as repugnant to the line of reasoning adopted here. As a consequence, Colgate v. Harvey must be and is overruled.

Affirmed.

Mr. Chief Justice Hughes concurs in the result upon the ground, as stated by the Court of Appeals of Kentucky, that the classification adopted by the legislature rested upon a reasonable basis.

Mr. Justice Roberts, dissenting:

I think that the judgment should be reversed. Four years ago in Colgate v. Harvey, 296 US 404, 80 L ed 299, 56 S Ct 252, 102 ALR 54, this court held that the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment prohibit such a discrimination as results from the statute now under review. I adhere to

*[94]

the views expressed in *the opinion of the court in that case, and think it should be followed in this.

Mr. Justice McReynolds joins in this opinion.

[33] Twining v. New Jersey, supra (211 US 92, 53 L ed 104, 29 S Ct 14).

[34] 296 US 404, 80 L ed 299, 56 S Ct 252, 102 ALR 54.

84 L. ed 596

JAMES STEWART & CO., Inc., Appellant,

v.

KATHERINE SADRAKULA, as Admrx., etc., of Nicholas Sadrakula, Deceased.

(309 US 94-105.)

States, § 29 — relation to United States — ceded places — applicability of state law — labor law.

1. The provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein.

[See *annotation reference*, 1.]

Appeal, § 815 — decision of Federal question — sufficiency of showing — applicability of state law in ceded territory.

2. A Federal question relating to the continued operation of a state law in territory acquired by the United States is shown to have been decided where an intermediate state court affirmed the decision of a lower court upon the ground that the state law continued operative in the ceded territory, and the highest state court, by an order of remittitur, also affirmed the case upon the same ground, with a statement that in its affirmance it necessarily passed upon the validity and applicability of the state law.

Appeal, § 501 — substantial Federal question — applicability of state law in ceded territory.

3. The determination by a state court that a state law for the protection of employees engaged in construction work continues operative in territory ceded to the United States presents a substantial Federal question.

States, § 29 — relation to United States — ceded places — exclusive jurisdiction — effect of Federal Constitution.

4. The constitutional provision that Congress shall have power to exercise exclusive jurisdiction over all places pur-

ANNOTATION REFERENCE.

1. As to applicability of state statutes or municipal regulations to contracts for performance of work on land owned or leased by the Federal government, see annotation in 91 ALR 779 and 115 ALR 371.

THOMAS BALDWIN, *Plf. in Err.*,
v.
J. C. FRANKS, Marshal of the UNITED STATES OF AMERICA FOR THE DISTRICT OF CALIFORNIA.

(See S. C. Reporter's ed. 678–707.)

Criminal law—conspiracy to drive Chinese subjects from their homes not within sections 5508, 5336, R. S.—section 5519 R. S., invalid in its operation within the State—construction of statutes—civil rights.

1. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable, so that each may be read alone.

2. Section 5519, R. S., cannot be sustained in whole or in part in its operation within a State, neither as to a conspiracy to deprive a person of protection under state laws nor a conspiracy to deprive him of rights secured to him by the Constitution, laws or treaties of the United States.

3. A conspiracy to deprive Chinese subjects, residing within a State, of rights secured to them by treaty, by forcibly expelling them from their homes and the town in which they reside, is not an offense within section 5519, R. S., which is held to apply only to conspiracies affecting citizens in their enjoyment of the elective franchise and their civil rights as citizens.

4. A conspiracy to deprive Chinese subjects of their rights under the laws and treaties of the United States is not within section 5519, R. S. An offense within that section means something more than resisting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution.

5. Penal statutes must be strictly construed.

[No. 884.]

Submitted Apr. 26, 1886. Decided Mar. 7, 1887.

IN ERROR to the Circuit Court of the United States for the District of California. Opinion below published, 27 Fed. Rep. 187. *Reversed.*

The history and facts of the case appear in the opinion of the court.

Mr. **A. L. Hart**, for plaintiff in error.

Mr. **Hall McAllister**, for defendant in error:

Any attempt to compel or constrain any Chinese resident of this country to remove from or to any particular place, or to refrain from following any lawful occupation, or doing any lawful work that he may find to do, is not only morally wrong, but contrary to the law of the land.

The words "privileges and immunities," used in the Constitution in relation to rights of citizens of the different States, have been fully considered by this court and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the Treaty with China.

Ward v. *Md.* 79 U. S. 12 Wall. 430 (20: 453); *Slaughter House Cases*, 83 U. S. 16 Wall. 76 (21: 408); *Corfield* v. *Coryell*, 4 Wash. (C. C.) 380, 384. See also *Holden* v. *Joy*, 84 U. S. 17 Wall. 242 (21: 533); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 190, 198 (23: 847).

This case is not obnoxious to the several cases in which this court has decided that certain provisions of the United States Statutes were merely intended to prohibit state action, and had no reference to the conduct of individuals.

Neither is this case within the operation of those decisions of this court which hold that the complaint is insufficient in failing to show that the crime charged is violative of some federal right possessed by the injured party. Here the allegations of the complaint are clear and distinct, that the whole object of the conspiracy charged, and of all the overt acts committed in pursuance thereof, was to drive and expel the Chinese aliens in question from their homes, from the County of Sutter, from their rights of residence in the Town of Nicolaus, from their right of labor in said town where they then lived, and from their right to there earn a livelihood at their respective lawful vocations as theretofore.

The distinction which runs through the cases decided by this court is that the complaint (to bring the offense within federal jurisdiction) must clearly show, not merely that the offenders have committed a crime, but that the crime has been committed with the manifest intent of defeating a federal right possessed by the injured party: that where the State interferes with rights of individuals, guaranteed to them by the Constitution or laws or treaties of the United States, then such state action comes within the prohibition of the Acts of Congress, provided Congress has taken appropriate action in the premises. And so, also, where Congress has made it an offense to violate certain rights of individuals, that where such individual rights are violated, and such rights are federal in their character, that is, rights guaranteed to the injured individuals by the Constitution, or laws, or treaties of the United States, that then they constitute federal offenses within the appropriate action of Congress, and within the jurisdiction of the federal tribunals.

U. S. v. *Reese*, 92 U. S. 217 (23: 564); *U. S.* v. *Cruikshank*, 92 U. S. 548 (23: 590); *U. S.* v. *Harris*, 106 U. S. 636–640 (27: 292–294); *Ex parte Yarbrough*, 110 U. S. 657–660 (28: 275–279); *U. S.* v. *Waddell*, 112 U. S. 79 (28: 673).

The circumstance that the offense named was committed within the territory of the State of California does not deprive the federal court of jurisdiction nor Congress of the power "to define and punish" the offense.

U. S. v. *Hudson*, 70 U. S. 3 Wall. 407 (18: 182); *U. S.* v. *43 Gallons of Whisky*, 93 U. S. 188 (23: 846); *Ex parte Yarbrough*, and *U. S.* *Waddell*, *supra*.

As to the scope of the treaty-making power, see:

Holmes v. *Jennison*, 39 U. S. 14 Pet. 561 (10: 579); *Haucastein* v. *Lynham*, 100 U. S. 483 (25: 628).

The Government of the United States, and not the State of California, is responsible for the damages sustained by the Chinese aliens in question.

Chy Lung v. *Freeman*, 92 U. S. 275 (23: 550).

The question in this case could not have been involved in *U. S.* v. *Harris*, 106 U. S. 641 (27: 294). In that case the law alleged to have been violated was a law of the State; but here the law alleged to have been violated is a law of the United States, a treaty—which is the supreme law of the land.

A statute may be regarded as constitutional for one purpose and not for another.

Tiernan v. *Rinker*, 102 U. S. 123 (26: 103); *People* v. *Hill*, 7 Cal. 104; *Oregon* v. *Wiley*, 4

Oreg. 187; *Moody* v. *Monroe*, 1 Mich. 68; *Carvill* v. *Power*, 1 Mich. 349; *Baker* v. *Braman*, 6 Hill, 47.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a writ of error brought by Thomas Baldwin, the plaintiff in error, for the review of a judgment of the Circuit Court of the United States for the District of California, refusing his discharge on a writ of *habeas corpus*, from the custody of the Marshal of the district; and the questions presented for consideration arise on a certificate of the judges holding the court, of a division of opinion between them in the progress of the trial. The record shows that Baldwin was held in custody by the Marshal, under a warrant issued by a commissioner of the circuit court, on a charge of conspiracy with Bird Wilson, William Hays and others, to deprive Sing Lee and others, belonging to "a class of Chinese aliens, being • • • subjects of the Emperor of China, of the equal protection of the laws and of equal privileges and immunities under the laws, for that said • • • persons so belonging to the class of Chinese aliens did then • • • reside at the Town of Nicolaus, in said County of Sutter, in said State of California, and were engaged in legitimate business and labor to earn a living, as they had a right to do, and they at that time had a right to reside at said Town of Nicolaus, • • • and engage in legitimate business and labor to earn a living, under and by virtue of the Treaties existing, and which did then exist, between the Government of the United States and the Emperor of China, and the Constitution and laws of the United States; but, nevertheless, while said • • • persons were • • • so residing and pursuing their legitimate business and labor for the purpose aforesaid, said conspirators • • • did, • • • having conspired together for that purpose, unlawfully and with force and arms, violently and with intimidation, drive and expel said persons, • • • belonging to said class of Chinese, • • • from their residence at said Town of Nicolaus, • • • and did • • • deprive them • • • of the privilege of conducting their legitimate business and of the privilege of laboring to earn a living, and, without any legal process, • • • placed said Chinese aliens • • • under unlawful restraint and arrest, and so detained them for several hours, and • • • by force and arms, and with violence and intimidation, placed them • • • upon a steamboat barge, then plying on the Feather River, and drove them from their residence and labor and from said county."

The questions certified relate only to the sufficiency of this charge for the detention of the prisoner. There are nine questions in all, the first six having reference to section 5519 of the Revised Statutes, and the others to sections 5508 and 5336, as the authority for the prosecution. The fourth fairly presents the whole case as it arises under section 5519, and that is as follows:

"4. Whether a conspiracy of two or more persons in the State of California, for the purpose of depriving Chinese residents, lawfully residing in California, in pursuance of the provisions of the several treaties between the United States and the Emperor of China, of the right to live and pursue their lawful vocations at the Town of Nicolaus in said State, and in pursuance of such conspiracy actually forcibly expelling such Chinese from said town, in the manner shown by the record, is: 1. A violation of and an offense within the meaning of section 5519 of the Revised Statutes of the United States; 2. Whether said section, so far as it applies to said state of facts and such Chinese residents, and makes the acts stated an offense against the United States, is constitutional and valid."

The seventh presents all the points for consideration under sections 5508 and 5336, as follows:

"7. Where two or more persons, with or without disguise, go upon the premises of Chinese subjects, lawfully residing in the State of California, with intent to prevent and hinder their free exercise or enjoyment of any right secured to them by the several Treaties between the United States and the Emperor of China, and in pursuance of such conspiracy, forcibly prevent their exercise and enjoyment of such rights, and expel such Chinese subjects from the town in which they reside:

"Whether (1) such acts so performed constitute an offense within the meaning of the provisions of section 5508 of the Revised Statutes of the United States; and,

"(2) If so, whether the provisions of said section, so making said acts an offense, are constitutional and valid;

"(3) Whether such acts so performed constitute an offense within the meaning of that clause of section 5336 of the Revised Statutes of the United States, which makes it an offense for two or more persons in any State to conspire, 'by force, to prevent, hinder or delay the execution of any law of the United States,' or within the meaning of any other clause of said section: and,

"(4) Whether said section, so far as applicable to the facts stated, is a constitutional and valid law of the United States."

The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offense as that with which Baldwin is charged, but whether it has so done.

That the treaty-making power has been surrendered by the States and given to the United States is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.

Articles II and III of a Treaty between the United States and the Emperor of China, concluded November 17, 1880, and proclaimed by the President of the United States October 5, 1881, are as follows:

Article II. "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored Nation."

Article III. "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored Nation, and to which they are entitled by treaty." 22 Stat. at L. 827.

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities or exemptions guaranteed to them by this Treaty, we do not doubt. What we have to decide, under the questions certified here from the court below, is whether this has been done by the sections of the Revised Statutes specially referred to. These sections are as follows:

Sec. 5519. "If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering
[684] the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, 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."

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."

Sec. 5336. "If two or more persons in any State or Territory conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, for a period not less than six months, nor more than six years, or by both such fine and imprisonment."

As the charge on which Baldwin is held in custody was evidently made under section 5519, and that is the section which was most considered in the court below, we will answer the questions based on that first. It provides for the punishment of those who "in any State or Territory conspire • • • for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." [685]

In *United States* v. *Harris*, 106 U. S. 629 [27: 290], it was decided that this section was unconstitutional, as a provision for the punishment of conspiracies of the character therein mentioned, within a State. It is now said, however, that in that case the conspiracy charged was by persons in a State against a citizen of the United States, and of the State, to deprive him of the protection he was entitled to under the laws of that State, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be invalid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a State by the Treaties of the United States. In support of this argument reliance is had on the well established rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough. [684]

Thus, in *United States* v. *Reese*, 92 U. S. 214 [23: 563], the indictment was against two of the inspectors of a municipal election in Kentucky, under sections 3 and 4 of the Act of May 31, 1870, chap. 114, 16 Stat. at L. 140, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election. There was nothing in

either of the sections to limit their operation to a refusal or hindrance "on account of the race, color, or previous condition of servitude" of the voter, and it was held that they were unconstitutional because, on their face, they were broad enough to cover wrongful acts without as well as within the constitutional power of Congress. An attempt was made there as here to limit the statute by construction so as to make it operate only on that which Congress might rightfully prohibit and punish, but to this the court said, p. 221 [565]: "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." This was answered in the negative, the court remarking: "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

Following this were the *Trade-Mark Cases*, 100 U. S. 82 [25: 550], in which there were indictments under sections 4 and 5 of the Act of August 14, 1876, chap. 274, 19 Stat. at L. 141, "to punish the counterfeiting of trade-mark goods and the sale or dealing in of counterfeit trade-mark goods." Of this Act the court said, speaking through *Mr. Justice* Miller, p. 93 [553], that its broad purpose "was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here." A statute so broad and sweeping was then held not to be within the constitutional grant of legislative power to Congress, but, p. 95 [554], "whether the trade mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control," was properly left undecided. The indictment, however, presented a case in which the defendant was charged with having in his possession counterfeits and colorable imitations of the trade-marks of foreign manufacturers, and it was suggested that if Congress had power to regulate trade-marks used in commerce with foreign Nations and among the several States, this statute might be held valid in that class of cases, if no further; but the court decided otherwise, and in so doing said, p. 96 [553]: "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part, when they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body." And again, further on, after citing *United States* v. *Reese*, and quoting from the opinion in that case, it was said, p. 99 [553]: "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, to make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under a state law." [688]

The same question was also considered and the former decisions approved in *United States* v. *Harris*, *supra*, and in the *Virginia Coupon Cases*, 114 U. S. 305 [29: 197], it was said that "To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

It is suggested, however, that *Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377] and *Fraser* v. *Illinois*, 116 U. S. 252 [29: 615] are inconsistent with *United States* v. *Reese* and the *Trade-Mark Cases*, but we do not so understand them. In *Packet Co.* v. *Keokuk* the question arose upon an ordinance of the City of Keokuk establishing a wharf on the Mississippi River and the rates of wharfage to be paid for its use. In its general scope the ordinance was broad enough to include a part of the shore of the river declared to be a wharf, which was in its natural condition and unimproved. The city had, however, actually built, paved and improved a wharf at a large expense within the limits of the ordinance, and the charges then in question were for the use of the facilities thus provided for receiving and discharging cargoes. An objection was made to the validity of the ordinance because it provided for charges to be paid for the use of the unimproved bank as well as for the improved wharves, but the court said, p. 89 [381]: "The ordinance of Keokuk has imposed no charge upon these plaintiffs which it was beyond the power of the city to impose. To the extent to which they are affected by it there is no valid objection to it. Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad, and that some of its provisions are unwarranted. When those provisions are attempted to be enforced, a different question may be presented." That was not a penal statute, but only a city ordinance regulating wharfage, and the suit was civil in its nature. The only question was whether the packet company was bound to pay for the use of improved wharves when the ordinance, taken in its breadth, fixed the charges and required payment for the use of that part of the established wharf which was unimproved as well as that which was improved. The precise point to be determined was whether, under those circumstances, the vessel owners were [689]

exempt from paying for the use of that which was improved.

In *Presser* v. *Illinois*, the indictment was for a violation of the provisions of one of the sections of the Military Code of Illinois, and it was claimed that the whole Code was invalid, because in its general scope and effect it was in conflict with title XVI of the Revised Statutes of the United States upon the subject of "The Militia." But the court held that, even if the first two sections of the Code, on which the objection rested, were invalid, they were easily separable from the rest which could be maintained. The objectionable sections related to the enrolment of the militia in the State generally, and the rest to the organization of eight thousand men as a "volunteer active militia." This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, "where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforcible, even though the other part should fail." *Virginia Coupon Cases*, [*supra*]. As was said in *Allen* v. *Louisiana*, 103 U. S. 84 [26: 319]. "The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if these were stricken out, to give effect to what appears to have been the intent of the Legislature."

Applying this rule to the present case, it is clear that section 5519 cannot be sustained in whole or in part in its operation within a State, unless *United States* v. *Harris* is overruled, and [690] this we see no occasion for doing. That case was carefully considered at the time, and subsequent reflection has not changed our opinion as then expressed. For this reason we answer the second branch of the fourth question which has been certified in the negative. This disposes of all the other points included in the first six questions, and no further answer to them is necessary.

We come now to the questions certified which arise under section 5508. That this section is constitutional was decided in *Ex parte Yarbrough*, 110 U. S. 651 [28: 274], and *United States* v. *Waddell*, 112 U. S. 76 [28: 673]. The real question to be determined, therefore, is whether what is charged to have been done by Baldwin constitutes an offense within the meaning of its provisions.

The section is found in title LXX, chapter 7, of the Revised Statutes embracing "Crimes against the Elective Franchise and Civil Rights of Citizens;" and it provides for the punishment of those "who 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 exercised the same;" and of those who go in companies of two or more "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." The person on whom the wrong to be punishable must be inflicted is described as a *citizen*. In the Constitution and laws of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a State or of the United States. It is so used in section 1 of article XIV of the Amendments of the Constitution, which provides 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;" and that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But it is also sometimes used in popular language to indicate the same thing as resident, inhabitant, or person. That it is not so used in section 5508 in the Revised Statutes is quite clear, if we revert to the original statute from which this section was taken. [691] That statute was the Act of May 31, 1870, chap. 114, 16 Stat. at L. 140. "To enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." It is the statute which was under consideration as to some of its sections in *United States* v. *Reese*, *supra*, and from its title, as well as its text, it is apparent that the great purpose of Congress in its enactment was to enforce the political rights of citizens of the United States in the several States. Under these circumstances there cannot be a doubt that originally the word citizen was used in its political sense, and as the Revised Statutes are but a revision and consolidation of the statutes in force December 1, 1873, the presumption is that the word has the same meaning there that it had originally.

This particular section is a substantial reenactment of section 6 of the original Act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account "of race, color, or previous condition of servitude." Sometimes, as in sections 3 and 4, the language is broader than this, and, therefore, as decided in *United States* v. *Reese*, those sections are inoperative; but still it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents, or inhabitants.

This section is highly penal in its character, much more so than any others, for it not only provides as a punishment for the offense a fine of not more than $5,000 and an imprisonment of not more than ten years, but it declares that any person convicted shall "be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is therefore to be construed strictly; not so strictly as to defeat the legislative will, but doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges [692] pertaining to a man as a citizen, and not as a person only or an inhabitant. And, besides, the crime has been classified in the revision among those which relate to the elective franchise and the civil rights of citizens. For these reasons we are satisfied that the word citizen, as used in this statute, must be given the same

meaning it has in the Fourteenth Amendment of the Constitution, and that to constitute the offense which is there provided for, the wrong must be done to one who is a citizen in that sense.

It is true that the word "citizen" only occurs in the first clause of the section, but in the second clause there is nothing to indicate that any other than a citizen was meant, and the section of the original statute from which this was taken has nothing from which any different inference can be drawn. That clearly deals with citizens alone, and the revision differs from it only in a re-arrangement of the original sentences and the exclusion of some superfluous words. Sections 5506 and 5507, which immediately precede this in the revision, clearly refer to political rights only, for they both relate to the privilege of voting, section 5506 being for the protection of citizens in terms, and section 5507 being for the protection of those to whom the right of suffrage is guaranteed by the Fifteenth Amendment of the Constitution. It may be that by this construction of the statute some are excluded from the protection it affords who are as much entitled to it as those who are included; but that is a defect, if it exists, which can be cured by Congress, but not by the courts.

We, therefore, answer the first subdivision of the seventh question certified in the negative. The second subdivision need not be answered otherwise than it has been elsewhere in this opinion.

It remains only to consider that part of the questions certified which relates to section 5336. That section provides for the punishment of those who conspire: 1, "to overthrow, put down, or destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof;" or 2, "by force to prevent, hinder or delay the execution of any law of the United States;" or 3, "by force to seize, take, or possess any property of the United States contrary to the authority thereof." This is a re-enactment of similar provisions in the Act of July 31, 1861, chap. 33, 12 Stat. at L. 284, "To define and punish certain conspiracies," and in that of April 20, 1871, chap. 22, § 2, 17 Stat. at L. 13, "To enforce the provisions of the Fourteenth Amendment of the Constitution of the United States, and for other purposes."

It cannot be claimed that Baldwin has been charged with a conspiracy to overthrow the government, or to levy war within the meaning of this section. Nor is he charged with any attempt to seize the property of the United States. All, therefore, depends on that part of the section which provides a punishment for "opposing" by force the authority of the United States, or for preventing, hindering, or delaying the "execution" of any law of the United States.

This evidently implies force against the government as a government. To constitute an offense under the first clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority. That is not pretended in this case. The force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection.

So, too, as to the second clause: the offense consists in preventing, hindering, or delaying the Government of the United States in the execution of its laws. This, as well as the other, means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution. The United States are bound by their Treaty with China to exert their power to devise measures to secure the subjects of that government lawfully residing within the territory of the United States against ill treatment; and if in their efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen. But that is not what Baldwin has done. His conspiracy is for the ill treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it. His force was exerted against the Chinese people, and not against the government in its effort to protect them. We are compelled, therefore, to answer the third subdivision of the seventh question in the negative, and that covers the fourth subdivision. [694

This disposes of the whole case, and, without answering the questions certified more in detail, *we reverse the judgment of the Circuit Court, and remand the case for further proceedings not inconsistent with this opinion.*

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

Mr. Justice Field dissenting:

I agree with the majority of the court in its construction of the different sections of the Revised Statutes which have been under consideration in this case, except the third clause of section 5336, and the last clause of section 5508.

The third clause of section 5336 declares that if two or more persons in any State or Territory conspire "by force to prevent, hinder or delay the execution of any law of the United States," each of them shall be punished by a fine of not less than $500 or more than $5,000, or by imprisonment, with or without hard labor, for a period of not less than six months or more than six years; or by both such fine and imprisonment. [70:

By the Treaty with China, of 1868, the United States recognize the right of Chinese to emigrate to this country, and declare that in the United States the subjects of that empire shall enjoy the same privileges and immunities in respect to residence which are enjoyed by citizens or subjects of the most favored nation.

The complaint against the plaintiff in error is that he conspired with others to expel by force from the town of Nicolaus, and the County of Sutter, in the State of California, the subjects of the Emperor of China, who were residing and doing business there, and in furtherance of the conspiracy entered the homes of certain persons of that class, seized them, and forcibly placed them upon a barge

on Feather River, on the bank of which the Town of Nicolaus is situated, and drove them from the county, and thus deprived them of privileges and immunities conferred by the treaty.

For this alleged offense the plaintiff in error, with others, was arrested. On application for a *habeas corpus* for his discharge, the judges of the circuit court were divided in opinion. This court holds that a conspiracy thus violently to expel the Chinese from the county and town where they resided and did business, and thus defeat the provisions of the Treaty, was not a conspiracy to prevent or hinder by force the execution of a law of the United States, although a treaty is declared by the Constitution to be the supreme law of the land.

Under the Constitution, a treaty between the United States and a foreign Nation is to be considered in two aspects—as a compact between the two Nations, and as a law of our country. As a compact, it depends for its enforcement on the good faith of the contracting parties, and to carry into effect some of its provisions may require legislation. For any infraction of its stipulations importing a contract, the courts can afford no redress except as provided by such legislation. The matter is one to be settled by negotiation between the executive departments of the two governments, each government being at liberty to take such measures for redress as it may deem advisable. *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253, 314 [7: 415, 435]; *Head Money Cases*, 112 U. S. 580, 598 [28: 798, 803]; *Taylor* v. *Morton*, 2 Curtis (C. C.) 454, 459; *Re Ah Lung*, 9 Sawy. 306.

But in many instances a treaty operates by its own force, that is, without the aid of any legislative enactment; and such is generally the case when it declares the rights and privileges which the citizens or subjects of each Nation may enjoy in the country of the other. This was so with the clause in some of our early treaties with European Nations, declaring that their subjects might dispose of lands held by them in the United States, and that their heirs might inherit such property, or the proceeds thereof, notwithstanding their alienage. Thus the Treaty with Great Britain of 1794 provided that British subjects then holding lands in the United States, and American citizens holding lands in the dominions of Great Britain, should continue to hold them according to the nature and tenure of their respective estates and titles therein, and might grant, sell, or devise the same to whom they pleased, in like manner as if they were natives, and that neither they nor their heirs nor assigns should, as far as might respect the said lands, and the legal remedies incident thereto, be regarded as aliens. Art. 14. A clause to the same purport, and embracing also movable property, was in the Treaty with France in 1778, article 9, and also in that of 1800, article 7. It required no legislation to give force to this provision. It was the law of the land by virtue of the Constitution, and congressional legislation could not add to its efficacy. Whenever invoked by the alien heirs, the rights it conferred were enforced by the federal courts. *Chirac* v. *Chirac*, 15 U. S. 2 Wheat. 259 [4: 234]; *Carneal* v. *Banks*, 23 U. S. 10 Wheat. 181 [6: 297]; *Hughes* v. *Edwards*, 22 U. S. 9 Wheat. 489, 496 [6: 142, 144]. See also the Treaty with the Swiss Confederation of 1850, art. 5; *Hauenstein* v. *Lynham*, 100 U. S. 483 [25: 628].

This is so also with clauses found in some treaties with foreign Nations, stipulating that the subjects or citizens of those Nations may trade with the United States, and for that purpose freely enter our ports with their ships and cargoes, and reside and do business here. [704
Thus the Treaty of Commerce with Italy, of February 26, 1871, provides that "Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter, with their ships and cargoes, all the ports of the United States and of Italy respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories." Article 1. These stipulations operate by their own force; that is, they require no legislative action for their enforcement. Treaty of Commerce with Great Britain of 1815, art. 1; renewed and continued for ten years by art. 4 of the Treaty of 1818, and continued indefinitely by art. 1 of the Treaty of 1827; Treaty with Bolivia of May 13, 1858, art. 8; Treaty with Costa Rica of July 10, 1851, art. 2; Treaty with Greece of December, 1837, art. 1; Treaty with Sweden and Norway of July 4, 1827, art. 1.

The right or privilege being conferred by the treaty, parties seeking to enjoy it take whatever steps are necessary to carry the provisions into effect. Those who wish to engage in commerce enter our ports with their ships and cargoes; those who wish to reside here select their places of residence, no congressional legislation being required to provide that they shall enjoy the rights and privileges stipulated. All that they can ask, and all that is needed, is such legislation as may be necessary to protect them in such enjoyment. That they have, I think, to some extent, in the clause punishing any conspiracy to prevent or hinder by force the execution of a law of the United States. The section in which this clause appears is a re-enactment in part of the Act of July 31, 1861, and declares, among other things, a conspiracy of two or more persons to overthrow by force the Government of the United States, or to oppose by force its authority, or "by force to prevent, hinder, or delay the execution of any law of the United States," or by force to seize and possess any of their property against their authority, to be a high crime, and prescribes for it severe punishment. As thus seen, the section is not in- [70
tended as a protection against isolated or occasional acts of individual personal violence. For such offenses the laws of the States make ample provision. It is intended to reach *conspiracies* against the supremacy and authority of the Government of the United States, and against the enforcement of its laws. It is directed not only against those who conspire to overthrow the government, but those also who conspire to defeat the execution of its laws, including under the latter treaties as well as statutes, and thus permanently deprive others of the rights, benefits and protection intended to be conferred by such laws. In the case before

as, the purpose of the alleged conspirators was to permanently deprive the Chinese residing in Nicolaus—not any particular Chinese, but all of that class of persons—of the right of residence conferred by the Treaty. That right is not limited to any particular place; it may be exercised wherever it is lawful for anyone to reside without encroachment upon the equal right of others. The conspirators well knew, as everyone in California knows, the provision of the Treaty and its meaning; and their purpose was to nullify and defeat it.

A treaty, in conferring a right of residence, requires no congressional legislation for the enforcement of that right; the treaty in that particular is executed by the intended beneficiaries. They select their residence. They are not required, as said above, to reside in any particular place, or do business there. A conspiracy to prevent by force a residence in the town or county selected by them appears to me, therefore, to be a conspiracy to prevent the operation—that is, the execution—of a law of the United States, and to be within the letter and spirit of the third clause of section 5336. If the conspirators can expel the Chinese from their residence in the town and county of their selection without being amenable to any law of the United States, they can, with like exemption from legal liability, expel the Chinese from the entire State, and thus utterly defeat the stipulations of the Treaty.

So, also, a conspiracy to prevent by force ships belonging to subjects of a foreign Nation —not any particular ship, but ships generally belonging to them—from entering our ports with their cargoes would, in my judgment, be a conspiracy to prevent by force the operation
696] of the Treaty with that Nation, which stipulates that its subjects shall have that privilege. And in all other cases where a clause of a treaty conferring rights or privileges operates by its own terms and does not require congressional legislation to give it effect, a conspiracy to prevent by force their enjoyment is a conspiracy to prevent by force the execution of a law of the United States; that is, to prevent its having, with respect to the rights and privileges stipulated, any effectual operation. I do not see how Congress could improve the matter, or do more than it has already done, by declaring that those who thus conspire by force to deprive parties of the rights or privileges conferred by a treaty should be punished. Its declaration to that effect would be no more than what the present law provides.

The last clause of section 5508 declares that "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder the free exercise or enjoyment of any right or privilege so secured [by the Constitution or laws of the United States], 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."

I do not agree with the majority of the court that this clause is limited in its application only to offenses against citizens. The first clause of the section is thus limited, but, in my judgment, the last is more extensive, and reaches an invasion of the premises of anyone, whether citizen or alien, by two or more persons for the unlawful purposes mentioned. But I am not clear that the qualification of going "in disguise" on the highway does not also extend to the going on the premises of another—and thus render the clause inapplicable to the case before the court; though there is much force in the view of *Mr. Justice* Harlan, that the clause should be read as though its words were: "If two or more persons go on the highway in disguise, or on the premises of another, with the intent," etc., thus making the words "in disguise" apply only to the offense on the highway. If his view be correct, the last provision of the clause would describe the exact offense charged against the plaintiff in error and his co-conspirators - that they went on the premises of the Chinese with the intent to deprive them of rights and privileges conferred by the Treaty—the law of the land—an intent which they carried out by forcibly expelling the Chinese from the town and county of their residence and business. But without adopting or rejecting his view, I prefer to place my dissent upon what I deem the erroneous construction by the court of the third clause of section 5336, in holding that it does not cover this case, but applies only to cases where there has been a forcible resistance to measures adopted by Congress for the execution of a law, or a treaty of the United States. [707

The result of the decision is that there is no national law which can be invoked for the protection of the subjects of China, in their right to reside and do business in this country, notwithstanding the language of the Treaty with that Empire. And the same result must follow with reference to similar rights and privileges of the subjects or citizens resident in this country of any other Nation with which we have a treaty with like stipulations. Their only protection against any forcible resistance to the execution of these stipulations in their favor is to be found in the laws of the different States. Such a result is one to be deplored.

Mr. Justice Harlan, dissenting:

By the Treaty of 1880–1 with China, the Government of the United States agreed to exert all its power to devise measures for the protection, against ill treatment at the hands of other persons, of Chinese laborers or Chinese of any other class, permanently or temporarily residing, at that time, in this country, and to secure to them the same rights, privileges, immunities and exemptions to which the citizens or subjects of the most favored Nation are entitled, by treaty, to enjoy here. It would seem from the decision in this case, that if Chinamen, having a right, under the Treaty, to remain in our country, are forcibly driven from their places of business, the Government of the United States is without power in its own courts to protect them against such violence, or to punish those who, in this way subject them to ill treatment. If this be so, as to Chinamen lawfully in the United States, it must be equally true as to the citizens or subjects of every other foreign Nation, residing or doing business here under the sanction of treaties with their respective governments.

I do not think that such is the present state

of the law, and must dissent from the opinion and judgment of the court.

It is conceded in the opinion of the court to be within the constitutional power of Congress [695] to provide—as by section 5508 of the Revised Statutes it has done—that "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," etc. It is also conceded that, in the meaning of that section, a treaty between this Government and a foreign Nation is a "law" of the United States; and that the wrongs done by Baldwin and others to the subjects of the Emperor of China, named in the warrant, prevented the free exercise and enjoyment of rights and privileges secured to those aliens by the Treaty between the United States and China. I concur in these views, but am unable to assent to the proposition that the offense charged is not embraced by the foregoing section or by any other valid enactment of Congress.

My brethren hold that section 5508 describes only wrongs done to a "citizen;" in other words, that Congress did not intend, by that section, to protect the free exercise or enjoyment of rights secured by the Constitution or laws of the United States, except where citizens are concerned. This, it seems to me, is an interpretation of the statute which its language neither demands nor justifies. Observe that the subject with which Congress was dealing was the protection of "*any* right or privilege" secured by the Constitution or laws of the United States. There is, perhaps, plausible ground for holding that the first clause of section 5508 embraces only a *conspiracy* directed against a "citizen." But the succeeding clause describes two other and distinct offenses; namely, the going of two or more persons "in disguise on the highway," and the going of two or more persons "on the *premises* of another"—that is, upon the premises of another *person*—with intent, in either case, to prevent or hinder the free exercise or enjoyment by such person of any right or privilege secured to him by the Constitution or laws of the United States. The use of the word "another," instead of "citizen," in the [696] latter clause, shows that, in respect of rights and privileges so secured, Congress had in mind the protection of persons, whether citizens or not. In this view, the statute is not unlike the Fourteenth Amendment, the first section of which recognizes as well rights appertaining to citizenship as rights belonging to persons. Baldwin, and others, according to the statements in the warrant, certainly did go "on the premises of another," with the intent to interfere with rights which the court concede are secured by treaty, and, therefore, by the supreme law of the land. *Chew Heong* v. *U. S.* 112 U. S. 540 [28: 771]; *Head Money Cases*, 112 U. S. 580 [28: 798]. In my judgment the case is within both the letter and spirit of the statute. It is, however, excepted by the court from its operation, by imputing to Congress the purpose of withholding national protection from those who do not happen to enjoy the privileges of American citizenship,—a purpose inconsistent with the obligations which the Nation has assumed by treaties with other countries. I cannot think it possible that Congress, while providing for the punishment of two or more persons, who go on the *premises* of a citizen, with intent to prevent his free exercise or enjoyment of rights secured by the Constitution or laws of the United States, purposely refrained from providing for the punishment of the same persons going on the premises of one, not a citizen, with intent to prevent the enjoyment by the latter of rights secured by the same Constitution and laws.

The rule of interpretation which the court lays down, if applied in other cases, will lead to strange results. We have statutes which give "to every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws," etc. (§§ 2289, 2290, 2291), the right, for purposes of a homestead, and under certain conditions, to enter unappropriated public lands. The party making the entry, or, if he be dead, his widow, etc., will be entitled ultimately to receive a patent, provided he resides upon and cultivates the land for a certain length of time, and provided, in the case of the [697] foreigner, he shall have become a citizen of the United States prior to his application for a patent. Now, suppose that an entry is made under the homestead statute, by a citizen, and a similar entry is made at the same time, in the same locality, by one who has only filed his declaration of intention to become a citizen. During the period of residence upon and cultivation of the lands both of the parties so making entries are, we will suppose, forcibly driven from the land by a lawless band of persons, with the intent to prevent them from perfecting their respective rights to a patent. In the case of the citizen thus wronged, we held in *United States* v. *Waddell*, 112 U. S. 76 [28: 673], that he may invoke the protection given by section 5508, and in that way have the wrong doers punished in a court of the United States as therein prescribed. But in the case of the person who has only declared his intention to become a citizen, the wrong doers cannot be reached by indictment in a court of the United States, because, under the decision in this case, that section only furnishes protection to *citizens*.

It is said—though I believe no such suggestion is made by the court—that the words "if two or more persons go in disguise on the highway, or on the premises of another," apply only when the offenders are "in disguise." I cannot suppose that Congress intended to make a distinction between wrong doers going in disguise "on the premises of another," for the purpose of interfering with rights secured by the Constitution or laws of the United States, and wrong doers who openly and without masks enter upon the same premises with a like unlawful purpose. It intended, rather, to guard the homes of all persons against invasion by combinations of lawless men, who seek, by entering those homes, to prevent the free exercise of

rights secured by the Constitution or laws of the United States. If the clause had read, "If two or more persons go on the highway in disguise, or on the premises of another," it would never occur to anyone that the words "on the premises of another" were qualified by the words "in disguise." The free exercise of personal rights secured by the United States should not be made to depend upon the trifling circumstance that the words "in disguise" precede, rather than follow, the words "on the high- [698] way."

In my judgment the going of two or more persons, whether openly or in disguise, on the premises of another, whether the latter be a citizen or not, with intent to prevent his free exercise or enjoyment of a right secured by the Constitution or laws of the United States, was made by section 5508 an offense against the United States.

I feel obliged also to express my nonconcurrence in so much of the opinion of the court as holds that Congress is without power under the Constitution to make it—as by section 5519 of the Revised Statutes it is made—an offense against the United States for two or more persons, in any State, "to conspire, or go in disguise on the the highway, or on the premises of another, for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State • • • from giving or securing to all persons within such State • • • the equal protection of the laws."

It is not necessary in this case to inquire what is the full scope of that clause of the Fourteenth Article of Amendment, which provides that "No State shall • • • deny to any person within its jurisdiction the equal protection of the laws." It is sufficient to say, that that provision does something more than describe the duty and limit the power of the States. Taken in connection with the fifth section, conferring upon Congress power to enforce the Amendment by appropriate legislation, that provision is equivalent to a declaration, in affirmative language, that every *person* within the jurisdiction of a State has a right to the equal protection of the laws; just as the prohibition in the Thirteenth Amendment, against the existence of slavery, operated not only to annul state laws upholding that institution, but to establish "universal civil and political freedom throughout the United States," and to invest every individual person within their jurisdiction with the right of freedom: *Civil Rights Cases*, 109 U. S. 20 [27: 842]; and just as the prohibition in the Fifteenth Amendment, against the denial or abridgment of the right [699] of citizens of the United States to vote, on account of their race, color, or previous condition of servitude, operated to invest such citizens with "a new constitutional right," which "comes from the United States;" namely, "exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude." *U. S. v. Cruikshank*, 92 U. S. 542 [23: 588]; *U. S. v. Reese*, 92 U. S. 214, [23: 563].

In the *Civil Rights Cases*, p. 23 [843] it was held that Congress, under its express power to enforce, by appropriate legislation, the provisions of the Thirteenth Amendment, could, so far as necessary or proper, enact legislation, "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not," for the purpose of eradicating "all forms and incidents of slavery and involuntary servitude." And since, in the matter of voting, the exemption of citizens from discrimination on account of race, color, or previous condition of servitude is a right which "comes from the United States," and is "granted or secured by the United States" (*U. S. v. Cruikshank*), can it be doubted that Congress, under its express power to enforce the Fifteenth Amendment, by appropriate legislation, could make it an offense against the United States for two or more persons to conspire to deny or abridge the citizen's right to vote, on account of his race or color? Is there any recognized exception to the general rule that Congress may, by appropriate legislation, secure and protect rights derived from or guaranteed by the Constitution or laws of the United States? Believing that these questions must be answered in the negative, I am unable to perceive any constitutional objection to section 5519; certainly, none of such a serious character as to justify this court in holding that Congress by enacting it, has transcended its powers. If the United States is powerless to secure the equal protection of the laws to persons within the jurisdiction of a State, until the State, by hostile legislation or by the action of her judicial authorities, shall have denied such protection, and can even then interfere only through the courts of the Union in suits involving either the validity of such state legislation, or the action of the [700] state authorities, it is difficult to understand why Congress was invested with power, by appropriate legislation, to enforce the provisions of the Fourteenth Amendment; for, without such power of legislation, the courts of the Union are competent to annul any state laws or reverse any action of state judicial officers which deny the equal protection of the laws to any particular person or class of persons. Indeed, since the organization of the government, there has existed a remedy in the courts of the Union for any denial in a state court of rights, privileges, or immunities derived from the United States. It seems to me that the main purpose of giving Congress power to enforce, by *legislation*, the provisions of the Amendment was, that the rights therein granted or guaranteed might be guarded and protected against lawless combinations of individuals, acting without the direct sanction of the State. The denial by the State of the equal protection of the laws to persons within its jurisdiction may arise as well from the failure or inability of the state authorities to give that protection, as from unfriendly enactments. If Congress, upon looking over the whole ground, determined that an effectual and appropriate mode to secure such protection was to proceed directly against combinations of individuals, who sought, by conspiracy or by violent means, to defeat the enjoyment of the right given by the Constitution, I do not see upon what ground the courts can question the validity of legislation to that end.

There is another view of this question which seems to be important. In *United States* v. *Wad-*

ments of this count are an answer to the ground of demurrer insisted upon, that the count does not allege the amount claimed as due and unpaid.

Whether the demurrer to the second replication to plea 3 was or was not improperly overruled is immaterial, as the evidence without conflict showed that there was no breach of the contract of July 17, 1905, set up in said plea. The defendant himself testified that there was no material difference between him and the plaintiff "as to the work under that contract." Consequently defendant was entitled to nothing, so far as that plea was concerned, even if the replication had not been in the case.

If a defendant has suffered damages on account of a breach by the plaintiff of the contract upon which the plaintiff bases his cause of action, a plea of recoupment is the procedure by which defendant may bring the matter before the court and have his damages considered. Behrman v. Newton, 103 Ala. 525, 529, 15 South. 858. For this reason we see no reversible error in the action of the court in giving charge 2, requested by the plaintiff.

The defendant's defense is that plaintiff had breached, to the defendant's damage, a contract made April 1, 1905; and there is testimony in the record which tends to support the defense. The plaintiff requested, and the court gave, the following charge: "(5) I charge you, gentlemen of the jury, that to constitute proof of a breach of contract executed by plaintiff and defendant April 1, 1905, upon the part of the plaintiff, it must be shown that the terms of the contract, including plans and specifications, or some one provision or term thereof, has been broken." This charge is criticised, in brief of appellant's counsel, as being invasive of the province of the jury. The criticism is inapt.

The proposition of law involved in charge 6, given for the plaintiff, is correct; and while the charge is misleading in its tendencies, and the court could well have refused it on this account, yet the defendant could have protected himself against its misleading tendencies, and the court will not be put in error for giving it. Woodward Iron Co. v. Curl, 44 South. 982.

Charge 4, as copied in the transcript, correctly defines set-off, and was properly given. The charge is not the same as charge 4 set out in appellant's brief, and we have found in the record no charge corresponding with that so quoted by the appellant. But, waiving this point, and taking the brief of counsel as referring to charge 3, which he sets out, and which is covered by the sixth ground in the assignment of errors, the court cannot be put in error for giving charge 3, because the evidence of the defendant, Theo. Poull, showed without dispute that there was no material difference between plaintiff and defendant as to the work done under the contract of July 17, 1905, the one sued upon. Therefore plaintiff's demand was proved, and the first postulate of the charge, if erroneous, could not possibly have worked injury to defendant, and the remainder of the charge was misleading merely.

The court did not err in overruling the motion for a new trial.

We have treated all the grounds of error insisted upon in the briefs, but can sustain none, and the judgment appealed from is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and MAYFIELD, JJ., concur.

(139 Ala. 125)

GARDINA v. BOARD OF REGISTRARS OF JEFFERSON COUNTY.

(Supreme Court of Alabama. Feb. 2, 1903.)

1. ELECTIONS (§ 1*)—SUFFRAGE—NATURE OF RIGHT.

While theoretically sovereignty is in the people, practically it resides only in those who exercise the right of suffrage.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ELECTIONS (§ 5*)—RIGHT OF SUFFRAGE—POWER TO REGULATE—STATES.

Power to determine who are entitled to exercise the right of suffrage is in the several states, except as restricted by the fifteenth amendment of the federal Constitution, and that provision thereof requiring congressional electors to have the qualifications of electors of the most numerous branch of the state Legislature.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. ELECTIONS (§ 10½*)—RIGHT OF SUFFRAGE—REGULATIONS—VALIDITY.

Regulations of the elective franchise must be reasonable, uniform, and impartial, and should not abridge the constitutional right of the citizen or unnecessarily prevent its exercise.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 10½.*]

4. ELECTIONS (§ 1*)—FRANCHISE—NATURE OF RIGHT.

The exercise of the elective franchise is a privilege, and not a right.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. ELECTIONS (§ 13*)—REGISTRATION—VALIDITY OF REGULATIONS.

A state may require citizens to conform to registration laws in order to vote, and the validity of such laws is not affected by the fact that the registering officer may, by neglecting to perform his duty, disfranchise the electors; an elector's remedy being to compel performance of the duty.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 14; Dec. Dig. § 13.*]

6. ELECTIONS (§ 24*)—REGULATIONS—MANNER OF HOLDING.

The Legislature may prescribe the time and place of holding elections, and require notice thereof.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 16; Dec. Dig. § 24.*]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. ELECTIONS (§ 60*)—QUALIFICATION OF VOTERS—CITIZENSHIP—DECLARATION OF INTENTION.

Const. 1875, art. 1, § 2, provides that all residents, born in the United States, or naturalized, or who have declared their intention to become citizens of the United States, are citizens of the state, with equal civil and political rights. Const. 1901, § 177, provides that every male citizen of the United States, and every male resident of foreign birth who, before the ratification of this Constitution, has declared his intention to become a citizen of the United States, shall be an elector, provided all foreigners who have declared their intention to become citizens of the United States shall, if they fail to become citizens thereof, when entitled to become such, cease to have a right to vote until they become citizens. Code 1907, § 280, requires practically the same qualifications for voting, and states the necessary period of residence in the state, county, etc.; section 291 provides that foreigners who have legally declared their intention to become citizens, if they fail to do so when they are entitled to be such, shall cease to have the right to vote until they become citizens; and section 312 provides that those persons, and no others, who will have qualifications as to residence prescribed by section 290, shall be qualified to register as electors, if not otherwise disqualified. *Held*, that foreigners who have merely declared an intention to become citizens of the United States since the ratification of the Constitution of 1901, but have not perfected their naturalization, cannot register or vote, nor are they citizens of this state, within Const. U. S. Amend. 14, defining federal and state citizenship, so as to entitle them to register and vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 65; Dec. Dig. § 60.*]

8. ALIENS (§ 60*)—NATURALIZATION — POWER TO NATURALIZE.

Naturalization is a national right and privilege, rather than a state right; Congress having exclusive power to provide for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 117, 118; Dec. Dig. § 60.*]

9. CITIZENS (§ 11*)—CLASSES OF CITIZENSHIP.

There are two classes of citizens under our form of government, citizens of the United States and of the state; and one may be a citizen of the former without being a citizen of the latter.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 18; Dec. Dig. § 11.*]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Proceeding by Frank Gardina against the Board of Registrars of Jefferson County. From a judgment for defendant, petitioner appeals. Affirmed.

William Conniff, for appellant. Alexander M. Garber, Atty. Gen., for appellee.

MAYFIELD, J. We agree with counsel for appellant that there is but one question to be decided on this appeal, namely, can a man of foreign birth be registered as an elector of this state, on his mere declaration of intention to become a citizen of the state and the United States? The law regulating this subject is as follows:

Const. Ala. 1901, § 177:

"Every male citizen of this state who is a citizen of the United States, and every male resident of foreign birth, who, before the ratification of this Constitution, shall have legally declared his intention to become a citizen of the United States, twenty-one years old or upwards, not laboring under any of the disabilities named in this article, and possessing the qualifications required by it, shall be an elector, and shall be entitled to vote at any election by the people: Provided, that all foreigners who have legally declared their intention to become citizens of the United States, shall, if they fail to become citizens thereof at the time they are entitled to become such, cease to have the right to vote until they become such citizens."

Const. Ala. 1875, § 2, art. 1:

"That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the state of Alabama, possessing equal civil and political rights."

Code Ala. 1907, §§ 290, 291:

"290. Qualification of Elector to Vote.—Every male citizen of this state who is a citizen of the United States, and every male resident of foreign birth, who, before the ratification of the present Constitution of the state, shall have legally declared his intention to become a citizen of the United States, twenty-one years old or upwards, not laboring under any of the disabilities named in section 203 (1557) of this Code, and who shall have resided in this state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and who shall have been duly registered as an elector, and shall have paid, on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year 1901, and for each subsequent year, shall be an elector, and shall be entitled to vote at any election by the people.

"291. Foreigners, Right to Vote.—All foreigners, who shall have legally declared their intention to become citizens of the United States shall, if they fail to become citizens thereof at the time they are entitled to become such, cease to have the right to vote until they become such citizens."

Code of Alabama, 1907, § 312:

"Persons Qualified to Register.—The following persons, and no others, who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed by section 290 (1556) of this Code,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be qualified to register as electors, provided they shall not be disqualified under section 208 (1057) of this Code," etc.

Elections are the machines through which the voice of the people acting in their sovereign capacity is transformed into law. These elections must be exercised at the time, place, and in the manner prescribed by the Constitution and statutes which the people, through their agents, have constituted. By means of elections the people choose these officers, and choose those who shall exercise the legislative, executive, and judicial functions of the government. The Constitutions of the various states contain provisions that certain specific propositions, such as amendments of Constitutions, removal of county seats, election of officers, etc., shall be determined by the vote of the electors, either by a majority or sometimes by two-thirds majority of the electors. While the sovereignty is in the people, theoretically speaking, practically considered it resides in those persons only who are permitted to exercise the right of elective franchise. Cooley, Const. Lim. 752.

The power to determine who are qualified electors and who are entitled to exercise the elective franchise is left to the several states. The federal Constitution does not prescribe the regulations as to this matter, except that the electors for Representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the state Legislature, and also the fifteenth amendment, which forbids the state from denying any citizen the right to vote on account of race, color, or previous condition of servitude. The exercise of elective franchise is a privilege, and not a right. The state may grant or deny the right. Aliens are denied the right. The fifteenth amendment does not deny the state the right to forbid any person from voting, but only provides that he shall not be excluded on account of his race, color, or previous condition of servitude. Minors and women may be and are usually excluded from the right to vote, and also those who have been convicted of infamous crimes, also idiots and lunatics, also nonresidents of the state, county or municipality, etc., in which the election is to be held; but these are not the only qualifications that the states may require. They may require any qualifications, or exclude any person or class of persons, unless the federal Constitution or the state Constitution forbids it. The state may provide registration laws, and require that citizens conform thereto before they are entitled to vote. It is no excuse to the validity of such law that the registering officer may neglect to perform every duty and thereby disfranchise the electors. The remedy would be for the elector to compel the performance of the duty. But regulations as to the elective franchise must be reasonable and uniform and impartial, and they should not deny or abridge the constitutional right of the citizen, nor unnecessarily impede its exercise. Statutes may prescribe the time and place of elections, and they may also prescribe the notice to be given of the election. Cooley, Const. Lim. 757, 758.

It will be observed that the Constitution of 1901, and the election laws thereafter, wrought a complete change in the qualifications of electors and mode of registration as prerequisites to vote. It is also clear that only those foreigners who had declared their intention before the adoption of the Constitution of 1901 could register or vote thereafter, and they must have become citizens at the time they were entitled to become such, else they lost their right to vote or register until they did become citizens. The Code provisions on this subject were evidently intended to make these constitutional provisions perpetual, so as to apply to future cases.

The election laws, statute or Code, do not authorize these foreigners who have merely declared their intention to become citizens of the United States since the Constitution of 1901 was ratified, but who have not perfected their naturalization as required, to register or vote in this state, and it is doubtful if the Legislature could so authorize. It appearing that the appellant in this case had declared his intention of becoming a citizen since the ratification of the Constitution, and that he had not perfected his naturalization and was not a citizen at the time he applied for registration it follows that he cannot register until he perfects his naturalization, unless he is a "citizen of this state" within the meaning of the election laws of this state.

It will be observed that section 2, art. 1, of the Constitution of 1875, defined or prescribed who were citizens of this state, and that appellant would be a citizen under that section; but it also appears that that section was not embraced in, or adopted as a part of, the Constitution of 1901, and there is no substitute for it in the new Constitution. We must, therefore, resort to other sources for a definition of "citizen of this state." The word "citizen" has come to us from the Roman law. In Roman law it designated a person who had the freedom of the city of Rome and could exercise the political and civil privileges of the Roman government. 2 Kent, Com. p. 76, note. It was both an honor and a sacred privilege to be a Roman citizen. Paul, the great Apostle of the Gentiles, claimed and asserted the right of a Roman citizen when apprehended in Jerusalem. The chief captain answered him: "With a great sum obtained I this freedom; but Paul said, 'I was free born.'" Again this great Apostle is heard to say: "I am a man which am a Jew, of Tarsus, a city in Cilicia, a citizen of no mean city." Citizen-

ship has always been regarded as the most sacred right or privilege that the sovereign can confer. Mr. Webster defines "citizen" as "a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill public offices in the gift of the people; also either native-born or naturalized persons who are entitled to full participation in the exercise and enjoyment of so-called private rights." Bouvier says a citizen, in American law, is one who, under the Constitution and law of the United States, has a right to vote for representatives in Congress and other public officers and who is qualified to fill offices in the gift of the people; 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.

The Supreme Court of Nebraska has held that "citizen," as used in that Constitution, relative to the right to hold office, means a person who is an American citizen by birth or a person of foreign birth who has been naturalized. State v. Boyd, 31 Neb. 682, 48 N. W. 738, 51 N. W. 602. The Constitution of the United States provides: "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." Const. Amend. 14. Congress of the United States has exclusive power to provide for naturalization, and is required to establish a uniform rule for all states, though it may provide for naturalization to be acquired by and through state courts. Const. U. S. art. 1, § 8, subd. 4. Naturalization is therefore a national right and privilege, rather than a matter of state concern. Scott v. Strobach, 49 Ala. 490.

There are, then, under our republican form of government, two classes of citizens, one of the United States and one of the state. One class of citizenship may exist in a person, without the other, as in the case of a resident of the District of Columbia; but both classes usually exist in the same person. The federal Constitution, by this amendment, has undertaken to say who shall be citizens both of the states and United States. Prior to this amendment, the states could probably have determined, respectively, who were citizens of each, though naturalization has been exclusively a national subject, rather than a state, since the federal Constitution was first adopted. Consequently we find no authority, state or national, for registering appellant as an elector of this state.

The judgment of the lower court is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

BAILEY v. STATE.

(Supreme Court of Alabama. Feb. 11, 1909.)

FALSE PRETENSES (§ 28*)—INDICTMENT—DESCRIPTION OF "PERSON" TO WHOM PRETENSE WAS MADE—CORPORATION.

An indictment for obtaining money under false pretenses, which alleged that the false pretense was made to a certain corporation, sufficiently alleged the "person" to whom the false pretense was made; Code 1907, § 1, providing that the word "person" includes a corporation, as well as a natural person.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 28.*

For other definitions, see Words and Phrases, vol. 6, pp. 5357-5370; vol. 8, p. 7732.]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

Ed. Bailey was convicted of obtaining money under false pretenses, and he appeals. Affirmed.

John W. A. Sanford, Jr., for appellant. Alexander M. Garber, Atty. Gen., and Thomas W. Martin, Asst. Atty. Gen., for the State.

HOWELL, J. The appellant was tried and convicted on an indictment for obtaining money under false pretenses. The indictment is in Code form. Cr. Code 1907, p. 670, form No. 58. There is no bill of exceptions in the record, and the only question presented for our consideration is the one raised by the demurrer to the indictment. The demurrer takes the point that the indictment fails to allege the name of any person to whom any false representation was made, but instead thereof alleges that the false pretense was made to the Louisville & Nashville Railroad Company, a corporation.

So far as we are advised, this is the first time this precise question has ever been presented to this court. The case of White v. State, 86 Ala. 69, 5 South. 674, is somewhat analogous: appellant there having been convicted of attempting to defraud by false pretenses "the Louisville & Nashville Railroad Company, a corporation duly incorporated under the laws of Kentucky." The indictment in that case was not assailed on the point here raised. In 19 Cyc. p. 425 (D), it is said: "An indictment for obtaining property by false pretense must allege specifically that defendant made the pretense in question, and state to whom the pretense was made, and who was defrauded thereby, unless his name is unknown. It is sufficient to allege that the pretense was made to, or that the person defrauded was, a corporation, either private or municipal, a firm, or, where the pretense was by advertisement, the public generally." In the case of State v. Turley, 142 Mo. 403, 44 S. W. 267, the precise question was considered and decided, and it was there held that the indictment was sufficient. In the opinion in that case it is said arguendo: "No one would contend that if

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

WATSON et al. v. BONFILS et al.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1902.)

No. 1,633.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP IN TERRITORIES FATAL.
A national court has no jurisdiction of a suit which involves a controversy between a citizen of a state and a citizen of a territory, and the fact that citizens of different states are interested in the controversy and are made parties to the suit does not remove the fatal objection.

2. SAME—CITIZENSHIP OF REAL AND PROPER PARTIES MATERIAL, OF NOMINAL PARTIES IMMATERIAL.
The citizenship of nominal parties to a suit is not material and may be disregarded, but the citizenship in a state or foreign country by every proper party who has a real interest in the controversy involved in the suit is essential to the jurisdiction of a federal court on the ground of diversity of citizenship.

3. SAME—PROPER PARTIES REAL PARTIES TO A SUIT.
A party who has a real controversy with the opposing parties to a suit, which presents a common point of litigation, that affects its entire subject-matter, and the decision of which will settle the rights of all the parties to the suit, is a proper and real party to the suit.

4. SAME—PRESUMPTIONS—DIRECT AND COLLATERAL ATTACK.
In a direct attack upon a judgment or decree of a federal court by writ of error or appeal, the record must affirmatively show the jurisdiction of the court which rendered it. But on a collateral attack, jurisdiction is presumed.

5. SAME—AMENDMENT TO SHOW PERMISSIBLE IN CIRCUIT COURT, BUT NOT IN APPELLATE COURT.
Where, through the mistake or inadvertence of one of the parties, the requisite averments of citizenship have not been made, an appellate court may reverse and remand the cause, with leave to the court below to permit amendments to show its jurisdiction, but it has no power to permit such amendments in the appellate court.

6. FRAUDULENT CONVEYANCES—EQUITABLE INTEREST.
A conveyance by a debtor of its leviable equitable interest in land with intent and in furtherance of a scheme to induce parties to become its creditors, and to delay and defraud them, is voidable at the election of existing and subsequent creditors.

7. SAME—USE OF LEGAL INSTRUMENTS TO EFFECT. NO BAR TO AVOIDANCE.
The use of sheriff's deeds and other legal instruments to effect a fraudulent conveyance of property by a debtor is no bar to its avoidance.

8. SAME—SCHEME TO DEFRAUD.
A bank devised the scheme to run the title to all the real estate upon which it foreclosed mortgages into a realty corporation whose stock it held, and to take notes and mortgages upon the real estate for the amounts due by the former mortgagors. The result was that it procured notes of the realty corporation, which was insolvent, for $230,000, many of which were partially secured by mortgages; and it carried these notes and the worthless stock of the realty company, $100,000 in amount, at par, among its assets. *Held*, that the plan disclosed an intent to obtain creditors by deceit and to defraud them, and sheriff's deeds and conveyances made in furtherance of the scheme were voidable for fraud at the election of the creditors.

9. TRUSTS—EXPRESS FORBID INFERENCE OF IMPLIED WITH DIFFERENT TERMS.
An express trust prohibits the inference from the same transaction of an implied trust on different terms. Where parties agree that property

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* 1. Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 241; Mason v. Dullaghan, 27 C. C. A. 295.

shall be transferred to and held by a corporation under the express trust which the relation of a corporation to its creditors and stockholders creates, and it is transferred to the corporation accordingly, they are estopped from claiming that an implied trust of different terms arose from the transaction, and no such trust can be inferred between them.

10. CORPORATION — SOLE STOCKHOLDER AND CREDITOR CANNOT IGNORE ITS EXISTENCE.
A corporation is an entity distinct from its stockholders and creditors, and a sole creditor and stockholder of a corporation cannot ignore its existence, and convey, incumber, or deal with its property without the action of the corporation.

11. GENERAL ASSIGNMENT—ASSIGNEES CANNOT AVOID CONVEYANCES FRAUDULENT AS TO CREDITORS.
A general assignment for the benefit of creditors under the laws of Missouri and under the common law does not vest in the assignees the rights of creditors to avoid the fraudulent conveyances of the assignor. It conveys what the assignor has, but nothing that he has transferred by conveyances good against him, but fraudulent as to his creditors.

12. GENERAL ASSIGNMENT—EFFECT IN ANOTHER STATE.
A general assignment made in one state (Missouri) vests no better title in, and grants no greater power or rights to the assignees in, another state (Kansas), than it gave them in the state where it was made.

13. SUBSEQUENT ATTACHMENTS OF REAL ESTATE FRAUDULENTLY CONVEYED SUPERIOR TO TITLE OF ASSIGNEES UNDER LAWS OF MISSOURI AND COMMON LAW.
Subsequent attachments of real estate fraudulently conveyed by an assignor by deeds good against him are superior in law and in equity to the title of assignees under a general assignment under the laws of Missouri and the common law.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

George B. Watson, Silas Porter, and Junius W. Jenkins (A. E. Watson and Henry McGrew, on the brief), for appellants.

Frank Hagerman and L. W. Keplinger (O. L. Miller, C. F. Hutchings, William Warner, O. H. Dean, W. D. McLeod, Hale Holden, and Albert H. Horton, on the briefs), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree in favor of the complainants, certain creditors of an insolvent bank, which avoids liens of attaching creditors upon real estate in the state of Kansas, and impresses a trust in favor of all the creditors of the bank upon it under a general assignment which the bank made in the state of Missouri.

The only ground of the jurisdiction of the circuit court was diversity of citizenship. One of the defendants, an attaching creditor, was a citizen of the territory of Oklahoma. A national court has no jurisdiction of a suit or controversy between a citizen of a state and a citizen of a territory, and the joinder or association of citizens of states with the respective parties to such a suit or controversy does not re-

¶ 11. See Assignments for Benefit of Creditors, vol. 4, Cent. Dig. §§ 520, 752.

move the fatal objection. City of New Orleans v. Winter, 1 Wheat. 91, 95, 4 L. Ed. 44; Barney v. Baltimore City, 6 Wall. 280, 287, 18 L. Ed. 825. Counsel for complainants are met at the opening of their argument in support of their decree by this conceded fact, and this indisputable principle of law, and they devote more than 20 pages of their printed briefs to attempts to escape from the logical result to which they lead. They say that the federal courts have jurisdiction of controversies between citizens of different states, and hence of any controversy between citizens of different states; that in this suit there were a number of separate controversies between citizens of different states, in which Jeoffroy, the citizen of Oklahoma, had no interest, because his attachment was late, and subject to prior attachments, one of which, for example, had ripened into a sale and a sheriff's deed of certain parts of the real estate he attached before this suit was instituted, so that Jeoffroy had no interest in the controversy between the complainants and the defendant who held this sheriff's deed. But this argument confounds interests in property with controversies. When this suit was commenced the defendants had different interests in the real estate which they had attached. One of them had a sheriff's deed of certain lots on which Jeoffroy and some of the other attaching creditors had no lien which could be successfully maintained against the title under that deed. But the controversy between the complainants and every one of the attaching creditors was, after all, one and the same. It was whether or not the general assignment in Missouri created a trust in the attached real estate in Kansas in favor of all the creditors of the assignor, which was superior in equity to the liens of the attachments. If it did, every attachment was voidable at the suit of the complainants; and, if it did not, every attachment was impregnable to their attack. Hence there was a single controversy, a single and common point of litigation in this suit, the decision of which would terminate the litigation and settle the rights of all the parties to it. And there can be no misjoinder of causes of action in equity in any bill which presents a common point of litigation which affects the entire subject-matter, and the decision of which will settle the rights of all the parties to the suit. Kelley v. Boettcher, 29 C. C. A. 14, 23, 85 Fed. 55, 64; Hayden v. Thompson, 36 U. S. App. 361, 373, 17 C. C. A. 592, 598, 71 Fed. 60, 67; Chaffin v. Hull (C. C.) 39 Fed. 887; Brinkerhoff v. Brown, 6 Johns. Ch. 139; Fellows v. Fellows, 4 Cow. 682, 700, 702, 15 Am. Dec. 412; Prentice v. Storage Co., 19 U. S. App. 100, 107, 7 C. C. A. 293, 296, 58 Fed. 437, 441; Brown v. Safe Deposit Co., 128 U. S. 403, 412, 9 Sup. Ct. 127, 32 L. Ed. 468; Addison v. Walker, 4 Younge & C. Ch. 442; Parr v. Attorney General, 8 Clark & F. 409, 435; Worthy v. Johnson, 8 Ga. 236. If Jeoffroy had been a nominal party merely, his presence might have been disregarded, and the jurisdiction of the court below might have been maintained. Wormley v. Wormley, 8 Wheat. 421, 451, 5 L. Ed. 651. But he was a real party to the controversy, and its decision was as vital to the determination of his rights and those of the complainants as it was to the determination of the rights of any of the other attaching creditors and those of the complainants. It may be that the complainants could have reached the merits of a suit in the circuit court against a single attaching cred-

itor, and it is undoubtedly true that they could have accomplished this end by omitting Jeoffroy from their list of defendants, and alleging that his joinder would oust the jurisdiction of the court. 5 Stat. 321; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158. But they did not pursue this course. There was a real controversy between them and this citizen of the territory of Oklahoma. They brought a suit against him which involved this controversy. They joined other parties (with whom they had the same controversy) with him as defendants. He still remained, however, a real and a proper party to the suit; and the presence of a proper party to a suit involving a real controversy between him and the opposing parties, over which the federal court has no jurisdiction, is as fatal to the power of that court to hear and determine the issues which the suit involves as the presence of an indispensable party under similar circumstances. Pittsburg, C. & St. L. R. Co. v. Baltimore & O. R. Co., 10 C. C. A. 20, 27, 28, 61 Fed. 705, 711, 712.

Counsel challenge the fact that Jeoffroy was a party to the suit when the decree was rendered. They insist that jurisdiction should be presumed, and that the fact that the bill was repeatedly amended without naming him as a defendant raises the presumption that he was dismissed from the suit before the entry of the decree. When the judgment of a federal court is attacked collaterally, the presumption of jurisdiction, as well as every other presumption which upholds the judgments of courts of general jurisdiction, accompanies it. Evers v. Watson, 156 U. S. 527, 531–533, 15 Sup. Ct. 430, 39 L. Ed. 520. But it is not so when the judgment or decree is directly assailed by a writ of error or an appeal to review it. In that case the burden is on him who would sustain it to show from the record that the court below had jurisdiction of the subject-matter of, and the parties to, the litigation. And where the jurisdiction of the circuit court depends upon diversity of citizenship, it fails, unless the necessary citizenship affirmatively appears in the record. Grace v. Insurance Co., 109 U. S. 278, 283, 3 Sup. Ct. 207, 27 L. Ed. 932; Robertson v. Cease, 97 U. S. 646, 24 L. Ed. 1057; Railroad Co. v. Swan, 111 U. S. 379, 382, 4 Sup. Ct. 510, 28 L. Ed. 462. It may be that in the absence of other evidence a presumption that a defendant was dismissed from the suit before the decree was rendered arises from the filing of an amended bill without again naming him as a defendant. Hicklin v. Marco, 56 Fed. 549, 555, 6 C. C. A. 10, 16. But there is no room for any such presumption in this case, because the facts that Jeoffroy was made a party defendant to this suit by the complainants, that he appeared and answered the bill, and that the question of his citizenship was one of the issues in the case are conclusively established by the record; and there is no evidence that he was ever dismissed, or that any attempt was ever made to dismiss him, from the suit before the appeal to this court was perfected. There was an averment in the bill that Jeoffroy was a citizen of Kansas. He answered that he was not a citizen of Kansas, but that he was a citizen of the territory of Oklahoma. The complainants thereupon stipulated that Jeoffroy was at the commencement of the suit, and continued to be, a citizen, resident, and inhabitant of the territory of Oklahoma, and upon this stipulation the case went

to final hearing and decree. Now, in the face of this conclusive proof the only evidence which complainants have to offer to establish a dismissal of Jeoffroy before the decree was rendered is that in some of the amendments to their bill which they were permitted to interpose after the stipulation was made, and before the decree was entered, they used the term "et al." in the title of the cause to represent all the parties to it except the plaintiff and the defendant who were first named in the original bill. However desirable it may be to sustain the jurisdiction of the court below, and to avoid the delay and expense of another trial of the issues presented in this case, there is no escape from the established fact that Jeoffroy, a citizen of a territory, was an actual and proper party to this suit when it was commenced and when the decree was rendered, or from the resultant conclusion that on account of this fact the circuit court never had any jurisdiction of this case, without an utter disregard of the uncontradicted evidence, or a defiant violation of an indisputable principle of law. The result is that the decree below was rendered by a court which had no jurisdiction of the suit, and it cannot be sustained.

Counsel for the complainants did not fail to foresee the possibility of this result, and, with a prudence and prescience that would have been admirable if they had been early, they have, since the appeal was taken, procured an assignment of the claim of Jeoffroy to Edward C. Wright, and have moved this court, on behalf of Wright and of the complainants, to amend the record by dismissing the case as to Jeoffroy. It is earnestly contended that inasmuch as the complainants might have dismissed as to Jeoffroy, and in that way have saved the jurisdiction of the circuit court, at any time before the decree was rendered (Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America, 82 Fed. 124, 128, 27 C. C. A. 73, 77), this court may either permit them to do so here, or may reverse the decree and remand the case to the circuit court, with instructions to that court to permit the dismissal and to reinstate the decree against the remaining defendants. An appellate court has no power to allow such an amendment, but in cases in which there has been no issue regarding citizenship in the court below, and through the mistake or inadvertence of one of the parties the requisite averments have not been made, it may reverse and remand the case, with leave to the court below to permit their insertion in the proper pleading by an amendment. Insurance Co. v. Rhoads, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. Ed. 380; Morgan v. Gay, 19 Wall. 81, 83, 22 L. Ed. 100; Robertson v. Cease, 97 U. S. 646, 651, 24 L. Ed. 1057; Railway Co. v. Newcom, 6 C. C. A. 172, 173, 56 Fed. 951, 952; Railroad Co. v. Nichols, 29 C. C. A. 464, 85 Fed. 869. The suit in hand is not a case of this class. There was no mistake or inadvertence in the pleading or proof; no lack of an issue regarding citizenship. The issue of the citizenship of Jeoffroy was squarely presented by the pleadings. It was settled by the stipulation of the parties, and the issue of law which it presented was necessarily decided by the court when it entered the decree. On the record at the final hearing below, therefore, the defendants were entitled to a decree dismissing the bill for want of jurisdiction upon an issue of fact that had been settled by the stipulation of the parties. On that record

the defendants are entitled in this court to a reversal of the decree against them, and to a direction to the court below to dismiss the bill because it had no jurisdiction of the controversy in, or of the parties to, the suit. It does not seem probable that this court has the power to permit the complainants to withdraw at this late day the issue on which they have been defeated, and to make a new and different case, of which the circuit court may acquire jurisdiction. But the gravity of the case, and the obvious importance to all the parties to this suit of reaching an end to this litigation, plead with great force for the exercise of this power if it exists, while, on the other hand, it is certain that it should not be exerted unless the complainants have clearly established their right to a decree on the merits of this case, as well as the further fact that they have been guilty of no unreasonable delay in presenting their application to dismiss the troublesome defendant, and to make a new case, of which the circuit court may obtain jurisdiction. In view of this state of the case, and to the end that, if possible, a just and speedy conclusion of this controversy may be reached, it has been thought wise to examine the equitable rights of the respective parties to this suit in the land which is the subject of the controversy, as this record discloses them, and to state the conclusion of this court regarding them, and the reasons which control its opinion.

The property in dispute consists of about 300 lots in Kansas City, in the state of Kansas. The time when the rights of the respective parties to this suit in this property became fixed was between July 9, 1893, and August 12, 1893. During this time the Corbin Investment Company, a corporation, was the owner of 185 of the lots, and the title to them was of record in its name. Nearly all the remaining lots were owned by the Realty Investment Company, another corporation, and the title to them stood of record in its name, subject to a mortgage for about $10,000 to the Kansas City Safe Deposit & Savings Bank, a corporation. This bank owned the stock of the other two corporations. On July 10, 1893, the bank, which was organized under the laws of the state of Missouri, made a general assignment, under and in accordance with the laws of that state, to two assignees, who subsequently resigned their trust and were succeeded by Howard M. Holden, one of the defendants in this suit. Between August 5, 1893, and August 12, 1893, the defendant Archie E. Watson and 51 other creditors of the bank, with knowledge of the previous assignment, attached the lots in the state of Kansas as the real estate of the bank, on the ground that the bank was not a resident of that state. On April 27, 1898, the complainants Frederick G. Bonfils and three other creditors of the bank exhibited this bill in equity to avoid the attachments, and subject the lots in Kansas to a sale and disposition for the benefit of all the creditors of the bank, on the theory that the general assignment of July 10, 1893, created a trust in this property in favor of all the creditors, which was superior in equity to the liens by attachment which the defendants had fastened upon them at law under the statutes of Kansas. The ultimate question in the case is, did the general assignment create any such trust that was superior in equity to the legal liens of the attachments?

Many and various have been the proceedings in and out of court

relating to the claims of these parties since August, 1893. These proceedings have been examined. They contain nothing which has avoided or weakened the rights acquired in that month by the defendants through the levy of their attachments.

In a suit in one of the courts of the state of Kansas, Howard M. Holden, who had been appointed successor of the assignees of the bank by a court of Missouri, procured a decree by default against the Realty Investment Company and the Corbin Investment Company to the effect that they held the title to the lots in controversy in trust for him; but that decree expressly provided that nothing therein should determine any issues between Holden and the attaching creditors, and the supreme court of Kansas subsequently held in the same suit that Holden had no legal or equitable interest in the property as against those creditors. Watson v. Holden, 58 Kan. 657, 50 Pac. 883.

Under section 532 of the Civil Code of Kansas (section 4631, Gen. St. Kan. 1889), a stranger to an attachment suit, whose property is levied upon as that of the defendant therein, may lawfully appear in that action and obtain a discharge of the property from the attachment, by a motion, on the ground that he is, and the defendant is not, the owner of it. Long v. Murphy, 27 Kan. 375, 381; Boot & Shoe Co. v. August, 51 Kan. 53, 57, 32 Pac. 635. The Realty Company and the Corbin Company appeared in the various actions in the court of Kansas brought by the attaching creditors, and moved that court to discharge the attachments on the lots which stood in their names, respectively, on the ground that they were the respective owners thereof, and that the bank had no attachable interest therein, and that court denied their motions. While this decision does not render the question it determined res adjudicata (Watson v. Jackson, 24 Kan. 442; Sponenbarger v. Lemert, 23 Kan. 55), it was a judicial determination of a question of which that court had jurisdiction; and it is not only a persuasive decision of the question of law there involved, but it brings with it the presumption that, if there was any state of facts which would have warranted that decision, proof of that state of facts was made at the hearing of the motions. King v. McAndrews, 50 C. C. A. 29, 111 Fed. 860, 866. The attachments, therefore, come to this court sustained by the conceded fact that they were issued on a lawful ground under the statutes of Kansas, and by the decision of the court of Kansas which issued them, in a judicial controversy before it between the attaching creditors and the two corporations that had the legal title to the lots,—a controversy of which that court had jurisdiction, and which the law required it to decide,—that the bank had an attachable interest in the lots when the attachments were levied. The contention of the complainants is that this conclusion was erroneous, because the bank had conveyed the property away by the general assignment, and had created a trust in it for the benefit of all the creditors of the bank before the attachments were made, so that no attachable interest remained in the bank. Do the facts of the case sustain this position?

Some time in or prior to the year 1891 the bank devised the scheme of running the title to real estate upon which it foreclosed mortgages into the Realty Company, and of taking from it notes secured by mort-

gages upon this real property to the amount that the former mortgagors of it owed the bank. The net result of the execution of this plan was that when the bank failed, in July, 1893, the Realty Company owed it $330,000, a large part of which was partially secured by mortgages on real estate which it owned, and it was insolvent. The bank, however, carried these notes and the stock of the Realty Company, which amounted to $100,000, among its assets at their par value. On September 25, 1891, the bank recovered a judgment in foreclosure against the lots in question in this suit for $90,445. Pursuant to the scheme which has been described, it ran the title to this real estate into the Realty Company at the sale under this foreclosure in May, 1892, by means of bids at the sale, sheriff's deeds, and conveyances from those who had received them; and the Realty Company gave its notes and a mortgage on this property to the bank for $81,000, the amount still due from the former mortgagor, although the lots were not worth more than $63,000. In May, 1893, the bank caused the Corbin Investment Company to be organized, took its stock of the par value of $100,000, and gave it credit on the books of the bank to that amount. Thereupon at the request of the bank the Realty Company conveyed 185 of the lots in controversy to the Corbin Company. The Corbin Company checked $79,000 of its credit over to the Realty Company, and the bank released the 185 lots from the lien of its mortgage, and credited the check for $79,000 which the Realty Company turned over to it on the latter's mortgage for $81,000, thereby reducing the debt secured by it to about $10,000.

If the bank had been free from debt and from the intention to contract debts, there was nothing in all this which it might not lawfully have done. There was nothing illegal or immoral in the transactions between the bank and the Realty Company and the Corbin Company, as long as they alone were considered. It was perfectly competent for the bank to cause its equitable interest in this property to be conveyed to the Realty Company, and to take the latter's notes and mortgage for $81,000 therefor, and that transaction vested in the Realty Company an impregnable title to the land, and in the bank a perfect title to the notes and mortgage, as between themselves. In the same way the conveyance of the 185 lots by the Realty Company to the Corbin Company was unassailable by either of the three parties to it, because each obtained for that with which it parted the consideration it agreed to accept. The Corbin Company delivered its stock to the bank for an agreed credit of $100,000. The Realty Company conveyed the lots for a check for $79,000 against this credit, and the bank credited $79,000 on the notes and mortgage of the Realty Company in consideration of the assignment of this check. There was no fraud, deceit, misrepresentation, or misunderstanding concerning these transactions between these three parties; and the title to the 185 lots in the Corbin Company and to the remaining lots in the Realty Company was vested thereby, and made impregnable to attack by either of them.

But these transactions take on a different hue when viewed from the standpoint of a creditor of the bank. In 1891 and 1892, after the judgment of foreclosure was rendered, and before the sale under it, the

bank was the actual and the apparent owner of an equitable interest in this property equal in value to the worth of the land. That interest was subject to attachment and execution under the laws of Kansas. Shanks v. Simon, 57 Kan. 385, 391, 46 Pac. 774; Watson v. Holden, 58 Kan. 657, 661, 50 Pac. 883. Every conveyance of lands made with intent to hinder, delay, or defraud creditors is voidable at their election (1 Gen. St. Kan. 1889, § 3162), and the fact that sheriff's deeds or other legal instruments are used to perpetrate the fraud is no bar to a redress of the injury it inflicts (Decker v. Decker, 108 N. Y. 128, 15 N. E. 307). Now, while the scheme pursuant to which the title to these lots was vested in the Realty Company was legitimate and innocent so long as the three corporations alone were considered, it was a patent fraud upon both the existing and the subsequent creditors of the bank. It was so contrived as to defraud them in two ways: In the first place, it tended to induce parties to become and to continue creditors of the bank by making it appear to them that the bank had bills receivable to the amount of over $300,000, which really had none of the valuable attributes of bills receivable, but simply represented the right of the bank to procure title to real estate of far less value by foreclosure. Carrying the worthless stock of the Realty Company among the assets of the bank at par had a like effect, and this act throws a strong light on the intent which inspired the scheme. In the second place, it ran the equitable interest of the bank in the real estate subject to its foreclosures, which was open to the levies of its creditors, and which it was its right and its duty to turn into a legal title in itself, so that it would continue to be subject to their executions, into a third party, subject to a mortgage to itself, so that a creditor must avoid the conveyances and mortgages before he can realize the full benefit of his levy upon it. Why did not the bank take the title to its foreclosed real estate in its own name, refuse to take notes and mortgages upon it from third parties which really represented nothing but the right to foreclose new mortgages upon it, and tell the truth? The question is susceptible of but one true answer. It was because such a course would have prevented people from becoming or continuing its creditors, and would have subjected its land to the immediate payment of its debts. The inevitable effect of the scheme which the bank concocted and practiced was to deceive and defraud both the creditors which it then had, and those which it subsequently procured. The legal presumption is that it intended the necessary consequences of its acts. This presumption is strengthened by the evidence which has been reviewed, and by more which points to the same conclusion, which we shall not stop to recite, until no doubt is left that the title to this property was vested in the Realty Company in the operation of a plan, and with the intent to deceive, hinder, and defraud the existing and subsequent creditors of the bank: and that is the conclusion of this court. The Realty Company, which acquired this title, and the Corbin Company, which succeeded to it, were aware of this scheme and purpose, and participated in their execution. The result is that the sheriff's deeds and conveyances by which the equitable interest of the bank was transferred to the Realty Company, and the subsequent conveyance of the 185 lots to the Corbin Company, were voidable at

the election of the creditors of the bank, and that equitable interest was attachable and leviable at their suit, because the conveyances by which it passed from the bank to the other corporations were voidable for fraud in the face of their attachments.

In reaching this conclusion, the objection of counsel for the complainants that the fraud of the bank was not sufficiently pleaded by the defendants to permit its consideration has received attention. But it must be overruled, because the answers contain ample notice that this fraud would be relied upon by the defendants, because many of the facts which disclose it were stipulated into the record, and because in the pursuit of this inquiry (an inquiry whether or not this court should exercise its discretion to permit the complainants to mend their hold) the salient facts which have been reviewed, and which go so far to show the merits of the defense, ought not to be ignored.

The real estate was therefore attachable in August, 1893, because the conveyances by which the interest of the bank had passed to the two realty companies, though valid between them, were void for fraud as against attaching creditors. The defendant creditors availed themselves of this fact and attached the property. Now, where is the superior equity of the complainants and of the other contract creditors, who made no attachments and took no steps to avoid these conveyances until they brought this suit in 1898? They say that the general assignment of July 10, 1893, created a trust in their favor prior and superior to the attachments. In discussing this contention, it will be conceded that the complainants have all the rights, and that they may avail themselves of all the equities, which vested in the original assignees. On July 10, 1893, when this assignment was made, the title to these lots had been vested in the Realty Company and the Corbin Investment Company by conveyances which the bank had caused to be made for considerations which it had agreed to accept, and which it had received, and that title and those conveyances were valid and unassailable by either of those corporations. The realty companies owned the lots, and the bank owned their stock, and the notes of one of them for about $10,000, secured by a mortgage on some of the lots. The bank made an assignment of all of its property. What did that assignment convey? The answer does not seem difficult. It conveyed the stock of the corporations, the notes, and the mortgage; but it did not convey the real estate, or any other interest in it than that evidenced by the notes, the mortgage, and the stock. Suppose the two realty companies had made an assignment of all their property to another assignee at the same time that the assignment was made by the bank; the assignee of the latter companies would certainly have taken the lots, and the assignees of the bank would not, because the title to them was in those companies, and they alone could convey it. The fact that the bank alone assigned cannot change the result. It did not have, and therefore it could not and did not convey, the lots, or any interest in them that was not evidenced by the stock, the notes, and the mortgage which it held.

It is conceded that the bank caused the two realty corporations to be organized for the purpose of handling its real estate through them, that it placed the title to it in their names, and that it was practically

the sole creditor and the sole stockholder of the two corporations. In view of these facts, counsel for the complainants persistently urge that the real estate was held by the two companies in trust for the bank, that the bank was the equitable owner of the land, and that its assignment conveyed this equitable ownership in trust for its creditors. The two corporations did undoubtedly hold the title to the land in trust for the bank, and the bank was in equity the owner of it; but how did they hold it in trust, and what were the terms that conditioned the equitable ownership of the bank? They held the land and its title in trust for the bank on the same terms and subject to the same rules of law that every corporation holds its property in trust for its creditors and stockholders, and on no other terms; and the bank had the same equitable ownership in this real estate that the creditors and stockholders of any corporation have in its property, and no other. The evidence in this record is conclusive that these corporations agreed that the terms of the trust on which the two realty companies should hold the land for the bank were the terms which conditioned the legal relation of a corporation to its creditors and stockholders, and that they executed that agreement by issuing and delivering to the bank the notes and stock of the corporations, and by establishing between them and the bank the legal relation of corporations to their creditor and stockholder. There is no evidence that these corporations ever consented or agreed that the land should be held on any other terms or subject to any other trust, and, as the law and the relation of the two realty companies to their stockholder and creditor which these corporations purposely established make the terms of the trust on which it was held express and definite, no implied trust contradicting or varying those terms could have arisen. Where competent parties advisedly agree upon and express the terms of a trust on which property shall be held by some of them, and title to the property is changed accordingly, they are thereby estopped from claiming that an implied trust on different terms arose from the transaction, and as between them no such trust can be inferred.

Nor could the bank disregard or ignore the existence of these realty corporations, and convey their title to this land. It is one thing to create a corporation, and another to dissolve it. It is one thing to vest title to property in a corporation. It is another to devest it. Any one may deed land to a corporation, but no one but the corporation can reconvey it. At the time this assignment was made the title to these lots was in the realty corporations. The bank had no title to them, and no equitable interest in them, except that of a creditor and a stockholder of the corporations that held them. Its deed could not convey and its mortgage could not incumber the title to this land. The corporations which held it were existing entities, as distinct and separate from their stockholder and creditor as is one individual from another. They, and they alone, had the power to sell, convey, mortgage, and deal with the lots they held. The charters of the corporations and the law of the land denied their stockholder and creditor this privilege. The limit of its power was to convey the notes and the stock of the corporations which it owned. Insurance Co. v. Bohn, 12 C. C. A. 531, 535, 65 Fed. 165, 169, 27 L. R. A. 614; Cook, Stocks

& S. § 6632; Bank v. Allen, 90 Fed. 545, 559, 560, 33 C. C. A. 167, 175, 176; Riggs v. Insurance Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716; Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; McCormick v. Insurance Co., 66 Cal. 311, 5 Pac. 617; Phillips v. Insurance Co., 20 Ohio, 174, 184.

The assignment under which complainants assert their alleged equity was made in the state of Missouri, in accordance with the laws of that state. The stream cannot rise higher than its source, and this assignment vested no better title in, and granted no greater power or rights to, the assignees in the state of Kansas than it gave them in the state of Missouri, pursuant to whose laws it was executed. Limekiller v. Railroad Co., 33 Kan. 83, 89, 5 Pac. 401, 52 Am. Rep. 523. An assignment at common law and under the statutes of Missouri does not vest in the assignee the rights of creditors to avoid the fraudulent conveyances of the grantor. It conveys for the purpose of the trust what the assignor has, only, but nothing which he has transferred or caused to be transferred to others by conveyances that are good against him, but fraudulent as to his creditors. Harris v. Harris, 25 Mo. App. 496, 502; Roan v. Winn, 93 Mo. 503, 511, 4 S. W. 736.

The sum of the whole matter is that the equitable interest which the bank held in these lots in 1891 had in July and August, 1893, been vested in the Realty Company and the Corbin Company by conveyances and transactions which were good against the bank and its assignees (Zoll v. Soper, 75 Mo. 460; Jackman v. Robinson, 64 Mo. 289; Merry v. Fremon, 44 Mo. 518; Harris v. Harris, 25 Mo. App. 496; Roan v. Winn, 93 Mo. 503, 4 S. W. 736), but which were voidable for fraud at the election of the creditors of the bank. The assignment did not convey this equitable interest to the assignees through whom complainants assert their supposed equity, because the bank had already caused it to be transferred to the two realty companies. The conveyances to these realty companies were voidable, not void. They were impregnable to attack by either of the three corporations. They were valid as to all the creditors of the bank who did not seasonably elect and act to avoid them, but they were voidable for fraud by those who did so elect and act. Johnson v. Trust Co., 43 C. C. A. 458, 461, 104 Fed. 174, 177. The attaching creditors elected to avoid them, and to fasten their liens upon this equitable interest of the bank in August, 1893. The complainants have failed to convince that they have any equity superior to these lawful liens, for two reasons: In the first place, they have no greater rights or power than the original assignees, and the original assignees had no greater rights or power than the bank. None of them ever had any right or power to avoid the fraudulent conveyances, and the attachments were as valid against the assignees and these complainants as they would have been against the bank if it had never made an assignment. In the second place, the fraudulent conveyances were not void, but voidable at the election of each creditor. The attaching creditors elected to avoid them, and fastened their liens upon the property in July, 1893. After they had succeeded through a fierce litigation, that is still protracted, and about five years after the attachments were levied, the complainants disclosed their election, by filing this bill, to share in the proceeds of the property.

which the attaching creditors had seized and held during all this time. Laches raises no equity superior to that which diligence creates.

Many proceedings are portrayed in the record in this case, and many questions of law have been discussed in the briefs of counsel, to which no reference has been made. They have all been examined, but there is nothing in any of them which, in our opinion, will ever lead to a different result from that at which we have arrived. Reference has been made to the salient facts and the controlling rules of law which must ultimately measure the rights of these parties, and, as there is no equity in the bill of the complainants, their application for leave to dismiss in the court below as to the defendant Jeoffroy, and to amend their record so that the circuit court may acquire jurisdiction, must be denied, and the bill must be dismissed.

The decree below is accordingly reversed, the case is remanded to the circuit court, with directions to dismiss the bill for want of jurisdiction, and to make such orders and take such proceedings as will, as far as practicable, restore to the attaching creditors all property which they have been prevented from receiving or have been deprived of by the proceedings of that court or its officers in this suit. And it is so ordered.

CALDWELL, Circuit Judge (dissenting). The supreme court of the United States has divided parties, for purposes of jurisdiction in the federal courts, into formal, necessary, and indispensable. Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Alexander v. Horner, 1 McCrary, 634, Fed. Cas. No. 169. As these terms are defined by that court, Jeoffroy, the citizen of Oklahoma territory, was not an indispensable party in this case, and he might have been dismissed out of the suit, and the court would have had jurisdiction of the remaining parties and the subject-matter. It was error to proceed to a final decree while he remained a party to the record. But when it is made to appear, and is not disputed, that he no longer has any interest in the subject-matter, enters a disclaimer, and asks to be dismissed out of the suit, and the plaintiffs in the suit join in that motion, this court ought to grant the motion, or disregard the technical error and proceed to a decision of the cause on its merits. The cause ought not be reversed and remanded for that now mere formal error, and the parties be compelled to bring the case here a second time for a decision on its merits. On the merits, the bill ought to be dismissed for want of equity.

NORTH AMERICAN RY. CONST. CO. v. R. E. McMATH SURVEYING CO.

(Circuit Court of Appeals, Seventh Circuit. May 6, 1902.)

No. 624.

1. CONTRACT FOR RAILROAD CONSTRUCTION—ACTION TO RECOVER FOR EXTRA WORK—EFFECT OF PROVISION MAKING ENGINEER ARBITER.
In an action to recover for extra work done in the construction of a railroad under a contract which made the engineer arbiter of all differences between the parties, and his decision conclusive upon every question relative to the execution of the contract and the price to be

¶ 1. See Contracts, vol. 11, Cent. Dig. §§ 1300, 1310, 1313.

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McKENZIE vs. MURPHY.

An alien domiciled in this state, being a householder or head of a family, is entitled to the exemption of his homestead from sale on execution.

Unless the terms of a statute are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent. (*Patterson vs. Thompson*, 23 Ark.)

The word citizen is often used as meaning only an inhabitant, a resident of a town, state or county, without any implication of political or civil privileges: and such is the meaning of the word in the homestead law.

Error to Phillips Circuit Court.

Hon. M. W. ALEXANDER, Circuit Judge.

GARLAND & RANDOLPH for the plaintiff

No person but a free white citizen of this state can claim the benefit of the homestead exemption. *Sec.* 29, *ch.* 68, *Gould's Digest.*

We maintain that no one is a citizen unless he is a citizen of the United States. This conclusion is warranted by the provisions of chapter 9, Gould's Digest, which extended to aliens, or persons not citizens of the United States, rights and privileges, which they were already entitled to if citizens of the state. See *secs.* 1, 5. *bill of rights*; *State vs. Penney*, 5 *Eng.* 621; *secs.* 2, 4, 6, *art.* 3, *State Const.* The definition of the term citizen, would appear to clear up all doubt on the question. It is "one who is in the enjoyment of all the rights to which the people are entitled, and bound to fulfill the duties to which they are subject." *Amy vs. Smith*, 1 *Litt. R.*, 334; *Bouvier's Inst.*, *vol.* 1, *p.* 64. To obtain the benefit of the act the party must show that he is within all its provisions: that he is *free*, *white*, *a citizen of the state*, *a householder or the head of a family*, and *a resident* on the homestead claimed.

The court should have excluded the certificate of the clerk that

Murphy was naturalized. It was not competent evidence of the fact. *Miller vs. Reinhart*, 18 *Geo. R.*, 239; 1 *Williams* (*Vern.*) 621; 2 *Jones* (*N. C.*) *Law R.*, 368.

POPE & NEWTON, *contra*.

The certificate of the clerk of Phillips circuit court, though somewhat informal, was sufficient evidence that Murphy had been fully and properly admitted to citizenship by a court of competent jurisdiction; and was conclusive as to all the facts recited therein or necessarily implied. *Spratt vs. Spratt*, 4 *Pet. Rep.*, 407; *Campbell vs. Gordon and wife*, 2 *Cond. Rep.*, 343; *Towle's case*, 5 *Leigh*, 743; *State vs. Penny*, 10 *Ark.*, 621.

By "citizen" we generally understand a person not only domiciled within a state, but entitled to all the privileges and franchises thereof. But this is not the only sense, even in strict law, in which it is used. In ordinary use, it is frequently taken to mean the residents of a place, and so in law the word means nothing more than domicil: 2 *Cranch.*, 64; 7 *Cranch.*, 308; 8 *Cranch.*, 335; 2 *Gal. C. C. R.*, 268; 6 *Hall's Amer. Law Jour.*

Citizenship of the United States is not necessary to constitute one a citizen of a state. Residence determines state citizenship as distinguished from that of the United States. See *Clark vs. Clark*, 5 *Mason, C. C. R.*, 70; *Cooper's Lessee vs. Galbrath*, 3 *Wash. C. C. R.*, 546. The same distinction is taken in the constitution and laws of this state. *Art.* 4, *sec.* 2, *Cons.*; *ib. secs.* 20, 21, 22; *art.* 2, *sec.* 4. *Gould's Dig.*, *ch.* 9: It is submitted, that it is not necessary, to entitle the defendant to avail himself of the homestead exemption, to show that he was, or is a citizen of the United States. Nothing was necessary but to show that he was a free white citizen of the state. Residence, with the intention to make this his permanent home, constituted him a citizen within the meaning of the act.

Mr. Justice FAIRCHILD delivered the opinion of the court.

This case was tried in the circut court of Phillips county at its

May term, 1860, and was an action of ejectment by the plaintiff in error, against the defendant in error, for a town lot in Helena, long occupied by the defendant, a householder and head of a family, and a free white person; but the question between the parties was, in the court below, and is, in this court, whether the defendant is entitled to the benefit of the homestead exemption act, that would reserve the town lot, the property in suit, from execution, if the defendant, in addition to the characteristics noted, was a citizen of this state. To show this, the defendant was permitted to read in evidence a certificate of naturalization which was not a copy of the judgment of a court, but a statement by the clerk, that, by act of the court, the defendant was admitted to be a citizen of the United States. This alleged error of the circuit court does not affect the validity of its judgment, if another position taken by the defendant and declared by the court to be law and applicable to the case, be correct: which is, that the law in question used the phrase, citizen of the state, not in the political sense of citizenship by the laws of the United States, but simply to signify a resident, an inhabitant of the state. For, if this be the right construction of the statute, the defendant was entitled to judgment without any such testimony as his certificate of naturalization would have afforded, if a legal instrument of evidence, and the admission in evidence of the certificate, though not legal to prove the order of naturalization, would not affect a judgment good without any such record.

We are of the opinion that the circuit court well applied the law on the proposition it announced as the law applicable to the case on trial.

The statute, so far as material to the case under consideration, is as follows:

"Every free white citizen of this state, male or female, being a householder, or the head of a family, shall be entitled to a homestead, exempt from sale or execution . . . . not exceeding one hundred and sixty acres of land, or one town or city lot being the residence of such householder or head of a family, with the appurtenances and improvements thereunto belonging.

"The preceding section shall be deemed and construed to exempt such homestead, in the manner aforesaid, during the time it shall be occupied by the widow, or child, or children of any deceased person, who was when living, entitled to the benefits of this act." *Secs.* 29, 30, *ch.* 68, *Gould's Digest.*

The object of the statute, as is plainly to be seen from reading the foregoing sections, was to afford a home to the family of which the citizen, the householder, was the head, irrespective of his liabilities. The statute intended no individual benefit for the head of the family; disconnected from the family, the head of it was entitled to no consideration; but the family, when deprived of its head by death, was to have the protection of the act by holding the land, or town or city lot, upon which the family residence was situated, exempt from execution, so long as either was occupied and used as the residence of the family of which the deceased head was the representative.

Such being the object of the statute, we cannot suppose that the general assembly intended to confer a benefit upon the family of a citizen, native born, or naturalized, which it would deny to that of a domiciliated foreigner, as the one was as likely as the other to need the exemption, and both were in reason and in nature equally entitled to its protection.

An allusion to the facts of this case may afford an illustration of the reasonableness of this conclusion. Murphy, the defendant, was shown, at the trial, to have lived in this state since 1842, except an interval of a few months in New Orleans, in 1850 and 1851, he served as a soldier of the United States for twelve months in its war with Mexico, married in this country, had been the head of a family for ten years, and had a wife and three children at the time of the trial. And by the efforts of both plaintiff and defendant to introduce testimony upon the subject, he endeavored to become naturalized. We cannot perceive any reason why, upon this state of facts, the family of the defendant, or Murphy for it, as its head, is not as fully entitled to the exemption of the statute, as if he had by legal evidence proven a suc-

cessful application for participation in the political rights of citizenship of the United States. Yet, if the words of the statute will not support such a construction, it must not be given. *Branton vs. Brantom*, 23 *Ark.*, 578; but as was said, in construing another statute in an important matter, "unless its terms are entirely free from ambiguity, regard must be had to its known object, to the mischief intended to be provided against, to its general spirit and intent." *Patterson vs. Thompson*, *ante* 55.

The word "citizen" is often used in common conversation and writing, as meaning only an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges; and we think it is so used in our constitution. In *art. IV. sec. 2*, of the constitution of 1836, it is written, "every free white male citizen of the United States, who shall have attained the age of twenty-one years, and who shall have been a citizen of this state six months, shall be deemed a qualified elector." Besides being a citizen of the United States, a voter or elector in this state must have been a citizen of the state for six months, which can mean nothing else than to have been a resident of the state for that time, an inhabitant, as is the term used in sec. 4, of the same article, in prescribing that, as a qualification of a representative, in addition to being a free white male citizen of the United States. Section 4, of the declaration of rights, article II, constitution of 1836, is thus: "That the civil rights, privileges, or capacities of any citizen shall, in no wise, be diminished or enlarged on account of his religion." An alien has civil rights, though he may not have the civil capacities of conferring or holding offices, and can those rights "be diminished or enlarged on account of his religion?" Or, if an attempt is made to do this by statute, or without law, would it not be void by this section? If so, it must be because citizen is used in the sense of resident, or inhabitant, else a wider rule of construction must be adopted so as to hold that an alien is, by implication, free from gain or loss of civil rights on account of religion, because other persons are expressly saved therefrom, which, if good

law, would bad logic. So, in sec. 7, of the same article, "every citizen may freely speak, write and print on any subject—being responsible for the abuse of that liberty." A law prohibiting this to an unnaturalized foreigner, would be in danger of falling, when met by this inviolate privilege to every citizen.

In the United States courts, their jurisdiction dependent upon controversies between citizens of different states, is believed to have been often upheld by the mere fact of residence, without the existence of political citizenship, as being in accordance with the constitutional provision on that subject, though the authorities are not now accessible.

Upon reason, and upon authority, we think the judgment of the circuit court is right, and it is affirmed.

to this ruling the plaintiffs excepted, and the verdict being in favor of the garnishees, appealed.

The cause was argued before LE GRAND, C. J., ECCLESTON and MASON, J.

George W. Dobbin for the appellants.

The evidence shows that Kennedy was a trader or merchant, resident and domiciled in Maryland; and the question is, whether he is a citizen of Maryland within the meaning of the attachment laws of 1795, ch. 56, and 1839, ch. 39, sec. 2? The former act uses the word "*citizen*," and the question is, does it mean only that class of persons who have *all* the rights of *citizenship*, or does it include those also who have a *commercial domicil* but have not the *political* rights of citizens? We say the latter. There is a clearly recognised distinction between citizenship for *commercial* purposes and citizenship for *political* purposes. The former may exist without the latter. *Story's Confl. of Laws*, sec. 48. 1 *Kent's Com.*, 74 to 76. 8 *Term Rep.*, 31, *Wilson vs. Marryat*. 1 *Maule & Selw.*, 726, *Bell vs. Reid*. 3 *Bos. & Pul.*, 113, *McConnell vs. Hector*. 1 *Do.*, 430, *Marryat vs. Wilson*. 3 *Rob. Adm. Rep.*, 12, *The Indian Chief*. 4 *Do.*, 255, *The Danous*, cited at the foot of the case of the *Nayade*. 2 *Cranch*, 120, *The Charming Betsy*. 7 *Do.*, 506, *Livingston vs. Md. Ins. Co.* 8 *Do.*, 278, *The Venus*. 1 *Paine's C. C. Rep.*, 609, *Catlett vs. Pacific Ins. Co.* 5 *Mason*, 70, *Case vs. Clarke*. 3 *Wash. C. C. Rep.*, 553, *Cooper vs. Galbraith*.

The attachment laws must be construed together as a system, (*Dwarris on Statutes*, 699.) The act of 1715, ch. 40, makes no reference to *citizenship;* it says "*inhabitants*," and applies to all parties. The act of 1795, ch. 56, is a *supplement* to the former, and says, that "any person, not being a *citizen* of this State, and not *residing* therein," who shall abscond, &c. The act of 1825, ch. 114, uses the terms, "inhabitant or resident," and so does the act of 1834, ch. 79. These acts show that the words citizen, inhabitant and resident, were used by the legislature as synonymous.

Edward O. Hinkley for the appellees, argued:

1st. That the attachment laws must be construed strictly. Such have been the repeated decisions of our own courts. 1 *H. & McH.*, 504, *Thompson vs. Tawson.* 5 *H. & J.*, 130, *Shivers vs. Wilson.* 6 *Do.*, 446, *Yerby vs. Lackland.* *Ibid.*, 497, *Mandeville vs. Jarrett.* 6 *G. & J.*, 335, *Wever vs. Baltzell.* 10 *Do.*, 274, *Baldwin vs. Neale.* *Ibid.*, 383, *Stone vs. Magruder.*

2nd. The terms, resident, citizen and inhabitant, are not synonymous or convertible. In this country the word *citizen* has reference to the rights of the elective franchise; inhabitant means a permanent resident; and resident one who resides in a place for an indefinite time. These terms must not be confounded; the decisions of our own courts upon our own local and peculiar laws have settled this point, and it cannot now be questioned.

3rd. The acts relating to attachments give no right of attachment against a *resident* absconding, but only against a citizen absconding, or against a *non-resident*. All the previous acts relate to *citizens*, and the legislature knowing this when they passed the new attachment law of 1854, ch. 153, changed the phraseology and used the word "*person*." This is a legislative construction of the previous acts.

4th. If there be any right of attachment as against a *resident absconding*, it is only to be exercised against him as a *non-resident* for the reason, that *eo instanti* a resident who is not a citizen absconds, he becomes a non-resident. But whether there be or not any right of attachment in such a case, it is clear, that in *this case* the attachment cannot be sustained upon the oath of the plaintiffs that the defendant is a citizen, when, in fact, he is not a citizen, for what the plaintiff avers in the oath he must *prove*. 1 *Gill*, 372, *Boarman vs. Israel.* 3 *Do.*, 313, *Barr vs. Perry.* *Ibid.*, 485, *Dickinson vs. Barnes.*

Mason, J., delivered the opinion of this court.

In the present instance the affidavit being in due form, and according to the requirements of the acts of Assembly, makes a

prima facie case in favor of the plaintiffs, and entitles them to their attachment against the defendant, as an absconding debtor. The garnishees in this action seek to rebut the *prima facie* case thus made, by showing, that at the time the defendant absconded he was not a *citizen* of this State; and it is ingeniously argued, that if the case is embraced at all within the operation of the attachment law, it must fall under that branch which provides a remedy against *non-resident debtors*, and not under that which relates to *absconding citizens*, for in the act of *absconding*, the debtor, not having been a citizen, became a *non-resident*. This view of the subject might be unanswerable, if the attachment laws contemplated that a debtor should *leave the State* before he could be said to have *absconded*. But this argument is a *non sequitur*. A party may abscond, and subject himself to the operation of the attachment laws against *absconding debtors*, and still not depart from the limits of the State. In such a case the party could not be said to be a non-resident of the State, and therefore could not be proceeded against by attachment as such. Unless, under such circumstances, he could be treated as an *absconding citizen*, his case would not be covered by the attachment laws at all.

Kennedy, the defendant in this case, it appears, was an unnaturalized Irishman, residing and doing business in Baltimore at the time he absconded, and the question for us to determine is, whether those circumstances are sufficient to constitute him a *citizen* in contemplation of our attachment laws, inasmuch as we have shown that he could not be proceeded against as a *non-resident* debtor?

It certainly never could have been the intention of our legislature to have made such an invidious distinction in favor of *foreign citizens* residing in our State, over our own resident citizens, as to exempt the former from being proceeded against as absconding debtors, while the latter were to be held subject to all the penalties of the attachment laws against debtors absconding to evade their creditors.

We are of the opinion, that as the debtor was residing and doing business in Baltimore, he was, in contemplation of our attachment laws, *a citizen of this State*, and as such, having

actually runaway to avoid his creditors, was liable to be proceeded against as an absconding debtor.

We do not wish to be understood as deciding, that the debtor in this case was a citizen for every purpose and in every sense. A party may not be a citizen for political purposes, and yet be a citizen for commercial or business purposes. In the present instance we simply determine, that Kennedy, for commercial objects, was a *citizen* of this State in contemplation of our attachment system.

For the reasons expressed, the judgment of the court below was erroneous and must be reversed. *Story's Confl. Laws*, sec. 48. 1 *Kent*, 74, 75, 76. *Wilson vs. Murryat*, 8 *Term*, 31, 36. *McConnell vs. Hector*, 3 *B. & P.*, 113. 3 *Wash. C. C. Rep.*, 553, *Cooper vs. Galbraith*.

Judgment reversed, and judgment for appellant.

Anthony Groverman *vs.* Charlotte Spencer.

In future, in all cases of a divided court, no opinions will be filed representing the views of the different judges.

Appeal from the equity side of the Superior Court for Baltimore City.

In this case the appeal was argued before a full court, and the decree of the court below affirmed by a divided court.

Mason, J., delivered the following opinion of this court, in reference to its practice in such cases in future:

In this case the court are divided. Two of the judges are of opinion the decree ought to be affirmed, and the two other judges are of opinion that it ought to be reversed.

Although opinions representing the views of the different judges have been prepared, the whole court think it proper not to file them, for they determine nothing which would gov-

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gressional legislation could only be needed to prevent the important rule of the Constitution being nullified by failure of officers to give effect to it.

Congress has made elaborate provisions for protecting the political rights which are given by the fifteenth amendment, and also the right to the equal protection of the laws, secured by the fourteenth amendment. The most important of these are the provisions for the appointment by the United States Circuit Courts of supervisors to watch and oversee the registration of voters and the elections for representatives in Congress; for the appointment of deputy United States marshals to assist in the preservation of order at the elections, and to aid the supervisors in the performance of their duties; for the punishment as crimes of such acts as tend to invade, hinder, or obstruct the enjoyment of the political rights which the amendments were intended to confer and secure; and for the conferring upon the federal courts of jurisdiction in election cases where a federal right, privilege, or immunity is in question.[1] The legislation thus adopted has received the attention of the Supreme Court, and the following general principles have been laid down: —

1. The Constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States, when they possess it at all, under state laws, and as a grant of state sovereignty. But the fifteenth amendment confers upon citizens of the United States a new exemption; namely, an exemption from discrimination in elections on account of race, color, or previous condition of servitude. This exemption the United States may protect by appropriate legislation.

2. The power in Congress to legislate at all on the subject of voting at state elections rests upon the fifteenth amendment. The whole subject was in the hands of the

[1] Rev. Stat. U. S. (1873), ch. 24 and 26.

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States before, and Congress obtained a right to intervene only by the amendment, and to the extent that should be needful to protect the exemption to which citizens of the United States thereby became entitled.

3. The third and fourth sections of the act of May 31, 1870, which undertook to punish election officers and others for denying or abridging the right of citizens to vote, not being limited in their operation to unlawful discriminations on account of race, color, or previous condition of servitude, were beyond the limit of the fifteenth amendment, and therefore beyond the power of Congress. Parties cannot be punished under them, even though their acts may have contemplated or accomplished the unconstitutional discrimination.[1]

Section III. — The Right of Assembly and Petition.

The Constitution. — The first amendment to the Constitution further declares that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances. Two rights are protected by this provision: the right of the people to assemble themselves together, and the right of petition; but they are protected as against federal action only.[2]

The People. — When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention, and determine by their votes whether the completed work of the convention shall or shall not be adopted; the people choose the officers under the consti-

[1] United States v. Reese, 92 U. S. Rep. 214; United States v. Cruikshanks, 92 U. S. Rep. 542.

[2] United States v. Cruikshanks, 92 U. S. Rep. 542.

ntion, and so on. For these and similar purposes the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected. In this case, therefore, the right to assemble is preserved to all the people, and not merely to the electors, or to any other class or classes of the people.

Right to Assemble.—The right to assemble may be important for religious, social, industrial, or political purposes; but it was no doubt its political value that was in view in adopting the amendment. To assemble for religious purposes is a part of the religious liberty of the people, and required no additional protection. Social meetings and industrial meetings are seldom likely to be disturbed by the authorities, except when they are believed to contemplate public disorder, and are in open defiance of the law; but there must be an actual breach of the law before they can be intermeddled with. Individuals may perhaps render themselves liable to arrest by threats, but these only constitute individual misconduct.

A political meeting by electors may have one purpose, and that by non-electors another. The former will usually meet for some purpose preparatory to the exercise of the political franchise, such as to hear addresses, select candidates for their suffrages, and the like, or perhaps to petition those for the time in authority in respect to something in which they may take special interest. The non-electors may also meet for petition or remonstrance, or, on the other hand, they may meet to express their sense of wrong at being excluded from political privileges, and to demand a right to participate with others. A demand for equality

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The right of assembly always was, and still is, subject to reasonable regulations by law. Parliament has sometimes been compelled to interpose strict regulations, when a great and tumultuous body of people threatened to appear at its doors to present a demand for a change in the law.

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A petition is, nevertheless, merely a privileged publication, and the right to be heard by means of it may be so abused as to take away the privilege. One must not resort to it for the purpose of visiting his malice upon others

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through the publication of false charges; but when the occasion is proper for petition, good motives in presenting it will be presumed, and the fact that it contains false and injurious aspersions of character will not make out a right of action, but malice in the petitioner must be established also.[1] The petition must be for something within the authority of the person or body addressed to grant, or must in good faith be supposed to be;[2] and when it is, it will be protected while circulating for signatures, as well as after it has been presented.[3] But if a false charge is merely put in the form of a petition, without the intent to present it, it is not within the privilege.[4]

SECTION IV. — THE RIGHT TO KEEP AND BEAR ARMS.

The Constitution. — By the second amendment to the Constitution it is declared that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.[5]

[1] Gray v. Pentland, 2 S. & R. (Penn.) 23; Howard v. Thompson, 1 Wend. (N. Y.) 310.
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The Right is General. — It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Standing Army. — A further purpose of this amendment is, to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people as the general preparation of the people for the defence of their institutions with arms is preservative of them.

What Arms may be kept. — The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression,

and the secret carrying of those suited merely to deadly individual encounters may be prohibited.[1]

SECTION V. — FREEDOM OF SPEECH AND OF THE PRESS.

The Constitution. — The first amendment to the Constitution further provides that Congress shall make no law abridging the freedom of speech or of the press. What is first noticeable in this provision is that it undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing, and it forbids any law of Congress that shall abridge them. We are thus referred for an understanding of the protection to the pre-existing law; and this must either have been the common law, or the existing statutes of the States. The statutes, however, will be found to be nearly silent on this important subject, and the common law must be our guide.

Freedom of the Press. — De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: "The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury."[2] Mr. Justice Blackstone adopted this view as undoubtedly correct,[3] and in this country it has been accepted as expressing the views of those who framed and adopted this amendment.[4] If it expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, while forbidding this and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publications as the law might provide.

It seems more than probable, however, that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: it did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a large share in the government into their own hands, and when the command would be laid on their own representatives would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecutions, and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship. Nor could any valuable purpose be accomplished by introducing in the Constitution a provision which should forbid merely a previous supervision of intended publications, if the law might be so made, or so administered, as to inflict punishment for publications which might be not only innocent, but commendable. The citizen might better have the arm of the government interposed for prevention, than reached out afterwards to inflict penalties; his just freedom would be restrained in the one case as well as in the other.

Light may be thrown upon the intent by a consideratio

[1] Andrews v. State, 3 Helsk. 165, found also with notes in 1 Green's Cr. Rep. 409, and 8 Am. Rep. 8.

[2] De Lolme, Const. of Eng., ch. 10. [3] 4 Bl. Com. 151.

[4] Rawle on Const., ch. 10; 2 Kent, 17; Story on Const., § 1889; Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 313.

of the purposes which the enjoyment of the right subserves. The press is a public convenience, which gathers up the intelligence of the day to lay before its readers, notifies coming events, gives warning against disasters, and in various ways contributes to the happiness, comfort, safety, and protection of the people. But in a constitutional point of view its chief importance is, that it enables the citizen to bring any person in authority, any public corporation or agency, or even the government in all its departments, to the bar of public opinion, and to compel him or them to submit to an examination and criticism of conduct, measures, and purposes in the face of the world, with a view to the correction or prevention of evils; and also to subject those who seek public positions to a like scrutiny for a like purpose. These advantages had been fully realized and enjoyed by the people during the revolutionary epoch: the press had been the chief means of disseminating free principles among the people, and in preparing the country to resist oppression; and its powers for good in this direction had appeared so great as to cast its other benefits into the shade. It is a just conclusion, therefore, that this freedom of public discussion was meant to be fully preserved; and that the prohibition of laws impairing it was aimed, not merely at a censorship of the press, but more particularly at any restrictive laws or administration of law, whereby such free and general discussion of public interests and affairs as had become customary in America should be so abridged as to deprive it of its advantages as an aid to the people in exercising intelligently their privileges as citizens, and in protecting their liberties.

The freedom of the press may therefore be defined to be the liberty to utter and publish whatever the citizen may choose, and to be protected against legal censure and punishment in so doing, provided the publication is not so far

injurious to public morals or to private reputation as to be condemned by the common-law standards, by which defamatory publications were judged when this freedom was thus made a constitutional right. And freedom of speech corresponds to this in the protection it gives to oral publications.[1]

Blasphemous and indecent publications, and the exhibition of indecent pictures and images, were always punishable at the common law, and their punishment may be provided for by Congress in any territory under its exclusive control. Libellous written, printed, or pictorial attacks upon individuals, maliciously made, were also criminal; and if, in respect to these offences, the common law should be found defective, statutory law may supply the defects, — not, however, enlarging the general scope of liability. Besides the criminal, there was always a civil responsibility, in the case of any false and malicious publication calculated to disgrace or injure an individual, and damages might be recovered by the party wronged, whether the publication was made by writing or print, or was merely oral. These rules are consistent with a just freedom, and they remain undisturbed.

The cases which are important in a constitutional point of view are those which are said to be privileged; by which is meant, that the party is protected against responsibility, either civil or criminal, notwithstanding his publication may prove both unfounded and injurious. There are two classes of privilege; the one absolute, or where the protection is complete and perfect, and the other conditional and dependent on motive. Some of these cases rest on grounds of private confidence merely, and are not important here; but others rest on public and general reasons.

Cases of Absolute Privilege. — One of these is provided

[1] Cooley, Const. Lim. 4th ed. 527.

for specially in the clause of the Constitution which declares that members of Congress, for any speech or debate in either house, shall not be questioned in any other place.[1] Another relates to what is said by a witness in the course of judicial proceedings, and which is not allowed to be made the ground of a civil action, however false and malicious it may be, though the State may punish the perjury.[2] A like protection is thrown around what a juror may say to his fellows in the jury-room, concerning the parties to the case submitted to them, or concerning those who may have given evidence therein.[3] Complaints for the purpose of bringing a supposed offender to trial, and the preliminary information on which the officers may act in originating proceedings have a similar privilege,[4] and so do pleadings and other papers in the progress of litigation, where in their statements they do not depart from the matter in controversy.[5] The Executive of the United States and the governors of the several States are exempt from responsibility for their official utterances, and so are all judges of courts, and all officers performing functions in their nature judicial, while acting within the limits of their jurisdiction.[6] The party to a cause, summing it up to jury or court, must have the utmost liberty of dealing with the actions, conduct, and motives of the opposing party and the witnesses, and the law protects this liberty and extends it to his counsel also; and the latter, so long as he keeps to the case in hand and does not wander from it for the purpose of detraction and abuse, may freely

[1] Const., Art. I. § 6.
[2] Marsh v. Ellsworth, 50 N. Y. 309; Terry v. Fellows, 21 La. An. 375.
[3] Dunham v. Powers, 42 Vt. 1.
[4] Dawkins v. Lord Rawlet, L. R. 5 Q. B. 94.
[5] Carr v. Selden, 4 N. Y. 91; Strauss v. Meyer, 48 Ill. 386.
[6] Townshend, Slander and Libel, § 227; Cooley on Torts, 214.

urge in the interest of his client what he believes the case demands.[1]

Libels on Government. — At the common law it was a criminal offence to publish anything against the constitution of the country or the established order of government. This was upon the ground that the tendency of such publications was to excite disaffection with the government, and thus to induce a revolutionary spirit. But a calm and temperate discussion of public events and measures was always in theory allowed, and every man had a right to give to every matter of public importance a candid, full, and free discussion. It was therefore only when a publication went beyond this, and tended to excite tumult, that it became criminal. But as the government itself will institute and conduct the prosecutions, and as the offence will consist in a criticism of the constitution and system of government as the authorities administer them, it is never likely that anything very effective in criticism will be found by the prosecution to be either calm or temperate. The government prosecutions for libel in England, have been so manifestly and notoriously unjust, unreasonable, and oppressive, that one advocate won a great name and a great place in the regard of the people in resisting them; and at length public sentiment compelled their abandonment. A publication in criticism or condemnation of the government or Constitution of the United States is not punishable at the common law for the reason that the United States as such has no common law, and can therefore punish as crimes only the acts which are made punishable by express statute.[2] Nor is it by any means clear that such publications could be made crimes by legislation. The right of the people to change their institutions at will is expressly recognized

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federal and state constitutions, and this implies a right to criticise, discuss, and condemn, and a right if possible to bring the people to the point of consenting to any change short of the abolition of republican institutions. It is believed that the sedition law of 1798 went to the very verge of constitutional authority, if not beyond it;[1] and the entire failure to re-enact any similar legislation since is satisfactory evidence that it is regarded as unnecessary, if not unsound in principle. But conspiracies to overturn the government by force are always punishable, and seditious publications are usually a part of the *res gestæ* of such offences.

Reports of Trials, &c. — Full and fair reports of what takes place publicly in legislative bodies and their committees, and in the courts high and low, are also absolutely privileged. The citizen has a right to be present at such proceedings, but the reasons which throw them open to spectators justify publication for the benefit of those who cannot or do not attend. It is only by publicity of proceedings that those to whom the liberty and civil and political rights of their fellows are submitted, can be kept under a due sense of responsibility, and within the limits of the rules that should govern their conduct.[2] But the report must be confined to the proceedings themselves, and must not indulge in defamatory observations, headings, or comments.[3] The privilege, however, has never been extended to *ex parte* proceedings or examinations, the reason being that they tend to mislead the public

[1] The prosecutions under this law, reported in Wharton's State Trials, pp. 333, 659, 684, and 688, are very instructive. They did more to excite disaffection to the government than all the miscellaneous complaints of.

[2] Hoare v. Silverlock, 9 C. B. 20; Gazette Co. v. Timberlake, 10 Ohio, N. S. 548.

[3] Pittock v. O'Niel, 63 Penn. St. 253; Storey v. Wallace, 60 Ill. 51.

rather than to enlighten it.[1] One may publish these, but at the peril of being held responsible if any untrue statement made in the publication proves injurious to the standing, reputation, or business of individuals.

Cases conditionally Privileged. — In cases of absolute privilege the motive of the party making the publication is not suffered to be gone into, because the public benefit to be accomplished in the exercise of the privilege cannot be fully had without the most full and absolute exemption from civil responsibility. But there are some cases which are privileged in which it is perfectly reasonable to require that the privileged party shall publish only what he believes, and that the occasion of the publication shall be such as to justify it if true. The following are such cases.

Criticism of Officers and Candidates. — When one offers himself as a candidate for a public position, he voluntarily puts in issue his fitness for the place, and those who question it have a right to be heard before the people, and to give their reasons freely. When one holds a public office the issue offered is still broader, for the manner in which official duties have been performed comes in with his personal qualities, character, and habits, and may be discussed as something in which the public are concerned. Any citizen may speak freely, not only what he knows, which bears upon the subject, but also what he believes and what he suspects, provided he has only the public interest in view and does not act maliciously. It must be said, however, that, while the authorities have conceded this rule, they have in some cases applied it with so little liberality as nearly to destroy its value.[2]

Discussion of Public Affairs. — A like liberty of comment and discussion is allowed upon subjects in which the gen-

[1] Usher v. Severance, 20 Me. 9.

[2] King v. Root, 4 Wend. (N. Y.) 113; Lewis v. Few, 5 John. (N. Y.) 1; Cooley, Const. Lim., 4th ed., 553–551.

from discrimination in elections on account of race, color, or previous condition of servitude. This exemption the United States may protect by appropriate legislation.

2. The power in Congress to legislate at all on the subject of voting at state elections rests upon the fifteenth amendment. The whole subject was in the hands of the States before, and Congress obtained a right to intervene only by the amendment, and to the extent that should be needful to protect the exemption to which citizens of the United States thereby became entitled.

3. The third and fourth sections of the act of May 31, 1870, which undertook to punish election officers and others for denying or abridging the right of citizens to vote, not being limited in their operation to unlawful discriminations on account of race, color, or previous condition of servitude, were beyond the limit of the fifteenth amendment, and therefore beyond the power of Congress. Parties cannot be punished under them even though their acts may have contemplated or accomplished the unconstitutional discrimination.[1]

Section III. — The Right of Assembly and Petition.

The Constitution. — The first amendment to the Constitution further declares that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances. Two rights are protected by this provision: the right of the people to assemble themselves together, and the right of petition; but they are protected as against federal action only.[2]

The People. — When the term "the people" is made use of in constitutional law or discussions, it is often the case

[1] United States v. Reese, 92 U. S. 214; United States v. Cruikshanks, 92 U. S. 542. See Ex parte Siebold, 100 U. S. 371.
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that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention, and determine by their votes whether the completed work of the convention shall or shall not be adopted; the people choose the officers under the Constitution, and so on. For these and similar purposes the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected. In this case, therefore, the right to assemble is preserved to all the people, and not merely to the electors, or to any other class or classes of the people.

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Section V. — Freedom of Speech and of the Press.

The Constitution. — The first amendment to the Constitution further provides that Congress shall make no law abridging the freedom of speech or of the press. What is first noticeable in this provision is that it undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing, and it forbids any law of Congress that shall abridge them. We are thus referred for an understanding of the protection to the pre-existing law; and this must either have been the common law, or the existing statutes of the States. The statutes, however, will be found to be nearly silent on this important subject, and the common law must be our guide.

Freedom of the Press. — De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: "The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury."[2] Mr. Justice Blackstone adopted this view as undoubtedly correct,[3] and in this country it has been accepted as expressing the views of those who framed and adopted this amendment.[4] If it

[1] Andrews v. State, 3 Heisk. 165; found also with notes in 1 Green's Cr. Rep. 460, and 6 Am. Rep. 6; State v. Shelby, 90 Mo. 302.

[2] De Lolme, Const. of Eng., ch. 10. [3] 4 Bl. Com., 151.

[4] Rawle on Const., ch. 10; 2 Kent, 17; Story on Const., § 1889; Commonwealth v. Blanding, 3 Pick. (Mass.) 304, 313.

expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, while forbidding this, and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publications as the law might provide.

It seems more than probable, however, that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: it did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a larger share in the government into their own hands, and when the command would be laid on their own representatives, would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecutions, and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship. Nor could any valuable purpose be accomplished by introducing in the Constitution a provision which should forbid merely a previous supervision of intended publications, if the law might be so made, or so administered, as to inflict punishment for publications which might be not only innocent, but commendable. The citizen might better have the arm of the government interposed for prevention, than reached out afterwards to inflict penalties: his just freedom would be restrained in the one case as well as in the other.

Light may be thrown upon the intent by a consideration of the purposes which the enjoyment of the right subserves. The press is a public convenience, which gathers

up the intelligence of the day to lay before its readers, notifies coming events, gives warning against disasters, and in various ways contributes to the happiness, comfort, safety, and protection of the people. But in a constitutional point of view its chief importance is, that it enables the citizen to bring any person in authority, any public corporation or agency, or even the government in all its departments, to the bar of public opinion, and to compel him or them to submit to an examination and criticism of conduct, measures, and purposes in the face of the world with a view to the correction or prevention of evils; and also to subject those who seek public positions to a like scrutiny for a like purpose. These advantages had been fully realized and enjoyed by the people during the revolutionary epoch; the press had been the chief means of disseminating free principles among the people, and in preparing the country to resist oppression; and its power for good in this direction had appeared so great as to cast its other benefits into the shade. It is a just conclusion therefore, that this freedom of public discussion was meant to be fully preserved; and that the prohibition of laws impairing it was aimed, not merely at a censorship of the press, but more particularly at any restrictive laws or administration of law, whereby such free and general discussion of public interests and affairs as had become customary in America should be so abridged as to deprive it of its advantages as an aid to the people in exercising intelligently their privileges as citizens, and in protecting their liberties.

The freedom of the press may therefore be defined to be the liberty to utter and publish whatever the citizen may choose, and to be protected against legal censure and punishment in so doing, provided the publication is not so far injurious to public morals or to private reputation as to be condemned by the common-law standards, by which defamatory publications were judged when this freedom was thus made a constitutional right. And freedom of speech

corresponds to this in the protection it gives to oral publications.[1]

Blasphemous and indecent publications, and the exhibition of indecent pictures and images, were always punishable at the common law, and their punishment may be provided for by Congress in any territory under its exclusive control. Libellous written, printed, or pictorial attacks upon individuals, maliciously made, were also criminal: and if, in respect to these offences, the common law should be found defective, statutory law may supply the defects, — not, however, enlarging the general scope of liability. Besides the criminal, there was always a civil responsibility, in the case of any false and malicious publication calculated to disgrace or injure an individual, and damages might be recovered by the party wronged, whether the publication was made by writing or print, or was merely oral. These rules are consistent with a just freedom, and they remain undisturbed.

The cases which are important in a constitutional point of view are those which are said to be privileged; by which is meant that the party is protected against responsibility, either civil or criminal, notwithstanding his publication may prove both unfounded and injurious. There are two classes of privilege, the one absolute, or where the protection is complete and perfect, and the other conditional and dependent on motive. Some of these cases rest on grounds of private confidence merely, and are not important here; but others rest on public and general reasons.

Cases of Absolute Privilege. — One of these is provided for specially in the clause of the Constitution which declares that members of Congress, for any speech or debate in either house, shall not be questioned in any other place.[2] Another relates to what is said by a witness in the course

[1] Cooley, Const. Lim., 6th ed., 518.
[2] Const., Art. I. § 6.

of judicial proceedings, and which is not allowed to be made the ground of a civil action, however false and malicious it may be, though the State may punish the perjury.[1] A like protection is thrown around what a juror may say to his fellows in the jury-room, concerning the parties to the case submitted to them, or concerning those who may have given evidence therein.[2] Complaints for the purpose of bringing a supposed offender to trial, and the preliminary information on which the officers may act in originating proceedings have a similar privilege,[3] and so do pleadings and other papers in the progress of litigation, where in their statements they do not depart from the matter in controversy.[4] The Executive of the United States and the governors of the several States are exempt from responsibility for their official utterances, and so are all judges of courts, and all officers performing functions in their nature judicial, while acting within the limits of their jurisdiction.[5] The party to a cause, summing it up to jury or court, must have the utmost liberty of dealing with the actions, conduct, and motives of the opposing party and the witnesses, and the law protects this liberty and extends it to his counsel also; and the latter, so long as he keeps to the case in hand and does not wander from it for the purpose of detraction and abuse, may freely urge in the interest of his client what he believes the case demands.[6]

[1] Marsh v. Ellsworth, 50 N. Y. 309; Terry v. Fellows, 21 La. Ann. 375; Verner v. Verner, 64 Miss. 321.
[2] Dunham v. Powers, 42 Vt. 1.
[3] Dawkins v. Lord Paulet, L. R. 5 Q. B. 94.
[4] Garr v. Selden, 4 N. Y. 91; Strauss v. Meyer, 48 Ill. 385; Wilson v. Sullivan, 91 Ga. 238; Runge v. Franklin, 72 Tex. 585; Dada v. Piper, 41 Hun, 251; Bartlett v. Christhilf, 69 Md. 219.
[5] Townshend, Slander and Libel, § 227; Cooley on Torts, 2nd ed. 250.
[6] Hoar v. Wood, 3 Met. (Mass.) 193; Maulsby v. Reifsnider, 69 Md. 143. In England counsel stand on the same ground as witnesses and judges, and their statements are absolutely privileged. Munster

Libels on Government. — At the common law it was a criminal offence to publish anything against the constitution of the country or the established order of government. This was upon the ground that the tendency of such publications was to excite disaffection with the government, and thus to induce a revolutionary spirit. But a calm and temperate discussion of public events and measures was always in theory allowed, and every man had a right to give to every matter of public importance a candid, full, and free discussion. It was therefore only when a publication went beyond this, and tended to excite tumult, that it became criminal. But as the government itself will institute and conduct the prosecutions, and as the offence will consist in a criticism of the constitution and system of government as the authorities administer them, it is never likely that anything very effectual in criticism will be found by the prosecution to be either calm or temperate. The government prosecutions for libel in England have been so manifestly and notoriously unjust, unreasonable, and oppressive, that one advocate won a great name and a great place in the regard of the people in resisting them; and at length public sentiment compelled their abandonment. A publication in criticism or condemnation of the government or Constitution of the United States is not punishable at the common law, for the reason that the United States as such has no common law, and can therefore punish as crimes only those acts which are made punishable by express statute.[1] Nor is it by any means clear that such publications could be made crimes by legislation. The right of the people to change their institutions at will is expressly recognized by federal and state constitutions, and this implies a right to criticise, discuss, and condemn, and a right if possible to bring the people to the point of consenting to any change short of the abolition of republican institutions. It is

believed that the sedition law of 1798 went to the very verge of constitutional authority, if not beyond it;[1] and the entire failure to re-enact any similar legislation since is satisfactory evidence that it is regarded as unnecessary, if not unsound in principle. But conspiracies to overturn the government by force are always punishable, and seditious publications are usually a part of the *res gestæ* of such offences.

Reports of Trials, &c. — Full and fair reports of what takes place publicly in legislative bodies and their committees, and in the courts high and low, are also absolutely privileged. The citizen has a right to be present at such proceedings, but the reasons which throw them open to spectators justify publication for the benefit of those who cannot or do not attend. It is only by publicity of proceedings that those to whom the liberty and civil and political rights of their fellows are submitted, can be kept under a due sense of responsibility, and within the limits of the rules that should govern their conduct.[2] But the report must be confined to the proceedings themselves, and must not indulge in defamatory observations, headings, or comments.[3] The privilege, however, has never been extended to *ex parte* proceedings or examinations, the reason being that they tend to mislead the public rather than to enlighten it.[4] One may publish these, but at the peril of being held responsible if any untrue statement made in the publication proves injurious to the standing, reputation, or business of individuals.

[1] The prosecutions under this law, reported in Wharton's State Trials, pp. 333, 659, 681, and 688, are very instructive. They did more to excite disaffection to the government than all the misconduct complained of.

[2] Hoare v. Silverlock, 9 C. B. 20; Gazette Co. v. Timberlake, 17 Ohio St. 548. The publication before a hearing of the contents of a paper filed is not privileged. Cowley v. Pulsifer, 137 Mass. 392.

[3] Pittock v. O'Niel, 63 Penn. St. 253; Storey v. Wallace, 60 Id. 51; Hayes v. Press Co., 127 Pa. St. 612.

charge set forth in the indictment. Not, of course, by direct, irrefragable evidence—such evidence, where intent is an element of the crime, is rarely if ever possible—but by evidence which may satisfy the judgment and conscience beyond a reasonable doubt. You will not convict because you suspect; on the other hand, you will not refuse to convict, because you have doubts of legal policy, or sympathies that are to be shocked by a capital execution. You will answer upon the evidence before you, just as you would in a case that called for your cautious because responsible action, in the concerns of daily life, fearlessly, honestly, as men who have sworn to do justly between him and the state.

Mr. Vandyke asked the court to charge, that if the jury believe Marsden exercised the ordinary, usual acts of ownership in the fitting out of this vessel, these acts of his, being part of the res gestæ should be taken into consideration in determining the question whether the vessel was navigated for or on his account.

KANE, District Judge. They are so no doubt. Yet these acts on his part may be colored and explained by attendant circumstances. If Mr. Marsden acted as owner of this vessel in purchasing her, paying for her, repairing her, fitting her for sea, bargaining and paying for her ship's stores, procuring her pilot, all these are acts of ownership, and would certainly show that if he was not the owner, she was at least navigated on his behalf. But then if in direct connection with these acts of his, and running alongside of them, it be proved as fact, that the funds which he was using were the funds of a third person not a citizen, that he had no funds of his own, that he spoke of himself as a mere broker or agent, and was recognized as such by the banker who put him in funds, and by the third person whose funds they were; then, if all these be deemed true and not merely devices to disguise the truth, they would establish the fact of ownership in another, just as in a different aspect, they would be proof he was the owner of the vessel.

Verdict, not guilty.

Incidental Points.

In the course of this trial, the following points, aside from the main case, occurred and were decided:

First Point.

After the prisoner had pleaded not guilty, and a jury had been called, one of the jurors who was in delicate health, stated to the court, that certainly he would be unable to go through the cause without an attack of illness. The prisoner having exhausted his twenty challenges, the court, stating that it had no power to discharge a juror after he was once sworn, unless by consent of parties, suggested to the counsel that in view of the great inconvenience likely to arise, the record by consent might be so far falsified as to strike out the juror's name, and so as not to show that he had ever been called or sworn at all; and that the defendant should have the privilege of another challenge. That in this way both parties would be estopped from alleging the irregularity as matter of error. Being so recommended by the court, this course was agreed to by the counsel on both sides.

Second Point.

When the prosecution had opened its case, and being about to go on with its evidence, had sworn a witness, the prisoner's counsel asked the court to instruct the witness and the other witnesses generally, before any of them were examined, and with a view to their own protection, that they were not bound to make any statements criminating themselves.

GRIER, Circuit Justice. We cannot do this. It would put it in the power of a witness by a mental reservation to tell only what he pleased, and to be the judge of what would criminate him, and the crimination might be moral, political or criminal. The court will interfere when necessary.

Third Point.

To prove the reputed American character of the vessel on which the piracy alleged in the principal case was charged to have been committed, and the public declaration of her ownership by a citizen of the United States—such character and ownership being essential facts to sustain the indictment—the prosecution offered in evidence the vessel's original registry at the custom house in New York; promising to follow this proof up with other evidence of ownership. This registry, as is generally known, is made under an act of congress (Act of December 31, 1792 [1 Stat. 287]), declaring what vessels shall be "denominated and deemed vessels of the United States, entitled to the benefits and privileges appertaining to such vessels." It prescribes that before the registry can be made, the owners or one of them must swear or affirm that according to the best of his or their knowledge and belief, the vessel is owned wholly or in part by a citizen of the United States.

Objection being made by Mr. Guillou and Mr. Kane, who relied on U. S. v. Brune [Case No. 14,677], that case was distinguished by Mr. Vandyke, district attorney, for the United States, from this, because there the evidence was neither preceded nor to be followed up by any other evidence. It was the only evidence the prosecution relied on; and though offered as prima facie, was in truth relied on as conclusive. Here we shall follow the matter up by direct evidence of actual ownership. We wish to prove the history of this vessel from her build to the present day,

and these papers are offered as part of the history of the vessel, and as part of the record and title of the vessel. What they are worth will be hereafter a question. As part of the paper title of the vessel, and as showing through whose hands she has passed, and in whose hands she now is, they are at least competent.

GRIER, Circuit Justice. You can prove that these are the original custom house papers; and they may go to the jury as part of the case generally, and to show under what public character the vessel appeared and acted. What they are worth in law as evidence of actual ownership by a citizen of the United States, is matter to be considered hereafter.

Fourth Point.

The custom house registry of ownership of the vessel, which was now in evidence, being found to be in the name of one Gray, who on those books thus appeared to be owner, and the prosecution alleging that the name of Gray was a simulated one, which had been fraudulently assumed by some person in order to get the apparent ownership out of Marsden, a former registered, and still the real owner—the prosecution in order to prove the fraud, and that the name was thus simulated, now offered to prove by an expert that two different signatures on the registry, to wit, the signature to a bond, a crew bond, and a manifest which purported to be made, one by one person, and one by another, were in fact made by the same person under different names. But the prosecution had not proved, nor was it admitted by the defence, who had made either signature. The question put to the expert was, "Look at the signatures to the bond, to the crew bond, and to the manifest, and say whether they are, to the best of your knowledge and belief, by the same person?"

Mr. Guillou objected to the question. Unless you have an acknowledged signature, or one proved by one who saw it signed, for comparison, you cannot bring in the evidence of a mere expert.

Mr. Vandyke. That is true in the case of a forgery. I know that there must then be a test paper by which the other signatures are to be proved. But I wish to show that the same man, whoever he be, signed the manifest, the oath, the crew bond and the register bond; that they are all signed by one and the same person. If I offered this testimony for the purpose of showing that a certain A. B. signed those papers, then it would be necessary for me to have an admitted signature of A. B., in order to prove that he did sign them; my object now is only to prove the fact that the signatures on all the papers are by the same person.

Mr. Guillou, in reply. In a capital case any doubtful or dangerous evidence ought to be wholly excluded. It does not do to let evidence in to the jury, expecting that an antidote will come from the charge of the court. An effect in a criminal case is produced by the mere admission of evidence, and the charge cannot destroy this effect. How uncertain is the evidence of an expert on a question of this kind! If you would bring every expert from Maine to Louisiana, you would find one half of them would decide directly contrary to this witness on the stand. Nor has the counsel on the other side any right to open so wide a field for controversy; he is able to produce any number of witnesses he may want on the subject, but the defendant who is a stranger here and a foreigner, has not the same means to do so.

GRIER, Circuit Justice. If the evidence were offered to prove that the prisoner had made both these signatures, it would be incompetent unless you had first an acknowledged or proven signature of the prisoner as a datum for a standard of comparison. Perhaps, indeed, it is only in cases of forgery where there is a similitude of handwriting, that such evidence is admitted at all. But here Mr. Vandyke is trying to prove external facts unconnected with the defendant. He has to show that the defendant did certain acts, that he went to Africa. He has not only to do that, but he must show more—he must show the national character of this vessel, her history, and a hundred other matters; and then her name painted on her stern. So, also, he gives the public register connected with her, showing the public character the vessel acted under. He then shows that a man by the name of Marsden is connected with her, and is the owner; that he paid her bills and fitted her out to go upon this voyage; that he had a bill of sale to her, and that he is a citizen; that under suspicious circumstances, there was a transfer made to a separate party, who, he alleges, is a man of straw—nobody at all—and in order to prove so, wants to show that the signature of the captain and that of this party appear to be the same, done by the same hand. Now if that be a fact, would there not be some evidence in the case to show that it is so? He has put himself upon showing that this man is not the true owner; that there is a bill of sale made to him which is a mere sham; that it is made to nobody, and this is legitimate evidence in the case; not that it fixes this man as Darnaud, but that the transfer upon the record shows upon its face these two signatures were done by the same hand. Whether the signatures appear to be done by the same hand, that, I think, is a question you can put to an expert. Though the testimony is of rather a dangerous character, and not much to be relied on.

JOSEPH E. SNOWDEN, Petitioner,
v.
EDWARD J. HUGHES, Louie E. Lewis and Robert E. Straus, et al., etc.

(321 US 1-19.)

Constitutional Law, § 315 — Fourteenth Amendment — privileges and immunities protected.

1. The protection extended to citizens of the United States by the privileges and immunities clause of the Fourteenth Amendment includes those rights and privileges which under the laws and Constitution of the United States are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law.

Constitutional Law, § 348] — privileges and immunities clause — right to become candidate for office.

2. The right to become a candidate for state office is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause of the Fourteenth Amendment.

[*See annotation, p. 509, post.*]

Constitutional Law, § 715 — right to state office as liberty or property right.

3. An unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause of the Fourteenth Amendment.

[*See annotation, p. 509, post.*]

Constitutional Law, § 348] — equal protection — denial of certificate of nomination.

4. Equal protection of the laws is not denied by the action of the state primary canvassing board in denying a certificate of nomination to one who had received at a primary election a sufficient number of votes to entitle him thereto, where refusal to issue the certificate was not based on any intentional or purposeful discrimination between persons or classes, nor upon a state statute inconsistent with the guarantee of the Fourteenth Amendment.

[*See annotation, p. 509, post.*]

Constitutional Law, § 316 — equal protection — unlawful administration of state statutes.

5. The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of the equal protection of the law as guaranteed by the Fourteenth Amendment unless there is shown to be present in it an element of intentional or purposeful discrimination.

Evidence, § 213 — presumptions — intention to discriminate.

6. A discriminatory purpose on the part of state officers in administering state laws fair on their face is not presumed; there must be a showing of clear and intentional discrimination.

Pleading, § 191 — complaint — sufficiency — violation of right to equal protection.

7. The allegations of a complaint in a

STATE OFFICE — NOT PREDICATED ON U.S. CITIZENSHIP

ANNOTATION REFERENCE.

1. As to Fourteenth Amendment as applied by federal courts to questions affecting nomination for, or election to, state offices, see annotation, p. 509, post.

suit to recover damages for alleged infringement of plaintiff's civil rights in violation of the Fourteenth Amendment by the act of a state primary canvassing board in failing to issue a certificate of nomination to one receiving a sufficient number of votes at a primary election to entitle him thereto, that defendants "wilfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate showing the plaintiff was one of the nominees, that they conspired and confederated together for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the state election laws, thereby depriving plaintiff of the nomination and of certain election to the office sought, and by so doing deprived plaintiff of the equal protection of the laws guaranteed by the Fourteenth Amendment, are insufficient to show the purposeful discrimination in the administration of state law essential to an invasion of the constitutional right to the equal protection of the laws.

[*See annotation, p. 509, post.*]

Constitutional Law, § 316 — equal protection — violation of statute as denial of.

8. That the action of state officers violates state law does not deprive a person affected thereby of the right to equal protection of the laws guaranteed by the Fourteenth Amendment.

Constitutional Law, § 315 — equal protection — political rights.

9. Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights; but the necessity of showing of purposeful discrimination is no less in a case involving political rights than in any other.

Constitutional Law, § 314 — Fourteenth Amendment — Civil Rights Act — operation.

10. It was not intended by the Fourteenth Amendment and the Civil Rights Act that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

[No. 57.]

Argued and submitted December 13, 1943. Decided January 17, 1944. Rehearing denied March 13, 1944.

88 L ed 498

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment affirming a judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing a suit to recover damages for an alleged violation of the plaintiff's civil rights in violation of the Fourteenth Amendment and federal legislation implementing it. Affirmed.

See same case below, 132 F(2d) 476.

William R. Ming, Jr., of Washington, D.C., argued the cause, and, with Joseph E. Snowden and Heber T. Dotson, both of Chicago, Illinois, filed a brief for petitioner:

Petitioner was deprived of a fundamental liberty without due process in violation of the Fourteenth Amendment.

The right of every qualified citizen to be a candidate for a representative office is a fundamental civil right. See Fletcher v. Tuttle, 151 Ill 41, 37 NE 683, 25 LRA 143, 42 Am St Rep 220; Crandall v. Nevada, 6 Wall.(US) 35, 18 L ed 745; and cf. Allgeyer v. Louisiana, 165 US 578, 41 L ed 832, 17 S Ct 427; Coppage v. Kansas, 236 US 1, 59 L ed 441, 35 S Ct 240, LRA1915C 960; Truax v. Raich, 239 US 33, 60 L ed 131, 36 S Ct 7, LRA1916D 545, Ann Cas 1917B 283; Butler v. Perry, 240 US 328, 60 L ed 672, 36 S Ct 258; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 US 522, 67 L ed 1103, 43 S Ct 630, 27 ALR 1280; People ex rel. LeRoy v. Hurlbut, 24 Mich 44, 9 Am Rep 103; Minersville School Dist. v. Gobitis, 310 US 586, 84 L ed 1375, 60 S Ct 1010, 127 ALR 1493.

William C. Wines, of Chicago, Illinois, argued the cause, and, with George F. Barrett, Attorney General of Illinois, filed a brief for respondents Edward J. Hughes et al.:

The complainant fails to state a cause of action under the Civil Rights Act because:

(1) The right of candidacy for

nomination at a primary election is not a civil right either apart from or under the Constitution of the United States.

The law does not recognize the right to public office as in any sense an individual, private, or personal right, and therefore the right to induction in public office is neither "liberty" nor "property" within the purview of the Fourteenth Amendment or Civil Rights Acts. See Taylor v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009; Blackman v. Stone (DC) 17 F Supp 102; Blackman v. Stone (CCA 7th) 101 F(2d) 500.

Isaac E. Ferguson, of Chicago, Illinois, submitted the cause for respondents Robert E. Straus, et al., as co-executors, etc. Herbert M. Lautmann and Frank C. Bernard, both of Chicago, Illinois, were on the brief:

The complainant fails to state a cause of action under the Civil Rights Act.

Assuming, on the motion to dismiss plaintiff's complaint, that when the members of the state primary canvassing board omitted the name of the plaintiff as nominee for the office of state representative they misconstrued or misapplied the election laws of Illinois, such decision and action did not violate any right of the plaintiff protected by the Fourteenth Amendment. Taylor v. Beckham, 178 US 545, 44 L ed 1187, 20 S Ct 890, 1009.

The right or privilege of the plaintiff to be a candidate for the office of state representative was a right or privilege of state citizenship, dependent solely upon state law; not a right, privilege, or attribute of national citizenship, specially protected by the Fourteenth Amendment. Carter v. Greenhow, 114 US 317, 29 L ed 202, 5 S Ct 928, 962; Madden v. Kentucky, 309 US 83, 84 L ed 590, 60 S Ct 406, 125 ALR 1383; Love v. Chandler (CCA 8th) 124 F(2d) 785; Brawner v. Irvin (CC) 169 F 964; United States v. Moore (CC) 129 F 630.

Petitioner's complaint fails to show that he was deprived of any personal or property right in violation of the Constitution and laws of the United States.

The alleged erroneous application by the members of the state primary canvassing board of the Illinois election laws, even though characterized as wilful, malicious, and arbitrary, did not give rise to a cause of action against the members of the board under the Civil Rights Acts. Cf Taylor v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009; See also Mitchell v. Greenough (CCA 9th) 100 F(2d) 184, writ of certiorari denied in 306 US 659, 83 L ed 1056, 59 S Ct 788; Brawner v. Irvin (CC) 169 F 964.

The right to be a candidate to the office of state representative is a right of state citizenship, not of national citizenship. The Fourteenth Amendment did not bring within the protection of the national government the great body of civil rights pertaining to state citizenship, but only the special rights incident to national citizenship. Twining v. New Jersey, 211 US 78, 53 L ed 97, 29 S Ct 14; Madden v. Kentucky, 309 US 83, 84 L ed 590, 60 S Ct 406, 125 ALR 1383; United States v. Bathgate, 246 US 220, 62 L ed 676, 38 S Ct 269.

Mr. Chief Justice Stone delivered the opinion of the Court:

Petitioner, a citizen of Illinois, brought this suit at law in the District Court for Northern Illinois against respondents, citizens of Illinois, to recover damages for infringement of his civil rights in violation of the Fourteenth Amendment and 8 USCA §§ 41, 43, and 47 (3), 2 FCA title 8, §§ 41, 43, and 47 (3). He alleged that the suit was within the jurisdiction of the court as a suit arising under the Constitution and laws of the United States, 28 USCA § 41(1), 7 FCA title 28, § 41(1), a suit for the recovery of damages for injury to property and

*[3]

for deprivation of *a right or privilege of a citizen of the United States, 28 USCA § 41(12), 7 FCA

title 28, § 41(12), and a suit for the recovery of damages for deprivation, under color of state law, custom, regulation or usage, of a right or privilege secured by the Fourteenth Amendment, 28 USCA § 41 (14), 7 FCA title 28, § 41(14).

The complaint makes the following allegations: Petitioner was one of several candidates at the April 9, 1940, Republican primary election held in the Third Senatorial District of Illinois pursuant to Ill Rev Stat (State Bar Asso Ed), c 46, Art 8, for nominees for the office of representative in the Illinois General Assembly. By reason of appropriate action taken respectively by the Republican and Democratic Senatorial Committees of the Third Senatorial District in conformity to the scheme of proportional representation authorized by Ill Rev Stat c 46, § 8-13, two candidates for representative in the General Assembly were to be nominated on the Republican ticket and one on the Democratic ticket. Since three representatives were to be elected, Ill Const Art 4, §§ 7 and 8, and only three were to be nominated by the primary election, election at the primary as one of the two Republican nominees was, so the complaint alleges, tantamount to election to the office of representative.

The votes cast at the primary election were duly canvassed by the Canvassing Board of Cook County, which, as required by Ill Rev Stat c 46, § 8-15, certified and forwarded to the Secretary of State a tabulation showing the results of the primary election in the Third Senatorial District. By this tabulation the Board certified that petitioner and another had received respectively the second highest and highest number of votes for the Republican nominations. Ill Rev Stat c 46, § 8-13 requires that the candidates receiving the highest votes shall be declared nominated.

Respondents Hughes and Lewis, and Henry Horner whose executors were joined as defendants and are

88 L. ed 590

*[4]

respondents *here, constituted the State Primary Canvassing Board for the election year 1940. By Ill Rev Stat c 46, § 8-15 it was made their duty to receive the certified tabulated statements of votes cast, including that prepared by the Canvassing Board of Cook County, to canvass the returns, to proclaim the results and to issue certificates of nomination to the successful candidates. Such a certificate is a prerequisite to the inclusion of a candidate's name on the ballot. Ill Rev Stat c 46, § 10-14. Acting in their official capacity as State Primary Canvassing Board they issued, on April 29, 1940, their official proclamation which designated only one nominee for the office of representative in the General Assembly from the Third Senatorial District on the Republican ticket and excluded from the nomination petitioner, who had received the second highest number of votes for the Republican nomination.

After setting out these facts the complaint alleges that Horner and respondents Hughes and Lewis, "willfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate showing that petitioner was one of the Republican nominees, that they conspired and confederated together for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the laws of Illinois. It alleges that Horner, Hughes and Lewis, acting as state officials under color of the laws of Illinois, thereby deprived petitioner of the Republican nomination for representative in the General Assembly and of election to that office, to his damage in the amount of $50,000, and by so doing deprived petitioner, in contravention of 8 USCA §§ 41, 43, and 47(3), 2 FCA title 8, §§ 41, 43, and 47(3), of rights, privileges and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, both guaranteed to him by the Fourteenth Amendment.

*[5]

*The District Court granted motions by respondents to strike the complaint and dismiss the suit upon the grounds, among others, that the facts alleged did not show that the plaintiff had been deprived of any right, privilege or immunity secured to him by the Constitution or laws of the United States, and that, the alleged cause of action being predicated solely upon a claim that state officers had failed to perform duties imposed upon them by state law, their failure was not state action to which the prohibitions of the Fourteenth Amendment are alone directed, and hence was not sufficient to establish an infringement of rights secured to petitioner by the Fourteenth Amendment. The Court of Appeals for the Seventh Circuit affirmed, 132 F(2d) 476, holding on authority of Barney v. New York, 193 US 430, 48 L ed 737, 24 S Ct 502, that the action of the members of the State Board, being contrary to state law, was not state action and was therefore not within the prohibitions of the Fourteenth Amendment.

In substance petitioner's alleged cause of action is that the members of the State Primary Canvassing Board, acting as such but in violation of state law, have by their false certificate or proclamation and by their refusal to file a true certificate deprived petitioner of nomination and election as representative in the state assembly. To establish a cause of action arising under the Constitution and laws of the United States within the jurisdiction of the District Court as prescribed by 28 USCA § 41(1), (12) and (14), 7 FCA title 8, §§ 41(1), (12), and (14), he relies particularly on the provisions of the Fourteenth Amendment supplemented by two sections of the Civil Rights Act of 1871, 8 USCA §§ 43, 47(3), 2 FCA title 8, §§ 43, 47(3).[1]

*[6]

*Section 43 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . 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 . . . for redress." Section 47(3), so far as now relevant, gives an action for damages to any person "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States," by reason of a conspiracy of two or more persons entered into "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws." It is the contention of petitioner that the right conferred on him by state law to become a candidate for and to be elected to the office of representative upon receipt of the requisite number of votes in the primary and general elections, is a right secured to him by the Fourteenth Amendment, and that the action of the State Primary Canvassing Board deprived him of that right and of the equal protection of the laws for which deprivation the Civil Rights Act authorizes his suit for damages.

Three distinct provisions of the Fourteenth Amendment guarantee rights of persons and property. It 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

[1] 8 USCA § 41, 2 FCA title 8, § 41, on which petitioner also relies, guaranties to all persons within the United States "the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." As pointed out later in this opinion, no claim of discrimination based on race is made

person within its jurisdiction the equal protection of the laws."

Headnote 1 The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but

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does not include rights pertaining *to state citizenship and derived solely from the relationship of the citizen and his state established by state law. Slaughter-House Cases, 16 Wall.(US) 36, 74, 79, 21 L ed 394, 408, 409; Maxwell v. Bugbee, 250 US 525, 538, 63 L ed 1121, 1130, 40 S Ct 2; Prudential Ins. Co. v. Cheek, 259 US 530, 539, 66 L ed 1044, 1052, 42 S Ct 516, 27 ALR 27; Madden v. Kentucky, 309 US 83, 90–93, 84 L ed 590, 594–596, 60 S Ct 406, 125 ALR 1383.

Headnote 2 The right to become a candidate for state office, like the right to vote for the election of state officers, Minor v. Happersett, 21 Wall.(US) 162, 170–178, 22 L ed 627, 629–631; Pope v. Williams, 193 US 621, 632, 48 L ed 817, 822, 24 S Ct 573; Breedlove v. Suttles, 302 US 277, 283, 82 L ed 252, 256, 58 S Ct 205, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.

More than forty years ago this Court determined that an unlawful

Headnote 3 denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause. Taylor & Marshall v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, Cave v. Missouri, 246 US 650, 62 L ed 921, 38 S Ct 334, as we reaffirm it now.

Nor can we conclude that the action of the State Primary Canvassing

Headnote 4 Board, even though it be regarded as state action within the prohibitions of the Fourteenth Amendment, was a denial of the equal protection of the laws. The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely from the Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guaranties of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes. On the argument before us petition-

*[8]

er *disclaimed any contention that class or racial discrimination is involved. The insistence is rather that the Board, merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law and has thereby denied to him the equal protection of the laws secured by the Fourteenth Amendment.

But not every denial of a right conferred by state law involves a

Headnote 5 denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the

statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf McFarland v. American Sugar Ref. Co. 241 US 79, 86, 87, 60 L ed 899, 904, 36 S Ct 498, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 US 356, 373, 374, 30 L ed 220, 227, 228, 6 S Ct 1064. But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 US 519, 520, 47 L ed 572, 573, 23 S Ct 402, there must be a showing of "clear and intentional discrimination," Gundling v. Chicago, 177 US 183, 186, 44 L ed 725, 728, 20 S Ct 633; see Ah Sin v. Wittman, 198 US 500, 507, 508, 49 L ed 1142, 1145, 1146, 25 S Ct 756; Bailey v. Alabama, 219 US 219, 231, 55 L ed 191, 197, 31 S Ct 145. Thus the de-

Headnote 6

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nial of equal protection by *the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. Neal v. Delaware, 103 US 370, 394, 397, 26 L ed 567, 573, 574; Norris v. Alabama, 294 US 587, 589, 79 L ed 1074, 1076, 55 S Ct 579; Pierre v. Louisiana, 306 US 354, 357, 83 L ed 757, 759, 59 S Ct 536; Smith v. Texas, 311 US 128, 130, 131, 85 L ed 84, 86, 87, 61 S Ct 164; Hill v. Texas, 316 US 400, 404, 86 L ed 1559, 1562, 62 S Ct 1159. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. Virginia v. Rives, 100 US 313, 322, 323, 25 L ed 667, 670, 671; Martin v. Texas, 200 US 316, 320, 321, 50 L ed 497–499, 26 S Ct 338; Thomas v. Texas, 212 US 278, 282, 53 L ed 512, 514, 29 S Ct 393; cf Williams v. Mississippi, 170 US 213, 225, 42 L ed 1012, 1016, 18 S Ct 583.

Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. Coulter v. Louisville & N. R. Co. 196 US 599, 607, 609, 610, 49 L ed 615, 617, 618, 25 S Ct 342; Chicago, B. & Q. R. Co. v. Babcock, 204 US 585, 597, 51 L ed 636, 640, 27 S Ct 326; Sunday Lake Iron Co. v. Wakefield Twp. 247 US 350, 353, 62 L ed 1154, 1156, 38 S Ct 495; Southern R. Co. v. Watts, 260 US 519, 526, 67 L ed 375, 387, 43 S Ct 192.[2] Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even

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though it is neither systematic *nor long-continued. Cf. McFarland v. American Sugar Ref. Co. 241 US 79, 60 L ed 899, 36 S Ct 498, supra.

The lack of any allegations in the

[2] See also Raymond v. Chicago Union Traction Co. 207 US 20, 36, 52 L ed 78, 87, 28 S Ct 7, 12 Ann Cas 757; Sioux City Bridge Co. v. Dakota County, 260 US 441, 447, 67 L ed 340, 343, 43 S Ct 190, 28 ALR 979; Bohler v. Callaway, 267 US 479, 489, 69 L ed 745, 751, 45 S Ct 431; Cumberland Coal Co. v. Board of Revision, 284 US 23, 25, 28, 76 L ed 146, 148, 149, 52 S Ct 48; cf. Great Northern R. Co. v. Weeks, 297 US 135, 139, 80 L ed 532, 535, 56 S Ct 426.

complaint here. tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "wilful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. United States v. Illinois C. R. Co. 303 US 239, 243, 82 L ed 773, 777, 58 S Ct 533. So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee. Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged. Indeed on the allegations of the complaint, the one Republican nominee certified by the Board was entitled to be certified as the nominee receiving the highest number of votes, and the Board's failure to certify petitioner, so far as appears, was unaffected by and unrelated to the certification of the other successful nominee. While the failure to certify petitioner for one nomination and the certification of another for a different nomination may have involved a violation of state law, we fail to see in this a denial of the equal protection of the laws more than if the Illinois statutes themselves had provided that one candidate should be certified and no other.

Headnote 7

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*If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. Compare Owensboro Waterworks Co. v. Owensboro, 200 US 38, 47, 50 L ed 361, 364, 26 S Ct 249. And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature. Nashville, C. & St. L. R. Co. v. Browning, 310 US 362, 369, 370, 84 L ed 1254, 1258, 1259, 60 S Ct 968. See also Coulter v. Louisville & N. R. Co., supra (196 US 608, 609, 49 L ed 617, 618, 25 S Ct 342); Hayman v. Galveston, 273 US 414, 416, 71 L ed 714, 717, 47 S Ct 363; Iowa-Des Moines Nat. Bank v. Bennett, 284 US 239, 244, 76 L ed 265, 271, 52 S Ct 133. A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory. Compare Missouri v. Lewis (Bowman v. Lewis) 101 US 22, 30, 32, 25 L ed 989, 992, 993; Yick Wo v. Hopkins, 118 US 356, 30 L ed 220, 6 S Ct 1064, supra.

Headnote 8

Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. McPherson v. Blacker, 146 US 1, 23, 24, 36 L ed 869, 873, 13 S Ct 3; Nixon v. Herndon, 273 US 536, 538, 71 L ed 759, 47 S Ct 446; Nixon v. Condon, 286 US 73, 76 L ed 984, 52 S Ct 484, 88 ALR 458; see Pope v. Williams, supra (193 US 634, 48 L ed 823, 24 S Ct 573). But the necessity of a showing of purposeful discrimina-

Headnote 9

ion is no less in a case involving political rights than in any other. It was not intended by [footnote 10] the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

A construction of the equal protection clause which would find a violation of federal right in every

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departure *by state officers from state law is not to be favored. And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment. See Taylor & Marshall v. Beckham, 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009, supra, and authorities cited; Cave v. Missouri, 246 US 650, 62 L ed 921, 38 S Ct 334, supra. Only once has it been contended here that an unlawful denial by state executive, administrative or legislative authority of the right to state office is for that reason alone a denial of equal protection. Wilson v. North Carolina, 169 US 586, 42 L ed 865, 18 S Ct 435.[9] In rejecting that contention this Court said at pages 594, 595:

"In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. . . .

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are

*[13]

justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

As we conclude that the right asserted by petitioner is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon, we find it unnecessary to consider whether the action by the State Board of which petitioner complains is state action within the meaning of the Fourteenth Amendment. The authority of Barney v. New York, 193 US 430, 48 L ed 737, 24 S Ct 502, supra, on which the court below relied, has been so restricted by our later decisions, see Raymond v. Chicago Union Traction Co. 207 US 20, 37, 52 L ed 78, 87, 28 S Ct 7, 12 Ann Cas 757; Home Teleph. & Teleg. Co. v. Los Angeles, 227 US 278, 294, 57 L ed 510, 517, 32 S Ct 312; Iowa-Des Moines Nat. Bank v. Bennett, supra (284 US 246, 247, 76 L ed 272, 273, 52 S Ct 133); cf. United States v. Classic, 313 US 299, 326, 85 L ed 1368, 1383, 61 S Ct 1031, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of

[9] In United States v. Classic, 313 US 299, 85 L ed 1368, 61 S Ct 1031, this Court refused to pass on a similar contention as to a refusal to count ballots cast in an election for federal officers. The holding in that case that a refusal to count votes cast, and the consequent false certification of candidates, was a denial of a right or privilege "secured . . . by the Constitution . . . of the United States" was rested on the ground that the right to vote for a federal officer, whether or not it be deemed a privilege of citizens of the United States, see Twining v. New Jersey, 211 US 78, 97, 53 L ed 97, 105, 29 S Ct 14, is a right secured by Art 1, §§ 2 and 4 of the Constitution. See 313 US at 314, 315, 85 L ed 1376, 1377, 61 S Ct 1031, and cases cited; United States v. Mosley, 238 US 383, 59 L ed 1355, 35 S Ct 904. The Court pointed out that "the indictment on its face does not purport to charge a deprivation of equal protection to voters or candidates," 313 US at 329, 85 L ed 1385, 61 S Ct 1031, and declined to consider whether the facts alleged could constitute such a denial.

a nature such as the Fourteenth Amendment protects against state action.

The judgment is accordingly affirmed for failure of the complaint to state a cause of action within the jurisdiction of the District Court.

Affirmed.

Mr. Justice Rutledge concurs in the result.

Mr. Justice Frankfurter, concurring:

The plaintiff brought this action in a district court to recover damages claimed to have been suffered at the hands of the defendants as members of the State Primary Canvassing Board of Illinois. The theory of his claim is that the defendants, being in legal effect the State of Illinois, denied to the plaintiff the equal protection of its laws.

*[14]

*The crucial allegations charging such a denial are in the following paragraph of the complaint:

"11. That notwithstanding the clear and plain mandates of § 454 and § 456, c 46, Illinois Revised Statutes, the defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner, acting as the State Primary Canvassing Board of Illinois, entered into an understanding and agreement and combined, conspired and confederated together to willfully, maliciously and arbitrarily refuse to designate plaintiff as one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois and to issue their Official Proclamation designating plaintiff as one of the said nominees and to file their proper and correct certificate in the office of the Secretary of State of Illinois showing that plaintiff was one of the nominees of the Republican Party for the Office of Representative in the General Assembly from the Third Senatorial District of Illinois."

I should be silent were the Court merely to hold that as a matter of pleading these allegations are not sufficiently explicit to charge as an arbitrary act of discrimination the concerted and purposeful use by the defendants of their official authority over the election machinery of the State so as to withhold from the plaintiff the opportunity to present himself to the voters of that State "as one of the nominees of the Republican Party" for election to the General Assembly of Illinois. I should be silent even though it were avowed that such a constrained reading of the complaint reflected the most exacting attitude against drawing into the federal courts controversies over state elections. Unless I mistake the tenor of the Court's opinion, the decision is broader than mere inadequacy of pleading.

All questions pertaining to the political arrangements of state governments are, no doubt, peculiarly out-

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side the *domain of federal authority. The disposition of state offices, the manner in which they should be filled and contests concerning them, are solely for state determination, always provided that the equality of treatment required by the Civil War Amendments is respected. And so I appreciate that there are strong considerations of policy which should make federal courts inhospitable toward litigation involving the enforcement of state election laws. But I do not think that the criteria for establishing a denial of the equal protection of the laws are any different in cases of discrimination in granting opportunities for presenting oneself as a candidate for office "as one of the nominees of the Republican Party" than those that are relevant when claim is made that a state has discriminated in regulating the pursuit of a private calling. It appears extremely unlikely that the plaintiff could establish his case. The sole question now is whether, assuming he can make good his allegations, he should be denied the opportunity of a trial to do so.

The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, wheth-

er by the courts or the executive agencies of a state. See McGovern v. New York, 229 US 363, 370, 371, 57 L ed 1228, 1231, 1232, 33 S Ct 876, 46 LRA(NS) 391. However, in forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws," the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment. Speaking of a situation in which conscious discrimination by a state touches "the plaintiff alone," this Court tersely expressed the governing principle by observing that "we suppose that no one would contend that the plaintiff was given the

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*equal protection of the laws." McFarland v. American Sugar Ref. Co. 241 US 79, 86, 87, 60 L ed 899, 904, 36 S Ct 498. And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws? See A. Backus, Jr. & Sons v. Fort Street Union Depot Co. 169 US 557, 571, 42 L ed 853, 859, 18 S Ct 445.

But to constitute such unjust discrimination the action must be that of the state. Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit in the federal courts on the basis of illegal state action. The problem is beset with inherent difficulties and not unnaturally has had a fluctuating history in the decisions of the Court. Compare Barney v. New York, 193 US 430, 48 L ed 737, 24 S Ct 502, with Raymond v. Chicago Union Traction Co. 207 US 20, 52 L ed 78, 28 S Ct 7, 12 Ann Cas 757; Memphis v. Cumberland Teleph. & Teleg. Co. 218 US 624, 54 L ed 1185, 31 S Ct 115, with Home Teleph. & Teleg. Co. v. Los Angeles, 227 US 278, 57 L ed 510, 33 S Ct 312. It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is pro tanto the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court.

Our question is not whether a remedy is available for such an illegality, but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts to the states, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials. See, e. g. Ex parte Royall, 117 US 241, 251. Take the present case. The plaintiff complains that he has been denied the

*[17]

equal *protection of the laws of Illinois precisely because the defendants, constituting the State Canvassing Board, have wilfully, with set purpose to withdraw from him the privileges afforded by Illinois, disobeyed those laws. To adapt the language of an earlier opinion, I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State. Holmes, J., dissenting, in Raymond v. Chicago Union Traction Co., supra (207 US at p. 41, 52 L ed 89, 28 S Ct 7, 12 Ann Cas 757).

I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State, cer-

dell [*supra*], and again in this case, the court has sustained the power of Congress to enact section 5508, which, among other things, makes it an offense against the United States for two or more persons to "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 secured by the Constitution or laws of the United States. Now, it is difficult to understand why, if Congress can do this, it may not make it an offense for the same persons (§5519) to "go in disguise on the highway, or on the premises of another, [701] for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws." The only possible answer to this suggestion is to say that "the equal protection of the laws" is not a right or privilege secured by the Constitution of the United States. But that, it seems to me, cannot be said without doing violence to the language of that instrument, and defeating the intention with which the people adopted it.

It was long since announced by this court that "Congress must possess the choice of means, and must be empowered to use any means which are in fact conductive to the exercise of a power granted by the Constitution." *U. S.* v. *Fisher*, 6 U. S. 2 Cranch, 358 [2: 304]. And in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 421 [4: 605], *Chief Justice* Marshall, speaking for the court, said: "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." In view of these settled doctrines of constitutional law, I am unwilling to say that it is not appropriate legislation for the enforcement of the right, given by the Constitution, to the equal protection of the laws, for Congress to make it an offense against the United States, punishable by fine and imprisonment for two or more persons in any State to conspire, or go in disguise on the highway, or go on the premises of another, for the purpose of depriving him of the equal protection of the laws.

True copy. Test:
James H. McKenney, Clerk, Sup. Court, U. S.

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[707] RICHARD VITERBO, *Appt.*,
v.
J. FRIEDLANDER, ET. AL., Exrs. of SAMUEL FRIEDLANDER, Deceased.

(See S. C. Reporter's ed. 707-737.)

Landlord and tenant—nature of relation between, under Civil Code of Louisiana—distinction between civil and common law—annulment of lease—injuries by overflow through the opening of a crevasse in levee of Mississippi River—"fortuitous or unforeseen event"—review of authorities.

1. The general purpose and common rule of the civil law, as expressed in the Civil Code of Louisiana, are that the lessor shall secure to the lessee the possession, use and enjoyment of the thing leased, against everything but the fault of the lessee; and that any loss of the thing, or deprivation of its use and enjoyment, by accidents or fortuitous events, shall be borne by the lessor and not by the lessee.

2. The opening of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must be considered as a "fortuitous or unforeseen event," within the meaning and scope of articles 2697 (2667) and 2699 (2669) of the Code, entitling the lessee, if thereby the plantation is wholly or partly destroyed, or is rendered unfit for the purpose for which it was leased, to have the lease annulled.

3. In the case presented, this court is of opinion that the lease being of a sugar plantation to be used to cultivate sugar cane, the injuries proved to the plantation, and to its capacity for producing cane and sugar, amounted to a partial destruction of the plantation, or, what is the same thing in legal effect, to making it cease to be fit for the purpose for which it was leased; that those injuries were caused by a fortuitous or unforeseen event; and that under articles 2697 (2667) and 2699 (2669) of the Civil Code, construed in the light of other articles, and of the principles of the civil law, as established in Louisiana, the plaintiff is entitled to have the lease annulled.

4. The ordinary rules of interpretation of statutes are applicable to the Louisiana Code.

5. In construing those parts of the Code which re-enact provisions originally enacted in both the English and French languages, both texts may be taken into consideration; but if the two cannot be reconciled, the English must prevail.

[No. 703.]

Submitted Jan. 4, 1887. Decided March 7, 1887.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana. Opinion below, 24 Fed. Rep. 320. *Reversed.*

Statement of the case by *Mr. Justice* **Gray**: [708]

This was a petition, filed October 2, 1884, by a citizen of France against a citizen of Louisiana, to annul a lease of a sugar plantation from the defendant to the petitioner for five years; and alleging that by an extraordinary rise of the Mississippi River, which could not have been foreseen, and without any fault of the lessee, a crevasse was made in the levees of a neighboring plantation, the leased plantation overflowed, all the cane destroyed, and the plantation rendered wholly unfit for the purpose for which it had been leased; and that the petitioner requested the defendant, as soon as the water from the crevasse should have withdrawn, to put back the plantation in the same condition as when leased, and to replace the plant cane and stubble, and the defendant refused to do so. By direction of the circuit court, the case was transferred to the chancery side, and the petitioner filed a bill in equity, containing similar allegations, and praying for like relief.

The lease in question was dated October 27, 1883, and was of "a sugar plantation, situated in the parish of St. Charles in this State, known as Friedlander's plantation," and "all the buildings, outhouses, fences, sugar houses, and other appurtenances thereof" (particularly described), from September 27, 1883, to December 15, 1888, at an annual rent of $5,000, which the lessee agreed to pay; and contained the following provisions: [709]

"And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field, which the said lessee expressly binds himself to plant as seed cane on said plantation; and to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation for the sole use and benefit of said lessor, at the termination of this lease, December 15,

BLUMEN v. HAFF.
No. 7542.

Circuit Court of Appeals, Ninth Circuit.
Aug. 12, 1935.

1. Aliens ⇐53

Aliens extradited to United States from England to answer to charge of grand larceny committed on previous trip to United States *held* to have "entered" country within immigration laws and to be subject to deportation proceedings.

[Ed. Note.—For other definitions of "Enter; Entry (Under Immigration Laws)," see Words & Phrases.]

2. Citizens ⇐3

Persons born in country of which their parents are natives are citizens of that country according to common law.

3. Citizens ⇐12

Residents of territory transferred to different country become citizens of that country unless they are absent at time of transfer and elect to retain original citizenship.

4. Aliens ⇐53

Where aliens entering country had given as their birthplace city of Austria which was subsequently transferred to Roumania, use of Polish passports in entering country on previous occasion *held* to justify their deportation to Poland in absence of proof as to law of Poland, Austria, or Roumania, or as to question of citizenship.

5. Aliens ⇐53

Aliens extradited from England to answer to grand larceny charge *held* not entitled to claim right to liberty to leave country in their own way and in their own time after release from prison, in place of being deported, where England refused to receive them.

6. Aliens ⇐53

Plea of guilty by aliens in prosecution for grand larceny *held* "confession of guilt" within immigration laws justifying their deportation.

[Ed. Note.—For other definitions of "Confess; Confession," see Words & Phrases.]

7. Aliens ⇐53

Aliens extradited from England to answer to charge of grand larceny of which they were convicted *held* subject to deportation for having been convicted of offense committed before their last entry.

8. Aliens ⇐53

Aliens convicted of grand larceny committed in this country within three years after their entry and imprisoned for six years *held* subject to deportation as aliens sentenced to imprisonment because of conviction in this country of crime involving moral turpitude (8 USCA § 155).

Appeals from the District Court of the United States for the Northern District of California, Southern Division; Adolphus St. Sure, Judge.

Application by Julius Maximilian Blumen, alias Julius M. Busch, and another for a writ of habeas corpus against Edward L. Haff, as district director of immigration for the Port of San Francisco. From an order denying the application, plaintiffs appeal.

Affirmed.

Stephen M. White, of San Francisco, Cal., for appellants.

H. H. McPike, U. S. Atty., Robert L. McWilliams, Asst. U. S. Atty., and Arthur J. Phelan, U. S. Immigration and Naturalization Service, all of San Francisco, Cal., for appellee.

Before WILBUR, GARRECHT, and DENMAN, Circuit Judges.

WILBUR, Circuit Judge.

The appellants are in the custody of the appellee, Edward L. Haff, District Director of Immigration and Naturalization for the Port of San Francisco, under warrants of deportation directing their deportation to Poland. Appellants applied to the District Court for writ of habeas corpus. The appellee was ordered to show cause why such a writ should not issue, and, after hearing, the application was denied and the petition dismissed. The records relating to the order of deportation are set out as exhibits to the petition for the writ, and also to the return to the order to show cause.

The petitioners are brothers. They were born at Weynitz, Roumania. At the time of their birth this territory was in the Empire of Austria. It has since been transferred to Roumania. Julius Blumen came from Germany and entered the United States in 1923, where he resided until January, 1924, when he departed for France, remaining there until March or April, 1924, when he returned to the United States. Leopold Blumen first came to the

United States from France in April or May, 1924. Both petitioners resided in the United States until October, 1925, when they departed for England where they remained until August, 1926, when they were extradited to the United States to answer to the charge of grand larceny committed in San Francisco, Cal., between April, 1924, and October, 1925. Petitioners pleaded guilty to the charge and were sentenced to a term of imprisonment in the state penitentiary at San Quentin, Cal. They remained in prison from April 29, 1927, to June 19, 1933, at which time the term of imprisonment expired and they were released from the custody of the warden of the penitentiary and were immediately taken into custody by the United States Immigration authorities for deportation under the warrants of deportation above mentioned.

Each warrant of deportation states as a ground thereof that the petitioner therein named at the time of his entry on August 8, 1926, was a person likely to become a public charge, and that he had been convicted of or admits the commission of a felony or crime or misdemeanor involving moral turpitude, to wit, grand larceny, prior to his entry into the United States in August, 1926.

The first warrant issued by the Secretary of Labor February 16, 1931, directed the deportation of appellants to Roumania, but on March 23, 1931, the Roumanian authorities declined to issue passports or accept appellants for deportation to Roumania claiming that petitioners had forfeited their rights to be considered citizens of Roumania by accepting and using Polish passports. On March 27th the Secretary of Labor amended his warrant of deportation to provide for the deportation of appellants to Poland. On April 21, 1933, the warrants were amended to provide for deportation of appellants to England, but on May 15, 1933, the warrants for deportation to Poland were reinstated because of the refusal of the British authorities to accept appellants for deportation to England.

The appellants present five objections to the order of deportation, as follows:

"1. That they have not entered or been found in the United States within the meaning of the immigration laws and that, therefore, they are not subject to deportation proceedings.

"2. That they are not citizens or subjects of Poland and that, therefore, the Secretary of Labor had no authority to order their deportation to that country.

"3. That the immigration authorities, in taking them into custody immediately upon their release from prison, without affording them a reasonable time to depart, unmolested, from the United States, deprived them of a right guaranteed by treaty and statute.

"4. That they did not, within the meaning of the law, admit the commission of a crime, involving moral turpitude, prior to entry.

"5. That they were not persons likely to become public charges at the time of their entry."

[1] The first contention is based upon the proposition that inasmuch as appellants reentered the United States in 1926 in the custody of an officer and involuntarily, they are not subject to deportation, but rather to exclusion proceedings, if any. In support of this contention appellants cite Nishimura Ekiu v. United States, 142 U. S. 651, 12 S. Ct. 336, 35 L. Ed. 1146; Kaplan v. Tod, 267 U. S. 228, 45 S. Ct. 257, 69 L. Ed. 585; U. S. ex rel. Valenti v. Karmuth (D. C.) 1 F. Supp. 370; Ex parte Chow Chok, 161 F. 627; Id., 163 F. 1021. It is unnecessary to analyze these cases. All deal with situations where there was an apprehension of the parties in connection with their attempt to enter the United States and so, although they were actually within the United States, it was held they had not entered within the meaning of the law and were subject to exclusion proceedings rather than deportation proceedings. In the case at bar the petitioners entered the country and were found therein. The decisions by the District Court in Gomes v. Tillinghast, 37 F.(2d) 935, and by the Circuit Court of Appeals for the Third Circuit in U. S. ex rel. Fitleberg v. McCandless, 47 F.(2d) 683, tend to support this view, although we think the proposition that appellants entered the United States at the time they were brought in in 1926 is too clear for discussion. See U. S. ex rel. Stapf v. Corsi, 287 U. S. 129, 53 S. Ct. 40, 77 L. Ed. 215; U. S. ex rel. Claussen v. Day, 279 U. S. 398, 49 S. Ct. 354, 73 L. Ed. 758.

[2, 3] Appellants' second contention that they are not citizens of Poland, and therefore cannot be ordered deported to that country, is based upon the proposition that the only evidence with relation to the citi-

zenship of appellants other than their Polish passports is the statement made by them at the time of their entry in 1926, namely, that they were born in the city of Weynitz, in the Empire of Austria, and that their parents were both natives of that country. This would, according to common law, make them citizens of Austria (U. S. v. Wong Kim Ark, 169 U. S. 649, 653, 18 S. Ct. 456, 42 L. Ed. 890), and upon the transfer of the territory in which they were born to Roumania by the Treaty of St. Germain they would become citizens of Roumania unless at that time they were absent from Roumania and elected to retain their Austrian citizenship (Boyd v. Nebraska, 143 U. S. 135, 162, 12 S. Ct. 375, 36 L. Ed. 103).

The appellee contends that inasmuch as the civil law and not the common law obtains in Austria and Roumania, it cannot be assumed that by birth within the territory of Austria of parents who were also born in Austria the petitioners became citizens of Austria, for the reason that the civil law recognized the principle of jus sanguinis, that is, that citizenship is acquired by descent and not by place of birth.

[4] The appellants contend that the Polish passports used by them in obtaining admission to the United States in 1924 are not competent evidence of citizenship and therefore that the order of deportation is erroneous. In support of this contention appellants cite Urtetiqui v. D'Arcy, 9 Pet. 692, 9 L. Ed. 276; Edsell v. D. Charlie Mark (C. C. A.) 179 F. 292; Miller v. Sinjen (C. C. A.) 289 F. 388. In all these cases the party whose citizenship was involved was attempting to prove his American citizenship by a passport issued to him by the Secretary of State. It was held that as against the government issuing the passport it was not evidence of the citizenship of the holder. Here the question is whether the fact can be shown that an alien who seeks entry into this country offered a Polish passport to establish his claim to enter and his nationality and allegiance. It is clear that his tender of such proof of his allegiance to the Polish government is a declaration or admission on his part that he is a subject of Poland. The fact that appellants were born in Austria is not necessarily inconsistent with Polish citizenship. No proof was made as to the law of Poland, Austria, or Roumania, or as to the question of citizenship except evidence of birth and parentage. In the absence of such proof the acts of the appellants in obtaining and presenting Polish passports for the purpose of entering the United States sustains the conclusion of the Secretary of Labor and her warrant.

[5] With reference to the third contention that the petitioners have not been given a reasonable opportunity to depart from the United States unmolested, appellants rely upon cases in which after extradition and trial for the offense for which persons were extradited, an attempt has been made to punish them for an entirely different offense in the country to which they have been extradited. It is in this connection that the Supreme Court of the United States has held that the extradited person shall not be arrested or tried for any other offense than that with which he is charged in the extradition proceedings until he shall have had a reasonable time to return unmolested to the country from which he was brought. U. S. v. Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. Ed. 425. This applies also to an arrest upon a civil process. In re Reinitz (C. C.) 39 F. 204; In re Baruch, 41 F. 472. These decisions could have no application to proceedings the very purpose of which is to facilitate the exit of the petitioner from the United States. Inasmuch as he was extradited from England and that country has refused to receive him, the petitioners are not in a position to claim the right to their liberty in order that they may leave the country in their own way and in their own time. Gorcevich v. Zurbrick (C. C. A.) 48 F.(2d) 1054; U. S. ex rel. Karamian v. Curran (C. C. A.) 16 F.(2d) 958; Lazzaro v. Weedin (C. C. A.) 4 F.(2d) 704; Johnson v. Weedin (C. C. A.) 16 F.(2d) 105.

As we sustain the deportation upon other grounds, it is unnecessary to consider the contention that deportation could not be predicated upon the proposition that the appellants were liable to become public charges because under indictment for crime. The authorities on this question are in conflict and the appellee does not press the point. Coykendall v. Skrmetta (C. C. A.) 22 F.(2d) 120; Ng Fung Ho v. White (C. C. A.) 266 F. 765; U. S. ex rel. Iorio v. Day (C. C. A.) 34 F.(2d) 920; U. S. ex rel. Medich v. Burmaster (C. C. A.) 24 F.(2d) 57, 59.

[6] The next contention is that the appellants did not admit the commission of a crime involving moral turpitude prior to entry. The claim is that the plea of guilty was not an admission of the crime. In that regard counsel cites an excerpt from an opinion of the Supreme Court in Kercheval v. U. S., 274 U. S. 220, 47 S. Ct. 582, 583, 71 L. Ed. 1009, where it is said: "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction." We think it clear that a plea of guilty is a confession of guilt within the meaning of the immigration laws. It is an admission under the most solemn circumstances, a judicial confession.

[7,8] Furthermore, as they were convicted of an offense committed before their last entry, they were subject to deportation for that reason. U. S. ex rel. Karpay v. Uhl (C. C. A.) 70 F.(2d) 792, and U. S. ex rel. Rosen v. Williams (C. C. A.) 200 F. 538, 541; U. S. ex rel. Volpe v. Smith, 289 U. S. 422, 53 S. Ct. 665, 77 L. Ed. 1298. Also, as appellee says, "they would have been deportable (8 USCA § 155) if they had never left the United States, as aliens 'sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry.'"

We conclude that the Secretary of Labor was right in ordering the petitioners deported.

Order affirmed.

LU WOY HUNG v. HAFF, District Director of Immigration.

No. 7480.

Circuit Court of Appeals, Ninth Circuit.

Aug. 5, 1935.

1. Aliens ⇐53

Fact that alien was paroled prisoner of state *held* not to prevent arrest of alien under warrant of deportation, in absence of objection by state, as against contention that federal government could not divest state of jurisdiction over such alien while he was on parole from state prison (Immigration Act 1917, § 19 [8 USCA § 155]).

2. Aliens ⇐53

Letter in which state parole officer requested director of immigration to inform him of disposition of case of alien who had been paroled from state prison and arrested on deportation warrant, so that record could be kept of alien's deportation or continued presence in United States, *held* express consent by state authorities to arrest and deportation of alien by federal government.

3. Aliens ⇐53

Deportation of alien who is on parole from state prison *held* not prohibited by statute prohibiting deportation of alien who has been sentenced to imprisonment until after termination of imprisonment (8 USCA § 180b).

Appeal from the District Court of the United States for the Northern District of California, Southern Division; Harold Louderback, Judge.

Habeas corpus proceeding by Lu Woy Hung, alias Lew Way Hong, Jin Wah, against Edward L. Haff, as District Director of Immigration for the Port of San Francisco. From an order denying the petition for a writ of habeas corpus and remanding the petitioner to custody of the respondent for deportation, the petitioner appeals.

Order affirmed.

Stephen M. White, of San Francisco, Cal., for appellant.

H. H. McPike, U. S. Atty., Robert L. McWilliams, Asst. U. S. Atty., and Arthur J. Phelan, U. S. Immigration and Naturalization Service, all of San Francisco, Cal., for appellee.

Before WILBUR and MATHEWS, Circuit Judges, and ST. SURE, District Judge.

WILBUR, Circuit Judge.

This appeal is from the order of the District Court of the United States denying a petition for a writ of habeas corpus and remanding appellant to the custody of appellee for deportation.

Appellant, an alien Chinese person, was admitted to the United States on March 24, 1917, as a minor son of a Chinese

courts should try to reduce rather than perpetuate confusion. *Eady* is inconsistent with cases that came before it and with cases decided after it. It empties Rule 6(b) of meaning. It produces a conflict among the circuits. Whatever doctrine may govern the timing of appeals when people think, mistakenly, that they had filed a timely Rule 59 motion—the subject of *Thompson* rather than *Eady*—there is no authority for entertaining and granting a Rule 59 motion that is in fact untimely.

This means that counsel who are unaware of the time limits and who mistakenly rely on the pronouncements of district judges may forfeit the right to obtain new trials. Forfeitures are not necessarily disastrous; Andrews still has an appeal. But any inadvertent surrender of a legal right is to be regretted. In *Averhart v. Arrendondo*, *supra*, responding to a related problem arising from the fact that a party must file a fresh notice of appeal after the denial of a motion under Rule 59, we requested district judges to give notice to pro se litigants about the timing of any necessary appeals. Perhaps it is a good idea to give a notice to the bar of the limits created by Rules 6 and 59; perhaps every judgment should be accompanied by some stiff warnings about the strict limits on extensions of time. This is more appropriately a question for the consideration of the Standing Committee on Practice and Procedure of the Judicial Conference, which recommends changes in the federal rules. The Standing Committee and its Advisory Committee on Civil Rules should take a close look at this problem, and the sooner the better.

UNITED STATES of America, Plaintiff-Appellee/Cross-Appellant,

v.

Liudas KAIRYS, Defendant-Appellant/Cross-Appellee.

Nos. 85-1314, 85-1397.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 13, 1985.

Decided Jan. 27, 1986.

Government instituted denaturalization proceedings. The United States District Court for the Northern District of Illinois, James B. Moran, J., 600 F.Supp. 1254, revoked citizenship, and denaturalized citizen appealed. The Court of Appeals, Cummings, Chief Judge, held that: (1) evidence supported trial court's finding that defendant was Nazi camp guard and thus his citizenship was illegally procured; (2) Nazi SS personnel card was admissible in denaturalization proceedings; (3) denaturalization statute was applicable retroactively; and (4) retroactive application of illegal procurement amendment did not violate ex post facto prohibitions.

Affirmed.

1. Aliens ⇐71(3)

Naturalization is illegally procured if any statutory requirement is not met at time naturalization is granted.

2. Aliens ⇐71(5)

By virtue of his service at Nazi labor camp, naturalized citizen failed to obtain valid visa, which was statutory [8 U.S.C.A. §§ 1427(a), 1429] prerequisite to naturalization. Immigration and Nationality Act, §§ 316(a), 318, as amended, 8 U.S.C.A. §§ 1427(a), 1429.

3. Aliens ⇐46

No personal involvement in persecution of civilians is required to render alien ineligible for visa under Displaced Persons Act which excludes from emigration indi-

viduals who assisted enemy in persecuting civilians. Displaced Persons Act of 1948, § 10, 62 Stat. 1009.

4. Aliens ⇐71(18)

Evidence justifying denaturalization must be clear, convincing and unequivocal.

5. Evidence ⇐372(10)

Issue of admissibility of document under Fed.Rules Evid.Rule 901(b)(8), 28 U.S.C.A., governing admissibility of aged documents was whether document was *Personalbogen* or SS personnel card from SS records located in Soviet Union archives and was over 20 years old; whether contents of document fairly identified individual against whom denaturalization proceedings had been initiated went to its weight and was matter for trier of fact, but was not relevant to threshold determination of its admissibility.

6. Evidence ⇐372(1)

It is not necessary to show chain of custody for admission of aged documents, but rather, Fed.Rules Evid.Rule 901(b)(8), 28 U.S.C.A., governing admissibility of aged documents merely requires that document be found in place where, if authentic, it would likely be.

7. Evidence ⇐372(6)

Vague allegation that Soviet Union regularly released forged documents was insufficient to make Nazi SS personnel card suspicious for purposes of admissibility in denaturalization proceedings under Fed.Rules Evid.Rule 901(b)(8), 28 U.S.C.A, governing admissibility of aged documents.

8. Evidence ⇐372(1, 6)

Document which matched other authenticated Nazi personnel cards in form, was found in Soviet Union archives, the depository for SS documents, and whose paper fiber was consistent with documents of more than 20 years old, was admissible as aged document in denaturalization proceedings. Fed.Rules Evid.Rule 901(b)(8), 28

9. Aliens ⇐71(19)

District court's finding that naturalized citizen had served as guard at labor camp and thus his citizenship was illegally procured was not clearly erroneous, where citizen's thumbprint appeared on SS personnel card, expert testimony established that signature on card was his and other camp guards identified naturalized citizen's picture.

10. Statutes ⇐263

Legislative enactments are presumed to be prospective absent clear statements by Congress to contrary.

11. Statutes ⇐264

In order for statute to be considered remedial for retroactivity purposes it must be one that neither enlarges nor impairs substantive rights but relates to means and procedures for enforcement of those rights.

12. Aliens ⇐71(2)

Illegal procurement amendment [8 U.S.C.A. § 1451(a)] to Immigration and Nationality Act was not remedial for retroactivity purposes, where amendment operated to divest individual of prized status of citizenship when prior to its enactment that right was vested, thereby altering legal consequence of acts completed before its effective date. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

13. Aliens ⇐71(2)

By placing illegal procurement amendment [8 U.S.C.A. § 1451(a)] in section of Immigration and Nationality Act [8 U.S.C.A. § 1451(i)] which stated that all provisions were to be applied to any naturalization grant under that subchapter and to any naturalization heretofore granted, Congress expressed sufficient intent to apply illegal procurement retroactively. Act June 29, 1906, ch. 3592, § 15, 34 Stat. 596; Immigration and Nationality Act, § 340(a, i), as amended, 8 U.S.C.A. § 1451(a, i); Nationality Act of 1940, § 338(g), 54 Stat.

14. Aliens ⇐71(10)

Denaturalization is civil rather than criminal proceeding.

15. Aliens ⇐71(10)

Purpose of denaturalization is not to punish citizens, but to protect integrity of naturalization process.

16. Constitutional Law ⇐197

Retroactive application of illegal procurement amendment [8 U.S.C.A. § 1451(a)] to Immigration and Nationality Act did not violate prohibition against ex post facto laws, in light of fact denaturalization proceedings were not criminal in nature and did not inflict punishment. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a); U.S.C.A. Const. Art. 1, § 9, cl. 3; Amend. 5.

17. Constitutional Law ⇐250.5

Illegal procurement standard for denaturalization does not violate equal protection even though intentional and voluntary acts are required for expatriation of native born citizen, whereas intentional acts are not required for denaturalization. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a); U.S.C.A. Const.Amend. 5.

18. Equity ⇐72(1)

To assert laches doctrine party must demonstrate lack of diligence and prejudice.

19. Aliens ⇐71(12)

Denaturalized citizen failed to establish laches defense to government's denaturalization action, where Government was unaware of citizen's illegal presence until 1977, and suit was brought three years later after Department of Justice investigation.

20. Constitutional Law ⇐274.3

Jury ⇐19(1)

Denaturalization is civil and equitable in nature; thus, due process does not require jury trial, but rather, is satisfied by fair trial before impartial decisionmaker. U.S.C.A. Const. Art. 3, § 1 et seq.; Amends. 5, 6.

Fred H. Bartlit, Jr., Kirkland & Ellis, Chicago, Ill., for defendant-appellant/cross-appellee.

Michael Wolf, Office of Special Investigations, Washington, D.C., for plaintiff-appellee/cross-appellant.

Before CUMMINGS, Chief Judge, BAUER and FLAUM, Circuit Judges.

CUMMINGS, Chief Judge.

[1] The defendant, Liudas Kairys, appeals an order of the United States District Court for the Northern District of Illinois revoking his citizenship pursuant to 8 U.S.C. § 1451(a). *United States v. Kairys*, 600 F.Supp. 1254 (1984). Section 1451(a) allows for revocation of citizenship that was "illegally procured" [1] or "procured by concealment of a material fact or by willful misrepresentation." [2] We affirm.

Statement of the Case and Facts

[2] Denaturalization proceedings were commenced against Kairys on August 13, 1980, by the United States Justice Depart-

> It shall be the duty of the United States Attorneys ... to institute proceedings ... in the judicial district in which the naturalized citizen may reside at the time of suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation....

1. Naturalization is illegally procured if any statutory requirement is not met at the time naturalization is granted. *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981); H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S. Code Cong. & Admin.News 2950, 2983. An applicant must enter the United States pursuant to a valid visa to obtain citizenship. An applicant ineligible under the immigration laws cannot obtain a valid visa. 8 U.S.C. §§ 1427(a), 1429.

2. In pertinent part, 8 U.S.C. § 1451(a), as amended in 1961, provides:

ment. The government brought three pertinent counts against him under § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a) (as amended in 1961). Count I charged willful misrepresentation or concealment of a material fact in defendant's petition for naturalization; Count II charged illegal procurement of naturalization because defendant's service as a Nazi camp guard made him ineligible for a visa; and Count III charged illegal procurement of citizenship due to willful misrepresentations in obtaining his visa. The district court entered an order under Count II revoking Kairys' citizenship [3] and dismissed the remaining four counts. Kairys appealed and the government cross-appealed on the dismissal of Counts I and III.

The main issue at trial was the defendant's identity—was Kairys the person the government claimed him to be? [4] The defendant contends that he is Liudas Kairys born in Kuanas, Lithuania, on December 20, 1924. As a child he moved to Svilionys, Lithuania, where he completed four years of grammar school. His schooling continued in Svencionys, Lithuania, and he then completed three years of secondary education in Vilnius, Lithuania. Defendant asserts that between 1940 and 1942 he worked on a farm in Radviliskis, Lithuania, and that in 1942 he was captured and sent to the Hammerstein prisoner of war (POW) camp.[5] The defendant claims he was a forced laborer in various locations throughout Lithuania and Poland for the remainder of the war.

The government, on the other hand, maintains that the defendant is Liudvikas Kairys born in Svilionys, then Polish, on December 24, 1920. He joined the Lithuanian army, which merged with the Russian army in 1939. The government contends that some time before March of 1940 Kairys moved to Vilnius, Lithuania, and obtained Lithuanian citizenship.[6] During the German invasion of Poland, Kairys was captured and placed in the Hammerstein POW camp. In June of 1942 he was recruited by the Nazis and sent to training camp at Trawniki, Poland. In March of 1943 Kairys was transferred to the Treblinka labor camp in Poland to serve as a Nazi camp guard, where he remained until the camp was closed in July 1944 when the Russians advanced into Poland. At some point during his service he was promoted to *Oberwachmann* of his Nazi guard unit.

[3] The defendant argues that to be ineligible for a visa under the DPA, the

3. The Displaced Persons Act of 1948 (DPA), Pub.L. No. 80-774, § 2, 62 Stat. 1009, *amended by* Pub.L. No. 81-555, 64 Stat. 219 which authorized Kairys and other European refugees to emigrate to the United States, specifically excluded individuals who had "assisted the enemy in persecuting civil[ians]." In *Fedorenko*, the Supreme Court held as a matter of law that service as a Nazi concentration camp guard equaled persecution of civilians for purposes of the DPA without proof of personal involvement in atrocities (449 U.S. at 512-13 n. 34, 101 S.Ct. at 750 n. 34), and the outcome here must be the same because service in a Nazi labor camp was similar to service in a Nazi concentration camp. This case does not present "difficult line-drawing problems" (*id.*), for, as in the *Fedorenko* camps, labor camp guards were issued uniforms, armed with guns, paid a stipend, and allowed to leave camp on furlough (*id.*). Once a court finds that Kairys was a Nazi labor camp guard, it follows that his subsequent naturalization was illegally procured, see *Fedorenko*, 449 U.S. at 512-15, 101 S.Ct. at 750-52. Thus, by virtue of his service at the Treblinka labor [illegible] failed to obtain a valid visa which is a statutory prerequisite to naturalization, 8 U.S.C. §§ 1427(a), 1429.

4. Because this case involves the identity of an individual before and during World War II, the significance of some facts depends on the history of that era. The district court's opinion has provided a clear and thorough historical basis for the facts of this case (see 600 F.Supp. at 1256-58), so that we do not need to repeat it here.

5. The defendant was captured when the Germans invaded Poland. The Germans also took control of those parts of Lithuania under Polish sovereignty.

6. The necessity of Kairys' obtaining Lithuanian citizenship relates to the dispute over his birthplace. If Kairys was born in Kuanas, he would have been a Lithuanian citizen by birth. If, however, he was born in Svilionys, his 1920 birth would not be sufficient for citizenship because Svilionys was under Polish sovereignty at that time.

government must show personal involvement in atrocities. However, the Supreme Court resolved that issue in *Fedorenko*, holding that disclosure of service as an armed camp guard results in ineligibility as a matter of law without a showing of individual involvement in persecutions. 449 U.S. at 510 n. 32, 512, 513, 101 S.Ct. at 749 n. 32, 750; see also *United States v. Kairys*, 600 F.Supp. at 1265 and n. 5. Because we find nothing significant to distinguish armed guard service at a labor camp from such service at a concentration camp, there is no need to show that Kairys was personally involved in persecution.

Although the Supreme Court notes that Fedorenko had testified to shooting in the direction of escaping prisoners, 449 U.S. at 512 n. 34, 101 S.Ct. at 750 n. 34, this was to distinguish Fedorenko's position as a camp guard from those concentration camp *survivors* who were forced to perform tasks within the camp. Thus in cases not involving armed guards such as defendant, a showing of personal involvement in persecutions may be necessary. Nonetheless, *Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution.

Both parties are in agreement as to what transpired after the war. Kairys worked as a farm laborer in Wiesent, Germany. In 1947 he entered the United States Army Labor Service Corps. Kairys applied for a visa in April of 1949, which was granted shortly thereafter. In May of 1949 he arrived in Chicago where he has since resided. In 1957 Kairys applied for naturalization, the petition was approved and the district court granted him citizenship later that year. From 1951 to the present Kairys has held one job in Chicago, has married and has two daughters. He is active in community and Lithuanian community affairs.

Kairys raises several issues on appeal. First, he contends there is insufficient evidence in the record to uphold the district court's finding that he was a Nazi labor camp guard at Treblinka. Second, Kairys raises various issues concerning the retroactive application of a 1961 amendment to the Immigration and Nationality Act. Third, he contends that the illegal procurement standard of § 1451(a) violates equal protection. Fourth, he argues that laches should bar the government's action. Finally, he claims he has the right to a jury trial.[7]

I. SUFFICIENCY OF THE EVIDENCE

[4] The government's burden of proof in a denaturalization case is heavy. The government must prove its case by "clear convincing, and unequivocal" evidence and not "leave the issue in doubt."[8] *Fedorenko v. United States*, 449 U.S. 490, 505, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981) (quoting *Schneiderman v. United States*, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed 1796 (1943)); *Costello v. United States*, 36

7. Kairys raises one further issue in his brief, *viz.*, that the cooperation between the United States government and the Soviet Union denied him access to documents and witnesses, violating his right to due process. We see no merit in this contention. There is simply nothing in the record to support the claim of a due process violation. Although there may be some situations where involvement of the Soviet Union should result in close examination of the discovery proceedings, see, *e.g.*, *United States v. Kowalchuk*, 773 F.2d 488, 493–94 (3d Cir.1985) (Aldisert, J., dissenting), that situation is not before this Court.

8. The phrasing of the standard is somewhat confusing. At oral argument counsel for the defendant implied that this test could be higher than the criminal "beyond a reasonable doubt" standard. On its face, the standard seems t imply that the issue should be doubt-free befor finding for the government, whereas the crim nal standard allows a reasonable doubt. It i clear that the Supreme Court intended a stric standard, see *Schneiderman*, 320 U.S. at 125, 6 S.Ct. at 1336, but not to the extent that it woul surpass the criminal standard. The Court i *Schneiderman* simply articulated the standar as the clear, convincing, and unequivocal rathe than the "mere preponderance" standard. *I* 320 U.S. at 125, 63 S.Ct. at 1336 (quoting *Ma well Land-Grant Case*, 121 U.S. 325, 381, 7 S.C 1015, 1029, 30 L.Ed.2d 949 (1887)). Thus w hold the evidence justifying revocation must b clear, convincing, and unequivocal. *Unite States v. Kowalchuk*, 773 F.2d 488, 493 (3d Ci 1985).

U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961); *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). Our review of the district court's findings is conducted under the clearly erroneous standard of Fed.R.Civ.P. 52(a). *United States v. Koziy*, 728 F.2d 1314, 1318–1319 (11th Cir.1984), certiorari denied, — U.S. —, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984); *United States v. Demjanjuk*, 680 F.2d 32, 33 (6th Cir.1982), certiorari denied, 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982): Here the district court found from the evidence presented that "beyond any reasonable doubt ... the defendant is Liudvikas Kairys, born in Svilionys [then Polish] on December 24, 1920, who later became a resident of Vilnius, a Lithuanian citizen and ultimately an *Oberwachmann* at Treblinka labor camp" and thus his citizenship was illegally procured. 600 F.Supp. at 1262. We hold that the court's factual findings are not clearly erroneous.

Kairys' argument focuses on the accuracy and admissibility of a *Personalbogen*, which is a German Waffen Schutzstaffel (SS) identity card. The government relied in part on the *Personalbogen* to establish its version of the defendant's identity. The district court admitted the *Personalbogen* under Federal Rule of Evidence 901(b)(8). The defendant argues that the admission of the document was error, claiming that it is a forgery fraught with inaccuracies, erasures, inconsistencies, and unexplained problems. The government counters that the defendant failed to produce any substantive evidence that the document was anything other than what it was purported to be—the defendant's Nazi SS personnel card.

A. *Admissibility*

Federal Rule of Evidence 901(b)(8) governs the admissibility of ancient documents. The Rule states that a document is admissible if it "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered." The question of whether evidence is suspicious and therefore inadmissible is a matter of the trial court's discretion. *United States v. Bridges*, 499 F.2d 179 (7th Cir.1974), certiorari denied, 419 U.S. 1010, 95 S.Ct. 330, 42 L.Ed.2d 284 (1974). We see no error here.

[5] Although the Rule requires that the document be free of suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be. As Rule 901(a) states: "The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In other words, the issue of admissibility is whether the document is a *Personalbogen* from the German SS records located in the Soviet Union archives and is over 20 years old. Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility. *Koziy*, 728 F.2d at 1322.

[6, 7] The defendant does argue that a question was raised about whether the document was actually an original *Personalbogen*. First, the defendant raises general allegations that the Soviet Union routinely disseminates forged documents as part of propaganda campaigns. Next the defendant contends that the thumbprint ink was "unusual" and that it could have been placed on the document by mechanical means. But government witnesses testified that the only likely way for the print to appear on the *Personalbogen* was from the defendant's pressing his thumb to the paper. Additionally, the defendant notes that the government failed to establish the proper chain of custody from Treblinka to the Soviet archives. However, it is not necessary to show a chain of custody for ancient documents. Rule 901(b)(8) merely requires that the document be found in a place where, if authentic, it would likely be. All that is left, then, is the vague allegation that the Soviet Union regularly releases

forged documents. That is not sufficient to make the document suspicious for purposes of admissibility.

[8] There was sufficient evidence in the record that the document was a German SS *Personalbogen*. It matched other authenticated *Personalbogens* in form, 600 F.Supp. at 1261; it was found in the Soviet Union archives, the depository for German SS documents, *id.*; and its paper fiber was consistent with that of documents more than 20 years old, *id.* at 1260. Its admission was not error.

B. *Sufficiency of Evidence*

The defendant points to numerous supposed problems with respect to the evidence presented by the government. First, he claims that the *Personalbogen* is inaccurate and inconsistent and therefore unreliable. For example, he notes that the document misstates his hair and eye color as dark blond and grey, respectively, when he claims they are black and blue, respectively.[9] The defendant also claims that other personnel records are inaccurate or of questionable reliability; for example, he notes that the promotion documentation is back-dated and therefore unreliable. The defendant further argues that the absence of certain testimony reflects the weakness of the government's case, for example, the absence of eyewitness survivors to identify Kairys as a camp guard. Finally, the defendant points to his introduction of a temporary identity card that places him in Radviliskus and other Lithuanian cities (rather than Trawniki and Treblinka in Poland) during the war period.

[9] Despite Kairys' protests, the record supports the district court's findings.[10] There is sufficient testimony and other evidence for the trial court to have found that the *Personalbogen* correctly identified the defendant as a Nazi labor camp guard at Treblinka. The district court relied primarily on the fact that defendant's thumbprint appears on the identity card, supported by expert testimony that the signature on the card was the defendant's. 600 F.Supp. at 1262. In addition, other camp guards placed a Kairys at Treblinka, some of whom identified the defendant's picture. A witness testified that he observed Kairys in a German SS uniform in late 1943 or early 1944. Promotion and other personnel records indicate that a Kairys trained at Trawniki, was transferred to Treblinka, and was promoted to *Oberwachmann*. Finally, personal records, such as a baptismal certificate and a newspaper citizenship notice, fix the defendant's birth date as December 24, 1920, and birthplace as Svilionys (then under Polish sovereignty), rather than December 20, 1924, in Kuanas, Lithuania. These were all credibility determinations for the trier of fact to make. We cannot say that the district court was clearly erroneous in deciding the facts as it did.

II. THE 1961 AMENDMENT

A. *Retroactivity*

The defendant raises the general issue of whether the 1961 amendment, which readded the "illegal procurement" standard for denaturalization to 8 U.S.C. § 1451(a) (see note 12 *infra*), should apply to him since his 1957 grant of citizenship was prior to that amendment. Defendant makes two arguments: first, retroactive application of the 1961 amendment violates general rules of statutory construction; and second, retroactive application of the illegal procurement standard violates the *ex post facto* clause of the Constitution.

9. Although the defendant now claims his hair to be black, several documents in the record filled out by Kairys himself describe his hair color as brown. The discrepancy between dark blond and brown is quite a bit smaller than between dark blond and black.

10. It is important to note that most of the defendant's major factual contentions fail when presented with the record. For instance, in his brief Kairys notes that the *Personalbogen* indicates that the holder of the card has a scar on his left hip, but claims that a doctor testified that the defendant has no scar on his hip. What defendant fails to disclose is that the doctor did testify that Kairys has a scar about one inch above the left hip, an area that a layperson could describe as "hip." See also *supra* note 9.

1. *Statutory Construction*

[10] Kairys argues strongly that retroactive application of the illegal procurement standard violates statutory construction principles. Legislative enactments are presumed to be prospective absent clear statements by Congress to the contrary. See *United States Fidelity and Guaranty Co. v. United States*, 209 U.S. 306, 314, 28 S.Ct. 537, 539, 52 L.Ed. 804 (1908); *South East Chicago Cm. v. Department of Housing & Urban Development*, 488 F.2d 1119 (7th Cir.1973). The district court ruled that the statute was remedial and thus was not being applied retroactively, 600 F.Supp. at 1268. Although we disagree with the district court's categorization of the amendment as merely remedial, we affirm on the basis that sufficient evidence of congressional intent exists to apply the amendment to pre-1961 naturalizations.

[11] In order for a statute to be considered remedial it must be one that neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights. *Bagsarian v. Parker Metal Co.*, 282 F.Supp. 766 (N.D. Oh.1968). In *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir.1981), a products liability act was held to be remedial because it created no new causes of action or substantive rights or liabilities. Similarly, in *Czubala v. Heckler*, 574 F.Supp. 890, 897 (D.C. Ind.1983), a statute that outlined procedures for remand due to new and substantial evidence was held remedial. But a New York statute that created a private cause of action for unfair and deceptive practices was held not remedial because it created an entirely new right of action and greatly expanded liability, changing the rights and liabilities of the parties. *Buccino v. Continental Assurance*, 578 F.Supp. 1518 (S.D.N.Y.1983).

[12] Likewise, the amendment to § 1451(a) goes beyond merely affecting procedural mechanisms and alters the rights of naturalized citizens. Although the district court is correct in stating that the statute applies to denaturalization proceedings rather than the granting of the substantive right, 600 F.Supp. at 1268, it can hardly be characterized as not impairing the right of citizenship held by naturalized individuals. The "illegal procurement" amendment operates to divest an individual of the prized status of citizenship when prior to its 1961 passage that right was vested after 1952 (see *infra* note 12). See *Schneiderman*, 320 U.S. at 122, 63 S.Ct. at 1335. Therefore, the inquiry is whether the amendment changes the legal consequences of acts completed before its effective date. *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981). Here most certainly the legal consequences of Kairys' being a Nazi camp guard at Treblinka has changed; between 1952 and 1961 there was no "illegal procurement" standard so that the government could not use that standard to denaturalize Kairys, whereas since 1961 the government could use that standard to deprive him of citizenship.

[13] It remains to determine whether Congress has expressed sufficient intent to apply the 1961 "illegal procurement" amendment retroactively, as the government contends. As already noted, statutes are to be construed as prospective unless otherwise stated. *Greene v. United States*, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); *Hospital Employees Labor Program v. Ridgeway Hospital*, 570 F.2d 167, 169–70 (7th Cir.1978); *South East Chicago Cm.*, 488 F.2d 1119; IA C. Sands, *Sutherland on Statutory Construction*, § 22 at 200 (4th ed. 1972). This rule is even more appropriate when the statute affects vested rights. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 720–21, 94 S.Ct. 2006, 2020–21, 40 L.Ed.2d 476 (1974).

Nonetheless several factors demonstrate congressional intent to apply the amendment to pre-1961 grants of citizenship. The district court found the strongest indication of such intent in 8 U.S.C. § 1451(i), which states that the entire provisions of § 1451 are to be applied to "any naturalization granted under this subchapter" and to

"any naturalization heretofore granted." [11] Therefore, when Congress amended § 1451(a) it was already a retroactive subsection by virtue of subsection (i). To emphasize, the amendment was placed in a section already governed by a separate provision for retroactivity, a provision of which Congress was presumably aware when passing the amendment to § 1451(a). This interpretation is consistent with the purpose of the illegal procurement provision. Congress reinserted [12] the illegal procurement standard in § 1451(a) in order to effectuate the purposes of both the naturalization and denaturalization statutes. See H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.Code Cong. & Admin.News 2950, 2982–84. Congress did not want individuals who were not properly qualified or had not properly completed the required initial steps to acquire and retain American citizenship. It would be completely illogical to conclude that Congress intended the illegal procurement denaturalization standard to apply to pre-1952 Act and post-1961 Act naturalizations and not to others such as his 1957 grant. That conclusion would serve to make the denaturalization requirements ineffective for naturalized citizens such as the defendant. Given this broadening of the statute's scope (by reinserting the illegally procured standard into § 1451(a)) Congress surely did not mean to create a loophole class of people who would not be subject to the new (1961) version of the statute. See *Hutchinson v. Commissioner*, 765 F.2d 665, 669 (7th Cir.1985).

Finally, when Congress wished to make provisions prospective in the 1961 Act (of which this amendment to § 1451(a) is a part) it expressly did so,[13] still another indication that the provision at issue was meant to be retroactive. Therefore, we are unwilling to ascribe a contrary intent to Congress by giving the 1961 "illegal procurement" amendment only a prospective effect.

2. *Ex Post Facto*

The defendant argues that the retroactive application of the 1961 amendment to his 1957 citizenship violates the constitutional prohibition against *ex post facto* laws, U.S. Const. art. I, sec. 9, cl. 3. The defendant's argument is unpersuasive.

[14, 15] Denaturalization is a civil rather than criminal proceeding. See *Fedorenko*, 449 U.S. at 516, 101 S.Ct. at 752; *Schellong v. United States*, 717 F.2d 329, 336 (7th Cir.1982), certiorari denied, 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984). Additionally, the purpose of the denaturalization statute is not to punish citizens, but to protect the integrity of the naturalization process. *Fedorenko*, 449 U.S. at 506–07, 101 S.Ct. at 747–48. Although sometimes harsh, § 1451(a) merely works to effectuate the intentions of Congress that only those qualified may become and remain citizens. Specifically, the denaturalization statute does not punish naturalized citizens for post-naturalization acts, and for this reason the cases cited by Kairys are distinguishable. See *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Kennedy v. Mendoza-Martinez*,

11. 8 U.S.C. § 1451(i) provides:
The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court....

12. Illegal procurement subsections had already been incorporated into preceding denaturalization statutes. See § 15, Act of June 29, 1906, 34 Stat. 596, 601; § 338(g), Nationality Act of 1940, 54 Stat. 1137, 1160. In the 1961 Act Congress re-added the "illegally procured" language to the prior § 1451(a) language "procured by concealment of a material fact or willful misrepresentation." The "illegally procured" language had been inexplicably and apparently inadvertently dropped from the 1952 Act. See *United States v. Stromberg*, 227 F.2d 903 (5th Cir.1955).

13. See §§ 17 and 19, Pub.L. No. 87–301, 75 Stat. 656; H.R.Rep. No. 1086, 87th Cong., 1st Sess. 38–41 (dealing with petitions for naturalization and loss of United States citizenship, respectively).

372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The Supreme Court recognized in *Johannessen v. United States* that a denaturalization proceeding imposes no new penalties and does not make unlawful that which was previously lawful. 225 U.S. 227, 242–43, 32 S.Ct. 613, 617–18, 56 L.Ed. 1066 (1912). Rather it works to deprive the naturalized citizen of a privilege that should never have been bestowed. *Id.*; see also *Koziy*, 728 F.2d at 1320 ("The utilization of illegal procurement deprived Koziy of a privilege that was never rightfully his.").

[16] Because denaturalization proceedings are not criminal in nature and do not inflict punishment, the retroactive application of the amendment does not violate the prohibition against *ex post facto* laws.

B. *Equal Protection*

[17] The defendant also asserts that the illegal procurement standard violates the equal protection clause of the Fifth Amendment. His reasoning is that because intentional and voluntary acts are required for expatriation of native-born citizens, *Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964), intentional acts must also be the basis for denaturalization of naturalized citizens. This argument, however, ignores the intrinsic differences between the two types of citizenship, as well as the long history of the illegal procurement standard in denaturalization statutes—upheld by the Supreme Court. See *Fedorenko*, 449 U.S. at 517–18, 101 S.Ct. at 752–53; *United States v. Ness*, 245 U.S. 319, 321, 38 S.Ct. 118, 119, 62 L.Ed. 321 (1917); *United States v. Ginsberg*, 243 U.S. 472, 474–75, 37 S.Ct. 422, 423, 61 L.Ed. 853 (1917); *Luria v. United States*, 231 U.S. 9, 22–24, 34 S.Ct. 10, 13, 14, 58 L.Ed.2d 101 (1913).

American citizenship is a precious right and consequences of its loss may be severe. See *Costello*, 365 U.S. at 269, 81 S.Ct. at 536; *Chaunt*, 364 U.S. at 353, 81 S.Ct. at 149; *Baumgartner v. United States*, 322 U.S. 665, 675–76; *Schneiderman*, 320 U.S. at 122, 63 S.Ct. at 1335. Naturalization is not a second-class status. *Schneider v. Rusk*, 377 U.S. 163, 165–66, 84 S.Ct. 1187, 1188–89, 12 L.Ed.2d 218 (1964). The Fourteenth Amendment provides that all citizens are equal, whether native or naturalized. U.S. Const. amend. XIV. Congress has the power to regulate the naturalization process, U.S. Const. art. I, § 8, cl. 4,[14] which includes detailing both the requirements for naturalization and the standards for denaturalization.

Section 1451(a) is a proper exercise of Congress' power to set the requirements for naturalization and to authorize denaturalization in the event of noncompliance. It does not act unequally upon naturalized citizens to remove their citizenship when they have failed to comply with the requirements of naturalization. *Luria*, 231 U.S. at 24, 34 S.Ct. at 13 (illegal procurement "makes no discrimination between the rights of naturalized and native citizens"). Rather the difference in treatment is due to the inherent differences in the two types of citizenship; for natives there are no pre-citizenship acts to prescribe.

The cases cited by the defendant are inapplicable. *Schneider* and *Afroyim* do stand for the propositions that naturalized and native citizens must be treated equally and that before any citizen can be expatriated or denaturalized there must be a voluntary and intentional act. But this standard applies only to acts committed after citizenship. Because there are no analogous pre-citizenship requirements for native-born individuals, naturalized citizens are not being treated any differently than their intrinsic differences require.

Furthermore, the Supreme Court in *Fedorenko* continued its acceptance of illegal procurement as a basis for revocation of citizenship both by using that standard as a

14. The Constitution empowers Congress to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4.

basis for its decision, 449 U.S. at 515, 101 S.Ct. at 751, and by references to *Ginsberg* and *Ness*,[15] 449 U.S. at 517–18, 101 S.Ct. at 752–53. Moreover, the Court, recognizing the facial inconsistency, reconciled the diverging concepts of *Schneider-Afroyim* and *Ginsberg-Ness*. *Id.* at 505–07, 101 S.Ct. at 746–48. Because Kairys' argument is inconsistent with this controlling Supreme Court authority, it must fail.

III. LACHES

[18, 19] The defendant protests that this action should be barred by laches. We do not consider it necessary to reach that question because the defendant cannot meet the necessary requirement to assert a laches defense. In *Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961), the Supreme Court addressed the issue of whether or not laches barred the government from proceeding against the defendant in a denaturalization proceeding. There the Court noted that the lower courts had consistently disapproved of the use of laches in denaturalization proceedings, reasoning that laches is not a defense against the sovereign. *Id.* at 281, 81 S.Ct. at 543 and cases cited therein. The Court went on to hold that in any event the defendant had not adequately demonstrated prejudice. *Id.* at 282–83, 81 S.Ct. at 543–44. In this case the district court noted that the defendant would probably fail in meeting the laches standard. 600 F.Supp. at 1264 n. 3. To assert the laches doctrine a party must demonstrate lack of diligence and prejudice. *Costello*, 365 U.S. at 281, 81 S.Ct. at 542. Here the government was unaware of Kairys' illegal presence until 1977. Suit was brought in August of 1980 after a Department of Justice investigation. We agree with the district court that this would not rise to the level of lack of diligence. See also *United States v. Trifa*, 662 F.2d 447 (6th Cir.1981), certiorari denied, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982).

IV. JURY TRIAL

[20] The defendant claims that the trial court erred in not granting his request for a jury trial. He asks this Court to overturn past decisions clearly holding that there is no right to a jury in denaturalization proceedings, *Luria v. United States*, 231 U.S. 9, 27–28, 34 S.Ct. 10, 15, 58 L.Ed. 101 (1913); *Schellong*, 717 F.2d at 338. We are not prepared to do so.

This Court reconsidered this issue recently both in *United States v. Walus*, 616 F.2d 283, 304 n. 53 (7th Cir.1980), and in *United States v. Schellong*, 717 F.2d 329, 338 (7th Cir.1983), and has continued to uphold the ruling of *Luria* that there is no right to a jury in denaturalizations because they are proceedings in equity. See *Fedorenko*, 449 U.S. at 516, 101 S.Ct. at 752 (reaffirming that denaturalization actions are equitable in nature). In *Schellong* this Court discussed alternative constitutional bases for a right to jury trial under Article III and the Sixth Amendment. Ultimately this Court concluded that because denaturalization is civil and equitable in nature, due process was satisfied by a fair trial before an impartial decisionmaker. 717 F.2d at 336. We adhere to those holdings.

V. CONCLUSION

For the reasons stated above, the district court committed no error in the proceedings.[16] Accordingly, the order of the district court revoking the defendant's naturalization is affirmed.

15. Both *Ginsberg* and *Ness* were Supreme Court decisions that upheld denaturalizations of citizens under the 1906 illegal procurement standard; both involved unintentional acts before citizenship.

16. Because we conclude that the defendant's citizenship was illegally procured, as alleged in Count II of the complaint, we do not consider the government's cross-appeal arguments that Counts I and III (alleging willful concealments and misrepresentations of material facts) were improperly dismissed by the district court.

the vessel, when she left New York, and ever afterwards, were the usual equipments of a vessel of her class, on an innocent commercial voyage, such as that stated in the evidence. In delivering the opinion of the court, Judge Story observes (page 238): "The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of congress. Here again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners; the vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner; and this is done from the necessity of the case, as the only adequate means of suppressing the wrong." The same necessity, it appears to me, exists in the present case. Any other construction of the act would, in my opinion, go wholly to defeat its operation and violate its plain import. But the jury have here found that the railroad company were notified by public advertisements, and by the agents of the post-office department of the United States, that the defendant and his agents were employed in the business of carrying letters. Such notice, certainly, would go far to remove any objection to making them liable to the penalty to which, in the cases cited, the owners were subjected, without notice or opportunity to avoid the prohibited act.

It is my opinion, from the facts found by the jury, that the defendant did procure and assist in the doing or perpetration of the acts prohibited by the nineteenth section of the act of 1825, and that by so doing has incurred the penalties claimed by the United States. I feel the less difficulty in coming to this conclusion, as the case has been submitted with a view (whatever may be the result here) of removing it for reconsideration to the supreme court of the United States, whose decision will hereafter insure a uniform course in all the courts of the Union, and where any error or injustice has been committed by this court it will be fully corrected.

Judgment is entered on the verdict in favor of the United States for $2,000.

Case No. 15,282.

UNITED STATES v. HALL et al.

[3 Chi. Leg. News, 260; 13 Int. Rev. Rec. 181.]

Circuit Court, S. D. Alabama. May, 1871.

CONSTITUTIONAL LAW—CITIZENSHIP—FOURTEENTH AMENDMENT—ENFORCEMENT ACT.

1. Under the original constitution and the first eight articles of amendment, congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion or in the right peaceably to assemble.

2. It was the purpose of the people, by the first ten amendments, to reserve to themselves and the states the power to secure the rights enumerated therein against the action of congress and not give congress power to enforce them as against the states.

3. By the original constitution, citizenship in the United States was a consequence of citizenship in a state, but by the fourteenth amendment this order of things is reversed, and citizenship in the United States is defined and is made independent of citizenship in a state, and citizenship in the state is a result of citizenship in the United States, so that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof.

4. The privileges and immunities here referred to may be denominated fundamental, which belong of right to the citizens of all free states, and which have been enjoyed by the citizens of the several states which compose the Union from the time of their becoming free; that among these are those which in the constitution are expressly secured to the people either as against the action of the federal or state governments. Included in these are the rights of freedom of speech, and the right peaceably to assemble.

5. The right of freedom of speech, and the other rights enumerated in the first eight articles of the amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, and that congress has the power to protect them by appropriate legislation.

6. The "Enforcement Act," under which this indictment is founded, applies to cases of this kind, and that it is legislation appropriate to the end in view—the protection of the fundamental rights of citizens of the United States.

[This was an indictment against John Hall, Jr., and William Pettigrew.]

John P. Southworth, Dist. Atty., and Alex. McKinstry, for the United States.

Robert H. Smith, Turner Reavis, and Thos. H. Herndon, for defendants.

Before WOODS, Circuit Judge, and BUSTEED, District Judge.

WOODS, Circuit Judge. This is an indictment for a violation of the 6th section of the act of congress, approved May 31, 1870 [16 Stat. 140], entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes." It contains two counts. The first count in substance charges that the defendants did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate Charles Hays and others, naming them, citizens of the United States of America, with intent to prevent and hinder their free exercise and enjoyment of the right of freedom of speech, the same being a right and privilege granted and secured to them by the constitution of the United States. The second count charges in substance that the defendants did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate William Miller and others,

naming them, good and lawful citizens of the United States, with intent to prevent and hinder their free exercise and enjoyment of the right and privilege to peaceably assemble, the same being a right and privilege granted and secured to them by the constitution of the United States. A demurrer is filed to this indictment based on the following grounds: (1) That the matters charged in said counts are not in violation of any right or privilege granted or secured by the constitution of the United States. (2) That they are not in violation of any provision of the act of congress, on which the indictment is based, or of any statute of the United States. (3) That each of said counts charges the commission of several and distinct offenses.

Article 1 of amendments to the constitution provides that congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people "peaceably to assemble and petition the government for a redress of grievances." It is not claimed by counsel for the United States that freedom of speech and the right peaceably to assemble are rights granted by the constitution, but it is asserted that they are rights recognized and secured. On the other hand, counsel for defendants assert that while the constitution recognizes the existence of these rights it does not secure them. That the constitution only inhibits congress from impairing them, but that no such restriction applies to the states. In the case of Permoli v. First Municipality, 3 How. [44 U. S.] 600, it was held by the supreme court that "the constitution makes no provision for protecting the citizens of the respective states in their religious liberties. That is left to the state constitutions and laws. Nor is there any inhibition imposed by the constitution of the United States in this respect upon the states." This language may well be applied also to the rights of freedom of speech, and the right peaceably to assemble, which are referred to in the same article of amendment as the right of religious liberty. So in Barron v. Baltimore, 7 Pet. [32 U. S.] 243, the same court held that "the provision in the fifth amendment declaring that private property shall not be taken for public use without due compensation is intended solely as a limitation upon the exercise of power by congress, and is not applicable to the legislation of the states." In Pervear v. Commonwealth, 5 Wall. [72 U. S.] 476, the supreme court held that the provision in the 8th article of amendment that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted," applies to national, not to state, legislation.

The result of these and other authorities to the same effect, is that the right of freedom of speech and the right peaceably to assemble, and other rights enumerated in the first eight articles of amendment are protected by the constitution only against the legislation of congress, and not against the legislation of the states. Nevertheless, it is true that these rights are not secured to the people of the United States. The security may not be perfect and complete. These rights may be impaired by state legislation, yet they are secured against the action of congress. Can it be said, with truth, that the right of trial by jury, the right of the accused to be confronted with the witnesses against him, the right not to be deprived of life, liberty or property without due process of law, are not secured by the constitution of the United States? We think that all rights which are protected against either national or state legislation may fairly be said to be secured rights. If we assume, then, that the right of freedom of speech and the right peaceably to assemble are rights secured by the constitution of the United States, then the first two grounds of demurrer must be overruled, for the indictment alleges that the defendants did conspire together to injure and oppress the parties named with intent to prevent and hinder their free exercise and enjoyment of rights secured by the constitution, to wit: the right of freedom of speech and the right peaceably to assemble, and this the statute declares to be an offense.

The argument of this demurrer has taken a wide range, and questions not distinctly presented by it have been submitted to our consideration. As this discussion has called in question the power of congress to pass the act in which the indictment is founded, we will proceed to consider this objection to the indictment. It is claimed that when congress is prohibited from interfering with a right by legislation, that does not authorize congress to protect that right by legislation; that as the states are not prohibited by the constitution from interference with the rights under consideration, congress, although prohibited itself from impairing these rights, has no grant of power to interfere for their protection as against the states. That the first eight articles of amendment were passed as limitations upon the power of congress, and that the history of the constitution shows that in the adoption of these articles, it was not the purpose of the people to enlarge, but to restrain the power of congress. In the Federalist (article 84), Mr. Hamilton, in replying to the objection that the proposed constitution of the United States contained no bill of rights, says: "I affirm that bills of rights in the sense and to the extent they are contended for are not only unnecessary in the proposed constitution, but would be even dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed.

I will not contend that such a provision will confer a regulating power, but it is evident it would afford to men disposed to usurp, a plausible pretense for claiming that power." The debates in the communities of the several states upon the adoption of the constitution and bill of rights proposed, especially in Massachusetts, New Hampshire and New York, show that the purpose of the people in the adoption of the first eight amendments was to limit, and not enlarge the powers of congress. See 1 Elliott's Debates, pp. 322, 326, 328. We are of opinion, therefore, that under the original constitution and the first eight articles of amendment, congress had not the power to protect by law the people of a state in the freedom of speech and of the press, in the free exercise of religion, or in the right peaceably to assemble. Jealousy of the power conferred on the congress by the original constitution suggested and accomplished the adoption of the first ten amendments to the constitution, and we entirely agree with counsel for defendants that it was the purpose of the people by these amendments to reserve to themselves and the states the power to secure the rights enumerated therein against the action of congress, and not give congress power to enforce them as against the states.

We have thus far considered this demurrer, and it seems to have been argued for the defense, without reference to the recent amendments to the constitution. As we are of opinion that the fourteenth amendment has a vital bearing upon the question raised, it is well that we should look to its provisions. It declares that "all persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside." By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the constitution of the United States to citizens thereof. The amendment proceeds: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, 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. Corfield v. Coryell [Case No. 3,230]. Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech, and the right peaceably to assemble.

To recur now to the first ground of demurrer: are these rights secured to the people by the constitution of the United States? We find that congress is forbidden to impair them by the first amendment, and the states are forbidden to impair them by the fourteenth amendment. Can they not, then, be said to be completely secured? They are expressly recognized, and both congress and the states are forbidden to abridge them. Before the fourteenth amendment, congress could not impair them, but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them, and so far as the provisions of the organic law can secure them they are completely and absolutely secured. The next clause of the fourteenth amendment reads: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." Then follows an express grant of power to the federal government: "Congress may enforce this provision by appropriate legislation." From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures. The extent to which congress shall exercise this power must depend on its discretion in view of the circumstances of each case. If the exercise of it in any case should seem to interfere with the domestic affairs of a state, it must

be remembered that it is for the purpose of protecting federal rights, and these must be protected even though it interfere with state laws or the administration of state laws. We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that congress has the power to protect them by appropriate legislation. We are further of opinion that the act on which this indictment is founded applies to cases of this kind, and that it is legislation appropriate to the end in view, namely, the protection of the fundamental rights of citizens of the United States. But it is alleged for further ground of demurrer that this indictment charges the commission of several and distinct offenses. It charges that the defendants did band and conspire together, with intent to injure, oppress, threaten and intimidate, etc. The well-settled rule of criminal pleading is, that the operative words of a criminal statute may all be inserted in the indictment, connected by the conjunctive "and," and that proof of any one of the acts charged will sustain the indictment. This indictment is framed under this rule, and we think this objection to it not well taken.

We are of opinion, also, that this indictment is sufficiently definite and certain. The law describes particularly the offense created by it, and the indictment follows the language of the law. Our conclusion is, therefore, that the demurrer to this indictment must be overruled.

Case No. 15,283.

UNITED STATES v. HALL.

[4 Cranch, C. C. 229.] [1]

Circuit Court, District of Columbia. May Term, 1832.

CRIMINAL LAW — INDICTMENT — VARIANCE — FORGERY.

1. Upon the trial of an indictment under the 11th section of the penitentiary act for the District of Columbia, for uttering as true a counterfeited bank-note, it is not necessary that the note given in evidence should correspond in words and figures with the note set out in the indictment, with the following averment, namely, "which said false, forged, and counterfeited note is as follows, namely," &c., setting out the note verbatim et literatim, with all the words, letters, figures, and numerals, upon the face of the note.

2. But if the forged note be lost after the indictment found and before the trial, the jury must be satisfied that it corresponded with that set out in the indictment in the names of the cashier and president so far as that there was not, in the one, any letter added or omitted which would vary the sound of the name, and that the note which was passed had upon its face the letters "No" prefixed to the number 15,402, as is set forth in the indictment.

The indictment against [Edward] Hall contained two counts:

1st. That he did falsely make, forge, and counterfeit, and did cause and procure, &c., and did willingly aid and assist in falsely making, forging, &c., a certain paper, partly printed and partly written, commonly called a "bank-note," and purporting to be a note of the president, directors, and company of the Bank of the United States, and to be signed by Nicholas Biddle, president of the said bank, and by W. M'Ilvaine, cashier, which said false, forged, and counterfeited note is as follows, namely:

"D 15,402 No. 15,402
"(20) (XX)

"The President, Directors and Co. of the Bank of the United States, promise to pay to Thomas C. Spotswood or bearer on demand twenty dollars. Philadelphia, March 4, 1831. N. Biddle, President.

"W. M'Ilvaine, Cashier."

—with intention to prejudice one Samuel Dixon, against the form of the statute in that case made and provided, and against the peace and government of the United States.

2d. The second count charged that he "did pass, and did utter and publish as true, a certain other false, forged and counterfeited paper partly printed and partly written," &c., describing it exactly as in the first count, "which said false, forged and counterfeited note is as follows," &c., (setting out the note as before,) "with intent to prejudice one Samuel Dixon, he the said Edward Hall at the time he so passed the said false, forged, and counterfeited note, and uttered and published the same as true, then and there well knowing the said note to be false, forged, and counterfeited, against the form of the statute," &c.

No evidence was offered under the first count.

By the eleventh section of the act of congress of March 2, 1831 (4 Stat. 445), "for the punishment of crimes in the District of Columbia," usually called the penitentiary act, it is enacted, among other things, "that every person duly convicted" "of having passed, uttered or published, or attempted to pass, utter, or publish, as true, any such falsely made, altered, or counterfeited paper, writing or printed paper to the prejudice of the right of any person, body politic, &c., "knowing the same to be falsely made, &c., "with intent to defraud such person, &c., "shall be sentenced to suffer imprisonment and labor," &c.

At the trial it appeared that the forged note had been purloined from the district attorney, in the court-room, since the indictment was found; and secondary evidence was admitted, without objection.

R. S. Coxe, for defendant, prayed the court to instruct the jury, that if they shall believe, from the evidence, that the note passed by the defendant, did not correspond in words and figures, with that set out in the indictment, then the jury ought to find their verdict for the defendant.

[1] [Reported by Hon. William Cranch, Chief Judge.]

like. Snowden should be allowed the opportunity to make that showing no matter how thin his chances of success may seem.

Annotation.—Fourteenth Amendment as applied by federal courts to questions affecting nomination for, or election to, state offices.

The fundamental question presented in SNOWDEN v. HUGHES (reported herewith) ante, 497, and considered in this annotation, is whether, and under what circumstances, a candidate for a state office may successfully invoke the guaranties of the Fourteenth Amendment in a federal court, as against state action which would interfere with his nomination or election.

Theoretically, such an attack upon state action may be rested upon the ground that the state has interfered, not only with the rights of the candidate for office, but also with the right of the voters.[1] Constitutional safeguards of this latter right are contained, not only in the Fourteenth, but also in the Fifteenth and Nineteenth Amendments. This right has been the subject of numerous annotations[2] and is not considered in the present annotation.

The question under annotation, which is not only one of substantive constitutional law, but also one going to the jurisdiction of federal courts,[3] will be considered in connection with the various clauses of the Fourteenth Amendment.

As a general proposition, it is man-

[1] See Harrison v. Hadley (1873; CC) 2 Dill. 229, Fed Cas No. 6,137, where a candidate for the office of associate justice of the supreme court of the state invoked the aid of a federal court, inter alia, on the ground that some voters were wrongfully and fraudulently deprived of the right to register and vote.

[2] The following annotations are of interest in connection with constitutional questions concerning the right to vote:

Conspiracy to interfere with right to vote as within federal statutes denouncing conspiracy against exercise of rights under federal Constitution and laws, 107 ALR 1372.

Constitutionality of statutes in relation to registration before voting at election or primary, 91 ALR 349.

Validity of registration laws, 45 L ed 214.

Constitutionality of discrimination as regards property qualification, or payment of tax, as condition of right to vote, 82 L ed 257.

Constitutionality, construction, and application of constitutional or statutory provisions which make payment of poll tax condition of right to vote, 139 ALR 561.

Extent of power of political party, committee, or officer to exclude persons from participating in its primaries as voters or candidates, 70 ALR 1501, supplemented in 88 ALR 473, 97 ALR 685 and 151 ALR 1121.

Validity of statutes requiring information as to age, sex, residence, etc., as a condition of registration or right to vote, 14 ALR 260.

Nineteenth Amendment as affecting liability of women to poll tax under previous constitutional or statutory provisions limited to male voters, 71 ALR 1335.

[3] Where the jurisdiction of a federal District Court is invoked on the ground that a controversy arises "under the Constitution or laws of the United States" (28 USCA § 41(1), 7 FCA title 28, § 41(1)), the facts alleged must clearly show a real and substantial dispute as to the federal question on the determination of which recovery depends, the mere allegation as to the existence of such a question which is not real and substantial and is without color of merits not being sufficient. See 27 RCL 117, United States Courts, § 120.

While the United States Supreme Court is not deprived of its jurisdiction to review a state judgment merely because the state court committed no error in deciding the federal question involved, yet, ordinarily, an appeal (formerly writ of error) will be dismissed "for want of jurisdiction" where it appears from the face of the record that the decision of that question was so plainly right as not to require argument. See Taylor v. Beckham (1900) 178 US 548, 44 L ed 1187, 20 S Ct 890, 1009; and Cave v. Missouri (1918) 246 US 650, 62 L ed 921, 38 S Ct 334, infra, under heading "Due process clause." In general, see 27 RCL 78, United States Courts, § 82.

Indeed, as this court had occasion to remark, in substance, in the case of American School of Magnetic Healing v. McAnnulty (C. C.) 102 Fed. 565, 566, if the courts could be called upon and be required to review the findings of the Postmaster General in every case of this sort the statute under consideration would not prove to be an efficient means for preventing the misuse of the mails.

In view of these considerations, the court holds that it has no right to grant the relief which the complainant seeks to obtain. The finding of the Postmaster General that the complainant was engaged in a scheme to obtain money through the mails by means of false and fraudulent pretenses and representations is one which this court is not authorized to review or overrule, inasmuch as the finding is based on evidence which certainly tends to sustain it, and in that event the statute empowers the Postmaster General to judge of its weight and sufficiency. The bill of complaint is accordingly dismissed, at the complainant's cost.

UNITED STATES v. MOORE et al.

(Circuit Court, N. D. Alabama, S. D. May 8, 1904.)

1. CONSTITUTIONAL LAW—RIGHTS OF CITIZENS—ORGANIZATION.

The right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement or advancement, or for any other lawful purpose, is a fundamental right of a citizen in all free governments; but it is not a right, privilege, or immunity granted or secured to citizens of the United States by its Constitution or laws, and is left solely to the protection of the states.

2. SAME—LIFE AND LIBERTY.

The fourteenth amendment of the federal Constitution, which prohibits a state from depriving any person of his life, liberty, or property without due process of law, adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

3. SAME—FEDERAL COURTS—JURISDICTION.

Federal courts have no jurisdiction to punish a conspiracy to oppress and intimidate a citizen of the United States to prevent him from exercising the right to establish a miners' union in a state, in the furtherance of which defendants were alleged to have assaulted such citizen, with intent to murder him by shooting at him with a pistol; such offense being entirely within the jurisdiction of the state courts.

On Demurrer to Indictment.

The indictment, found under section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712], contained two counts. The first charged that the defendants, Charles Moore, William Ballinger, John Chance, George De Loach, Luther Rayburn, and Sterling Shores, conspired to injure, oppress, and intimidate one B. L. Greer, a citizen of the United States, to prevent the free exercise and enjoyment by him of a right or privilege secured to him by the Constitution and laws of the United States, to wit, "the right and privilege of establishing, organizing, and perfecting a local union of the United Mine Workers of America at Empire, in the county of Walker and state of Alabama," and that, in pursuance of the conspiracy, and to effect its object, the defendants unlawfully assaulted and beat said Greer, etc. The second count charges a conspiracy among defendants to injure, oppress, and threaten said

Greer "for having, and because of his having exercised the right and privilege," named, setting it forth as described in the first count, and that, in the execution of the conspiracy, and to effect its object, the defendants unlawfully, and with malice aforethought, assaulted said Greer with intent to murder him by shooting at him with a pistol, etc.

The defendants demurred substantially on the following grounds: (1) Because it appears from the indictment that the right or privilege claimed is not secured to said Greer as a citizen of the United States by the Constitution and laws thereof, and that said conspiracy and assault did not violate any privilege or immunity of a citizen of the United States. (2) The indictment shows that no offense was committed against the criminal laws of the United States, but only an offense against the laws of the state of Alabama. (3) The indictment shows that this court has no jurisdiction to try and punish the offense set forth.

Thos. R. Roulhac, Dist. Atty., and N. L. Steele, Asst. Dist. Atty., for the United States.

Walker Percy and W. I. Grubb, for defendants.

JONES, District Judge (after stating the facts as above). Unquestionably the right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement and advancement, or for any other lawful purpose, is a fundamental right of a citizen, protected in every free government worthy of the name. The only issue this case presents is, to what government, under our complex institutions, is committed the duty to protect that right?

In ascertaining the privileges or immunities of citizens of the United States, as distinguished from the rights which pertain to the citizen of the state as such, and to what governments, respectively, their protection is committed, we must consult the history of our institutions, as well as the language of the Constitution. All well-informed persons know that our ancestors brought with them from England traditionary privileges, personal and political rights, which had been gained in struggles between Commons and King, confirmed by repeated acts of Parliament and judicial decisions, and so long acquiesced in that in time they finally became the accepted maxims of government which constitute the British Constitution. The Revolution deprived the people of the Colonies of none of these rights, but put them more directly in their own keeping. Their painful experience with the helplessness and inefficiency of the government under the Articles of Confederation convinced the people that their welfare and happiness would be best subserved by committing some of their powers, rights, and liberties to a new government, which, as to such matters, should be supreme and independent of the states. Accordingly the people of the United States, acting through their several state conventions, created the government of the United States, with all needful power to conduct their affairs with other nations, to regulate the rights of the states, and the rights of citizens of different states as among themselves and with the general government, and some other matters of common concern to the people, and committed to the new government all their powers, rights, and liberties as to those carefully enumerated matters, specified in the Constitution of the United States, and reserved all the other rights, powers, and liberties theretofore enjoyed by the people of the states to

the keeping and protection of the state governments, which remained after the adoption of the Constitution, as they were before, sovereign as to them. As there was much apprehension in the conventions which ratified the Constitution, which contained no bill of rights, that the rights of the states and of the people would be unduly trenched upon by the general government, the first Congress proposed ten amendments; the resolutions submitting them, reciting that:

"The conventions of a number of states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that proper declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its creation," etc.

These amendments denied power to Congress to interfere with certain enumerated rights of the citizen, and gave certain constitutional guaranties, as to the right of trial by jury, etc. The last two of the ten amendments thus proposed provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and 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 is quite apparent, therefore, that the protection of certain rights of the citizen of a state, although he is by recent amendments made a citizen of the United States and of the state in which he resides, depends wholly upon laws of the state, and that as to a great number of matters he must still look to the states to protect him in the enjoyment of life, liberty, property, and the pursuit of happiness.

Inevitably, then, when a citizen claims protection of a right or privilege, as one secured to citizens of the United States by its Constitution or laws, these inquiries arise: Is the right or privilege claimed granted in terms by any provision of the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the Constitution does specify and confer upon citizens of the United States as to arise by necessary implication? Is its exercise necessary or appropriate in the performance of any of the duties which the Constitution and laws of the United States exact from its citizens? Is its protection by federal authority needful to the just supremacy of the general government over any matter committed to it, or directly conservative or promotive of any of the ends for which the Constitution ordained the government of the United States? If the character of the right or privilege claimed does not permit affirmative answer to any of these inquiries, it is clear the right is not derived from or dependent on the Constitution, and its protection is not committed to the general government.

It is no longer open to discussion or doubt that "the United States are a nation whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right created by or arising under or dependent upon the Constitution may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection and of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible

and best adapted to attain the object." In re Quarles and Butler, 158 U. S. 535, 15 Sup. Ct. 960, 39 L. Ed. 1080; Logan v. United States, 144 U. S. 293, 12 Sup. Ct. 617, 36 L. Ed. 429. Among the rights and privileges secured to citizens of the United States, expressly or impliedly, which are grouped here to show how entirely different they are in origin and nature from the right involved in this case, are the right to vote for presidential electors and members of Congress; the right to hold and seek office under the federal government; the right to petition Congress for redress of grievances, and to freely print, speak, or write one's sentiments, being responsible for the abuse thereof, concerning any right or matter committed to the federal government; the right, of his own volition, to become a citizen of any state of the Union by bona fide residence therein, with the same rights as other citizens of that state; the right of every judicial or executive officer or other person engaged in the service, or kept in the custody of the United States, in the course of the administration of justice, to be protected from lawless violence; the right to the privileges of the writ of habeas corpus; the right to go to and return from the seat of government; the right to resort to the courts of the United States; the right to communicate to any executive officer any information which the citizen has of the commission of an offense against the laws; the right to engage in interstate commerce; the right to enter a homestead upon the public domain, and live on it for the purpose of perfecting the entry; the right to claim the protection of the government when on the high seas or in foreign lands, or in any place committed exclusively to federal jurisdiction; the right to be exempt from discrimination on account of race, as to equality before the law, suffrage, or service on juries; the right to pass from one state to any other for any lawful purpose; the right to be free from taxes and excises not imposed by the state on its own citizens; and the right to be free from slavery or involuntary servitude, except as a punishment for crime.

The power conferred upon Congress by the Constitution concerning these rights, in some instances, as under the fourteenth amendment, is corrective merely of invasion of them by state law or authority. Under other provisions, as under the thirteenth amendment, the power of Congress is full, primary, and direct, authorizing not only the annulment of state laws antagonistic to the right secured, but extending as well to legislation for the protection of the right, and punishment of individuals who transgress its laws on the subject. It deals with things, not merely with names. Prigg v. Pennsylvania, 16 Pet. 539, 10 L. Ed. 1060. "It is clear that this amendment, besides abolishing forever slavery and involuntary servitude, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure." United States v. Harris, 106 U. S. 540, 1 Sup. Ct. 610, 27 L. Ed. 290. Under this amendment Congress has the undoubted power to deal not only with the laws which seek to accomplish the forbidden ends, but also with acts of individuals which bring about the same result. Peon-

age Cases (D. C.) 123 Fed. 671; Slaughterhouse Cases, 16 Wall 36, 21 L. Ed. 394.

The Supreme Court recently declared:

"To leave to the several states prosecutions of conspiracies to prevent citizens enjoying the privileges granted or secured by the Constitution of the United States would tend to defeat the supremacy and independence of the national government. As said by Chief Justice Marshall in McCulloch v. Maryland [4 Wheat. 316, 4 L. Ed. 579], and cannot be too often repeated, 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 those 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 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." 158 U. S. 537, 15 Sup. Ct. 951, 39 L. Ed. 1080.

If, therefore, the citizen is obstructed or intimidated by the lawless acts of individuals in the "free exercise or enjoyment of any right or privilege secured to him by the Constitution and laws of the United States," Congress may make such acts crimes against the United States, and punish them in its courts. Section 5508 of the Revised Statutes [U. S. Comp. St. 1901, p. 3712] is a lawful exercise of the authority of Congress to that end. It is to be borne in mind, however, that "the protection of this section extends to no other right—to no right or privilege dependent on a law or laws of the states. Its object is to guaranty safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties, as well as statutes, and it does not, under this section, at least, design to protect any other right." United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 36, 28 L. Ed. 673.

The right or privilege here involved is not granted in terms to any citizen of the United States by any provision of the Constitution. Its exercise is not necessary to the enjoyment of any right or privilege which the Constitution does specify and confer. It does not result from relations of citizens of the United States to the government of the United States, as needful or proper to the discharge of any duty the citizen owes it. Its protection is not essential to the supremacy of the general government over any matter committed to it by the Constitution, nor is its enforcement a proper means to any end which the Constitution ordained the government of the United States to accomplish. The right has not been assailed or invaded under any state law or by any state authority, or on account of race, color, or previous condition of servitude, or in any other way than by the acts of lawless individuals. How, then, can such an offense fall within the criminal jurisdiction of the courts of the United States?

The Constitution of the United States, as we repeat, left the power and duty to protect life, liberty, property, the pursuit of happiness, freedom of speech, the press, and religious liberty, and the right to order persons and things within their borders, for the protection of the health, lives, limbs, morals, and peace of citizens, save as the original power of the states over them might be disturbed or de-

stroyed by the specific grants of power to the general government, where the Constitution found them—in the exclusive keeping and power of the state—and denied the general government any responsibility for or power over them. Rights like these do not arise from the Constitution of the United States, and are in no wise dependent upon it. Provisions of the Constitution which refer to rights like these are merely in recognition of rights which existed before the government of the United States was formed, in abdication of power in the general government to interfere with or invade them, and in some instances intended as a breakwater against their invasion by state power. As said in United States v. Cruikshank, 92 U. S. 553, 23 L. Ed. 588:

"The very highest duty of the states when they entered into the Union under the Constitution was to protect all persons within their boundaries in the enjoyment of those unalienable rights with which they were endowed by their Creator. In these respects, as regards the particular right here involved, the recent amendments to the Constitution have made no change in the power or duty of the general government. The fourteenth amendment, which prohibits a state from depriving 'any person of life, liberty or property without due process of law,' adds nothing to the rights of one citizen against another, but simply furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." United States v. Cruikshank, 92 U. S. 551, 23 L. Ed. 588.

In that case it was further said:

"Within the scope of its powers as enumerated and defined, the government of the United States is supreme and above the states, but beyond it has no existence. It was created for special purposes, and endowed with all power for its preservation and the accomplishment of the ends the people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."

If, as contended by the government, Congress has power to punish conspiracies to prevent the exercise of rights like that here invaded, it has equal power to punish individual acts having the same end in view. It could invade the whole domain of the municipal codes of the states, and punish every act of lawless violence directed against the enjoyment of any right concerning life, liberty, and property, or the pursuit of happiness. The authority and duty of the states in the premises would be transferred to the federal government, whenever it legislated as to them, and violations of its laws as to such rights were punished in its courts; and that government, contrary to the design of the Constitution of the United States, would have at least concurrent jurisdiction with the state governments in prescribing and punishing offenses against rights whose protection was never committed or intended to be committed to the United States, but, on the contrary, expressly left to the power of the states. Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 550, 23 L. Ed. 588.

All who value the blessings of justice administered without respect of persons, and who love liberty regulated by law, will share in the regret that acts like those disclosed in the indictment can happen in our midst, and that apprehension exists that the right here claimed, which is dependent solely upon the laws of Alabama, will not be vin-

dicated and enforced in the tribunals of this state. Whether these apprehensions be well or ill founded, it would be a less evil to society to leave the wrong unredressed than to usurp jurisdiction to punish the offenders here.

As the acts charged cannot constitute an offense against the laws of the United States, the demurrers will be sustained, and an order will be entered that the defendants go hence without day.

WILSON et al. v. CHICAGO LUMBER & TIMBER CO. et al.

(Circuit Court, D. Colorado. March 28, 1901.)

No. 4277.

1. DEEDS—CONSTRUCTION—REFERENCE TO MAP.

A deed to land in the town site of Denver, made pursuant to a decree of the probate judge, entered after hearing on the petition of the grantee, described the land by metes and bounds; making the old bed of the South Platte river, as shown on a map referred to therein, a part of the northwesterly boundary, and the extreme depth of the tract westerly from the street on which it fronted 125 feet, which was the depth claimed by the petitioner. At the time the map was made, it was difficult, if not impossible, to correctly locate the old bed of the river, which had been obliterated by floods. According to the scale of the map, it was shown to be 250 feet from the street at the nearest point where it would be reached by the boundary given, but the field notes of the survey on which the map was based showed it to be very near the street. *Held*, that it could not be presumed that the judge intended to grant more than the petitioner claimed, nor could the distances given in the description be ignored because of the reference to the river bed, the location of which was uncertain, and that the deed must be construed as conveying no land west of a line 125 feet from the street.

Action in Ejectment. On trial to the court.

R. H. Gilmore and John D. Fleming, for plaintiffs.

Elmer E. Whitted, for defendants.

HALLETT, District Judge. This is an action of ejectment to recover the possession of land in the city of Denver, the description of which will soon appear. Plaintiffs claim title under a deed issued by Henry A. Clough, probate judge of Arapahoe county, to Polinah S. Truax, of date September 17, 1872, pursuant to an act of Assembly approved February 8, 1872 (Ninth Session, p. 191). Polinah Truax made a petition to the probate judge of Arapahoe county, in which she declared that she held, under deed from Jacob Dowing, a former probate judge, of date 9th September, 1860, land described as follows:

"Beginning at a point 65 feet from the northwest corner of F and Williams Streets; thence along the west side of F street to Bassett street, 185 feet; thence westerly at right angles with F street 125 feet; thence southerly on a line parallel with F street 185 feet; thence easterly 125 feet to the place of beginning."

She then described certain improvements which she had made on the premises, and declared that she had occupied the same since January 1, 1872, in good faith and in ignorance of any adverse claim. She knew not why her title was challenged, and prayed for a deed to her

Pa.Super. 544, 174 A. 795, and accordingly the court did not err in instructing the jury to that effect.

Most of the other reasons for a new trial grow out of the alleged erroneous instructions that the agreement was a bailment lease.

[2] Another reason for a new trial stressed by the plaintiffs is that the court erred in refusing to admit paragraph 12 of the statement of claim for the reason that it is not denied in the affidavit of defense. The twelfth paragraph avers that after the sale the automobile became the property of the plaintiffs. The affidavit of defense makes an effective denial of this paragraph. It denies that Cook owned or lawfully possessed the automobile and avers that the defendant owned it at all times complained of and that the sheriff at no time delivered possession to the plaintiffs.

The plaintiffs further contend that because the affidavit of defense is made on information and belief only, it is totally defective and the same as if no affidavit had been filed; and that under section 13 of the Pennsylvania Practice Act (12 P.S. Pa. § 412), paragraph 12 of the statement should have been admitted as an averment of "the ownership or possession of the vehicle, machinery, property or instrumentality involved" which was not denied.

[3] The purpose of section 13 of the Practice Act is stated in Flanigan v. McLean, 267 Pa. 553, 558, 110 A. 370, 371: "Doubtless the legislative intent was, in the absence of contradiction by affidavit of defense, to dispense with proof of certain formal averments as to the instrumentality, or agency of the person, involved in the occurrence and charged with responsibility therefor—not to relieve a plaintiff from proving the vital averments of his declaration as to injury, negligence, damages, etc." See, also, Charlap v. Lepow, 87 Pa.Super. 466, 469; Gledic v. Salinger, 37 Dauphin Co. Rep. 55.

[4] The averments admitted under section 13, in the absence of a denial, are formal averments of such character as do not tend to establish the wrongful act complained of and are not usually of any substantial contest. Even in the absence of an affidavit of defense in trespass cases, the plaintiff cannot take judgment, but must prove the material allegations, including the commission of the wrongful act.

[5] The automobile is not the instrumentality or property involved in the wrongful act complained of and charged with responsibility therefor, within the meaning of section 13 of the Practice Act (12 P.S.Pa. § 412). The averment of ownership of the automobile by the plaintiffs was not merely a formal allegation, but a vital averment which the plaintiff was obliged to prove in order to establish a wrongful taking by the defendant. The averment of ownership of the automobile in this case could not be admitted under section 13 of the Practice Act and the court properly refused to admit in evidence this averment.

The court has carefully considered all of the reasons for a new trial and is of the opinion that they are without merit.

And now, the reasons for a new trial are dismissed, the motion for a new trial is overruled, and a new trial is refused.

Petition of SPROULE.
No. 54295-Y.

District Court, S. D. California, Central Division.

July 9, 1937.

1. Citizens ⇐3

The basis of citizenship in the United States is the English doctrine under which nationality meant birth within allegiance of the king.

2. Aliens ⇐60

The control over naturalization, vested in Congress by the Constitution, gave it power to enact laws granting citizenship to aliens residing within the United States and thereby conferring upon them all rights of native-born persons (Const. art. 1, § 8, cl. 4).

3. Aliens ⇐68(2)

The declaration of intention to become a citizen does not confer citizenship, and declarant, though he acquires inchoate nationality, remains an alien until naturalization is completed (8 U.S.C.A. § 373).

4. Aliens ⇐68(1)

A person does not become a citizen of the United States until procedure of

naturalization has been fully complied with and order divesting him of his former nationality and making him a citizen has been signed by judge of court having jurisdiction (8 U.S.C.A. § 373).

5. Aliens ⇐68(2)

A person declaring his intention to become a citizen remains an alien until naturalization is completed, even though law of state of person's residence may confer upon him elective franchise or other privileges of citizenship, or even right to hold public office (8 U.S.C.A. § 373).

6. Aliens ⇐68(2)

The rights flowing from declaration of intention to become a citizen are strictly construed (8 U.S.C.A. § 373).

7. Aliens ⇐68(1)

Where a woman seeks restoration of citizenship, lost through marriage to an alien or through husband's loss of citizenship, under statute requiring showing of compliance with certain requirements before she is repatriated, construction, if doubts exist, must be in favor of government (8 U.S.C.A. § 369).

8. Aliens ⇐60

Nationality once lost cannot be restored except through naturalization.

9. Aliens ⇐61

The statute under which women may seek to restore citizenship lost through marriage to an alien or through husband's loss of citizenship evidences congressional intention to facilitate restoration of nationality of women who come under it (8 U.S.C.A. § 369).

10. Aliens ⇐68(1)

A woman seeking restoration of citizenship lost through marriage to an alien or through husband's loss of citizenship must show compliance with statute providing for restoration under such circumstances (8 U.S.C.A. § 369).

11. Aliens ⇐60

States cannot, by conferring right to vote, turn aliens into United States citizens.

12. Aliens ⇐64

A woman, claiming citizenship through father's declaration of intention during her minority and seeking restoration following death of her Canadian husband, never became a citizen, and hence could not be restored to citizenship, where father's declaration was not followed by naturalization during her minority, and woman did not reside in the United States requisite time before and after majority or take oath to support Constitution but resided in Canada for 22 years (8 U.S.C.A. §§ 7, 8, 369; Rev.St. § 2167; Treaty with Great Britain Sept. 16, 1870, 16 Stat. 775).

Proceedings in the matter of the petition of Mary Edith Sproule to be admitted a citizen of the United States.

Petition denied.

C. W. Buttz, of Devils Lake, N. D., for petitioner.

H. B. Terrill and Albert Del Guercio, both of Los Angeles, Cal., for the Naturalization Service.

YANKWICH, District Judge.

Mary Edith Sproule, to whom we shall refer as the petitioner, has filed a petition for naturalization under the provisions of section 4 of the Act of September 22, 1922 (42 Stat. 1021–1022), as amended by the Act of July 3, 1930 (46 Stat. 854, § 2 (a) 8 U.S.C.A. § 369), which reads:

"Sec. 4. (a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

"(1) No declaration of intention and no certificate of arrival shall be required, and no period of residence within the United States or within the county where the petition is filed shall be required;

"(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

"(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

"(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

"(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after this section, as amended, takes effect [July 3, 1930]."

She is a native of Canada, a subject of Great Britain, born in Van Camp Mills, Canada, January 19, 1867, of alien parents. She claims to have resided in the United States continuously since September, 1912. She migrated with her parents and other members of her family to the United States in 1883, settling in Pembina county, Dakota Territory. On May 9, 1888, she married Ezra Sproule, a native and citizen of Canada, at Drayton, N. D. Shortly after the marriage, they removed to Canada, returning to the territory of North Dakota in September, 1888. They returned to Canada in the fall of 1890, and there took up their permanent domicile, returning to Los Angeles, Cal., in September, 1912, where the petitioner has resided ever since.

The husband has never been naturalized in this country. The applicant states that he died in 1923, but has been unable to produce evidence of his death. The petitioner's father, Reuben Van Camp, declared his intention to become a citizen of the United States in the district court of Pembina county, Dakota Territory, on September 30, 1879, but did not complete his naturalization during her minority.

The petitioner claims that, through this declaration of intention, she acquired inchoate right to citizenship, which later matured into citizenship when the Territory of Dakota was admitted into the Union on November 2, 1889,—a citizenship which she did not lose by marriage to a British subject.

The position of the petitioner is rather inconsistent. She applied for citizenship under an act which is commonly called the "Repatriation Act" (40 Stat. 340) and which *implies* loss of citizenship by native-born or naturalized Americans through marriage to aliens. Her contention, in the briefs filed in her behalf, is that she has always been an American citizen, and that, if her petition for naturalization is denied, it be done upon the ground that she is already a citizen of the United States.

[1, 2] As whatever rights she acquired deraign from her father's declaration of intention, it is well to bear in mind that the basis of citizenship in the United States is the English doctrine under which nationality meant birth within the allegiance of the king. United States v. Wong Kim Ark (1898) 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890. The control over naturalization, vested in the Congress by the Constitution, gave to it the power to enact laws granting citizenship to persons of alien birth residing within the United States and thereby conferring upon them all the rights of native-born persons. Constitution of the United States, art. 1, § 8, cl. 4; Luria v. United States (1913) 231 U.S. 9, 34 S.Ct. 10, 58 L.Ed. 101. The Constitution sought to overcome one of the colonists' grievances against the English king. In the Declaration of Independence, he was charged with "obstructing the laws for naturalization of foreigners."

[3-5] The declaration of intention (8 U.S.C.A. § 373) is merely the first step in the process of naturalization. It does not confer citizenship.

As said by our own Circuit Court of Appeals in Johnson v. Nickoloff (C.C.A.9, 1931) 52 F.(2d) 1074, 1075: "A person does not become a citizen of the United States until the procedure of naturalization has been fully complied with and an order divesting him of his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction. 26 Op.Attys.Gen. 611."

Although the declarant acquires an inchoate nationality, he remains an alien until the naturalization is completed. Wilson on International Law (2d Ed.) 1927, p. 136; In re Polsson (C.C.Cal.1908) 159 F. 283; In re Moses (C.C.N.Y.1897) 83 F. 995; Frick v. Lewis (C.C.A.6, 1912) 195 F. 693; United States v. Bell (D.C.N.Y.1918) 248 F. 992. And this status is not changed by the fact that the law of the state of the declarant's residence may confer upon him the elective franchise or other privileges of citizenship, or even the right to hold public office. An alien he remains. City of Minneapolis v. Reum (C.C.A.8, 1893) 56 F. 576.

[6] The rights flowing from the declaration of intention are strictly construed. They will not be extended beyond the obvious limits of the proceeding. Terrace v. Thompson (1923) 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; U. S. v. Manzi (1928) 276 U.S. 463, 48 S.Ct. 328, 72 L.Ed. 654.

In the light of these principles, we consider the grounds upon which the petitioner relies in seeking naturalization.

The act under which the petition is filed seeks to restore citizenship to women who, having been American citizens, by birth or naturalization, have lost it through marriage to an alien or through the husband's loss of citizenship.

From the beginning of our national life, legislative bodies have sought to recognize the right of American citizens to expatriate themselves, on the one hand, and, on the other hand, to preserve to those who reside abroad without actually expatriating themselves the right of American citizenship against the claims of countries of their residence. Thus we find that in 1786, Virginia passed an act providing that any citizen might relinquish his citizenship and depart from the commonwealth and "thenceforth be deemed no citizen." See Scott's Cases on International Law (1922) p. 154. On July 27, 1868, the Congress of the United States enacted a statute (15 Stat. 223 [8 U.S.C.A. §§ 13–15 and notes]) claiming American citizenship for American citizens residing abroad and disavowing claims of foreign countries to their allegiance. See 8 U.S.C.A. § 15. Through a series of treaties, beginning in 1868, known as the Bancroft Treaties, this right was recognized, as were also the reciprocal rights of the contracting countries to reclaim the allegiance of naturalized persons who have returned to the country of their birth and resided therein a certain length of time. In 1907 (34 Stat. 1228), the law was enacted under which a naturalized citizen forfeits citizenship if (subject to certain exceptions) he resides within the country of his birth for a period of two years or in any other country for a period of five years. 8 U.S.C.A. § 17.

With regard to women, one of the universally recognized methods for change of nationality is marriage. Practically all European countries, a large number of Latin-American countries, countries of the Near and Far East, such as China, Japan, Siam, and Persia, confer upon the wife the nationality of her husband. Fauchille: Droit International Public, 8 Ed. (1922) vol. 1. p. 150 et seq.

In the United States, prior to the Act of March 2, 1907, no statutory enactment existed imposing upon American women the citizenship of their husbands. The judicial pronouncements lacked uniformity. Nevertheless, the better reasoned ones followed the general rule of international law, especially when the marriage was followed by removal of the wife to the country of her husband's birth. Ruckgaber v. Moore (C.C.N.Y.1900) 104 F. 947; In re Fitzroy (D.C.Mass.1925) 4 F.(2d) 541; In re Page (D.C.Cal.1926) 12 F.(2d) 135; In re Krausmann (D.C.Mich.1928) 28 F.(2d) 1004; In re Lynch (D.C.Cal.1929) 31 F.(2d) 762. To me, the principle declared in these cases seems well grounded. This not only because it applies a principle of law recognized throughout the civilized world, but also because it is logically sound. It is true that the disabilities under which a married woman labored at common law did not extend to her political status. Shanks v. Dupont (1830) 3 Pet. 242, 7 L.Ed. 666. Nevertheless, when marriage to an alien occurs, by the law of most countries, the nationality of the husband is conferred upon the woman. If the marital domicile continues to be in the United States, there is reason for applying to the woman's status the presumption against loss of nationality. But when the woman follows her husband to a foreign country, in which the nationality of her husband would be imposed upon her, she has severed the last tie which bound her to American nationality, *the tie of residence* in the country of her nativity. There is then no reason left for allowing her to maintain a double allegiance. In following her husband, she must have said, as did Ruth of old: "For whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God." Ruth 1:16.

The diplomatic precedents which seem to recognize a reversion of nationality upon the return of the woman to the United States after death or divorce (3 Moore, International Law Digest, pp. 454–456) do not command approval. They are administrative determinations in nonadversary proceedings, before state department officials, who, by the very nature of their duties, would resolve all doubts in favor of American citizenship.

[7, 8] When we are dealing with a judicial proceeding, under a special statute, which requires that the applicant show compliance with certain requirements before she is repatriated, the construction, if doubts exist, must be in favor of the Government. See Hauenstein v. Lynham

(1879) 100 U.S. 483, 25 L.Ed. 628; Swan & Finch Co. v. United States (1903) 190 U.S. 143, 23 S.Ct. 702, 47 L.Ed. 984; Zartarian v. Billings (1907) 204 U.S. 170, 27 S.Ct. 182, 51 L.Ed. 428; Tutun v. United States (1926) 270 U.S. 568, 578, 46 S.Ct. 425, 427, 70 L.Ed. 738; United States v. Schwimmer (1929) 279 U.S. 644, 649, 49 S.Ct. 448, 449, 73 L.Ed. 889; United States v. Rodgers (C.C.A.3, 1911) 185 F. 334. And see 3 Moore, International Digest, § 413. Nationality once lost cannot be restored except through naturalization. Fauchille, Op.Cit. 879.

[9] The act under which the application is made evidences the intention of the Congress to facilitate the restoration of nationality to women who come under it.

[10] The burden of showing compliance with it rests upon the applicant in each instance.

We do not believe that the petitioner here has met this burden.

[11, 12] She claims citizenship through her father's declaration of intention (which was not followed by naturalization during her minority), the Organic and Enabling Acts of the Territory of Dakota, and the doctrine declared in Boyd v. Nebraska ex rel. Thayer (1892) 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103. Section 5 of the Act of Congress of March 2, 1861 (12 Stat. 239, 241), providing a temporary government for the Territory of Dakota, provided: "Sec. 5. That every free white male inhabitant of the United States above the age of twenty-one years, who shall have been a resident of said Territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters and holding office at all subsequent elections shall be such as shall be prescribed by the legislative assembly: Provided, *That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States.*" (Italics added.)

Section 3 of the Enabling Act for the Dakotas, approved February 22, 1889, provided, in part, as follows: "That all persons who are qualified by the laws of said territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed states."

The elective franchise in the territory was extended to: (1) Citizens of the United States; (2) those who had declared upon oath their intention to be such; (3) those who had taken an oath to support the Constitution of the United States; and (4) to persons who had been declared by law to be citizens of the territory. Territory of Dakota Political Code, § 47, Levisee's Revised Codes of the Territory of Dakota 1883. By the Constitution of North Dakota, the voting privilege was limited to male persons over the age of twenty-one, who, in addition to satisfying residential requirements of one year within the state, six months within the county, and ninety days within the precinct, were, (1) citizens of the United States, or (2) had declared their intention to become citizens *conformably to the naturalization laws of the United States.* Constitution of North Dakota, § 121.

By section 128 of the same Constitution, women were allowed to vote at school elections provided they satisfied "the qualifications enumerated in Section 121 of this article as to *age, residence* and *citizenship.*" (Italics added.)

Section 13 of Political Code of North Dakota provides:

"Who are citizens. The citizens of the state are:

"1. All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls;

"2. All persons born out of this state and who are citizens of the United States and residing within this state." R.C.1905, § 11; R.C.1895, § 11.

Section 18 of the same Code provides:

"Persons not citizens. Persons in this state not its citizens, are either:

"1. Citizens of other states; or,

"2. Aliens." R.C.1905, § 16; R.C.1895, § 16.

Voting and citizenship are not necessarily coexistent. One may be a citizen without having the right of the vote. Women were such for centuries. At the same time, the right to vote does not confer citizenship, and states cannot, by conferring it, turn aliens into citizens of the United States. City of Minneapolis, v. Reum,

supra. However, repeatedly, in our history, in admitting new states into the Union, the Congress of the United States has performed acts of collective naturalization. This was done by the act admitting Nebraska, discussed in Boyd v. Thayer, supra, and the act relating to the annexation of Texas, discussed in Cantzen v. United States (1900) 179 U.S. 191, 21 S. Ct. 98, 45 L.Ed. 148. The effect of acts of this character is thus stated in Boyd v. Thayer, supra, 143 U.S. 135, at page 170, 12 S.Ct. 375, 385, 36 L.Ed. 103: "Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafterwards be controlled, *and it also involves the adoption as citizens of the United States of those whom congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of congress.*" (Italics added.)

To be "recognized" as a citizen of the territory of North Dakota as required by this decision, the petitioner, in the light of the organic and enabling acts, and of the Constitution and laws of the territory already quoted, would have to be either (1) a citizen of the United States or (2) one who had declared on "oath her intention to become such" and had taken "an oath to support the Constitution of the United States."

She is in neither class.

And her petition must be denied unless, as she contends, the inchoate right which she acquired through her father's declaration of intention, and *which did not mature into citizenship, during her minority,* stand her in stead of the other requirements.

Boyd v. Thayer, supra, upon which the petitioner relies in her claim for citizenship, does not help her. Briefly, the facts there were: James E. Boyd was born in Ireland of Irish parents in 1834. He was brought to this country in 1844 by his father, Joseph Boyd, who settled in Ohio, and on March 5, 1849, he declared his intention to become a citizen of the United States. In 1855, James E. Boyd voted in Ohio *as a citizen under the belief that his father had completed his naturalization in 1854.* In 1856, he removed to the Territory of Nebraska. In 1857, he was elected to serve as county clerk of Douglas county. In 1864, *he was sworn into military service and served as a soldier of the Federal Government to defend the frontier from an attack of Indians;* in 1866, he was elected a member of the Nebraska Legislature and served one session; in 1871, he was elected a member of the convention which framed the State Constitution; in 1880, he was elected and acted as president of the city council of Omaha; and in 1881 and 1885, respectively, was elected mayor of that city, serving in all four years. From 1856 until the state was admitted, and from then to his election as Governor, he had voted at every election, territorial, state, municipal, and national. *Prior to the admission of the state he had taken the oath of office required by law in entering upon the duties of the offices he had filled and sworn to support the Constitution of the United States and that of Nebraska.* In 1888, he was elected Governor of the State, taking the oath of office and entering upon the discharge of his duties. His right to hold office was challenged upon the ground that he was not a citizen of the United States. The state superior court so held. But the Supreme Court of the United States sustained Boyd's contention that the inchoate right of citizenship which he acquired through his father's declaration of intention ripened into citizenship through the admission of Nebraska and by his taking the oath under Nebraska's Organic Law when he occupied various offices. The gist of the opinion is contained in the following quotation:

"Clearly, minors acquire an *inchoate* status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this election is determined by application on their own behalf, but *it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance.* * * * We are of opinion that James E. Boyd is entitled to claim that, if his father did not complete his naturalization before his son had attained majority, the son cannot be held to *have lost the inchoate status he had acquired by the declaration of intention, and to have elected to become the subject of a foreign power,*

but, on the contrary, that the oaths he took and his action as a citizen entitled him to insist upon the benefit of his father's act, and placed him in the same category as his father would have occupied if he had emigrated to the territory of Nebraska; that, in short, he was within the intent and meaning, effect and operation, of the acts of congress in relation to citizens of the territory, and was made a citizen of the United States and of the state of Nebraska under the organic and enabling acts and the act of admission." Boyd v. Thayer, supra, 143 U.S. 135, at pages 178, 179, 12 S.Ct. 375, 388, 36 L.Ed. 103. (Italics added.)

The only similarity between the present case and the Boyd Case lies in the fact that the father in each instance declared his intention to become a citizen, but never completed the naturalization during his child's minority. The Supreme Court in Boyd v. Thayer, supra, stresses the fact that Boyd had taken oath to support the Constitution of the United States when he occupied various offices before the admission of Nebraska as a territory. This language is used: *"He had taken, prior to the admission of the state, the oath required by law in entering upon the duties of the offices he had filled, and sworn to support the constitution of the United States and the provisions of the organic act under which the territory of Nebraska was created.* For over 30 years prior to his election as governor he had enjoyed all the rights, privileges, and immunities of a citizen of the United States, and of the territory and state, as being in law, as he was in fact, such citizen." Boyd v. Thayer, supra, 143 U.S. 135, at page 179, 12 S. Ct. 375, 388, 36 L.Ed. 103. As, under the Nebraska Enabling Act, citizenship was extended to those who "shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States" (10 Stat. 279, § 5), the court, in *the face of an unquestioned exercise of citizenship rights for a period of thirty years*, held that the election to various offices and the taking of the oath prior to the admission of Nebraska were sufficient to complete the naturalization. The court accepted these oaths as an *"actual equivalent"* for the more technical application for citizenship. They evidenced Boyd's "election" to become a citizen. The court, *by this decision*, did not mean to confer citizenship automatically upon the minor child of any territorial resident who may have declared his intention to become a citizen and never completed it. See Contzen v. United States, supra; United States v. Manzi, supra; Zartarian v. Billings, supra; 3 Moore, International Digest, § 413.

The petitioner here left the Territory of Dakota as the wife of an alien, before that territory was admitted into the Union. She returned only to leave again the year following the admission to become a permanent resident of Canada. She cannot claim derivative citizenship through her father (8 U.S.C.A. §§ 7 and 8) because his citizenship was not completed before her majority. She did not comply with section 2167 of the Revised Statutes, now repealed, which permitted a minor alien who had resided in the United States three years preceding his arrival at majority and continued to reside therein, upon reaching the age of twenty-one and after a residence of five years, including the three years of minority, to be admitted as a citizen of the United States without making, during minority, the declaration of intention required of others. Nor did she take any oath to support the Constitution of the United States of the type which the court in Boyd v. Thayer, supra, considered the "actual equivalent" of the compliance with the section. On the contrary, she married an alien, took up her residence, *which extended over a period of twenty-two years*, in a country, the laws of which, recognized by treaty with the United States, impressed her with the citizenship of her husband. Treaty of September 16, 1870, 16 U.S.Statutes 775; Jenns v. Landes (C.C.Wash.1898) 85 F. 801; United States v. Reid (C.C.A.9, 1934) 73 F.(2d) 153. Her "inchoate" rights never having matured into citizenship at the time of her marriage to an alien, she was an alien at the time. Such she remained. The object of the statute under which the proceeding is instituted is to restore citizenship to women who have lost it by marriage.

Here no citizenship was lost.

Hence there is nothing to restore. The petition for naturalization will, therefore, be denied.

Exception to the petitioner.

to record, and its effect upon the other creditors. I do not think the court would be justified in disturbing his finding to the effect that D. C. Alford should only be allowed to prove his claim as an unsecured claim and share equally with the general creditors.

The referee's finding is approved.

BRAWNER v. IRVIN.

(Circuit Court, N. D. Georgia, E. D. May 1, 1909.)

1. CIVIL RIGHTS (§ 13*)—STATUTORY PROVISIONS—ACTION FOR DAMAGES.
Rev. St. § 5510 (U. S. Comp. St. 1901, p. 3713), declaring that every person who, under color of any law, statute, ordinance, regulation, or custom, subjects an inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States or to different punishments, pains, or penalties, on account of his being an alien, or by reason of his color or race, than that prescribed for the punishment of citizens, shall be punished, is a penal statute, the infringement of which will not give rise to a civil action for damages.

[Ed. Note.—For other cases, see Civil Rights, Cent. Dig. § 11; Dec. Dig. § 13.*]

2. CIVIL RIGHTS (§ 13*)—STATUTES—CONSTRUCTION.
Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), declares that 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 the laws, shall be liable to the party injured in an action at law. *Held*, that the rights, privileges, and immunities referred to were those secured by the Constitution and the laws of the United States and did not include the right of an individual to life, liberty, or property, which were primary rights within the protection of the state of which the individual is an inhabitant.

[Ed. Note.—For other cases, see Civil Rights, Dec. Dig. § 13.*]

3. COURTS (§ 282*)—FEDERAL COURTS—CONSTITUTIONAL QUESTIONS—FOURTEENTH AND FIFTEENTH AMENDMENTS.
The fourteenth and fifteenth amendments of the federal Constitution are limitations on the states and did not confer primary rights enforceable by a person of color in the first instance in the federal courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

4. CIVIL RIGHTS (§ 1*)—STATUTES—CITIZENS—NEGROES.
Persons of African descent have the same, but no greater, rights than other citizens in the state where they make their home; the rights and privileges protected from infringement by Rev. St. § 1979 (U. S. Comp. St. 1901, p. 1262), and the infringement of which creates a cause of action for damages, being common to all citizens.

[Ed. Note.—For other cases, see Civil Rights, Dec. Dig. § 1.*]

5. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION.
The federal courts have no jurisdiction of an action for damages by a citizen of African descent against an Anglo-Saxon citizen of the same state for an alleged unlawful assault committed under color of executive authority.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 282.*]

E. C. Kinnebrew, for plaintiff.
Sam Olive, for defendant.

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*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. The declaration in this case is as follows:

"The petition of Lula Brawner shows that W. H. Irvin has injured and damaged her in the sum of $5,000 under the facts set forth in the following paragraphs:

"Second. Said W. H. Irvin is a resident of Elbert county, Ga.

"Third. For that heretofore, to wit, on the 20th day of June, 1908, your petitioner was living in the city of Elberton in Elbert county, Ga., with her husband, William Brawner, and her children in her own house, attending to her domestic duties, at peace with all the world and demeaning herself as an orderly and law-abiding woman.

"Fourth. Your petitioner further shows that while at her home at the time and place mentioned in paragraph 3 of this petition and living in the condition therein set forth, the defendant in this case, W. H. Irvin, the then chief of police of the said city of Elberton, called your petitioner from her house into her yard, arrested her, and then and there maliciously and cruelly assaulted and beat her with a whip, cutting her flesh in scars, causing her much pain and suffering, all without fault on her part, and without any just cause or provocation.

"Fifth. When the said W. H. Irvin arrested petitioner as stated in paragraph 4 of this petition, and before whipping her, he charged her with having struck a child of his relatives, which charge petitioner then and there denied, and which she now avers to be wholly and absolutely untrue.

"Sixth. The defendant, after whipping petitioner as charged in paragraph 4 of this petition, locked her up in the city prison, immediately, kept her there for two hours, after which he discharged her from custody without preferring any charge against her and without requiring her to give bond for her appearance before any court.

"Seventh. As chief of police of the city of Elberton, the defendant has the power under the laws, ordinances, and regulations of the city government to arrest offenders and under certain conditions to put them in custody, and in treating petitioner as set forth in the foregoing paragraphs he was acting under color of his official authority, and subjected her to a different punishment from that prescribed for citizens by reason of her color.

"Eighth. The whipping of petitioner by the defendant was in an open and public manner, in the daytime. The people on neighboring lots being spectators, it subjected petitioner to great mortification.

"Ninth. The state courts of Elbert county have declined to prosecute the defendant after being asked by petitioner so to do. The grand jury took no action on the matter. Petitioner asks for redress under the Constitution and laws of the United States.

"Tenth. By reason of the unprovoked and aggravated character of the assault, the contempt of public justice displayed by the defendant in his usurpation of power, and the pain and mortification caused to petitioner, she prays that the court may allow her exemplary and punitive damages in this case.

"Eleventh. All of the foregoing happened to the injury and damage of petitioner as set forth in paragraph 1 of this petition."

Then follows the prayer for process.

Defendant has filed a plea to jurisdiction and demurrer.

It is sought to support this suit by section 5510, Rev. St. (U. S. Comp. St. 1901, p. 3713), which reads as follows:

"Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any state or territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished," etc.

This, as will be seen, is a penal statute, so it could hardly be sufficient to support a civil suit.

Counsel for plaintiff further invokes section 1979, Rev. St. (U. S. Comp. St. 1901, p. 1262), which reads 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."

It does not appear from the declaration in this case that the defendant has deprived the plaintiff of any rights, privileges, or immunities secured by the Constitution and laws of the United States. As is well understood, of course, the right of an individual to life, liberty, and property, and to be free from molestation, is primarily and originally the right of a citizen of the state of which the individual is an inhabitant. To bring a case within this section, it must appear that some right, privilege, or immunity secured by the Constitution and laws of the United States has been infringed. It is useless, of course, to attempt to support this proceeding under the fourteenth or fifteenth amendments to the Constitution of the United States. These are limitations upon the states. Nor is there any warrant for such procedure under the thirteenth amendment.

Without discussing all the cases since the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, I think the determination of this question is sufficiently found in Hodges v. United States, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65. In that case the defendant was charged with conspiracy against certain persons named, "citizens of the United States of African descent, in the free exercise and enjoyment of rights and privileges secured to them and each of them by the Constitution and laws of the United States, and because of their having exercised the same." The facts charged were that the persons against whom the conspiracy was said to have been formed had made contracts to work for certain sawmill operators as laborers and workmen, and the conspirators threatened to injure them in their persons, and that the conspirators unlawfully marched and moved in a body, armed with deadly weapons, and threatened and intimidated the said workmen, for the purpose of compelling them to quit their employment and work at the sawmills; all this being done because they were colored men and citizens of African descent, contrary to the form of the statute, etc. There was a demurrer in the Circuit Court, which demurrer was overruled, and thereupon the case was taken directly to the Supreme Court of the United States on a writ of error. In the statement of the case preceding the opinion, the court refers, among other sections of the revised statutes, to two sections invoked, that is sections 1977 and 5508 (U. S. Comp. St. 1901, pp. 1259, 3712). In delivering the opinion of the court, Mr. Justice Brewer said:

"While the indictment was founded on sections 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved. That prior to the three post bellum amendments to the Constitution the national government had no jurisdiction over a wrong like

that charged in this indictment is conceded. That the fourteenth and fifteenth amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the state is complained of. Unless therefore the thirteenth amendment vests in the nation the jurisdiction claimed, the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases."

The extract contained in the opinion in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, from the opinion of Mr. Justice Washington in Corfield v. Coryell, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230, is then quoted, as follows:

"'The inquiry,' he says, 'is: What are 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, in their nature, 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, 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 prescribe for the general good of the whole.'"

Further quotation is then given from the Slaughterhouse Cases (page 77 of 16 Wall. [21 L. Ed. 394]) as follows:

"'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.'"

The opinion then proceeds:

"Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the tenth amendment, which reads, '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,' is not shorn of its vitality. True, the thirteenth amendment grants certain specified and additional power to Congress, but any congressional legislation directed against individual action which was not warranted before the thirteenth amendment must find authority in it."

In further discussing the matter, and after some reference to the proper definition of "slavery" and "involuntary servitude," Mr. Justice Brewer continues:

"It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom

to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery."

The opinion then concludes:

"At the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government like the Indian tribes, and thus retain for the nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the fourteenth amendment it made citizens of all born within the limits of the United States, and subject to its jurisdiction. By the fifteenth it prohibited any state from denying the right of suffrage on account of race, color, or previous condition of servitude, and by the thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved; they taking their chances with other citizens in the states where they should make their homes."

The whole matter resolves itself therefore into this: A person of African descent has no more rights than a person of Anglo-Saxon descent. All are citizens, and persons of African descent, as is stated in the foregoing opinion, take their chances with other citizens in the states where they make their home, so that the rights, privileges, and immunities referred to in section 1979 are nothing peculiar to persons of African descent, but are common to all citizens.

Whatever wrong may have been inflicted upon the plaintiff in this case, and whatever rights she may have against the defendant in a court of competent jurisdiction, it is perfectly clear that this court has no jurisdiction in the case. The plaintiff and defendant are citizens and residents of this district, both, indeed, residing in the same town. Whatever rights the plaintiff has must be enforced therefore in the courts of the state. The declaration certainly makes no case in the courts of the United States.

The plea to the jurisdiction will be sustained.

PORTLAND CO. v. SEARLE.

(Circuit Court, D. Maine. May 10, 1909.)

No. 41.

1. SALES (§ 52*)—BUYER—EVIDENCE.

Evidence *held* to warrant a finding that a contract of sale of certain railroad equipment, etc., was made with defendant's testator and on his credit, and not on the credit of certain railroad corporations in which testator was interested.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 138; Dec. Dig. § 52.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tered upon and disposed of by the administrator of another estate, as was done in this case. We have concluded that the Probate Court, by reason of uncontroverted facts in the record, was without jurisdiction of the subject matter of the suit. The case of Vivion v. Nicholson, 54 Tex.Civ. App. 43, 116 S.W. 386, is similar in its facts to many of the facts of this case and to it we refer without quoting therefrom.

The case is reversed and judgment is here rendered in favor of appellants for their interests in the lands involved in the suit.

Reversed and judgment rendered.

SAN JACINTO NAT. BANK v. SHEPPARD, Comptroller, et al.

No. 8746.

Court of Civil Appeals of Texas. Austin.

Nov. 9, 1938.

Rehearing Denied March 8, 1939.

1. Taxation ⇐876(1)

"Located," as used in statute imposing inheritance tax on devises to religious, educational, or charitable organizations "located" without the state or to such organizations "located" within the state if devise is for use without the state, is used in sense of domicile or residence rather than merely to distinguish generally a foreign from a domestic corporation, and requires that even a domestic corporation, to claim more favorable exemption, use the devise within the state. Rev.St.1925, art. 7119; art. 7122, as amended by Acts 1931, c. 72.

[Ed. Note.—For other definitions of "Locate," see Words & Phrases.]

2. Taxation ⇐876(6)

A corporation chartered under the laws of Ohio for religious, benevolent, and educational purposes is "located" without the state within statute imposing inheritance tax on devises to religious, educational, or charitable organizations "located" without the state, notwithstanding organization had three or four representatives within the state doing religious work and furthering generally the purposes of the organization. Rev.St.1925, art. 7119; art. 7122, as amended by Acts 1931, c. 72.

3. Taxation ⇐42(1)

Constitutional requirement that taxation be equal and uniform does not prevent reasonable classifications of persons and property for purposes of taxation, and requirement is met when tax is equal and uniform as applied in the same class. Vernon's Ann.St.Const. art. 8, § 1.

4. Taxation ⇐859(2)

A statute imposing inheritance tax on devises to religious, educational, or charitable organizations "located" without the state, or to such organizations "located" within the state, if devise is for use without the state, is not violative of constitutional requirement that taxation be equal and uniform. Rev. St.1925, art. 7119; art. 7122, as amended by Acts 1931, c. 72; Vernon's Ann.St.Const. art. 8, § 1.

5. Constitutional law ⇐207(1)

"Citizen," as used in constitutional provision guaranteeing to "citizens" of each state the same privileges and immunities as citizens of other states, applies only to natural persons and members of the body politic owing allegiance to the state, and not to artificial persons created by the Legislature. U.S.C.A.Const. art. 4, § 2.

[Ed. Note.—For other definitions of "Citizen," see Words & Phrases.]

6. Constitutional law ⇐207(1)
Taxation ⇐859(1)

Statute imposing inheritance tax on devises to religious, educational, or charitable organizations "located" without the state, or to such organizations "located" within the state, if devise is for use without the state, is not violative of constitutional provision guaranteeing to "citizens" of each state the same privileges and immunities as "citizens" of other states. Rev.St.1925, art. 7122, as amended by Acts 1931, c. 72; U.S.C.A.Const. art. 4, § 2.

7. Taxation ⇐859(5)

Generally, a state statute granting an exemption in inheritance tax to domestic charitable corporations using devises or gifts within the state is not invalid, because it denies exemption to foreign corporations of such kind.

Appeal from District Court, Travis County; Roy C. Archer, Judge.

Action by the San Jacinto National Bank against George H. Sheppard, Comptroller, and another to recover back inheritance taxes theretofore paid. Judgment for defendants, and plaintiff appeals. Affirmed.

Leonard J. Garver, Jr., of Cincinnati, Ohio, and W. A. Keeling and Charles N. Avery, Jr., both of Austin, for appellant.

Wm. McCraw, Atty. Gen., and John J. McKay, Asst. Atty. Gen., for appellees.

BAUGH, Justice.

This suit was brought, under permission to do so granted by the Legislature, by appellant, executor and trustee of the estate of A. D. Milroy, deceased, against the State Comptroller and State Treasurer of Texas (hereinafter for convenience designated as the State) to recover $12,902.51 theretofore paid as inheritance taxes on the estate of Milroy. Trial was to the court without a jury and judgment rendered that appellant take nothing; hence this appeal.

The material facts are not controverted. A. D. Milroy, a citizen of Texas, died testate on November 8, 1931. By will he devised one-half of his estate, all located in Texas, to the Christian Restoration Association, a foreign non-profit corporation, chartered under the laws of Ohio for religious, benevolent, and educational purposes. The State claimed and collected the amount sued for as inheritance taxes due from said estate under the provisions of Art. 7122, R.S., as amended by Acts 42nd Leg., Reg.Ses., Ch. 72, p. 109.

Arts. 7117 to 7122, R.S., levy inheritance taxes, fix rates thereof, prescribe the classes subject thereto, and provide certain exemptions. Art. 7119, prior to amendment thereof in 1931, provided an exemption of property valued at less than $25,000, if devised to a religious, educational, or charitable organization "located within this State," and to be used within this State, and taxes estates so passing in excess of that value. Art. 7122, as amended in 1931, applicable to estates, provides that "If passing to or for the use of any other person [than those named in the preceding articles] within or without this State or to any religious, educational or charitable organization or institution located without the State of Texas, or to any religious, educational or charitable organization or institution located in the State of Texas or to the United States, and the bequest, devise or gift is to be used without this State * * *" then the tax so levied is fixed to begin at 5% on properties in excess of $500 value, and graduated thereafter according to value up to 20% on any value in excess of one million dollars.

The first argument made by appellant is that the beneficiary corporation is "located" in Texas within the meaning of the statute above quoted. This argument is based on the testimony that said organization had some three or four representatives in Texas doing religious work, and furthering generally the purposes of the organization. It did not, however, have any churches or schools in the State. On the other hand, it was chartered under the laws of Ohio, the second section of its charter providing,—"Said corporation is to be *located* at Cincinnati, Hamilton County, Ohio, and its principal business there transacted." (Italics ours.) Nowhere in its charter was anything required to be done in Texas. Nor did the will of Milroy require the funds derived from his devise to it to be used in Texas. Clearly under the charter and said will the beneficiary corporation could have used the devise anywhere the directors thereof should determine in their meetings in Ohio.

[1, 2] It is clear, we think, that the term "located" as used in the statute was used by the Legislature in the sense of domicile or residence of such corporation; and not only to distinguish, generally, a foreign from a domestic corporation, but to require that even a domestic corporation, in order to claim a more favorable exemption, must use the devise or gift within the State. Manifestly the Christian Restoration Association was not subject to control of the Legislature of Texas so far as its corporate existence and the transaction of its principal business, or the use of its properties, were concerned. Its domicile was in Ohio, and consequently it was in legal contemplation "located" there. Thompson on Corporations, 3rd Ed., Vol. 1, § 212, p. 251, and § 568, p. 801.

[3, 4] The contention is also made that Art. 7122, R.S., is violative of Art. 8, § 1, of the State Constitution, Vernon's Ann. St., providing that "taxation shall be equal and uniform." It is long since settled, however, that this provision does not prevent the making of reasonable classifications of persons and property for purposes of taxation; and its requirements are met

when the tax is equal and uniform as applied in the same class. The constitutionality of this particular article of the statute was expressly upheld by the Supreme Court in State v. Hogg, 123 Tex. 568, 70 S.W.2d 699, 72 S.W.2d 593, and need not be further considered here.

[5-7] The contention is also made that said statute is violative of Sec. 2, Art. 4, of the United States Constitution, U.S.C.A., guaranteeing to the citizens of each state the same privileges and immunities as the citizens of other states, in that the statute taxes a foreign corporation more onerously than it does the same character of domestic corporation. It has been expressly held that the term "citizen" as used in that section applies "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 has prescribed." Paul v. Virginia, 75 U.S. 168, 177, 8 Wall. 168, 19 L.Ed. 357. Appellant also relies on the case of Travis v. Yale & Town Mfg. Co., 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460, involving an income tax of the State of New York, wherein it was held that such law discriminated between residents and non-residents of the State of New York, which act made no distinction between natural citizens and corporations. However that may be, as between charitable corporations, the majority rule is that where a state law grants an exemption in inheritance tax statutes to domestic charitable corporations, using devises or gifts within the state, and denies such exemptions to such foreign corporation, not subject to the laws of the state levying the tax, it is not invalid for that reason. Such exemption only of domestic corporations is sustained for the reason that in such case the state can exercise its power of visitation and control only over domestic corporations. As held by the Supreme Court of Ohio, the state of the domicile of the beneficiary corporation herein, "It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large." See Humphreys v. State, 70 Ohio St. 67, 70 N.E. 957, 961, 65 L.R.A. 776, 101 Am.St.Rep. 888, 1 Ann Cas. 233; People of Illinois v. Jessamine Withers Home, 312 Ill. 136, 143 N.E. 414, 34 A.L.R. 628, and annotations thereunder at page 681, et seq. Subsequent annotations also appear, on this subject, in 62 A. L.R. 337, and 108 A.L.R. 300. See, also 26 R.C.L., § 197, p. 227; and 61 C.J., § 2529, p. 1679.

This rule is not without exception, and appellant cites us particularly to the case of Smith v. Loughman, 245 N.Y. 486, 157 N.E. 753. Regardless of that case, however, the Supreme Court of the United States in Board of Education v. Illinois 203 U.S. 553, 27 S.Ct. 171, 173, 51 L.Ed 314, 8 Ann.Cas. 157, affirmed the holding of the Supreme Court of Illinois grounded on the proposition that the State had the power in levying such tax to grant exemptions to such domestic corporations over which it had control, without granting same to foreign corporations over which it had no control, and that in doing so there was a reasonable classification for purposes of taxation, and not a discrimination within the meaning of the Federal Constitution. In that case the court used the following language with reference to the power of the State to make such classifications for purposes of taxation: "This power is not unconstitutionally exercised by legislation which exempts the religious and educational institutions of the state from an inheritance tax and subjects educational and religious institutions of other states to the tax. Regarding alone the purposes of the institutions, no difference may be perceived between them, but regarding the spheres of their exercise, and the benefits derived from their exercise, a difference is conspicuous."

It follows, therefore, that under the statutes and the power of the State to make such classification, the tax collected was properly exacted in the instant case. And under this conclusion, the question of whether it was paid voluntarily, or under protest, becomes immaterial. The judgment of the trial court is consequently affirmed.

Affirmed.

peril sought to be avoided, was that of drifting, stern foremost, on a rocky point, projecting far into the sea, and far from high-water mark, and where, if the vessel had struck, all on board would probably have been lost—the vessel have gone to pieces, and the cargo have been scattered, if not lost or destroyed; that this peril was averted, and the vessel run on shore, bows on, in a much less dangerous place, near high-water mark, where the lives of all might have been preserved, and where the cargo was saved in the vessel.

On the whole, I am of opinion that the case cannot be distinguished from Columbian Ins. Co. v. Ashby, and therefore decree that the libellant is entitled to a contribution. Decree for libellant.

[NOTE. A decree was passed for $2,500, which was affirmed by the circuit court. Case unreported.]

This case was taken, by appeal, to the supreme court, and was there dismissed for want of jurisdiction. That point was not taken by the learned counsel for the respondent, and they declined to argue it, when invited to do so by the supreme court. Cutler v. Rae, 7 How. [48 U. S.] 729. See Crocker v. Jackson [Case No. 3,398].

The decision was not by a majority of the supreme court. See statement of Wayne, J., in [Cutler v. Rae] 8 How. [49 U. S.] 615, append. McLean, J., in Dibe v. The St. Joseph [Case No. 3,908], says that the decision was by a divided court, and has not been satisfactory to the profession, and was not in accordance with the prior decisions of the supreme court. It is substantially overruled by the late case of Dupont v. Vance, 19 How. [60 U. S.] 162.

Case No. 11,600.

In re READ.

[See 5 Fed. 721.]

Case No. 11,601.

READ v. BERTRAND.

[4 Wash. C. C. 514.][1]

Circuit Court, D. Pennsylvania. April Term, 1825.

ASSUMPSIT—COUNTS THEREUNDER—FEDERAL JURISDICTION—CITIZENSHIP.

1. Assumpsit for goods sold and delivered, money had and received, and insimul computassent. Plaintiff employed defendant as his agent to sell a parcel of goods, for a certain commission. He sold a part of them, and received part of the purchase money, which, with the residue of the goods, he confided to a person whom he appointed as his clerk, and who ran off with the money and goods. The plaintiff cannot recover on the first and third counts, as no sale was made of these goods to the defendant, nor was any account settled and a balance struck between the parties. But the plaintiff is entitled to recover, under the second count, the amount of money received by defendant and lost by the perfidy of his own agent.

2. What constitutes judicial citizenship in reference to the jurisdiction of the courts of the United States.

[Explained in Toland v. Sprague, Case No. 14,070.]

Action to recover the balance of an account of sales rendered by the defendant to plaintiff. The case was, the plaintiff, a merchant of New York, entered into a contract with defendant, then residing in Philadelphia, in the year 1818, to furnish him with a large assortment of jewellery, which he was to take from place to place in the United States to sell for the plaintiff, upon a commission of five per cent. on the invoice prices, and one half of what he might sell them for beyond those prices, the same to be in lieu of expenses and all other charges. The defendant, after passing through many of the states with the articles so furnished by the plaintiff, and making sales of part of them, went to New Orleans, where he opened a store for the sale of the goods then on hand, and of other assortments of like goods sent to his store in New Orleans at different times. In 1819 the defendant came to Philadelphia for the purpose of meeting the plaintiff, and of pointing out the kind of goods suitable for the New Orleans market, to be sent him in future; having left a young man, named Flep, in charge of the store and of a sum of money which he had received from the sales of the plaintiff's goods, to be invested by him in a bill, to be remitted to the plaintiff. Whilst the defendant was in Philadelphia, he received a letter from a friend in New Orleans, informing him that Flep had packed up the goods left in his charge, and disappeared with them. He took with him also the money left by the defendant. The plaintiff then entered into an engagement with the defendant, that the latter should go to the Havana and to New Orleans, and elsewhere, in pursuit of Flep; he binding himself not to sue the defendant for four months. The defendant accordingly went to the Havana and to New Orleans in October, 1819, but was unsuccessful in overtaking Flep, or in recovering any part of the property taken away by him. The defendant wrote to the plaintiff from New Orleans, informing him of his ill success, and mentioning that he was there working for his living. He remained in New Orleans till May, 1820, when he came to Philadelphia, and from thence wrote to the plaintiff, informing him of his arrival, and that his object in coming on was to make some settlement with the plaintiff. The plaintiff's agent endeavoured to prevail upon the defendant to go to New York to see the plaintiff, which he declined, observing that he might thereby expose himself to be sued when distant from his friends. He said he had come to Philadelphia on purpose to go to gaol, and to take the benefit of the insolvent law. The defendant presented to the plaintiff's agent an account, in which, amongst other things, he charged his expenses in New Orleans on his

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

last trip, "whilst waiting to hear from the plaintiff." Early in June the defendant was arrested at the suit of the plaintiff, under a writ issued from this court, and remained in gaol till October, when he was discharged on common bail. He then returned to New Orleans, where he has remained ever since. The objections made to the plaintiff's recovery were: (1) That the defendant being a citizen of Louisiana at the time this suit was brought, and the plaintiff a citizen of New York, this court has no jurisdiction of the cause. (2) That this action will not lie, there being no settled account between the parties. That the proper action was account. At all events, the plaintiff cannot recover under the count for money had and received, without showing that the money for which the plaintiff's goods were sold had been collected.

Mr. Bradford, for plaintiff.
Mr. Philips, for defendant.

WASHINGTON, Circuit Justice (charging jury). The first point for the consideration of the jury is that which concerns the jurisdiction of the court, and this depends upon a mixed question of law and fact. What facts constitute a citizen of the United States a citizen of any particular state, are of the first description. Whether the evidence proves those facts or not, is the latter description. The constitution of the United States having extended the judicial power of the United States to controversies between citizens of different states, there can be no question but that congress might have given jurisdiction to a circuit court sitting in one district, although the plaintiff and defendant were citizens of states other than that where the process was served, provided they were not citizens of the same state. But congress has thought proper to give the jurisdiction under the limitation that one of the parties, plaintiff or defendant, must be a citizen of the state where the suit is brought, and the other a citizen of some other state.

The plaintiff in this case then being a citizen of the state of New York, this court cannot entertain jurisdiction of this cause, unless you should be satisfied that the defendant was a citizen of this state at the time when this suit was brought. Judicial citizenship, or that species of citizenship intended by the constitution and law of congress, in reference to the jurisdiction of the courts of the United States, is nothing more or less than residence or domicil in a particular state, the person claiming to be a citizen of such state, being, at the same time, a citizen of the United States. This domicil may be changed from one state to another, if the removal be bona fide, and with intention to abandon his residence and to fix it permanently in the state to which he removes. But if the removal be for a temporary purpose, and with an intention to return to his former state of residence after that is accomplished, he is considered as a mere sojourner in the place of his temporary residence, and a citizen of the state from which he had departed. This intention to make the state he removes to the place of his permanent residence, is to be gathered from his conduct, his declarations, and from a variety of other circumstances, of all which the jury are the judges, and must decide upon the whole of the evidence laid before them.

The following appears to be the history of the defendant in relation to this subject: Whether he was a native of New Orleans or not does not appear, but it is in proof that he resided in that state from 1804 to 1809, when, being a minor, he removed with his mother and stepfather to this city, where he was bound an apprentice to a jeweller to learn that trade. He is therefore to be considered as a citizen of this state at the time he entered into the contract with the plaintiff which forms the ground of this suit, the domicil and consequent citizenship of the parent constituting the domicil and citizenship of their children during their minority, and afterwards, unless they change it. This contract was entered into in the year 1818, by which the defendant bound himself to take charge of a large assortment of jewellery belonging to the plaintiff, and to dispose of the same wherever he could find purchasers in the different states which he might visit, upon a certain commission in lieu of all charges and expenses, and to return to the plaintiff all such of the goods as he should be unable to sell. After travelling through many of the states in the character of a pedlar, and selling a part of the goods, he arrived at New Orleans in the same year, where he rented a store, and opened the remaining stock of jewellery, for the more convenient and advantageous disposition of it, as well as of other cargoes which the plaintiff was to send, and did send to him from time to time. It by no means appears in evidence that, when he left Philadelphia, it was his intention to fix his residence in New Orleans, or in any other place out of the state. In the summer of 1819 he returned to Philadelphia, with the professed intention to visit the plaintiff, and make a selection of the particular kind of goods suited to the New Orleans market, leaving his store open in that city, and his unsold goods under the care of a clerk whom he had employed to assist him, and to dispose of during his absence. This return then to Philadelphia being for a temporary purpose, is not to be considered as a change of domicil. If you should be of opinion that his residence in New Orleans was intended to be permanent, so as to have gained him a domicil there. In the autumn of that year he returned to New Orleans, by the way of the Havana, in pursuit of the treacherous clerk, in whose charge he had left his store and goods, and remained there working for his living, as he stated in one of his letters to the plaintiff in the spring of 1820. In May, 1820, he again returned to Philadelphia, in order, as he stated in his letter to the plaintiff of the 27th of that month, to come to some settlement with the plaintiff.

have disturbed the verdict on the weight or for the want of evidence. From our reading of the evidence, as it appears in the record, it fairly tends, we think, to sustain the material allegations of the appellant's complaint. We are of the opinion, therefore, that the case is one in which the appellant had a clear and undoubted right to a trial by jury and to a verdict, wholly uninfluenced by any opinion of the court in relation to the evidence. The court invaded the province of the jury in the instruction complained of, and as applied to this case it was clearly erroneous.

For this error of law, we think, the motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial and for further proceedings.

No. 11,199.

McDonel v. The State.

Practice.—*Production of Articles Used as Evidence.*—A motion, based on matters not within judicial knowledge, for the production of certain named articles in open court for inspection, should be supported by affidavit showing the facts and some reason for invoking the action of the court.

Jurors.—*Competency of.*—*Alien.*—*Statute Construed.*—The statute, R. S. 1881, section 1793, which makes alienage a cause of challenge of a juror, requires only that he be a citizen of this State, and not that he shall be a citizen of the United States.

Witness.—*Impeachment of.*—*Evidence.*—Where a witness testifies in his examination in chief that the reputation of a party is good with respect to some quality or disposition, it is competent to show by cross-examination that he has heard reports at variance with the reputation he has given the party. *Oliver* v. *Pate*, 43 Ind. 132, distinguished.

Criminal Law.—*Evidence.*—A denial by one accused of crime, of a fact which tends to show guilt, is itself a criminating circumstance, and proper evidence against him.

Same.—*Inspection of Weapons by Juror.*—It is entirely proper, as part of the *res gestæ*, to allow the jury to inspect a weapon by which an offence is alleged to have been committed.

Practice.—*Witness.*—*Misconduct of Counsel.*—Persistence of counsel in putting proper questions to a witness, which the court erroneously refused to allow, is not subject to criticism in the Supreme Court.

From the Criminal Court of Allen County.

S. E. Sinclair, H. C. Hanna, H. Colerick and *W. S. Oppenheim*, for appellant.

F. T. Hord, Attorney General, *C. M. Dawson*, Prosecuting Attorney, and *W. C. Colerick*, for the State.

Hammond, J.—Indictment charging the appellant with murder in the first degree. A trial by jury resulted in conviction, fixing the death penalty as the punishment. Over appellant's motion for a new trial, and exception to the ruling, judgment was pronounced upon the verdict.

The record properly presents many questions as to the rulings of the trial court, but, regarding all others as waived, we will consider such only as appellant's counsel have discussed in this court:

1. The indictment was returned April 7th, 1883, and the trial began on the 7th of the following month. Three days after the return of the indictment the appellant moved the court in writing for an order to require the prosecuting attorney to produce in open court, for the inspection and examination of appellant's counsel, certain named articles, alleged in the motion to be in the possession of the prosecuting attorney, and to have been introduced in evidence by the State at the examination before the justice of the peace; and asking, upon the production of the same, that they should be placed in the custody of an officer of the court, for the inspection of either party in the presence of such officer. The motion was overruled. The ruling was correct. No affidavit accompanied the motion. The court could not take judicial notice that the articles referred to were in the custody of the State's attorney, nor that they had been introduced in evidence before the justice at the preliminary examination, nor that

their production for the inspection of appellant's counsel was necessary or material for his defence. Analogous motions in civil cases are expressly required by statute to be supported by affidavit. Section 480, R. S. 1881. Good practice in all cases requires that where a motion is founded upon matters not within the judicial knowledge of the court, there should be an affidavit as to the existence of the facts upon which it is based, showing their materiality and the necessity for invoking the aid of the court with reference thereto.

2. In empanelling the jury to try the case, one Henry Bushing was called as a juror. He stated under oath, as to his competency, that he was a voter, and a freeholder and householder, in the city of Fort Wayne; that he had not formed or expressed any opinion as to the guilt or innocence of the accused; that he was born in Germany; was thirty-three years of age; that his parents lived in Germany; that he had resided in the United States and in this State seventeen years; that he had, at the clerk's office, in the court-house, in Fort Wayne, six years after coming to this country, taken out his first, but had never taken out his second, naturalization papers; and that he had been voting for the past ten years. The appellant objected to the juror, on the ground that he was an alien, but his objection was overruled by the court, and to this ruling he excepted. On his peremptory challenge, Bushing was then excused from the jury, and another was called and accepted in his place. The peremptory challenge which excused Bushing was the thirteenth and last peremptory challenge exercised by the appellant. It is claimed that the challenge for cause should have been allowed, and that its refusal by the court was error, for which appellant was entitled to a new trial.

Section 1793, R. S. 1881, provides that "The following, and no other, shall be good causes for challenge to any person called as a juror in any criminal trial: * * * *

"*Ninth*. That he is an alien."

The evidence of Bushing on his *voire dire* showed that although he was not a citizen of the United States, he was a citizen and a voter of the State, under section 2 of art. 2 (section 84, R. S. 1881) of our State Constitution. One may be a citizen of a State and yet not a citizen of the United States. *Thomasson* v. *State*, 15 Ind. 449; *Cory* v. *Carter*, 48 Ind. 327 (17 Am. R. 738); *McCarthy* v. *Froelke*, 63 Ind. 507; *In Re Wehlitz*, 16 Wis. 443.

It is proper, therefore, to consider whether the ninth cause for challenge of a person, called as a juror, in section 1793, *supra*, relates to one who is not a citizen of the United States, or merely to one who is not a citizen of this State. It must be conceded that the word "alien" almost uniformly applies to one born beyond the jurisdiction of the United States, and not naturalized conformably to the laws of the United States. It is not improbable, however, that this general use of the word obtains from the fact that in most of the States of the Union persons who are not citizens of the United States are not admitted to State citizenship. In this State, however, a declaration of intention to become citizens of the United States, with the requisite residence in this State, not only confers upon male persons of foreign birth the elective franchise, but renders them eligible to any office in the State, except Governor, Lieutenant Governor, Senator and Representative in the Legislature. Sections 103 and 133, R. S. 1881; *McCarthy* v. *Froelke*, *supra*.

Mr. Proffatt, in his treatise on trial by jury, section 116, says: "It is necessary that a juror should be a citizen of the State, a qualified elector, and that he has not forfeited any of his political rights by a conviction for crime. Alienage, therefore, is good ground for the exclusion of a person from a jury." The word "alienage" seems to be used by the author with reference to one who is not a citizen of the State. By section 1386, R. S. 1881, the jury commissioners, in selecting jurors, are directed to take their names from those on the tax-duplicate, who are legal voters and citizens of the United States; "and they shall not select the name of any

person who is not a voter of the county, or who is not either a freeholder or householder" of the county. The wording of the section warrants the construction that the part relating to citizens of the United States is simply directory, while that respecting legal voters and householders or freeholders is mandatory. Section 1393, R. S. 1881, defining the qualifications of a juror, is as follows: "To be qualified as a juror, a person must be a resident voter of the county and a freeholder or householder." It will be seen that the definition does not require the juror to be a citizen of the United States. We are of the opinion that the ninth cause for challenge in section 1793, *supra*, has reference to the qualification of a juror as defined in section 1393, *supra*, or, in other words, that the term "alien," as used in the statute, relates to one who is not a citizen, nor a voter of the State.

This construction is in harmony with the spirit and policy of our Constitution and laws respecting citizens of the State of foreign birth, who may not be citizens of the United States. For it would seem incompatible with the spirit of our laws to exclude one from the jury-box who was eligible to act as jury commissioner in selecting jurors; or as sheriff in empanelling a jury; or as judge to preside at the trial. The construction we give the statute avoids this inconsistency, and we think should be adopted. We must, therefore, hold that there was no error in refusing the appellant's challenge to Bushing on the ground of alienage.

3. There was evidence at the trial tending to show that the motive for the homicide was to obtain money belonging to the deceased.

Louise Cavalier, a witness for appellant, testified that at the time of the commission of the crime she was acquainted with his general reputation for humanity and honesty in the neighborhood where he resided, and that such reputation was good. She was cross-examined by counsel for the State, and asked a series of questions as to whether she had heard certain rumors, specifically named, which, had she admitted hearing

them, would have materially weakened the force of her evidence in chief as to appellant's reputation. To each of the questions thus asked her on cross-examination the court sustained the appellant's objection; but he complained and objected to the persistence of counsel for the State in asking what he claims were improper questions. It is urged that the course of counsel for the State in this respect prejudiced the rights of the accused by making on the minds of the jury the impression that he had been guilty of the offences about the rumors of which the questions were asked. Had the questions, numerous as they were, been wholly irrelevant, we are not prepared to say that the conduct of the State's counsel would not have been open to criticism; but we are clearly of the opinion that the questions asked the witness on cross-examination were proper, and that the court erred against the State in sustaining appellant's objections thereto. The questions were relevant, not to prove that the appellant had been guilty of the offences referred to in the questions, but to elicit testimony which might affect the credibility of the witness's evidence in chief as to the appellant's reputation for humanity and honesty. One's reputation consists in the general estimation in which he is held by his neighbors. This is to be ascertained from what they generally say of him. When a witness testifies that such reputation is good with respect to some quality or disposition, it is competent to show by his cross-examination that he has heard reports at variance with the reputation he has given the party; and if his admissions of hearing such adverse rumors go to the extent of showing that they were general in the neighborhood where the party resided, the effect of the witness's testimony in chief would be destroyed. Wills Cir. Ev. 165–6. *Oliver* v. *Pate*, 43 Ind. 132, cited by appellant's counsel, is not in conflict with this view. There the questions asked the witnesses on cross-examination were as to what they had heard the neighbors say as to the honesty of a party whose reputation for truth and veracity they had testified was good. The questions asked on

cross-examination in that case were properly held to be impertinent to the matter testified to by the witnesses in their examination in chief.

4. The State introduced as a witness one Arthur Dodge. He testified that he went to the jail where appellant was confined, with a certain gun and pawn ticket, and asked the appellant in the presence of one Erastus Shuman, if he knew the gun, and if he had signed the ticket, and that the appellant denied knowing the gun, and also denied signing the ticket. Witness testified that he then asked Shuman, in appellant's presence, if appellant signed that ticket; that Shuman replied that he did; and that appellant then said that he did not sign it, and also said that he had never seen the gun or the ticket.

The gun was identified by other witnesses as having been the property of the deceased at the time of the homicide, which occurred on March 23d, 1883. Shuman testified that he was a pawnbroker in Fort Wayne; that on March 28th, 1883, which was before the discovery of the crime, the appellant brought this gun to the witness's place of business and pawned it to him for $10, signing two pawn tickets, one of which the witness retained, giving the other to the appellant. Other evidence showed that the pawn ticket, which Shuman identified as the one he gave appellant, was found concealed at a place where the appellant had been seen to go. The conversation at the jail about a pawn ticket related to the one given by Shuman to the appellant. It is earnestly insisted that the conversation testified to by Dodge was improperly admitted. We are of a contrary opinion. If the jury believed from the evidence that the gun belonged to the deceased, and that it was pawned by the appellant as Sherman testified, the appellant's denial of ever having seen the gun, or of having signed the pawn ticket, was a circumstance proper for the jury to consider, with other circumstances, in determining his guilt. Where one charged with a crime denies, or gives a false account of a circumstance or suspicious

fact, tending to connect him with the offence, such denial may be regarded as a criminal circumstance proper to go to the jury. Whart. Crim. Ev., section 761. There was no error in admitting the testimony objected to.

5. The evidence showed quite conclusively that the mortal wound was inflicted with a hatchet, identified by the evidence as found in the cabin where the body of the deceased was discovered several days after his death. After it was thus identified at the trial, one of the counsel for the State said: "We desire that the jury inspect this hatchet," at the same time placing it in the hands of one of the jurors. It was immediately taken from the juror by order of the court. The conduct of counsel for the State, in this matter, was objected to by appellant's counsel. Thereupon the court said to the jury: "I do not think that these articles can be given to the jury. The fact that the juror had placed in his hand what was alleged to be the hatchet with which the fatal blow was given, you, Gentlemen of the Jury, will not consider that in evidence, or as any part of the evidence, and you are not to take into consideration the marks, if any, that you saw upon it, nor consider that as evidence when you retire to make up your verdict in this case, and you must not speak of it, or refer to it in the jury room, as it is not evidence."

Had the conduct of counsel, in handling the hatchet to the juror, been as flagrant a breach of propriety as it is claimed to have been, we would still, in view of the court's prompt and broad admonition to the jury, think such conduct was rendered harmless in its effect. Jurors are presumed to be men of conscience and intelligence, honestly striving to do impartial justice. Where, in the course of a trial, there occurs an irregularity, such as that under consideration is claimed to have been, but is promptly and fully disapproved by the court in an instruction to the jury, it can not be presumed that the jury will disregard the court's caution and allow the misconduct to bias their minds. Our opinion is, however, that the State had a right to have the hatchet inspected

by the jury. It is well settled that all instruments by which an offence is alleged to have been committed may be inspected by the jury. All clothing of the parties concerned and all materials in any way forming part of the *res gestæ*, from which inferences of guilt or innocence may be drawn, are proper to be produced at the trial for the inspection of the jury. *Com.* v. *Brown*, 121 Mass. 69; *People* v. *Gonzalez*, 35 N. Y. 49; *Gardiner* v. *People*, 6 Parker C. C. 155; *State* v. *Mordecai*, 68 N. C. 207; *State* v. *Graham*, 74 N. C. 646.

There was no error respecting the inspection of the hatchet by the jury, of which the appellant can complain.

6. The appellant's counsel insist that the seventeenth instruction given by the court on its own motion does not state the law correctly upon the subject of malice. The instruction is as follows:

"17. Malice, within the meaning of the law, includes not only hatred and revenge, but every other unlawful and unjustifiable act. Malice is not confined to ill-will towards an individual, but it is intended to denote an action flowing from any wicked and corrupt motive; a thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief."

The fault of the above charge, if any, was rather in favor of the appellant. Its definition of malice seems to exclude its existence unless there be hatred and revenge connected with the doing of every unlawful and unjustifiable act. It is not open to the objection urged by appellant's counsel, that it informed the jury that the doing of any unlawful or unjustifiable act would, of itself, denote malice. The instructions, taken altogether, were quite as favorable to the appellant as he could have expected.

7. Finally, it is urged that the verdict of the jury is not sustained by the evidence. We have examined the evidence carefully. It is circumstantial, but the circumstances are so clearly proved, and point so conclusively to the guilt of the

appellant, that there appears to be no ground for reasonable doubt. We think that the jury, in finding the appellant guilty, as charged in the indictment, reached a correct conclusion.

We have thus, deeply impressed with the importance and magnitude of the case, involving, as it does, the life of a human being, given each question presented our best consideration. Our acknowledgments are due to counsel, both for the appellant and for the State, for their able briefs and oral arguments, which have been of great assistance in our labor.

The record does not disclose any error prejudicial to the legal rights of the appellant.

Judgment affirmed.

No. 10,376.

The Louisville, New Albany and Chicago Railway Company v. Rountree.

Practice.—*Issue and Trial.*—*Withdrawal of Appearance and Answer.*—*Motion to Set Aside Default.*—*Error.*—There is no error in overruling a motion to set aside a default, when the record shows there was no default, but that after issue joined and trial had, and before the announcement of the finding, the defendant's counsel merely withdrew their appearance and the answer to the complaint.

From the Montgomery Circuit Court.

A. D. Thomas, for appellant.

R. B. F. Peirce, *G. W. Hurley* and *B. Crane*, for appellee.

Howk, J.—Upon the record of this cause the appellant, the defendant below, has assigned as errors the following decisions of the circuit court:

1. In overruling its motion to set aside the default and judgment in this cause;

2. In overruling its motion for a new trial of such motion.

Appellee's counsel insist, in argument, that the judgment in this case was rendered against the appellant, not upon its

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concurrence of the act of leaving the premises vacant, so that they may be appropriated by the next comer, and the intention of not returning. "His not using the land or appropriating it to any suitable use" would not tend in the slightest degree to show an intention to abandon it. The intention to relinquish the possession may have been entertained, not only for a moment, but during the whole period of his possession; but if the intention was not manifested by leaving the possession vacant, without the intention of returning, there was no abandonment.

The twenty-fourth instruction given at the request of defendants, Southworth and Green, and the charge given by the Court on the return of the jury for instructions, are faulty in this respect: The jury were charged that if the plaintiffs, and those under whom they claim, had left the premises vacant, unimproved, and without attention for more than five years before the commencement of the action, they were authorized to find therefrom the fact of abandonment. They should have been instructed that such fact must be taken into consideration in deciding the question of abandonment. The essential fact of intention to abandon, is not necessarily inferable from the fact stated.

By the judgment it is ordered and adjudged that the plaintiffs take nothing by this proceeding as against certain defendants; and it is also adjudged that those defendants severally recover from the plaintiffs the possession of portions of the premises specifically described. Those tracts were in the possession of the respective defendants, and there is nothing in the pleadings to warrant a judgment, that they recover from the plaintiffs the possession of those several portions of the premises.

The index to the voluminous transcript in this case is a sham. The statement on motion for a new trial comprises about seven eighths of the transcript, and upon it all the questions in the case arise, but it has no index.

Judgment and order reversed, and cause remanded for a new trial, without costs.

SPRAGUE, J., expressed no opinion.

No. 2,372.

THE PEOPLE OF THE STATE OF CALIFORNIA, ex. rel. M. M. KIMBERLY, APPELLANT, v. PABLO DE LA GUERRA, RESPONDENT.

TREATY OF GUADALUPE HIDALGO.— INHABITANTS OF CEDED TERRITORY.— CITIZENSHIP.— The treaty of Guadalupe Hidalgo had the effect directly and of itself to fix the status of the inhabitants of the ceded territories, in their relation as citizens to the respective Governments of Mexico and the United States.

IDEM.— ARTICLE IX.— The only way in which it was possible for Congress to admit the Mexicans in the territory ceded by the treaty of Guadalupe Hidalgo to the enjoyment of all the rights of citizens of the United States, was by incorporating the ceded territory into the Union as States.

IDEM.— ADMISSION OF A STATE.— After admission into the Union, no Act of Congress was necessary to define the rights of the inhabitants who were recognized as members of the community organized into a State.

CITIZENSHIP.— The possession of all political rights is not essential to citizenship.

CALIFORNIA.— ADMISSION OF, AS A STATE.— QUALIFICATION OF ELECTOR.— When Congress admitted California as a State, the constituent members of the State, in their aggregate capacity, became vested with the sovereign powers of government "according to the principles of the Constitution," and had the right to prescribe the qualifications of electors.

IDEM.— TREATY OF GUADALUPE HIDALGO.— It was no violation of the ninth article of the Treaty of Guadalupe Hidalgo that the qualifications of electors, as prescribed in the Constitution of California, were such as to exclude some of the inhabitants from certain political rights.

APPEAL from the County Court of Santa Barbara County.

Judgment was for defendant; and plaintiff appealed.

The other facts are stated in the opinion.

A. Packard, for Appellant.
Eugene Lies, of Counsel.

If the judicial election had taken place under the Act of 1851, (p. 287) or that of 1853, (p. 333), neither of which prescribes any qualifications, the relator might need to rely entirely upon the principle discussed in the case of *Walther* v. *Raboll* (30 Cal. 185). But, at the time of this election, the Act of April 20, 1863, was in force; and its 19th Section declares that "no person shall be eligible to the

office of District Judge who shall not have been a citizen of the United States and a resident of this State for two years and of the District one year, next preceding his election."

The error assigned by appellant is that the Court below decided in substance that respondent was, and had been for two years before his election, a citizen of the United States solely by virtue of his choice under the treaty.

It may appear invidious, at this late day, to claim that, notwithstanding Articles 8 and 9 of the Treaty of Guadalupe Hidalgo, the distinguished respondent, who has filled high offices before and since the admission of California into the Union is not a citizen of the United States, simply because Congress has not yet seen fit to declare that, in its judgment, the "proper time" had come to provide for his admission. Nevertheless the conclusion, however vigorous, seems inevitable, and the point is by no means a new one.

It was first distinctly raised September 12th, 1849, by Mr. Gilbert, in the Convention that met to frame a Constitution for California. In the long debate which followed (Report p. 62–75) there appears no difference of opinion, except as to whether the Indian citizens of Mexico should have the suffrage. Mr. Gilbert's proposition, even at that early day, required no argument in its support.

The question again came up in committee of the whole as to the qualifications of Senators and Members of the Assembly; and was again mooted in regard to the qualification for the office of Governor, although the section, as reported and afterwards adopted, ensured the eligibility of native Californians to that office, at the first election, allowing sufficient time, it was thought, for Congress to adopt the provision contemplated by the ninth Article of the Treaty. (Report p. 157, *et seq.*)

When the report of the committee of the whole came to be considered by the Convention, the respondent in this proceeding introduced a substitute for the first section of the article on suffrage, the main object of which was to secure the right of voting for the descendants of Indians

(Report, p. 323). Afterward (p. 341) he assented, by way of compromise, to Mr. Vermeule's proviso as it now reads at the end of said section. But throughout this debate it is manifest that he was fully conscious that he, together with his countrymen similarly situated, was, at that time, and would remain, until Congress took special action, merely one of those Mexican citizens in California who had "elected to become citizens of the United States."

The fifth section of the schedule appended to the Constitution again recognizes the distinction, for it invites, to vote on the adoption of that document: "every citizen of California, declared a legal voter by this Constitution, and every citizen of the United States," etc.

Now, if there be anything in the notion that the native Californians became citizens of the United States by simply abstaining to signify, in some way, their desire to "retain the title of Mexicans," (Treaty, art. 8,) then the respondent was one before he became a member of that Convention, viz: as early at least as the 30th of May, 1849.

It can scarcely be contended that the respondent's case was bettered by the admission of California into the Union. For the act of admission merely sanctioned a Constitution which recognizes a distinction between those who by right were already citizens of the United States and those who expected to become so at the proper time, to be "judged of by the Congress of the United States."

Judge Bennett clearly was of the opinion that the admission of the State into the Union, did not make those Mexicans citizens of the United States, when, in *The People* v. *Naglee*, (1 Cal. 232), he classified them as established Mexicans who, not having declared their intention still to continue Mexican citizens, have elected to become American citizens. Far from intimating that they have become such, according to the statement in the syllabus to that case, he takes occasion to criticize the language of the first section of the Foreign Miners' Act, which, aside from the Court's interpretation, would only seem to exempt those Mexicans who had become citizens of the United States under the Treaty

i. e. by virtue of some special declaration of Congress. (*Tobin* v. *Walkinshaw*, 1st McA. 193.)

An intimation in the case of *The American and Ocean Insurance Company et al.* v. *Canter*, may seem to militate against our view (Peters 542). Evidently the reasoning is based upon the assumption that the treaty in question operated *eo instante* "to admit and incorporate" not to provide for future admission and incorporation; therefore the passage in question, even if not altogether *obiter dictum*, can only be invoked as authority here if a similar construction can be forced upon the ninth article of the Treaty of Guadalupe Hidalgo. At all events the Court nowhere intimates that the inhabitants have become citizens of the United States. To have done so would have been to accord the power of naturalization to the treaty-making power. And with all due respect, it is submitted that the "political power" of which the Court speaks might depend on many things besides the circumstance referred to.

To show that a different rule applies when a treaty contains a provision for future action we apply to the same high authority. In the case of *Foster & Elam* v. *Neilson* (2 Peters, 314), Judge Marshall says: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra-territorial; but it is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established, our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the Court." This identical language is incorporated

approvingly in *The United States* v. *Arredondo*, (6 Peters, 735); at p. 710 of the same opinion, the principle is distinctly asserted and maintained. And, in the case of *The United States* v. *Percheman*, after the Spanish version of the treaty had been laid before and interpreted to the Court (7 Peters 69), the Court reasserts the principle laid down in *Foster & Elam* v. *Neilson*, (Id. p. 89). The language of the Court is: "If the claim was confirmed by the treaty, which is the supreme law of the land, the United States have no power" &c. (p. 79.) In other words, Percheman's claim stands confirmed because it has been brought to the knowledge of the Court, that the real terms of the treaty, instead of providing, as was thought before, for some legislative action in its aid, actually operated to confirm such claim. In the case of *Garcia* v. *Lee*, (12 Pet. 515) Judge Taney recognizes *Elam* v. *Neilson*, as authority throughout.

We respectfully refer the Court to the following authorities cited by Abbott, and not within our reach. (S. Dist. of N. Y. 1847, matter of Metzger, 5 N. Y. Obs. 83, Ct. of Claims 1855-6; *Humphrey* v. *United States*, Dev. 51, 7th, Circ. Mich. 1852; *Turner* v. *American Baptist Missionary Union*, 5 McLean, 344.

The distinction in question is, we think, a sufficient answer (although there are others) to any argument based on the authority of *City of New Orleans* v. *Armas and Cucullu*, (9th Pet. 224) and indeed on any of the Louisiana and Florida cases.

The reasoning in the famous case of *Groves et al.* v. *Slaughter* (15 Pet. 449) is amenable, we concede, to the criticism which sooner or later attends all mere political or expediency decisions, but only because it goes infinitely farther than the point we are endeavoring to sustain.

The Constitution of Mississippi contained the following language: "The introduction of slaves into this State, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." The decision of a majority of the Court was that an Act of the Legislature was required to carry that prohibition into effect.

We may also appeal to the practice of our government heretofore:

The treaty of 1803 with France contained the following Article: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of the citizens of the United States, and in the meantime protected," &c.

Notwithstanding this assurance, which seems to us as strong as that in the Florida treaty, Congress thought fit to define the status of the inhabitants by the Act of March 2d, 1805. By the first section of that Act it is declared that they shall be "entitled to and enjoy all the rights, privileges and advantages secured by said Ordinance (13th July, 1787), and now enjoyed by the people of the Mississippi Territory." Previously to this, their rights and privileges seem to have been only those enumerated in the fifth section of the Act of March 26, 1804.

Furthermore the Act of February 20, 1811, authorizing the "inhabitants" to form a State government, invites certain "inhabitants," in contradistinction with "citizens of the United States" to vote for members of the Convention.

Wherefore, in view of these antecedents, when Congress, April 8th, 1812, admitted Louisiana into the Union, it might well be considered to have redeemed the pledge in the treaty. It is believed that the admission of Louisiana was delayed for seven years — not from the date of the treaty, but from the Act of 1805, defining the political status of the inhabitants — so that the inhabitants might be on an equal level for eligibility to the House of Representatives, under the second subdivision of Section 2, Article 1 of the Constitution of the United States.

In the case of Florida, "An Act for carrying into execution the treaty between the United States and Spain," &c. was passed March 3d, 1821. By its terms the power to establish a government is delegated to the President. But

soon thereafter (March 30, 1822,) Congress, resuming the matter into their own hands, established a government. Section 10 of that Act (3 U. S. L. 658) specifies the rights and immunities of the "inhabitants." Sections 12 and 13 of the amendatory Act of March 3d, 1823 (Id. p. 753) pursue the same object. Further electoral privileges are conceded to the citizens of the territory of Arkansas by the Act of Jan. 21, 1829 (4 U. S. L. 332) while the same act (Sec. 5) amplifies the franchise to the qualified voters of Florida.

The case of Texas offered no difficulties. Here we were dealing with an independent Republic. Section 10 defined citizenship: "All persons (Africans, the descendants of Africans and Indians, excepted) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the republic, and entitled to all the privileges of such."

Clearly then the joint resolution of Dec. 29, 1845, (9 Stat. at large, 108) admitting Texas "into the Union on an equal footing with the original States in all respects whatever" admitted those as citizens whom that sovereignty had designated as such, and those only. This would seem to be established in the case of *Benner et al. v. Porter*, (9 How. 235) cited in *Calkin & Co. v. Cocke* (14 How. 238). In other words, the Texans became citizens of the United States not because of the admission alone, but because of the fundamental law of the annexed sovereignty at the time of the admission. Now the fundamental law of California discriminates.

We would seem to be justified, without any further demonstration, to assume that the words "at the proper time to be judged of by Congress," so different from the language in the treaties with Spain and France, were inserted in the treaty of Guadalupe Hidalgo with a distinct and definite purpose. But we intend to make that point still clearer.

The original Article IX, as proposed by the Mexican Commissioners, read as follows: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is

stipulated in the preceding article shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States. In the meantime they shall be maintained and protected in the enjoyment of their liberty, their property and civil rights now vested in them according to the Mexican laws. With respect to political rights their condition shall be on an equality with that of the inhabitants of the other territories of the United States, and at least equally good as that of the inhabitants of Louisiana and the Floridas, when these provinces by transfer from the French Republic and the crown of Spain, became territories of the United States.

"The same most ample guaranty shall be enjoyed by all ecclesiastics, and religious corporations or communities, as well in the discharge of the offices of their ministry as in the enjoyment of their property of every kind, whether individual or corporate. This guaranty shall embrace all temples, houses, and edifices dedicated to the Roman Catholic worship, as well as all property destined to its support, or to that of schools, hospitals, and other foundations for charitable or beneficent purposes. No property of this nature shall be considered as having become the property of the American Government, or as subject to be by it disposed of or diverted to other uses.

"Finally the relations and communication between the Catholics living in the territories aforesaid and their respective ecclesiastical authorities, shall be open, free and exempt from all hindrance whatever, even although such authorities should reside within the limits of the Mexican Republic as defined by this treaty, and this freedom shall continue so long as a new demarcation of ecclesiastical districts shall not have been made conformably with the laws of the Roman Catholic Church." (*Tratado de Paz Querelaro*, 1848, pp. 11, 12, 13.)

The American Commissioners, however, insisted upon and obtained the present version. And they had powerful motives: the Mexicans in the ceded territory were supposed to be disaffected, particularly in California. The official correspondence (see for instance Sen. Doc. 1st. Sess. 31st. Cong. vol. 9) is full of information on this subject.

Bitterness had been added here to that which always attends war by peculiar circumstances. The first struggle (the Bear war) was understood to be revolutionary and unauthorized by any recognized Government. During its progress it was characterized by bloody deeds and harsh retaliation. Soon after the raising of the American flag, the two highest Mexican officers deserted the country. The Southern part of the State arose in arms and expelled the American garrison. Several encounters took place, not always to the advantage of the invaders. Well might Congress be left to judge of the proper time when these Mexicans should be admitted to the enjoyment of the rights of citizens of the United States.

Besides, a glance at the debates in Congress shows a prejudice, in the minds of the Senators and Representatives, against the character of the population of the territory. Calhoun, in a great white-man-government speech, is quite emphatic. (Cong. Globe, vol. 19, p. 49.) So is Dayton (Id. p. 100.) To such men the words in question were tendered as a salve.

If it be pretended, under the authority of *Knowles' case* (5 Cal. 300) that there is no such thing as a "citizen of the United States," and that, consequently, the qualification prescribed for District Judges by the Act of 1863 is illusory, we shall answer that the proviso of the treaty is open to the same criticism, and shall furthermore cite that case as authority for the position that there is but one way of turning a foreigner into a citizen, viz.: the judgment of some Court of Record, entered in some proceeding authorized by the general laws of Congress establishing "uniform rules" on naturalization. That the treaty-making power is, and always has been, incompetent to naturalize; and that the State itself, a uniform rule once established by Congress, has no power to adopt a citizen, except in the manner pointed out

by that rule. And to maintain the last mentioned position it is scarcely necessary to appeal to the authority of the case whose report fills some two hundred pages of the 19th How., from page 393 to the end.

We have hitherto argued with special reference to those "words of solemn import" in the ninth article of the treaty of Guadalupe Hidalgo, which provides for special action by Congress.

We now beg leave to present the view that, even if those words were absent from the treaty, the respondent would not be a citizen of the United States.

The States that formed the original Union, though liberal beyond precedent in the adoption of foreigners, as witnessed by that clause in the Declaration of Independence, where the disinclination of the parent country to encourage foreign immigration is mentioned as a grievance justifying rebellion, realized, to the utmost, the value of the privileges which they extended to aliens. The whole subject of naturalization was referred to Congress. That this grant of power was exclusive appears from many decisions. (*Chirac* v. *Chirac*, 2 Wheat. 269; *U. S.* v. *Villato*, 2 Dall. 372; *Thurow* v. *Massachusetts*, 5 How. 585; *Smith* v. *Turner*, 7 Id. 556; *Dred Scott* v. *Sanford*, 19 How. 398.) Congress, in the exercise of its constitutional power, announced its settled policy in the Act of April 14th, 1802. The first section of that Act reads as follows: "That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following condition *and not otherwise.*"

In 1804 it was thought best to establish another "uniform rule of naturalization" for a certain class of individuals. And the first section of that Act might well serve as a model for an Act to admit to citizenship our Mexican residents whenever Congress shall consider that the probation has been sufficient.

If we have not wholly misunderstood the history of the country, Congress has never, in any single instance, departed from the general rule. It has conferred the privileges of citizenship on the inhabitants of annexed territories, but it has done so by special enactments. It has first defined the political status of the inhabitants, and afterward raised them to a level with other inhabitants of the Union by investing the annexed territory with the dignity of a sovereign State. Or, it has reached the same result by simply approving a State Constitution which declared who were the citizens of that State; and these became immediately entitled to the benefit of the provisions of Section 2, Article IV. of the Federal Constitution.

But when Congress admitted California into the Union, it was neither an independent republic which it incorporated, as in the case of Texas, nor a district prepared for admission by the usual initiatory stage of territorial existence, as in the cases of Louisiana and Florida. It was a portion of Mexico, acquired by purchase, which demanded admission. It tendered a Constitution which far from conferring, or attempting to confer, citizenship upon the Mexican residents, pointedly discriminated between them and the citizens of the United States, though generously conferring the right of suffrage upon the former.

In admitting California, Congress did no more then, as regards its Mexican inhabitants, than to confirm the political status attributed to them in the fundamental law of the admitted State, viz: that of Mexicans residing in California who had elected to become citizens of the United States.

It was not an independent sovereignty which the treaty promised to incorporate. It was a portion of the "Departmento de Californias." If, by any perversion of terms, it should be claimed that the respondent had some status under the Mexican Constitution, at the date of the treaty, as a citizen of California, which the United States might be bound to consider and respect, as was done in the case of Texas, we confidently answer that, under the Mexican Constitution in force at that time there was no such thing as a citizen of any portion of the Republic of Mexico. There was a Republic of Mexico: it was divided geographically and politically into a number of "Departmentos." But

each of these derived its powers solely from the central source of authority. Its legislative body had no life but what was conferred by the nation at large. State rights, such as we understand them, were unknown in Mexico. The very machinery of local government was prescribed by central legislation (see Constitution of 1836, and law of 20th of March, 1837). There was, therefore, no such thing as a citizen of California, (as we understand the term) before the American conquest. There were simply certain citizens of the Republic of Mexico residing here. This is all that the treaty recognizes, all that the State Constitution acknowledge. Aliens to all intents and purposes, they had never owed any special allegiance to that portion of the Mexican Republic which the treaty annexed; their allegiance was due to the whole Republic of Mexico. By electing to become citizens of the United States, they had no State allegiance to abjure, in terms or by implication, only allegiance to the Republic of Mexico. No special autonomy ever belonged to California as a portion of the Mexican territory, beyond what has been indicated in this hasty sketch. No political rights ever attached to an inhabitant of California, under Mexican rule, except the rights of a Mexican residing there. Wherefore the respondent, at the date of the Treaty had no special franchise, as a Mexican, attached to the circumstance of his dwelling in California. He was simply a Mexican who might or not elect to become a citizen of the United States. He did so elect; but that alone does not make him a citizen.

In conclusion, we insist that the respondent was an alien enemy up to the ratification of the treaty of Guadalupe Hidalgo; that between that time and the date of the admission of the State of California into the Union, he joined, by virtue of his silence, that class of Mexicans who are deemed to have elected to become citizens of the United States, but he is not and never was a citizen within the meaning of the Act of April 20, 1863, prescribing qualifications for the high office which he pretends to fill.

Peachy & Hubert, for Respondent.

First — On the point of conquest, it will suffice to say, in the language of the Supreme Court of the United States, in the case of Percheman (7 Pet. 87), that "the conqueror displaces the former sovereign, and assumes dominion over the country; the people change their allegiance, and their relation to the ancient sovereign is dissolved." Now it is a well-established principle of the common law, that "if the king of England make a new conquest, the persons there born are his subjects." (Bac. Ab., Tit. Aliens.) Why? Because they are born within the dominions and allegiance of the king. "One born in Ireland, Scotland, or Wales, or any of the king's plantations, is a natural subject of England, because he is born within the allegiance of the king." (Bac. Ab., Tit. Aliens.) All English subjects are either natural born, or denizens (so made by letters patent), or naturalized, by act of parliament. From these three classes alike allegiance is due to the natural person of the king. It was on this distinction between the natural and politic persons of the king, that the celebrated decision in Calvin's case was grounded. It was there held that persons born in Scotland after the English crown came to James I., were born under allegiance to the natural person of the king of England, and might inherit in England. In the case of *Craw* v. *Ramsey* (Vaughan R. 270), it is held that "according to the resolution and reasons of Calvin's case, the specific and adequate cause, why the king's subjects of his other dominion than England, do inherit in England, is, because they are born his natural subjects, as the English are, he being actually king of England at the time of their birth, when their subjection begins; and so are born liege men to the same king." In the same case, p. 283, we are told that "No fiction of law can make a man a natural subject that is not; for a natural subject and a natural prince are relatives, and if an act of naturalization should thereby make a man a natural subject, the same subject would have two natural sovereigns, one when he was born,

can citizens, "have become such." We think this intimation scarcely does justice to the able jurist who delivered the opinion in that case. For he says: "those who have declared such intention (to retain their Mexican citizenship) if there be any, still remain aliens and foreigners, and as such are subject to the same restriction by State authority as the subjects or citizens of any other foreign country." (1 Cal. 351.)

It is clear, therefore, that in Judge Bennett's opinion, the treaty operated of itself to give to Mexicans the right to retain their Mexican citizenship by declaring their intention. The treaty says: "Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States." How retain? and how acquire? By "making their election within one year from the date of the exchange of ratifications." If the treaty *proprio vigore* confers the right to retain, it must equally confer the right to acquire. According as the right of election is exercised, Mexican citizenship is retained, or our United States citizenship is acquired; both come of election, or neither.

The ninth article of the treaty does really contain a promise. The United States therein pledge their faith to Mexico that all those Mexicans who, in the exercise of the right of election conferred on them by the eighth article, have not retained their Mexican citizenship, "shall be incorporated into the Union of the United States, and be admitted at the proper time, (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States according to the principles of the constitution," &c. This article in our conception, is nothing more nor less than a promise, that, at some future day, Congress will admit California into the Union, and those Mexicans who have not retained their Mexicanship, shall be regarded as members of the new State, entitled to all the rights of citizens of the United States according to the principles of the Constitution.

To become a citizen of the United States, as by the eighth article of treaty Mexicans were permitted to become at their election, is one thing. "To be incorporated into the Union of the United States, and admitted to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution," is a very different and a very much more august thing, according to the opinion in those days prevailing as to the power and dignity of a sovereign State in the then Union.

The citizenship of the respondent, so far as it could emanate from the treaty, is traced to the ninth article as its only possible source, in the opinion of appellant's counsel. Why the eighth article, which is the true source of his citizenship so far as it comes from treaty stipulation, should have been overlooked by them and disregarded, it is difficult to understand. The appellant's whole argument upon the point that the treaty is not operative of itself, but requires legislative action to give it effect, rests upon a mistaken supposition. It is not the ninth but the eighth article of the treaty that the respondent regards as the source of his right and authority to become a citizen of the United States, in the exercise of the right of election thereby conferred on him. And the respondent might well add, that if the said eighth article has not the meaning which he and all his countrymen imagined they saw plainly expressed on its face, it is the most ingeniously devised article for the suggestion of a serious mistake, that was ever introduced into a solemn treaty.

Third—Now we come to the fulfillment of the promise made in the ninth article of the treaty. The respondent, one of those Mexicans who did not retain his Mexican citizenship, has been "incorporated into the Union of the United States, and admitted at the proper time (at least Congress appears to have thought it the proper time) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution."

The Constitution of the United States gives to Congress, in so many words, the right to admit new States into the Union: "A State is a body politic, or society of men united together for mutual safety and advantage." (Halleck's Int.

This article of the treaty gives to the Mexicans then domiciled in California, the right to retain their domicile in the ceded territory, and to retain their allegiance to the Republic of Mexico. In this respect, it gives them an advantage which is denied them by the law of nations. For according to that law they may, if they choose, depart within a reasonable time from the conquered territory, taking with them their property or its proceeds; but they cannot remain there domiciled without incurring all the obligations to the new sovereign; which are imposed by full allegiance.

It gives them, moreover, the right to choose between the old and the new sovereigns, to retain the rights of Mexican citizens, or to acquire those of citizens of the United States. It prescribes to them, further, the method by which they may retain their Mexican citizenship or acquire citizenship in the United States.

We regret that the learned counsel of the appellant, failing to notice this article of the treaty, which is so pertinent to the question under discussion that it affords the true grounds of its solution, bestowed all their labor on the ninth article, which has no bearing on it.

We contend that Don Pablo de la Guerra, being a Mexican, then established in California, having refrained from declaring his intention to retain the character of a Mexican citizen, during the time specified in the treaty, elected to become, and by his election did become, a citizen of the United States.

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in Courts of justice, as equivalent to an Act of the legislature, whenever it operates of itself without the aid of legislative provision." Per Chief Justice Marshall, in *Foster & Elam* v. *Neilson*, 2 Pet. 314.)

Does the eighth article of the treaty, operate of itself, or does it require legislative aid to put it in operation? There can be no doubt that it operates of itself. It is a contract and stipulation with the Republic of Mexico, granting a privilege to her citizens, and not a mere promise of a future grant. It is a grant direct and immediate to certain Mexicans of the right to retain their Mexican citizenship, or to acquire citizenship in the United States. It is a grant of the right of election, to be exercised in a certain manner, and within a specified time. And this time begins to run from the date of the grant, i. e., from the exchange of ratifications, and is limited to one year. If this article had been intended as a mere promise on our part, that Congress shall, at some future time, enact a law conferring on Mexicans established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the treaty, the right to retain their Mexican citizenship, or to become citizens of the United States at their election, it would seem that in fixing a time within which the right of election must be exercised, the date of the law which confers the right, would have been selected as the initial point, and not the date of the exchange of ratifications.

But this is certain, if the treaty operates of itself as a grant to Mexicans then established in the ceded territory, of the right to retain their domicile in California, and their allegiance to Mexico, by making a declaration to that effect, it equally operates of itself as a grant to those same Mexicans of the right to acquire citizenship in the United States, by refraining for the space of one year from and after the exchange of ratifications, to make the declaration aforesaid. For the choice is between remaining a citizen of Mexico, and becoming a citizen of the United States. The right of election which is granted, is the right to choose between those two things. If they have the right to choose the one, they have an equal right to choose the other. The respondent chose to become, and, by his election, did become a citizen of the United States.

The respondent's counsel say that Judge Bennett in the case of the *People* v. *Nagle*, is far from intimating that Mexicans who, not having declared their intention still to continue Mexican citizens, have elected to become Ameri-

the other when naturalized, which he can never have more than two natural fathers, or two natural mothers, except the sovereigns be subordinate, the inferior holding his kingdom as Liege Homager from the Superior."

Under our form of government, there being no such thing as allegiance to any natural person, the ligament which binds the individual to the State consists entirely in the obligations imposed on him by reason of his being one of many who constitute a State or body politic. If we eliminate everything like a personal relation between natural persons from the idea of citizenship, it is reduced merely to that relationship which exists between the individual and the aggregate of individuals called the State, and out of this relationship arises allegiance.

When, therefore, the United States wrests a province from another, and incorporates it permanently in its own territory, and the country from which it is taken by force, cedes it by treaty, whereby the allegiance due by its inhabitants to the ancient sovereign, is transferred in all its fullness and perfection to the new one, it seems that the inhabitants of that province must be considered citizens of the country to which they have been transferred. Even by the strict principles of the common law, if California had been conquered by England, all persons there born after the conquest, would be English subjects; because born within the allegiance of the king. But between the allegiance due by those born before, and those born after the conquest, there is no other difference than that the first allegiance comes by transfer, and the second by birth. They have different origins, and different effects; but they are wholly alike so far as regards obligation to the State, and the absence of obligation to all other States. And therein, if we are not mistaken, is to be found the true test of citizenship in these United States. When the United States conquers a territory by force, and confirms the conquest by treaty; enforces a temporary allegiance by war, and accepts full and permanent allegiance by contract, transfer and relinquishment on the part of the former sovereign, it seems to us that the inhabitants of the conquered province bear to the new sovereign all those relations out of which citizenship necessarily arises. These relations, be it further observed, are forced upon the inhabitants by the conqueror, who procures for himself a formal recognization and relinquishment of them by the old sovereign.

We are speaking of citizenship in its simplest form, and entirely divested of those political rights which, under our democratic form of government, are so commonly engrafted upon it as to have given rise to an error common in popular thought, that they are its essentials.

Second — If the respondent did not become a citizen by the conquest, cession, and permanent incorporation by the United States of the territory whereon he was then, and has been ever since domiciled, he certainly did become one, by force of the treaty of Guadalupe Hidalgo.

The 8th Article of the treaty is as follows:

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain within the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."

The remaining clause of the 8th Article has no bearing on the question involved in this case.

Nat. Law, 63.) This definition is not the best, because it is equally the definition of things which are not States; but it is true. States are societies of men united together for mutual advantage and safety. To admit a new State into the Union, is to admit a society of men united together for the purpose of government, into a union composed of similar societies.

Governor Riley's proclamation inviting the people of California to form a State Constitution, under which they might ask for admission into the Union, confers the right to vote for delegates to the Constitutional Convention, upon "every free male citizen of the United States and of Upper California, twenty-one years of age, and actually resident in the district where the vote is offered," &c. (1 Hittel, 80.)

The Constitution formed by the Convention so elected, declares that every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Queretaro on the 30th day of May, 1848, of the age of twenty-one years, &c., "shall be entitled to vote at all elections which are now, or may hereafter be authorized by law," &c. (Const. Cal. Art. 2, Sec. 1.)

And further, "every citizen of California, declared a legal voter by this Constitution, and every citizen of the United States, a resident of this State on the day of election, shall be entitled to vote at the first general election under this Constitution, and on the question of the adoption thereof." (Const. Cal., Schedule, Sec. 5.)

"Whereas, the People of California have presented a Constitution, and asked admission into the Union, which Constitution was submitted to Congress by the President of the United States," &c. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the State of California shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever."

Who were the "People of California who presented a Constitution and asked admission into the Union?" They certainly included all persons who had the right to vote for delegates to the Constitutional Convention, and upon the question of the adoption of the Constitution. The makers of the organic law of the State must be considered members of the body politic which it creates. It was they "who presented the Constitution and asked admission into the Union;" and it was they who were admitted into the Union under the name of the State of California. And they were admitted on an equal footing, in all respects whatever, with the several people, who, under the names of the several States which they respectively composed, made and originated the Union. To say that any one individual of the aggregate, called the People of California, thus admitted into the Union, is not thereby made a citizen of the United States, if he was not one before, is to assert what appears to us simply impossible.

How did there ever come to be a citizen of the United States, if it was not by virtue of the voluntary coming together under the Constitution of the United States, of the independent and sovereign communities, who severally acquired their independence and sovereignty when they renounced allegiance to the British Crown. So entirely independent of each other were these communities, that the Constitution of the United States makes no claim to the adhesion of any one of them; but, in so many words disclaiming such a right, submits itself to the consideration of each separate people or State, as a desirable union for the purposes of mutual welfare and common defense. "The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." (Const. U. S., Art. VII.)

In the interval between the declaration of independence, and the adoption of the Constitution of the United States, each colony, assuming the sovereignty and the name of a State, regulated, by its own legislation and for itself exclusively, the whole matter of citizenship and allegiance. There

ere citizens of Virginia, New York, Georgia, &c.; but there as no citizen of any government common to the colonies. hese facts are matters of history. (See, on this point, ngles v. *Trustees of the Sailors' Snug Harbor*, 3 Pet. R. 99.) How then did there come to be a citizen of the United tates? As soon as the Conventions of nine States ratified ie Constitution, it became an established government for ie States that ratified it. The citizens of those nine States ere the first citizens of the United States. But the people f California, that is to say, those persons who, in the lanuage of the Act of Admission, "presented a Constitution, nd asked for admission into the Union," were admitted herein under the name and style of the State of California, n an equal footing with the original States, in all respects hatever. Why the name "People of California," as used n the Act of Admission, should be construed to mean the itizens of the United States residing in California, passes ur comprehension. The counsel for the respondent can nd no reason for the limitation in the want of congressional ower, for Congress has a right to admit a new State into ne Union, every one of whose citizens, before admission, as an alien to the United States. And so far from finding ny circumstance in the relations between California and the ederal Government, to warrant such mutilation of the ame, those relations would fully justify the enlargement of doubtful term, so to embrace the whole class of Mexicans lomiciled in California, to whom incorporation "into the Union of the United States," and admission "to the enjoyment of all the rights of citizens of the United States," had ven promised by treaty. Certain it is, that if the name People of California, in the Act of Admission, does not embrace "the Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic," our government has utterly failed to fulfill its promise of *incorporating* such Mexicans into the Union of the United States; nor is it easy to see how, under the circumstances, hat promise can now be fulfilled. For the promise to incorporate those Mexicans domiciled in California, who

shall renounce allegiance to Mexico, into the Union of the United States, means nothing more nor less than to admit them as a body politic or State into the Union. To naturalize individuals is quite a different thing from incorporating a large body of men, domiciled in a certain territory, into the Union of these United States." But Congress has incorporated one body of men inhabiting California into the Union of these United States. If this body of men does not include those Mexicans in California, whose incorporation "into the Union of the United States," and whose admission to "the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution," was so emphatically promised by the treaty, how is the treaty stipulation to be carried out? We are inclined to believe that Congress has not violated the promises of the treaty by rendering their fulfillment impossible. On the contrary, if we are not to attribute to Congress wanton bad faith, and the most plentiful lack of statesmanship, we must believe that the Constitution which was presented by the people of California to the Congress of the United States, when they asked admission into the Union, was carefully examined by that body of legislators, with special reference to the question: whether by said Constitution, the Mexicans domiciled in California, to whom incorporation into the Union of the United States had been promised, were clearly, and beyond the possibility of doubt, made members of the body politic — named the State of California — then asking admission. Ordinary good faith could not fail to prompt such an inquiry; nor would any legislator, who had the least regard for decency, have failed to denounce the Constitution and to refuse admission to the State, if the Mexicans to whom incorporation into the Union had been promised, had been denied membership in the body politic.

The only question, then, that the logic of this case admits of is: Was the respondent a member of the body politic which was admitted into the Union under the name of the State of California? Was he one of the people of California, within the meaning of that term in the pre-

amble of the Act, who presented a Constitution and asked admission into the Union, and were admitted? How is that fact to be determined? Solely by the Constitution of California; and if, by that organic law, the respondent was not made a member of the body politic, or State of California, or in one word, a citizen of the State of California, then there was no such thing as a citizen of the State. For the Constitution does not declare by formal definition, who shall be citizens of the State, but, in conferring the right of suffrage, it describes as citizens of California all persons who are declared legal voters by this "Constitution," to whom, as well as to every citizen of the United States a resident of this State on the day of election, the right to vote at the first general election under the Constitution, and on the question of the adoption thereof, is given. (Schedule, Sec. 5.) The respondent was a member of the Convention which framed the Constitution, as rightfully a member as any other gentleman who was delegated to perform that duty. The Constitution gave him the right to vote upon the question of its adoption, and describes him as "a citizen of California," entitled to vote at all elections which are now or hereafter may be authorized by law." (Const. Cal., Art. 11, § 1. Schedule, § 5.) Add to this that California had been in the full and undisputed exercise of all the powers of a State for at least eight months before its admission into the Union, during which time, and at the date of admission, the respondent represented the Senatorial Districts of Santa Barbara and San Luis Obispo in the Senate of the State, and we think there can be little doubt that he was one of the people of California who presented the Constitution and asked admission into the Union.

The appellants' counsel say: "The case of Texas offered no difficulties. Here we were dealing with an independent republic." If we understand the counsel's argument, it is this: All persons who, by the organic law of Texas, were citizens of Texas at the time of its admission, became citizens of the United States by virtue of the admission; but the Constitution of California discriminates between the citizens of the United States and the Mexicans who had elected to become such, and therefore the Mexicans were not members of the body politic, called the State of California, which was admitted into the Union, and did not thereby become citizens of the United States. There would be some force in this argument if the discrimination referred to excluded said Mexicans from membership in the body politic which was created by the Constitution. But unfortunately for the counsel's argument, the discrimination is resorted to by the Constitution solely for the purpose of describing two classes of persons, both of which classes are to be considered citizens of the State. If there be any doubt as to the inclusion of either class in the term "citizens of California," it cannot refer to the Mexicans who had elected to become citizens of the United States; for they are described in the schedule, section 5, as citizens of California, declared legal voters by this Constitution. Thus the real discrimination is between the white male citizens of Mexico, who have elected to become citizens of the United States, upon whom the right of suffrage is conferred by the first section of the second article of the Constitution, and who, by section 5 of the schedule, are described as citizens of California, and citizens of the United States resident in California. The discrimination is against the citizens of the United States, inasmuch as a distinction is made between them and citizens of California.

We refer the Court to the cases of *Cryer* v. *Andrews*, (11 Texas Reports, p. 192); and to Desbois's case, (Martin La. Rep. N. S. 285); and to the case of *The United States* v. *Laverty*, decided in the District Court of the United States, and reported in the same volume of Martin, p. 747. These cases fully establish the respondent's citizenship.

In the case from Texas, the Court says: "For whether the time be computed from the death or from the Act, still nine years had not elapsed before the consummation of annexation between Texas and the United States; and from that time the plaintiff (a citizen of Arkansas) became virtually a citizen of Texas, and entitled to the privileges

and immunities of citizenship." * * "This position seems so clear that comment in support of it is unnecessary. When the Congress of the United States, under the authority to admit new States, receives a foreign nation into the confederacy, the laws of those respective nations, in relation to the naturalization of individual immigrants, have no application to the respective citizens of each. By the very act of union, the citizens of each become citizens of the government, or governments formed by this union. The position which has been sometimes broached, that the citizens of Texas must submit to the laws of naturalization before they can become citizens of the United States, is quite preposterous." (Id. p. 83.) Now what is said of Texas is true of California. For it is obvious that the civil status of the citizens of the admitted State, considered in reference to the Union, depends, not upon the previous condition of the admitted State, but solely upon what it became by reason of its admission. It is its admission as a State into the Union, which places it in such a relation to the Union, that its citizens become citizens of the Union, and all the citizens of the latter become its citizens. By entering the Union all the States assume an equal footing, whatever differences before then may have existed between them in respect to independence and sovereignty.

The effect of incorporating a State into the Union upon an equal footing in all respects whatever with the original States, is to render its condition such as it would have been had the new State been a party to the adoption of the Constitution of the United States. In this point of view we are inclined to deny the correctness of the position of the learned Judge, who, in Desbois's case, above cited, says that admission into the Union is the naturalization of a large body of men by a single act. In our view of the matter, those who were citizens of California at the moment of her admission into the Union were not naturalized thereby. They became citizens of the United States by a much higher warrant, precisely as the citizens of Virginia and Massachusetts and Georgia became citizens

of the United States when they adopted the Constitution; and they certainly were not naturalized citizens.

The Constitution of the United States (Art. 1, Sec. 2) declares that no person shall be a representative, who shall not have been seven years a citizen of the United States when elected, &c. And in Art. II. Sec. 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. As it was the adoption of the Constitution by the Conventions of nine States that established and created the United States, it is obvious there could not then have existed any person who had been seven years a citizen of the United States, or who possessed the Presidential qualifications of being thirty-five years of age, a natural born citizen, and fourteen years a resident of the United States. The United States in these provisions, means the States united. To be twenty-five years of age, and for seven years to have been a citizen of one of the States which ratifies the Constitution, is the qualification of a representative. To be a natural born citizen of one of the States which shall ratify the Constitution, or to be a citizen of one of said States at the time of such ratification, and to have attained the age of thirty-five years, and to have been fourteen years a resident within one of the said States, are the Presidential qualifications, according to the true meaning of the Constitution.

California having been admitted into the Union on a footing of equality with the original States, in all respects whatever, must be considered as having come into the Union, Congress permitting, by ratifying the Constitution of the United States. To be a State of the Union, on an equal footing in all respects whatever with those States which became members of the Union by their own voluntary ratification of the Constitution which created it, is to be entitled to all the rights and privileges which would result from entrance into the Union, in the mode prescribed by the Constitution for its own primordial establishment. We therefore hold that the respondent became a

citizen of the United States in precisely the same way as Thomas Jefferson and all the other signers of the Declaration of Independence, that is to say: by virtue of the ratification of the Constitution of the United States by the conventions of the several States of which respectively they were citizens. The ratification of their own Constitution by the people of California, is the ratification of that of the United States; for in the 12th Section of the Schedule it is provided, that "the senators and representatives to the Congress of the United States, elected by the Legislature and people of California, as herein directed, shall be furnished with certified copies of the Constitution, when ratified, which they shall lay before the Congress of the United States, requesting, in the name of the people of California, the admission of the State of California, into the American Union." Here was the ratification of the Constitution of the United States by a convention of the State of California, which, together with the consent of Congress, signified by the Act of Admission, made California a State of the Union — the equal in all respects whatever of the original States. The original States agreed among themselves upon the manner in which each one might come into the contemplated Union if it pleased, and gave to Congress the power to admit new States upon the same terms. The coming into the Union of an original State, depended solely on its own will made known in a prescribed mode. The coming into the Union of a new State, depends not on its own will alone, but also on the will of Congress, and that is the only difference between the two cases.

Coffroth & Spaulding, for Appellant, in reply.

Contended that, if, as contended by respondent, the eighth and ninth articles of the treaty of Queretaro make all citizens of Mexico living in California at the time of the treaty, who did not within one year elect to remain citizens of Mexico, citizens of the United States without any Act of Congress, then the Constitution of the State of California is

repugnant to that treaty; for, by that instrument, a discrimination is made between white citizens of Mexico and Negroes and Indians, who were as much citizens of Mexico as white persons.

TEMPLE, J., delivered the opinion of the Court, WALLACE, J., and CROCKETT, J., concurring:

The respondent was born at Santa Barbara, in 1819, and has ever since resided at that place, and is admitted to have been a white male citizen of Mexico at the date of the treaty of Guadalupe Hidalgo. After the ratification of that treaty he elected to become a citizen of the United States in the mode provided in the treaty. He was a member of the Constitutional Convention which framed the Constitution of California, and has almost continuously, since the adoption of that instrument, held office under its provisions. At the judicial election, held in 1869, he was elected Judge of the First Judicial District, and the relator in this proceeding contests his right to the office, on the ground that he is not a citizen of the United States, as by an Act passed April 20, 1863, it is provided that "no person shall be eligible to the office of District Judge, who shall not have been a citizen of the United States and a resident of this State for two years."

Article IX of the treaty of Guadalupe Hidalgo is as follows: "The Mexicans who, in the Territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding Article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

It is contended on the part of the relator that Mexicans who were resident in California at the date of the treaty, and who elected in the mode provided to become citizens of the

United States, did not acquire the right of citizenship by the terms of the treaty, but an Act of Congress admitting them to such rights is necessary, and that no such Act having been passed, the respondent is not a citizen.

The question raised would be of very grave import to the people of this State, were it not for the fact that its solution is quite obvious. By the eighth article of the treaty it is provided that the Mexicans who were resident in the ceded territory might either remain or remove to the Mexican Republic, and should be protected in their property. It is then stipulated:

"Those who shall prefer to remain in said Territory may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of ratification of this treaty; and those who shall remain in the said Territories after the expiration of that year, without having declared their intention to retain their character of Mexicans, shall be considered to have elected to become citizens of the United States."

The natural consequence of the cession of the Territory by Mexico, and its acquisition by the United States, would be that the allegiance of the inhabitants who remained in it would be transferred to the new sovereign. By the stipulation of the treaty, however, three courses were left open to the inhabitants. One was to remove to the Republic of Mexico; in which event they would of, course, continue to be citizens of Mexico; the second was to remain in the ceded Territory and retain the title and rights of Mexican citizens; the third, to become citizens of the United States.

That the treaty was intended to operate directly, and of itself to fix the status of those inhabitants, does not admit of a doubt. That it had that effect, so far as those who elected to remain citizens of Mexico are concerned, is obvious, and there is no reason for a different construction as to those who elected to become citizens of the United States. In fact, this would have been the natural consequence of the treaty (so far as was possible under our form of Government), and it required this special treaty stipulation to enable the inhabitants to remain in the ceded territory and owe no allegiance to the new Government. But for this provision the Mexicans who remained would not have been considered aliens, but would have been vested with such rights of citizenship as can be conferred upon the inhabitants of a Territory who are not citizens of any of the States of the Union. But, by the terms of the treaty, those who did not elect to remain citizens of Mexico, lost their rights as Mexican citizens, at least as soon as the election was made, and the conclusion is irresistible that they acquired (so far as was possible) the rights of citizens of the United States at the time they lost those of Mexican citizens; otherwise they remained a people without a country.

This article of the treaty would probably never have received a different construction from that here given, were it not for the following article, which has been strangely misconstrued. It provides that these Mexicans in the ceded Territories, who do not retain the character of Mexican citizens, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution. The Union with which they are to be incorporated is, of course, the Union of the States composing the United States, and by which Union that Government is created. They can be incorporated into this Union only as a State, and the admission of the people to the full rights as citizens of the United States follows as the consequence of that act; and this is the only way in which it was possible for Congress to confer upon them all the rights of citizens of the United States. For this purpose it is not necessary to inquire whether, under our form of Government, there can be a citizen of one of the United States who is not a citizen of the States. I have no doubt that those born in the Territories, or in the District of Columbia, are so far citizens as to entitle them to the

protection guaranteed to citizens of the United States in the Constitution, and to the shield of nationality abroad; but it is evident that they have not the political rights which are vested in citizens of the States. They are not constituents of any community in which is vested any sovereign power of government. Their position partakes more of the character of subjects than of citizens. They are subject to the laws of the United States, but have no voice in its management. If they are allowed to make laws, the validity of these laws is derived from the sanction of a Government in which they are not represented. Mere citizenship they may have, but the political rights of citizens they cannot enjoy until they are organized into a State, and admitted into the Union.

But the United States cannot acquire territory to hold and rule permanently in full government. Such acquisitions are in pursuance of its power to admit new States, and every Territory thus acquired must be held to have been acquired for the purpose of being erected into a State. Indeed that may be considered as the last act in the acquisition of the Territory, for it is then for the first time incorporated into the Union. Once admitted into the Union it requires no Act of Congress to define the rights of the inhabitants who were recognized as members of the community organized into a State, "because the Constitution itself defines the relative rights, powers and duties of the State, and the citizens of the State, and the General Government." (*Scott* v. *Sandford*, 19 How. 440.)

Having admitted into the Union a State, of which these inhabitants were constituent members, Congress could do no more. It has conferred upon them all the rights of citizens, or rather it has recognized these rights in the only mode provided by the Constitution which was applicable to them.

The question involved in this case seems to have been decided in the case of the *American Insurance Company* v. *Canter*, (1 Peters, 511.) This case involved the validity of a territorial law of Florida, establishing a certain Court.

Chief Justice Marshall, in pronouncing the opinion of the Court, says: "On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the Territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution; and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.'"

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in the Government till Florida shall become a State. In the meantime, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

But it is suggested by counsel for relator, that if this construction be correct, then the Constitution of California is in conflict with the ninth article of the treaty, for that article provides that all Mexican citizens who elect to become citizens of the United States, shall be admitted to all the rights of citizens, while the Constitution discriminates. It declares that white male citizens of Mexico, who have elected to become citizens of the United States, shall be electors, while all, without distinction of color, including Indians, were Mexican citizens, and entitled to vote by the laws of Mexico.

If this be so, it does not follow that the respondent is not a citizen of the United States, but that the elective franchise is denied to certain persons who had been entitled to its exercise under the laws of Mexico. The possession of all political rights is not essential to citizenship. When Con-

gress admitted California as a State, the constituent members of the State, in their aggregate capacity, became vested with the sovereign powers of government, "according to the principles of the Constitution." They then had the right to prescribe the qualifications of electors, and it is no violation of the treaty that these qualifications were such as to exclude some of the inhabitants from certain political rights. They were excluded in accordance with the principles of the Constitution.

The respondent is clearly a citizen of the United States, and the judgment should be affirmed.

So ordered.

By RHODES, C. J.: I concur in the judgment.

SPRAGUE, J., expressed no opinion.

No. 2,597.

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. G. W. B. McDONALD, PETITIONER, v. THOMAS H. BUSH, (County Judge of San Diego County), et al., RESPONDENT.

CERTIORARI.— The writ of certiorari can only issue to an inferior officer or tribunal exercising judicial functions, and the proceedings or act to be reviewed must be judicial in its character.

JUDICIAL ACT.— The performance of a ministerial act by a judicial officer, does not constitute the act itself a judicial proceeding.

HELD.— MINISTERIAL ACT.— CERTIORARI.— The appointment of a member of the Board of Supervisors by a County Judge, is a ministerial and not a judicial act, and is not subject to review by certiorari.

THE facts are stated in the opinion.

Jo Hamilton, Attorney-General, *Chalmers Scott* and *Chase & Jones*, for Petitioner.

W. Jeff Gatewood, for Respondent.

RHODES, C. J., delivered the opinion of the Court, CROCKETT, J., and TEMPLE, J., concurring:

It appears that proceedings were instituted in the District Court for Los Angeles County, against three of the

Supervisors of San Diego County, for the purpose of removing them from office, under the provisions of the Act of March 14, 1853. (Stats. 1853, p. 40, and Hit. Dig., Section 4,778.) The second section of the Act is as follows: "If any person now holding, or who shall hereafter hold, any office in this State, who shall refuse or neglect to perform any official act, in manner and form as now prescribed, or as may hereafter be prescribed by law, shall in like manner be deprived of office." The District Court rendered judgment removing the Supervisors from office; and notice of the judgment having been served on the County Judge of San Diego County, he made an order appointing three persons to fill the vacancies in office occasioned by the judgment. He did not act by virtue of any authority conferred on him by the Act above mentioned, for that Act confers the power of appointment, in case of such removal from office, upon the Governor; but he claims to have acted under the provisions of Section 46 of the Revenue Act of 1857. The relator states the election and qualification of himself and the other Supervisors who were removed from office, and the order of the County Judge appointing the persons therein named, in the place of those who were removed from office; and alleges that those persons have respectively taken upon themselves the duties of the office of Supervisor, etc., and prays that "the interests of the people of California may be protected herein; that a writ of certiorari and mandamus may issue;" that the proceedings of the County Judge may be reviewed and declared void, and that the appointees may be ordered to desist from all further proceedings as Supervisors. A writ of certiorari was issued to the County Judge, and the County Clerk has returned the order appointing the persons therein named as Supervisors, in place of those who were removed by the District Court for Los Angeles County, but does not certify that the order is a full and complete transcript of the record in his office, in the matter of the appointment of such persons as Supervisors.

However desirable it may be that the action of the County Judge should be reviewed, and that the question of

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ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission. To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. But the way is still open to any carrier to apply to the Commission for modification of the order, if it is believed to operate unjustly in any respect.

Affirmed.

UNITED STATES v. BHAGAT SINGH THIND.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 202. Argued January 11, 12, 1923.—Decided February 19, 1923.

1. A high caste Hindu, of full Indian blood, born at Amrit Sar, Punjab, India, is not a "white person", within the meaning of Rev. Stats., § 2169, relating to the naturalization of aliens. P. 207.
2. "Free white persons," as used in that section, are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. P. 214. *Ozawa* v. *United States*, 260 U. S. 178.
3. The action of Congress in excluding from admission to this country all natives of Asia within designated limits including all of India, is evidence of a like attitude toward naturalization of Asians within those limits. P. 215.

QUESTIONS certified by the Circuit Court of Appeals, arising upon an appeal to that court from a decree of the District Court dismissing, on motion, a bill brought by the United States to cancel a certificate of naturalization.

Mr. Solicitor General Beck, with whom *Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Will R. King, with whom *Mr. Thomas Mannix* was on the brief, for Bhagat Singh Thind.

Section 2169, Rev. Stats., applies "to aliens being free white persons and to aliens of African nativity and to persons of African descent." It may be assumed that the terms "Caucasian" and "white persons" are synonymous.

In the latter part of the Eighteenth Century Blumenbach divided the human race into five groups, namely, the Caucasian, the Mongolian, the Ethiopian, the Malay and the American Indian; and, while this classification has been the subject of much criticism, it has stood the test of time and is practical. Blumenbach's Life and Works, p. 265; Enc. Brit., tit. "Anthropology;" Huxley, Man's Place in Nature, p. 372; *In re Saito*, 62 Fed. 126; Taylor, Origin of the Aryans, p. 2; Bopp's Comparative Grammar (1833–1835); Mueller, Survey of Languages, p. 29; Mueller, Home of Aryans, p. 48; 14 Enc. Brit., pp. 382, 487; Peschel, Races of Men (Leipsic, 1874), pp. 20, 270; Keane, Man: Past and Present, pp. 442, 443, 557; Keane, The World's Peoples, p. 404; Anderson, The Peoples of India (London, 1913), pp. 21, 27, 68; 2 Enc. Brit., pp. 712, 749.

The foregoing authorities show that the people residing in many of the states of India, particularly in the north and northwest, including the Punjab, belong to the Aryan race. The Aryan race is the race which speaks the Aryan language. It has been pointed out by many scholars that identity of language does not necessarily prove identity of blood, for ordinarily anyone can learn a foreign language. But this argument has no application to the Aryan of India; for, as far back as history

goes, the Aryans themselves have been the conquering race. No other race superimposed any foreign language upon them. The Aryan language is indigenous to the Aryan of India as well as to the Aryan of Europe.

The high-class Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the negro, speaking from a matrimonial standpoint. The caste system prevails in India to a degree unsurpassed elsewhere. "Roughly, a caste is a group of human beings who may not intermarry, or (usually) eat with members of any other caste." Anderson, Peoples of India, p. 35.

With this caste system prevailing, there was comparatively a small mixture of blood between the different castes. Besides ethnological and philological aspects, it is a historical fact that the Aryans came to India, probably about the year 2000 B. C., and conquered the aborigines. See 2 Historians' History of the World, p. 475.

Upon the interpretation of § 2169, Rev. Stats., by the different federal courts, see *In re Singh*, 257 Fed. 209; *In re Mozumdar*, 207 Fed. 115; *In re Halladjian*, 174 Fed. 834; *United States* v. *Balsara*, 180 Fed. 694; *Dow* v. *United States*, 226 Fed. 145; *In re Najour*, 174 Fed. 735; *In re Ellis*, 179 Fed. 1002.

The Naturalization Act and the Immigration Act of February 5, 1917, relate to two entirely different subjects, and for that reason alone there could be no amendment to the Naturalization Act by implication.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This cause is here upon a certificate from the Circuit Court of Appeals, requesting the instruction of this Court in respect of the following questions:

"1. Is a high caste Hindu of full Indian blood, born at Amrit Sar, Punjab, India, a white person within the meaning of section 2169, Revised Statutes?

"2. Does the act of February 5, 1917, (39 Stat. L. 875, section 3) disqualify from naturalization as citizens those Hindus, now barred by that act, who had lawfully entered the United States prior to the passage of said act?"

The appellee was granted a certificate of citizenship by the District Court of the United States for the District of Oregon, over the objection of the naturalization examiner for the United States. A bill in equity was then filed by the United States, seeking a cancellation of the certificate on the ground that the appellee was not a white person and therefore not lawfully entitled to naturalization. The District Court, on motion, dismissed the bill (268 Fed. 683) and an appeal was taken to the Circuit Court of Appeals. No question is made in respect of the individual qualifications of the appellee. The sole question is whether he falls within the class designated by Congress as eligible.

Section 2169, Revised Statutes, provides that the provisions of the Naturalization Act "shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

If the applicant is a white person within the meaning of this section he is entitled to naturalization; otherwise not. In *Ozawa* v. *United States*, 260 U. S. 178, we had occasion to consider the application of these words to the case of a cultivated Japanese and were constrained to hold that he was not within their meaning. As there pointed out, the provision is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. "The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular

ices been suggested the language of the act would have
en so varied as to include them within its privileges."
p. 195) citing *Dartmouth College* v. *Woodward*, 4 Wheat.
3, 644. | Following a long line of decisions of the lower
ederal courts, we held that the words imported a racial
nd not an individual test and were meant to indicate only
ersons of what is *popularly* known as the Caucasian race:
but, as there pointed out, the conclusion that the phrase
'white persons" and the word "Caucasian" are synony-
nous does not end the matter. It enabled us to dispose
f the problem as it was there presented, since the appli-
ant for citizenship clearly fell outside the zone of de-
atable ground on the negative side; but the decision still
left the question to be dealt with, in doubtful and differ-
ent cases, by the "process of judicial inclusion and exclu-
sion." Mere ability on the part of an applicant for
naturalization to establish a line of descent from a Cau-
casian ancestor will not *ipso facto* and necessarily conclude
the inquiry. "Caucasian" is a conventional word of
much flexibility, as a study of the literature dealing with
racial questions will disclose, and while it and the words
"white persons" are treated as synonymous for the pur-
poses of that case, they are not of identical meaning—
idem per idem.

In the endeavor to ascertain the meaning of the statute
we must not fail to keep in mind that it does not employ
the word "Caucasian" but the words "white persons,"
and these are words of common speech and not of scien-
tific origin. The word "Caucasian" not only was not
employed in the law but was probably wholly unfamiliar
to the original framers of the statute in 1790. When we
employ it we do so as an aid to the ascertainment of the
legislative intent and not as an invariable substitute for
the statutory words. Indeed, as used in the science of
ethnology, the connotation of the word is by no means

lent for the words of the statute, other considerations
aside, would simply mean the substitution of one per-
plexity for another. But in this country, during the last
half century especially, the word by common usage has
acquired a popular meaning, not clearly defined to be
sure, but sufficiently so to enable us to say that its popular
as distinguished from its scientific application is of ap-
preciably narrower scope. It is in the popular sense of
the word, therefore, that we employ it as an aid to the
construction of the statute, for it would be obviously
illogical to convert words of common speech used in a
statute into words of scientific terminology when neither
the latter nor the science for whose purposes they were
coined was within the contemplation of the framers of the
statute or of the people for whom it was framed. The
words of the statute are to be interpreted in accordance
with the understanding of the common man from whose
vocabulary they were taken. See *Maillard* v. *Lawrence*,
16 How. 251, 261.

They imply, as we have said, a racial test; but the
term "race" is one which, for the practical purposes of
the statute, must be applied to a group of living persons
now possessing in common the requisite characteristics,
not to groups of persons who are supposed to be or really
are descended from some remote, common ancestor, but
who, whether they both resemble him to a greater or less
extent, have, at any rate, ceased altogether to resemble
one another. It may be true that the blond Scandinavian
and the brown Hindu have a common ancestor in the
dim reaches of antiquity, but the average man knows per-
fectly well that there are unmistakable and profound dif-
ferences between them today; and it is not impossible, if
that common ancestor could be materialized in the flesh,
we should discover that he was himself sufficiently differ-
entiated from both of his descendants to preclude his
racial classification with either. The question for deter-

mination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons. In 1790 the Adamite theory of creation—which gave a common ancestor to all mankind—was generally accepted, and it is not at all probable that it was intended by the legislators of that day to submit the question of the application of the words "white persons" to the mere test of an indefinitely remote common ancestry, without regard to the extent of the subsequent divergence of the various branches from such common ancestry or from one another.

The eligibility of this applicant for citizenship is based on the sole fact that he is of high caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race. The Aryan theory as a racial basis seems to be discredited by most, if not all, modern writers on the subject of ethnology. A review of their contentions would serve no useful purpose. It is enough to refer to the works of Deniker (Races of Man, 317), Keane (Man: Past and Present, 415-6), Huxley (Man's Place in Nature, 278) and to the Dictionary of Races, Senate Document No. 662, 61st Cong., 3d sess., 1910-1911, p. 17.

The term "Aryan" has to do with linguistic and not at all with physical characteristics, and it would seem reasonably clear that mere resemblance in language, indicating a common linguistic root buried in remotely ancient soil, is altogether inadequate to prove common racial origin; there is, and can be, no assurance that the so-called

Aryan language was not spoken by a variety of races living in proximity to one another. Our own history has witnessed the adoption of the English tongue by millions of Negroes, whose descendants can never be classified racially with the descendants of white persons notwithstanding both may speak a common root language.

The word "Caucasian" is in scarcely better repute.[2] It is at best a conventional term, with an altogether fortuitous origin,[3] which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example, (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians,[4] (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.[5]

[1] Dictionary of Races, *supra*, p. 31.

[2] 2 Encyclopedia Britannica (11th ed.), p. 113: "The ill-chosen name of Caucasian, invented by Blumenbach in allusion to a South Caucasian skull of specially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races. Again, two of the best-marked varieties of mankind are the Australians and the Bushmen, neither of whom, however, seems to have a natural place in Blumenbach's series."

[3] The United States Bureau of Immigration classifies all Pacific Islanders as belonging to the "Mongolic grand division." Dictionary of Races, *supra*, p. 102.

[4] Keane himself says that the Caucasic division of the human family is "in point of fact the most debatable field in the whole range of anthropological studies." Man: Past and Present, p. 444.

And again: "Hence it seems to require a strong mental effort to sweep into a single category, however Gastle, so many different

The various authorities are in irreconcilable disagreement as to what constitutes a proper racial division. For instance, Blumenbach has five races; Keane following Linnaeus, four; Deniker, twenty-nine.[5] The explanation probably is that "the innumerable varieties of mankind run into one another by insensible degrees,"[6] and to arrange them in sharply bounded divisions is an undertaking of such uncertainty that common agreement is practically impossible.

It may be, therefore, that a given group cannot be properly assigned to any of the enumerated grand racial divisions. The type may have been so changed by intermixture of blood as to justify an intermediate classification. Something very like this has actually taken place in India. Thus, in Hindustan and Berar there was such an intermixture of the "Aryan" invader with the dark-skinned Dravidian.[7]

In the Punjab and Rajputana, while the invaders seem to have met with more success in the effort to preserve

peoples—Europeans, North Africans, West Asiatics, Iranians and others all the way to the Indo-Gangetic plains and uplands, whose complexion presents every shade of color, except yellow, from white to the deepest brown or even black.

"But they are grouped together in a single division, because their essential properties are one, . . . their substantial uniformity speaks to the eye that sees below the surface . . . we recognize a common racial stamp in the facial expression, the structure of the hair, partly also the bodily proportions, in all of which points they agree more with each other than with the other main divisions. Even in the case of certain black or very dark races, such as the Bejas, Somali, and a few other Eastern Hamites, we are reminded instinctively more of Europeans or Berbers than of negroes, thanks to their more regular features and brighter expression." *Id.* 448.

[5] Dictionary of Races, *supra*, p. 6. See, generally, 2 Encyclopædia Britannica, (11th ed.), p. 113.

[6] 2 Encyclopædia Britannica, 11th ed., p. 113.

[7] 13 Encyclopædia Britannica, (11th ed.), p. 502.

their racial purity,[8] intermarriages did occur producing an intermingling of the two and destroying to a greater or less degree the purity of the "Aryan" blood. The rules of caste, while calculated to prevent this intermixture, seem not to have been entirely successful.[9]

It does not seem necessary to pursue the matter of scientific classification further. We are unable to agree with the District Court, or with other lower federal courts, in the conclusion that a native Hindu is eligible for naturalization under § 2169. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. The immigration of that day was almost exclusively from the British Isles and Northwestern Europe, whence they and their forbears had come. When they extended the privilege of American citizenship to "any alien, being a free white person," it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind. The succeeding years brought immigrants from Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock, and these were received as unquestionably akin to those already here and readily amalgamated with them. It was the descendants of these, and

[8] *Id.*

[9] 13 Encyclopædia Britannica, p. 503: "In spite, however, of the artificial restrictions placed on the intermarrying of the castes, the mingling of the two races seems to have proceeded at a tolerably rapid rate. Indeed, the paucity of women of the Aryan stock would probably render these mixed unions almost a necessity from the very outset; and the vaunted purity of blood which the caste rules were calculated to perpetuate can scarcely have remained of more than a relative degree even in the case of the Brahman caste."

And see the observations of Keane (Man: Past and Present, p. 561) as to the doubtful origin and effect of caste.

her immigrants of like origin, who constituted the white
pulation of the country when § 2169, reënacting the
turalization test of 1790, was adopted; and there is no
ason to doubt, with like intent and meaning.
What, if any, people of primarily Asiatic stock come
ithin the words of the section we do not deem it neces-
ry now to decide. There is much in the origin and his-
ric development of the statute to suggest that no Asiatic
hatever was included. The debates in Congress, during
e consideration of the subject in 1870 and 1875, are
ersuasively of this character. In 1873, for example, the
ords "free white persons" were unintentionally omitted
om the compilation of the Revised Statutes. This omis-
on was supplied in 1875 by the act to correct errors and
pply omissions. C. 80, 18 Stat. 318. When this act
as under consideration by Congress efforts were made to
trike out the words quoted, and it was insisted upon the
ne hand and conceded upon the other, that the effect of
heir retention was to exclude Asiatics generally from citi-
enship. While what was said upon that occasion, to be
ure, furnishes no basis for judicial construction of the
tatute, it is, nevertheless, an important historic incident,
hich may not be altogether ignored in the search for the
ue meaning of words which are themselves historic.
hat question, however, may well be left for final deter-
nination until the details have been more completely dis-
losed by the consideration of particular cases, as they
rom time to time arise. The words of the statute, it
must be conceded, do not readily yield to exact interpre-
ation, and it is probably better to leave them as they are
han to risk undue extension or undue limitation of their
neaning by any general paraphrase at this time.

What we now hold is that the words "free white per-
ons" are words of common speech, to be interpreted in
ccordance with the understanding of the common man,
ynonymous with the word "Caucasian" only as that

word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

It is not without significance in this connection that Congress, by the Act of February 5, 1917, c. 20, § 3, 39 Stat. 874, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants.

It follows that a negative answer must be given to the first question, which disposes of the case and renders an answer to the second question unnecessary, and it will be so certified.

Answer to question No. 1, No.

WILLIAM B. GREENOUGH, ATTORNEY-GENERAL, EX REL., vs. BOARD OF POLICE COMMISSIONERS OF THE TOWN OF TIVERTON.

DECEMBER 31, 1909.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Domestic Corporations are Resident Citizens. Intoxicating Liquors.*

Corporations created by the General Assembly for the purpose of conducting the liquor business are "citizens resident within this state" for the purposes set forth in Gen. Laws, cap. 102, § 2, providing that licenses for the manufacture or sale of pure spirituous and intoxicating liquors "may be granted to citizens resident within this state."

(2) *Corporations. Judicial Notice. Construction of Statutes.*

The court will take notice of acts of incorporation for the purposes of construction.

(3) *Legislative Construction.*

If the General Assembly has created corporations for the express purpose of doing business that can only be done by resident citizens, such fact furnishes conclusive evidence of legislative construction, for it is not to be presumed that the legislature acted abortively.

(4) *Business Corporations. Intoxicating Liquors.*

A corporation organized to engage in the business of manufacturing, buying, selling, etc., intoxicating liquors, is a business corporation within the provisions of Gen. Laws, cap. 176.

(5) *Residence of Corporation.*

The residence of a corporation is created for it by law, and is the state which created it, and cannot be changed by act of the corporation.

CERTIORARI. Heard, and petition denied.

DUBOIS, C. J. This is a petition for a writ of *certiorari* brought by the attorney-general of the State, at the relation of certain citizens and taxpayers of the town of Tiverton, in said State, and for and on behalf of the inhabitants of said town, against Henry C. Wilcox, Richard Boardman, and Harry W. Grinnell, all of said town of Tiverton, and who are the board of police commissioners of said town of Tiverton, setting forth:

"1. That under the provisions of Section 2 of Chapter 102 of the General Laws of the State of Rhode Island and the amend-

ments thereof, it is provided that 'the town councils of the several towns and boards of commissioners as hereinafter provided may grant or refuse to grant licenses to such citizens resident within this state for the manufacture or sale of pure, spirituous and intoxicating liquors within the limits of said town and city as they may deem proper' and by Chapter 1034, Section 5, of the Public Laws it is provided that 'Said Board shall also have and exercise within and for said town all the power and authority vested in and conferred upon the town council of said town by the provisions of Chapter 102 of the General Laws and all acts in amendment thereof or in addition thereto,' whereby said Board of Police Commissioners of the Town of Tiverton were authorized to grant such licenses and from time to time exercise said power under the provisions aforesaid.

"2. That on, to wit, the 1st day of May, A. D. 1909, said Board of Police Commissioners transferred a certain retail license to sell pure, spirituous, malt and intoxicating liquors, which had been before that time issued and granted to John J. Keams, at 87 Main Street to Nos. 5 and 7 Bay Street in said Town of Tiverton, to the Union Wine Company, a corporation, and at the same time changed said license from a retail to a wholesale license, by a statement to that effect on the face thereof.

"3. That said Union Wine Company was at the time of the transfer of said license a corporation and was not a citizen of the State of Rhode Island at the time of the granting of said license and that under the provisions of law above cited a license to sell such liquors could not legally be granted to any corporation inasmuch as a corporation is not and cannot be a citizen of this State within the true intent and meaning of said provisions and others relating to the same subject matter.

"4. That from and after the transfer of said license to said corporation said corporation has sold malt and spirituous liquors at the place designated in said license and is now selling such liquors at said place.

"Wherefore, inasmuch as there is no other adequate remedy for correcting the said illegal action of said Board of Commissioners, your petitioner prays that a writ of *certiorari* may

issue out of this court to be directed to the said Henry C. Wilcox, Richard Boardman and Harry W. Grinnell, Police Commissioners of the Town of Tiverton, commanding them to certify their records as such commissioners relative to said proceedings to this court and that the action of said Board of Commissioners in the premises may be quashed.

"And your petitioner further prays that a citation may issue to Henry C. Wilcox, Richard Boardman and Harry W. Grinnell, all of said town of Tiverton, Police Commissioners as aforesaid, to appear and show cause, if any they have, why the prayer of this petitioner should not be granted.

"WM. H. GILLESPIE,

"*Attorney General.*

"Oct. 25, 1909."

to which the respondents have made answer, as follows:

"Henry C. Wilcox, Richard Boardman and Harry W. Grinnell, as the Board of Police Commissioners of the Town of Tiverton, answering the petition in the above entitled cause, say:

"*First:* The Board of Police Commissioners admit the allegation contained in paragraphs No. 1 and No. 2 of said petition.

"*Second:* For answer to paragraph No. 3 of said petition said Board of Police Commissioners aver that the said Union Wine Company was at the time of the transfer of said license, a corporation duly organized under the laws of the State of Rhode Island, and is by its charter authorized to engage in the business of manufacturing, distilling, buying, selling, importing, exporting, exchanging, and otherwise acquiring, holding, owning, dealing in or disposing of wines, spirits, liquors, ales, beers, at wholesale or retail or otherwise, . . . and as such corporation is a citizen resident of the State of Rhode Island; and, as said Board is informed and advised, is a proper party to be granted a license under and by virtue of the authority conferred by Section 2 of Chapter 102 of the General Laws of the State."

The legislative meaning of the word "citizens," in the clause "citizens resident within this state," contained in Gen. Laws

cap. 102, § 2, whereof the material portion is set forth in the foregoing petition, is what is particularly sought in this inquiry.

The respondents affirm, and the petitioner denies, that it includes domestic corporations.

The definition of the noun "citizen," according to Webster (Internat. Dict.), is; "1. One who enjoys the freedom and privileges of a city; a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises. 2. An inhabitant of a city, a townsman. 3. A person, native or naturalized, of either sex, who owes allegiance to a government and is entitled to reciprocal protection from it. 4. One who is domiciled in a country, and who is a citizen, though neither native nor naturalized, in such a sense that he takes his legal *status* from such country." According to Bouvier Law. Dict.: "Citizen. In English Law. An inhabitant of a city. * * The representative of a city, in parliament. * * In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in Congress, and other public officers, and who is qualified to fill offices in the gift of the people. * * One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. * * A member of the civil state entitled to all its privileges. * * A person may be a citizen for commercial purposes and not for political purposes: 7 Md. 209. * * * *"

Although the sale of intoxicating liquors has been subject to legislative control ever since the settlement of this colony and State, the word "citizen" in this connection was first introduced in Pub. Laws, cap. 508, passed June 25, 1875, wherein it was provided that the town councils and boards of aldermen might grant or refuse to grant licenses to sell liquors, within their respective town or city, "to such number, and so many citizens resident within their respective town or city, as they may think proper." By the provisions of the Gen. Stats. (1872), cap. 79, § 2, said councils and boards might grant or refuse to grant such licenses "to such number, and so many persons within their respective town or city, as they may think proper." It is perfectly apparent from this examination that the change was made by inserting the words "citizens resident" in place of the word "persons" in the statute. The reason

for making the change is not indicated in the act itself, nor is there any preamble thereto. Gen. Stats. cap. 22 "Of the Construction of Statutes," § 5, provided that "The word 'person' may be construed to extend to and include copartnerships and bodies corporate and politic." This provision has been continued in the various revisions of the statutes, and still remains in force. By the provisions of Gen. Stats. cap. 22, § 15, acts of incorporation were deemed to be public acts for certain purposes, and such has been the law from that time to the
(2) present. Therefore the court will take judicial notice of acts of incorporation for the purposes of construction. *Foley* v. *Ray*, 27 R. I. 127-129. The first paragraph of each chapter on the construction of statutes requires that its provisions shall be observed in construing statutes, unless the observance of them would lead to a construction inconsistent with the manifest intent of the General Assembly, or be repugnant to some other part of the same statute. It is therefore apparent that the legislative intent is to be ascertained with the aid of the rule thus furnished if possible; and if not, then in some other manner. The statute of constructions contains no definition of the word "citizens." It is not claimed, however, that it was or is beyond the power of the General Assembly to construe the word "citizen" so as to include corporations; the claim is merely that such power has not been exercised. Whether the word includes corporations or not, must be ascertained without the aid of the statute. One ground of argument for the petitioner was that the change from "persons" to "citizens resident" in Pub. Laws, cap. 508, may have been made to exclude corporations in order to confine the issuance of licenses to persons having the right to vote. If such had been the intention of the legislature they could have used words more apt for the purpose. The word "elector," or "voter," is a technical term descriptive of a citizen having constitutional and statutory qualifications that enable him to vote; and if the legislature had intended to restrict licenses to electors, or voters, it is to be presumed that such appropriate words would have been employed for that purpose, to avoid ambiguity. The legislature did employ the words "legal voter" in Gen. Laws, cap. 102, § 29, which authorizes such a person to make complaint for cer-

tain purposes. It is therefore manifest that the distinction between citizens and legal voters was apparent to the law-making body. Before 1875, the statutes permitted licenses to be granted to "persons" within towns and cities, irrespective of their citizenship or alienage, and without regard to their residence, and such permission was sufficient to include corporations both foreign and domestic. The language was also broad enough to include women, children, and persons under guardianship. But the other provisions, including that requiring a bond to be given by the person applying for the license, clearly indicated the intention of the legislature to exclude persons under disability. We think that the evident purpose of the legislature in making the change was to exclude *alien residents* from holding licenses under the provisions of the act. The argument that if the words "citizens resident" include all persons except *aliens resident* such construction would include women, children, and persons under disability, may be disposed of by the consideration that the statute in question is no more obnoxious to that objection than the prior one heretofore referred to, and that some of the same, together with additional, safeguards surround it. Whether the legislature intended that corporations should be included within the term "citizens resident," may be gathered from their acts. If the General Assembly
(3) has created corporations for the express purpose of doing business that can only be done by resident citizens, such fact furnishes conclusive evidence of legislative construction, for it is not to be presumed that the legislature acted abortively. Under Pub. Stats. 1882, cap. 87, § 1, no person shall manufacture or sell, or suffer to be manufactured or sold, etc., within this State, any ale, wine, rum, or other strong or malt liquors, etc., unless as thereinafter provided. Section 2 allowed town councils and boards of aldermen of cities to grant or refuse to grant licenses to such number and so many citizens resident within their respective town or city, for the sale of pure spirituous and intoxicating liquors, within the limits of such town or city, as they may think proper. Section 11 fixes the amount of fees, and also provides that a license to manufacture pure liquors shall carry with it the right of sale, at his manufactory, by the manufacturer, of

pure liquors manufactured by him. While this statute was in force, on May 31, 1883, the General Assembly passed "An Act to Incorporate the Rhode Island Brewing Company," whereby the persons therein named, and their associates, successors, and assigns, were constituted and created a body corporate and politic by the name of The Rhode Island Brewing Company, for the purpose of manufacturing and brewing lager beer, beer, and ales, and the transaction of any other business connected therewith or incident thereto, with the powers, privileges, and liabilities incident to corporations under the provisions of Pub. Stats. caps. 152 and 155. The capital stock was not to exceed one hundred thousand dollars. Under the provisions of Pub. Stats. cap. 27, § 14, it was necessary for the incorporators to pay into the general treasury the sum of one hundred dollars as a tax before organization of the corporation. On May 29th, 1895, the General Assembly passed an act changing the name of said corporation to James Hanley Brewing Company. May 29th, 1891, the General Assembly passed an act to incorporate the Mount Hope Brewing Company for the purpose of "manufacturing, brewing, and *selling* lager beer, beer, porter, and ales." July 23, 1891, the General Assembly amended an act to incorporate the Hathaway Steam Trap Company, constituted for the purpose of manufacturing and selling steam traps, passed at the May session, 1891, so as to create a body corporate and politic by the name of the American Brewing Company, for the purpose of manufacturing and brewing lager beer, ales and porters, etc., with a capital stock of two hundred thousand dollars. May 17, 1895, the original act was further amended so as to constitute the Providence Brewing Company for brewing beer, ale, and porter. These are not the only instances of legislative action in the premises, but they are sufficient for the purposes. It is claimed, however, that the Union Wine Company, described in the petition and in the answer of the respondents, is a corporation not specially chartered by the General Assembly, but organized under Gen. Laws, cap. 176, § 2. This statute was
(4) enacted by the General Assembly in accordance with the provisions of article IX of amendments to the constitution, adopted November 1892, whereof section 1 reads as follows:

"SECTION 1. Hereafter the general assembly may provide by general law for the creation and control of corporations: *Provided, however*, that no corporation shall be created with the power to exercise the right of eminent domain, or to acquire franchises in the streets and highways of towns and cities, except by special act of the general assembly upon a petition for the same, the pendency whereof shall be notified as may be required by law." Chapter 176, aforesaid, section 1, provides for the classification and formation of corporations, and it appears from an examination of the statute that there are three classes, viz., "Class I.—Business corporations; Class II.—Insurance and banking corporations; and class III.—Literary and scientific corporations and miscellaneous corporations." Section 2 aforesaid provides that any three or more persons of lawful age who shall associate by written articles which shall express, *inter alia*, their agreement to constitute an ordinary business corporation; the name by which it shall be known; the business for which it is constituted; the town or city in which it is to be located; the amount of the capital stock, etc., shall, upon complying with the requirements thereinafter provided, be and become a corporation for the transaction of the business named in said articles of agreement, with a proviso excluding the formation of certain kinds of corporations therein set forth. It was urged in argument that a corporation formed "to engage in the business of manufacturing, distilling, buying, selling, importing, exporting, exchanging, and otherwise acquiring, holding, owning, dealing in or disposing of wines, spirits, liquors, ales, beers at wholesale or retail or otherwise," is not an ordinary business corporation. It is true that by very many worthy people the liquor business is regarded as unusual and peculiar; but the question to be determined is not whether the liquor business is ordinary or extraordinary, in our opinion, but whether a corporation can be formed for the purpose of carrying on that business, under the provisions of said Gen. Laws, cap. 176. Is such a corporation included in any of the classes specified therein? It certainly does not belong in either class II or III. Is it embraced within the provisions of "Class I.—Business corporations?" The definition of the noun "business," according to Webster's

Internat. Dict. is: "3. Financial dealings; buying and selling; traffic in general; mercantile transactions." A corporation organized for such purposes is, therefore, a business corporation.

Corporations, constituted merely for the purpose of conducting business, which do not possess extraordinary corporate powers, especially the powers enumerated in the provisos contained in said article IX of the amendment to the constitution and in said Gen. Laws, cap. 176, § 2, are ordinary business corporations. The petitioner objects that a corporation can not be licensed as a resident, "for that word implies intent to remain, as well as actual location in a place, and a corporation can not strictly be said to be capable of an intent to remain."

5) The sufficient reply to the objection may be found in the opinion of Durfee, C. J., in *Stafford* v. *Am. Mills Co.*, 13 R. I., 310: "We do not think a foreign corporation can under any circumstances be regarded as a *resident* of the State, in the absence of any legislation recognizing it or giving it a *status* as such. The proper seat or "residence" of such a corporation is the State which created it and which continues it in existence, otherwise the corporation might have its residence in a multitude of jurisdictions." The residence of a corporation is created for it by act of law, and can not be changed by act of the corporation. A more permanent residence than that of a domestic corporation in the State which created it can hardly be conceived.

We are therefore of the opinion that the legislature by their acts have deemed corporations, created by them for the purpose of conducting the liquor business, to be "citizens resident," for the purposes set forth in Gen. Laws, cap. 102, § 2.

This conclusion in relation to a purely local matter renders unnecessary any consideration of the cases contained in the long list of Federal and State decisions, regarding citizenship of corporations for certain purposes, cited by counsel for the respective parties.

For these reasons the petition must be denied and dismissed.

Littlefield & Barrows and Samuel H. Davis, for petitioners.

Tillinghast & Murdock, for respondents.

Gorman, Egan & Gorman and Michael J. Lynch, of counsel for certain domestic corporations.

HENRIETTA H. VASSAR, *et al.*, vs. GEORGE A. LANCASTER.

DECEMBER 31, 1909.

PRESENT: Dubois, C. J., Blodgett, Johnson, Parkhurst, and Sweetland, JJ.

(1) *Exceptions.*

A notice of intention to prosecute a bill of exceptions can not take the place of an exception to the decision of a justice of the Superior Court denying a motion for a new trial.

(2) *Establishing Truth of Transcript.*

C. P. A., § 491, provides for establishing the truth of the exceptions, when they have been disallowed, "in such manner as the court shall by rule prescribe." Rule 13 of the Supreme Court provides the procedure upon "every petition for allowance of a bill of exceptions or for determining the correctness of a transcript of testimony":—

Held, that the truth of exceptions must be established by the ascertainment of the truth as to the testimony offered and the rulings of the court upon the offer of said testimony, and the truth or lack of truth of the exceptions will appear from the transcript if its correctness is established, but the provisions of C. P. A., § 491, and of rule 13, would not be necessary if the transcript was the only source of information as to its own correctness.

Held, further, that, where it appeared that the grounds of disallowance of a transcript were entirely untenable as to the transcript, considered by itself, the way was still open to establish the truth of the exceptions by establishing the truth as to the proceedings at the trial in the manner provided in section 491 and rule 13, and this right was not defeated by the disallowance of the transcript by the judge.

Held, further, that the defendant, not having proceeded by petition verified by affidavit to establish the correctness of the transcript, but having contented himself with an attempt to establish only the truth of the exceptions, left the truth as to the rest of the proceedings at the trial unestablished, and the exceptions, therefore, if established, could not be considered.

COVENANT. Heard on petition to establish truth of exceptions, and dismissed.

JOHNSON, J. Action for breach of covenant to pay rent, and for breach of other covenants under a lease.

A trial in the Superior Court resulted in a verdict for the plaintiff for $522. Within seven days after verdict the defendant filed a motion for a new trial, on the grounds:

"1. That the verdict was against the evidence;

"2. That the verdict was against the law;

(80 R. I. 220)

RONDEAU v. SAYLES et al.†

(Supreme Court of Rhode Island. Jan. 7, 1910.)

1. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—NOTICE TO MASTER—EVIDENCE.

While plaintiff, a servant in defendant's factory, was standing between two machines shifting a belt with his left hand, the electric lights suddenly went out, leaving the room in total darkness, and plaintiff's right arm was caught in a machine and injured. *Held*, that evidence that during a period of five years the lights had frequently, at times as often as twice a week, gone out suddenly, though this was unknown to plaintiff, was competent on the question of notice to defendant, and sufficient to require it to show the cause of the extinguishment at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1220; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

While plaintiff, a 14 year old servant in defendant's factory, was standing between two machines shifting a belt with his left hand, the electric lights suddenly went out, leaving the room in total darkness, and plaintiff's right arm was caught in an adjacent machine and injured, while he was disengaging his left hand. *Held*, that whether plaintiff conducted himself with ordinary prudence for one of his years was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1095, 1103; Dec. Dig. § 286.*]

Exception from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Charles V. Rondeau against Albert A. Sayles and others. There was a nonsuit, and plaintiff excepts. Exception sustained, and case remitted for a new trial.

John W. Hogan (Philip S. Knauer, of counsel), for plaintiff. Gardner, Pirce & Thornley (William H. Caufield, of counsel), for defendants.

BLODGETT, J. It appears by the plaintiff's testimony that at 10 minutes before 6 o'clock on the evening of December 11, 1908, the plaintiff, an employé of the defendants and then of the age of 14 years, was engaged in shifting with his left hand a belt from a fixed to a loose pulley, in accordance with instructions theretofore given him by the defendants' overseer, preparatory to the closing down of the mill for the night, and that while so standing between the third and fourth machines in a certain row, in a passageway 21½ inches in width, all the light in the room, which was furnished by an electrical plant owned and operated by the defendants, was instantly extinguished without warning of any kind, and before the usual hour, and contrary to the long-established custom of a premonitory signal given five minutes in advance. It was so dark on that day in that room that it had been found necessary to turn on the electric light an hour and a half before the time of the accident, and the sudden extinguishment of the light caused total darkness. It was as "dark as pitch," as one witness expresses it. Though the plaintiff was using his left hand on his work in this narrow space between moving belts and machines in operation, in withdrawing his hand therefrom as the light was extinguished, his right arm was, in this sudden darkness, caught in the gearing of the fourth machine—a machine adjoining the one on which he was employed—and his right arm was crushed and mangled and torn from his body, and the plaintiff rendered unconscious. At the trial the plaintiff was nonsuited, and the case is here on exception thereto.

We are of the opinion that the motion for a nonsuit was improperly granted, since the case presented is not a case resting upon the happening of the accident alone. There was affirmative testimony offered to show that the electric arc lighting system in this building, which had been unchanged in equipment for more than five years, had frequently gone out suddenly and without warning, at times as often as once or twice a week, for a long period of time, apparently covering more than five years, and resulting in complete cessation of work, and necessitating employés leaving the mill for the rest of the day, although this was unknown to the plaintiff, who had been employed in the mill about two weeks. The frequency of these occurrences and the nature of them were certainly competent evidence to be submitted to the jury upon the question of notice to the defendants of the conditions which produced them, and were sufficient to require them to show the cause of the sudden extinguishment of the light on the evening in question. Apparently it was held in the court below that it must be presumed that the lights were extinguished by the act or neglect of some one who stood in the legal relation of fellow servant with the plaintiff. It is equally possible on this evidence that they were so extinguished because of defective operation or improper construction of the lighting system. The plaintiff was not dismembered by the machine on which he was working, but by being caught in an adjacent machine while disengaging his left hand from the former machine in the darkness, and surely it is a fair question for the jury whether a boy of his years conducted himself with ordinary prudence in this emergency.

Exception sustained, and case remitted to the superior court for a new trial.

(30 R. I. 222)

GREENOUGH, Atty. Gen., v. BOARD OF POLICE COM'RS OF TOWN OF TIVERTON.

(Supreme Court of Rhode Island. Nov. 19, 1909. Opinion, Dec. 31, 1909.)

1. CITIZENS (§ 2*)—DEFINITION.

The noun "citizen" has been defined to be one who enjoys the freedom and privileges of a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†For opinion on motion for reargument, see 74 Atl. 1073.

city; a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises; an inhabitant of a city; a townsman; a person, native, or naturalized, of either sex, who owes allegiance to a government and is entitled to reciprocal protection from it; one who is domiciled in a country, and who is a citizen, though neither native nor naturalized, in such a sense that he takes his legal status from such country. In English law, the term means an inhabitant of a city; the representative of a city, in Parliament. In American law, a citizen is one who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people; one of the sovereign people; a constituent member of the sovereignty, synonymous with the people; a member of the civil state, entitled to all its privileges. A person may be a citizen for commercial purposes, and not for political purposes.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 1; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, pp. 7602, 7603.]

2. Elections (§ 59*)—"Elector"—"Voter."

The word "elector," or "voter," is a technical term, descriptive of a citizen having constitutional and statutory qualifications to vote.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 3, pp. 2341, 2342; vol. 8, pp. 7850, 7860.]

3. Corporations (§ 3*)—"Business Corporation"—Definition.

The term "business corporation" means a corporation engaged in financial dealings, buying and selling, traffic, and mercantile transactions in general, and includes a corporation organized to manufacture, distill, buy, sell, import, export, exchange, and otherwise acquire, hold, own, deal in, or dispose of wines, spirits, liquors, ales, and beers at wholesale or retail or otherwise.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 1, p. 924.]

4. Intoxicating Liquors (§ 55*)—Licenses—Grant to Corporation—"Citizens Resident of the State."

A domestic corporation, organized to manufacture and deal in intoxicating liquors, spirits, etc., is a "citizen resident of the state," within Gen. Laws 1896, c. 102, § 2, providing that the town council of the several towns and boards of commissioners may grant liquor licenses to such citizens resident within the state, for the manufacture and sale of liquor, as they deem proper.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 55; Dec. Dig. § 55.*

For other definitions, see Words and Phrases, vol. 2, pp. 1164–1174; vol. 8, pp. 7602–7603; vol. 7, pp. 6161–6166; vol. 8, p. 7789.]

Petition for a writ of certiorari, on relation of William B. Greenough, Attorney General, against the Board of Police Commissioners of the Town of Tiverton. Petition denied and dismissed.

Littlefield & Barrows and Samuel H. Davis, for petitioners. Tillinghast & Murdock, for respondents. Gorman, Egan & Gorman (Michael J. Lynch, of counsel), for certain domestic corporations.

PER CURIAM. The court is of the opinion that the words "citizens resident" contained in Gen. Laws 1896, c. 102, § 2, are broad enough to include domestic corporations organized for the purpose of carrying on the business of manufacturing or selling pure, spirituous, and intoxicating liquors according to law.

The petition for a writ of certiorari must therefore be denied and dismissed. Opinion to be filed later.

Opinion.

DUBOIS, C. J. This is a petition for a writ of certiorari, brought by the Attorney General of the state, at the relation of certain citizens and taxpayers of the town of Tiverton, in said state, and for and on behalf of the inhabitants of said town, against Henry C. Wilcox, Richard Boardman, and Harry W. Grinnell, all of said town of Tiverton, and who are the board of police commissioners of said town of Tiverton, setting forth:

"(1) That under the provisions of section 2 of chapter 102 of the General Laws of the State of Rhode Island and the amendments thereof, it is provided that 'the town councils of the several towns and boards of commissioners as hereinafter provided may grant or refuse to grant licenses to such citizens resident within this state for the manufacture or sale of pure, spirituous and intoxicating liquors within the limits of said town and city as they may deem proper'; and by chapter 1034, section 5, of the Public Laws it is provided that 'said board shall also have and exercise within and for said town all the power and authority vested in and conferred upon the town council of said town by the provisions of chapter 102 of the General Laws and all acts in amendment thereof or in addition thereto,' whereby said board of police commissioners of the town of Tiverton were authorized to grant such licenses and from time to time exercise said power under the provisions aforesaid.

"(2) That on, to wit, the 1st day of May, A. D. 1899, said board of police commissioners transferred a certain retail license to sell pure, spirituous, malt, and intoxicating liquors, which had been before that time issued and granted to John J. Kearns at 87 Main street, to Nos. 5 and 7 Bay street in said town of Tiverton, to the Union Wine Company, a corporation, and at the same time changed said license from a retail to a wholesale license, by a statement to that effect on the face thereof.

"(3) That said Union Wine Company was at the time of the transfer of said license a corporation, and was not a citizen of the state of Rhode Island at the time of the granting of said license, and that under the provisions of law above cited a license to sell

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such liquors could not legally be granted to any corporation, inasmuch as a corporation is not and cannot be a citizen of this state within the true intent and meaning of said provisions and others relating to the same subject-matter.

"(4) That from and after the transfer of said license to said corporation, said corporation has sold malt and spirituous liquors at the place designated in said license, and is now selling such liquors at said place.

"Wherefore, inasmuch as there is no other adequate remedy for correcting the said illegal action of said board of commissioners, your petitioner prays that a writ of certiorari may issue out of this court, to be directed to the said Henry C. Wilcox, Richard Boardman, and Harry W. Grinnell, police commissioners of the town of Tiverton, commanding them to certify their records as such commissioners relative to said proceedings to this court, and that the action of said board of commissioners in the premises may be quashed. And your petitioner further prays that a citation may issue to Henry C. Wilcox, Richard Boardman, and Harry W. Grinnell, all of said town of Tiverton, police commissioners as aforesaid, to appear and show cause, if any they have, why the prayer of this petitioner should not be granted.

"Oct. 25, 1909.

"Wm. B. Greenough, Attorney General."

To which the respondents have made answer as follows:

"Henry C. Wilcox, Richard Boardman, and Harry W. Grinnell, as the board of police commissioners of the town of Tiverton, answering the petition in the above-entitled cause, say:

"First. The board of police commissioners admit the allegation contained in paragraphs No. 1 and No. 2 of said petition.

"Second. For answer to paragraph No. 3 of said petition, said board of police commissioners aver that the said Union Wine Company was, at the time of the transfer of said license, a corporation duly organized under the laws of the state of Rhode Island, and is by its charter authorized to engage in the business of manufacturing, distilling, buying, selling, importing, exporting, exchanging, and otherwise acquiring, holding, owning, dealing in, or disposing of wines, spirits, liquors, ales, beers, at wholesale or retail or otherwise. • • • and as such corporation is a citizen resident of the state of Rhode Island, and, as said board is informed and advised, is a proper party to be granted a license under and by virtue of the authority conferred by section 2 of chapter 102 of the General Laws of the state."

The legislative meaning of the word "citizens," in the clause "citizens resident within this state," contained in Gen. Laws 1896, c. 102, § 2, whereof the material portion is set forth in the foregoing petition, is what is particularly sought in this inquiry. The respondents affirm, and the petitioner denies, that it includes domestic corporations.

The definition of the noun "citizen," according to Webster (Internat. Dict.), is: "(1) One who enjoys the freedom and privileges of a city; a freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises. (2) An inhabitant of a city; a townsman. (3) A person, native or naturalized, of either sex, who owes allegiance to a government and is entitled to reciprocal protection from it. (4) One who is domiciled in a country, and who is a citizen, though neither native nor naturalized, in such a sense that he takes his legal status from such country." According to Bouvier, Law Dict.: "Citizen. In English Law. An inhabitant of a city. • • • The representative of a city, in Parliament. • • • In American Law. One who, under the constitution and laws of the United States, has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people. • • • One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. • • • A member of the civil state, entitled to all its privileges. • • • A person may be a citizen for commercial purposes and not for political purposes. 1 Mc. 249. • • ••"

Although the sale of intoxicating liquors has been subject to legislative control ever since the settlement of this colony and state, the word "citizen" in this connection was first introduced in Pub. Laws 1875, p. 15, c. 508, passed June 23, 1875, wherein it was provided that the town councils and boards of aldermen might grant or refuse to grant licenses to sell liquors within their respective town or city, "to such number, and so many citizens resident within their respective town or city, as they may think proper." By the provisions of Gen. St. 1872, c. 79, § 2, said councils and boards might grant or refuse to grant such licenses "to such number, and so many persons within their respective town or city, as they may think proper." It is perfectly apparent from this examination that the change was made by inserting the words "citizens resident" in place of the word "persons" in the statute. The reason for making the change is not indicated in the act itself, nor is there any preamble thereto. Gen. St. 1872, c. 22, "Of the Construction of Statutes," § 5, provided that "the word 'person' may be construed to extend to and include copartnerships and bodies corporate and politic." This provision has been continued in the various revisions of the statutes and still remains in force. By the provisions of Gen. St. 1872, c. 22, § 15, acts of incorporation were deemed to be public acts for certain purposes, and such has been the law from that time to the present. Therefore the court will take judicial notice of acts of incorporation for the purposes of construction. Foley v. Ray, 27

R. I. 127–129, 61 Atl. 50. The first paragraph of each chapter on the construction of statutes requires that its provisions shall be observed in construing statutes, unless the observance of them would lead to a construction inconsistent with the manifest intent of the General Assembly, or be repugnant to some other part of the same statute. It is therefore apparent that the legislative intent is to be ascertained with the aid of the rule thus furnished if possible, and if not then in some other manner. The statute of constructions contains no definition of the word "citizens." It is not claimed, however, that it was or is beyond the power of the General Assembly to construe the word "citizen" so as to include corporations. The claim is merely that such power has not been exercised. Whether the word includes corporations or not must be ascertained without the aid of the statute.

One ground of argument for the petitioner was that the change from "persons" to "citizens resident" in Pub. Laws 1875, p. 12, c. 508, may have been made to exclude corporations, in order to confine the issuance of licenses to persons having the right to vote. If such had been the intention of the Legislature, they could have used words more apt for the purpose. The word "elector" or "voter" is a technical term descriptive of a citizen having constitutional and statutory qualifications that enable him to vote; and, if the Legislature had intended to restrict licenses to electors or voters, it is to be presumed that such appropriate words would have been employed for that purpose to avoid ambiguity. The Legislature did employ the words "legal voter" in Gen. Laws 1896, c. 102, § 29, which authorizes such a person to make complaint for certain purposes. It is therefore manifest that the distinction between citizens and legal voters was apparent to the lawmaking body. Before 1875 the statutes permitted licenses to be granted to "persons" within towns and cities, irrespective of their citizenship or alienage, and without regard to their residence, and such permission was sufficient to include corporations, both foreign and domestic. The language was also broad enough to include women, children, and persons under guardianship. But the other provisions, including that requiring a bond to be given by the person applying for the license, clearly indicated the intention of the Legislature to exclude persons under disability. We think that the evident purpose of the Legislature in making the change was to exclude alien residents from holding licenses under the provisions of the act. The argument that, if the words "citizens resident" include all persons except aliens resident, such construction would include women, children, and persons under disability, may be disposed of by the consideration that the statute in question is no more obnoxious to that objection than the prior one heretofore referred to, and that some of the same, together with additional, safeguards surround it. Whether the Legislature intended that corporations should be included within the term "citizens resident" may be gathered from their acts. If the General Assembly has created corporations for the express purpose of doing business that can only be done by resident citizens, such fact furnishes conclusive evidence of legislative construction, for it is not to be presumed that the Legislature acted abortively.

Under Pub. St. 1882, c. 57, § 1, no person shall manufacture or sell, or suffer to be manufactured or sold, etc., within this state, any ale, wine, rum, or other strong or malt liquors, etc., unless as thereinafter provided. Section 2 allowed town councils and boards of aldermen of cities to grant or refuse to grant licenses to such number and so many citizens resident within their respective town or city for the sale of pure, spirituous and intoxicating liquors, within the limits of such town or city, as they may think proper. Section 11 fixes the amount of fees, and also provides that a license to manufacture pure liquors shall carry with it the right of sale at his manufactory by the manufacturer of pure liquors manufactured by him. While this statute was in force, on May 31, 1882, the General Assembly passed "An act to incorporate the Rhode Island Brewing Company," whereby the persons therein named and their associates, successors, and assigns were constituted and created a body corporate and politic by the name of the Rhode Island Brewing Company, for the purpose of manufacturing and brewing lager beer, beer, and ales, and the transaction of any other business connected therewith or incident thereto, with the powers, privileges, and liabilities incident to corporations under the provisions of Pub. St. 1882, cc. 152, 153. The capital stock was not to exceed $100,000. Under the provisions of Pub. St. 1882, c. 27, § 14, it was necessary for the incorporators to pay into the general treasury the sum of $100 as a tax before organization of the corporation. On May 20, 1885, the General Assembly passed an act changing the name of said corporation to James Hanley Brewing Company. May 20th, 1891, the General Assembly passed an act to incorporate the Mt. Hope Brewing Company for the purpose of "manufacturing, brewing and selling lager beer, beer, porter and ales." July 23, 1891, the General Assembly amended an act to incorporate the Hathaway Steam Trap Company, constituted for the purpose of manufacturing and selling steam traps, passed at the May session, 1891, so as to create a body corporate and politic by the name of the American Brewing Company, for the purpose of manufacturing and brewing lager beer, ales, and porters, etc., with a capital stock of $200,000. May 17, 1893, the original act was further amended so as to constitute the Providence

Brewing Company for brewing beer, ale, and porter. These are not the only instances of legislative action in the premises, but they are sufficient for the purpose.

It is claimed, however, that the Union Wine Company, described in the petition and in the answer of the respondents, is a corporation not specially chartered by the General Assembly, but organized under Gen. Laws 1896, c. 176, § 2. This statute was enacted by the General Assembly in accordance with the provisions of article 9, of amendments to the Constitution, adopted November, 1892, whereof section 1 reads as follows: "Section 1. Hereafter the General Assembly may provide by general law for the creation and control of corporations: Provided, however, that no corporation shall be created with the power to exercise the right of eminent domain, or to acquire franchises in the streets and highways of towns and cities, except by special act of the General Assembly upon a petition for the same, the pendency whereof shall be notified as may be required by law." Chapter 176 aforesaid (section 1) provides for the classification and formation of corporations, and it appears from an examination of the statute that there are three classes, viz.: "Class I.—Business Corporations: Class II.—Insurance and Banking Corporations; and Class III.—Literary and Scientific Corporations and Miscellaneous Corporations." Section 2 aforesaid provides that any three or more persons of lawful age, who shall associate by written articles which shall express, inter alia, their agreement to constitute an ordinary business corporation, the name by which it shall be known, the business for which it is constituted, the town or city in which it is to be located, the amount of the capital stock, etc., shall, upon complying with the requirements thereinafter provided, be and become a corporation for the transaction of the business named in said articles of agreement, with a proviso excluding the formation of certain kinds of corporations therein set forth.

It was urged in argument that a corporation formed "to engage in the business of manufacturing, distilling, buying, selling, importing, exporting, exchanging, and otherwise acquiring, holding, owning, dealing in, or disposing of wines, spirits, liquors, ales, beers at wholesale or retail or otherwise," is not an ordinary business corporation. It is true that by very many worthy people the liquor business is regarded as unusual and peculiar; but the question to be determined is, not whether the liquor business is ordinary or extraordinary in our opinion, but whether a corporation can be formed for the purpose of carrying on that business, under the provisions of said Gen. Laws 1896, c. 176. Is such a corporation included in any of the classes specified therein? It certainly does not belong in either class II or III. Is it embraced within the provisions of "Class I.—Business Corporations"? The definition of the noun "business," according to Webster's Internat. Dict. is: "(3) Financial dealings; buying and selling; traffic in general; mercantile transactions." A corporation organized for such purposes is therefore a business corporation. Corporations, constituted merely for the purpose of conducting business, which do not possess extraordinary corporate powers, especially the powers enumerated in the provisions contained in said article 9 of the amendments to the Constitution, and in said Gen. Laws 1896, c. 176, § 2, are ordinary business corporations.

The petitioner objects that a corporation cannot be licensed as a resident, "for that word implies intent to remain, as well as actual location in a place, and a corporation cannot strictly be said to be capable of an intent to remain." The sufficient reply to the objection may be found in the opinion of Durfee, C. J., in Stafford v. Am. Mills Co., 13 R. I. 310: "We do not think a foreign corporation can under any circumstances be regarded as a resident of the state, in the absence of any legislation recognizing it or giving it a status as such. The proper seat or 'residence' of such a corporation is the state which created it and which continues it in existence; otherwise, the corporation might have its residence in a multitude of jurisdictions." The residence of a corporation is created for it by act of law, and cannot be changed by act of the corporation. A more permanent residence than that of a domestic corporation in the state which created it can hardly be conceived.

We are therefore of the opinion that the Legislature by their acts have deemed corporations, created by them for the purpose of conducting the liquor business, to be "citizens resident," for the purposes set forth in Gen. Laws 1896, c. 102, § 2. This conclusion in relation to a purely local matter renders unnecessary any consideration of the cases contained in the long list of federal and state decisions, regarding citizenship of corporations for certain purposes, cited by counsel for the respective parties.

For these reasons, the petition must be denied and dismissed.

(218 Pa. 89)

KELLERT et ux. v. ROCHESTER & P. COAL & IRON CO.

(Supreme Court of Pennsylvania. Oct. 25, 1909.)

1. MINES AND MINERALS (§ 65*)—SURFACE SUPPORT—DEED OF MINING RIGHTS.

In a deed of mining rights in fee simple, the grantors released all claim for damages by operation of the mines. *Held* binding on subsequent grantees of the surface land, though the words "heirs and assigns" are not used after the name

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Sac. No. 661. In Bank.—December 1, 1899.]

LEWIS BERGEVIN, Respondent, v. H. W. CURTZ, Appellant.

ELECTION—ELIGIBILITY OF SUPERVISOR—"ELECTOR"—CHANGE OF RESIDENCE—REGISTRATION.—A person elected supervisor in a district to which he had changed his residence from another district more than one year prior to the election, and who, during that period and at the time of the election, was an "elector" of that district, as defined in section 1 of article II of the constitution, was eligible for the office in that district, under section 15 of the County Government Act of April 1, 1897, notwithstanding he did not change his registration from the precinct of his former residence until a little more than thirty days prior to the election.

Id.—REGISTRATION NOT A QUALIFICATION OF AN ELECTOR.—Registration is not a "qualification" of an elector, and cannot add to the qualifications fixed by the constitution; but it is to be regarded as a reasonable regulation by the legislature for the purpose of ascertaining who are qualified electors, and of having their names enrolled upon an authentic list, in order to prevent illegal voting.

Id.—ELIGIBILITY NOT EXCLUSIVE OF REGISTRATION.—An elector may be eligible to the office for which he was elected, though his name may not be upon the great register, and though for that reason he could not have voted at the election.

Id.—"ELECTOR" AND "VOTER"—DISTINCTION AS TO QUALIFICATIONS.—The constitutional qualifications of an elector are not the same things as the legal qualifications of a voter. The voter is the elector who votes; and an elector may not be legally qualified to vote.

Id.—CONSTRUCTION OF CODE—"QUALIFIED ELECTOR"—"REGISTRATION."—Section 1083 of the Political Code, assuming to define who "shall be a qualified elector," which adds to the constitutional qualifications that of enrollment upon the great register of the county fifteen days prior to the election, must be construed to use the words "qualified elector" in the sense of an elector who has the right to vote.

APPEAL from a judgment of the Superior Court of Alpine County. N. D. Arnot, Judge.

The facts are stated in the opinion.

Woods & Lovinsky, and P. N. Packard, for Appellant.

W. M. Thornburg, and Bruner & Brothers, for Respondent.

COOPER, C.—Appellant was duly elected to the office of supervisor of supervisor district No. 1 of Alpine county at the November election, 1898. This is a proceeding by respondent, as an elector, contesting the right of appellant to hold said office solely on the ground that at the time of the election he was not eligible thereto. The court below rendered judgment against appellant, declaring that at the time of said election he was ineligible to said office, and by its decree annulled and set aside the election. The defendant has appealed from the judgment, and the case is brought here on the judgment-roll. It appears from the findings that appellant is a natural born citizen of the United States, twenty-seven years of age, that he has resided in the state of California all his life, in the county of Alpine ever since June, 1891, and in precinct No. 1 in supervisor district No. 1 since the first day of July, 1897. That appellant's name appears upon the great register of said county June 21, 1894, in precinct No. 2 in supervisor district No. 2, but that he removed from said last-named precinct and district into precinct and district No. 1 about July 1, 1897. That appellant's name remained upon said great register in precinct 2 and supervisor district 2 of said county until the third day of October, 1898, when at his request it was canceled upon the said precinct register No. 2, and placed upon the precinct register of precinct No. 1 in said supervisor district No. 1. That on the eighth day of November, 1898, the appellant was a duly registered voter in said precinct No. 1 in supervisor district No. 1, but had only been such since the third day of October, 1898, and was not a registered voter in said supervisor district No. 1 for one year next preceding the day of election. The court below, as a conclusion of law from the said findings, adjudged that appellant had not been an elector of district No. 1 for one year immediately preceding his election, and was therefore not eligible to the office at the time he was elected. This is the sole question to be determined in the case. It is provided in section 15 of the County Government Act of April 1, 1897 (Stats. 1897, p. 455), that: "Each member of the board of supervisors must be an elector of the district which he represents, must reside therein during his incumbency, and must have been such elector for at least one year immediately preceding his

In order to find the meaning and definition of elector we must look to the constitution of the state. An elector is a person possessing the qualifications fixed by the constitution. (*O'Flaherty v. Bridgeport*, 61 Conn. 181.)

It is provided in the constitution, article II, section 1, that every male citizen of the United States "who shall have been resident of the state one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." The findings of the court show that appellant was an elector of the district for which he was elected for more than one year immediately preceding the November election. He had been a resident of the state, county, and precinct for more than one year immediately preceding the election. He possessed all the qualifications of an elector as prescribed by the constitution, and, unless we should hold that he must have possessed some qualification other than that laid down by said instrument, he was at the time of his election eligible to the office. We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors and who desire to vote to show that they have the necessary qualifications, as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable and must not conflict with the requirements of the constitution. The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. (Pol. Code, sec. 1094.) The section provides that in the register shall be entered the names of the qualified electors of the county, and "that any elector who has registered and thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application." The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list. It was said by the court in *Webster v. Byrnes*, 31 Cal. 276, in discussing the right of a party to vote in a case where his vote was challenged: "The question here is, Is he a qualified elector of the precinct at which he voted, and was his name at the time upon the great register and poll list?" In the case of *Welch v. Williams*, 93 Cal. 307, it was said by the chief justice, speaking for the court in Bank: "The object of the registration law is to prevent illegal voting by providing, in advance of election, an authentic list of the qualified electors."

In the case of *Sanford v. Prentice*, 28 Wis. 302, it is said: "There is a difference between an elector or person legally qualified to vote and a voter. In common parlance, they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote."

In this case the appellant would have been eligible to the office of supervisor of the district for which he was elected if his name had not been on the great register. He could not have voted at the election, and thus would have been deprived of voting for himself if he so desired, but having the constitutional qualifications he was eligible to the office. The court below evidently was of the opinion that one must have his name enrolled upon the great register before he could be an elector, and this because of the reading of section 1083 of the Political Code. That section, after enumerating the constitutional qualifications of a voter, adds, "and whose name shall be enrolled on the great register of such county fifteen days prior to an election shall be a qualified elector," etc. The words "qualified elector" are used in the sense of elector who has the right to vote. It appears plain that the legislature recognized the fact that there might be electors who were not so qualified. The County Government Act does not provide

as a condition of eligibility to the office of supervisor, that the candidate must have been a qualified elector of the district which he represents for at least one year.

We advise that the judgment be reversed and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

Beatty, C. J., Van Dyke, J., McFarland, J., Henshaw, J.

[Sac. No. 650. Department Two.—December 4, 1899.]

In the Matter of the Estate of E. I. UPHAM, Deceased.

WILLS—DATE OF DEVISES AND BEQUESTS—ALTERATION OF COMMON LAW BY CODE.—Section 1332 and 1333 of the Civil Code have the effect to abrogate the old common-law distinction by which devises spoke as of the date of the will, and bequests as of the date of the testator's death; and both devises and legacies in this state speak of the latter date.

Id.—RESIDUARY DEVISE—DISPOSITION OF LAPSED DEVISE.—Where there is a valid residuary devise, the property mentioned in a lapsed devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed in the will.

Id.—RESIDUARY DEVISE TO CHARITABLE USE.—A residuary devise to the legally constituted and qualified trustees or managers of a Good Templars' Orphans' Home, in a specified locality, "in trust for the use and benefit of the orphan children of said institution," is a valid devise of the residue of the estate to a charitable use.

Id.—LIBERAL CONSTRUCTION OF CHARITIES.—Charities, both as to the trusts and the beneficiaries, are more liberally construed than are gifts to individuals.

Id.—DEVISE OF CHARITY TO UNINCORPORATED BODY—SUPERINTENDENCE OF COURT OF EQUITY—EFFECTUATION OF TRUST.—The fact that the trustees of the designated orphans' home to whom the devise was made, were not, themselves an incorporated body, though selected biennially under the auspices of an incorporated grand lodge of Good Templars, to manage and control the orphans' home, cannot affect the validity of the charity. A court of equity will not allow a charitable use to fail for want of a legal trustee; and, if the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of equity, and the court will appoint trustees, if necessary to effectuate the trust.

Id.—PROVISION FOR RATABLE APPORTIONMENT OF DEVISES—RESIDUARY DEVISE NOT REVOKED.—A residuary devise, following special devises and bequests, is not revoked by a subsequent paragraph providing that the foregoing devises are to be increased or diminished ratably, with the exception of two devises specified, if the estate is more or less than sufficient to pay the devises and bequests; and such provision does not prevent the falling into the residuary devise of lapsed devises or legacies, or invalid and void devises or legacies.

Id.—RESIDUARY DEVISE, HOW CONSTITUTED.—No particular mode of expression is necessary to constitute a residuary devise. It is sufficient if the intention of the testator be plainly expressed in the will that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated.

APPEAL from an order of the Superior Court of Solano County denying a petition for partial distribution of the estate of a deceased person. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Freeman & Bates, for Appellants.

J. M. Walling and Robert Thompson, for Trustees of Good Templars' Home for Orphans, Respondents.

John M. Gregory, for Minor and Unrepresented Heirs.

McFARLAND, J.—E. I. Upham died leaving a will which, on its face, purports to dispose of all his property. His brothers, Joseph M. and Lorenzo Upham, who are his next of kin and only heirs at law, filed a petition in the probate court for a partial distribution to them of certain parts of the estate which they claim had not been disposed of by the will, and therefore went to them as heirs. The court held that the whole estate had been disposed of by the will, and that as petitioners were not devisees or legatees they were not entitled to partial distribution. The petition was denied, and from the order denying it the said brothers Joseph M. and Lorenzo

tainly not until the highest court of the State confirms such action and thereby makes it the law of the State. I agree, in a word, with the court below that Barney v. New York, 193 US 430, 48 L ed 737, 24 S Ct 502, is controlling. See Isaeks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv L Rev 969. Neither the wisdom of its reasoning nor its holding has been impaired by subsequent decisions. A different problem is presented when a case comes here on review from a decision of a state court as the ultimate voice of state law. See for instance Iowa-Des Moines Nat. Bank v. Bennett, 284 US 239, 76 L ed 265, 52 S Ct 133. And the case is wholly unlike Lane v. Wilson, 307 US 268, 83 L ed 1281, 59 S Ct 872, in which the election officials acted not in defiance of a statute of a state but under its authority.

Mr. Justice Douglas, with whom Mr. Justice Murphy concurs, dissenting:

My disagreement with the majority of the Court is on a narrow ground. I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the

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state elections. *That would place the federal judiciary in a position "to supervise and review the political administration of a state government by its own officials and through its own courts" (Wilson v. North Carolina, 169 US 586, 596, 42 L ed 865, 871, 18 S Ct 435)— matters on which each State has the final say. I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination. But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He charges a conspiracy to wilfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an "unequal" administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose. While the complaint could have drawn the issue more sharply, I think it defines it sufficiently to survive the motion to dismiss.

No doubt unconstitutional discriminations against a class, such as those which we have recently condemned in Lane v. Wilson, 307 US 268, 83 L ed 1281, 59 S Ct 872, and Skinner v. Oklahoma, 316 US 535, 86 L ed 1655, 62 S Ct 1110, may be more readily established than a discrimination against an individual per se. But though the proof is exacting, the latter may be shown as in Cochran v. Kansas, 316 US 255, 86 L ed 1453, 62 S Ct 1068, where a prisoner was prevented from perfecting an appeal. The criteria are the same whether one has been denied the opportunity to be a candidate for public office, to enter private business, or to have the protection of the courts. If the law is "applied and administered by public authority with an evil eye and an unequal

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*hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" (Yick Wo v. Hopkins, 118 US 356, 373, 374, 30 L ed 220, 227, 228, 6 S Ct 1064), it is the same as if the invidious discrimination were incorporated in the law itself. If the action of the Illinois Board in effect were the same as an Illinois law that Snowden could not run for office, it would run afoul of the equal protection clause whether that discrimination were based on the fact that Snowden was a Negro, Catholic, Presbyterian, Free Mason, or had some other characteristic or belief which the authorities did not

ELECTOR

The judgment and order denying a new trial are reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

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127 Cal. 86

BERGEVIN v. CURTZ. (Sac. 661.)

(Supreme Court of California. Dec. 1, 1899.)

COUNTIES—SUPERVISORS — QUALIFICATION — ELECTION.

Const. art. 2, § 1, provides that every male citizen of the United States who shall have been resident of the state for one year next preceding an election, of the county ninety days, and of the election precinct thirty days, shall be entitled to vote. Act April 1, 1897, § 15 (St. 1897, p. 455), declares that each member of the board of supervisors must be an elector of the district which he represents, and must have been such elector for at least one year immediately preceding his election. *Held*, that an elector who has resided in the district he was elected to represent for one year immediately preceding his election as supervisor was eligible to the office, though he was not entitled to vote at such election for the reason that his name has not been entered on the great register of the county as directed by Pol. Code, § 1094.

In bank. Appeal from superior court, Alpine county.

Proceeding by Lewis Bergevin against H. W. Curtz contesting the latter's right to hold the office of supervisor. From a judgment for plaintiff, defendant appeals. Reversed.

P. M. Packard and Wood & Levinsky, for appellant. W. M. Thornburg, for respondent.

COOPER, C. Appellant was duly elected to the office of supervisor of supervisor district No. 1 of Alpine county at the November election, 1898. This is a proceeding by respondent, as an elector, contesting the right of appellant to hold said office solely on the ground that at the time of the election he was not eligible thereto. The court below rendered judgment against appellant, declaring that at the time of said election he was ineligible to said office, and by its decree annulled and set aside the election. The defendant has appealed from the judgment, and the case is brought here on the judgment roll.

It appears from the findings that appellant is a natural-born citizen of the United States, 27 years of age; that he has resided in the state of California all his life, in the county of Alpine ever since June, 1891, and in precinct No. 1 in superior district No. 1 since the 1st day of July, 1897; that appellant's name appears upon the great register of said county June 21, 1894, in precinct No. 2 in supervisor district No. 2, but that he removed from said last-named precinct and district into precinct and district No. 1 about July 1, 1897; that appellant's name remained upon said great register in precinct 2 and supervisor district 2 of said county until the 3d day of October, 1898, when, at his request, it was canceled upon the said precinct register No. 2, and placed upon the precinct register of precinct No. 1 in said supervisor district No. 1; that on the 8th day of November, 1898, the appellant was a duly-registered voter in said precinct No. 1, supervisor district No. 1, but had only been such since the 3d day of October, 1898, and was not a registered voter in said supervisor district No. 1 for one year next preceding the day of election. The court below, as a conclusion of law from the said findings, adjudged that appellant had not been an elector of district No. 1 for one year immediately preceding his election, and was, therefore, not eligible to the office at the time he was elected. This is the sole question to be determined in the case.

It is provided in section 15 of the county government act of April 1, 1897 (St. 1897, p. 455) that "each member of the board of supervisors must be an elector of the district which he represents, must reside therein during his incumbency, and must have been such elector for at least one year immediately preceding his election." In order to find the meaning and definition of "elector," we must look to the constitution of the state. An elector is a person possessing the qualifications fixed by the constitution. O'Flaherty v. City of Bridgeport, 61 Conn. 161, 23 Atl. 46[illegible]. It is provided in the constitution (article 2, § 1) that every male citizen of the United States "who shall have been resident of the state one year next preceding the election, and of the county in which he claims his vote ninety days, and in the election precinct thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." The findings of the court show that appellant was an elector of the district for which he was elected for more than one year immediately preceding the November election. He had been a resident of the state, county, and precinct for more than one year immediately preceding the election. He possessed all the qualifications of an elector as prescribed by the constitution, and, unless we should hold that he must have possessed some qualification other than that laid down by said instrument, he was, at the time of his election, eligible to the office. We do not think the legislature, even if it attempted to do so, could add any essential to the constitutional definition of an elector. It is settled by the great weight of authority that the legislature has the power to enact reasonable provisions for the purpose of requiring persons who are electors, and who desire to vote, to show that they have the necessary qualifications; as by requiring registration, or requiring an affidavit or oath as to qualifications, as a condition precedent to the right of such electors to exercise the privilege of voting. Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting. These regulations must be reasonable, and must not conflict with the requirements of the constitution.

The legislature has required that all electors, as a condition of the right to vote, shall have their names properly and in due season entered upon the great register of the county. Pol. Code, § 1094. The section provides that in the register shall be entered the names of the qualified electors of the county, and "that any elector who has registered and thereafter moved his residence to another precinct in the same county thirty days before an election may have his registration transferred to such other precinct upon his application." The legislature has made no attempt to change or add to the qualifications of an elector, but has simply provided a means whereby the elector who is entitled to vote may be known by having his name enrolled upon an authentic list. It was said by this court in Webster v. Byrnes, 34 Cal. 276, in discussing the right of a party to vote in a case where his vote was challenged: "The question here is: Is he a qualified elector of the precinct at which he voted, and was his name at the time upon the great register and poll list?" In the case of Welch v. Williams, 38 Cal. 307, 31 Pac. 222, it was said by the chief justice, speaking for the court in bank: "The object of the registration law is to prevent illegal voting by providing, in advance of election, an authentic list of the qualified electors." In the case of Sanford v. Prentice, 25 Wis. 362, it is said: "There is a difference between an elector or person legally qualified to vote and a voter. In common parlance they may be used indiscriminately, but, strictly speaking, they are not the same. The voter is the elector who votes,—the elector in the exercise of his franchise or privilege of voting,—and not he who does not vote." In this case the appellant would have been eligible to the office of supervisor of the district for which he was elected if his name had not been on the great register. He could not have voted at the election, and thus would have been deprived of voting for himself, if he so desired; but, having the constitutional qualifications, he was eligible to the office. The court below evidently was of the opinion that one must have his name enrolled upon the great register before he could be an elector, and this because of the reading of section 1083, Pol. Code. That section, after enumerating the constitutional qualifications of a voter, adds: "And whose name shall be enrolled on the great register of such county fifteen days prior to an election shall be a qualified elector," etc. The words "qualified elector" are used in the sense of elector who has the right to vote. It appears plain that the legislature recognized the fact that there might be electors who were not so qualified. The county government act does not provide, as a condition of eligibility to the office of supervisor, that the candidate must have been a qualified elector of the district which he represents for at least one year. We advise that the judgment be reversed, and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded to the lower court, with directions to render judgment on the findings in favor of appellant.

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137 Cal. 103

In re MEALY et al. (L. A. 857.)

(Supreme Court of California. Dec. 7, 1899.)

INVOLUNTARY INSOLVENCY — PETITION — APPEAL — OBJECTIONS WAIVED.

1. Under St. 1880, p. 121, § 9, providing that an adjudication of insolvency may be made, on petition of creditors, when a debtor, being insolvent, has made an assignment or transfer of his property with intent to delay, defraud, or hinder his creditors, a complaint failing to allege that a debtor was insolvent when doing said acts does not state a cause of action.

2. Under St. 1880, p. 121, § 9, providing that an adjudication of insolvency may be made, on petition of creditors, when a debtor, "in contemplation of insolvency, has made any payment, * * * or transfer of his property with intent to delay, defraud, or hinder his creditors," a complaint alleging that debtors, "in contemplation of insolvency, have made a payment, and transfer of their property," with such intent, but failing to state when and to whom such payment and transfer were made, does not state a cause of action.

3. Where a bond in involuntary insolvency proceedings is insufficient, because not signed by all of the petitioning creditors, objection to the trial court's jurisdiction to render judgment will not be entertained when made for the first time in the supreme court.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Petition for involuntary insolvency by creditors of A. M. Mealy and Florence Weeks Stetson, partners as A. M. Mealy & Co., debtors. From a judgment rendered for petitioners upon the overruling of a demurrer to the petition, said debtors appeal. Reversed and remanded.

Leonard & Morris and E. R. Annable, for appellants. Tillan & Dunning and Curtis & Curtis, for respondents.

CHIPMAN, C. Involuntary insolvency. The petitioning creditors had judgment by default, upon demurrer to their petition being overruled, adjudging appellants to be insolvent. The appeal is from this judgment. The points urged on the appeal are (1) that the demurrer should have been sustained; and (2) that no sufficient bond was filed.

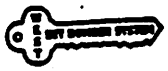
1. The demurrer was for insufficiency of facts, and on the further ground that the petition is uncertain and unintelligible, in that it does not state when the alleged assignment, sale, or transfer was made, and is ambiguous for like reason, and for the further reason that it does not state to

to the rear of a lighted disabled car standing within a few feet of the sidewalk on its right side of the street, and which car had been stopped there long enough to permit the driver of the car towing it to get out and fix a broken tow chain.

[7] The acts forbidden by law and committed by appellant while driving his automobile when intoxicated which support the conviction are driving upon a highway in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property (subd. (a), sec. 505, Vehicle Code), coupled with his failure to follow the disabled automobile and its tow car at a reasonable and prudent distance, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the roadway. (Subd. (a), sec. 531, Vehicle Code.) That the reckless, illegal and unlawful manner of defendant's driving proximately contributed to the injuries sustained by Theodore Gonzales admits of no doubt.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: YORK, P. J.; DORAN, J.



86 Cal.App.2d 721

McMILLAN v. SIEMON.

Civ. 2285.

District Court of Appeal, Fourth District, California.

Jan. 25, 1940.

1. Elections ⇐18

The proviso in constitutional amendment that elector moving from precinct in which registered to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election is controlling in determining whether elector may vote in precinct wherein registered at general city election within 40 days after his removal from such precinct to another precinct, if in conflict with statute prescribing voters' qualifications, though both such proviso and statute were adopted by people of state as initiative measures at same election. Pol.Code, § 1044; § 1120, as amended; St.1915, pp. 1503, 1572; Const. art. 2, § 1, as amended in 1930; art. 4, § 1.

2. Constitutional law ⇐38

A constitutional amendment contravened by statute prevails, whether statute was adopted by Legislature or by people as initiative measure. Const. art. 4, § 1.

3. Elections ⇐60

The term "qualified elector," in proviso of constitutional amendment that elector moving from precinct in which registered to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election, is used in same sense as in statute providing that person having qualifications outlined in such amendment and conforming to registration law shall be qualified elector at all elections and means an elector entitled to vote. Pol.Code, § 1083; Const. art. 2, § 1, as amended in 1930.

[Ed. Note.—For other definitions of "Qualified Elector," see Words & Phrases.]

4. Elections ⇐60

The proviso in constitutional amendment that person moving from precinct in which registered as elector to another precinct in same county within 40 days before election shall be deemed resident and qualified elector of precinct from which he moved for purpose of such election gives elector within its provisions privilege of voting at election in precinct from which moved. Const. art. 2, § 1, as amended in 1930.

5. Constitutional law ⇐14
Contracts ⇐175(1)
Statutes ⇐188

In construing Constitution, as well as statutes, contracts, and all written or spoken language, words are presumed to have been used in their natural and ordinary meaning, in absence of technical terms.

6. Constitutional law ⇐12

Constitutional provisions must receive a liberal, practical common-sense construction.

7. Constitutional law ⇐12

New constitutional provisions must be considered with reference to situations intended to be remedied or provided for.

8. Constitutional law ⇐13

The object in construing constitutional provisions is to give effect to intent of people, in whom sovereignty of state resides.

9. Elections ⇐10

An election law should not be so construed as to disfranchise any voter, if reasonably susceptible of any other meaning.

10. Elections ⇐73

The statute providing that person, who was qualified elector 40 days immediately before election and registered and qualified elector of any special election or consolidated election precinct, continues to reside within such precinct until holding of election, and voted at either primary or general election of even-numbered year next preceding, may vote at such election without additional registration, does not prohibit elector, moving from precinct in which registered within 40 days before election, from voting in such precinct, though not consolidated with precinct of his residence, as such construction of statute would render it unconstitutional. Pol.Code, § 1120, as amended; §§ 1094–1121; Const. art. 2, § 1, as amended in 1930.

11. Elections ⇐19

Laws requiring electors to register as condition precedent to voting and providing for reasonable methods of registration do not add to electors' qualifications or abridge right to vote, but are only reasonable regulations for purpose of ascertaining who are qualified electors and preventing others from voting, and hence do not contravene constitutional provisions as to electors' qualifications. Pol.Code, §§ 1094–1121; § 1120, as amended.

Appeal from Superior Court, Kern County; H. Gans, Judge.

Proceeding by J. J. McMillan to contest the election of Alfred Siemon as City Councilman in the City of Bakersfield. From a judgment declaring contestant elected to such office and directing issuance of a certificate of election to him, contestee appeals.

Affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

W. C. Dorris, of Bakersfield, for respondent.

THOMPSON, Justice pro tem.

This is an appeal from a judgment in an election contest in which the contestant and respondent was declared elected by a majority of one vote to the office of city councilman for the sixth ward of the city of Bakersfield, and the judgment directed the issuance of a certificate of election to contestant.

The election was the regular city general election held April 11, 1939, under the Bakersfield city charter (Stats.1915, p. 1568) which provides that such elections are subject to the general election laws of the state (id., p. 1572.)

The controversy arises over the rulings of the trial court on the issue of illegal votes. Five witnesses were called by contestee who proved that they were electors otherwise qualified to vote, but who had removed from the respective precincts from which they were registered within forty days next prior to the election; that, at the time of the election, they resided in different precincts from the ones in which they registered and that they voted in the respective precincts from which they registered and in which they no longer resided. It was stipulated that it was not a special election and that none of the precincts involved had been consolidated. Contestee offered to prove that these five witnesses voted for contestant. The court rejected the offer.

The appeal presents but one main issue, namely, does an elector otherwise qualified, who has removed from and no longer resides in the precinct from which he registered, have the right to vote in such precinct at an election held within forty days after his removal when it is not a special election or when the precinct to which he has removed has not been consolidated with the precinct from which he has removed, for the purposes of the election.

The answer necessitates a construction of article II, section 1 of the Constitution of California in connection with section 1120 of the Political Code, both of which provisions of law were presented to and adopted by the people as initiative measures at the election in November, 1930 (Stats.

1931, pp. lxxxix, xci[xcvii]; id. p. 812; id. p. vii).

Article II, section 1, of the Constitution, after specifying the qualifications of an elector, contains the following proviso: "Provided, any person duly registered as an elector in one precinct and removing therefrom to another precinct in the same county within forty days prior to an election, shall for the purpose of such election be deemed to be a resident and qualified elector of the precinct from which he so removed until after such election."

Section 1120 of the Political Code reads as follows:

"Qualifications of voters. All persons shall be entitled to vote at the elections mentioned in section 1044 of this code, who come within the terms or comply with the requirements of this section.

"1. Every person who was a qualified elector forty days immediately preceding the holding of any of the elections mentioned in section 1044 of this code, and who was registered as required by law as a qualified elector of any one of the precincts which together compose the special election or consolidated election precincts, and who continues to reside within the exterior boundaries of such special election or consolidated election precinct, until the time of the holding of the election provided for and held under said section 1044, and who voted at either one or both of the August primary or general election of the even-numbered year next preceding, shall be entitled to vote at said election, without other or additional registration, except as provided in the second paragraph of this section. All other persons, in order to be entitled to vote at any of the elections provided for in said section 1044, must be registered in the manner required by sections 1094, 1096 and 1097 of this code, as an elector of and within one of the precincts which composes the special election or consolidated election precinct wherein he claims to be entitled to vote. Such registration must be made and had in accordance with the provisions of sections 1094, 1096 and 1097 of the Political Code; provided, that such registration shall be in progress at all times except during the thirty-nine days immediately preceding any such election held under said section 1044 of this code.

"2. Elections on or after April 1, 1932. When any of the elections mentioned in section 1044 of this code is held on or after the first day of April of the year 1932, any person to be entitled to vote at such election must have been registered since the opening of registration for such even-numbered year on January 1, 1932, in the manner required by sections 1094, 1096 and 1097 of this code as an elector of and within one of the precincts which compose the special election or consolidated precinct wherein he claims to be entitled to vote. [Amendment approved May 12, 1931; Stats.1931, p. 812.]"

Section 1044 referred to in section 1120 includes the election in controversy.

[1, 2] If the constitutional provision is applicable to the facts of this case, and if there is a conflict between the constitutional provision and the statutory one, then the Constitution will prevail and be controlling, regardless of the fact that the statute was adopted as an initiative measure. We cannot subscribe to appellant's suggestion that, because the two measures were adopted as initiatives at the same election, they must be considered as parts of one act and that consequently the code provision is equal in force and not subject to the currently adopted constitutional proviso. Article IV, section 1, of the Constitution, which reserved to the people the power to propose laws and amendments, known as the initiative, itself distinguishes between a law or act and a constitutional amendment. When initiative measures are voted upon by the people they are apprised by the title and the contents, as well as by other available information, whether they are passing upon a statute or an amendment to the organic law of the state. There is no reason why a constitutional amendment should not prevail if contravened by a statute, by whatever means the statute was adopted. Wallace v. Zinman, 200 Cal. 585, 593, 254 P. 946, 62 A.L.R. 1341; Hammond Lbr. Co. v. Moore, 104 Cal.App. 528, 531, 286 P. 504.

[3, 4] Appellant urges, however, that there is no conflict because the Constitution deals with the qualifications of electors for general purposes such as holding public office, signing election petitions, initiatives, recalls, serving as jurors, and similar rights which are accorded to electors generally, while section 1120 of the Political Code deals with the right of qualified electors to vote. Appellant distinguishes between qualified electors and registered qualified electors, and argues that the constitutional proviso does not say that the person

shall be deemed a registered qualified elector, but only a residential qualified elector, and it does not say he shall have the right to go back and vote in the precinct from which he moved. The constitutional proviso itself is, perhaps, the best answer to this contention, for, in order to have the benefit of its provisions, the person is required to be duly registered as an elector in one precinct and, under the conditions outlined, he is deemed to be a resident and "qualified elector" of that precinct. The term "qualified elector" is defined in section 1083 of the Political Code, which provides that a person who has certain qualifications (being the ones outlined in article II, section 1, of the Constitution) and "who has conformed to the law governing the registration of voters, shall be a qualified elector at any and all elections * * *." The term "qualified elector", as used in article II, section 1, of the Constitution, we think, is used in the same sense and means an elector who is entitled to vote. Bergevin v. Curtz, 127 Cal. 86, 89, 90, 59 P. 312; Russell v. McDowell, 83 Cal. 70, 80, 23 P. 183. The draftsmen who prepared the proviso in article II, section 1, of the Constitution could scarcely have used language which would more clearly indicate a deliberate intention to give the elector who comes within its provisions the privilege of voting at the election in the precinct from which he moved.

[5-9] In construing the Constitution the same rule which applies in construing statutes, contracts, and all written or spoken language obtains. In the absence of technical terms the words are presumed to have been used in their natural and ordinary meaning. Oakland Pav. Co. v. Hilton, 69 Cal. 479, 491, 11 P. 3. The provisions of the Constitution must receive a liberal, practical common-sense construction and new provisions must be considered with reference to the situation intended to be remedied or provided for. People v. Stephens, 62 Cal. 209, 233. The object is to give effect to the intent of the people in whom the sovereignty of the state resides. The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

Let us glance back into the history of this constitutional provision to ascertain what condition or situation gave rise to the necessity or the desire for such an amendment. Even before the adoption of the Constitution in 1879 the legislature recognized the importance of extending the privilege of voting to electors situated like the five witnesses in the instant case, and adopted, as subdivision 3 of section 1239 of the Political Code, the following provision of law: "A person must not be held, by reason of having moved from one precinct to another, in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." It is interesting to note that our Supreme Court, in the case of Russell v. McDowell, supra, interpreted that provision to mean that such a person was entitled to vote at such election. But this interpretation was obiter dictum, as it was not essential to the determination of the case. Such legislation was valid under the old Constitution which did not require any length of residence in a voting precinct as a prerequisite of the right to vote. Russell v. McDowell, supra. However, by the Constitution of 1879 (art. II, sec. 1) residence in his election precinct for thirty (now forty) days preceding the election was made an essential qualification to the right to vote, and in the case of Garibaldi v. Zemansky, 171 Cal. 134, 135, 152 P. 296, it was held that a statute adopted May 26, 1915 (Stats.1915, p. 859) and similar in all material respects to section 1239, subdivision 3, above mentioned, was invalid as in violation of article II, section 1, of the Constitution. In 1926 the provision of the Constitution in controversy in this case was adopted as an amendment to the Constitution, and this provision was retained in a 1928 amendment and reenacted as a part of a constitutional amendment by an initiative measure in 1930, except that the thirty-day period was increased to forty days. Before this amendment was adopted a person situated as the five witnesses above mentioned were situated lacked only one essential requirement to give him the right to vote, namely, residence in his precinct for the required period of thirty (now forty) days, by reason of his removal therefrom within said period. But the amendment provides that, for the purpose of the election, he shall be deemed a resident and qualified elector of the precinct from which he so removed, and therefore he has such necessary residence for the required time and should be entitled to vote.

In further aid of its interpretation we may resort to the pamphlet distributed to the voters with the sample ballot just prior to the election at which the constitutional provision was reenacted as a part of said initiative measure. Pol.Code. §§ 1195, 1195a; Beneficial Loan Soc. Ltd. v. Haight, 215 Cal. 506, 515, 11 P.2d 857; Yosemite Lumber Co. v. Industrial Acc. Com., 187 Cal. 774, 781, 204 P. 226, 20 A.L.R. 994. The material portion of the official description of the measure to be voted upon, as it appeared in said pamphlet, is as follows: "Suffrage * * * amends section 1 of article II of Constitution * * * declares person removing within forty days of election from precinct wherein registered to another precinct in same county shall for that election be deemed elector of former precinct and may vote therein; * * *." From this it would appear that the voters were informed that they were voting upon the question of the right of such persons to vote, and not upon their residential qualifications to sign petitions, serve on juries, and enjoy like privileges, as urged by appellant.

From this history it is manifest, and we are of the opinion, that the constitutional proviso involved in this case was plainly intended to, and does, apply to situations like the one that arose with respect to the five witnesses above mentioned and that they were entitled to vote in said election in the respective precincts in which they did vote.

[10, 11] In determining that the constitutional proviso above mentioned applies to the situation involved in the instant case we do not conclude that it nullifies the provisions of section 1120 of the Political Code, but are of the opinion that the Constitution and the statute may be reconciled. We do not agree with appellant's contention that an elector cannot go back to the precinct in which he registered and vote, if he has moved within forty days, unless the precinct of his residence has been consolidated with the precinct of his registration. Such a construction of said section 1120 would place it in direct conflict with article II, section 1, of the Constitution, and it would then be unconstitutional and void. While it may be difficult in a cursory examination of the language of the statute to harmonize it with the constitutional provision, still, when it is considered with the other sections of the chapter of the Political Code in which it appears, its meaning is more apparent. Part 3, title 2, chapter III (secs. 1094 to 1121) relate to the subject of "Registration of Electors" and the chapter is so designated in the code. The Constitution does not prohibit the enactment of laws, either by the legislature or by the people by means of the initiative, which require electors to register as a condition precedent to their exercising the privilege of voting and to provide for reasonable methods of registration. "Such provisions do not add to the qualifications required of electors, nor abridge the right of voting, but are only reasonable regulations for the purpose of ascertaining who are qualified electors, and to prevent persons who are not such electors from voting." Bergevin v. Curtz, supra, 127 Cal. at page 88, 59 P. at page 312. Such laws, therefore, do not contravene the constitutional provisions relating to the qualifications of electors. People ex rel. Martin v. Worswick, 142 Cal. 71, 76, 75 P. 663. Said chapter III outlines in numerous sections the manner in which such registration of voters shall be accomplished. Chapter IV of the same title relates to election precincts and precinct officers and section 1133 thereof provides that the board or body charged with the duty of conducting elections may subdivide the municipality or territory in which the election is to be held into special election or consolidated election precincts for such elections, and requires such board or body to number such precincts for the purpose of such election. Said section 1133 and said section 1120 were both added by the legislature as new statutes in 1907 (Stats.1907, p. 662) and, with the exception of a few minor changes immaterial to this issue, remained the same at the time said Bakersfield election was held. Obviously, when special election precincts or consolidated precincts are created, and an elector within the forty-day period moved from his registration precinct to another precinct within the same special election or consolidated precinct, he is still in the same voting precinct for that election, and it would be placing an unnecessary burden on such an elector and on the registration officer to require the elector to register again when his voting place is the same as if he were still residing in his original precinct. It seems logical to conclude, and we are convinced, that said section 1120 means that, under such a situation, no "other or additional registration" is required of the elector in order to vote at such an election at the precinct polling place in the special

election or consolidated election precinct, except as provided in subdivision 2 of said section, which subdivision provides that, in order to vote after April 1, 1932, he must have been registered since the opening of registration in January, 1932, which was the time fixed for beginning permanent registration under the amendment of 1930. It is just as obvious that those voters who are listed in one of the special election or consolidated precincts for a particular election, and who have not changed their residence within the forty-day period, should not have to reregister merely because their registration precinct is temporarily suspended and they are, for the purposes of such election, in a precinct temporarily created for such election only.

We take the position that the proviso contained in article II, section 1, of the Constitution applies to the facts of this case and that the questioned rulings of the trial court were correct and must be sustained; and also that section 1120 of the Political Code does not apply to this case for the reasons above stated.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

37 Cal.App.2d 12

In re FERAUT'S ESTATE.

FERAUT v. SACKETT.

Civ. 6313.

District Court of Appeal, Third District, California.

Jan. 29, 1940.

1. Wills ⇐719

Where real property was devised by wife to her husband, but before distribution to him, husband conveyed a portion to his son and upon husband's death son stood by and permitted property that had been given to him to be distributed in the estate of the husband, the son could not upon final distribution have set aside to him out of cash on hand in the husband's estate the value of the real property given to him.

2. Courts ⇐200½

A dispute regarding conveyance of interest of heir in real property could not be determined in probate court.

3. Executors and administrators ⇐315(3)

The probate court was without jurisdiction to grant motion to amend decree of final distribution where motion was made more than six months after the entry of decree, notwithstanding notice of motion had been given within six months.

4. Executors and administrators ⇐315(3)

It is not sufficient that notice of motion to amend final decree of distribution be given within six months after entry of order of distribution but motion must be made and action requested prior to the expiration of six months.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings in the matter of the estate of Julien Feraut, deceased, wherein Joseph B. Feraut filed a petition for an order to amend a decree of final distribution, which petition was opposed by Tessie Feraut Sackett, as administratrix of the estate of Julien Feraut, deceased. From an order denying the petition, the petitioner appeals.

Affirmed.

Darold D. DeCoe, of Sacramento, and Charles Reagh, of San Francisco, for appellant.

Charles A. Bliss, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from an order refusing to modify a final decree of distribution in the estate of Julien Feraut, deceased. To properly understand the controversy it is necessary to recite in some detail the history of the entire proceeding.

In 1933 Ella Shaff Feraut, the wife of Julien Feraut, the father of the parties concerned in this appeal, died testate, making her husband the beneficiary of her estate, which included the property here involved. Julien Feraut qualified as executor, but died June 4, 1935, before the administration of her estate was completed.

41. The Case of Seizure of Papers, being an Action of Trespass by JOHN ENTICK, Clerk, against NATHAN CARRINGTON and three other Messengers in ordinary to the King, Court of Common-Pleas, Mich. Term: 6 GEORGE III. A. D. 1765.

his Case is given with the above-mentioned title; because the chief point adjudged was, That a warrant to search for and seize the papers of the accused, in the case of a seditious libel, is contrary to law. But this was not the only question in the Case. All the other interesting subjects, which were discussed in the immediately preceding Case, except the question of General Warrants, were also argued in the following one; and most of them seem to have received a judicial opinion from the Court.

The state of the case, with the arguments of the counsel, is taken from Mr. Serjeant Wilson's Reports, 2 Wils. 275. But instead of his short note of the Judgment of the Court, the Editor has the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes. It was not without some difficulty, that the copy of this Judgment was obtained by the Editor. He has reason to believe, that the original, most excellent and most valuable as its contents are, was not deemed worthy of preservation by its author, but was actually committed to the flames. Fortunately, the Editor remembered to have formerly seen a copy of the Judgment in the hands of a friend; and upon application to him, it was immediately obtained, with liberty to the Editor to make use of it at his discretion. Before, however, he presumed to consult his own wishes in the use, the Editor took care to convince himself, both that the copy was authentic, and that the introduction of it into this Collection would not give offence. Indeed, as to the authenticity of the Judgment, except in some trifling inaccuracies, the probable effect of careless transcribing, a first reading left the Editor's mind without a doubt on the subject. But it was a respectful delicacy due to the noble lord by whom the Judgment was delivered, not to publish it, without first endeavouring to know, whether such a step was likely to be displeasing to his lordship; and though from the want of any authority from him, the Editor exposes himself to some risk of disapprobation, yet his precautions to guard against it, with the disinterestedness of his motives, will, he is confident, if ever it should become necessary to explain the circumstances to his lordship, be received as a very adequate apology for the liberty thus hazarded. Hargrave.

IN trespass; the plaintiff declares that the defendants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan, Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pried into and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2,000*l*.

Trespass for breaking and entering plaintiff's house, &c.

The defendants plead 1st, not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed tres-

Special justification under a warrant of the secretary of state.

pass, on the 6th of November 1762, and before, until, and all the time of the supposed trespass, the earl of Halifax was, and yet is one of the lords of the king's privy council, and one of his principal secretaries of state, and that the earl before the trespass on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled, 'The Monitor or British Freeholder, N° 357, 358. 360. 373. 376. 378. and 380, London, printed for J. Wilson and J. Fell in Paternoster-row,' containing gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody before the earl of Halifax to be examined concerning the premisses, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion. And the defendants further say, that afterwards and before the trespass on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about eleven o'clock, being the said time when, &c. by virtue and for the execution of the said warrant entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the earl of Halifax, according to the warrant; and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope, esq. who then was and yet is an assistant to the earl in his office of secretary of state, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of November in the said year was discharged out of their custody; and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house; and because at the said time when &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff, &c. (and repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c. wherefore they pray judgment, &c.

The plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he by any thing alledged by the defendants therein ought not to be barred from having his action against them, because he says, that the defendants at the parish of Stepney, of their own wrong, and without the cause by them in the plea alledged, broke and entered the house of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country, and the defendants do so likewise.—There is another plea of justification like the first, with this difference only; that in the last plea it is alledged, the plaintiff and his papers, &c. were carried before lord Halifax, but in the first, it is before Lovel Stanhope, his assistant or his clerk; and the like replication of 'de injuria sua propria absq; tali causa,' whereupon the third issue is joined.

Replication de injuria propria.

This cause was tried at Westminster-hall before the lord chief justice, when the jury found a Special Verdict to the following purport.

Special Verdict.

"The jurors upon their oath say, as to the issue first joined (upon the plea not guilty to the whole trespass in the declaration) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing desk, and several drawers of the plaintiff in his house and reading over and examining several of the papers there, and seizing, taking and carrying away some of his books and papers the found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (also excepted) the jurors on their oath say, that the time of making the following informatio

and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the earl of Halifax was, and still is one of the lords of the king's privy council, and one of his principal secretaries of state, and that before the time in the declaration, viz. on the 11th of October 1762, at St. James's Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston, esq. an assistant to the said earl, and a justice of peace for the city and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, 'The voluntary information of J. Scott. In the year 1755, I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore an attorney at law sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he Beardmore and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore, and myself and Entick (the plaintiff) at the Horn tavern, and agreed upon the setting up the paper by the name of the Monitor, and that Dr. Shebbeare and Mr. Entick should have 200*l.* a-year each. Dr. Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Shebbeare insisted on having the proportion of his salary paid him; he had 50*l.* which I (Scott) fetched from Vere and Asgill's by their note, which Beardmore gave him; Dr. Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised I know not by whom: it has been continued in these hands ever since. Shebbeare, Beardmore and Entick all told me that the late alderman Beckford countenanced the paper: they agreed with me that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 23d May, called Sejanus, I apprehend the character of Sejanus meant lord Bute: the original manuscript was in the handwriting of David Meredith, Mr. Beardmore's clerk. I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it. Jona. Scott, St. James's 11th October 1762.'

Scott's information before a justice of peace.

'The above information was given voluntarily before me, and signed in my presence by Jona. Scott. J. Weston.'

"And the jurors further say, that on the 6th of November 1762, the said information was shewn to the earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the king's messengers, and duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: 'George Montagu Dunk, earl of Halifax, viscount Sunbury, and baron Halifax, one of the lords of his majesty's honourable privy council, lieutenant general of his majesty's forces, lord lieutenant general and general governor of the kingdom of Ireland, and principal secretary of state, &c. these are in his majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, intitled the Monitor, or British Freeholder, N° 357, 358, 360, 375, 376, 378, 379, and 380, London, printed for J. Wilson and J. Fell in Pater Noster Row, which contain gross and scandalous reflections and invectives upon his majesty's government, and upon both houses of parliament; and him, having found you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premisses, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and other his majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the 6th day of November 1762, in the third year of his majesty's reign, Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran and Robert Blackmore, four of his majesty's messengers in ordinary.' And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed. And that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day time, by virtue and for execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing desk, and several drawers of the plaintiff there in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read

The secretary of state's warrant to seize plaintiff and his books and papers.

Delivered to the defendants to be executed, who on 11th of Nov. 1762, did execute the same without a constable.

and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said secretary of state in Westminster unto Lovel Stanhope, esq. then before, and still being an assistant to the earl in the examinations of persons, books and papers seized by virtue of warrants issued by secretaries of state, and also then and still being a justice of peace for the city and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there at the instance of the said Lovel Stanhope delivered the said books and papers to him. And the jurors further say, that, on the 13th of April in the first year of the king, his majesty, by his letters patent under the great seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the secretaries of state. And the king did thereby ordain, constitute and appoint the law-clerk to attend the offices of his secretaries of state, in order to take the depositions of all such persons whom it may be necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in *hæc verba*) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c. on the 13th of April in the first year of the king was, and ever since hath been and still is law-clerk to the king's secretaries of state, and hath executed that office all the time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the secretaries of state, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the king, &c. in the place of a messenger in ordinary, &c. And the jurors further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the perusal and copy of the said warrant, so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass herein before particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them; the jurors are altogether ignorant, and pray the advice of the Court thereupon. And if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them, the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out to 300*l.* and for those costs and charges, to 40*s.* But if upon the whole matter by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass; or that the plaintiff ought not to maintain his action against them; then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them.

" And as to the last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass, as the plaintiff in his replication has alleged."

This Special Verdict was twice solemnly argued at the bar; in Easter Term last by serjeant Leigh for the plaintiff, and Burland, one of the king's serjeants, for the defendants; and in this present term by serjeant Glynn for the plaintiff, and Nares, one of the king's serjeants, for the defendants.

Easter Term, 5 Geo. 3.

Counsel for the Plaintiff. At the trial of this cause the defendants relied upon two defences; 1st, That a secretary of state as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things) that 'no action shall be 'brought against any constable or other officer, 'or any person acting by his order and in his 'aid, for any thing done in obedience to the warrant of a justice, until demand hath been made 'or left at the usual place of his abode by the 'party, or by his attorney in writing signed by 'the party, demanding the same, or the perusal 'and copy of such warrant, and the same hath 'been refused or neglected for six days after

such demand,' and that no demand was ever ade by the plaintiff of a perusal or copy of ie warrant in this case, according to that tatute, and therefore he shall not have this ction against the defendants, who are merely inisterial officers acting under the secretary f state, who is a justice and conservator of the eace. 2dly, That the warrant under which ie defendants acted, is a legal warrant, and iat they well can justify what they have done y virtue thereof, for that at many different mes from the time of the Revolution till this me, the like warrants with that issued gainst the plaintiff in this case have been anted by secretaries of state, and executed y the messengers in ordinary for the time eing.

As to the first. It is most clear and mani- st upon this verdict, that the earl of Halifax cted as secretary of state when he granted the arrant, and not merely as a justice of the eace, and therefore cannot be within the sta- ute 24 Geo. 2, c. 44, neither would he be ithin the statute if he was a conservator of ne peace, such person not being once named herein; and there is no book in the law what- ver, that ranks a secretary of state *quasi* ecretary, among the conservators of the peace. ambert, Coke, Hawkins, lord Hale, &c. &c. one of them take any notice of a secretary f state being a conservator of the peace, and ntil of late days he was no more indeed than . mere clerk. A conservator of the peace had o more power than a constable has now, who s a conservator of the peace at common law. t the time of making this statute, a justice of eace, constable, headborough and other officers f the peace, borsholders and tithingmen, as ell as secretary of state, conservator of the eace, and messenger in ordinary, were all ery well known; and if it had been the intent f the statute, that a secretary of state, conser- ator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them; and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance. This disobedience will not only take them out of the protection of the statute, (if they had been within it), but will also disable them to justify what they have done, by any plea whatever. The office of these defendants is a place of considerable profit, and as unlike that of a constable and tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to as- sist him. 1 Hale's P. C. 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to con- stables and other public officers which the law takes notice of. (4 Inst. 176.) 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance. The defendants have also disobeyed the warrant in another matter: being commanded to bring the plaintiff, and his books and papers before lord Halifax, they carried him and them before Lovel Stanhope, the law-clerk; and though he is a justice of the peace, that avails nothing; for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to lord Halifax.* The information was made before justice Weston. The secretary of state in this case never saw the accuser or accused. It seems to have been below his dignity. The names of the officers introduced here are not to be found in the law-books, from the first year- book to the present time.

As to the second. A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries of state ever since the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before lord Halifax. What? Has a secretary of state a right to see all a man's private letters of correspondence, family con- cerns, trade and business?* This would be monstrous indeed; and if it were lawful, no man could endure to live in this country. In

* Mr. Burke in his Short Account of a late short Administration, (this administration came into employment under the mediation of the duke of Cumberland, son to George the second, in July 1765, and was removed in July 1766: during its continuance in office the marquis of Rockingham was First Lord of the Treasury, and Mr. Dowdeswell Chancellor of the Exche- quer) says, 'The lawful secrets of business and friendship were rendered inviolable by the Resolution for condemning the seizure of papers.' See New Parl. Hist. vol. 16, p. 207.

the case of a search-warrant for stolen goods, it is never granted, but upon the strongest evidence that a felony has been committed, and that the goods are secreted in such a house; and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful; for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good. Even customs, which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the commonwealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than eighty years; and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's-bench since that time. But it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny.

Counsel for the Defendants. I am not at all alarmed, if this power is established to be in the secretaries of state. It has been used in the best of times, often since the Revolution. I shall argue, first, that the secretary of state has power to grant these warrants; and if I cannot maintain this, I must, secondly, shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A secretary of state has the same power to commit for treason as a justice of peace. Kendall and Roe,* Skin. 596. 1 Salk. 346, S. C. 1 Lord Raym. 65. 5 Mod. 78, S. C. Sir William Wyndham was committed by James Stanhope, secretary of state, to the Tower, for high treason the 7th of October, 1715. See the case 1 Stra. 2. And serjeant Hawkins says, it is certain, that the privy council, or any one or two of them, or a secretary of state, may lawfully commit† persons for treason, and for other offences against the state, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a secretary of state may commit for treason and other offences against the state, he certainly may commit for a seditious libel against the government; for there can hardly be a greater offence against the state, except actual treason. A secretary of state is within the Habeas Corpus Act. But a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constables and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the state to be admitted to be an evil in particular cases, yet to let such libellers escape, who endeavour to raise rebellion, is a greater evil, and may be compared to the reason of Mr. Justice Foster in the Case of Pressing, [Vol. 18, p. 1323,] where he says, 'That war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that a private mischief must be borne with patience for preventing a national calamity, &c.'

2. Supposing there is a defect of jurisdiction in the secretary of state, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it. That it is not unusual in acts of parliament to comprehend by construction and generality, where express mention is made only of a particular. The statute of *Circumspecte agatis* concerning the bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute, 25 Edw. 3, c. enables the incumbent to plead in *quare impedit*, to the king's suit. This also extends to the suits of all persons, 38 E. 3, 21. The act 1 Ric. 2, ordains that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this act extends to all gaolers. Plowd. Com. case of Platt, 35 b. The stat. *de donis, conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other

* See this Case, in vol. 12, p. 1299.

† With respect to the power of a secretary of state to commit, see the Cases of Wilkes, p. 982, of this volume, and of Leach against Money and others, p. 1002 of this volume.

"If we are to learn from the records in courts of justice, and from the received practice at all times what is the law of the land, I have no difficulty in saying that the secretaries of state have the right to commit. This right was not even doubted by lord Camden, who expressed as great anxiety for the liberty of the subject as any man; indeed it has been thought by some persons eminent in our profession, who have considered the point since, that he rather overstepped the line of the law in the Case of Leach v. Wilkes, and certainly if that judgment can be supported, many other cases that have been solemnly determined, cannot be reconciled with it." Per lord Kenyon, C. J. in the Case of the King against Despard, 7 T. Rep. 742.

statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word 'constable' therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the secretary of state, and a commitment may be to their custody, as in sir W. Wyndham's case. A justice of peace may make a constable *pro hac vice* to execute a warrant, who would be within the stat. 24 Geo. 2. So if these defendants are not constables, yet as officers they have power to execute a warrant of a justice of peace. A constable may, but cannot be compelled to execute a warrant out of his jurisdiction. Officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said, that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the Plaintiff, in reply. It is said, this has been done in the best of times ever since the Revolution. The conclusion from thence is, that it is the more inexcusable, because done in the best of times, in an era when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the secretary of state hath power to commit for treason and other offences against the state; but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs. But it is said, if the secretary of state has power to commit, he has power to search, &c. as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the state. But that is only the argument and opinion of a single judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful without an act of parliament since the time of the Revolution. The stat. 24 Geo. 2, has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the statute of 24 Geo. 2. But the law knows no such officers as messengers in ordinary to the king. It is said the Habeas Corpus Act extends to commitments by secretaries of state, though they are not mentioned therein. True, but that statute was made to protect the innocent against illegal and arbitrary power. It is said, the secretary of state is a justice of peace, and the messengers are his officers. Why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? It seems to admit they were not the proper officers. If a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him. But a constable or other known officer in the law need not shew his warrant.

Lord Chief Justice. I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again. I shall only just mention a matter which has slipt the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, is within the stat. 24 Geo. 2, c. 44. To put one case (among an hundred that might happen): suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owners of the house, whether in such a case would the justice of peace, his officers or servants, be within the stat. 24 Geo. 2? I desire that every point of this case may be argued to the bottom, for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Mich. 6 *Geo.* 3.

Counsel for the Plaintiff on the second argument. If the secretary of state, or a privy counsellor, justice of peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power, can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of the peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a secretary of state, or a privy counsellor, had ever existed, it would appear from our law-books. All the ancient books are silent on this head. Lambert never once mentions a secretary of state. Neither he nor a privy counsellor, were ever considered as magistrates. In all the arguments touching the Star-Chamber, and Petition of Right, nothing of this power was ever dreamt of. State-commitments anciently were either *per mandatum regis* in person, or by warrant of several of the privy counsellors in the plural number. The king has this

power in a particular mode, viz. by the advice of his privy council, who are to be answerable to the people if wrong is done. He has no other way but in council to signify his mandate. In the Case of the Seven Bishops, this matter was insisted upon at the bar, when the Court presumed the commitment of them was by the advice of the privy council; but that a single privy counsellor had this power, was not contended for by the crown-lawyers then. This Court will require it to be shewn that there have been ancient commitments of this sort. Neither the secretary of state, or a privy counsellor, ever claimed a right to administer an oath, but they employ a person as a law-clerk, who is a justice of peace, to administer oaths, and take recognizances. Sir Barth. Shower, in Kendall and Roe's case, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party. Therefore whoever has power to commit, has power to bail. It was a question formerly, whether a constable as an ancient conservator of the peace should take a recognizance or bond. In the time of queen Elizabeth there was a case wherein some of the judges were of one opinion and some of another. A secretary of state was so inconsiderable formerly, that he is not mentioned in the statute of *scandalum magnatum*. His office was thought of no great importance. He takes no oath of office as secretary of state, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power, it must have been annexed to his office anciently; it cannot be now given to him by the king. The king cannot make two chief justices of the Common-Pleas; nor could the king put the great seal in commission before an act of parliament was made for that purpose. There was only one secretary of state formerly: there are now two appointed by the king. If they have this power of magistracy, it should seem to require some law to be made to give that power to two secretaries of state which was formerly in one only. As to commitments *per mandatum regis*, see Staunf. Pl. Coron. 72. 4 Inst. c. 5, court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor. It is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham secretary of state, 1 Leon. 71, it was returned on the Habeas Corpus at last, that the party was committed 'ex sententia et 'mandato totius concilii privati domini reginæ.' Because he found he had not that power of himself, he had recourse to the whole privy council's power, so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by parliament illegal from the beginning; so in the Case of Ship-Money the parliament declared it illegal.

Counsel for the Defendants on the secon argument. The most able judges and advocates ever since the Revolution, seem to have agreed that the secretaries of state have this power t commit for a misdemeanor. Secretaries o state have been looked upon in a very high light for two hundred years past. 27 H. 8, c 11. Their rank and place is settled by 31 H 8, c. 10. 4 Inst. 362, c. 77, of Precedency. 4 Inst. 56. Selden's Titles of Honour, c. Officer of State. So that a secretary of state is some thing more than a mere clerk, as was said Minshew verb. Secretary. He is 'è secretoribus consiliis domini regis.' Serjeant Pengelly moved, that sir William Wyndham might be bailed. If he could not be committed b the secretary of state for something less tha treason, why did he move to have him bailed This seems a concession that he might be committed in that case for something less tha treason. Lord Holt seems to agree that commitment by a secretary of state is good Skin. 598. 1 lord Raym. 65. There is no case in the books that says in what cases a secretary of state can or cannot commit; b what power is it that he can commit in the cas of treason, and in no other case? The resolution of the House of Commons touching th Petition of Right, [Selden last volume, Parliamentary History, vol. 2, p. 374.] Secretar Coke told the Lords, it was his duty to commit by the king's command. Yorkey's case Carth. 291, he was committed by the secretar of state on the statute of Elizabeth for refusin to answer whether he was a Romish priest The Queen and Derby, Fortescue's Report 140, the commitment was by a secretary o state, Mich. 10 Anne, for a libel, and held good. (Note. Bathurst J. said he had see the Habeas Corpus and the Return, and tha this was a commitment by a secretary of state The King and Earbury, Mich. 7 Geo. 2, 2 Barnard 346, was a motion to discharge a recognizance entered into for writing a paper called The Royal Oak. Lord Hardwicke said it was settled in Kendall and Roe's case, that a secretary of state might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the Crown-office of commitments by secretaries of state fo libels against the government.

After time taken to consider, Lord Camden Lord Chief Justice, delivered the Judgmen of the Court for the Plaintiff, in the followin words:

L. C. J. This record hath set up two defences to the action, on both of which the defendants have relied.

The first arises from the facts disclosed i the special verdict; whereby the defendant put their case upon the statute of 24 Geo. 2 insisting, that they have nothing to do with th legality of the warrants, but that they ough to have been acquitted as officers within the meaning of that act.

The second defence stands upon the legality f the warrants; for this being a justification n common law, the officer is answerable if the agistrate has no jurisdiction.

These two defences have drawn several oints into question, upon which the public, as ell as the parties, have a right to our opinion.

Under the first, it is incumbent upon the of- cers to shew, that they are officers within the eaning of the act of parliament, and likewise at they have acted in obedience to the war- ant.

The question, whether officers or not, in- olves another; whether the secretary of state, hose ministers they are, can be deemed a ustice of the peace, or taken within the equi- y of the description; for officers and justices re here co-relative terms: therefore either oth must be comprised, or both excluded.

This question leads me to an inquiry into the uthority of that minister, as he stands describ- d upon the record in two capacities, viz. secre- ry of state and privy counsellor. And since o statute has conferred any such jurisdiction s this before us, it must be given, if it does ally exist, by the common law; and upon his ground he has been treated as a conser- ator of the peace.

The matter thus opened, the questions that aturally arise upon the special verdict, are;

First, whether in either of these characters, r upon any other foundation, he is a conser- ator of the peace.

Secondly, admitting him to be so, whether e is within the equity of the 24th Geo. 2.

These points being disposed of, the next in rder is, whether the defendants have acted in bedience to the warrant.

In the last place, the great question upon the stification will be, whether the warrant to eize and carry away the plaintiff's papers is awful.

First Question.

The power of this minister, in the way wherein it has been usually exercised, is pretty ingular.

If he is considered in the light of a privy ounsellor, although every member of that oard is equally entitled to it with himself, yet e is the only one of that body who exerts it. His power is so extensive in place, that it preads throughout the whole realm; yet in ne object it is so confined, that except in li- els and some few state crimes, as they are alled, the secretary of state does not pretend o the authority of a constable.

To consider him as a conservator. He ever binds to the peace, or good behaviour, which seems to have been the principal duty f a conservator; at least he never does it in hose cases, where the law requires those sure- ies. But he commits in certain other cases, where it is very doubtful, whether the conser- ator had any jurisdiction whatever.

His warrants are chiefly exerted against li- ellers, whom he binds in the first instance to their good behaviour, which no other conser- vator ever attempted, from the best intelligence that we can learn from our books.

And though he doth all these things, yet it seems agreed, that he hath no power whatso- ever to administer an oath or take bail.

This jurisdiction, as extraordinary as I have described it, is so dark and obscure in its origin, that the counsel have not been able to form any certain opinion from whence it sprang.

Sometimes they annex it to the office of se- cretary of state, sometimes to the quality of privy counsellor; and in the last argument it has been derived from the king's royal prero- gative to commit by his own personal command.

Whatever may have been the true source of this authority, it must be admitted, that at this day he is in the full legal exercise of it; be- cause there has been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but the authority has been recognized and confirmed by two cases in the very point since that period: and therefore we have not a power to unsettle or contradict it now, even though we are per- suaded that the commencement of it was er- roneous.

And yet, though the enquiry I am now upon cannot be attended with any consequence to the public, it is nevertheless indispensable; for I shall trace the power to its origin, in order to determine whether the person is within the equity of the 24th Geo. 2.

Before I argue upon that point, or even state the question, whether the secretary of state be within that act, we must know what he is. This is no very agreeable task, since it may possibly tend to create, in some minds, a doubt upon a practice that has been quietly submitted to, and which is of no moment to the liberty of the subject; for so long as the proceedings under these warrants are properly regulated by law, the public is very little concerned in the choice of that person by whom they are issued.

To proceed then upon the First Question, and to consider this person in the capacity of a secretary of state.

This officer is in truth the king's private se- cretary. He is keeper of the signet and seal used for the king's private letters, and backs the sign manual in transmitting grants to the privy seal. This seal is taken notice of in the Articuli super Chartas, cap. 6, and my lord Coke in his comment (2 Inst. 556,) upon that chapter, p. 556, describes the secretary as I have mentioned. He says he has four clerks, that sit at his board; and that the law in some cases takes notice of the signet; for a *ne exeat regno* may be by commandment under the privy seal, or under the signet; and in this case the subject ought to take notice of it; for it is but a signification of the king's command- ment. If at the time my lord Coke wrote his 3d Institute he had been acquainted with the authority that is now ascribed to the secretary, he would certainly have mentioned it in this

place. It was too important a branch of the office to be omitted; and his silence therefore is a strong argument, to a man's belief at least, that no such power existed at that time. He has likewise taken notice of this officer in the Prince's case in the 8th Report. He is mentioned in the statute of the 27th H. 8, chap. 11, and in the statute of the same king touching precedency; and it is observable, that he is called in these two statutes by the single name of secretary, without the addition, which modern times has given him, of the dignity of a state-officer.

I do not know, nor do I believe, that he was anciently a member of the privy council; but if he was, he was not even in the times of James and Charles the 1st, according to my lord Clarendon, an officer of such magnitude as he grew up to after the Restoration, being only employed, by this account, to make up dispatches at the conclusion of councils, and not to govern or preside in those councils.

It is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts in Europe began to admit resident ambassadors; for upon the establishment of this new policy, that whole foreign correspondence passed through the secretary's hands, who by this means grew to be an instructed and confidential minister.

This being the true description of his employment, I see no part of it that requires the authority of a magistrate. The custody of a signet can imply no such thing; nay, the contrary would rather be inferred from this circumstance; because if his power to commit was inherent in his office, his warrants would naturally be stamped with that seal; and in this light the privy seal, one should think, would have had the preference, as being highest in dignity and of more consideration in law. Besides all this, it is not in my opinion consonant to the wisdom or analogy of our law, to give a power to commit, without a power to examine upon oath, which to this day the secretary of state doth not presume to exercise. Mr. Justice Rokeby, in the case of Kendall and Rowe, says, that the one is incident to the other; (5 Mod. 78,) and I am strongly of that opinion: for how can he commit, who is not able to examine upon oath?* What magistrate can be found, in our law, so defectively constituted? The only instance of this kind, that can be produced, is the practice of the House of Commons. But this instance is no precedent for other cases. The rights of that assembly are original and self created; they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error.† So that I still say, notwithstanding that particular case, there is no magistrate in our law so framed, unless the secretary of state be an exception. Now Mr. Justice Rokeby and myself though we agree in the principle, form our conclusions in a very different manner. He from the assumed power of committing, which ought first to have been proved, infers the incidental powers of administering an oath. on the contrary, from the admitted incapacity to do the latter, am strongly inclined to deny the former.

Again, if the secretary of state is a common law magistrate, one should naturally expect to find some account of this in our books, where his very name is unknown; and there cannot be a stronger argument against his authority in that light, than the unsuccessful attempts that have been made at the bar to transform him into a conservator. These attempts have given us the trouble of looking into those books that have preserved the memory of these magistrates, who have been long since deceased and forgotten. Fitzherbert, Crompton, Lambard, Dalton, Pulton, and Bacon, have all been searched to see, if any such person could be found amongst the old conservators. It is not material to repeat the whole number, and arrange them in their several classes; but it will be sufficient to enumerate the principal ones, because they may be referred to in some other part of the argument.

The king is mentioned as the first. Then come the chancellor, the treasurer, the high steward, the master of the rolls, the chief justice and the justices of the King's-bench, the judges in their several courts, sheriffs, coroners, constables; and some are said to be conservators by tenure, some by prescription and others by commission. But no secretary of state is to be found in the catalogue; and I do affirm, that no treatise, case, record, or statute, has ever called him a conservator, from the beginning of time down to the case of the King against Kendall and Rowe.*

The first time, he appears in our books to be a granter of our warrants, is in 1 Leonard 71, and 71, 29 and 30 Elizabeth, where the return to a Habeas Corpus was a commitment by Francis Walsingham, principal secretary, and one of the privy council. The Court take this distinction. Where a person is committed by one of the privy council, in such case the cause of the commitment should be set down in the return; but on the contrary, where the party is committed by the whole council, there no cause need be alleged. The Court upon this ordered the return to be amended, and then the return is a commitment by the whole council.

There is a like case in the 2 Leonard, p. 17, a little prior in point of time, where the commitment is by sir Francis Walsingham, one of the principal secretaries, &c. Because the warden of the Fleet did not return for what cause Helliard was committed, the Court gave

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 16, s. 4.

† Ibid. book 2, c. 15, s. 73.

* See Leach's Hawkins's Pleas of the Crown, book 1, c. 60, s. 1.

ıim day to mend his return, or otherwise the vriscoer should be delivered. Nobody who reads this case can doubt, but that the &c. must ıe supplied by the addition of privy counsellor, ıs in the other case.

These authorities shew, that the judges of hose days knew of no such committing magistrate as a secretary of state. They pay no regard to that office, but treat the commitment as the act of the privy counsellor only; and to shew farther that the privy counsellor as such was the only acting magistrate in state matters, all the twelve judges two years afterwards were obliged to remonstrate against the irregularities of their commitments, but take no notice of any such authorities practised by the secretaries of state.

In the 3d year of king Charles the 1st, when the House of Commons started that famous dispute, upon the right claimed by the king and the privy council to commit without shewing cause, it is natural to expect, that the secretary's warrant should have been handled, or at least named among the state commitments. But there is not throughout that long and learned discussion one word said about him, or his name so much as mentioned; and the Petition of Right, as well as all the proceedings that produced it, is equally silent upon the subject.

Again, when in the 16th year in the same king's reign the Habeas Corpus was granted by act of parliament (16 Cha. 1, c. 10, s. 8,) upon all the state commitments, and where the omission of one mode of committing would have been fatal to the subject, and frustrated all the remedy of that act, and where they have enumerated not only every method of committing that had been exercised, but every other that might probably exist in after times; yet the commitment by a secretary of state is not found amongst the number. If then he had power of his own to commit, this famous act of parliament was waste paper, and the subject still at the mercy of the crown, without the benefit of the Habeas Corpus; a supposition altogether incredible: for who can believe, that this parliament, so jealous, so learned, so industrious, so enthusiastic of the liberty of the subject, when they were making a law to relieve prisoners against the power of the crown, should bind the king, and leave his secretary of state at large?

Whoever attends to all these observations will see clearly, that the secretary of state in those days never exercised the power of committing in his own right; I say, in his own right, because that he did in fact commit, and that frequently even at the time when the matter of the Habeas Corpus was agitated in the 3d of king Charles the 1st, will appear from a passage in the Ephemeris Parliamentaria, page 162. This passage, when it comes to be attended to, will throw great light upon the present enquiry. It is sufficient of itself to convince me, from what source this practice first arose. It was from a delegation of the king's royal prerogative to commit by his own power, and from the king devolved in point of execution upon the secretary of state. The passage I allude to is a speech of secretary Cook.

Whilst the parliament were disputing the king's authority to commit, either by himself or by his council, without shewing the cause, the king, who was desirous to pacify those discontents, and yet unwilling to part with his prerogative, sent a message to the House of Commons to assure them, that if they would drop the business, he would promise them, upon his royal word, not to use this prerogative contrary to law. Secretary Cook delivers this message, and then the book proceeds in these words. After speaking of himself and the nature of his place, he says, "Give me leave freely to tell you, that I know by experience, that by the place I hold under his majesty, if I will discharge the duty of my place and the oath I have taken to his majesty, I must commit, and neither express the cause to the gaoler, nor to the judges, nor to any counsellor in England, but to the king himself. Yet do not think, I go without ground of reason, or take this power committed to me to be unlimited. Yea rather to me it is charge, burthen, and danger; for if I by this power commit the poorest porter, if I do not upon a just cause, if it may appear, the burthen will fall upon me heavier than the law can inflict; for I shall lose my credit with his majesty and my place: and I beseech you consider, whether those that have been in the same place, have not committed freely, and not any doubt made of it, or any complaint made by the subject."

To understand the meaning of this speech, I must briefly remind you of the nature of that famous struggle for the liberty of the subject between the crown and the parliament, which was then in agitation.

The points in controversy were these: whether a subject committing by the king's personal command, or by warrant of the privy council, ought to express the cause in the warrant, and whether the subject in that case was bailable.

The matter in dispute was confined to those two commitments. The crown claimed no such right for any other warrant; nor did the Commons demand redress against any other. The statute of Westminster the first, which was admitted on all sides to be the only foundation upon which the pretensions of the crown were built, speaks of no other arrests in the text, but the king's arrest only; and the comment of law had never added any other arrest by construction, but that only of the privy council. No other commitment whatever was deemed by any man to be within the equity of that act. The case, cited upon that occasion, speaks of no other commitments but these. Nay the House of Lords, who passed a resolution in the heat of this business in favour of the king's authority, resolves only, that the king or his council could commit, but meddle with no other commitment. Secretary Cook tells them

in this public manner, that he made a daily practice of committing without shewing the cause; yet the House takes no notice of any secretary's warrant as such, nor is the secretary's name mentioned in the course of all those proceedings. What then were those commitments mentioned by the secretary? They were certainly such only, as were 'per speciale mandatum domini regis.' They could be no other. They were the commitments then under debate. They, and they only, were referred to by the king's message, and were consequently the subject matter of the secretary's apology; for no other warrant claimed that extraordinary privilege of concealing the cause.

This observation explains him, when he calls it a power committed to him; which I construe, not as annexed to his office, but specially delegated. This accounts too for his notion, that the law could not touch him; but that if he abused his trust, he should lose his credit with the king and his place, which he describes as a heavier punishment than the law could inflict upon him. Upon this ground it will be easy to explain the notable singularities of this minister's proceeding, which are not to be reconciled to any idea of a common-law magistrate. Such are his meddling only with a few state-offences, his reach over the whole kingdom, his committing without the power of administering an oath, his employment of none but the messenger of the king's chamber, and his command to mayors, justices, sheriffs, &c. to assist him; all which particularities are congruous enough to the idea of the king's personal warrant, but utterly inconsistent with all the principles of magistracy in a subject.

If on the other hand it can be understood, that he could and did commit without shewing the cause in his own right and by virtue of his office, then was his warrant admitted to be legal by the whole House, and without censure or animadversion. It was neither condemned by the Petition of Right, nor subject to the Habeas Corpus Act of 16th of Charles the First, (c. 10.)

The truth of the case was no more than this. The council-board were too numerous to be acquainted with every secret transaction that required immediate confinement; and the delay by summoning was inconvenient in cases that required dispatch. The secretary of state, as most entrusted, was the fittest hand to issue sudden warrants; and therefore we find him so employed by queen Elizabeth under the quality of a privy counsellor. But when the attempt failed, the judges declaring, that he must shew the cause; and that they would remand none of his prisoners in any case but that of high treason, those warrants ceased, and then a new method was taken by making him the instrument of the king's *speciale mandatum;* for that is the form in which all warrants and returns were drawn, that were produced upon that famous argument.

Having thus shewn, not only negatively that this power of committing was not annexed to the secretary's office, but affirmatively likewise that he was notifier or countersigner of the king's personal warrant acting *in alio jure* down to the times of the 16th of Charles the first, and consequently to the Restoration, for there was no secretary in that interval, I have but little to add upon this head, but observing what passed between that time and the case of Kendall and Rowe.

The Licensing Act, that took place in the 13th and 14th of Charles the Second, (c. 33), gave him his first right to issue a warrant in his own name; not indeed to commit persons, but a warrant to search for papers. Whether upon this new power be grafted any authority to commit persons in his own right, as it should seem he did by the precedent produced the other day, is not very material. But it is remarkable, that during that interval he adhered in some cases to the old form, by specifying the express command of the king in this warrant.

With respect to the cases that have passed since the Revolution, such as the King against Kendall and Rowe, the Queen against Darby, and the King and Earbery, I shall take no other notice of them in this place, than to say, they afford no light in the present inquiry by shewing the ground of the officer's authority, though they are strong cases to confirm it.

But before I can fairly conclude, that the secretary of state's power was derived from the king's personal prerogative and from no other origin, I must examine, what has passed relative to the power of a separate privy counsellor in this respect. This is the more necessary to be done, because my lord chief justice Holt has built all his authority upon this ground; and the subsequent cases, instead of striking out any new light upon the subject, do all lean upon and support themselves by my lord chief justice Holt's opinion in the case of Kendall and Rowe.

I will therefore fairly state all that I have been able to discover touching the matter; and then, after I have declared my own opinion, shall leave others to judge for themselves.

In the first place it is proper to observe, that a privy counsellor cannot derive his authority from the statute of Westminster the first; which recites an arrest by the command of the king to be one of those cases that were irreplevisable by the common law. The principal commentator upon these words is Staundford, (Pl. fo. 72, b.) who says, as to the commandment of the king, this is to be understood of the commandment of his own mouth, or of his council, which is incorporate to him, and speaks with the mouth of the king himself; for otherwise, if you will take these words of commandment generally, you may say that every Capias in a personal action is the command of the king." Lambard in his chapter of Bailment, where he cites this act of parliament, gives it the same construction, by allowing a commitment by the council to be within the equity of these words, "command-

ment of the king." (Lamb. Eirenarch, & b. 3, c. 2, p. 335.) Thus far, and no further, did the crown lawyers in the third of king Charles the first endeavour to extend the text of the law; and it is plain from the cases before cited, that the judges in queen Elizabeth's time were of the same opinion, that the argument could not be extended in favour of the single counsellor; because they held, that he is bound to shew the cause upon his warrant, as distinguished from the other warrants, where they admit the cause need not be shewn.

If he is not then entitled by this statute, is he empowered by the common law? They, who contend he is, would do well to shew some authority in proof of their opinion. It is clear, he is not numbered among the conservators. It is as clear, that he is not mentioned by any book as one of the ordinary magistrates of justice with any such general authority.

The first place, in which any thing of this kind is to be found, is in the year-book of Henry the sixth, where the sheriff returns a detainer under the warrant of 'duos de concilio pro rebus regem tangentibus.' This proof has an unlucky defect in it; because the reading is doubtful, the word *dnos* as it is written standing as well for *dominos*, as for *duos*; so that till the reading is settled, which is beyond my skill, the authority must be suspended.

The next time you meet with a privy counsellor in the light of a magistrate is in the first of Edward the sixth, chap. 12, s. 19, where one of the privy council is empowered to take the accusation in some new treasons therein mentioned; and he is for this purpose joined with the justice of assize and justice of the peace. The like power is given to him by the 5th and 6th of the same king, c. 11, s. 10, in a like case; and I find in Kelyng, p. 19, that when the judges met to resolve certain points before the trial of the Regicides, they resolved, that a confession upon examination before a privy counsellor, though he be not a justice of the peace, is a confession within the meaning of the statute of the 5th and 6th of Edward the 6th. That act of parliament in the twelfth section had provided, that no person should be attainted of treason, but upon the testimony of two lawful accusers, unless the said party arraigned should willingly without violence confess the same.

It seems to me, that the ground upon which the judges proceeded in this resolution, was the express power given to the privy council in the clause next but one before that just mentioned, where the act enables them to take the accusation in the new treasons there mentioned.

Whether they reasoned in that way, or whether they conceived that the power there given was a proof of some like power which they enjoyed to take accusation in the case of treasons at the common law, the book has not explained; so that hitherto this authority in the case of high treason stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it.

The next authorities are the cases already recited in Leonard, which to the present point prove nothing more than this; that the judges do admit a power in a privy counsellor to commit without specifying in what cases. They demand the cause, and a better return; whereupon sir Fr...is W...singham, instead of relying upon his power as privy counsellor, returns a new warrant signed by the whole board.

Two years after this came forth that famous resolution of all the judges, which is reported in 1 Anderson 297, 34th of Elizabeth. There is no occasion to observe, how arbitrary the prerogative grew, and how fast it increased towards the end of this queen's reign. It seems to me, as if the privilege claimed by the king's personal warrant, and from him derived to the council-board, by construction, had some-how or other been adopted by every individual of that board; for in fact these warrants became so frequent and oppressive, that the courts of justice were obliged at last to interpose.

However they might be overborne by the terror of the king's special command either in or out of council, they had courage enough to resist the novel encroachments of the separate members; and therefore they did in the courts of King's-bench and Common Pleas set at large many persons so committed; upon which occasion a question being put to the judges, to specify in what cases the prisoner was to be remanded, they answer the question with a remonstrance of their own against the illegal warrants granted by the privy counsellors. The preamble relates entirely to these commitments, wherein they desire, that some good order may be taken, that her highness's subjects may not be committed or detained in prison by commandment of any nobleman, against the laws of the realm.

The question is this: In what cases prisoners sent to custody by her majesty, her council, or any one or more of her council, are to be detained in prison, and not to be delivered by her majesty's courts or judges.

The answer is, "We think, that if any person be committed by her majesty's command from her person, or by order from the council-board, or if any one or two of her council commit one for high treason, such persons so in the case before committed may not be delivered by any of her courts without due trial by the law and judgment of acquittal had. Nevertheless the judges may award the queen's writs to bring the bodies of such persons before them; and if upon return thereof the causes of their commitment be certified to the judges, as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came; which cannot conveniently be done, unless notice of the causes in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such prisoner."

There is a studied obscurity in this opinion, which shews, how cautious the judges were obliged to be in those dangerous times; for

whether they meant to acknowledge a general power in the king or his council to commit, as distinguished from a special power in one or more of his council to commit, only in the case of high treason; or whether this case of high treason is to be referred to all the commitments as the only unbailable case; or again, whether in the superior commitment by the royal person or his council, they would deliver the prisoner though no cause was specified; or if one of the council committed for offences below high treason where they declare they would not remand, yet whether they would absolutely discharge or only upon bail; is altogether either ambiguous or uncertain.

It is evident to me, that the judges did not intend to be understood touching these matters; and the only propositions, that are clearly laid down in this resolution, are these.

First, that they would never remand upon the counsellor's commitment but in high-treason.

Secondly, that the cause ought to be shewed in all cases.

This resolution grew to be much agitated afterwards in the third of Charles the first, and had the honour, like other dark oracles, to be cited on both sides.

Thus much it was necessary to observe upon this famous opinion; because it was upon this opinion, that lord chief justice Holt principally relied. At this time it is apparent, that all the privy counsellors exercised this right in common. Whatever it was, the complaint shews, it was a general practice, and a privilege enjoyed by all the members of that board; from whence it is natural to suppose, that if the power was well founded, the same practice would have continued to this time in the same way, seeing how tenacious all men are of those things that are called rights and privileges. Instead of this it doth not appear, that the council from that æra have ever asserted their rights; and now at last, when the secretary of state has revived the claim, for the common benefit, as it should seem, of the whole body, no other person has followed this example, or knows to this moment that he is entitled to such right. Any body who considers what the consequence must have been from these determinations of the judges, might venture to affirm, that the privy counsellor's warrant from this period ceased and grew out of use; for as the cause in this case was necessary to be specified, and the prisoner was never to be remanded but in the case of high treason, that warrant became at once unserviceable, and the crown was forced to resort to the royal mandate or the board-warrant, which, notwithstanding the case in Anderson, was still insisted to be unbailable and good without a cause.

Hence happened, that in the great debate in the third of king Charles the first, no privy counsellor's warrants do once occur; but instead thereof you find the secretary of state dealing forth the king's royal mandate, and the privy counsellor's authority at rest.

The only reason, why I touch upon these proceedings, is for the sake of observing, that no notice is taken in those arguments of the privy counsellor's right to commit; and yet the power of the king himself, and of his council, by the statute of Westminster the first, is largely discussed, and so fully handled, that if the warrant of one privy counsellor had then been in use, it must have been brought forth in the argument; for if it could have served no other purpose, it would have been material, in order to mark the distinction between that and the warrant of the whole board.

From these observations I conclude, that these warrants were then deceased and gone, and would probably have never made their appearance again even in description, if the bill in the 16th of Charles the first, c. 10, had not recalled them to memory, not as things either then in use or admitted to be legal, but as one of the modes of commitment which might be again revived, because it had been formerly practised.* Therefore when this form of warrant appears, as it does in the catalogue of other forms, both legal and illegal, no argument can be raised from a pretended recognition of this particular warrant; since it was necessary to name every mode, that ever had been used by the king, the council, or the Star-Chamber, in order to make the remedy by Habeas Corpus universal.

But if there can be a doubt, whether this act of parliament is to be deemed a recognition of this authority, there is a passage in the Journal of the House of Commons, that proves the contrary in direct terms.

Whilst this bill was passing, the House makes an amendment, which appears by the question put to be this, whether the House should assent to the putting the word 'liberties' out of the bill.

But as the passage in the bill is not mentioned in the Journals, it must be collected by inferences. By the phrase 'left out of the bill,' I presume it was permitted to stand in the preamble. Now when you look into the preamble, the word 'liberties' is there to be found in that part of the preamble which recites this usurpation of the privy council upon the liberties, as well as the properties of the subject; whereas the enacting clause condemns only the jurisdiction of that board, so far as it assumed a jurisdiction over the property of the subject; from whence I collect that the word 'liberties' stood in that clause; and the passage that follows in the Journal does strongly confirm it.

The words are these: "Resolved upon the question, that this House does assent to the putting the word 'liberties' out of the bill concerning the Star-Chamber and Council pleadings; because the House has a bill to be drawn to provide for the liberty of the subject in a large manner. Mr. Serjeant Wild and Mr. Whitelock are appointed to draw a bill to that

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 15, s. 71.

pose upon the several points that have been here this day debated.

"Resolved upon the question, that the body of the lords of the council, nor any one of them in particular as a privy-counseller, has any power to imprison any free-born subject, except in such cases as they are warranted by the statutes of the realm."

It is pretty plain from this passage, that the debate turned upon the meaning of the statute of Westminster the first, and the resolution of the judges in Anderson, about which it is not fit to give any opinion; my design by citing this passage being only to shew, that this act of parliament does not even prove the actual practice of such warrants at that time, much less does recognise their legality.

What follows is still more remarkable touching this business, upon a doubt started in the trial of the Seven Bishops.* They were committed by a warrant signed by no less than thirteen privy counsellors; but the warrant did not appear to be signed by them in council. The objection taken was, that the warrant was void, being signed only by the privy counsellors separately, and not in a body. If any man in Westminster-hall at that time had understood, that one or more privy councellors had a right to commit for a misdemesnour, that would have been a flat answer to the objection; but they are so far from insisting upon this, that all the king's counsellors, as well as the Court, do admit the warrant would have been void, if it could be taken to be executed by them out of council.

The solicitor-general upon that occasion cites the 16th of Charles the first, which statute is produced and read, and yet no argument is taken from thence to prove the authority of the separate lords, though the act is before them. Mr. Pollexfen in the course of the debate says, 'We do all pretty well agree, for 'aught I can perceive, in two things. We do 'not deny, but that the council-board has power 'to commit. They on the other side do not 'affirm, that the lords of the council can commit out of the council.

'*Attorney General.* Yes, they may as justices of the peace.

'*Pollexfen.* This is not pretended to be so here.

'*L. C. J.* No, no, that is not the case.'

The Court at last got rid of the objection, by presuming the warrant to have been executed in council.

There cannot be a stronger authority than this I have now cited for the present purpose. The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's right to commit in the case of a libel, as the whole body of privy counsellors are at this day.

The counsel on both sides in that cause were the ablest of their time, and few times have produced abler. They had been conversant in all the state-cases during the whole reign of king Charles the second, on one side or the other; and to suppose that all these persons could be utterly ignorant of this extraordinary power, if it had been either legal or even practised, is a supposition not to be maintained.

This is the whole that I have been able to find, touching the power of one or more privy counsellors to commit; and to sum up the whole of this business in a word it stands thus:

The two cases in Leonard do pre-suppose some power in a privy counsellor to commit, without saying what; and the case in Anderson does plainly recognise such a power in high treason: but with respect to his jurisdiction in other offences, I do not find it was either claimed or exercised.

In consequence of all this reasoning, I am forced to deny the opinion of my lord chief justice Holt to be law, if it shall be taken to extend beyond the case of high treason. But there is no necessity to understand the book in a more general sense; nor is it fair indeed to give the words a more large construction, than as the occasion ought always to be guided by the premises; and the premises are confined to the case of high treason only; the opinion should naturally conform to the cases cited, more especially as the case there before the Court was a case of high treason, and they were under no necessity to lay down the doctrine larger than the case required. Now whereas it has been argued, that if you admit a power of committing in high treason, the power of committing in lesser offences follows *a fortiori*; I beg leave to deny this consequence, for I take the rule with respect to all special authorities to be directly the reverse. They are always strictly confined to the letter. So when I see therefore, that a special power in any single case only and that [illegible] person, who in all other instances is [illegible] recorded by the common law as a [illegible] have no right to enlarge his authority one step beyond that case. Consider how absurd it would stand, if I should declare in case, that every privy counsellor without exception is invested with a power to commit in all treasons without exception from high treason down to trespass, which is also that he has a conservator. It might be said of me, as Sir [illegible] have explained himself a little more clearly, and told us where he had found the determination of so singular a nature, who says, that a conservator was to be found in the statute of Gloucester.

I have now finished all I have to say upon this head; and am warranted, that the secretary of state hath assumed this power as a thing which I know not how of the royal authority to himself; and that the opinion of Lord [illegible] known to many gentlemen. In the mean time I declare, wherein my brothers do not agree with me, that we are bound to abide by the determination of the Queen against Derby, the King against Earbery, and I have no right to

* See this Case, vol. 12, p. 183.

overturn these decisions, even though it should be admitted, that the practice, which has subsisted since the Revolution, had been erroneous in its commencement.

The secretary of state having now been considered in the two lights of secretary and privy counsellor, and likewise as the substitute of the royal mandate; in the two first he is clearly no conservator; in the last, if he can be supposed to have borrowed the right of conservatorship from the sovereign himself, yet no one will argue or pretend, that so great a person, one so high in authority, can be deemed a justice of the peace within the equity of the 24th of Geo. 2.

However, I will for a time admit the secretary of state to be a conservator, in order to examine, whether in that character he can be within the equity of this act.

SECOND QUESTION.

Upon this question, I shall take into consideration the 7th of James 1, c. 5, because, though it is not material upon this record to determine, whether the special evidence can be admitted under the general issue of not guilty, the defendant having in this instance justified; yet as that act is made in *eâdem materiâ*, and for the benefit of the same persons, the rule of construction observed in that will in great measure be an authority for this.

The 24th of Geo. 2 is entitled, 'An Act for 'the rendering justices of the peace more safe 'in the execution of their offices, and for indemnifying constables and others acting in obedience to their warrants.' The preamble runs thus: 'Whereas justices of the peace are 'discouraged in the execution of their offices, 'by vexatious actions brought against them, 'for or by reason of small and involuntary 'errors in their proceedings; and whereas it 'is necessary that they should be, as far as is 'consistent with justice and the safety and liberty of the subjects over whom their authority extends, rendered safe in the execution 'of the said office and trust; and whereas it is 'also necessary, that the subject should be 'protected from all wilful and oppressive abuse 'of the several laws committed to the care and 'execution of the said justices of peace.' Then comes the enacting part.

The only grantor of the warrant in the enacting part, as well as the preamble, is the justice of the peace. The officers, as they are described, are constables, headboroughs, and other officers or persons acting by their order, or in their aid. If any person acting in obedience to such warrant, and producing the said warrant upon demand, is afterwards prosecuted for such act, the statute says, he shall be acquitted, upon the production of such warrant. The counsel for the defendants say, the secretary and the messengers are both within the equity of this act. The first is a justice of the peace, because he is a conservator. If so the latter is his officer, which I will admit. The proposition then is, that conservators are within the equity of this act. They are clearly not within the letter; for justice and conservator are not convertible terms; and though it should be admitted, that a justice of the peace is still a conservator, yet a conservator is not a justice.

The defendants have argued upon two rules of construction, which in truth are but one.

First, where in a general act a particular is put as an example, all other persons of like description shall be comprized.

Secondly, where the words of a statute enact a thing, it enacts all other things in like degree.

In Plowden 57, and 467, and 467, several cases are cited as authorities under these rules of construction; as, that the bishop of Norwich in one act shall mean all bishops; that the warden of the Fleet shall mean all gaolers; that justices of a division mean all justices of the county at large, that guardian in socage after the heir's attaining fourteen, shall be a bailiff in account; that executors shall include administrators, and tenant for years a tenant for one year or any less time; with several other instances to the like purpose.

In the first place, though the general rule be true enough, that where it is clear the person or thing expressed is put by way of example, the judges must fill up the catalogue; yet we ought to be sure, from the words and meaning of the act itself, that the thing or person is really inserted as an example.

This is a very inaccurate way of penning a law; and the instances of this sort are scarce ever to be found, except in some of the old acts of parliament. And wherever this rule is to take place, the act must be general, and the thing expressed must be particular; such as those cases of the warden of the Fleet and the bishop of Norwich: whereas the act before us is equally general in all its parts, and requires no addition or supply to give it the full effect. Therefore if this way of arguing can be maintained by either of the rules, it must fall under the second, which is, that where the words of a statute enact a thing, it enacts all other things in like degree.

In all cases that fall within this rule, there must be a perfect resemblance between the persons or things expressed and those implied. Thus for instance, administrators are the same thing with executors; tenant for half a year and tenant for years have both terms for a chattel interest, differing only in the duration of the term; and so of the rest, which I need not repeat one by one: and in all these cases, the persons or things to be implied are in all respects the objects of the law as much as those expressed. Does not every body see from hence, that you must first examine the law before you can apply the rule of construction? For the law must not be bent by the construction, but that must be adapted to the spirit and sense of the law. The fundamental rule then, by which all others are to be tried, is laid down in Wimbish and Tailbois, Plowden 57, 58, ac-

cording to which the best guide is to follow the intent of the statutes. Again, according to Plowden, p. 205 and 231, the construction is to be collected out of the words according to the true intent and meaning of the act, and the intent of the makers may be collected from the cause or necessity of making the act, or by foreign circumstances.

Let us try the present case by these rules; and let the justice of the peace stand for a moment in this act as a magistrate at large; and then compare him as he is here described with the conservator.

The justice here is a magistrate intrusted with the execution of many laws, liable to actions for involuntary errors, and actually discouraged by vexatious suits; in respect of which perilous situation he is intended to be rendered more safe in the execution of his office.—He is besides a magistrate, who acts by warrant directed to constables and other officers, namely, known officers who are bound to execute his warrants.

Now take the conservator.—He is intrusted with the execution of no laws, if the word 'law' is understood to mean statutes, as I apprehend it is.—He is liable to no actions, because he never acts; the keeping of the peace being so completely transferred to and so engrossed by the justice, that the name of conservator is almost forgot. He is far from being discouraged by actions. No man ever heard of an action brought against a conservator as such; unless you will call a constable a conservator, which will not serve the present purpose, because these persons can hardly be deemed justices within the act.—Again, how does it appear, that the conservator could either grant a warrant like the present, or command a constable to execute it? These powers are at least very doubtful; but I think I may take it for granted, that the conservator could not command a messenger of the king's chamber.

Did then this act of parliament refer to magistrates of known authority and daily employment, or to antiquated powers and persons known to have existed by historical tradition only? Did it mean to redress real grievances, or those that were never felt? 'Ad ea, quæ 'frequenter accidunt, jura adaptantur.'

From this comparison it may appear, how little there is to drag the conservator into the law, who hardly corresponds with the justice of the peace in any one point of the description. But further, it is unfortunate for the conservators upon this question, that one half of them are the objects of the statute by name, as constables, &c. and yet not one of their acts as conservators is within the provision.

And now give me leave to ask one question. Will the secretary of state be classed with the higher or the lower conservator? If with the higher, such as the king, the chancellor, &c. he is too much above the justice to be within the equity. If with the lower, he is too much below him. And as to the sheriff and the coroner, they cannot be within the law; because they never grant such warrants as these. So that at last, upon considering all the conservators, there is not one that does not stand most evidently excluded, unless the secretary of state himself shall be excepted.

But if there wanted arguments to confute this pretension, the construction that has prevailed upon the seventh of James the first, would decide the point. That is an act of like kind to relieve justices of the peace, mayors, constables, and certain other officers, in troublesome actions brought against them for the legal execution of their offices; who are enabled by that act to plead the general issue. Now that law has been taken so strictly, that neither church-wardens, nor overseers, were held to be within the equity of the word 'constables,' although they were clearly officers, and acted under the justice's warrants. Why? Because that act, being made to change the course of the common law, could not be extended beyond the letter. If then that privilege of giving the special matter in evidence upon the general issue is contrary to the common law, how much more substantially is this act an innovation of the common law, which indemnifies the officer upon the production of the warrant, and deprives the subject of his right of action?

It is impossible, that two acts of parliament can be more nearly allied or connected with one another, than that of 24 George 2, and the 7th of James 1. The objects in both are the same, and the remedies are similar in both, each of them changing the common law for the benefit of the parties concerned. The one, in truth, is the sequel or second part of the other. The first not being an adequate remedy in case of the several persons therein mentioned, the second is added to complete the work, and to make them as secure as they ought to be made from the nature of the case. If by a contrary construction any person should be admitted into the last that are not included in that first, the person, whoever he is, will be without the privilege of pleading the general issue, and giving the special matter in evidence, which the latter would have certainly given by express words, if the parliament could have imagined he was not comprised in the first.

Upon the whole, we are all of opinion, that neither secretary of state, nor the messenger, are within the meaning of this act of parliament.

THIRD QUESTION.

But if they were within the general equity, yet it behoved the messenger to shew, that they have acted in obedience to the warrant; for it is upon that condition, that they are intitled to the exemption of the act. When the legislature excused the officer from the perilous task of judging, they compelled him to an implicit obedience; which was but reasonable: so that now he must follow the dictates of his warrant, being no longer obliged to inquire, whether his superior had or had not any jurisdiction. The late decision of the Court of

King's-bench in the Case of General Warrants[a] was ruled upon this ground, and rightly determined.

This part of the case is clear, and shall be dispatched in very few words.

First, the defendants did not take with them a constable, which is a flat objection. They had no business to dispute either the propriety or the legality of this direction in the execution of the warrant; nor have their counsel any right to dispute it here in their behalf. They can have no other plea under this act of parliament, than ignorance and obedience.

Secondly, they did not bring the papers to the earl of Halifax, to be examined according to the tenor of the warrant, but to Mr. Lovell Stanhope. This command ought to have been literally pursued; nor is it any excuse to say now, as they do in their plea, that Mr. Lovell Stanhope was an assistant to the earl of Halifax. If he is a magistrate, he can have no assistant, nor deputy, to execute any part of that employment. The right is personal to himself, and a trust that he can no more delegate to another, than a justice of the peace can transfer his commission to his clerk.

I shall say no more upon this head. But I cannot help observing, that the secretary of state, who has not been many years intrusted with this authority, has already eased himself of every part of it, except the signing and sealing the warrant. The law clerk, as he is called, examines both persons and papers. He backs or discharges. This is not right. I could wish for the future, that the secretary would discharge this part of his office in his own person.

FOURTH AND LAST QUESTION.

The question that arises upon the special verdict being now dispatched, I come in my last place to the point, which is made by the justification; for the defendants, having failed in the attempt made to protect themselves by the statute of the 24th of Geo. 2, are under a necessity to maintain the legality of the warrants, under which they have acted, and to shew that the secretary of state in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the secretary of state. In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.

This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.

This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself, the great executive hand of criminal justice, the lord chief justice of the court of King's-bench, chief justice Scroggs excepted, never having assumed this authority.

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, which practice has been found by the special verdict; though I must observe, that the defendants have no right to avail themselves of that finding, because no such practice is averred in their justification.

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of Habeas Corpus, yet no court of justice has ever declared them illegal.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition.

These arguments, if they can be called arguments, shall be all taken notice of; because upon this question I am desirous of removing every colour or plausibility.

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent.

If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent.

It is executed against the party, before he is heard or even summoned; and the information, as well as the informer, is unknown.

It is executed by messengers with or without a constable (for it can never be presumed, that such a necessary (in point of law) is the prisoner or the absence of the party, as the

[a] Money and others against Leach, Mich. 6 Geo. 3, *ante*, p. 1002.

messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, the only witnesses are the trespassers, the party injured is left without proof.

If this injury falls upon an innocent person, he is destitute of remedy as the guilty; and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

It must not be here forgot, that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel.

Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occasion executed in its utmost latitude: for in the case of Wilkes against Wood, when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, "that all must be taken, manuscripts and all." Accordingly, all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack.

I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the secretary of state; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading down the soil. If he cannot tell the truth, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for me without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

* "If a private person suspect another of felony, and lay such ground of suspicion before a constable, and require his assistance to take him, the constable may justify killing the party if he fly, though in truth he were innocent. But in such case, where no hue and cry is levied, certain precautions must be observed: 1. The party suspecting ought to be present; for the justification is, that the constable did aid him in taking the party suspected. 2. The constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it. From whence it should seem that there ought to be a reasonable ground shewn for it: otherwise it would be immaterial whether such information were given to the constable or not, as to the point of his justification. And it was formerly supposed to be necessary, that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril." East's Pleas of the Crown, ch. 5, s. 69.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my lord Coke (4 Inst. 176,) denied its legality; and therefore if the two cases resembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.*

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove to the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition, that an usage tolerated from the æra of liberty, and continued downwards to this time through the best eyes of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendant for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could have wished, that upon this occasion the Revolution had not been considered as the only basis of our liberty.

The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is, that, so far from being sanctified, they are condemned by the Revolution.

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the Court of King's-bench, which lately declared with great unanimity in the Case of General Warrants, that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But wherever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if a strange a thing could be supposed, I do not see how we could declare the law upon such evidence.

But still it is insisted, that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law which a few criminal booksellers have been afraid to dispute.

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 13, s. 17.

The defendants upon this occasion have stopped short at the Revolution. But I think it would be material to go further back, in order to see, how far the search and seizure of papers have been countenanced in the antecedent reigns.

First, I find no trace of such a warrant as the present before that period, except a very few that were produced the other day in the reign of king Charles 2.

But there did exist a search-warrant, which took its rise from a decree of the Star-Chamber. The decree is found at the end of the 3d volume of Rushworth's Collections. It was made in the year 1636, and recites an older decree upon the subject in the 23d of Elizabeth, by which probably the same power of search was given.

By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a licence; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate.

It was very evident, that the Star-Chamber, now soon after the invention of printing I know not, took to itself the jurisdiction over public libels, which soon grew to be the peculiar business of that court. Not that the courts of Westminster-hall wanted the power of holding pleas in those cases; but the attorney-general for good reasons chose rather to proceed there; which is the reason, why we have no cases of libels in the King's-bench before the Restoration.

The Star-Chamber from this jurisdiction presently usurped a general superintendance over the press, and exercised a legislative power in all matters relating to the subject. They appointed licensers; they prohibited books; they inflicted penalties; and they dignified one of their officers with the name of the messenger of the press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. Whilst the press is free, I am afraid it will always be licentious, and all governments have an aversion to libels. This parliament, therefore, did by ordinance restore the Star-Chamber practice; they recalled the licences, and sent forth again the messenger. It was against the ordinance, that Milton wrote that famous pamphlet called Areopagitica. Upon the Restoration, the press was free once more, till the 13th and 14th of Charles 2, when the Licensing Act passed, which for the first time gave the secretary of state a power to issue search warrants: but these warrants were neither so oppressive, nor so inconvenient as the present. The right to enquire into the licence was the pretence of making the searches; and if during the search any suspected libels were found, they and they only could be seized.

This act expired the 32d year of that reign, or thereabouts. It was revived again in the 1st year of king James 2, and remained in force till the 5th of king William, after one of his parliaments had continued it for a year beyond its expiration.

I do very much suspect, that the present warrant took its rise from these search-warrants, that I have been describing; nothing being easier to account for than this engraftment; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the person. The same evidence would serve equally for both purposes. If it was charged for printing or publishing, that was sufficient for either of the warrants. Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.

When the Licensing Act expired at the close of king Charles 2's reign, the twelve judges were assembled at the king's command, to discover whether the press might not be as effectually restrained by the common law, as it had been by that statute.

I cannot help observing in this place, that if the secretary of state was still invested with a power of issuing this warrant, there was no occasion for the application to the judges: for though he could not issue the general search-warrant, yet upon the least rumour of a libel he might have done more, and seized every thing. But that was not thought of, and therefore the judges met and resolved:

First, that it was criminal at common law, not only to write public seditious papers and false news; but likewise to publish any news without a licence from the king, though it was true and innocent.

Secondly, that libels were seizable. This is to be found in the State Trials; and because it is a curiosity, I will recite the passages at large.

"The Trial of Harris for a libel. Scroggs, Chief Justice.

"Because my brethren shall be satisfied with the opinion of all the judges of England what this offence is, which they would insinuate, as if the mere selling of books was no offence; it is not long since that all the judges met by the king's commandment, as they did some time before: and they both times declared unanimously, that all persons, that do write, or print, or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the persons punished by law; that all books which are scandalous to the government may be seized, and all persons so expounding may be punished: and further, that all writers of news, though not scandalous, seditious, nor reflecting upon the government or state; yet if they are writers, as they are few others, of false news, they are indictable and punishable upon that account." [See vol. 7, p. 929.]

It seems the chief justice was a little incorrect in his report; for it should seem as if he meant to punish only the writer of false news. But he is more accurate afterwards in the trial of Carre for a libel.

"Sir *G. Jefferies*, Recorder. All the judges of England having met together to know, whether any person whatsoever may expose to the public knowledge any matter of intelligence, or any matter whatsoever that concerns the public, they give it in as their resolution, that no person whatsoever could expose to the public knowledge any thing that concerned the affairs of the public, without licence from the king, or from such persons as he thought fit to intrust with that power."

"Then Scrogge takes up the subject, and says, The words I remember are these: Which by the king's command we were to give in our opinion, what was to be done in point of regulation of the press, we did all subscribe, that to print or publish any news-books or pamphlets, or any news whatsoever, is illegal; that it *is* a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it *is illicité* done, and the author ought to be convicted for it." [See vol. 7, p. 1187.]

These are the opinions of all the twelve judges of England; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that such *is* their opinion?—I say No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprung the famous general search-warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the twelve judges that subscribed the opinion.

The distinction from the opinion to the warrant is obvious. If you can seize a libel, you may search for it: if search is legal, a warrant to authorize that search is likewise legal: if any magistrate can issue such a warrant, the chief justice of the King's bench may clearly do it.

It falls here naturally in my way to ask, whether there be any authority besides this opinion of these twelve judges to say, that libels may be seized? If they say, I am afraid, that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction.—Consider for a while how the law of libels now stands.

Lord Chief Justice Holt and the Court of King's-bench have resolved in the King and Bear*, that he who writes a libel, though he neither composes it nor publishes, is criminal.

In the 5th Report, 125, lord Coke cites it in the Star Chamber, that if a libel concerns a public person, he that hath it in his custody ought immediately to deliver it to a magistrate, that the author may be found out.

In the case of Lake and Hauen, Hobart 252, it is observed, that a libel, though the contents are true, is not to be justified; but the right way is to discover it to some magistrate or other, that they may have cognizance of the cause.

In 1st Ventris 31, it is said, that the having a libel, and not discovering it to a magistrate was only punishable in the Star Chamber, unless the party maliciously publish it. But the Court corrected this doctrine in the King *vs.* Bear, where it said, though he never published it, yet his having it in readiness for that purpose, if any occasion should happen, is highly criminal: and though he might design to keep it private, yet after his death it might fall into such hands as might be injurious to the government; and therefore men ought not to be allowed to have such evil instruments in their keeping. Carthew 409. In Salkeld's report of the same case, Holt chief justice says, if a libel be publicly known, a written copy of it is evidence of a publication. Salk. 418.

If all this be law, and I have no right to present to deny it, whenever a favourite libel is published (and these compositions are apt to be favourites) the whole kingdom is granted or two becomes criminal, and it would be difficult to find one innocent jury amongst a thousand millions of offenders.

I can find no other authority to justify the seizure of a libel, than that of Scrogge and his brethren.

If the power of search is to follow the right of seizure, every body upon the consequence. He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody and consequently become the object of the search-warrant. If libels may be seized, I ought to be laid down with precision, where, upon what charges, against whom, in what magnitude, and in what stage of the prosecution. All these questions must be explained and proved to be law, before this general proposition can be established.

If therefore no authority in our books can be produced to support such a doctrine, and many Star-Chamber decrees, ordinances, &c. acts have been thought necessary to establish a power of search, I cannot be persuaded that such a power can be justified by the common law.

I have now done with the argument, which

* Reported Cartli. 407. 1 Ld. Raym. 446. 12 Mod. 209. 2 Salk. 647. 646.

has endeavoured to support this warrant by the practice since the Revolution.

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislature be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of state' different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative.

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.

Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.

Observe the wisdom as well as mercy of the law. The strongest evidence before a trial, being only *ex parte*, is but suspicion; it is not proof. Weak evidence is a ground of suspicion, though in a lower degree; and if suspicion at large should be a ground of search, especially in the case of libels, whose house would be safe?

If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; every act of publication makes new proof; and the solicitor of the treasury, if he pleases, may be the witness himself.

The messenger of the press, by the very constitution of his office, is directed to purchase every libel that comes forth, in order to be a witness.

Nay, if the vengeance of government requires a production of the author, it is hardly possible for him to escape the impeachment of the printer, who is sure to seal his own pardon by his discovery. But suppose he should happen to be obstinate, yet the publication is stopped, and the offence punished. By this means the law is satisfied, and the public secured.

I have now taken notice of every thing that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.

Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debauch the manners of the people; they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against the people.

After this description, I shall hardly be considered as a favourer of these pernicious productions. I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear. They will do well to consider, that unjust acquittals bring an odium upon the press itself, the consequence whereof may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy; and the worst of governments is more tolerable than no government at all.

[A great change of the king's ministers happened in the July before the judgment in the preceding case; particularly the marquis of Rockingham was placed at the head of the treasury. The judgment was soon followed with a resolution of the House of Commons, declaring the seizure of papers in the case of a libel to be illegal." Journ. Com. 22 April, 1760. At the same time the Commons passed a resolution

condemning general warrants in the case of libels. The latter resolution was afterwards extended by a further vote, which included a declaration, that general warrants were universally illegal, except in cases provided for by act of parliament. Journ. Com. 25th April, 1766.—All these resolutions were in consequence of Mr. Wilkes's complaint of a breach of privilege above two years before. Journ. Com. 15th November, 1763. Two prior attempts were made to obtain a vote in condemnation of general warrants and the seizure of papers, one in 1764, the other in 1765. Journ. Com. 14th and 17th February, 1764; 29th January, 1765. [See, too, New Parl. Hist.] But they both had miscarried, and one of the reasons assigned for so long resisting such interposition of the House was the pendency of suits in the courts of law. This objection was in part removed by the solemn judgment of the Common Pleas against the seizure of papers, and the acquiescence in it.' Whether the question of general warrants ever received the same full and pointed decision in any of the courts, it is not in our power at present to inform the reader. The point arose on the trial of an action by Mr. Wilkes against Mr. Wood; and lord Camden in his charge to the jury appears to have explicitly avowed his own opinion of the illegality of general warrants; but what was done afterwards is not stated. How a regular judgment of the point was avoided, in the case of error in the King's-bench between Money and Leach, by conceding that the warrant was not pursued, we have observed in a former Note, see p. 1028. As to the action, in which Mr. Wilkes finally recovered large damages from the earl of Halifax, it was not tried till after the declaratory vote of the Commons, which most probably prevented all argument on the subject. *Hargrave.*]

542. Proceedings in the Case of JOHN WILKES, esq. on two Informations for Libels, King's-Bench and House of Lords; 4 GEORGE III.—10 GEORGE III. A. D. 1763—1770.

[This Case is wholly extracted from sir James Burrow's Reports. 4 Burr. 2527.]

Wednesday, February 7, 1770.

AS this cause, in the several branches of it, came several times before the Court, it seemed better to reserve a general account of it till a final conclusion of the whole, than to report the particular parts of it disjointedly, in order of time as they were respectively argued and determined.

In Michaelmas Term 1763, the 4th year of his present majesty king George the 3d, sir Fletcher Norton, then his majesty's solicitor-general, (the office of attorney-general being then vacant,) exhibited an information against Mr. Wilkes, for having published, and caused to be printed and published a seditious and scandalous libel (the North Briton, N° 45.)

And soon after, he exhibited another information against him, (the office of attorney-general still remaining vacant,) for having printed and published, and caused to be printed and published, an obscene and impious libel (an Essay on Woman, &c.)

Mr. Wilkes having pleaded Not Guilty to both these informations, and the records being made up and sealed, and the causes * ready for trial, the counsel for the crown thought it expedient to amend them, by striking out the word 'purport,' and in its place inserting the word 'tenor.' The proposed amendments were all those parts of the information where the charge was, that the libel printed and published by Mr. Wilkes contained matters 'to the purport and effect following, to wit:' which the counsel for the crown thought it advisable to alter into words importing that such libel contained matters 'to the tenor and effect following, to wit.'

Sir Fletcher Norton (then become himself attorney-general) directed Mr. Barlow, clerk in court for the crown, to apply to a judge for such an order; apprehending it (as he afterwards publicly declared) to be a matter of course.

Mr. Barlow, in pursuance of these directions, applied to lord Mansfield, for a summons to shew cause 'why such amendment should not be made.' And his lordship issued a summons in each cause, dated 18th of February, 1764, for the defendant's clerk in court, agent, attorney or solicitor, to attend him at his house in Bloomsbury-square on Monday the 20th of February at eight o'clock in the morning; to shew cause why the information should not be amended, by striking out the word 'purport,' in the several places where it is mentioned in the said information, and inserting instead thereof the word 'tenor.' N. B. The summons in the cause relating to the seditious libel excepted the first place—'except in the first place.'

On notice of this summons, Mr. Philips, agent and solicitor for Mr. Wilkes, and Mr. Hughes his clerk in court, and attorney for him upon the record, both attended his lordship, at his own house, upon the said 20th of February 1764, accordingly, (being now vacation time, and no court sitting;) and did not

* They were tried on the 21st of February, 64.

CORY, appellant, v. CARTER.

(43 Ind. 327.)

Constitutional law—separate schools for colored children.

The constitution of Indiana provided that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," and it is made the duty of the general assembly to "provide by law for a general and uniform system of common schools * * equally open to all." The legislature passed a statute establishing separate schools for colored children, having all the rights and privileges of other schools. *Held*, not in violation of the constitution of the State, nor of the United States.*

THIS was a proceeding by mandate, on the part of the appellee against the appellants. The appellee, in his petition, alleged that he was a citizen of the State of Indiana, and resided in school district number two, in Lawrence township, Marion county, in the said State, and was a tax payer therein; that he was the father of two children, Mary and Edward Carter, and the grandfather of Lucy and John Carter, all of whom resided with him; that he was a negro of African descent, and that his said children and grandchildren were all negroes of the full blood and of the same descent: that his children and grandchildren were respectively of the age that entitled them to the benefits of the common schools in the said district; that there was a common school for white children in progress in said district, and that his said children and grandchildren presented themselves at the school-house in said district, and demanded admission and to be taught therein with the white children, but were refused admittance by the appellants Bever and Craig, the director and teacher of said school, for the reason that the said school was a school for white children, and not for negro children; that, after the refusal aforesaid, he caused to be served upon the appellants a written request and demand that his said children and grandchildren should be received and taught in the said school with the white children of said district, but they were refused admission solely upon the ground that they were negroes; that said

* See *Ward v. Flood*, *ante*, 605.

appellants and all other persons have wholly neglected, failed, and refused, and still neglect, fail, and refuse, to provide any school in said district, or in any adjoining district, near enough for said children or grandchildren to attend as scholars; and that by reason of the premises his said children and grandchildren are denied all opportunity to attend any school in said district or elsewhere in the neighborhood, as in right and law they are entitled to do.

There is no allegation that the trustee of said school district number two had failed or refused to provide the means of education for such children within the district, outside of the said school for white children, to the extent of their proportion, according to number of the school revenues of the said district.

The aid of the court was requested to declare the right of admission of said negro children into the school for white children, and to compel the appellants to admit them.

An alternate writ was issued against the appellants, requiring them to admit such children into the school in said district for white children, or appear and show cause why they should not so admit such children.

The appellants appeared and filed separate demurrers to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, but the demurrers were overruled; and the appellants refusing to plead further, but electing to stand by their exceptions to the rulings of the court, the court gave judgment for a peremptory writ of mandate.

The appellants appealed to the General Term, where the judgment of the Special Term was affirmed.

The error assigned is, that the Superior Court, in General Term, erred in affirming the judgment of the court in Special Term.

N. B. Taylor, *F. Rand* and *E. Taylor*, for appellant.

J. W. Gorden, *T. M. Browne* and *R. N. Lamb*, for appellee.

BUSKIRK, J. The question presented for our decision is, whether the court below erred in overruling the demurrer to the complaint, the correct solution of which will depend upon the proper construction to be placed upon the constitution and statutes of this State and the constitution of the United States; and as preliminary to the consideration of the grave constitutional questions

arising in the record, we proceed to inquire what provisions the legislature has made for the education of the white and colored children of the State.

The act of March 6th, 1865, provided for the annual assessment and collection of a tax on the property, real and personal, in the State (except that owned by negroes and mulattoes), for supporting a general system of common schools in the State. It provided for the enumeration each year of the white children within the respective townships, towns, and cities in the State, between the ages of six and twenty-one years, exclusive of married persons. It provided the officers and agencies for the system, the mode and means of carrying it on, for locating and establishing schools, and carrying them on, for building school-houses, and employing teachers, etc. It was essentially white — none but white children between the named ages, and who were unmarried, were entitled to its privileges. 3 Ind. Stat. 440–472; *Draper v. Cambridge*, 20 Ind. 268.

At the session of the legislature of this State next after the ratification of the fourteenth amendment to the constitution of the United States, an act was passed by the general assembly of this State, entitled "an act to render taxation for common school purposes uniform, and to provide for the education of the colored children of the State," which was approved May 13th, 1869, and is as follows:

"Section 1. Be it enacted by the general assembly of the State of Indiana, that in assessing and collecting taxes for school purposes under existing laws, all property, real and personal, subject to taxation for State and county purposes, shall be taxed for the support of common schools without regard to the race or color of the owner of the property.

"Sec. 2. All children of the proper age, without regard to the race or color, shall hereafter be included in the enumeration of the children of the respective school districts, townships, towns and cities of this State for school purposes; but in making such enumeration the officers charged by law with that duty shall enumerate the colored children of proper age, who may reside in any school district, in a separate and distinct list from that in which the other school children of such school district shall be enumerated.

"Sec. 3. The trustee or trustees of each township, town or city, shall organize the colored children into separate schools, having all the rights and privileges of other schools of the township: Provided,

there are not a sufficient number within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated, the trustee or trustees shall provide such other means of education for said children as shall use their proportion, according to numbers, of school revenue to the best advantage.

"Sec. 4. All laws relative to school matters, not inconsistent with this act, shall be deemed applicable to colored schools.

"Sec. 5. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage." 3 Ind. Stat. 472.

Prior to the passage of such act, the assessment of taxes for school purposes had been confined to the property of white persons. The first section provided for the levy and collection of a tax for school purposes upon all property within the State subject to taxation, without regard to the race or color of the owner.

The second section adds to the enumeration directed in section 14 of the act of March 6th, 1865, all colored children of the proper age, within the State, and directs them to be enumerated at the same time with the white children, but in a separate list or class from that the white children are enumerated.

The third section commands the trustees of each township, town, or city in the State, to organize the colored children therein into separate schools, with all the rights and privileges of white schools in the particular township, town, or city. But if the number of colored children within attending distance are not sufficient to organize a school, the trustees may consolidate several districts into one, for that purpose. And if the number of colored children within reasonable attending distance are not sufficient to be thus consolidated, the trustees shall provide such other means of education for such colored children as shall use their proportion, according to numbers, of the school revenue to the best advantage.

The fourth section makes all laws relative to school matters, not inconsistent with the provisions of the act, applicable to colored schools.

It is, in the first place, claimed that the act of May 13th, 1869, is in conflict with section 19 of article 4 of our constitution, which provides, that every act shall "embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

We think the subject of the act is common schools, and that the taxation of the property of all persons for school purposes, and the enumeration of, and providing schools for, the colored children of the State, are properly connected with the subject of the act. We have so frequently placed a construction upon the above quoted section, that we do not deem it necessary to re-examine the question. We cite the late case of *The State ex rel. Pitman* v. *Tucker*, 46 Ind. 355, where many of the cases are cited.

It is very plain and obvious to us, that by the supplemental act of May 13th, 1869, the legislature has provided for the education of the white and colored children of the State in separate schools, and the question presented for our decision is, whether such legislation is in conflict with the constitution of this State, or the constitution of the United States.

It is contended that the act in question is repugnant to section 23 of article 1, and section 1 of article 8, and they are: "Section 23. The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." 1 G. & H. 33.

Section 1, article 8 (1 G. & H. 48), declares, that "knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all."

It is important that we should settle in advance the rules by which we are to be guided in placing a construction upon the constitutional provisions above quoted.

In *The State* v. *Gibson*, 36 Ind. 389, we held that it was settled by very high authority, that, in placing a construction upon a written constitution, or any clause or part thereof, a court should look to the history of the times, and examine the state of things existing when the constitution, or any part thereof, was framed and adopted, to ascertain the old law, the mischief, and the remedy. The court should also look to the nature and object of the particular powers, duties, and rights in question, with all the aids and lights of cotemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning,

as will fairly secure the end proposed. *Kendall* v. *The United States*, 12 Peters, 524; *Prigg* v. *The Commonwealth of Pennsylvania*, 16 id. 539.

In the *Slaughter-House Cases*, 16 Wall. 36, the same rules were laid down and illustrated with great force by reference to the history of the times and condition of things which brought about the recent amendments to the constitution of the United States.

Judge COOLEY, in his great work on Constitutional Limitations, on page 54, says: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced by temporary excitements and passions among the people to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such

changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

Again, the learned author says: "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the law-giver that is to be enforced."

Another cardinal rule of construction laid down by this author is, that the whole instrument is to be examined in placing a construction upon any portion or clause thereof. He says:

"Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a rule of construction, that the whole is to be examined with a view to arriving at the true intention of each part; and this Sir Edward Coke regards the most natural and genuine method of expounding a statute. 'If any section [of a law] be intricate, obscure or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.' And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.

"This rule is especially applicable to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justifiable in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another, so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

In support of the above propositions, reference is made in the notes to the following authorities: *The People* v. *Morrell*, 21 Wend. 563; *Newell* v. *The People*, 7 N. Y. 109; *McKoan* v. *De Vries*, 3 Barb. 196; *The People* v. *Blodgett*, 13 Mich. 138; *United States* v. *Fisher*, 2 Cranch, 399; *Busley* v. *Mattingly*, 14 B. Mon. 89; *Sturges* v. *Crowninshield*, 4 Wheat. 202; *Schooner Paulina's Cargo* v. *United States*, 7 Cranch, 60; *Ogden* v. *Strong*, 2 Paine's C. C. 584; *United States* v. *Ragsdale*, Hemp. 497; *Southwark Bank* v. *The Commonwealth*, 26 Penn. St. 446; *Ingalls* v. *Cols*, 47 Me. 530; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Furman* v. *City of New York*, 5 Sandf. 16; *The People* v. *The New York Central R. R. Co.*, 24 N. Y. 492; *Bidwell* v. *Whitaker*, 1 Mich. 479; *Alexander* v. *Worthington*, 5 Md. 471; *Cantwell* v. *Owens*, 14 id. 215; *Case* v. *Wildridge*, 4 Ind. 51; *Pitman* v. *Flint*, 10 Pick. 504; *Ludlow* v. *Johnson*, 3 Ohio, 553; *District Township* v. *The City of Dubuque*, 7 Iowa, 262; *Pattison* v. *Board, etc.*, 13 Cal. 175; *Spencer* v. *The State*, 5 Ind. 41; *Denn* v. *Reid*, 10 Pet. 524; *Greencastle Township, etc.*, v. *Black*, 5 Ind. 569; *Stowell* v. *Lord Zouch*, Plow. 365; Broom's Leg. Max. (5th Am. ed.), 551; Co. Litt. 381, *a*; *Attorney-General* v. *Detroit, etc.*, *Plank Road Co.*, 2 Mich. 138; *The People* v. *Burns*, 5 id. 114; *Manly* v. *The State*, 7 Md. 135; *Parkinson* v. *The State*, 14 id. 184; *The Belleville, etc., R. R. Co.* v. *Gregory*, 15 Ill. 20; *Ryegate* v. *Wardsboro*, 30 Vt. 746; *Brooks* v. *Mobile School Commissioners*, 31 Ala. 229; *Den* v. *Dubois*, 1 Harr. 285; *Den* v. *Schenck*, 3 Halst. 34; *Wolcott* v. *Wigton*, 7 Ind. 44; *The People* v. *Purdy*, 2 Hill (N. Y.), 36; *Green* v. *Weller*, 32 Miss. 650; *Warren* v. *Shuman*, 5 Texas, 441; *Quick* v. *White Water Township*, 7 Ind. 570; *Gibbons* v. *Ogden*, 9 Wheat. 188; Smith's Const. Construc., §§ 502, 503; Sedgw. Stat. Law, 229, 233, 251 and 252.

An examination of the above authorities shows that they are in point, and fully support the doctrines announced.

It is essential to a correct interpretation of the above provisions of our constitution, in the light of the above rules of construction, that we should look to the history of the times and examine the condition of things existing prior to, and at the time of, the adoption and ratification of our present State constitution, and compare the sections in question with other portions and clauses of such constitution.

(The learned judge here proceeded to consider the political condition of the negroes in the State prior to the thirteenth, fourteenth and fifteenth amendments to the constitution of the United States.)

In the light of the foregoing history, constitutional provisions, legislative acts, and judicial constructions thereof, it is very plain and obvious to us that persons of the African race were not in the minds or contemplation of the wise and thoughtful framers of our constitution, when they prepared and agreed upon the above quoted sections, or of the people of the State when they ratified and adopted the constitution containing such provisions.

In our opinion, the privileges and immunities secured by section 23 of article 1 were not intended for persons of the African race; for the section expressly limits the enjoyment of such privileges and immunities to citizens, and at that time negroes were neither citizens of the United States nor of this State. It was held by this court, in *Sears* v. *The Board of Commissioners of Warren County*, 36 Ind. 267, that the privileges and immunities secured by the above-quoted section were intended for citizens of this State.

Nor in view of the other provisions of our constitution, and in the light of the rules of construction before stated, can it be successfully maintained that the provisions of section 1 of article 8 were intended for the children of the African race. It is unreasonable to suppose that the framers of the constitution, who had denied to that race the right of citizenship, of suffrage, of holding office, of serving on juries, and of testifying as witnesses in any case where a white person was a party, and had prohibited, under heavy pains and penalties, the further immigration of that race into the State, intended to provide for the education of the children of that race in our common schools with the white children of the State.

The public sentiment of the State, at that time, was unfriendly to the African race and their participation in governmental affairs, and demanded their exclusion from the State; and it is not for us to say, sitting here, whether such policy was wise or unwise, and we speak of it only as a matter of history having a bearing upon the construction of our constitution.

An application of the rules of construction heretofore laid down to the various provisions of our constitution will conclusively demonstrate that the provisions of the sections under examination have no application to the children and grand-children of the appellee.

One of the cardinal rules of construction is, that courts shall give effect to the intent of the framers of the instrument and of the people in adopting it. Then, as it is manifest that neither the framers of the constitution nor the people in adopting it intended that the children of the African race should participate in the advantages of a general and uniform system of common schools, we possess no power to adjudge to them what was not designed for them.

Another rule of construction is, that in placing a construction upon one section or clause, courts are required to examine the whole instrument and to give effect, if possible, to the whole instrument; and if different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. There is but one construction which will preserve the unity, harmony, and consistency of our State constitution, and that is, to hold that it was made and adopted by and for the exclusive use and enjoyment of the white race. Any other construction would convict the members of the constitutional convention and the voters of the State of the grossest inconsistency, absurdity, and injustice. It would be monstrous to hold that the framers of the constitution in adopting, and the voters of the State in ratifying it, intended that the common schools of the State should be open to the children of the African race, when, by the same instrument, that portion of such race as then resided in the State were denied all political rights, privileges, and immunities, and the further immigration of that race into the State was prohibited by the thirteenth article of the constitution, which received the almost unanimous approval of the voters of the State.

Another important rule of construction is, that the meaning of a constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. A constitution is inflexible and cannot bend to circumstances or be modified by public opinion. It is, therefore, the duty of the court to declare the law as it is written, leaving to the people, in their sovereign capacity, to make such changes as new circumstances may require; and, in our opinion, using the appropriate and forcible language of Judge COOLEY, "a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention

its founders, would be justly chargeable with reckless disregard official oath and public duty."

The views which we have expressed are greatly strengthened and nforced by the construction which this court placed upon a sec- on of the constitution of 1816, and of an act passed while it was force.

Section 1 of article 9 declares that "knowledge and learning, enerally diffused through a community, being essential to the reservation of a free government, and spreading the opportuni- es and advantages of education through the various parts of the ountry, being highly conducive to this end," etc., "the general ssembly shall, from time to time, pass such laws as shall be cal- ulated to encourage intellectual, scientifical, and agricultural im- rovement, by allowing rewards and immunities for the promotion nd improvement of arts, sciences, commerce, manufactures, and atural history; and to countenance and encourage the principles humanity, industry, and morality."

Section 2 of said article provided, that "it shall be the duty of he general assembly, as soon as circumstances will permit, to rovide by law for a general system of education ascending in a gular gradation from township schools to a State university, herein tuition shall be gratis, and equally open to all." R. S. 836, pp. 48, 49.

While the above constitution was in force, the legislature pro- ided for a general common school system, the 102d section of hich act was as follows:

"When any school is supported in any degree by the public chool fund, or by taxation, so long as the money so derived shall e expending thereon, such school shall be open and free to all the hite children resident within the district, over five and under wenty-one years of age." Chap. 15, R. S. 1843, p 321.

In the case of *Lewis* v. *Henely*, 2 Ind. 332, this court was re- uired to place a construction upon the above-quoted section, and t was held that negro children were not entitled to admission to he schools with the white children, and that the legislature had he right, under the constitution, to exclude negro children from ur public schools. It was further held that, although the egroes might be entitled to share in the funds derived from the ale of lands donated by congress, yet they would have to do so in eparate schools, and not in schools with white children.

Both constitutions provided for a general and uniform system of common schools; both provided that the tuition should be free and the schools equally open to all. Both constitutions deprived the negroes of all political rights. If the legislature, under the con stitution of 1816, had the right to exclude the negroes from the public shools for white children, it is difficult to see why it may not be done under the present constitution.

Having reached the true construction of the constitution of this State, as it came from the hands of its farmers and received the sanction of her qualified voters, the next step is to find out the extent of its qualification or change by the constitution of the United States.

Section 2 of article 4 of the constitution of the United States declares, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

This section, at an early date, received a construction in the case of *Corfield* v. *Coryell*, which has ever since been recognized and approved. It relates only to "those privileges and immunities which are fundamental," and which may all be comprehended under the following 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."

In the *Slaughter-House Cases*, the Supreme Court of the United States said: "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 did not compel the State into which the citizens of another State removed, to allow him the exercise of the same rights which he enjoyed in the State from which he removed. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Slaughter-House Cases*, 16 Wall. 76, 77; *Bradwell* v. *The State*, id. 130; *Ward* v. *Maryland*, 12 id. 430; *Conner* v. *Elliott*, 18 How. 591; *Brown* v. *State of Maryland*, 12 Wheat. 448, 449; *People* v. *Brady*, 40 Cal. 198; Story on Const., §§ 1805, 1806; Cooley's Const. Lim. 15, 16, 397; Potter's Dwarris on Stat. 525, 526; *Sears* v. *The Board, etc.*, 36 Ind. 267; *The Louisville, etc., Railroad Co.* v. *Hendricks*, 41 id. 48

It is well settled by repeated decisions of the Federal and State courts, that with the exception of the limitations imposed upon the powers of the States by section 10 of article 1 of the constitution of the United States, the several States were left as before the Federal Union was formed, with full powers to declare the rights of their itizens, without interference from the Federal government.

It is a familiar rule of construction of the constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. In one of the States of the Union, colored children were entitled to admission into schools for white children, and to be taught with white children, and yet, if a person residing in such State should remove into some other State, where such right is denied, the right so exercised in the State from which the person removed would be lost, because it was not one of those fundamental rights which accompany the person, but a domestic regulation exclusively within the constitutional and legislative power of each State, and to be regarded in the nature of a domestic regulation necessary for the good of the whole people, or which the good of the people of one State, in their sovereign judgment, required to be different from the regulation in another, as best securing "the general comfort and prosperity of the State." Story on Const., §§ 1353, 1409; Cooley's Const. Lim. 573, 574; 2 Kent's Com. 71; 2 Op. Att'y-Gen. 426; *Commonwealth* v. *Alger*, 7 Cush. 84; *The City of New York* v. *Miln*, 11 Pet. 139; *Slaughter-House Cases*, 16 Wall. 62; *Bradwell* v. *The State*, id. 130; *Thayer* v. *Hedges*, 22 Ind. 282; Potter's Dwarris on Stat. 352, 452, 455, 461.

It is very plain that the tenth amendment of the constitution of the United States cannot receive such construction as will aid the claim of the appellee. It declares, 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;" and the power to fix the qualifications of the citizen of the State, and to establish his rights in the State, is one of the powers expressly reserved to the State by this amendment; for there is no express limitation of the power of the States in the Federal constitution in this respect, as it then stood, and such limitation could not exist without express mention. Rawle on Const. 84, 87; Story on Const., § 1904; Works of Webster, vol. 3, p. 322; Cooley's Const. Lim. 19;

Federalist, 140; *Slaughter-House Cases*, 16 Wall. 70, 71, 72, 73; *Barron* v. *Mayor, etc.*, 7 Pet. 243; *Smith* v. *State of Maryland*, 18 How. 71; *Pervear* v. *The Commonwealth*, 5 Wall. 475; *Barker* v. *The People*, 2 Cow. 686; *James* v. *The Commonwealth*, 12 S. & R. 220; *Jane* v. *Commonwealth*, 3 Metc. (Ky.) 18; *Lincoln* v. *Smith*, 27 Vt. 336; *Warren* v. *Paul*, 22 Ind. 276; *The State ex rel. Lakey* v. *Garton*, 32 id. 1.

That the views hereinbefore expressed correctly represent the relative powers of the Federal and State governments at the close of the great civil war, and until after the ratification of the amendments to the constitution of the United States, which followed the termination of that contest, cannot, we think, be successfully controverted.

We next proceed to determine whether such amendments, or either of them, have worked a change, and, if they have, to what extent.

The thirteenth amendment was proposed by congress on the 1st day of February, 1865, and declared by the secretary of state to have been ratified December 18, 1865. It declares that "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;" and "congress shall have power to enforce this article by appropriate legislation." 3 Ind. Stat. 579.

This amendment was to prevent any question in the future as to the effect of the war and the president's proclamation of emancipation upon slavery, and its obvious purpose was to forbid all shades and conditions of African slavery. *Slaughter-House Cases*, 16 Wall. 68, 69.

It had no other office, and its real effect was more for the future than the present. As to the matter of social and political rights, the African was left just where section 37, article 1 of our State constitution left him, and subject to all the inconveniences and burdens incident to his color and race, except his former one of servitude. He was a person whose place and office, in the body politic, was yet to be designated and established. He possessed no political rights, in the usual and proper sense of that term, through, or had none conferred by, this enactment.

Following this constitutional amendment, the civil rights bill of April 9, 1866, was enacted by congress, the first section of which

clares who are citizens of the United States, and specifies certain
·hts which shall be accorded to such citizens in the States and
·rritories, and the residue is made up of pains and penalties for
·lation of the rights sought to be conferred, and the machinery
· enforcing its provisions.

It is not worth while to inquire into the effect of this act, or
·ether the Federal constitution, which made citizens of the differ-
t States citizens of the United States, could be changed by a
nple congressional enactment; for it is clear, admitting it to be
lid, that it does not relate to or bear upon the right claimed in
is case, for it purports only to confer upon negroes and mulattoes
· right, in every State and Territory, to make and enforce con-
·cts, to sue, be parties and give evidence, to inherit, purchase,
·se, sell, hold and convey real and personal property, and the full
·l equal benefit of all laws and proceedings for the security of
rson and property as enjoyed by white citizens, and subjects them
like pains and penalties. 3 Ind. Stat. 589. In this nothing is
·t to inference. Every right intended is specified.

The fourteenth amendment to the Federal constitution was pro-
·sed by congress July 16, 1866, and declared by the secretary of
·te to have been ratified July 28, 1868. It consists of several sec-
·ns, but section 1 is the only one necessary to this examination.
declares, that "all persons born or naturalized in the United
·ates, and subject to the jurisdiction thereof, are citizens of the
nited States and of the State wherein they reside. No State shall
·ke or enforce any law which shall abridge the privileges or im-
unities of citizens of the United States; nor shall any State deprive
·y person of life, liberty or property without due process of law,
·r deny to any person within its jurisdiction the equal protection
the laws."

This section can better be understood or construed, by dividing
·d considering it in four paragraphs or clauses, the last, however,
·ing a mere re-statement of what precedes it:

First. "All persons born or naturalized in the United States,
·d subject to the jurisdiction thereof, are citizens of the United
·tates and of the State wherein they reside."

In the *Slaughter-House Cases*, the Supreme Court of the United
tates say, this is a declaration "that persons may be citizens of the
nited States without regard to their citizenship of a particular State
·d 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 admit 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." It recognizes and establishes a "distinction between citizenship of the United States and citizenship of a State." "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." Hence, a negro may be a citizen of the United States and reside without its territorial limits, or within some of the Territories; but he cannot be a citizen of a State until he becomes a *bona fide* resident of the State.

Second. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This clause does not refer to citizens of the States. It embraces only citizens of the United States. It leaves out the words "citizen of the State," which is so carefully used, and used in contradistinction to citizens of the United States, in the preceding sentence. It places the privileges and immunities of citizens of the United States under the protection of the Federal constitution, and leaves the privileges and immunities of citizens of a State under the protection of the State constitution. This is fully shown by the recent decision of the Supreme Court of the United States in the *Slaughter-House Cases*, 16 Wall. 36.

Mr. Justice MILLER, in delivering the opinion of the court and in speaking in reference to the clause under examination, says:

"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 word "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.

is too clear for argument that the change in phraseology was lopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United ates, and of the privileges and immunities of the citizen of the tate, and what they respectfully are, we will presently consider; it we wish to state here that it is only the former which are placed this clause under the protection of the Federal constitution, nd that the latter, whatever they may be, are not intended to ave any additional protection by this paragraph of the amendent.

f, then, there is a difference between the privileges and imunities belonging to a citizen of the United States as such, and hose belonging to the citizen of the State as such, the latter must est for their security and protection where they have heretofore ested; for they are not embraced by this paragraph of the amendnent."

The same learned judge, in the further examination of the second lause, says:

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent mendments, no claim or pretense was set up that those rights lepended on the Federal government for their existence or protecion, 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 privi- 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 fourteenth 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 proposition of the plain-

tiffs 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 legislative power of 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" (these judgments sustained the validity of the grant, by the legislature of Louisiana, of an exclusive right, guarded by certain limitations as to price, etc., to a corporation created by it, for twenty-five years, to build and maintain slaughter-houses, etc., and prohibited the right to all others, within a certain locality), "would constitute this court a perpetual censor upon all legal 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."

Third. "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

This clause is the same contained in the fifth amendment to the constitution of the United States, but there applied to the action of the Federal government, and here placed as a check upon the States. But the constitution of our State contains, and per

haps those of all the States contain just such a provision, so that it expresses no new principle, but is the old rule in force since the foundation of the State governments. It prohibits the States from depriving any person of life, liberty, or property, except "in due course of legal proceedings, according to those rules and forms which have been established" by the State, "for the protection of private rights." Cooley's Const. Lim. 356, 357; *Westervelt* v. *Gregg*, 12 N. Y. 209.

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

In regard to this clause, the Supreme Court of this State, in *The State* v. *Gibson*, 36 Ind. 389, says, it "seems to have been added in the abundance of caution, for it provides in express terms what was the fair, logical, and just implication from what had preceded it, and that was, that the persons made citizens by the amendment should be protected by the laws in the same manner, and to the same extent, that white citizens were protected."

In the case of *The State* v. *Gibson, supra*, this court was called upon to place a construction upon the fourteenth amendment to the constitution of the United States. It was claimed in that case, that such amendment had abolished the laws of this State prohibiting the intermarriage of negroes and whites. We held that marriage was a purely domestic institution, and subject to the exclusive control of the State; that such amendment had not conferred on the Federal government any power to interfere with the institution of marriage, and that such amendment had not enlarged the powers of the Federal government nor diminished those of the States. We then said:

"The fourteenth amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the Federal government. It did not enlarge the powers of the Federal government, nor diminish those of the States. The inhibitions against the States doing certain things have no force or effect. They do not prohibit the States from doing any act that they could have done without them. * * * The only effect of the amendment under consideration was to extend the protection and blessings of the constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the constitution and the laws as were the white citizens, and the States could no more deprive them of

privileges and immunities than they could citizens of the white race. Citizenship entitled them to the protection of life, liberty, and property, and the full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened, or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the national government from its creation."

What was then intended to be expressed was, that the fourteenth amendment had not delegated to the Federal government the power to regulate and control the domestic institutions of a State. As will be hereinafter shown, it imposes some limitations upon the powers of the States as to slavery and the equal protection of the rights of citizens of the United States and of the States.

We were then unaided by any judicial construction of the fourteenth amendment; and we are gratified to know that the views then expressed have been, in all substantial respects, sustained by the highest judicial tribunal in this country, and the one especially charged with the construction and interpretation of the Federal constitution. By the solemn decision of that high court, the privileges and immunities belonging to the citizens of the States, as such, rest for their security and protection where they have heretofore rested, with the States themselves.

In *The State ex rel. Garnes* v. *McCann*, 21 Ohio, 198, the Supreme Court of that State use the following language:

"It would seem, then, that under the constitution and laws of this State, the right to classify the youth of the State for school purposes, on the basis of color, and to assign them to separate schools for education, both upon well-recognized legal principles and the repeated adjudications of this court, is too firmly established to be now judicially disturbed.

"But it is claimed that the law authorizing the classification in question contravenes the provisions of the fourteenth amendment of the constitution of the United States, and is, therefore, abrogated thereby.

"Unquestionably all doubts, wheresoever they existed, as to the citizenship of colored persons, and their right to the 'equal protection of the laws,' are settled by this amendment. But neither of these was denied to them in this State before the adoption of the amendment. At all events, the statutes classifying the youth of the State for school purposes on the basis of color

d the decisions of this court in relation thereto, were not at all sed on a denial that colored persons were citizens, or that they e entitled to the equal protection of the laws. It would seem, en, that these provisions of the amendment contain nothing con- cting with the statute authorizing the classification in question, r the decisions heretofore made touching the point in controversy this case. Nor do we understand that the contrary is claimed counsel in this case. But the clause relied on, in behalf o the aintiff, is that which forbids any State to 'make or enforce any w which will abridge the privileges or immunities of citizens of e United States.'

"This involves the inquiry as to what privileges or immunities e embraced in the inhibition of this clause. We are not aware at this has been as yet judicially settled. The language of the ause, however, taken in connection with other provisions of the nendment, and of the constitution of which it forms a part, fords strong reasons for believing that it includes only such privi- ges or immunities as are derived from, or recognized by, the con- itution of the United States.

"A broader interpretation opens into a field of conjecture limit- ss as the range of speculative theories, and might work such mitations of the power of the States to manage and regulate their cal institutions and affairs as were never contemplated by the mendment.

"If this construction be correct, the clause has no application this case, for all the privileges of the school system of this State re derived solely from the constitution and laws of the State. If e general assembly should pass a law repealing all laws creating nd regulating the system, it cannot be claimed that the fourteenth mendment could be interposed to prevent so grievous an abridg- ment of the privileges of the citizens of the State, for they would hereby be deprived of privileges derived from the State, and not f privileges derived from the United States.

"But we need not now further discuss this point, as the true eaning and exact limits of the clause in question are not necessa- ily involved in this case. For, conceding that the fourteenth mendment not only provides equal securities for all, but guaran- es equality of rights to the citizens of a State, as one of the privi- eges of citizens of the United States, it remains to be seen whether his privilege has been abridged in the case before us. The law in

question surely does not attempt to deprive colored persons of any rights. On the contrary, it recognizes their right, under the constitution of the State, to equal common-school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. At all events, the legislative action is conclusive, unless it clearly infringes the provisions of the constitution.

"At most, the fourteenth amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this State, that a classification of the youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State.

"We have seen that the law, in the case before us, works no substantial inequality of school privileges between the children of both classes in the locality of the parties. Under the lawful regulation of equal educational privileges, the children of each class are required to attend the school provided for them, and to which they are assigned by those having the lawful official control of all.

"The plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages, is not prohibited by either the State or Federal constitution, nor would it contravene the provisions of

either. There is, then, no ground upon which the plaintiff can claim that his rights, under the fourteenth amendment, have been infringed."

The foregoing opinion, having been rendered since the ratification of the fourteenth amendment, is directly in point, and is entitled to great weight and consideration, coming as it does from a court distinguished for its learning and ability.

How far, then, have the amendments operated to change the constitution of Indiana, or imposed limitations or restrictions upon the sovereign power of the State? We answer, in the following particulars:

1. The State cannot, in the future, while a member of the Federal Union, change her constitution so as to create or establish slavery or involuntary servitude, except as a punishment for crimes whereof the party shall have been convicted, thus protecting the new class of citizens, *i. e.*, negroes and mulattoes, from being again reduced to slavery.

2. The State cannot deny to, or deprive a citizen of the United States, *i. e.*, any negro or mulatto, of those national rights, privileges or immunities which belong to him as such citizen.

3. The State must recognize as its citizen any citizen of the United States, *i. e.*, any negro or mulatto, who is, or becomes, a *bona fide* resident therein.

4. The State must give to such, *i. e.*, to such negro or mulatto, who is, or who becomes, a *bona fide* resident therein, the same rights, privileges and immunities, secured by her constitution and laws to her other, *i. e.*, to her white citizens.

In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results, that there is no limitation upon the power of the State, within the limits of her own constitution, to fix, secure and protect the rights, privileges and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity and happiness.

This will preserve in their purity and vigor the structure and spirit of our complex system of government, as it came from the hands of the great and illustrious men who achieved our independence and formed our matchless form of government. Anterior to the adoption of the Federal constitution, the States existed as independent sovereignties, possessing supreme and absolute power over

all questions of local and internal government. To the States the whole charge of interior regulation is left by the Federal constitution; to them and to the people thereof all powers not expressly, or by necessary implication, delegated to the national government, and not prohibited to the States, are reserved to the States.

The constitution of the United States is the bond which binds the States in one Federal Union. It forms and provides the agencies for the continuance and management of the Federal government. It relates to and concerns matters of national import, and enables the States represented by their Federal head, as one of the independent and most powerful governments of the world, to enter into and manage its relations with the other independent powers of the earth. Under our constitution, our common-school system must be general. That is, it must extend over and embrace every portion of the State.

It must be uniform. The uniformity required has reference to the mode of government and discipline, the branches of learning taught, and the qualifications as to age and advancement in learning required of pupils as conditions of their admission. It does not mean that all the schools shall be of the same size and grade, or that all the branches of learning taught in one school shall be taught in all other schools, or that the qualifications as to age and advancement, which would admit a pupil in one school, would entitle such pupil to admission into all the other schools. Uniformity will be secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission.

The schools must be "equally open to all." This has reference to the persons who are entitled to receive instruction therein. The phrase "equally open to all," is not to be taken in a literal sense, for this would embrace the whole people of the State, the infant, the middle-aged, the septuagenarian and the married.

It is very obvious, that the common schools of the State are neither to be equally open to everybody, nor to every child; but that they are to be equally open to a class of persons, which class and their qualifications are to be designated and prescribed by the legislature.

The Federal constitution does not provide for any general system of education, to be conducted and controlled by the national government, nor does it vest in congress any power to exercise a general or special supervision over the States on the subject of educa-

tion. The constitution gives to congress the power to dispose of a.. make all needful rules and regulations respecting the Territories and other property belonging to the United States, and by virtue of this power territorial governments are organized. It also confers on congress the exclusive power to legislate in all cases whatever over the District of Columbia, and by virtue of this power congress has established in such district a system of common schools. Congress has also established and maintained military and naval schools at the expense of the government.

The system of common schools in this State has its origin in, and is provided for by the constitution and laws of this State. It is purely a domestic institution, and is subject to the exclusive control of the constituted authorities of the State. The constitution does not provide the machinery, nor lay down its rule of government or discipline, nor define the terms and conditions of admission. It makes it the imperative duty of the legislature to provide by law the system, and imposes no limitations on the power of the legislature, except that tuition shall be free, and the schools shall be equally open to all; that is, to such classes of persons as the legislature may in its wisdom determine.

There being no further restriction upon the legislative power and discretion, it necessarily follows, that in providing for this system of schools, the legislature is left free to fix the qualifications of pupils to be admitted to its benefits, as respects age and capacity to learn; to classify them with reference to age, sex, advancement and the branches of learning they are to pursue; to provide for the location and building of school-houses; and to designate to what schools and in what school-houses the different ages, sexes and degrees of proficiency shall be assigned; for these all concern the good order and success of the system.

It must also follow, that this policy or framework of government for that system vitally concerns and blends itself with the internal affairs of the State, with its happiness and prosperity, its peace and good order, and depends upon the wisdom of the legislature and of the agencies provided by the legislature, acting under its established rules, and comes within the power possessed by every sovereign State, and is clearly without the grants or inhibitions of such amendments to the constitution of the United States. *City of New York* v. *Miln*, 11 Pet. 139, 140; *License Tax Cases*, 5 Wall. 470, 471; *Lane County* v. *Oregon*, 7 id. 76; *United States* v. *Dewitt*, 9 id. 41; *The Collector* v. *Day*, 11 id. 124, 125; *The Slaughter-House Cases, supra; Bartmeyer* v. *Iowa*, 18 id. 133; *The State* v. *Gibson*, 36 Ind. 389; *The West Chester, etc., R. R. Co.* v. *Miles*, 55 Penn. St. 209; Cooley's Const. Lim. 572, 574; *Ellis* v. *The State*, 42 Ala. 525; *Fifield* v. *Close*, 15 Mich. 505.

This system of common schools must consist of many schools in different localities or geographical divisions; and these schools may be of different grades. In some of these localities or divisions there may be school-houses, and in others none. In some the school-house or houses may not be sufficient to accommodate all, and the revenue may not be sufficient to provide for them.

In this system, there ought to be and must be a classification of the children. This classification ought to and will be with reference to some properties or characteristics common to or possessed by a certain number out of the whole; and these classes may be put into and taught in different parts of the same school, or different rooms in the same school-house, or different school-houses, as convenience and good policy may require.

This is too reasonable to admit of question, for it concerns the general good, and does not affect the quality of the privilege, but regulates the manner of its enjoyment.

This being settled, what is there to prevent the classification of children, equally entitled to the privileges of the system of common schools, with reference to difference of race or color, if the judgment of the legislature should hold such a classification to be most promotive of, or conducive to, the good order and discipline of the schools in the system, and the interest of the public?

The legislature, under our State constitution as it existed without the limitation imposed upon the sovereign power of the State by the fourteenth amendment as hereinbefore stated, had the power to provide for the education only of the white children of the State; but, since its ratification, no system of public schools would be general, uniform and equally open to all which did not provide for the education of the colored children of the State.

It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color and race, and provide for their education in separate schools, or whether they must attend the same school without reference to race or color. In our opinion, the classification of

scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. In other words, the placing of the white children of the State in one class and the negro children of the State in another class, and requiring these classes to be taught separately, provision being made for their education in the same branches, according to age, capacity or advancement, with capable teachers, and to the extent of their *pro rata* share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the constitution. The system would be equally open to all. The tuition would be free. The privileges of the schools would be denied to none. The white children go to one school, or to certain of the schools in the system of common schools. The colored children go to another school, or to certain others of the schools in the system of the common schools. Or, if there are not a sufficient number of colored children within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated, the trustee or trustees shall provide such other means of education for said children as shall use their proportion, according to number, of school revenue to the best advantage. If there be cause of complaint, the white class has as much, if not greater cause than the colored class, for the latter class receive their full share of the school revenue, although none of it may have been contributed by such class; and when districts cannot be consolidated so as to form a school, such class is entitled to receive their full share of the school revenue, according to number, which shall be expended for their benefit to the best advantage, a privilege which is not granted to the white class.

In our opinion, there would be as much lawful reason for complaint, by one scholar in the same school, that he could not occupy the seat of another scholar therein at the same time the latter occupied it, or by scholars in the different classes in the same school, that they were not all put in the same class, or by the scholars in different schools, that they were not all placed in one school, as there is that white and black children are placed in distinct classes and taught separately, or in separate schools. *The State* v. *The City of Cincinnati*, 19 Ohio, 178; *Van Camp* v. *The Board, etc.*, 9 Ohio St. 406; *Baker* v. *The City of Cincinnati*, 11 Ohio St. 534; *The State, etc.*, v. *McCann*, 21 id. 198; *Dallas* v. *Fosdick*, 40 How. Pr. 249.

It is to be noted that the appellee, in his petition for a mandate, complains only that his children and grandchildren were excluded from the school where the white children were taught. There are no allegations that there was not a sufficient number of colored children in attending distance to constitute a school, or that the trustee or trustees had failed to provide such other means of education for said children as would use their proportion, according to number, of school revenue to the best advantage. There is a general allegation that the defendants had neglected, failed, and refused to provide any school in said district, or in any adjoining district near enough for his said children and grandchildren to attend as scholars.

The question is, therefore, squarely presented, whether the children and grandchildren of the appellee were entitled to be admitted and taught in the same school with the white children of the district. The legislature has provided that a separate school shall be provided in each district for the education of the colored children therein, where there is a sufficient number of colored children, and where there is a deficiency of colored children to form one district, several districts shall be consolidated. But if separate schools cannot be provided for the colored children on account of the smallness of the number of such children, then such other provision is to be made by the trustee for their education as the means in his hands will enable him to do.

The legislature has not pointed out or defined what other means shall be provided. There being no averment that the trustee has failed to provide for the education of the children and grandchildren of the appellee, outside of the school for white children, no question arises as to what would be a compliance with such requirement. But if such allegation had been made, it would not have entitled the children and grandchildren of appellee to admission into the white schools, because the legislature has not provided for the admission of colored children into the same schools with the white children, in any contingency; and even if, for the sake of the argument, we were to concede that colored children are, under and by force of the fourteenth amendment, so entitled, the courts cannot, in the absence of legislative authority, confer that right

upon them. The legislature has declared that when schools cannot be provided for the colored children, the trustee shall provide such other means for their education as will use up their full share, according to number, of the school revenue. If the trustee fails in the discharge of this duty, he may be compelled by mandate to discharge the duty imposed upon him by law.

The action of congress, at the same session at which the fourteenth amendment was proposed to the States, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; and if no obligation was expected to be or was imposed upon congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent States forming the Federal Union?

We refer to the legislation of congress relative to schools in the District of Columbia, at the first session of the thirty-ninth congress, and the third session of the forty-second congress.

On the 23d day of July, 1866, the act of congress, entitled "an act relating to public schools in the District of Columbia," took effect. It requires the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years, in the respective cities, bear to the whole number of children, white and colored, between the same ages. Acts sess. 1, 39th Cong. 222.

This was followed at the same session of congress by an act, entitled "an act donating certain lots in the city of Washington for schools for colored children in the District of Columbia," approved July 28th, 1866, which authorized and required the commissioner of public buildings to convey certain described lots, in the city of Washington, which belonged to the United States, to the

trustees for colored schools for the cities of Washington and Georgetown in said District, for the sole use of schools for colored children in that District; the said lots having been designated and set apart by the secretary of the interior to be used for colored schools; and the said lots whenever converted to any other use to revert to the United States. Acts sess. 1, 39th Cong. 354.

At its 42d session an act was passed, entitled "an act to amend an act entitled 'an act governing the colored schools of the District of Columbia,'" approved March 3d, 1873, which fixes the number of the board of trustees of schools for colored children in the District of Columbia, their mode of appointment, their duties, etc., and authorizes the governor of the District to appoint a superintendent of schools for colored children, who is to receive a salary of twenty-five hundred dollars annually, for his services, etc., and directs the proportion of school money then due, or afterward to become due, to the board of trustees of colored schools from the cities of Washington and Georgetown, to be paid to the treasurer of said board, and not to the trustees, as provided in the act of July 23, 1866. Acts sess. 3, 42d Cong. 260.

This legislation of congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification.

We are very clearly of the opinion that the act of May 13th, 1869, is constitutional, and that while it remains in force colored children are not entitled to admission into the common schools which are provided for the education of the white children.

In our opinion, the court below erred in affirming the action, of the court in special term; and the judgment is reversed, with costs, and the cause remanded to the court below, with directions to that court to overrule the judgment of the court in special term in overruling the demurrer to the petition for a mandate.

CORY ET AL. v. CARTER.

CONSTITUTIONAL LAW.—*Schools.—Education of Colored Children.—Separate Schools.*—The act of May 15th, 1869 (3 Ind. Stat. 472), entitled "an act to render taxation for common school purposes uniform, and to provide for the education of the colored children of the State," provides that a school tax shall be levied, without regard to the race or color of the owner of the property taxed; that all children, without regard to race or color, shall be included in the enumeration for school purposes, the colored children to be enumerated in separate lists from those in which the other school children are enumerated, and to be organized into separate schools, having all the rights and privileges of other schools; and if there be not a sufficient number of colored children, within attending distance, to form a separate school for each district, it is provided, that the trustees may consolidate several districts into one; or if there be not a sufficient number of colored children within reasonable distance to thus consolidate, the trustees shall provide such other means of education for colored children as shall use their proportion, according to number, of school revenue to the best advantage.

Held, in a suit by a negro father for a mandate to compel the admission of his children into a school for white children, that this statute is not in conflict with section 19 of article 4 of the state constitution, which provides, that every act shall "embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

Held, also, that the statute is not in conflict with section 23 of article 1 of the state constitution, which declares, that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Held, also, that said statute is not in conflict with section 1 of article 8 of the state constitution, which makes it the duty of the General Assembly "to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all."

Held, also, that said statute is not in conflict with section 2 of article 4 of the Constitution of the United States, which declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Held, also, that said statute is not in conflict with the thirteenth or fourteenth amendment of the Constitution of the United States, or with earlier amendments, or with the act of Congress of April 9th, 1866, known as the "Civil Rights Bill."

SAME.—*Thirteenth Amendment of Constitution of United States.*—The thirteenth amendment abolished slavery within the limits of the United States.

SAME.—*Fourteenth Amendment.—First Clause.*—The first clause of the fourteenth amendment made negroes citizens of the United States, and citi-

zens of the State in which they reside, and thereby created two classes of citizens, one of the United States and the other of the state.

SAME.—*Second Clause.*—The second clause of said amendment prohibits the states from abridging the privileges and immunities of citizens of the United states. This clause places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution, and leaves the privileges and immunities of citizens of a state under the protection of the constitution and laws of the state. The second clause simply contains an inhibition of power to the states, and does not confer upon the Federal Government power to protect or enforce, by legislation, the privileges and immunities of citizens of a state.

SAME.—*Third and Fourth Clauses.*—The third and fourth clauses of the fourteenth amendment only prohibit the states from doing acts which they were prohibited from doing by other clauses of the Federal Constitution.

SAME.—*Thirteenth, Fourteenth, and Fifteenth Amendments.—Limitation of Power of State.*—The thirteenth, fourteenth, and fifteenth amendments to the Federal Constitution impose the following limitations and restrictions upon the sovereign power of the State of Indiana: 1. The State cannot in the future, while a member of the Federal Union, change her constitution so as to create or establish slavery or involuntary servitude, except as a punishment for crimes whereof the party shall have been convicted. 2. The State cannot deny to a citizen of the United States or deprive him of those national rights, privileges, and immunities which belong to him as such citizen. 3. The State must recognize as its citizens any citizen of the United States who is or becomes a *bona fide* resident therein. 4. The State must give to each citizen of the United States, who is or becomes a *bona fide* citizen therein, the same rights, privileges, and immunities secured by her constitution and laws to her white citizens.

SAME.—*Common Schools.*—The system of common schools in this State has its origin in, and is provided for by, the constitution and laws of this State. It is purely a domestic institution, and subject to the exclusive control of the constituted authorities of the State. The Federal Constitution does not provide for any general system of education to be conducted and controlled by the National Government, nor does it vest in Congress any power to exercise a general or special supervision over the states on the subject of education.

SAME.—*Uniformity of Schools.*—Under our constitution, our common school system must be general, uniform, and equally open to all, but uniformity will be secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission.

SAME.—The legislature, under our state constitution, as it existed without the limitations imposed upon the sovereign power of the State by the fourteenth amendment, had the power to provide for the education of only

the white children of the State; but since its ratification no system o public schools would be general, uniform, and equally open to all, whic did not provide for the education of the colored children of th State.

SAME.—The classification of scholars, on the basis of race or color, an their education in separate schools involve questions of domestic polic which are within the legislative discretion and control, and do not amoun to an exclusion of either class.

SAME.—*Power of Courts.*—The legislature has not provided for the admissio of colored children into the same schools with the white children, in an contingency; and even if the fourteenth amendment absolutely require their admission, the courts cannot, in the absence of legislative authority confer that right upon them.

SAME.—The legislature has the power to provide for either separate o mixed schools, but it having failed to provide for mixed schools, th courts must execute the law as it comes from the law-making departmen of the government. If the act of May 13th, 1869, should be held uncon stitutional and void, there would then be no law providing for the enume ation and education of the colored children of the State, and they woul be left without any provision whatever for their education.

SAME.—*Construction of Statute.*—There being no averment that the trust had failed to provide for the education of the children of the plaintiff on side of the schools for the white children, no question arose as to wh would be a compliance with such provision of the statute.

From the Marion Superior Court.

N. B. Taylor, F. Rand, and *E. Taylor,* for appellants.

J. W. Gordon, T. M. Browne, and *R. N. Lamb,* for appe lee.

BUSKIRK, J.—This was a proceeding by mandate, on t part of the appellee against the appellants. The appellee, his petition, alleged that he was a citizen of the State of Ind ana and resided in school district number two, in Lawren township, Marion county, in the said State, and was a ta payer therein; that he was the father of two children, Ma and Edward Carter, and the grandfather of Lucy and Jo Carter, all of whom resided with him; that he was a negro African descent, and that his said children and grandchildr were all negroes of the full blood and of the same descer that his children and grandchildren were respectively of age that entitled them to the benefits of the common scho in the said district; that there was a common school for wh

children in progress in said district, and that his said children and grandchildren presented themselves at the school-house in said district and demanded admission and to be taught therein with the white children, but were refused admittance by the appellants Beaver and Craig, the director and teacher of said school, for the reason that the said school was a school for white children, and not for negro children; that after the refusal aforesaid, he caused to be served upon the appellants a written request and demand that his said children and grandchildren should be received and taught in the said school with the white children of said district, but they were refused admission solely upon the ground that they were negroes; that said appellants and all other persons have wholly neglected, failed, and refused, and still neglect, fail, and refuse, to provide any school in said district, or in any adjoining district, near enough for said children or grandchildren to attend as scholars; and that by reason of the premises his said children and grandchildren are denied all opportunity to attend any school in said district or elsewhere in the neighborhood, as in right and law they are entitled to do.

There is no allegation that the trustee of said school district number two had failed or refused to provide the means of education for such children within the district, outside of the said school for white children, to the extent of their proportion, according to number, of the school revenues of the said district.

The aid of the court was requested to declare the right of admission of said negro children into the school for white children, and to compel the appellants to admit them.

An alternate writ was issued against the appellants, requiring them to admit such children into the school in said district for white children or appear and show cause why they should not so admit such children.

The appellants appeared and filed separate demurrers to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, but the demurrers were overruled; and the appellants refusing to plead further, but electing to stand by their exceptions to the rulings of the court, the court gave judgment for a peremptory writ of mandate.

The appellants appealed to the general term, where the judgment of the special term was affirmed.

The error assigned is, that the superior court, in general term, erred in affirming the judgment of the court in special term.

The question presented for our decision is, whether the court below erred in overruling the demurrer to the complaint, the correct solution of which will depend upon the proper construction to be placed upon the constitution and statutes of this State and the Constitution of the United States; and as preliminary to the consideration of the grave constitutional questions arising in the record, we proceed to inquire what provisions the legislature has made for the education of the white and colored children of the State.

The act of March 6th, 1865, provided for the annual assessment and collection of a tax on the property, real and personal, in the State (except that owned by negroes and mulattoes), for supporting a general system of common schools in the State. It provided for the enumeration each year of the white children within the respective townships, towns, and cities in the State, between the ages of six and twenty-one years, exclusive of married persons. It provided the officers and agencies for the system, the mode and means of carrying it on, for locating and establishing schools, and carrying them on, for building school-houses, and employing teachers, etc. It was essentially white—none but white children between the named ages, and who were unmarried, were entitled to its privileges. 3 Ind. Stat. 440–472; *Draper* v. *Cambridge*, 20 Ind. 268.

At the session of the legislature of this State next after the ratification of the fourteenth amendment to the Constitution of the United States, an act was passed by the General Assembly of this State, entitled "an act to render taxation for common school purposes uniform, and to provide for the education

likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced by temporary excitements and passions among the people to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

Again, the learned author says:

"The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced."

Another cardinal rule of construction laid down by this author is, that the whole instrument is to be examined in placing a construction upon any portion or clause thereof. He says:

"Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a rule of construction, that the whole is to be examined with a view to arriving at the true intention of each part; and this Sir Edward Coke regards the most natural and genuine method of expounding a statute. 'If any section [of a law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.' And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.

"This rule is especially applicable to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justifiable in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another, so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

In support of the above propositions, reference is made in the notes to the following authorities:

The People v. *Morrell*, 21 Wend. 563; *Newell* v. *The People*, 7 N. Y. 109; *McKoan* v. *Derrice*, 3 Barb. 196; *The People* v. *Blodgett*, 13 Mich. 138; *United States* v. *Fisher*, 2 Cranch, 399; *Bosley* v. *Mattingly*, 14 B. Mon. 89; *Sturges* v. *Crowninshield*, 4 Wheat. 202; *Schooner Paulina's Cargo* v. *United States*, 7 Cranch, 60; *Ogden* v. *Strong*, 2 Paine C. C. 584; *United States* v. *Ragsdale*, Hemp. 497; *Southwark Bank* v. *The Commonwealth*, 26 Penn. St. 446; *Ingalls* v. *Cole*, 47 Me. 530; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Furman* v. *City of New York*, 5 Sandf. 16; *The People* v. *The New York Central R. R. Co.*, 24 N. Y. 492; *Bidwell* v. *Whitaker*, 1 Mich. 479; *Alexander* v. *Worthington*, 5 Md. 471; *Cantwell* v. *Owens*, 14 Md. 215; *Cane* v. *Wildridge*, 4 Ind. 51; *Pitman* v. *Flint*, 10 Pick. 504; *Ludlow* v. *Johnson*, 3 Ohio, 553; *District Township* v. *The City of Dubuque*, 7 Iowa, 262; *Pattison* v. *Board, etc.*, 13 Cal. 175; *Spencer* v. *The State*, 5 Ind. 41; *Denn* v. *Reid*, 10 Pet. 524; *Greencastle Township, etc.*, v. *Black*, 5 Ind. 569; *Stowell* v. *Lord Zouch*, Plow. 365; Broom Leg. Max. (5th Am. ed.) 551; Co. Lit.

381, *a.*; *Attorney General* v. *Detroit, etc., Plank Road Co.*, 2 Mich. 138; *The People* v. *Burns*, 5 Mich. 114; *Manly* v. *The State*, 7 Md. 135; *Parkinson* v. *The State*, 14 Md. 184; *The Belleville, etc., R. R. Co.* v. *Gregory*, 15 Ill. 20; *Rycgate* v. *Wardsboro*, 30 Vt. 746; *Brooks* v. *Mobile School Comm'rs*, 31 Ala. 229; *Den* v. *Dubois*, 1 Harrison, 285; *Den* v. *Schenck*, 3 Halst. 34; *Wolcott* v. *Wigton*, 7 Ind. 44; *The People* v. *Purdy*, 2 Hill N. Y. 36; *Green* v. *Weller*, 32 Miss. 650; *Warren* v. *Shuman*, 5 Texas, 441; *Quick* v. *White Water Township*, 7 Ind. 570; *Gibbons* v. *Ogden*, 9 Wheat. 188; Smith Const. Construc., secs. 502, 503; Sedgw. Stat. Law, 229, 233, 251, and 252.

An examination of the above authorities shows that they are in point, and fully support the doctrines announced.

It is essential to a correct interpretation of the above provisions of our constitution, in the light of the above rules of construction, that we should look to the history of the times and examine the condition of things existing prior to, and at the time of, the adoption and ratification of our present state constitution, and compare the sections in question with other portions and clauses of such constitution.

We will limit our inquiry into the political condition of the negroes in this State from the organization of our state government in 1816 down to the ratification of the thirteenth, fourteenth, and fifteenth amendments to the Constitution of the United States, and incidentally to their status in other states of the Union.

Prior to the act of May 13th, 1869, making taxation for common school purposes uniform, and providing for the education of the colored children of the State, 3 Ind. Stat. 472, no provision was made for their education in this State. As a race, their condition was one of marked and settled inferiority before the law, being reduced strictly to the enjoyment of the three primary rights only, and for a large portion of time legally precluded from their full exercise, viz., the right of personal security, the right of personal liberty, and the right of private property. But the power of exercising these rights was practically limited in degree as compared with the exercise and

enjoyment of the same rights by the white race. This was their most favorable condition in several states of the Union, they being admitted to the equal exercise of civil and political rights and privileges with the whites in but one state of the Union. In nearly one-half of the states of the Union, as a race, they lived in a state of life-long servitude, having no control of their time or actions, no right to acquire property, no lawful power to follow the promptings of their own thoughts and judgments, their lives and limbs, their minds and strength, the property and subject to the will of their masters; and notwithstanding the proclamation of emancipation, this continued to be their condition, practically and in a large degree, until after the ratification of the thirteenth amendment to the Constitution of the United States, December 18th, 1865. 2 Kent Com., 7th ed., pp. 252, 258, and note *b* to p. 258; *Scott* v. *Sandford*, 19 How. 393; *Smith* v. *Moody*, 26 Ind. 299; Rev. Stat. 1831, p. 375; Rev. Stat. 1838, p. 418.

By sec. 7 of article 11 of the constitution of 1816, it is provided that there shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. Rev. Stat. 1838, p. 50.

Sec. 2 of article 3 provided for an enumeration of all the white male inhabitants above the age of twenty-one years. Rev. Stat. 1838, p. 38.

Sec. 1 of article 6 limited the right of suffrage to the white male citizens of the United States of the age of twenty-one, and who had resided in the State one year immediately preceding the election. Rev. Stat. 1838, p. 46.

By the act of February 10th, 1831, every such person, coming into or being brought into this State, was prohibited from residing therein, unless bond with good and sufficient security, to be approved by the overseers of the poor of some township, was given on behalf of such person, payable to the State of Indiana, in the penal sum of five hundred dollars, conditioned that such person should not, at any time, become

a charge to the county in which such bond was given, nor to any other county in the State, as also for such person's good behavior, etc.

It provided penalties, likewise, for failure to comply with these provisions, consisting of hiring such person out and applying the proceeds to his benefit, and removal from the State; and by fine imposed and recovered by presentment or indictment, for harboring any such person failing to give the required bond.

This act remained upon the statute book of this State, and continued in force, for a period of over twelve years, and received the judicial sanction of the Supreme Court of the State. Rev. Stat. 1831, pp. 375, 376; Rev. Stat. 1838, pp. 418, 419; *The State* v. *Cooper*, 5 Blackf. 258; *Baptiste* v. *The State*, 5 Blackf. 283; *Hickland* v. *The State*, 8 Blackf. 365.

Article 13 of the constitution of this State, which took effect on the 1st day of November, 1851, and superseded the constitution of 1816, prohibited negroes and mulattoes from coming into or settling in this State after its adoption, declared all contracts with such persons void, and made it an offence punishable by fine of not less than ten nor more than five hundred dollars for any person to employ them; and this article was submitted, as a distinct proposition, to the people of the State for their approval or disapproval, and was adopted by a vote of one hundred and nine thousand nine hundred and seventy-six to twenty-one thousand and sixty-six. 1 G. & H. 52; Dillon's Hist. Ind. 577.

Other provisions of this constitution excluded negroes and mulattoes from the elective franchise, from holding office in the State or any of its departments, from the enumeration for senatorial and representative purposes, and from participation in all of the privileges pertaining to full and active citizenship, making them a separate and distinct class of inferiors before the law, and placing them politically in a separate body, with no constitutional grant of privileges and immunities under the title of "citizen" or "citizens," but leaving them in possession only of the three primary rights heretofore

mentioned. 1 Opin. Att'y Gen. 506; 4 Opin. Att'y Gen. 147; *Smith* v. *Moody*, 26 Ind. 299.

This the constitution and subsequent recognized and decided constitutional legislation clearly establish. Acts June 18th, 1852, 1 G. & H. 443; *Hatwood* v. *The State*, 18 Ind. 492; *Barkshire* v. *The State*, 7 Ind. 389.

In the light of the foregoing history, constitutional provisions, legislative acts, and judicial constructions thereof, it is very plain and obvious to us, that persons of the African race were not in the minds or contemplation of the wise and thoughtful framers of our constitution, when they prepared and agreed upon the above quoted sections, or of the people of the State when they ratified and adopted the constitution containing such provisions.

In our opinion, the privileges and immunities secured by sec. 23 of article 1 were not intended for persons of the African race; for the section expressly limits the enjoyment of such privileges and immunities to citizens, and at that time negroes were neither citizens of the United States nor of this State. It was held by this court, in *Sears* v. *The Board of Commissioners of Warren County*, 36 Ind. 267, that the privileges and immunities secured by the above quoted section were intended for citizens of this State.

Nor in view of the other provisions of our constitution, and in the light of the rules of construction before stated, can it be successfully maintained that the provisions of sec. 1 of article 8 were intended for the children of the African race. It is unreasonable to suppose that the framers of the constitution, who had denied to that race the right of citizenship, of suffrage, of holding office, of serving on juries, and of testifying as witnesses in any case where a white person was a party, and had prohibited, under heavy pains and penalties, the further immigration of that race into the State, intended to provide for the education of the children of that race in our common schools with the white children of the State.

The public sentiment of the State, at that time, was unfriendly to the African race and their participation in gov-

ernmental affairs, and demanded their exclusion from the State; and it is not for us to say, sitting here, whether such policy was wise or unwise, and we speak of it only as a matter of history having a bearing upon the construction of our constitution.

An application of the rules of construction heretofore laid down to the various provisions of our constitution will conclusively demonstrate that the provisions of the sections under examination have no application to the children and grandchildren of the appellee.

One of the cardinal rules of construction is, that courts shall give effect to the intent of the framers of the instrument, and of the people in adopting it. Then, as it is manifest that neither the framers of the constitution nor the people in adopting it intended that the children of the African race should participate in the advantages of a general and uniform system of common schools, we possess no power to adjudge to them what was not designed for them.

Another rule of construction is, that in placing a construction upon one section or clause, courts are required to examine the whole instrument and to give effect, if possible, to the whole instrument; and if different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory. There is but one construction which will preserve the unity, harmony, and consistency of our state constitution, and that is, to hold that it was made and adopted by and for the exclusive use and enjoyment of the white race. Any other construction would convict the members of the constitutional convention and the voters of the State of the grossest inconsistency, absurdity, and injustice. It would be monstrous to hold that the framers of the constitution in adopting, and the voters of the State in ratifying it, intended that the common schools of the State should be open to the children of the African race, when, by the same instrument, that portion of such race as then resided in the State were denied all political rights, privileges, and immunities, and the further immigration of that race into the State was prohibited by the thirteenth article of the constitution, which received the almost unanimous approval of the voters of the State.

Another important rule of construction is, that the meaning of a constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. A constitution is inflexible and can not bend to circumstances or be modified by public opinion. It is, therefore, the duty of the court to declare the law as it is written, leaving to the people, in their sovereign capacity, to make such changes as new circumstances may require; and, in our opinion, using the appropriate and forcible language of Judge COOLEY, "a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty."

The views which we have expressed are greatly strengthened and enforced by the construction which this court placed upon a section of the constitution of 1816, and of an act passed while it was in force.

Section 1 of article 9 declares that "knowledge and learning, generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to this end," etc. "the General Assembly shall, from time to time, pass such laws as shall be calculated to encourage intellectual, scientifical, and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures, and natural history; and to countenance and encourage the principles of humanity, industry, and morality."

Section 2 of said article provided, that "it shall be the duty of the General Assembly, as soon as circumstances will permit, to provide by law for a general system of education

ascending in a regular gradation from township schools to a state university, wherein tuition shall be gratis, and equally open to all." R. S. 1838, pp. 48, 49.

While the above constitution was in force, the legislature provided for a general common school system, the 102d section of which act was as follows:

"When any school is supported in any degree by the public school fund, or by taxation, so long as the money so derived shall be expending thereon, such school shall be open and free to all the white children resident within the district, over five and under twenty-one years of age." Chap. 15, R. S. 1843, p. 321.

In the case of *Lewis* v. *Henley*, 2 Ind. 332, this court was required to place a construction upon the above quoted section, and it was held that negro children were not entitled to admission to the schools with the white children, and that the legislature had the right, under the constitution, to exclude negro children from our public schools. It was further held that, although the negroes might be entitled to share in the funds derived from the sale of lands donated by Congress, yet they would have to do so in separate schools, and not in schools with white children.

Both constitutions provided for a general and uniform system of common schools; both provided that the tuition should be free and the schools equally open to all. Both constitutions deprived the negroes of all political rights. If the legislature, under the constitution of 1816, had the right to exclude the negroes from the public schools for white children, it is difficult to see why it may not be done under the present constitution.

Having reached the true construction of the constitution of this State, as it came from the hands of its framers and received the sanction of her qualified voters, the next step is to find out the extent of its qualification or change by the Constitution of the United States.

Section 2 of article 4 of the Constitution of the United States declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

This section, at an early date, received a construction in the case of *Corfield* v. *Coryell*, which has ever since been recognized and approved. It relates only to "those privileges and immunities which are fundamental," and which may all be comprehended under the following 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."

In the *Slaughter-House Cases*, the Supreme Court of the United States said: "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 did not compel the state, into which the citizen of another state removed, to allow him the exercise of the same rights which he enjoyed in the state from which he removed. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Slaughter-House Cases*, 16 Wal. 76, 77; *Bradwell* v. *The State*, 16 Wal. 130; *Ward* v. *Maryland*, 12 Wal. 430; *Conner* v. *Elliott*, 18 How. 591; *Brown* v. *State of Md.*, 12 Wheat. 448, 449; *People* v. *Brady*, 40 Cal. 198; Story Const., secs. 1805, 1806; Cooley Const. Lim. 15, 16, 397; Potter's Dwarris on Stat. 525, 526; *Scars* v. *The Board, etc.*, 36 Ind. 267; *The Jeffersonville, etc., R. R. Co.* v. *Hendricks*, 41 Ind. 48.

It is well settled by repeated decisions of the federal and state courts, that with the exception of the limitations imposed upon the powers of the states by section 10 of article 1 of the Constitution of the United States, the several states were left as before the Federal Union was formed, with full power to declare the rights of their citizens, without interference from the Federal Government.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state gov-

vernments by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States. In one of the states of the Union, colored children were entitled to admission into schools for white children, and to be taught with white children, and yet, if a person residing in such state should remove into some other state, where such right is denied, the right so exercised in the state from which the person removed would be lost, because it was not one of those fundamental rights which accompany the person, but a domestic regulation exclusively within the constitutional and legislative power of each state, and to be regarded in the nature of a domestic regulation necessary for the good of the whole people, or which the good of the people of one state, in their sovereign judgment, required to be different from the regulation in another, as best securing "the general comfort and prosperity of the state." Story Const., secs. 1353, 1409; Cooley Const. Lim. 573, 574; 2 Kent Com. 71; 2 Op. Att'y Gen'l, 426; *Commonwealth* v. *Alger*, 7 Cush. 84; *The City of New York* v. *Miln*, 11 Pet. 139; *Slaughter-House Cases*, 16 Wal. 62; *Bradwell* v. *The State*, 16 Wal. 130; *Thayer* v. *Hedges*, 22 Ind. 282; Potter's Dwarris on Stat. 352, 452, 455, 461.

It is very plain that the tenth amendment of the Constitution of the United States cannot receive such construction as will aid the claim of the appellee. It declares, 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;" and the power to fix the qualifications of the citizen of the state, and to establish his rights in the state, is one of the powers expressly reserved to the state by this amendment; for there is no express limitation of the power of the states in the Federal Constitution in this respect, as it then stood, and such limitation could not exist without express mention. Rawle Const. 84, 87; Story Const., sec. 1904; Works of Webster, vol. 3, p. 322; Cooley Const. Lim. 19; Federalist, 140; *Slaughter-House Cases*, 16 Wal. 70, 71, 72, 73; *Barron* v. *Mayor, etc.*, 7 Pet. 243; *Smith* v. *State of Md.*,

18 How. 71; *Percar* v. *The Commonwealth*, 5 Wal. 475; *Barker* v. *The People*, 3 Cow. 686; *James* v. *The Commonwealth*, 12 S. & R. 220; *Jane* v. *Commonwealth*, 3 Met. Ky. 18; *Lincoln* v. *Smith*, 27 Vt. 336; *Warren* v. *Paul*, 22 Ind. 276; *The State, ex rel. Lakey*, v. *Garton*, 32 Ind. 1.

That the views hereinbefore expressed correctly represent the relative powers of the federal and state governments at the close of the great civil war, and until after the ratification of the amendments to the Constitution of the United States, which followed the termination of that contest, cannot, we think, be successfully controverted.

We next proceed to determine whether such amendments, or either of them, have worked a change, and, if they have, to what extent.

The thirteenth amendment was proposed by Congress on the 1st day of February, 1865, and declared by the Secretary of State to have been ratified December 18th, 1865. It declares that "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;" and "Congress shall have power to enforce this article by appropriate legislation." 3 Ind Stat. 579.

This amendment was to prevent any question in the future as to the effect of the war and the President's proclamation of emancipation upon slavery; and its obvious purpose was to forbid all shades and conditions of African slavery. *Slaughter-House Cases*, 16 Wal. 68, 69.

It had no other office, and its real effect was more for the future than the present. As to the matter of social and political rights, the African was left just where section 37, article 1, of our state constitution left him, and subject to all the inconveniences and burdens incident to his color and race, except his former one of servitude. He was a person whose place and office, in the body politic, was yet to be designated and established. He possessed no political rights, in the usual and

proper sense of that term, through, or had none conferred by, this enactment.

Following this constitutional amendment, the civil rights bill of April 9th, 1866, was enacted by Congress, the first section of which declares who are citizens of the United States, and specifies certain rights which shall be accorded to such citizens in the states and territories, and the residue is made up of pains and penalties for violation of the rights sought to be conferred, and the machinery for enforcing its provisions.

It is not worth while to enquire into the effect of this act, or whether the Federal Constitution, which made citizens of the different states citizens of the United States, could be changed by a simple congressional enactment; for it is clear, admitting it to be valid, that it does not relate to or bear upon the right claimed in this case, for it purports only to confer upon negroes and mulattoes the right, in every state and territory, 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 the full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens, and subjects them to like pains and penalties. 3 Ind. Stat. 589. In this nothing is left to inference. Every right intended is specified.

The fourteenth amendment to the Federal Constitution was proposed by Congress July 16th, 1866, and declared by the Secretary of State to have been ratified July 28th, 1868. It consists of several sections, but section 1 is the only one necessary to this examination. It 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. 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."

This section can better be understood or construed, by dividing and considering it in four paragraphs or clauses, the last, however, being a mere re-statement of what precedes it:

First. "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."

In the *Slaughter-House Cases*, the Supreme Court of the United States say, this is a declaration "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 admit 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." It recognizes and establishes a "distinction between citizenship of the United States and citizenship of a state." "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." Hence, a negro may be a citizen of the United States and reside without its territorial limits, or within some one of the territories; but he cannot be a citizen of a state until he becomes a *bona fide* resident of the state.

Second. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This clause does not refer to citizens of the states. It

embraces only citizens of the United States. It leaves out the words "citizen of the state," which is so carefully used, and used in contradistinction to citizens of the United States, in the preceding sentence. It places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution, and leaves the privileges and immunities of citizens of a state under the protection of the state constitution. This is fully shown by the recent decision of the Supreme Court of the United States in the *Slaughter-House Cases*, 16 Wal. 36.

Mr. Justice MILLER, in delivering the opinion of the court and in speaking in reference to the clause under examination, says:

"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 word 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 citizen 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.

"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 same learned judge, in the further examination of the second clause, says:

"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 pretence 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 fourteenth 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 proposition 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 legislative power of 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" (these judgments sustained the validity of the grant, by the legislature of Louisiana, of an exclusive right, guarded by certain limitations as to price, etc., to a corporation created by it, for twenty-five years, to build and maintain slaughter-houses, etc., and prohibited the right to all others, within a certain locality),

"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."

Third. "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

This clause is the same contained in the fifth amendment to the Constitution of the United States, but there applied to the action of the Federal Government, and here placed as a check upon the states. But the constitution of our State contains, and perhaps those of all the states contain just such a provision, so that it expresses no new principle, but is the old rule in force since the foundation of the state governments. It prohibits the states from depriving any person of life, liberty, or property, except "in due course of legal proceedings, according to those rules and forms which have been established" by the state, "for the protection of private rights." Cooley Const. Lim. 356, 357; *Westervelt* v. *Gregg*, 12 N. Y. 209.

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

In regard to this clause, the Supreme Court of this State, in *The State* v. *Gibson*, 36 Ind. 389, say, it "seems to hav been added in the abundance of caution, for it provides in express terms what was the fair, logical, and just implication from what had preceded it, and that was, that the persons made citizens by the amendment should be protected by the laws in the same manner, and to the same extent, that white citizens were protected."

In the case of *The State* v. *Gibson*, *supra*, this court was called upon to place a construction upon the fourteenth amendment to the Constitution of the United States. It was claimed in that case, that such amendment had abolished the laws of this State prohibiting the intermarriage of negroes and whites. We held that marriage was a purely domestic institution, and subject to the exclusive control of the State; that such amendment had not conferred on the Federal Government any power to interfere with the institution of marriage, and that such amendment had not enlarged the powers of the Federal Government nor diminished those of the states. We then said:

"The fourteenth amendment contains no new grant of power from the people, who are the inherent possessors of all power to the Federal Government. It did not enlarge the powers of the Federal Government, nor diminish those of the states. The inhibitions against the states doing certain things have no force or effect. They do not prohibit the states from doing any act that they could have done without them. * * * The only effect of the amendment under consideration was to extend the protection and blessings of the constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the constitution and the laws as were the white citizens, and the state could no more deprive them of privileges and immunities than they could citizens of the white race. Citizenship entitled them to the protection of life, liberty, and property, and th

full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened, or taken away any of the reserved rights of the states, as they had existed and been fully recognized by every department of the national government from its creation."

What was then intended to be expressed was, that the fourteenth amendment had not delegated to the Federal Government the power to regulate and control the domestic institutions of a state. As will be hereinafter shown, it imposes some limitations upon the powers of the states as to slavery and the equal protection of the rights of citizen of the United States and of the states.

We were then unaided by any judicial construction of the fourteenth amendment; and we are gratified to know that the views then expressed have been, in all substantial respects, sustained by the highest judicial tribunal in this country, and the one especially charged with the construction and interpretation of the Federal Constitution. By the solemn decision of that high court, the privileges and immunities belonging to the citizens of the states, as such, rest for their security and protection where they have heretofore rested, with the states themselves.

In *The State, ex rel. Garnes, v. McCann*, 21 Ohio St. 198, the Supreme Court of that state uses the following language:

"It would seem, then, that under the constitution and laws of this state, the right to classify the youth of the state for school purposes, on the basis of color, and to assign them to separate schools for education, both upon well recognized legal principles and the repeated adjudications of this court, is too firmly established to be now judicially disturbed.

"But it is claimed that the law authorizing the classification in question contravenes the provisions of the fourteenth amendment of the Constitution of the United States, and is, therefore, abrogated thereby.

"Unquestionably all doubts, whersoever they existed, as to the citizenship of colored persons, and their right to the 'equal protection of the laws,' are settled by this amendment.

But neither of these was denied to them in this state before the adoption of the amendment. At all events, the statutes classifying the youth of the state for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case. Nor do we understand that the contrary is claimed by counsel in this case. But the clause relied on, in behalf of the plaintiff, is that which forbids any state to 'make or enforce any law which will abridge the privileges or immunities of citizens of the United States.'

"This involves the inquiry as to what privileges or immunities are embraced in the inhibition of this clause. We are not aware that this has been as yet judicially settled. The language of the clause, however, taken in connection with other provisions of the amendment, and of the constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the Constitution of the United States.

"A broader interpretation opens into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the states to manage and regulate their local institutions and affairs as were never contemplated by the amendment.

"If this construction be correct, the clause has no application to this case, for all the privileges of the school system of this state are derived solely from the constitution and laws of the state. If the General Assembly should pass a law repealing all laws creating and regulating the system, it can not be claimed that the fourteenth amendment could be interposed to prevent so grievious an abridgment of the privileges of the citizens of the state, for they would thereby be deprived of

privileges derived from the state, and not of privileges derived from the United States.

"But we need not now further discuss this point, as the true meaning and exact limits of the clause in question are not necessarily involved in this case. For, conceding that the fourteenth amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a state, as one of the privileges of citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question surely does not attempt to deprive colored persons of any rights. On the contrary, it recognizes their right, under the constitution of the state, to equal common school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the General Assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. At all events, the legislative action is conclusive, unless it clearly infringes the provisions of the constitution.

"At most, the fourteenth amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the state.

"The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this state, that a classification of the youth of the state for school purposes upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the state.

"We have seen that the law, in the case before us, works no substantial inequality of school privileges between the children of both classes in the locality of the parties. Under the lawful regulation of equal educational privileges, the children of each class are required to attend the school provided for them, and to which they are assigned by those having the lawful official control of all.

"The plaintiff, then, can not claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where his children shall be instructed, or what teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal Constitution, nor would it contravene the provisions of either. There is, then, no ground upon which the plaintiff can claim that his rights under the fourteenth amendment have been infringed."

The foregoing opinion, having been rendered since the ratification of the fourteenth amendment, is directly in point, and is entitled to great weight and consideration, coming as it does from a court distinguished for its learning and ability.

How far, then, have the amendments operated to change the constitution of Indiana or imposed limitations or restrictions upon the sovereign power of the State? We answer, in the following particulars:

1. The State cannot in the future, while a member of the Federal Union, change her constitution so as to create or establish slavery or involuntary servitude, except as a punishment for crimes whereof the party shall have been convicted; thus protecting the new class of citizens, *i. e.*, negroes and mulattoes, from being again reduced to slavery.

2. The State cannot deny to, or deprive a citizen of the United States, *i. e.*, any negro or mulatto, of, those national rights, privileges, or immunities which belong to him as such citizen.

3. The State must recognize as its citizen any citizen of the United States, *i. e.*, any negro or mulatto, who is or becomes a *bona fide* resident therein.

4. The State must give to such, *i. e.*, to such negro or mulatto, who is or who becomes a *bona fide* resident therein, the same rights, privileges, and immunities, secured by her constitution and laws to her other, *i. e.*, to her white citizens.

In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results, that there is no limitation upon the power of the State, within the limits of her own constitution, to fix, secure, and protect the rights, privileges, and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity, and happiness.

This will preserve in their purity and vigor the structure and spirit of our complex system of government, as it came from the hands of the great and illustrious men who achieved our independence and formed our matchless form of government. Anterior to the adoption of the Federal Constitution, the states existed as independent sovereignties, possessing supreme and absolute power over all questions of local and internal government. To the states the whole charge of interior regulation is left by the Federal Constitution; to them and to the people thereof all powers not expressly, or by necessary implication, delegated to the national government, and not prohibited to the states, are reserved to the states.

The Constitution of the United States is the bond which binds the states in one federal union. It forms and provides the agencies for the continuance and management of the federal government. It relates to and concerns matters of national import, and enables the states, represented by their federal head, as one of the independent and most powerful governments of the world, to enter into and manage its relations with the other independent powers of the earth. Under our constitution, our common school system must be general. That is, it must extend over and embrace every portion of the State.

It must be uniform. The uniformity required has reference to the mode of government and discipline, the branches of learning taught, and the qualifications as to age and advancement in learning required of pupils as conditions of their admission. It does not mean that all the schools shall be of the same size and grade, or that all the branches of learning taught in one school shall be taught in all other schools, or that the qualifications as to age and advancement, which would admit a pupil in one school, would entitle such pupil to admission into all the other schools. Uniformity will be secured when all the schools of the same grade have the same system of government and discipline, the same branches of learning taught, and the same qualifications for admission.

The schools must be "equally open to all." This has reference to the persons who are entitled to receive instruction therein. The phrase, "equally open to all," is not to be taken in a literal sense, for this would embrace the whole people of the State, the infant, the middle-aged, the septuagenarian, and the married.

It is very obvious, that the common schools of the State are neither to be equally open to everybody, nor to every child; but that they are to be equally open to a class of persons, which class and their qualifications are to be designated and prescribed by the legislature.

The Federal Constitution does not provide for any general system of education, to be conducted and controlled by the national government, nor does it vest in Congress any power to exercise a general or special supervision over the states on the subject of education. The Constitution gives to Congress the power to dispose of and make all needful rules and regulations respecting the territories and other property belonging to the United States, and by virtue of this power territorial governments are organized. It also confers on Congress the exclusive power to legislate in all cases whatever over the District of Columbia, and by virtue of this power Congress has established in such District a system of common schools. Con-

has also established and maintained military and naval schools at the expense of the government.

The system of common schools in this State has its origin in, and is provided for by, the constitution and laws of this State. It is purely a domestic institution, and is subject to the exclusive control of the constituted authorities of the State. The constitution does not provide the machinery, nor lay down its rule of government or discipline, nor define the terms and conditions of admission. It makes it the imperative duty of the legislature to provide by law the system, and imposes no limitations on the power of the legislature, except that tuition shall be free, and the schools shall be equally open to all; that is, to such classes of persons as the legislature may, in its wisdom, determine.

There being no further restriction upon the legislative power and discretion, it necessarily follows, that in providing for this system of schools, the legislature is left free to fix the qualifications of pupils to be admitted to its benefits, as respects age and capacity to learn; to classify them with reference to age, sex, advancement, and the branches of learning they are to pursue; to provide for the location and building of school-houses; and to designate to what schools and in what school-houses the different ages, sexes, and degrees of proficiency shall be assigned; for these all concern the good order and success of the system.

It must also follow, that this policy or framework of government for that system vitally concerns and blends itself with the internal affairs of the State, with its happiness and prosperity, its peace and good order, and depends upon the wisdom of the legislature and of the agencies provided by the legislature, acting under its established rules, and comes within the power possessed by every sovereign state, and is clearly without the grants or inhibitions of such amendments to the Constitution of the United States. *City of New York* v. *Miln*, 11 Pet. 139, 140; *License Tax Cases*, 5 Wal. 470, 471; *Lane County* v. *Oregon*, 7 Wal. 76; *United States* v. *Dewitt*, 9 Wal. 41; *The Collector* v. *Day*, 11 Wal. 124, 125; *The Slaughter-House Cases*, *supra*; *Bartemeyer* v. *Iowa*, 18 Wal. 133; *The State* v. *Gibson*, 36 Ind. 389; *The West Chester, etc., R. R. Co.* v. *Miles*, 55 Pa. St. 209; Cooley Const. Lim. 572, 574; *Ellis* v. *The State*, 42 Ala. 525; *Fifield* v. *Close*, 15 Mich. 505.

This system of common schools must consist of many schools in different localities or geographical divisions; and these schools may be of different grades. In some of these localities or divisions there may be school-houses, and in others none. In some the school-house or houses may not be sufficient to accommodate all, and the revenue may not be sufficient to provide for them.

In this system, there ought to be and must be a classification of the children. This classification ought to and will be with reference to some properties or characteristics common to or possessed by a certain number out of the whole; and these classes may be put into and taught in different parts of the same school, or different rooms in the same school-house, or different school-houses, as convenience and good policy may require.

This is too reasonable to admit of question; for it concerns the general good, and does not affect the quality of the privilege, but regulates the manner of its enjoyment.

This being settled, what is there to prevent the classification of children, equally entitled to the privileges of the system of common schools, with reference to difference of race or color, if the judgment of the legislature should hold such a classification to be most promotive of, or conducive to, the good order and discipline of the schools in the system, and the interest of the public?

The legislature, under our state constitution as it existed without the limitation imposed upon the sovereign power of the State by the fourteenth amendment as hereinbefore stated, had the power to provide for the education only of the white children of the State; but since its ratification, no system of public schools would be general, uniform, and equally open to all which did not provide for the education of the colored children of the State.

It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color and race, and provide for their education in separate schools, or whether they must attend the same school without reference to race or color. In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. In other words, the placing of the white children of the State in one class and the negro children of the State in another class, and requiring these classes to be taught separately, provision being made for their education in the same branches, according to age, capacity, or advancement, with capable teachers, and to the extent of their *pro rata* share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the constitution. The system would be equally open to all. The tuition would be free. The privileges of the schools would be denied to none. The white children go to one school, or to certain of the schools in the system of common schools. The colored children go to another school, or to certain others of the schools in the system of the common schools. Or, if there are not a sufficient number of colored children within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated, the trustee or trustees shall provide such other means of education for said children as shall use their proportion, according to number, of school revenue to the best advantage. If there be cause of complaint, the white class has as much, if not greater cause than the colored class, for the latter class receive their full share of the school revenue, although none of it may have been contributed by such class; and when districts can not be consolidated so as to form a school, such class is entitled to receive their full share of the school revenue, according

to number, which shall be expended for their benefit to the best advantage, a privilege which is not granted to the white class.

In our opinion, there would be as much lawful reason for complaint, by one scholar in the same school, that he could not occupy the seat of another scholar therein at the same time the latter occupied it, or by scholars in the different classes in the same school, that they were not all put in the same class, or by the scholars in different schools, that they were not all placed in one school, as there is that white and black children are placed in distinct classes and taught separately, or in separate schools. *The State* v. *The City of Cincinnati*, 19 Ohio, 178; *Van Camp* v. *The Board, etc.*, 9 Ohio St. 406; *Baker* v. *The City of Cincinnati*, 11 Ohio St. 534; *The State, etc.*, v. *McCann*, 21 Ohio St. 198; *Dallas* v. *Fosdick*, 40 How. Pr. 249.

It is to be noted that the appellee, in his petition for a mandate, complains only that his children and grandchildren were excluded from the school where the white children were taught. There are no allegations that there was not a sufficient number of colored children in attending distance to constitute a school, or that the trustee or trustees had failed to provide such other means of education for said children as would use their proportion, according to number, of school revenue to the best advantage. There is a general allegation that the defendants had neglected, failed, and refused to provide any school in said district, or in any adjoining district near enough for his said children and grandchildren to attend as scholars.

The question is, therefore, squarely presented, whether the children and grandchildren of the appellee were entitled to be admitted and taught in the same school with the white children of the district. The legislature has provided that a separate school shall be provided in each district for the education of the colored children therein, where there is a sufficient number of colored children, and where there is a deficiency of colored children to form one district, several districts shall be consolidated. But if separate schools can not be provided for the colored children on account of the smallness

of the number of such children, then, such other provision is to be made by the trustee for their education as the means in his hands will enable him to do.

The legislature has not pointed out or defined what other means shall be provided. There being no averment that the trustee has failed to provide for the education of the children and grandchildren of the appellee, outside of the school for white children, no question arises as to what would be a compliance with such requirement. But if such allegation had been made, it would not have entitled the children and grandchildren of appellee to admission into the white schools, because the legislature has not provided for the admission of colored children into the same schools with the white children, in any contingency; and even if, for the sake of the argument, we were to concede that colored children are, under and by force of the fourteenth amendment, so entitled, the courts can not, in the absence of legislative authority, confer that right upon them. The legislature has declared that when schools can not be provided for the colored children, the trustee shall provide such other means for their education as will use up their full share, according to number, of the school revenue. If the trustee fails in the discharge of this duty, he may be compelled by mandate to discharge the duty imposed upon him by law.

The action of Congress, at the same session at which the fourteenth amendment was proposed to the states, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; and if no obligation was expected to be or was imposed upon Congress by the amendment, to place the two races and colors in the same school, with what show of reason can it be pre-

tended that it has such a compelling power upon the sovereign and independent states forming the Federal Union?

We refer to the legislation of Congress relative to schools in the District of Columbia, at the first session of the Thirty-Ninth Congress, and the third session of the Forty-Second Congress.

On the 23d day of July, 1866, the act of Congress, entitled "an act relating to public schools in the District of Columbia," took effect. It requires the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years, in the respective cities, bear to the whole number of children, white and colored, between the same ages. Acts sess. 1, 39th Cong. 222.

This was followed at the same session of Congress by an act, entitled "an act donating certain lots in the city of Washington for schools for colored children in the District of Columbia," approved July 28th, 1866, which authorized and required the Commissioner of Public Buildings to convey certain described lots, in the city of Washington, which belonged to the United States, to the trustees for colored schools for the cities of Washington and Georgetown in said District, for the sole use of schools for colored children in that District; the said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools; and the said lots whenever converted to any other use to revert to the United States. Acts sess. 1, 39th Cong. 354.

At its 42d session an act was passed, entitled "an act to amend an act entitled 'An act governing the colored schools of the District of Columbia,'" approved March 3d, 1873, which fixes the number of the board of trustees of schools for colored children in the District of Columbia, their mode of

appointment, their duties, etc., and authorizes the Governor of the District to appoint a superintendent of schools for colored children, who is to receive a salary of twenty-five hundred dollars annually, for his services, etc., and directs the proportion of school money then due, or afterward to become due, to the board of trustees of colored schools from the cities of Washington and Georgetown, to be paid to the treasurer of said board, and not to the trustees, as provided in the act of July 23d, 1866. Acts sess. 3, 42d Cong. 260.

This legislation of Congress continues in force, at the present time, as a legislative construction of the fourteenth amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the states for their approval and ratification.

We are very clearly of the opinion that the act of May 13th, 1869, is constitutional, and that while it remains in force colored children are not entitled to admission into the common schools which are provided for the education of the white children.

In our opinion, the court below erred in affirming the action of the court in special term; and the judgment is reversed, with costs, and the cause remanded to the court below, with directions to that court to overrule the judgment of the court in special term in overruling the demurrer to the petition for a mandate.

OSBORN, J.—I am inclined to think that the allegations in the complaint are not sufficient to entitle the appellee to a mandate, and that the judgment of the court below ought to be reversed. But there is very much in the foregoing opinion in which I do not concur.

If I desired to do so, I could not, during the short time that I am to remain in my present position, properly and satisfactorily consider the questions discussed, and must therefore content myself with this qualified dissent.