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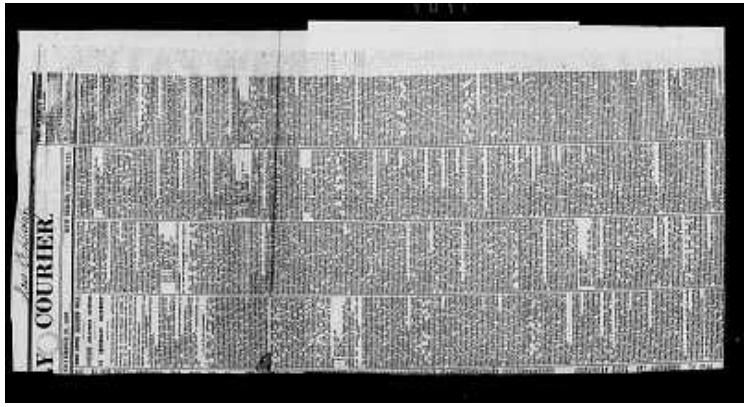

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THE CIVIL RIGHTS BILL.
JUSTICE SWAYNE'S OPINION.
AN IMPORTANT DOCUMENT!

The following is the opinion recently delivered in the United States District Court, in this city, by Justice Swayne, deciding in favor of the constitutionality of the Civil Rights Bill. It attracted much interest and attention at the time, and now appears as revised by the Justice himself:
CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

The United States vs. John Rhodes, and others. Indictment of burglary.

Justice Swayne:

This is a prosecution under the act of Congress of the 6th of April, 1866, entitled "An act to protect all persons in their civil rights, and to furnish the means for their vindication.

The defendants have been found guilty by a jury, the case is now before us, upon a motion in arrest of judgement.

Three grounds are relied upon in support of the motion. It is insisted:

That the indictment is fatally defective;

That the case which it makes, or was intended to make, is not within the act of Congress upon which it is founded; and,

That the act itself is unconstitutional and void.

I.-AS TO THE INDICTMENT.

If either count be sufficient, it will support the judgement of the Court upon the verdict. Our attention will be confined to the second count. That count alleges that the defendants, being white persons, "on the 1st of May, 1866, at the county of Nelson, in the State and District of Kentucky, at the hour of eleven of the clock in the night of the same day, feloniously and burglariously did break and enter the dwelling house

there situate of Nancy Talbot, a citizen of the United States of the African race, having been born in the United States, and not subject to any foreign power, who was then and there, and is now, denied the right to testify against the said defendants, in the courts of the State of Kentucky-and of the said County of Nelson-with intent the goods and chattels, moneys and property of said the Nancy Talbot in the said dwelling house then and there being, feloniously and burglariously to steal , take and carry away-contrary to the statutes in such case made and provided, and against the peace and dignity of the United States.

The objection urged against this count is, that it does not aver that "white citizens" enjoy the right which it is alleged is denied to Nancy Talbot. This fact is vital in the case. Without it our jurisdiction cannot be maintained. It is averred that she is a citizen of the United States, of the African race, and that she is denied the right to testify against the defendants, they being white persons. Section 669 of the code of civil practice of Kentucky gives this right to white persons under the same circumstances. This is a public statue and we are bound to take judicial cognizance of it. It is never necessary to set forth matters of law in the criminal pleading. The indictment is in legal effect, as if it averred the existence and provisions of the statute. The enjoyment of the right in question by white citizens is a conclusion of law from the facts stated. Averment and proof could not bring it into the case more effectually for any purpose than it is there already.

1 Chitt Jr. Law, 188.
2 Bos. & P, 127.
2 Leach, 942.
1 Bishop's Crim. Procedure, Sec, 52, 53.

This right is one of those secured to Nancy Talbot by the first section of this act. The objection to this count cannot be sustained.

II.-IS THE OFFENSE CHARGED, WITHIN THE STATUTE?

The first section enacts "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" *** "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, sell and convey real and personal property, and to have 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, statue, ordinance, regulation or custom, to the contraty notwithstanding."

The second section provider: "that any person who under color of any lew, statute, ordinance, regulation, or custom shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act or to different punishment, pains, or penalties on account of such person having at any time been held in the condition of slavery."*** "or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor." &c.

The third section declares "that the District Courts of the United States, within their respective districts, shall have exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also concurrently with the Circuit Court of

the United States, of all cases, criminal and civil, affecting persons who are denied and cannot enforce in the courts or judicial tribunals of the State where they may be, any of the rights secured to them by the first section of this act, and if any suit or prosecution, civil or criminal, shall be commenced in any State court against such person for any cause whatsoever"****"such defendant shall have the right to remove such cause for trial to the proper District or Circuit Court in the manner prescribed by the act relating to habeas corpus, and regulating judicial proceedings in certain cases, approved March 3, 1868, and all acts amendatory thereof."

It will be observed that jurisdiction is given to this court "of all causes, civil and criminal," affecting persons who are denied or cannot enforce in the local State Courts "any of the rights secured by the first section of this act." The denial of any one is as effectual as the denial of any other or of all. But it is said the cause set forth in the indictment is not one affecting Nancy Talbot in the sense of the law, and that therefore this court has no jurisdiction. The United States v. Ortega 11 Wheat. 467, is relied upon as authority, for this proposition. That case was as follows: The Constitution provides (Art. 3. Sec 2, that "in all cases affecting ambassadors, other public ministers and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." Ortega was indicted in the Circuit Court "for infracting the law of nations by offering violence to the person" of Salmon, the charge d'affaires of Spain in the United States. The Judges of the Circuit Court were opposed in opinion upon two questions, which were therefore certified to the Supreme Court.

They were:

(1.)Whether the case was one affecting a public minister within the meaning of the Constitution:

(2.)And whether in such cases the jurisdiction of the Supreme Court is exclusive?

The Supreme Court decided only the first question. It was held that the case did not affect the charge d'affaires. This rendered it unnecessary to decide the other question, and it is still unsettled.

It will be observed that the language of the statute is different. It is "causes, civil and criminal," and not cases.

Burrell in his Law Dictionary thus defines CAUSE: "The origin of foundation of a thing, as of a suit or action; a ground of action. 1. Comst. Rep., 470."

The phrase "causes, civil and criminal," must be understood in the sense of causes of civil action and causes of criminal prosecution. These do unquestionably affect the plaintiff in the one case, and the party against whose person or property the crime is committed, in the other.

The soundness and authority of the judgement in the case of Ortega are not questioned: but it is by no means true, as a universal proposition, that none are affected in the legal sense of the term, by a case, but those who are parties to the record. The solution of the question must always depend upon the circumstances.

In Osborn v. The Bank of the United States, the Court said: "If a suit be brought against a foreign minister the Supreme Court has original

jurisdiction, and this is shown in the record; but suppose a suit be brought, which affects the interest of a a foreign minister, or by which his servant, or his Secretary becomes a party to the suit-but the actual defendant pleads to the jurisdiction and asserts his privilege. If the suit affects a foreign minister, it must be dismissed-not because he is a party to it, but because it affects him. 9 Wheat.,584.

It may be asked, what is-if this is not the proper construction of the statute?

It has been answered that none are affected in criminal cases but the sovereign prosecuting and the defendants; and that hence, colored persons only can be prosecuted under its provisions.

When the act was passed there was no State where ample provision did not exist for the trial and punishment of persons of color for all offenses; and no locality where there was any difficulty in enforcing the law against them. There was no complaint upon the subject. The aid of Congress was not invoked in that direction. It is not de-

other provisions referred to, renders the protection which Congress has given, as effectual as it can well be made by legislation. It is one system - all the parts looking to the same end.

Where crime is committed with impunity by any class of persons - society, so far as they are concerned is reduced to that condition of barbarism which compels those unprotected by other sanctions, to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security.

It is said there can be no such thing as a right to testify, and that if Congress conferred it by this act, a cloud of colored witnesses may appear in every case and claim to exercise it.

There is no force in this argument. The statute is to be construed reasonably. Like the right to sue and to contract, it is to be exercised only on proper occasions and within proper limits. Every right given is to be the same "as is enjoyed by white citizens."

It is urged that this is a penal statute, and to be construed strictly. We regard it as remedial in its character, and to be construed literally, to carry out the wise and beneficent purposes of Congress in exacting it. Bacon's Ab. Tit. Statue I.

But if the act were a penal statue, the canons of interpretation to be applied would not affect the conclusion at which we have arrived.

U.S. v. Willberger, 5 Wheat., 96.
Com. v. Lowry, 8 Pick., 374.
U.S. v. Morris, 14 Pet., 475.
U.S. v. Winn, 3 Sumner's, 211.
1 Bishop's Crim. Law, 236

This objection to the indictment cannot avail the defendants.

III. IS THE ACT WARRANTED BY THE CONSTITUTION?

The first eleven amendments of the Constitution were intended to limit the powers of the Government which it created, and to protect the people of the States. Though earnestly sustained by the friends of the Constitution, they originated iu the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the Constitution saw many perils of evil in the center, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the Constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their power to remove every obstacle in the way of its success. The most momentous consequences of good or evil to the country were to follow in the results of the experiment. Hence the spirit of concession which animated the convention, and hence the adoption of these amendments after the work of the convention was done and had been approved by the people.

The twelfth amendment grew out of the contest between Jefferson and Burr for the Presidency.

The thirteenth amendment is the last one made. It trenches directly upon the power of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever, the power to replace it. Those who insisted upon the adoption of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

The act of Congress confers citizenship. Who are citizen, and what are their rights? The Constitution uses the words "citizen" and "natural born citizens," but neither that instrument nor any act of Congress has attempted to define their meaning. British jurisprudence, whence so much of our own is drawn, throws little light upon the subject. In Johnson's dictionary "citizen" is thus defined: "(1) A freeman or a city; not a foreigner; not a slave, (2) a townsman, a man of trade; not a gentleman; (3) an inhabitant; a dweller in any place." The definitions given by other English lexicographers are substantially the same. In Jacob's law dictionary (edition of 1783) the only definition given is as follows: "Citizens (cives) of London, are either freemen or such as reside and keep a family in the city &c.: and some are citizens and freemen, and some are not, who have not so great privileges as others. The citizens of London my prescribe against a statute because their liberties are reinforced by statute. 1 Roll, 195."

Blackstone and Tomlin contain nothing upon the subject. "The word civis taken in the strictest sense extends only to him that is entitled to the privileges of a city, of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant within the same city, for every inhabitant there is not a citizen." Scott qui tam v. Swarts, Com.,'Rep, 68.

"A citizen is a freeman who has kept a family in a city." Rey v. Hanger, 1 Roll. Rep., 186, 140.

"The term 'citizen,' as understood in our law, is precisely analogous to the term subject, in the common law; and the change of Government. The sovereignty has been changed from one man to the collective body of the people, and he who before was a subject of a King is now a citizen of the State." The State v. Manuel, 4, Dev. and Batt. 26.

In Shanks et. al. v. Dupont et al., 3 Peters, 247: the Supreme Court of the United States said: "During the war each party claimed the allegiance of the natives of the colonies as due exclusively to itself. The Americans insisted upon the allegiance of all born with the States respectively; and Great Britain asserted an equally exclusive claim. The treaty of 1788 acted upon the state of things as it existed at that period. It took the actual state of things as its basis. All those, whether natives or otherwise, who then adhered to the American States, where virtually absolved from their allegiance to the British Crown, and those who then adhered to the British Crown, were deemed and held subjects of that Crown. The treaty of peace was a treaty operating between the States on each side, and the inhabitants thereof: in the language of the seventh article, it was a 'firm and perpetual peace between his Britanic Majesty and the said States, and between the subjects of the one and the citizens of the other.' Who then were subjects or citizens was to be decided by the state of facts. If they were originally subjects of Great Britain and then adhered to her and were claimed by her as subjects, the treaty deemed them such; if they were originally British subjects, but then adhering to the State, the treaty deemed them citizens."

All persons born in the allegiance of the King are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance to together. Such is the rule of the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property, and not persons.

2 Kent's Com. (last ed) 1.
Calvin's Case, 7 Coke 1.
1 Black, Com., 368
Lynch vs. Clark, 1 Sandf. Chy. Re, 189.

The common law has made no distinction on account of race or color. None is now made in England nor in any other christian country of Europe.

The fourth of the articles of confederation declared that "the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the United Stated," &c. on the 25th of June,

1778, when these articles were under consideration by the Congress, South Carolina moved to amend this fourth article by inserting after the word "free" and before the word "inhabitants," the word "white." Two States voted for the amendment and eight against it. The vote of one was divided, Scott v. Sanford, 10 How. 575. When the Constitution was adopted free men of color were clothed with the franchise of voting in at least five of the States, and were a part of the people whose sanction breathed into it the breath of life. Scott v. Sanford 19 How. 573. The State v. Manuel, 2, Dev. and Batt. 24, 25.

"Citizens under our Constitution and laws mean free inhabitants born within the United States or naturalized under the laws of Congress." Ken's Com. 292, note.

We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor and subject only to the same exceptions, since as before the Revolution.

It is further said in the note in 1st Kent's Commentaries before referred to: "If a slave born in the United States be manumitted or otherwise lawfully discharged from bondage, or if a black man born in the United States becomes free, he becomes thenceforward a citizen, but under such disabilities as the laws of the several States may deem it expedient to prescribe to persons of color."

In the case of the State vs. Manuel it was remarked: "It has been said that by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State-

to Texas. All this was done under the war and treaty-making powers of the Constitution and those which authorize the National Government to regulate the Territory and other property of the United States, and to admit new states into the Union.

American Ins Co. v. Cantor, 1, Pct., 511.
Cross v. Harrison, 18 How., 164.
2 Story on the Conet, 158.

These powers are not involved in the question before us, and it is not necessary particularly to consider them. A few remarks, however in this connection, will not be out of place. A treaty is declared by the Constitution to be the "law of the land." What is unwarranted or forbidden by the Constitution can no more be done in one way than another. The authority of the National Government is limited, though supreme, in the sphere of its operation. As compared with States' Governments, the subjects upon which it operates are few in number. Its objects are national. It is one wholly of delegated powers. The Sates posses all which they have not surrendered: the Government of the Union, only such as the Constitution has given to it, expressly or incidentally and by reasonable intendment. Whenever an act of that Government is challenged, a grant of power must be shown or the act is void.

"The power to make colored persons citizens has been actually exercised in repeated and important instances. See the treaty with the

Choctaws of September 27th, 1880, art. 14; with the Cherokees of May 20th, 1830, art. 12, and the treaty of Guadeloupe Hidalgo of the 2d of February 1848, art. 8" Scott v Sanford, 19 Howard, 236-

Judge Curtis' Opinion.

See, also the treaty with France of April 30th, 1808, by which Louisiana was acquired, art. 3; and the treaty with Spain of the 23d of February 1819, by which Florida was acquired, art. 8.

The article referred to in the treaty with France and in the treaty with Spain, is in the same language. In both, the phrase "inhabitants" is used. No discrimination is made against those, in whole or part, of the African race. So in the treaty of Guadeloupe Hidalgo (articles 8 and 9), no reference is made to color.

Our attention has bee called to three provisions of the Constitution, besides the thirteenth amendment, each of which will be briefly adverted to.

(1) Congress has the power "to establish an uniform rule of naturalization." Art. 1, Sec. 8. After considerate fluctuation of the judicial opinion it was finally settled by the Supreme Court that this power is vested exclusively in Congress.

Collet v. Collet, 2 Dall., 294.
U.S. v. Velati, 2 Dall., 870.
Golden v. Prince, 3 Wesh. C.C.R., 813.
Chirac v. Chirac, 2 Wheat., 259.
Houston v. Moore, 2 Wheat,. 49.
Federalist, No. 52.

An alien naturalized is "to all intents and purposes a natural born subjects." Oo. Litt. 129.

"Naturalization takes effect from birth; denization from the date of the patient." Vin ab. Tit., Alien. D.

Until the passage of a late act of Parliament, naturalization in England was effected by a special statute is each case. the statutes were usually alike. The [[?]] appears to [[?]][[?]] Oro. Jac. 589, c 6. Under the late act. a resident alien may accomplish the object by a petition to the Secretary of State for the Home Department.

The power is applicable only to those of foreign birth. Alienage is an indispensable element in the process. To make one of domestic birth a citizen is not naturalization, and cannot be brought within the exercise of that power. There is an universal agreement of opinion on this subject.

Scott v. Sanford, 19 How., p 573.
2D Story, on the Constitution, 44.

In the exercise of this power, Congress has confined the law to white persons. No one doubts their authority to extend it to aliens, without regard to race or color. But they were not bound to do so. As in other

cases, it was for them to determine the extent and the manner in which the power given should be exercised. They could not exceed it, but they were not bound to exhaust it. It was well remarked by one of the dissenting Judges in Scott v. Sanford, 19 Howard, 536 in regard to African race: "The Constitution has not excluded them, and since has conferred on Congress the power to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States." It may be added that before the adoption of the Constitution, the States possessed the power of making both those of foreign and domestic birth, citizens, according to their discretion. This power as to the former they surrendered. They did not as to the latter, and they still possess it.

"The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Cons., 10 amendment

What the several States under the original Constitution only could have done, the nation has done by the thirteenth amendment. An occasion for the exercise of this power by the States may not, perhaps can not, hereafter arise.

(2). "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Const., Art. 14, Sec. 2

This provision of the Constitution applies only to citizens going from one State to another.

"It is obvious that if the citizens of each State were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as other aliens."

"The intention of this clause was to confer on them, if one may say, a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the same circumstances." 2 Story on the Const. Sec. 187

Chancellor Kent says: "If citizens remove from one State to another they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and to none other." 2 Com, 86

This provision does not bear particularly upon the question before us, and need not be further considered.

(3) "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic violence." Art. 4, Sec. 4.

Mr. Justice Story, adopting the language of the Federalist, says, that but for this power "a successful faction might erect a tyranny on the ruins of order and law; while no succor could be constitutionally afforded by the Union to the friends and supporters of the Government." * * "But a right implies a remedy, and where else could the remedy be deposited than

where it is deposited by the Constitution?" 2 Story, Const., 559, 560

This topic is foreign to the subject before us. We shall not pursue it further.

Congress, in passing the act under consideration, did not proceed upon this ground. It is not the theory or purpose of the act to apply the appropriate remedy for such a state of things.

The constitutionality of the act cannot be sustained under this section.

This brings us to the examination of the thirteenth amendment. It is as follows:

"ARTICLE XIII. 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.

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

Before adoption of this amendment, the Constitution, at the close of the enumeration of the powers of Congress, authorized that body "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any department of officer thereof."

In McCulloch vs. Maryland, Chief Justice Marshall used the phrase "appropriate" as the equivalent and exponent of "necessary and proper" in the preceding paragraph. He said: "Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted so the end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." * * "To use one" (a bank) "must be within the discretion of Congress, if it be on appropriate mode of executing the powers of Government." * * "But were its necessity less apparent" (the Bank of the United States), "none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place."

Pursuing the subject, he added: "When the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."-- 14 Wheat, 421, 422, 423.

Judge Story says: "In the practical application of Government, then, the public functionaries must be left at liberty to exercise the powers with which the people, by the Constitution and laws, have entrusted them. They must have a wide discretion as to the choice of means; and the only limitation upon that discretion would seem to be that the means are appropriate to the end; and this must admit of considerable latitude, for the relation between the action and the end, as has been justly

remarked, is not always so direct and palpable as to strike the eye of every observer. If the end be legitimate and within the scope of the Constitution, all the means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect."-[1 Story, Const., sec. 432.

These passages show the spirit in which the amendment is to be interpreted, and develop fully the principles to be applied. Before proceeding further, it will be well to pause and direct our attention to what has been deemed appropriate in

bound by oath to support this Constitution." No other oath is required, "yet he would be charged with insanity who would contend that the legislature might not [[?]] to the oath directed by the Constitution such other oath of office as its wisdom might suggest." McCulloch v. Maryland, 4 Wheat, 416.

The Bank of the United States, with all its faculties, was sustained because it was "convenient" and "appropriate" for the Government in the management of its fiscal affairs. 4 Wheat, 316.

Perhaps no measures of the National Government have involved more doubt of their constitutionality, than the acquisition of Louisiana and the embargo. Both were carried through Congress by those who had been most strenuous for a strict construction of the Constitution. Mr. Jefferson thought the former ultra vires, and advised an amendment of the Constitution, but expressed a willingness to acquiesce if his friends should entertain a different opinion. 2 Story on the Const., 160.

The second Bank of the United States was a measure of the same class of thinkers. The acquisition of Florida involved the same question of constitutional power as the acquisition of Louisiana. It was universally acquiesced in, and the constitutional question was not raised.

It is an axiom in our jurisprudence, that an act of Congress is not to be pronounced unconstitutional unless the defect of power to pass it is so clear as to admit of no doubt. Every doubt is to be resolved in favor of the validity of the law.

"The opposition between the Constitution and the law should be such, that the Judge feels a clear and strong conviction of their incompatibility with each other." Fletcher v. Peck, 6 Cr., 128

"The presumption indeed must always be in favor of the validity of laws, if the contrary is not clearly demonstrated" Cooper v. Telfair, 4 Dall, 18.

"A remedial power in the Constitution is to be construed liberally." Chisholm v. Georgia, 2 Dall., 476

"Perhaps the safest rule of interpretation after all, will be found to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history, and to give the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." Prigg v. The Com. of Penn., 16 Peters, 60.

Since the organization of the Supreme Court, but three acts of Congress have been pronounced by that body void for unconstitutionality.

Marbury v. Madison, 1 Cr., 137.
Scott v. Sanford, 19 How., 393
Ex parte Garland, 4 Wall., 334

The present effect of the amendment was to abolish slavery wherever it existed within the jurisdiction of the United States. In the future, it throws its protection over every one, of every race, color and condition, within that jurisdiction, and guards them against the recurrence of the evil.

The Constitution, thus amended, consecrates the entire territory of the Republic to freedom as well as free institutions. The amendment will continue to perform its functions throughout the expanding domain of the nation, without limit of time or space. Present possessions and future acquisitions will be alike within the sphere of its operation. Without any other provision than the first section of the amendment, Congress would have authority to give full effect to the abolition of slavery thereby decreed.

It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well considered judicial application. Any exercise of legislative power, within its limits, involves a legislative and not a judicial power can be invoked. Its office then is to repress and annul the excess: beyond that it is powerless.

We will now proceed to consider the state of things which existed before, and at the time the amendment was adopted, the mischiefs complained of or apprehended, and the remedy intended to be provided for existing and anticipated evils.

When the late civil war broke out slavery of the African race subsisted in fifteen States of the Union. The legal code relating to persons in the condition was everywhere harsh and severe. An eminent writer said: "They cannot take properly by descent or purchase: and all they find and all they own belongs to their master. They cannot make contracts, and they are deprived of civil rights. They are assets for the payment of debts, and cannot be emancipated by will or otherwise to the prejudice of creditors." 2 Kent's Com. 281, 222. In a note it is added, "In Georgia, by an act of 1829, no person is permitted to teach a slave, a negro, or a free person of color to read or write. So in Virginia by a statute of 1830, meetings of free negroes to learn reading or writing are unlawful, and subject them to corporal punishment: and it is unlawful for white persons to assemble with free negroes or slaves to teach them to read or write. The prohibitory act of the Legislature of Alabama, passed at the session of 1831-2, relative to the instruction to be given to the slaves or free colored population, or exhortation, or preaching to them, or any mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slave-holding States, but in Louisiana the law on the subject is armed with ten-fold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language in any public

discourse from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any sign or actions, having a tendency to produce discontent among the free colored population or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the State any paper, book, or pamphlet, having a like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court."

Slaves were imperfectly, if at all, protected from the grossest outrages by the whites. Justice was not for them. The charities and rights of the domestic relations had no legal existence among them. The shadow of the evil fell upon the free blacks. They had but few civil and no political rights in the slave States. Many of the badges of the bondman's degradation were fastened upon them. Their condition, like his, though not so bad, was helpless and hopeless. This is borne out by the passages we have given from Kent's Commentaries. Further research would darken the picture. The States had always claimed and exercised the exclusive right to fix the status of all persons living within their jurisdiction.

On the 1st of January, 1853, President Lincoln issued his proclamation of emancipation. Missouri and Maryland abolished slavery by their own voluntary action. Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations, slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give, in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or [[?]] upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "appropriate" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

It would be a remarkable anomaly if the National Government, without this amendment, could confer citizenship of aliens of every race and color, and citizenship, with civil and political rights, on the "inhabitants" of Louisiana and Florida, without reference to race and color, and cannot, with the help of the amendment, confer on those of the African race who have been born and always lived within the United States, all that this law seeks to give them.

It was passed by the Congress succeeding the one which proposed the

amendment. Many of the members of both houses were the same.

This fact is not without weight and significance. McCulloch v. Maryland, 4 Wheat., 401

The amendment reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. The whites needed no relief or protection, and they are practically unaffected by the amendment. The emancipation which it wrought was an act of great national grace, and was doubtless intended to reach further in its effects, as to every one within its scope, than the consequences of manumission by a private individual.
We entertain no doubt of the constitutionality of the act in all its provisions.

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