In the Supreme Court of U. S.

WM. FAGAN, et al

versus

STATE OF LOUISIANA, ex rel,

AND OTHER CASES.

UPON A RE-ARGUEMENT ORDERED BY THE COURT.

The Plantiffs submit as follows:

The plantiffs claim the reversal of the judgments of the Supreme Court of Louisiana, because they, severally, impair rights, privileges, and immunities recognized by the Constitution of the United States, and secured by it from invasion under color of a law of a State. The 13th and 14th amendments of this Constitution are the basis of this claim. The 13th amendment ordains that neither slavery nor involuntary servitude shall exist in the United States, nor under its jurisdiction, except as a sentence for crime Slavery had been a lawful state in every portion of the territory of the United States, and was still a lawful condition in some of the States when the amendment was adopted. Before this amendment a few only supposed that Congress could legislate for its abolition in the States, and a large number held the opinion that it had no power to prohibit slavery in the territories of the United States, Scott vs Sanford 19, H. 393. It is not denied that this amendment operates, fundamentally, upon the institutions of the United States. Its scope and operation I propose to examine. Slavery was at the foundation of society in the states of antiquity, and in some form penetrated the social and political arrangements of all nations. The captive in war, the insolvent

debtor, a disobedient or ungrateful posterity, the offender against laws, the pauper unable to sustain life were subjects for slavery. The condition was a hereditary condition, and slaves and their posterity might be sold, bought, bartered, or bequeathed. In some states and at some periods the master's power was absolute. He could use, abuse, dispose of or destroy the slave, as an owner of property might exercise dominion over it. In other states and periods, the master could not abuse or destroy the slaves, but was obliged to respect his person, his domestic relations; to allow to him holidays, the means of intellectual improvement, and certain rights of poperty. Slavery was introduced upon this continent, and none of the sources of slavery were prohibited in all the States. Even in the State of Vermont, until within a few years, slavery might be made lawful by contract or by sale under judgment for debt under its constitution. Indians were captured and sold in New England and Louisiana. The characteristic that distinguishes slavery wherever it has prevailed is that the slave is held to service or labor for the master as a matter of obligation or duty.* As an accessory and incident to this claim for service, there was a power over the person of the slave sometimes unlimited by law, and at other times modified and regulated so that the relation was only one for service. In some cases the services were defined, in others they were unlimited in kind or extent—"So that in the evening they know not what service they shall do in the morning; there is no certainty in service."

Bracton, 24, 26.

Mere degradation by law or custom in the absence of a personal relation of service did not constitute slavery. The chandala and other castes of India had their abode only in the country. They were only allowed to use broken vessels; their food was served in broken pots; their ornaments were of rusty iron; their clothes the mantles of the dead. No man who regarded his civil or religious duty would hold intercourse with them. They could not walk at night in cities or towns, and wore badges. Their business was to carry out the bodies of the dead who had died without kindred, and to execute the sentences of the law upon capital offenders. Some of the ordinances in regard to the Jews,

*But whatever be the limits as to the mode of exercising authority, if the obligation of service be unlimited in duration, I call that slavery.—Bentham principles of civil code, part 3, ch 2. Slavery is obligation of service unlimited in extent or time.—Herons h, jur. 71.

even within the last three centuries, are not dissimilar. Other castes were confined to certain and defined occupations; some of a degrading and menial character—base services, as sometimes called.

The conquered tribes in Israel were made hewers of wood and drawers of water to the congregation. The Egyptians were placed by Joseph on lands, and required to return one-fifth of the products, after he had purchased their property and persons in the years of famine. Schlegel in his philosophy of history (ch 4 p. 145,) in speaking of the division of castes in India observes, "That in this division of the social ranks there is no distinct class of slaves; that is to say no such class as bought slaves; no men the property and merchandise of their fellow men, as existed in Greece and Rome, or exist even at this day among Mahommedon nations, and as in the case of negroes are still to be found in the colonial possessions of the christian and European States. The Roman constitution during the republic and empire recognized relations of personal slavery, In the decline of the empire there was a modification of personal slavery, and it assumed some features of the caste.* The coloni, adscriptitii, inquilini appear in the Roman laws in the reign of the constitution, and afterward fill an important place in the Code. They resided on the land of their master, cultivated his land, paid to him an ascertained share of the products. He could not remove from the land, and if he escaped could be forced to return. He could be sold with the land, but not separately; nor could the land be sold apart. He could not maintain any suit, except for his share of the product, and this could not be sold without the master's consent. Similar conditions existed on the continent of Europe during the middle ages. Towards the year 1381 all then in England called bonds, that is to say all cultivators were serfs of body and goods occupying small portions of land, and unable to leave them without consent of their lords, whose tillage, gardening and cartage they were compelled to perform gratuitously. The lord might sell them with their house, oxen, tools, and posterity. The Parliament in the time of Richard 2d *unanimously* refused to ratify the charters made by that monarch for the enfranchisement of this class

*But see Inst. of Menu by Sir Wm. Jones, ch. 8, s s 413—415.

2. Thierry Norman Conquest 368; 3 Reeves' English Law by Finlayson 584—587, 257; Spence Inq. 330, 340; Scott vs Sanford 19, How. 497. In the 15 George, 6 ch., 24, an act recites that many colliers, coal heavers, and salters are in a state of slavery or bondage bound to the colliers or salt works for life, transferable with them when the original masters have no use for them. This act commenced a plan for the abolition of this bondage, which was finally completed by act of Parliament 1799.

Scott vs Sanford 19, How. 499.

Before this last act which Lord Stowell refers to as the final abolition of slavery in England (2 Hagg 94) some steps had been taken to abolish the slave trade. Burke had furnished his sketch of a negro code, many of its provisions having been adopted before the emancipation in the British West Indies. Slavery had been prohibited in the northwestern territory, and measures for abolition in some of the states. But when the language employed in the ordinance of 1787 was presented to the Congress of the Confederation, and adopted in 1787 as the fundamental law of the country; there had scarcely been any agitation on the subject, and not a vote had been passed in the Parliament of Great Britain to abolish the slave trade. The act of 1774 to provide for the relief of the colliers and salters stood alone.—There was opposition to the slave trade in the colonial legislatures, but slavery still existed. In Great Britain the relation of master and servant was a voluntary relation arising out of contract, and extended no further than the equitable construction of the contract allowed. The master could not chastise the servant, nor was there any law to enforce actual performance. Paley's phil. mast. and set.—Smith's master and servant p. 110.

What was involuntary servitude? The servitude (servitus) of the Roman law, and the continental law founded on it are relations of property. A right of one to deal with or to use the property of another, as an incident or accessory to his ownership of another property is a servitude. In strictness the relations are those of immoveable property. The estate owing the servitude is SERVIENT. The estate benefitted and the creditor is DOMINANT. When slaves become immoveable by destination and bound to the soil (coloni, adscriptitii,) the servitude lost some-

thing of its strict character, and acts and duties were imposed upon the estate. Tythes are spoken of as a servitude combined with an obligation. There was a right to a part of the produce *adversus quemcunque* with a charge on the owner to set it apart, so in Scotland the teind. So the *Thirlage* which is classed as a servitude, and imposes the specific duty upon the inhabitant of the thirl to carry his grain to the mill to be ground.

Austin on Jurisp. 884. Erskine Inst. 500—504

The Banalite of the French customs are of a similar discription. There was a prohibition of the tenant to hunt his lands; to fish in his waters; to grind at his mill; to bake in his oven; to full his cloth on his works; to sharpen his tools at his grindstone; to make wine, oil or cider at his own press; to sell at the public market without leave; to have a stallion for his mares; pigeons in his cote or rabbits in his warren. All these special interests or claims for use and enjoyment were reserved for the Lord, and are classed justly, as among the most odious of the acts of invasion of the rights of property. These rights of Banalite were all suppressed in the 23d section of the decree of 1791 of the legislative assembly.

It declares that all rights of Banalite of the oven, mill, winepress, SLAUGHTER HOUSE, forge, and the like, whether founded on custom, prescription, or recognized by judicial sentence, should be abolished without indemnity. Historical writers attribute to this legislature the suppression of castes in France, and the existence of civil liberty for all.

38 Dalloz jurisp. - Gen. 334.
De Tocque regime ancien (trans) 48.
De Stael rev. 149.

Nearly two centuries before (1614) at the last meeting of the States General, the third Estate presented a demand for the redress of their grievances. In their "Cahier" they asked that all nobles and others be forbidden to require any one to grind at their mill; to bake in their oven; to press in their winepress; or to make use of any other right of feudal service, whatever possession or usuage they may allege if they have not a title recognized as valid. That the employments subjected since 1576 to the system of exclusiveness by means of companies and guild be pursued

without restriction. * * * * * That the tradesman and artisans, whether belonging to a trade, forming a company, or to any other; pay no more dues for being admitted masters, for setting up business, or for any other part of their calling. That all the monopolies of trade or industry granted to individuals be abolished.

Thierry history Tiers Etat 240-1.

Turgot's oeuvres, Tome 8, p. 330—362.

The oppression and wrong continued until human nature could no longer submit. The reforms instituted by Turgot were resented as acts of hostility to the privileged orders, and they were able to obstruct the march of further reform until the revolution 1789. The reformation in Prussia was one of a similar character. It was yielded after the kingdom had been reduced to misery and destitution by the conquering hand of Napoleon.—The King in his edict of October 9th, 1807 refers to the "universal character of the prevailing misery;" he recognizes "that it is conformable to the principles of justice and of natural economy;" to remove all hindrances in the way of the individual attaining to that *measure* of material well being, which his *capacity* may enable him to attain. He speaks of the condition of the agricultural population as exercising a baneful influence. He abolishes all restrictions upon the acquisition of landed property by any of the three classes—nobles, burghers, and peasants. He breaks down the wall of partition between those ranks in reference to occupation. "Every *noble*, without derogation of rank, is henceforth *free* to exercise the *trades* and callings of the *burgher*." From the day of publishing the edict no new relations of villeinage could be enacted. From the same date all peasants holding by hereditary tenures, were emancipated with their *wives* and *children*. From Martinmas 1810, every remaining form of villeinage in all of the dominions shall *cease*. and from that date there shall be none but *freemen* in our dominions.

System of Land tenures 306—308.

This reference to the conditions under which personal slavery has existed, and the wide-spreading of the law of involuntary servitude promoted by the ambition and pride of caste, and of privileged orders in a state or kingdom, and the depressing and

degrading the mass of the population under the iron hand of law and custom, and the continuing so to do until relieved by by revolt or revolution, or national calamity enables us to comprehend the import and the object of the 6th article in the ordinance for the government of the Northwestern territory, and which has come to be the fundamental law of the entire land by the adoption of the 13th amendment to the Constitution of the United States. What was it that this amendment was designed to extirpate forever from the dominion of the United States. The American Anti-slavery Society in the preamble to their constitution of 1834 recited, " that the most High God had made of one blood all the families of man, to dwell on the face of all the earth, and hath endowed all alike, with the same inalienable rights of which are life, liberty, and the pursuit of happiness, and yet they say there are now more than two millions of human beings possessed of the deathless spirit, and heirs to the same immortal hopes and destined with ourselves, who are, nevertheless, deprived of these their sacred rights and kept in cruel and abject bondage."

This society therefore was formed to promote the abolition of slavery in the United States. The argument for this purpose was the uatural equality of right among men and the absolute injustice of all inequality as resulting from the direct operation of the laws.. But the abolitiou of slavery is very far within the scope and compass of this amendment. In the ordinance of 1787, it is associated with laws that have a wider and more enduring purpose. With laws for the maintenance of the sanctity of contracts, the protection of life, liberty and property, and the increase of moral and intellectual improvement.

In the Constitution of the United States there is an Association of a similar nature; there can be no titles of nobility, no corruption of blood because of crime. Honors and crimes have ceased to be hereditary. There is protection of the person from violation. Speech, publication and worship are free. The accused is secured of a fair inquiry and trial before conviction. Can not be reduced to slavery or be compelled to submit to an in voluntary servitude. These Constitutions were not the result of any sudden impulse nor the offering of any fanatical or revolutionary excitement.

The declaration of the inalienable rights of man was co-eval with the claim for independent existence as states.

Freedom was adopted as the life, strength and cherished hope of the republic. The proscriptive, monopolizing, exclusive, discriminating maxims of other forms of government and states of society, were deliberately rejected.

The adoption of the 13th Amendment removes not only from the Constitution, but from the entire American system, any allowance or tolerance to any form of slavery or involuntary servitude. The question arises: Do any one of these decrees or judgements recognize or establish any state or condition to which it is in any degree applicable? The decrees in two of the cases restrain the defendants collectively and individually from erecting "any docks, ways, wharves, landings, yards, pens, stables, for the landing, receiving stabling, yarding, keeping and preserving any beef-cattle, cows, sheep, swine or other animals destined for food or sale, in the parish of Orleans, Jefferson and St. Bernard." The same parties are also prohibited from "slaughtering any beeves, cattle, sheep, cows, swine, *or any* other *animals* intended for food, in the markets of the parishes of Orleans, Jefferson, and St. Bernard, EXCEPT *at the Crescent City Live-Stock Landing and Slaughter-House Company.*

We find that the parties before the Court prior to June 1869, had been for a long time engaged in the business from which they are prohibited, and had owned sundry property of the kind to which the injunction applies, and had contracted for buildings of a suitable kind for their business. The injunction operates to prevent their action. The second clause prohibits them doing the necessary acts to prepare animal meat for the markets of New Orleans, EXCEPT in the BUILDINGS of a SINGLE COMPANY.

All men have been prohibited in a similar manner by the Legislative Act of March 8th, 1869, No. 118. What was a lawful, profitable and useful avocation, has been placed in the *sole exclusive possession of seventeen persons*, designated by the General Assembly. The assembly fixes a price to be paid to the grantees of this charter for accommodation, and penalties upon all who may do a single act of work elsewhere. In either case they are exorbitant, the grant is for the term of twenty-five years.

The privilege granted to these *seventeen* is identical with the *banalite* in France, the *thirlage* in Scotland.

The monopoly granted to the Slaughter House Company is similar in all particulars in the guild or trade company. During the middle ages the relation of lord and vassal, whether the vassal was bond or free arose out of some tenure or title of the respective parties.

The lord owned the land, defended it in war, and adorned it in peace, while his tenants and bondsmen contributed their labor or the products of their labor as an acquittance of their duties. The trades, companies and guilds were associations of protection and help, originally similar to the Butcher's Benevolent Association. In the course of time the company or guild became *exclusive*, and none could enter without the consent of the company, or carry on their trade *without* being a member of the company. The surrender of the trade of the three parishes to the domination of *seventeen persons* forms a trade company or guild.

No person in the three parishes outside of the corporation can erect or establish landings, stables, yards, pens, abattoirs within those parishes. No person can make use of for the landing of animals for draft or for slaughter, designed for sale or for keeping or maintaining them at any other places. No person can labor upon them at any other place than the place of the company.

The obligation to surrender for twenty-five years the privilege of having, building, or improving property for this purpose, is implied, not by *contract*, nor the *constitution*, of their *titles*, to their property, but, by legislative *act*, to favor these *seventeen persons*.

A servitude is placed upon three parishes to promote their advantage and emolument. I do not use the word in its strict sense in the law books which relates to the dependence or duty imposed upon one parcel of land to benefit another, but in the more popular and expository sense. That a duty is imposed upon the owner and occupant of land in the three parishes to refrain from any improvements of a specified character for a specified purpose for the use and advantage of these *seventeen men*, who have property they have improved in that manner.

That every owner or bailee of personal property like that de-

scribed in the act, and who desires to use it at New Orleans, or the other parishes in the markets for sale, must place it under the care and keeping of the seventeen persons at their places.

That every artisan-butcher, whether the owner of animals, or merely a laborer to prepare food for market, must perform his labors in the houses of this company, not elsewhere in the three parishes. The SERVIENTS under this enactment are all the inhabitants using in any manner animals brought to the markets for sale or for slaughter. The DOMINANTS are the seventeen made into a corporation, with these seignoral rights and privileges. The masters are these seventeen, who alone can admit or refuse other members to their corporation. The abused persons are the community, who are deprived of what was a common right, and bound under a thraldom.

II.

The invalidity of this enactment becomes more apparent when we come to consider it in connection with the 14th Amendment to the Constitution. That Amendment was a development of the 13th, and is a more comprehensive exposition of the principles which lie at the foundation of the 13th.

Slavery had been abolished as the issue of the Civil war. More than three millions of a population lately servile, were liberated without preparation for any political or civil duty.

Besides this population of emancipated slaves there was a large and growingp opulation who came to this couutry without education, uuder the laws and constitution of the country, and who had begun to exert a perceptible influence over government and administration. There were also a large number of unsettled and difficult questions of state and national right that had no other settlement or solution but what the war had afforded. It had been maintained from the origin of the constitution, by men in every part of the United States, and of the highest order of ability, and who exerted a great influence, that the *State* was the highest political orgauization in the United States, and through the consent of the separate States, the Union had been formed for limited purposes, and that there was no social union except by and through the States, and that in extreme cases the several

States might cancel the obligations to the Union and reclaim the allegiance and fidelity of its members. Her claim was,

"She made our laws to bind *us*, not herself,
And hath full right to exempt.
Whom so it pleases her by choice,
From national obstriction without taint
Of crime, or legal debt."

that while a separate colony she had declared and maintained independence, and was declared to be and acknowledged as a separate and independent State.

That her confederation did not destroy sovereignty or independeuce. That as a separate State she consented to revise, was represented in the convention to revise, and consented to the change in the Constitution.

That she bound herself only by the ratification, and reserved all the powers not therein given to the General Government. That in the Constitution the organization and the arrangement of the States are indispensable to the organization and continuance of the Federal Government. The Government would be without organization were the States to withhold their aid.—Balwin's Consti. views. There is no definition of what constitutes a citizen, nor how a native becomes a citizen. The 14th Amendment does define citizenship, and the relations of citizens to the State and Federal Government, and thus deals with the most important and pervading of all the questions that can arise.

Mr. Calhoun in his work on the Constitution inquires, "What is the true relation between the two Governments, that of the United States, and those of the several States? For it is clear if the States retain their Sovereignty, as separate and independent commuuities, the allegiance and obedience of each would be due to their respective States, and that the Government of the United States and those of the several States would stand as equal and co-ordinate in their respective spheres and instead of being united *socially*, their citizens would be *politically* connected through their respective States. On the contrary if they have by ratifying the Constitution divested themselves of this individuality and sovereignty and merged themselves into one great community or nation, it is equally clear that the sovereignty

would remain in the whole—or what is termed the American People; and that allegiance and obedience would be due to them. Nor is it less so that the government of the several States would in such case stand to the United States in the relation of inferior and subordinate to superior and paramount, and that the individuals of the several States thus forced as it were into one great general mass, would be united *socially* and *politically*—a revolution much more radical indeed, than that which followed the Declaration of Independence.

1 Calh. works 122.

So in the Senate of the United States he is reported to have said. "If by citizen of the United States he meant citizen at large, one whose citizenship extends to the entire geographical limits of the country, a sort of the citizen of the world, all that I have to say is, that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the whole mass of our population." 2 Calh. works 242.

In the case of the State vs Hunt 2 Hill S. C. R. 1—257, Judge Harper, a very able jurist, maintains the same opinions, and in the course of his opinion says, "It has been admitted in argument by all the counsel who have argued against the oath of allegiance, except one, that in case of a *secession* of the State from the Union, the citizens and constituted authorities of the State would be bound to obey and give effect to the act." The counsel alluded to, Blanding, Pettigru, McWillie and Williams were opposing nullification and disunion, and were men of great eminence as jurists in that State. In the case of Scott vs Sanford, 19 How. 393, a plea in abatement, asserting the incapacity of the plaintiff to maintain the action because he was a negro descended from African ancestors, who had been imported and sold as slaves, was overruled upon demurer, and the defendant pleaded in law to the action and obtained a verdict and judgment.

A majority of the Court determined that the plaintiff could not upon a writ of error call in question the correctness of the judgmeut in favor of his demurer, after plea, verdict and judgment on the merits. The Chief Justice and Mr. Justice Curtis were of the minority on this question, and delivered elaborate

and able and opposing opinions upon the validity of this plea to the jurisdiction of the Court.

The Chief Justice held, that citizenship in the United States depended upon the fact of citizenship at the time the Constitution of the United States was adopted and descent from those, except in the case of naturalization. That persons like those described in the plea did not form any portion of the body politic then, and had no capacity to acquire it since that time. Mr. Justice Curtis did not agree to this opinion, and after a very exact and particular analysis of the pertinent clauses in the Constitution comes to a conclusion as follows: "Laying aside the case of aliens, and confining our view to free persons within the several States, we find that the Constitution has recognized the general principal of public law that *allegiance* and citizenship* depend upon the place of birth. That it has not attempted practically to apply the principle by designating the particular classes of persons, who should or should not come under it. That when we turn to the Constitution for an answer to the question, what free person born within the several States are citizens of the United States—the only answer we can receive from any of its express provisions is, that citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise, as electors under the Constitution depends on their own citizenship in the several States. Add to this that the Constitution was ordained by the citizens of the several States. That they were the people of the United States for whom and whose posterity the government was declared in the preamble of the Constitution to be made. That each of them was a citizen of the United States at the time of the adoption of the Constitution within the meaning of the terms of that instrument. That by them the government was to be and was in fact organized, and that no power is conferred on the government of the Union to discriminate between them or to disfranchise them. The necessary conclusion is, "that those persons born within the several States, who by favor of the respective Constitution and laws, are citizens of the State are citizens of the United States." This conclusion is the same as was expressed by Mr. Calhoun in the discussion he made, a portion of which I have quoted. The

*Appendix—Citizenship.

same would seem to be the opinion of Mr. Pinckney. In his speech upon the Missouri restriction he asks "what is this Union? a confederation of States equal in sovereignty, capable of every thing which the Constitution does not forbid or authorize Congress to forbid. It is an equal Union between parties equally sovereign. The object of the Union was common protection of already existing sovereignty. The parties gave up a portion of that sovereignty to insure the remainder. As far as they give it up by the common compact they have ceased to be sovereign.—By acceding to it the new State is placed on the same footing as the original State."–Pinckney's Life, 305. His conclusion was that Congress had no power to impose a restriction upon the State of Missouri in relation to the capacity or status of a portion of its population.

The opinions of Mr. Calhoun and Justice Curtis do not agree upon the effect of the Constitution granting to Congress power "to establish a uniform *rule* of naturalization throughout the United States." The latter contends that the entire subject of naturalization is in Congress. The former says that the power extends simply to the establishment of a uniform rule by which foreigners may be naturalized in the several States, without infringing in any other respect in reference to naturalization, the rights of the States as they existed before the adoption of the Constitution. and that every citizen is a citizen of some State or Territory, and, as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens of the several States; and it is in this and in no other sense, that we are citizens of the United States.

2 Calh. works, 243.

The opposing theory does not require an enlarged statement, my object being to show in what manner and for what cause the amendment was made. The popular and plausible argument was from facts outside of the documents and upon a very liberal interpretation of the facts. The colonies, it was said, were planted in an age of development. They were planted under the same conditions, and were under the dominion of the same king.—There were several attempts at alliance before the Declaration of Independence, and that declaration was a manifestation of unity

and an unfolding of national life. The articles of confederation were on their face perpetual, and the Constitution was designed to form a more perfect union for posterity. It took no cognisance of the names, number or extent of the States. All the acquisitions of territory were for the nation. That the full realization of national unity consisted in the overthrow of the confederate principle, and of separate state sovereignty by the amazing —not to say miraculous exhibition of power and strength under divine guidance in a struggle, face to face, and of life and death, in which the head of the serpent was crushed under the heel of the nation.

These enable the Nation to say to the States with the confidence, we do not say with the presumption of the Anarch,

> That we were formed then say'st thou? and the work
> Of secondary hand? Strange point and new!
> Doctrine which we would know whence learned; who saw
> When this creation was? Remember's't thou?
> We know no time when we were not as now,
> Know none before us. Self-begot self-raised
> By our own quickening power. * * * * *
> Our puissance is our own.

The 14th Amendment determines that persons born or naturalized are citizens of the United States and of the State where they *reside*. That no State shall depri ve any person of life, liberty or property without due process of law.. Nor deny to any person of the equal protection of their laws. Nor *abridge* the privileges or immunities of any citizen—Citizenship is a term of relation—The position of a person in the State determines his duty to the State—Relation of the citizen to the State depends upon the fact of *residence*—There is no citizenship of a person in a State independently of the fact of residence—Residence depends upon the will of any citizen of the United States without reference to the consent of the State. The State may not deny to him equal protection nor abridge his privileges or his immunities. The hereditary union of the native and adopted citizen in the bonds of citizenship throughout the entire jurisdiction of a country, makes of that country a nation. There cannot be a doubt of this, when the nation is clothed with power to enforce the

allowance of all of the privileges and immunities of the citizen in every part of the empire by legislation; to protect his life, liberty and property, and claims to protection. The difficulty with Mr. Calhoun was that there was no social union among the people of the several States. Their bond was political. There was no citizenship in the whole United States, except sub. modo. and by the permission of the States. There was connection. affinity, but no identity. The United States had no integral existence except as an incomplete combination among several integers. This Amendment consolidated these several integers into a consistent whole. Were there Brahmen in Massachusetts, born above the world, the chief of all creatures, and with the universe held in charge for them, and Soudra's in York or Somerset counties Pennsylvania, who simply had life through the benevolence of the other, this Amendment places them on the same footing—The Soudra may jeer, deride or discredit the Brahmen, or have sweet concord with them.

Some of the freeborn natives of the United States were not free to reside in freesoil States. Before this Amendment the privilege of connubium was restricted by such adventitious considerations as color, and Commercium was not altogether free. They might have been sold as vagrants. In that State when liberty had been particularly dear, there was a power reserved to sell a man to pay his debts. The States had a vast power to regulate the capacity and conditions of men.

1st Art. Const. Vermont.

That all men are born equally free and independent and have certain natural inherent and inalienable rights. * * * * * * * Therefore no male persons born in this country or brought over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after they arrive at the age of twenty-one years. * * * unless they are bound by their own consent after they arrive at age, or bound by law for the payment of debts, damages, fines, costs and the like.

The 14th Amendment places the indelible mark of citizenship upon all of those who being free before the war, were still held as an inferior class; those who were emancipated by the 13th Amendment in 1866, were yet in an inferior condition. It was

then denied that Civil Rights could be granted by federal legislation, by men of authority. But the Amendment is not confined to the population that had been servile, or had any of the disabilities or disqualifications arising from race or from contract.

There are forty millions of population who may refer to this Amendment to determine their rank in the United States, and in any particular State. There are thirty-seven Governments among the States to which it directs commands, and the States that may be hereafter admitted, and the persons hereafter to be born or naturalized will find here declarations of the same weighty import to them all.

To the State Governments it says, "Let there be no law made or enforced to diminish one of the privileges and immunities of the people of the United States;" nor law to deprive them of their life, liberty, property or protection without trial. To the people the declaration is, "Take and hold this your certificate of status and of capacity—the Magna Charta of your rights and liberties. To the Congress it says, "Take care to enforce this Article by suitable laws." It has been conceded, in opinions of this Court that municipal sovereignty is vested in the States with but little dimunition. That vested rights might be divested without the validity of the law being obnoxious to review by the federal authority. That life, liberty, and property were under the protection of State governments. This Amendment deals with these subjects with an imperial authority. It sets bounds to the power of the States, and strengthens the hands of Congress *to enforce* obedience. Sismondi says of a Constitution "That it describes a condition under which a society, a people, or a nation exists, and in this broad sense might include the laws and usages which aggregate a great number of persons into a single body or community, and acting for their preservation according to a common will. But that the word is usually applied to the instrument which embodies the objects of the association, and describes the means to render the members better and more happy. In constitutional States the society is engaged to assure to all, or the greater number, security, peace, respect for rights, the enjoyment of the fruits of industry and property, and progress in virtue and prosperity."—Constitution des peuples, 4.

It is the characteristic of modern constitutions to define the organization of the powers of government and the relations of the government to the people. The protection of life, personal freedom, property, religion and industry, from domestic or foreign obstruction, are the objects of government and the just right of those submitted to authority. These serve to make subsistence more easy, to bring under the control of all the comforts of life by co-operation or division of labor; the benefits arising from improvements and accumulations of capital, science and art, and to inspire in all the hope of amelioration and advancement. The 14th Amendment has in a direct manner ascertained the powers of the State and Federal Governments towards one-another, and to the people, in all of these fundamental aims of constitutional organization. I am not able to examine this Amendment to the Constitution as a measure of hostility; as a form of words to establish the supremacy of a party—a party platform; a cunningly devised scheme to entrap States which were said to have been in rebellion, that Congress might disfranchise their population, or overturn their Government, obliterating for a time, State lines; and numbering the departments according to Arabic numerals, and swaying them by means of a Brigadier's sword, and a Brigadier's will, so that Governments might be organized for party and personal objects; which have justified Machiavel's remark of Governments in his own time. "The exploits of antiquity fire noble minds with the desire to imitate them; the transactions of a recent date will fire the noble minded among posterity with a desire to avoid and spurn such ignominious examples." This Amendment purports to be an act of Union to determine the reciprocal relations of the millions of populations within the bounds of the United States—the numerous State Governments and the entire United States administered by a common Government, that they might mutually sustain, support and co operate for the promotion of peace, security, and the assurance of property and liberty. To accomplish these there must be some precise and defined declaration of their relative obligations, duties, powers, and rights. The places of the citizen and of the government or governments must be ascertained, that quarrel, and riot, and revolt, and civil war be pre-

vented. The ground for strife and collision must be enclosed. The first clause in this section has a peculiar significance in this aspect of the discussion. The fact of citizenship does not depend upon parentage, family, nor upon the historical division of the land into separate States, some of whom had a glorious history, of which its members were justly proud. Citizenship is assigned to nativity in any portion of the United States, and every person so born is a citizen. The naturalized person acquires citizenship of the same kind without any action of the State at all. So either may by this title of citizenship make his residence at any place in the United States, and under whatever form of State administration, he must be treated as a citizen of that State. His privileges and immunities must not be impaired, and all the privileges of the English Magna Charta in favor of freemen, and of the French Constitutions of right to protection are collected upon him and overshadow him as derived from this Amendment.—The States must not weaken nor destroy them. The comprehensiveness of this amendment; the natural and necessary breadth of the language; the long drawn history of some of the clauses; their connection with discussions, contests and domestic commotions that form land-marks in the annals of constitutional government; with the circumstances under which it became part of this constitution, demonstrate that the weighty import of its ordination is not to be misunderstood. We have in general terms stated the subjects to which it is applicable and the aims it was intended to attain. We shall inquire whether the plaintiffs have made a case to entitle them to the protection and guarantee of this clause of the amendment. The case of Ward vs. Maryland, 12 Wall. 419 was relied upon in the former argument for a definition of the terms "privileges and immunities." The case involved the validity of a statute of Maryland, which imposed a tax in the form of a license to sell the agricultural and manufactured articles of other states than Maryland by card, sample, or printed lists or catalogues. The purpose of the tax was to prohibit sales in that mode, and to relieve the resident merchant from the competition of these itinerant or transient dealers. This court decided that the power to carry on commerce in this form was a privilege or immunity of the sojourner or

absentee dealer, which could not be *destroyed* or *abridged* by the legislative authority of the State, and relied on the 2d section of the 4th article of the Constitution. The court in its discussion refers to the history of these words in the articles of the confederation and the Constitution, and to the cases in which they have been interpreted, and affirm that they secured to a citizen of one State the privileges and immunities of a citizen in an other State, and that these were the privileges of acquiring and holding property, and of carrying on trade and commerce. (p. 430.) The section of the Constitution cited in the opinion of the court, and this article of the confederation are among the most definitely marked of all the federative features of those instruments. The grant corresponds with those relations of alliance among the Greek cities known as Isopolity, where two equal and independent States mutually secured to their citizens all those privileges, which a resident alien could not exercise, except through a guardian; the right of intermarriage; of purchasing landed property; of making contracts of all kinds; to appear in courts, and to be exempt when citizens were so. 2 Niebuhr, Rome 37. The privileges granted to the Latin cities and others in particular relations of amity with Rome are similar. 2 Savigny's Roman law, 64-68. So the treaty between the United States and France in 1778.

The clause in the 14th amendment does not deal with any interstate relations; nor relations that depend in any manner upon State laws, nor is any standard among the States referred to for the ascertainment of these privileges or immunities. The clause assumes that these were privileges and immunities that belong to an American citizen, which are not to be subject to State law.

The State is commanded neither to make nor enforce any law that will abridge them. We have seen that the words are suitable, and have been employed to describe the personal rights—the civil rights which usage, tradition, habitudes of society, written law, and the common sentiment of the people have recognized as forming the basis of the institutions of the entire country. The first clause of the amendment has designated the members of the nation; those who composed its entire body politic; those who had rights and duties under the Constitution and laws, and who were to be faithful to both. The second clause

proceeds to affirm that every component part of this body politic is entitled to privileges and immunities by the very existence of the the nation, and which the nation guarantees. The freedom and inviolability of the body of each citizen is secured in the Constitution itself by the prohibition; upon the existence of slavery and involuntary servitude, and the denial of the power to the general government of the power to deprive him of life, liberty, and property without due course of law, by forbidding bills of attainder *and expost facto laws. Upon this inviolability the very possibility of the existence of a free republican government is grounded. Every citizen must be able to travel throughout the United States to perform his duties of a citizen, whether derived from his right to cultivate the ground, or to purchase products, or to carry on trade, or to maintain himself and his family by free industry. The capacity to acquire and to hold property is also recognized in the Constitution, as existing rights in the possession and enjoyment of the citizen. These positive rights live in the conciousness of the people, and are called the people's rights—the common right—the common law, and are the product of the common mind of the people, living and working in individuals, and which each individual recognizes to be necessarily law, aud conforms his daily practice to it. Au eminent publicist thus dissents from the doctrine, with which we occasionally meet—that property is the creation of the law, as if it had no natural foundation; as if it were not a natural right; as if it did not precede all laws, and were not their ground, but an effect. He says, "Government is ordained not to create so much as to protect and regulate property, and the chief strength of government lies in the sanction which the moral sense, the natural right gives to honestly earned possessions.—We hear much of radicalism, of agrarianism at the present day, but of all radicals the most dangerous, perhaps, is he who makes property the creation of law, because what the law creates the law may destroy." The 14th amendment seems to have been made under some apprehension of the destructive faculty in State government. Since the date of Magua Charta a freeman could claim against the king, "the immunity from imprisonment, outlawry, banishment, disseisin or destruction. His privilege was to be judged by his peers and the law of the land. These have

*Story's Miscellaneous writings, 620.

since been termed rights, privileges and immunities according to their connections. The Colonists claimed as their unquestionable right the same privileges and immunities.

Every political community in the land assumes that they exist unimpaired. In all constitutions they enter as the reserved rights of the citizen and people. They were denied to the slave. The 13th amendment declared that there should be no slavery nor involuntary servitude. The potestas domini in servum ceased to exist. The usus fructus hominum disappears from the institutions and habitudes of the United States. All men are to have equal protection from State jurisdictions. All men are to have their rights to life, liberty and property ascertained before deprivation. Each citizen is to have his privileges and immunities undiminished; liberty; the right to personal freedom; the power of determining, by his own choice, his own conduct; to have no master, no overseer put over him; to be able to employ himself without constraint of law or owner; to use his faculties of body and mind, at places and with persons chosen by himself, and on contracts made by himself. All these things grow out of the two amendments, and are held under the safeguard of the nation.—These things being secured, all other things would follow. But the amendments secure the more important and the most imperiled of the consequential rights. They protect property. They compel to equal protection.

Thus the social right to combine his faculties with those of others, to profit by the combination; to share in the conquests of the society over nature on equal terms are also secured.—What we claim is nothing new. The common law of England recognized at a very early period as a common right, that of selecting and following a vocation.—3 Reeves' Eng. Law by Finlayson, p. 594. Sometimes parliament, in the interests of the privileged orders, invaded this right and placed obstructions in the way of its exercise. The statutes in regard to laborers is an instance of the kind, but the judicial tribunals never lost an opportunity to assist the right of the subject. To permit encroachments upon this right would only introduce slavery of another species.

We have stated the judgments in the different cases before this

Court, and ascertained the extent of the subtraction they make from the personal rights and free agency of the plaintiffs in the suit. The object of the act is to create a MONOPOLY in favor of the Crescent City Live Stock Landing and Slaughter-house Co. by placing all persons not belonging to that Company under a disability to do and perform acts in the course of a regular business, for the benefit of **the** Company. Austin, in his jurisprudence, p. 986, defines monopoly, "to consist in the duty which is imposed upon persons generally, to *forbear* from all such acts as would defeat or thwart its purpose." Again, he says, (p's 48-401) "the right styled a monopoly is a right in rem, which has no subject. There is no specific subject over, or to which the right exists, or in which the right inheres. The officium or common duty to which the right corresponds, is a duty lying on the world at large from selling commodities of a given description or class, but it is not a duty lying on the world at large to forbear from acts regarding determinately a specific subject." The statement is true as to inventions and copyrights, the only forms of monopoly existing under the law of Great Britain.

But under the Act No. 118, there is a determinate subject.— The monopoly is not only that all men shall forbear to make use of their property for the preservation of animals intended for sale and slaughter in three parishes, but, that they shall carry to and deposit in the buildings and enclosures of the corporation, their property upon an involuntary contract of bailment with the Company, and also, that all persons doing work in a regular vocation shall use their buildings to carry on their work.

But the question comes, has a State power to declare all the lands within a large territory shall not be used in a particular manner in order to benefit the owners of a single parcel of land in that neighborhood? In this case an owner is enjoined from selling, and persons competent to contract are restrained from purchasing land, lest they might interfere with the *monopoly* of the defendants. They are prohibited **to improve it** or any other land in the three parishes, with docks, ways, stables, yards, &c. Such thraldom of the soil in feudal times was not uncommon.— Filangieri speaking of tenants in Europe at the end of the last century says, "There is another barbarous custom which prevails

everywhere a remnant of feudalism. It is that of the chase. The Northern Nations were hunters by character and from necessity ; after they had overrun Europe they were unwilling to renounce hunting. It was no longer a necessity but became an amusement and served to increase the pleasures of opulence and grandeur. A large extent of land is reserved from cultivation and set apart for this purpose. This right which bears the impress of the barbarism of the time is contrary to the rights of property, to the public interest, which prevents the progress of agriculture, and not only has not been abolished, but in some portions of Europe is exercised most rigorously.

La Science de la Legislation b. 2, ch. 12, p. 165.

In the reign of Charles 1st, the oppression of the Forest Laws and of the Courts to enforce them compelled the interference of Parliament, which passed an act which was "a great benefit and ease to the people." If the Legislature can barter away to a Corporation exclusive privileges and strike the land with disabilities, the land will soon become a desolation and a waste!— Why not confine the planting of sugar to certain counties, or to certain plantations, of cotton to others, of rice to others, pasturage to others? Why not confine all laborers to service on some one or more of the plantations? Why not all of certain classes of persons to certain forms or modes of work? The answer to all of these questions is that though such laws appear only to affect the use and disposition of property, they do in fact diminish the rights and liberties of the persons who possess them.

The thraldom in favor of the lord necessarily makes of the tenant a bondsman. A modern writer says, "In the progress of society; however, there is an essential tendency to freedom. Originally governments exercised the most absolute power over their subjects. Land in Greece and Rome and the feudal monarchies of Europe, belonged to the States, and the possessor enjoyed it as a mere usufructuary. The liberty of the individual and his absolute independence of the government, provided he does not improperly interfere with the comfort and happiness of others; these are political innovations upon the old systems of States, and the more advanced each nation becomes, so much the more will the liberty of the individual be developed. So

much the more will his right to the property in his works be assured. So much the more will all shackles be removed from the free transfer of property."—Heron's hist. of jur. 710. If the purpose of the 14th Amendment to the Constitution needed vindication it will be obtained from such arguments as these. The Amendment was designed to secure individual liberty, individual property, and individual security and honor from arbitrary partial, proscriptive and unjust legislation of State governments. Congress was directed to enforce the distribution of impartial and equal judgment and justice in every portion of the United States. An enlightened statesman and jurist of this country discusses this question upon the constitutional principles that prevail here.—He puts the question whether the Federal or State governments possess a right to distribute wealth and poverty, gain and loss among occupations and individuals?

He says, "men by nature have two rights; to his conscience and to his labor; and it was the design of civil society to secure these rights. In the case of religious freedom, we enjoy one right; in that of the freedom of property our condition is not so clear; yet both stand on the same foundation. By suppressing the distinction between occupations and covering all by the inclusive term, LABOR, we at once discern the natural equality of right—The occupations of men are the men themselves; and every free government supposes that it is only distinguishable from a tyrannical one by equal laws, and equal rights of its citizens. Our societies grew up from this principle, and we find nothing in our Constitution by which it is abolished.

Our government received men animated by the Creator, with a free will over his mind and his labor; and were instituted to protect the divine bounty. The freedom of conscience was made complete. Because no contributions from the natural rights were necessary to the support of the civil government; but the freedom of labor was not complete from the necessity of such contributions. **For ages, governments used the division.** For ages, governments used the division of mankind into religious sects as a means of making some men subservient to the avarice of others. We have detected this fraud; but its principle is maintained still by governments that use the division of mankind into religious

sects, as a means of making some men subservient to the avarice of others. The natural right of labor in subjecting themselves to contributions for the support of civil government, never intended to acknowledge themselves to be the slaves of a despotic power. These contribution were agreed to for the purchase of protecting and not to establish a power of transfering the fruits of laborfrom one person to another.

Construction construed, 203, 204.

This is but an exposition of the Constitutions of all the States and of the American common law. It is not a discovery that life, liberty, property, protection, privilege, and immunity are held by individual and personal titles. They were claimed as the sacred inheritance of our people, brought to this continent by the first colonists, and maintained with heroic and magnanimous efforts. All the calculations and aims of the people had been made upon this unquestioned conviction. What the 14th amendment was designed to accomplish was to afford a permanent and powerful guarantee to them. This consisted in the recognition of them as the assured estate of the population, and the withdrawal from the States of any power to abridge or to destroy them. The mandate to the States is to maintain and to preserve them; to Congress to enforce a compliance from the States.

It is said that the immigrants to the United States and their posterity since 1789 form a large majority of the population of the country. Within this decade near four millions of emancipated slaves, without education, capacity, and generally with the habits and ignorance that belong to a savage condition—"The heathen of the country," as described in the Constitution of the Anti-Slavery Society, have become free citizens. These facts have wrought a change in the face of society and of politics. A historian of Rome many years ago in representing the state of the great city after the proscription, and massacres and destruction of the Patrician families, Senators and citizens of Rome during the civil wars; the increase of slaves and freedmen and the adulteration of race and blood from the influx of these and of aliens, intimates that the long settled and stable communities of modern Europe, and their freedom from physical change, notwithstanding their long and frequent wars, allowed of no compari-

son. But that the case was different in this hemisphere where the native race is overwhelmed from one generation to another by a constant stream of foreign and inter-state immigration.—"In America," he says, there is a rapid change and decomposition of national sentiment constantly in progress. The ideas of one decade of years become obsolete in the next. Manners and fashions are fluctuating. Even the language partakes of the general instability, though retained on its foundations by its European sister. A few fixed principles of polity belonging, perhaps, to an exceptional state of social development alone remain like land-marks, overtopping the ceasless flow of thoughts and prejudices around them." The 14th amendment contemplated the adoption of what is called impartial suffrage and that has been compelled. The force of universal suffrage in politics is like that of gun-powder in war, or steam in industry. In the hands of power, and where the population is incapable or servile power will not fail to control it, it is irresistible. Whatever ambition, avarice, usurpation, servility, licentiousness, or pusillanimity needs a shelter will find it under its protecting influence. Besides in a large section of the United States, the flower of the virile population had perished in an inter-states war. A large portion of its dominant population were disfranchised by the third section of the article. In that region there had been a subversion of all the relations in society and a change in social order and conditions; while in the other section there had been a great accumulation of capital and credit; shameful malfeasance had become very common, and there had been an effusion over the whole land of an alert, active, aspiring, overreaching, unscrupulous class—the foulest offspring of the war, who sought money, place and influence in the worst manner and for purposes entirely mischievous. Their associations were formed not for such mutual advantage as is consistent with law, but for the execution of rapines that the laws prohibited. A wise and provident statesman would have found in the facts before him and the fact that a vast development was taking place, constantly leading to other and, perhaps, greater mutations in society—an occasion for strenuous and patriotic exertion of his noblest powers. How were all these varieties of people, this increasing multitude to be held to-

gether so as to be a united and contented people working for a common object. How were the thirty-six State governments—and with the prospect of indefinite increase, to be held to perform their duties to accomplish the same results. It was patent that some of them might be wanting in the requisites for carrying on good government, and might be unfaithful to their trust.

The 14th amendment embodies all that the statesmanship of the country has ordained for accommodating the Constitution and the institutions of the country, to the vast additions of territory, increase of the population, multiplication of states and territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, commercial development.

It is not our business to inquire whether this Amendment is or in the future will be esteemed a full or a proper solution of the important problems that were presented. Our inquiry is, what solution has been made? It is apparent by the first clause that the national principle has received an indefinite enlargement.—The tie between the United States and every citizen in every part of its own jurisdiction has been made intimate and familiar. To the same extent the confederate features of the government have been obliterated. The States in their closest connection with the members of the State, have been placed under the oversight and restraining and enforcing hand of Congress. The purpose is manifest to establish through the whole jurisdiction of the United States one people, and that every member of the empire shall understand and appreciate the constitutional fact that his privileges and immunities cannot be abridged by State authority.—That State laws must be so framed as to secure life, liberty, property from arbitrary violation, and protection of law shall be secured to all. Thus as the great personal rights of each and every person were established and guarded, a reasonable confidence that there would be good government, might seem to be justified.

Unquestionably a very large share of blessings are stored and garnered here as in a common repository. Here is the hope of the laboring man; the confidence and trust of the merchant; the stability, success and profit of the agriculturist; the leisure and inspiration of the student, and the peace, the comfort, the

enjoyment of the family and the home. Much that governments can afford are comprehended in the proper enforcement of the command of this article.

If there be an assurance and enjoyment of these blessings content would inevitably follow. In solicitude for them all other cares aud anxieties may yeild a priority. In the argument we heretofore submitted, we cited the opinion of a publicist of France, that there was an inherent right of a man to labor and to enjoy the fruits of labor, and that this does not come from any concession of the State, but is his prerogative, that the man and his labors have a hypostatic union. The man is manifest in his works. So a christian is blessed at his death, for he rests from his labors, and his works do follow him.

M. Thiers finds in liberty, the foundation of all other rights. "There is a species of property," he says, "which cannot be charged as a usurpation. The right to one's self, to his own faculties, physical and intellectual, his hands, feet, eyes, brain, in a word his soul and his body." Here is an incontestable and indivisible property to which no Agrarian law can be applied. Of which none can complain to the law, to society, or to the person himself. For which there can be no hatred nor envy, which none can take away; and for which there can be no controversy except with God. He deduces, as a right not less sacred, the product of the faculties, and this includes his entire possessions, and which society is intended to guarantee. For without it there will be no work, and without work there will be no civilization, not the necessaries of life, only pauperism, misery, barbarism, crime.—De la propriete, 36, 47.

I have assumed that the 14th Amendment was not adopted as an act of hostility; nor designed to sow discord; nor to answer an ephemeral or unworthy purpose. Those who deprive the first section of its vitality, and demand an interpretation which would leave the State Governments, in possession of their powers over persons and property unimpaired, do place a stigma upon the authors of the Article. The remaining sections have been for the most part executed. They have not produced wholesome fruits. The first section remains. It promises protection to forty millions of persons against the excesses of thirty-seven State Governments.

The language of the section to the State Governments to maintain prescribed bounds, and to Congress to enforce obedience to the command, is imperative. The excesses apprehended are invasions of the personal rights of individuals under color of authority.—Two forms of invasion are apprehended The State may deny individual rights and liberties and claim to perform all of the offices and duties of society, and under the names of socialism, communism, and other specious pretences, control all the revenues and labors of the State. Or the advantages, benefits, partialities and privileges of the State may be conferred upon a few to the detriment and oppression of the people.

The American Constitutions have not a word in favor of either of these. They are built upon the foundations of individual rights, of equal rights, equal protection from the laws.

The fact that in some of the States there had been found extremes in the conditions of persons—inequalities of the most conspicuous character and quality -was one that the amending power of the Constitution was compelled to observe in preparing the 14th amendment. In 1832 a society had been formed in Boston of less than twenty persons—some females—whose constitution affirmed that every person of full age and sane mind has a right to *immediate freedom* from personal bondage of whatsoever kind. They also proposed to elevate to civil and political privileges the colored population, and to provide for their improvement. A more numerous society upon a broader platform was made two years after in New York. Before the adoption of the 14th amendment, slavery had been abolished in all places over which Congress had jurisdiction by act of Congress. The President had made a proclamation and a number of the States had emancipated slaves. The 13th amendment had been adopted.

There were acts for elevating the condition of the colored population and a civil-rights bill. The 14th amendment was the consummation of a long and direful conflict and to provide against the recurrence. To what were the thoughts of those who made and adopted the amendment directed?

The agitation in reference to the emancipation of slaves was only one phase of the movement over christendom in favor of the depressed and inferior classes of society. Industrial and material

progress had given a value and a correspondent dignity to labor. Mere manual labor—the steady persevering and effective application of the body to the accomplishment of a useful purpose obtained sympathy. There was a general disposition to relieve one from a life of toilsome drudgery and to ameliorate his condition. Societies were formed—associations of laboring men were formed, and discussions were had as to their rights and the means of their improvement.

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

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

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

III.

There were six cases before the Supreme Court of Louisiana which presented the validity of the Act of March 8th, 1869, to that Court. The Court filed opinions in a single case, (No. 479, as printed,) in which Estaban and others are plaintiffs, and the State of Louisiana defendant. In this case the Attorney General was engaged by this Corporation to ask in the name of the State for restraints upon a portion of its population in the prosecution of their industry, as a just thing and in the name of the State. The Corporation is really the plaintiff, and the Attorney General an attorney at law acting for their behalf. A peer of Great Britain has appended to one of his published works, "Maxims on

the popular art of cheating, being an introduction to the noble science by which every man may become his own rogue." One of these maxims is "When you want something from the public, throw the blame of asking on the most sacred principle you can find. A common beggar can read you exquisite lessons on this most important maxim in the art of cheating. "In the name of God, Sir, a penny ! !"

This Corporation veils its iniquities under pretences of providing for the public health, and employs the Attorney General to secure to them the benefit of their iniquity in the name of the State. The case 480 is one by the Corporation itself. It was brought before June 1st 1869. Before the Act was operative, and was presented to prevent the defendants from prosecuting their trade or to carry on their business. The decrees in both these cases are similar in their form and operation. They decree that the defendants in these cases shall not do any acts, or employ any property within parishes of Orleans, Jefferson, and St. Bernard which might in any manner infringe the monopoly granted to the Crescent City Live-Stock Landing and Slaughter-House Company, in the Act No. 118, of March 9th, 1867.

The third case before the Court is one commenced by the plaintiffs against the Corporation, to prevent them from obstructing them in the prosecution and trade in those parishes, and setting forth that act of incorporation was contrary to the constitution of the United States, as well as of the State, granting to the Corporation, as a part of the National or State domain, the individual and personal rights of members of the State which the Legislature had no power to alienate or to destroy. In the same petition the corruption of the Legislature in making the grant was averred. In these cases the facts were agreed upon that there had been such an incorporation as is set forth in Act No. 118, and that the Butchers' Benevolent Association and other adverse parties had carried on the business, set forth in the pleadings, for a long period and persisted in doing so. Three of the six cases have been dismissed, some of those who originally opposed the monopoly having acquired a share in it. Two opinions were filed in favor of the charter, and three Judges of the Supreme Court concurred in the judgment. A dissenting opinion is filed.—

These are to be found in the record 479.

The Ch. J. at p. 34, sect. V. fo. 91 says, It is urged, "That the Act is violative of the Bill of Rights, incorporated in the Constitution of the State in 1868, and the 14th Amendment of the Constitution of the United States, because it deprives one class of citizens of *certain rights* of *property* and *freedom of action*, not for the good of the community, but for the private gain of other individuals of the community." He says, "This proposition assumes that one class of persons is deprived of certain rights of property for the gain of individuals. This assumption is unwarranted by the record and contemporaneous history" What is shown by the record? The record shows a large body of persons, hundreds in number, had been conducting a lawful bnsiness, in a lawful way, for many years; they had invested capital and labor, and had acquired skill in this useful business, for their own benefit, the subsistence of their families, and the welfare of the community. That by a legislative act their buildings and other constructions for the purpose were closed. They were deprived of power to erect other buildings, or to employ their capital, skill and labor, with freedom. But that seventeen designated persons were invested by the Legislature with the sole and exclusive power to conduct and to carry on this business; the power to have property suitable, such as landings, docks, ways, stables, pens, and abattoirs, was withdrawn from all others in these parishes. All animals to whomsoever belonging, which may at any time be for sale or slaughter must be confided to their care. All persons must work in these abattoirs or not at all in the vocation of preparing meat for market. This corporation receives a price determined in their charter. In a word a great monopoly of a trade which has always existed, has been granted to seventeen favored adventurers. The judgments sustain these disabilities upon the application and use of property and these restraints upon the freedom of the right of action. That this was done for the private gain of these seventeen is shown by the fact that whatever has been seized and abstracted from the members of these associations and these tradesmen, has been granted to this company of seventeen. The facts recorded in the judgment at test conclusively the accuracy and justice of the charge made

against this enactment. A leaf is torn by the Judge, from the brief of the attorney for this corporation, and exhibited, as showing the contemporaneous history. None of the documents referred to belong to either of the records. The facts are, that about the beginning of this century the preparation of meat for market was made on the west bank of the river, and opposite to what is now the lower portion of the city on the river. At that time the mass of the population was collected there. We know of no law nor ordinance, and affirm after a careful inquiry there was none, that placed there the laborers in that vocation. The probability is that in the absence of firm roads and vehicles, and the presence of an alluvial and miry soil, water-carriage across the river was easier than any land carriage.

In the course of years the city extended along the bank of the river above, and the streets were opened and improved.—Stock came from the country above by means of boats. So the stock landings were fixed above the city, and continued above until this enactment. In 1866 the court affirms there was a complaint to the grand jury to the effect that there had been some impurity of the water of the river, owing to the throwing of the filth and offal into the river above the water works, and communicated to the people through them. In the year 1867 the legislature passed an act, making it obligatory upon the city councils at once to procure and use suitable vessels for carrying all the filth collected from the city and from the slaughter houses to a place outside of and below the city limits. Shortly after this the State government was placed under the charge of a Brigadier General of the army of the United States; the Governor was displaced, legislative sessions discontinued, and the Mayor and Aldermen suspended by other appointees.

This condition remained until the reconstruction of the State. The legislature of 1868–9, following after the adoption of the Constitution and Constitutional amendments, passed the act No. 118. The Judge assumes that this act was passed as a sanatary measure, and that this is shown by the title of the act. There cannot be a doubt that these defendants were liable to a presentment by the grand jury, and to punishment if they or any of them created a public nuisance, and were liable to civil suit for

damage done to any one by their fault. There are strict ordinances and statutes which would have answered every purpose of preventive and remedial justice. The ancient and accustomed mode of dealing with offences is through the ordinary, usual and appropriate channels of courts of justice. The Constitution and laws require that no inquiry or adjudication shall be made affecting property or person, except by a full jury of the peers of the party affected having knowledge of the matters in question, and with the means of defence open to him. An arbitrary enactment extending over the property of three parishes and placing restraint upon the freedom of hundreds, without judicial inquiry, without a jury trial, openly and flagrantly violate the fundamental law and institutions; bring all laws and institutions into disrepute, and thus loosen and endanger those guarantees for the security of person and property on whose sacred inviolability depends public prosperity and private security.

But the theory put forward, that the presentment of the grand jury in 1866 and the measure of 1867, was at the foundation of the act of 1869 does not account for the conditions of the act of the latter year.

We shall propound one which we have as much right to denominate contemporaneous history as the other. Our hypothesis is, that a person we will call Durbridge, had lands on the west bank of the river he desired to sell. That his "brain conceived this measure." That he communicated it, and it was found to have money in it. That $60,000 were subscribed to pay the expenses of its passage. That 6000 shares of stock—paid up stock (so called) were placed in the charge of a committee. That the seventeen resolved themselves into a committee to go in person to see the bill carried. That money and stock were distributed to the members of the legislature, and that the bill passed. That this very corporation defended itself successfully against Durbridge in a suit for stock that there was turpitude in the procurement of the charter, and this turpitude was proved in open court and his suit defeated.

No consideration for the public health will explain such a novelty as that the daily meat of the entire population of three parishes, one of which is the largest city for the reception of

domestic products for sale in the United States, is forbidden, except at the establishments mentioned, by *seventeen* persons without any knowledge of the business or connections of the people—and this to be for twenty-five years. The words of Lord Coke are potent in their application to it. *New things which have fair features* are most commonly hurtful to the commonwealth; for commonly they tend to the GRIEVOUS VEXATION and oppression of the *subject* and not to that glorious end that *at first was pretended.*

Co. 2, Inst. 540.

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

The judge, p. 37, fo. 102 says, "Having prohibited the slaughtering of animals and the landing of stock within the limits where such business had been conducted, it was eminently proper that the General Assembly should provide places with suitable conveniences for the butchers and dealers in live stock to carry on their business *without interruption.* This the legislature did through the agency of a corporation." Indeed! Who occasioned this *interruption* in the business of "butchers and live stock dealers?" Who asked of the General Assembly to supply "*suitable conveniences*" to the butchers and dealers in live stock?

What ground for the universal prohibition upon the butchers

and dealers in live stock to supply themselves with suitable conveniences? What motive for the exclusion of the live stock dealers and butchers from the exercise of any part of the live stock landing and slaughter house business, and granting this as a monopoly to the SEVENTEEN?

In what a simpering, sidling, hobbling mode does this corporation come to this court. In the extract, "this" says the Judge, 'the State did through the agency of a corporation." This corporation stalked and strutted through the land as a seignoral power. At its instance the metropolitan police became wardens for it, and seized upon and held property and prevented sales of meat in the open market.

Such powers as the Lords of Montmorency and the feudal barons on the Rhine exercised, this company exercises. Their establishments are the centres of trade and of labor in all that concerns one-half of the subsistence of the people.

They hold it as a chartered right for twenty five years; an indestructible title; a sovereign grant of a monopoly; an agency indeed! How comes this faculty of men to labor freely in a lawful and necessary avocation, to be a part of the public domain of a State, and therefore a proper matter for legislative alienation or grant. We understand that public lands can be granted; that ferry rights can be conferred; that State revenues can be appropriated.

Those existed before the grant in the State as a part of its domain, and it can alienate what belongs to it. But the right of a man in his person to the employment of his faculties and to the products of those faculties, do not come to him by any concession of the State, nor can he be deprived of them by any law of the State.

They are his inviolable prerogative. We do not deny that the State has the power to prevent the use of **them when** they create a nuisance. That this right does not authorize the plaintiff to contaminate the atmosphere breathed by their neighbors, nor to pollute the waters that their neighbers employ, nor to sell to them putrid food. No man has the right unnecessarily to vitiate the elements so as to render them detrimental to health or disagreeable to the senses. In discharge of its duty as a protector, a

government should afford redress for such wrongs. This is the police power of a State. But this is a sweeping edict, that banishes from three parishes an important and necessary occupation, which prevails in every community, an edict which inflicts injury upon hundreds of individuals in their property and their business, to be supported by incorporating in the title of the act "to protect the health of the city of New Orleans."

"All crime and all excellence" says Mr. Augustus Tomlinson in Paul Clifford, "depend upon a good choice of words. If you take money from the public and say you have robbed, you have indubitably committed a great crime, but if you do the same and say *you have been relieving the necessities of the poor*, you have done an excellent action; if in afterward dividing this money with your companions, you say you have been sharing booty, you have committed an offence against the laws of your country; but if you observe you have been sharing with your friends, the gains of your industry, you have been performing one of the noblest actions of humanity."

How gracious and benevolent it is for these seventeen individuals to come so far away from their homes to assist in protecting the health of the city of New Orleans!

The Judge at p. 37, folio 103, says, "We are gravely told that this act infringes the liberty of the citizen and the freedom of the use of property, and that therefore it is a violation of the Bill of Rights in the Constitution of Louisiana, as well as of the 14th Amendment of the Constitution of the United States. We think this is a fallacy. Liberty is the right to do what the law permits. Freedom does not preclude the idea of subjection; on the contrary it presupposes the existence of some legislative provision, the observance of which secures freedom to one by securing the like observance from others. But the Act of March 8th 1869, does not prevent butchers from following their trade; every one who wishes may butcher, subject only to the regulation of the law."

What notion was intended to be expressed in this paragraph it is not easy to determine.

A Louisiana slave prior to 1860, in remaining on the plantation of his master, and submited to his orders, and performed his daily tasks, unquestionably did precisely as the law permitted.

I do not call this liberty. The slaves' "*subjection*" to the authority of his master does in my judgment exclude the idea of freedom.

The closing of all the places of buiness in three parishes upon a stated day, which men had erected, to follow a useful avocation, and to earn an honorable livelihood for themselves and families, and the compulsion of these persons to carry their property to places appointed for them by an act of intemperate legislation is not liberty. Nor does the subjection to such a measure imply the enjoyment of freedom. It is an act of arbitrary power.— "Government" says Lord Brougham, "does not cease to be absolute because the Sovereign exercises his authority through certain functionaries appointed by himself." 3 Polit. Ph. p. 3, and again he says, "The whole history of the Constitution abounds with proofs,how easily absolute power may be exercised and the rights of the people best secured by law, be trampled on while the theory of a free government remains unaltered." Ibid 293.

This act was passed a few months after the Constitution of the State had been adopted with clauses to protect the liberties of men, and after the adoption of the 14th Amendment to the Constitution of the United States. These opinions sufficiently show that these were estimated as very little more than a ceremonial, that there was but little liberty, except that which an act of legislation permits, and that freedom and subjection are very close neighbors in the judgment of the court.

It would be too high and honorable a notice to impute this act and many others of the same character to a result of ambition, or usurpation, or love of power, or to introduce some broad though erroneous principle into the administration of the government. We believe it to be a mere trade between the members of the legislature and the corporation for the passage of an act.

The contents of the act were matters of supreme indifference. An act to construct a railroad with subsidies; or to grant a monopoly of lottery business; or to lay a tax to pay a corporation to build levees; or to sell gas; or to give seventy-five thousand dollars for a revisal of the statutes and codes; or fifty-thousand dollars to an attorney general for services not rendered, would have commanded the same vote on the same considerations.—

The value received by the members and not that to be obtained by the public, dictates legislation and administration. A proposition to any constitutional convention sitting at any time before this decade, to permit discriminations between members of the same profession or the same trade in the conditions on which they might labor, would have met with no sanction or favor.

The judicial tribunals were intolerant of laws that had any such object or tendency. The case of Philadelphia association vs. Wood, 39 Penn. 73, is an instance. The legislature imposed taxes upon foreign Insurance Companies which were appropriated to a firemen's association.

It was one of those acts that have a fascination for such bodies. To appropriate the money of a foreign corporation to replenish the treasury of a popular and pleasant association of firemen is such an act of beneficence that most legislatures would take pleasure in. Nothing was more congenial to their human nature than that of using the money that did not belong to it for purposes of mere charity.

The decision of the Supreme Court of Pennsylvania was adverse to the act, and the opinion of the Court contains a clear and creditable exposition of the injustice of such an act. In the case of Wood vs. Maryland, this Court expressed decided disapprobation of an act which was designed to depress the business of one class for the advantage of one more favored.

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

If the statute had been, that dealers in such merchandise must bring it to the State and have it for delivery before a contract for the sale could be made. That no one should sell or contract to sell except in a house designated, the objections to the act would not have been lessened. No evasion nor subterfuge would have concealed the object of the regulation. The regulation in any form would have placed the nonresident upon terms of inequality.—The regulation in any form which produced such a result would deprive the nonresident of a privilege or an immunity. The Louisiana act affects no concealment or evasion.

There is a bold and blustering air about the edict which indicates the complacency and self satisfaction of the Seventeen who purchased it from the legislature. Their law is, "No man shall land, keep or slaughter any animal in three parishes; or have, keep or establish houses or buildings for keeping or preserving animals, *except* OURSELVES.

In the noble edict of Louis 16th, in 1776, giving freedom to trades and professions, as prepared by his great minister Turgot, he recites the contributions that had been made by the guilds and trade companies, and says, "It was the allurement of these fiscal advantages undoubtedly, that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. *This* illusion had extended so far, that some persons asserted that the right to work was a royal privilege, which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred and imprescriptible of all."

He regards it "as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this unalienable right of humanity." If we can imagine that there had been any thought bestowed by those who have passed and supported enactment (No. 118,) we should find it in some crude notion of the sovereign powers of the legislature over the faculties of men, and some potency in the words to protect health. The case cited from 2 Louisiana, Rep. 218, does not come to the threshold of this discussion An ordinance was passed confining the opening of oysters to particular public places to which all had the same means of access. There could be no doubt of the motive of the act, and there was no attempt to limit the persons concerned in the sale, or to give one person an advantage over another. The article of oysters was one which might easily become pernicious in a tropical climate.

But in the act under consideration there is nothing of a sanitary nature, unless it be in the prohibition of the slaughter houses on the bank of the river above the city and the direction

for inspection. There is no reason suggested for a prohibition extending over three entire parishes. The ordinances of the city are so full upon the subject of the inspection of meat, that it is difficult to find the reason for the creation of this new office, unless it be in that policy which has prevailed to increase the number of those who feed upon the public without any necessity. But that portion of the act which creates monopoly and restricts freedom has no sort of relation to any interest. The motive for this portion of the act is to accord an advantage, a preference, an exclusive and profitable privilege at the expense of the public interest.

The judge deals with this subject by quoting from Cooley's Constitutional Limitations a single sentence. That author states the obligation of the government to be impartial, and that equality should be the basis of legislation. He puts a case like the one before this court, and condemns it as unconstitutional. (Cooley's Const. Lim. 392—3.) This we have extracted and published in the brief submitted heretofore. He also says, as the judge cites, there are cases in which the State may grant to specified individuals privileges, because that the privilege can only be enjoyed by a few, and if it be important for it to exist the State must of necessity select the persons. No one pretends that there was any necessity to confine the live stock landing and slaughter house operations of three parishes to a single corporation of seventeen persons. It had been conducted without any such agency previously to 1869, and not a word of complaint was made, except what is collected under the name of contemporary history in the opinion. The record of the evidence before the district courts contain nothing. The court assumes that because there are, is one exception to the general rule of restriction upon legislative partialities, there is no restriction at all. The American Constitutions imposes the restriction. The rights of men to life, liberty, and the pursuit of happiness are declared in the Constitution of the State of Louisiana in the first article. Their equality of right in civil, political relations and to be free from exclusive privilege are maintained in other sections that follow. The adoption of this Constitution was preceded by a unanimous vote of the convention adopting the 14th amendment. The most

complete freedom in the exercise of all of the faculties, and the most ample enjoyment of property compatible with the exercise of the same faculties and rights by others, will alone meet the standard established in these fundamental laws. The 14th amendment was designed to guarantee to every American citizen this freedom and enjoyment. The State was prohibited from altering or impairing by legislation the standard thus determined on. There was to be no alloy from local partialities or prejudices, and no debasement from venality or corruption in the State authorities. It is no slight aggravation of this wrong, that it is pretended they were moved thereto by a regard for the public weal, when it is manifest that the interests of hundreds have been directly sacrificed, and the community itself is burdened for the emolument of a few persons. In the brief we have submitted, we have called attention to the history of monopolies in Great Britain and in France. It was not till the establishment of the commonwealth in England that they were destroyed. Neal in his history of the Puritans says, that in the reign of Charles 1st the number of monopolies was incredible. There was no part of the subject's property that ministry could dispose of, but what was bought and sold.

Vol. 2, p. 233.

A full account will be found in Brodies' history of Br. Empire, v. 1, p. 292, v. 2, p. 276, v. 3, 18. What did the colonists and their posterity seek for and obtain by their settlement of this continent; their long contest with physical evils that attended their colonial condition; their long and wasting struggle for independence; by their efforts, exertions and sacrifices since? Freedom. Free action, free enterprise—free competition. It was in freedom they expected to find the best of auspices for every kind of human success. They believed that equal justice, the impartial rewards which encourage to effort in this land, would produce great and glorious results. They made no provisions for sinecures, pensions, monopolies, titles of nobility, privileged orders, exempting from legal duty. What they did provide for, was that there should be no oppression; no pitiful exaction by petty tyranny; no spoliation of private right by public authority; no yoke fixed upon the neck for work to gorge the cupidity and

avarice of unprincipled officials; no sale of justice nor of right, and there should be a fair, honest, faithful government to maintain what were the unchartered prerogatives of every individual man, and are now the constitutional inviolable rights of an American citizen.

APPENDIX.

MONOPOLIES.

We have heretofore submitted a brief in which reference was made to cases in Great Britain and in the United States relative to the grant of monopolies, and the decisive consideration they had received.

Notwithstanding the condemnation in the time of Elizabeth, and the act of 21st James relative to monopolies, when Charles 1st undertook to rule without a parliament, he resorted to a sale of monopolies.

This history will be found in 1st Neal, hist. of Puritans, part 2, ch. 4, p. 397. 1 Wallington hist. notices 220. 1 Lister's Life Clarendon 40.

The following is a report of Sir John Culpepper's speech in the Long Parliament on this subject.

"Mr. Speaker:

I have but one grievance more to offer unto you, but that compriseth many. It is a nest of wasps or swarm of vermine which have over-crept the land. I mean the monopolies and Pollers of the people; these like the frogs of Egypt, have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl and powdering tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical.—Mr. Speaker! I have echoed to you the cries of the Kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament."

Monopolies concerning wine, coal, salt, starch, the dressing of meat in taverus, beavers, belts, bone-lace, leather, pins, and other things to the gathering of rags, are referred to in this speech.

The American colonists had a full taste of the restrictive system. Bancroft, vol. 5, p. 264, tells us that no English Bible could be printed in the Colonies until after the Declaration of Independence. That wool hats could not be carried from the province. That seven years apprenticeship was necessary to work at a trade, and a master manufacturer of hats could have but two apprentices. * * * * Bancroft says that while free labor was deprived of its natural rights that the slave trade was unrelentingly prosecuted.

Louisiana has created monopolies in the Slaughter House business; the sale of gas; the making of levees in the State; the erection of Privies in New Orleans, and the selling of Lottery Tickets. The endowment of various companies with State bonds and the endorsement of their securities. The funding of all sorts of securities, as debt. Prodigal expenditures and jobs innumerable form only a portion of the mischiefs of a government destitute of any sense of moral responsibility.

The writers upon the French system since the restoration of Louis 18th, say. "All Frenchmen possess individual rights as distinct from authority." These rights are,

1. Personal liberty.
2. Trial by jury.
3. Religious liberty.
4. Liberty of industry.
5. Inviolability of property.
6. Liberty of the press.

Benjamin Constant commenting on the Constitution and the 4th Article, says, "Society having for its object the prevention of individuals from injuring each other, has no control over industry until it becomes harmful. The nature of industry is to struggle against a rival industry by a perfectly free competition, and with efforts to attain an intrinsic superiority All measures of a different kind would not be the employment of industry, but oppression and fraud. Society would have the right and its duty would be to oppress them. Of the rights that society certainly possesses, it results that it does not possess a right to employ against the industry of one, in favor of another, the power and the means that was given to it for the benefit of all. The

action of authority over industry may be divided into two classes; prohibitions and encouragements.

Privileges cannot be separated from prohibitions because they imply them. For what is a privilege in a matter of industry? It is the employment of the force of all the society to confer to the profit of some men those advantages, which it is the duty of the society to secure for all its members.

It is this that England did before the union of Ireland to the Kingdom. It interdicted to the Irish all kinds of foreign commerce. It is what it does to day in forbidding commerce with the East Indias except to the East India Company which has a great monopoly. It is what the city of Zurich did before the revolution in compelling the country population to sell their products and manufactures to **them.** There is a manifest injustice in the principle. If the privilege be granted to a *few*, it is unquestionably useful to those *few*, but the utility is of the sort that **belongs to** SPOLIATION.

* * * * * In the same chapter the author speaks of the corporations, guilds, trade companies, &c., that had existed. He says, "It was a system not less iniquitous than absurd. Iniquitous, that it does not permit a person desiring to work and seeking work, and which may preserve him from committing crime. Absurd, in that under the pretext of perfecting workmanship, it removes competition, which is the surest mode of accomplishing the object in view.

1st Politique Constitutionelle. 124—333, ch. 24.

BUTCHERS.

In our brief, and in this discussion we have referred to the legislation concerning Butchers in France. They formed companies, and in the reign of Charles 6th that company in Paris performed a very conspicuous part in the troubles of the kingdom of France. They formed a close corporation and the privileges of the members were hereditary. Their **privileges** were to the exclusive power of purchase of cattle in a large district. These corporations under the edict of Turgot and the legislation of the **revolution** were abolished.

In 1811, Napoleon limited the number of Butchers and gave to them some of their privileges, leaving all other parts of France under the law of freedom. The State necessity required or was supposed to require a constant supply of meat, and a close connection between the government and those so engaged.

This deviation from the general principle was the subject of discontent and trouble, and the matter was terminated by a decree of the Council of State proposed by Rouher, then Secretary of State, for Agriculture, Commerce and Public Works in 1858. We submit extracts from his report, which make further illustratiod unnecessary.

"It is admitted everywhere; it is a mattter of universal experience, that if a profession be free, competition will establish a proper market. It is easy to account for this A merchant who trades in the face of rivalry and who cannot make an agreement with his rival, will be constrained to take the measu res as will enable him to undersell him.

As a general rule it is certain that free competion compels a reduction of price. If this be true of commerce in general, why should it not be true in the business of the Boucherie? Is it to be feared in this profession more than in another, that liberty will not regulate itself, that the number of Butchers will exceed the demand, and that the aggregate of the expenses will produce an augmentation of the price of meat." * * * * * * * * * * *

After pursuing the subject he says, "Such are the considerations which demonstrates that in the point of salubrity and of price of meat as in the point of provisioning Paris that the establishment of the principles of commercial freedom in regard to the Boucherie will create no injury to public safety or health." * * * I add that Boucherie is free in almost all of Europe. In Belgium, Switzerland, Piedmont in Prussia, in England. At Berlin, a city of 600,000 inhabitants, in London, a city of 2,000,000, and that in these different countries and great capitals there is no complaint caused by the disorders of the system. Finally, without going further then in our own country, Paris is the only city of the empire submitted to the empire of restriction. In the most important cities of France, Lille, Rouen, Toulouse, Bordeaux, Lyons, the trade of Boucherie is free. It is so at the gates

of Paris, in those great suburban communes of Batignolle, Montrouge, Ternes, De La Chapelle, Montmartre, which surround the the capital and contain a population as dense as the capital itself." * * * * * * *

In conclusion the system of incomplete limitation dissatisfies every one and disturbs all interests; and complete restriction could never be maintained. On the other hand after a careful examination of the subject, after an experience of many years, after an enlightened inquiry of all of the facts, it has been demonstrated that the liberty of the profession of Boucherie in Paris reclaimed in the name of a fundamental principle of law cannot at this time be the cause or occasion of disorders which justify restrictions existing upon it.

Tardieu—Dictionaire **D'Hygiene** public et salubrite, p. 248.—Verbo. Boucherie.

PRIVILEGES AND IMMUNITIES.

These words have had a place in public law for many centuries. The privata lex and privilegium of the Roman law had reference to the form of the act creating the right and not to the right. The division between public and private acts of congress or legislature is analagous to the division of which the privilegium is a part. *Munus* was the charge imposed upon a citizen as incident to his character. *Immunis* was the exemption from these. In English and American law, these words signify the rights, liberties and exemptions belonging to particular classes, conditions or states of persons, and to particular persons holding office. The privileges of parliament, of the clergy, of cities, of attorneys are spoken of as well as the privileges of citizens. Alexander Hamilton in the 84th No. of the Federalist, says of Bills of Rights, ‹ That they were stipulations between kings and their subjects; abridgements of prerogative in favor of privilege; reservations of right not surrendered to the Prince." And in the same No. he states one of their objects to be, "to declare and specify the political privileges of the citizen in the structure of the government and to define certain immunities and modes of proceeding relative to personal and private matters." He refers to **Magna**

Charta and its confirmations, and the petition of Rights as examples. These great statutes are grants of "*Liberties*" and rights, concessions and liberties are used as descriptive of the subjects of the grant. The king grants, "The underwritten liberties." The word privilege would be descriptive of the liberties granted to the freemen. The king agrees that no freeman shall be taken, disseised, banished, outlawed or destroyed. * * * These are the civil rights of freeman; He promises that merchants shall have safe and secure conduct to go and come and stay and to buy and sell. * * * Burke in his speech on "Conciliation of America," places the "privileges and immunities" of the colonies in **opposition** to the imperial powers of Parliament, and says it is difficult to draw the line between them. So in the colonial discussions the question was whether they should claim their privileges and immunities as British subjects, or rely upon the natural rights of men. In the Congress of 1765 at New York, the debate was of "Liberty, Privilege and Prerogative," for a fortnight. In the submission of Virginia to the Commissioners of the Commonwealth, the Virginians reserved their "rights and privileges" as British subjects, and that they were not to be treated as a conquered people. Austin in his jurisprudence p. 535 says **that** in common parlance privilege is synonymous with right.

The judicial interpretations of these words as used in the Constitution have already been cited. The decisions are uniform that the privileges and immunities secured are the personal rights to life, liberty, property, to free pursuit of commerce, and to exemption from disparaging and unequal enactments. These words have a *similar* or analogous import in the 14th Amendment.—The first section of that Amendment is a Bill of Rights. The prerogatives of the State Governments over life, liberty, property, privilege and immunity are restrained. The privileges and immunities which are reserved from State legislation and control, belong to the same class of rights as are included under the same words as the Constitution and articles of Confederation. This article defines for the first time a citizen of the United States. It establishes a single political body—a people of the United States—composed of natives and naturalized persons, who were

citizens of an entire country, who were not expatriated by any change, from State, to State or Territory, and with the same privileges and immunities in every place. No State intervention or compact was necessary to give to them a title to these. On the contrary the State was prohibited from doing or procuring any act to revoke or to lessen them. This Constitution applies as well in favor of a citizen in the State of his *residence*, as in favor of a *resident* of one State proceeding to another State to sojourn there.

We have shown that the clauses of Magna Charta, which are embraced in this amendment were pleaded against the prerogative of the crown to grant a monopoly, In the Magna Charta and in the ratifications of that Charta by Parliament, the crown was restrained from violating the *liberties* granted.

The same prohibition rests upon the States in the 14th Amendment. They are not allowed to abridge, deprive of, or deny the liberties secured in the 14th Amendment to the people of the State.

We refer to the briefs heretofore filed for the cases which have been decided by the courts of England and America to the effect that monopolies are against common right, and did violate the *liberties* granted in the 2nd and other sections of the great charter.

We have referred to these cases as authorative for the reason that the 1st Section of the 14th Amendment does place upon the legislative powers of the State in regard to *all persons*, the same restrictions that were at that time imposed upon the royal prerogative, in favor of the freemen of England.

CITIZENSHIP.

The common law of England is that persons born in that kingdom owe allegiance to the Sovereign, and **are subjects** who cannot **renounce their allegiance.** The American courts have applied this as a rule of common law in a number of cases.

But this is not a rule of *public law.* Among ancient commonwealths citizenship depended upon and was derivable from race. Neither a foreigner, nor any of his posterity, could obtain citizenship without a law or a treaty. The circumstance of birth or

habitation in a particular place had no effect to change a man into a citizen, and without a specific law or treaty or charter.—The change of a monkey into a man would have been as strange as the change of a slave or freedman into a citizen.

The English rule, and now the American Constitution does not exist on the continent of Europe. Race is still regarded as the important criterion, and the fact of *birth-place* is regarded as an inferior and secondary circumstance in the question.

In the United States the principal discussion of this question arose in the case of Scott vs Sanford, between Ch. J. Taney and Mr. Justice Curtis, who agreed that the judgment upon the demurrer to the plea in abatement was properly before the court.—The opinion of the Chief Justice was that the people of the respective States in their political capacity were parties to the Constitution and ratified it. That these people were the free white inhabitants of these States. That these inhabitants authorized the adoption of a uniform rule of naturalization, and that no other than the **descendants** of those free inhabitants and naturalized persons could be citizens. That it did not belong to a single State to endow a person with citizenship, so as to enjoy the privilege of a citizen under the Constitution of the United States. It was only by *amending* the Constitution that a new class of citizens or new conditions of citizenship could be established. The Chief Justice evidently regarded the local law of Great Britain, and the local law of the separate States as having nothing to do with the question. The formation and adoption of the Constitution was an elemental condition in the affairs of the country, and not to be judged of upon the municipal rule of any separate State.

Justice Curtis assumed that the public law of the United States was, that nativity on the soil gave a title to citizenship in the State, provided the person was in a free condition. He contended there had been before the adoption of the Constitution persons of African descent who were free, and that since the adoption of the Constitution in some of the States, there were persons of African descent, who had in addition to freedom, possessed civil and political rights. That these being citizens of the State, were to be regarded by the federal authorities as citizens

of that State, and so were entitled to privileges and immunities as such, under the Constitution of the United States.

It is apparent from the examination of these very able opinions, that neither affirm the proposition contained in the 1st Section of the 14th Amendment in reference to citizenship *as* the law of citizenship at that date. The proposition, that there was "a people of the United States," composed of the aggregate mass of free inhabitants in all the States, distinctly from any relationship with the several States, and independently of their constitutions, and laws, and limits has been maintained. Mr. Justice Story would seem to have had this opinion, and to have advanced it in his commentaries.

Justice Baldwin prepared his "Constitutional Views" to dissent from this conclusion of Justice Story. It is impossible to read the work of Justice Baldwin, without being impressed with the extraordinary ability of its author, and being convinced of his entire comprehension of this subject. It would not be difficult to prove that a very large majority of the Judges of the Supreme Court of the United States have expressed opinions in accordance with his.

The 14th Constitutional Amendment was designed to enlarge and to determine the relations of citizens, and to place their obligations beyond dispute. Its adoption at the time and under the conditions which attended it, verified a prediction of Gouverneur Morris, in the Convention that framed the Constitution, when the necessity of drawing the line between national sovereignty and State independence was insisted on. "That if Aaron's rod could not swallow the rods of the magicians, their rods would swallow his." If the rods of the States be what that great statesman described as the rods of the magicians, they ceased to have any magical force when this Amendment was ratified.

CITIZENSHIP—ADDENDUM.

Dr. Arnold of Rugby says, "I need not say how various the qualifications for citizenship have been in different ages and in different countries. But was it ever held in the ancient world that a man gained a title to become a citizen by living in a country, acquiring a fortune in it, and paying taxes for the public service? * * * *

Citizenship, in the common course of things, was a matter of race; he was a citizen who was lineally descended from a citizen, and had not forfeited his right by some crime.

This was not a mere narrow-minded spirit of family pride.—Particular races of men have their own peculiar physical and moral character. They preserved also, in the ancient world, their particular customs, particular moral principles on various important points, and also their particular religion. The mixture of races was accounted a monstrous confusion, introducing a discordance in the habits and principles of a people, subversive of political union. Individuals who obtained the rights of citizenship, conformed immediately to the laws, civil and religious, of the country which had adopted them. Individuals might be thus admitted without anger, but the admission of masses of new citizens was considered highly mischievous, as it was likely to shake the existing institutions of the country."

Arnolds' miscellaneous writings, art. christian politics, p. 465.

1 Wallon. L'Esclavage dans L'Antiquite 159.

1 Gibbons' history 45. 2 Ibid 158.

2 Revue de Droit, Internat. et de leg. comp. 107.