In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
STANLEY.
[*Kansas.*] } No. 1.

THE UNITED STATES
vs.
RYAN.
[*California.*] } No. 2.

THE UNITED STATES
vs.
NICHOLS.
[*Western Missouri.*] } No. 4.

THE UNITED STATES
vs.
HAMILTON.
[*Middle Tennessee.*] } No. 460.

BRIEF FOR THE UNITED STATES.

These are cases of criminal proceedings for violations of the civil rights act of 1875 (below). The cases of *Stanley* and *Nichols* present *indictments* for refusing to admit colored persons into *inns;* that of *Ryan* is an *infor-*

mation for refusing to admit a colored person to the *parquette of a theater*, and that of *Hamilton*—an indictment for excluding a colored person from *the first-class cars of a railroad train.*

The *information* was dismissed below; the other records present certificates of division.

The Thirteenth amendment of the Constitution and so much of the Fourteenth as is applicable here, are as follows:

XIII.

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

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

XIV.

SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Upon the 9th of April, 1866 (14 Stat., 27), Congress enacted certain provisions in the civil rights act of that year; these, in connection with additional provisions of like nature (sections 16 and 17), were formally re-enacted by the eighteenth section of the enforcement act of May

31, 1870 (16 Stat., 144), and are now contained in sections 1977, 1978, 1979, and 5510 of the Revised Statutes, from which they are here taken:

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects or causes to be subjected any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties on account of such inhabitant being an alien or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than one year, or by both.

The act now directly under consideration, that of March 1, 1875 (18 Stat., 335, Richardson's Supplement, 148), is as follows:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of

government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted, &c.

[SECTION 1]. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings either under this act or the criminal law of any State. *And provided further*, That a judgment for the penalty in favor of the party aggrieved or a judgment upon an indictment shall be a bar to either prosecution respectively.

SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offences against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, district, or circuit courts of the United States wherever the defendant may be found without regard to the other party; and the district attorneys, marshals,

and deputy marshals of the United States, and commissioners appointed by the circuit and Territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned and bailed, as the case may be, for trial before such court of the United States or Territorial court, as by law has cognizance of the offence, except in respect of the right of action accruing to the person aggrieved; and such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases: *Provided*, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: *And provided further*, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution, respectively.

SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

SEC. 5. That all cases arising under the provisions of this act in the courts of the United States, shall be reviewable by the Supreme Court of the United States without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

It may be proper to submit here a doubt which occurs in connection with the form of proceeding in *Ryan's* case; *i. e.*, whether the above act of 1875 can be enforced by an *information*?

That act (section 2, proviso 2) gives a choice of remedy, *either* a *civil* one or a *criminal*,—*not both.*

The *form of remedy* in the former case is *expressly* given; *i. e.*, *an action of debt.* Nothing is said directly as to the form of proceeding for the misdemeanor.

But an implication may perhaps be gathered from the 2d proviso of section 3 that this proceeding also is *fixed*, and is to be *by indictment* alone. Probably Congress did not intend by the language of that proviso that a judgment for the criminal "prosecution" shall be a bar to the civil "prosecution," only when the former is *by indictment*, leaving such judgment upon *an information* unprovided for. The suggestion, on the contrary, seems to be, that *indictment is to be the only form of the criminal prosecution* under consideration; *i. e.*, that judgment upon any criminal proceeding shall be such a bar; "indictment" and "criminal proceeding" being used in the statute as equivalent.

If the form of proceeding in *Ryan's* case is inadmissible, the questions certified therein to this court, were, of course, coram non judice, so that the question as to the Federal rights of persons to seats in theaters does not now arise.

In the other cases, which concern Federal rights in *inns* and upon *railroad trains*, it seems that the proceedings are sufficient to raise the questions proposed.

In the indictment against *Stanley* the description of the party *denied* possibly may not show that he had applied to the defendant *for such accommodations as he was entitled to receive.* An innkeeper is not bound to furnish supper to all persons who demand it, but only to travelers, or at all events, to "guests. (Calye's case, 8 Co., 32, and 1 Smith Lead. cas.) [194]. It may be that as regards others he can exercise choice or caprice as to the race of persons to be admitted to his table; *i. e.*, may deny this one, and admit that.

Submitting this suggestion without more words, because the constitutional question involved there is identical with that in the case of *Nichols*, and is like that in *Hamilton's* case, the proceedings in both of which appear to be valid, I proceed to the indictment against *Nichols*, which in form is as follows:

The grand jurors * * * present that * * * one Samuel Nichols, late of said district, was the keeper and proprietor of a public inn for the accommodation of travelers and the general public—that is to say, a certain common inn called the Nichols House * * * that one W. H. R. Agee was then and there a citizen of the United States of America and of the State of Missouri, and a person of color, and one of the Negro race, within the jurisdiction of the United States, and he, the said W. H. R. Agee, being then and there a traveler, was then and there an applicant to the said Samuel Nichols * * * for the accommodations, advantages, facilities, and privileges of said inn as a guest therein; but he, the said Samuel Nichols, then and there did deny to the said W. H. R. Agee admission as a guest in said inn, and the full and equal enjoyment by him, the said W. H. R. Agee, as such guest, of the accommoda-

tions, advantages, facilities, and privileges of said inn * * * for the sole reason that he, the said W. H. R. Agee, was a person of color and one of the Negro race, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

I premise that upon the subject of *inns* the common law is in force in Missouri, except as regards the matter [unimportant here] of *responsibility for baggage*, &c.

The only questions upon *the form* of the above indictment that have occurred to me are, (1) is it alleged that *Agee* applied for such entertainment as an innkeeper is bound to give; and (2) should it have been alleged that he *tendered pay*, or, at least, that he was *ready and willing to pay*. (Rex *vs.* Ivens, 7 C. & P., 213, Eng. ed., n.; and Fell *vs.* Knight, 8 Mees. & Welsby, 269.)

(1.) As to the first point, I submit that the allegation that *Agee* applied for the accommodations, &c., "*as a guest*" is sufficient. In this connection the term of "guest" is one *of art*, well known in law as a correlative of "innkeeper." (Norcross *vs.* Norcross, 53 Maine, 163; Fell *vs.* Knight, 8 Meeson & Welsby, 269; Walling *vs.* Peter, 23 Conn., 183; Shoecraft *vs.* Bailey, 25 Iowa, 553.) It denotes one who receives food, lodging, &c., *under the special dealing incident to innkeeping;* and, therefore, in pleading, is a sufficiently *certain* statement of all the matters which it includes. (Stephen's Plead., 354.)

(2.) As regards *tender*, &c., the denial in question was so explicit as to the grounds thereof that any tender, and, of course, allegation of tender, became unnecessary.

I come now to the principal question in this case:

Is the above act of 1875 constitutional?

This is understood to depend upon its conformity to the provisions of one or other of the *constitutional amendments* quoted above.

Several weighty judgments upon each of these amendments have been delivered by this court, and to these, as greatly facilitating the present investigation, it will be proper to advert in the first place.

In the Slaughter-house Cases (16 Wall., 36), it was held that a legislative grant by Louisiana of certain exclusive rights of slaughtering cattle within a territory of 1,154 square miles, including New Orleans, was valid as a *police regulation*, and was not within the prohibitions of either of the above amendments. In discussing this question, the Opinion of the court holds that the thirteenth amendment, although intended primarily to abolish *African* slavery, equally forbids any other form of involuntary servitude, however named; also, that the first clause of the fourteenth amendment protects against hostile State legislation such privileges and immunities only as belong to citizens of the United States *as such; ex. gr.*, such as those that arise out of the Federal Constitution, the nature and essential character of the National Government, &c.

Four justices dissented from that judgment and Opinion, and held (waiving a decision upon the thirteenth amendment) that the fourteenth amendment protects citizens of the United States against deprivation by State action of their *common rights*, meaning thereby those

privileges and immunities which of right belong to the citizens of *all free governments; ex. gr.*, that of immunity from disparaging and unequal enactments whilst in the pursuit of the ordinary avocations of life.

By Bradwell *vs.* The State (16 Wall., 130), a refusal by the supreme court of Illinois to grant a woman license to practice law, on the ground of the ineligibility of females *under the law of that State, i. e., the common law*, violated no right of the applicant under either the thirteenth or the fourteenth amendment.

The Opinion of the court affirms the above-cited argument in the Slaughter-house Cases. Concurring in the *judgment* of the court, four justices place themselves solely upon the ground that the right to practice law is not one of the immunities or privileges of women *as citizens in general.*

By Bartmeyer *vs.* Iowa (18 Wall., 129), a right to sell intoxicating liquors is not one of the privileges, &c., of citizens of the United States, or protected by the fourteenth amendment against the usual and ordinary legislation by States regulating or prohibiting such sales.

Concurring in that judgment, because such usual legislation is proper as a police regulation, three justices (a vacancy having occurred in the seat of Chief Justice Chase, one of the four *dissentients* above) again dissented from the argument of the court.

By Minor *vs.* Happersett (21 Wall., 162), the fourteenth amendment does not confer upon a *woman* a right to vote, and therefore the provision of the Illinois State constitution confining the right to vote for electors for President, &c., to *males*, is not invalid.

The Opinion goes upon the ground that such right was not coextensive with "citizenship" in the State at the

time of the adoption of the amendment, and that the latter did not *add* to the rights previously included in such citizenship.

Walker *vs.* Sauvinet (92 U. S., 90) was a case in which a licensed coffee-house keeper in New Orleans had refused refreshments to a colored person, and the latter had brought suit thereupon in a State court, under a State statute providing that, if upon the trial of such a case the jury should not agree, the same should be immediately submitted to the judge, upon the pleading and evidence already on file, whereupon he should decide the same at once.

Held, that States have a right to regulate trials in their own courts in their own way; and therefore that a jury trial, in suits at common law in such courts, is no *privilege* or *immunity* of national citizenship within the fourteenth amendment.

In United States *vs.* Reese (92 U. S., 214), it is held that an inspector of a municipal election in Kentucky was guilty of no offense against the United States for refusing to receive the vote of a citizen of the United States of African descent, on account of his race, &c., the third and fourth sections of the enforcement act of 1870, upon which the charge in question was drawn, having failed to create an offense *because of race*, &c.; as specified in the constitution, and also in the indictment.

In Kennard *vs.* Louisiana (92 U. S., 480), it is held that a State statute, providing certain speedy and peremptory proceedings to determine contests for judgeships therein, did not violate the fourteenth amendment by depriving persons of property *without due process.*

By United States *vs.* Cruikshank (92 U. S., 542), the fourteenth amendment, in *guarantying* persons against action by the States, depriving them of life, &c., without due process, or of the equal protection of the laws, does not empower the United States to enforce rights to life, &c., *generally; ex. gr.*, against infringement by private persons.

In Munn *vs.* Illinois (94 U. S., 113), it is held that a State statute regulating charges for the use of *grain elevators* does not violate the fourteenth amendment by *depriving* persons of their property, &c.; because such elevators are devoted to a public use, and so are affected with a public interest in the same way as *ferries*, *inns*, *warehouses*, *&c.*

The case of the Chicago, &c., Railroad Company *vs.* Iowa (94 U. S., 155), applies the same rule to a railroad company, and is followed by four other cases; (reported 94 U. S., 164, 179, 180, and 181, n.).

[In Blyew *vs.* The United States (13 Wall., 581), an indictment against *whites* for the murder of a *colored* person in Kentucky, in which the colored witnesses for the prosecution were incompetent by the State law: *Held*, that the case was not one "affecting" either the *deceased*, or the *witnesses* excluded, within the meaning of the Civil Rights act of 1866: giving jurisdiction to courts of the United States over "all causes civil and criminal *affecting persons* who are denied" certain rights.]

[By Brown *vs.* Railroad (17 Wall., 445), in a case where a train consisted of two passenger cars alike comfortable, the foremost of which upon the down trip became hindmost upon the return, a regulation that in going down the first should be set apart for colored persons and the last for whites, such use to be reversed upon the return,

was held to be a violation of an amendatory provision in the charter (A. D. 1863) "that no person shall be excluded from the cars on account of color."]

[In Hall *vs.* De Cuir (95 U. S., 485), a Louisiana statute required common carriers to make no discrimination on account of race or color as regards passengers. Thereupon the supreme court of the State, in a case where a colored person traveling from New Orleans to another place within Louisiana, upon a steamboat *which plied betwixt the former place and Vicksburg in Mississippi*, had been excluded by the captain on account of her race and color from a cabin reserved for whites, decided that the captain was amenable to the statutory penalty: *Held*, *upon error*, that such provision was a regulation of *inter-State commerce*, and therefore unconstitutional.]

In Strauder *vs.* West Virginia (100 U. S., 303), a colored man had been convicted of murder by a jury drawn under a State law which rendered colored men ineligible as jurors. Before the trial he had duly applied for removal of the case into the circuit court of the United States, and—upon this being refused,—to quash the venire, &c., because of the above legislative provisions: *Held*, *upon error*, that the fourteenth amendment entitled the prisoner to trial by a jury drawn without regard to race or color, &c.

The Opinion of the court in this case declares that although in form the fourteenth amendment is only *prohibitory*, in effect it creates *a positive immunity* for the party in whose behalf its prohibitions exist—*i. e.*, a constitutional interest in having the action of the State (through all its agencies) *undiscriminating* in respect of race, &c., and of the *protection* which it affords.

In ex parte Virginia (100 U. S., 339) it is held that

the provisions of the act of 1875 (above), making it a misdemeanor in State officers charged with any duty in selecting jurors to exclude any citizen on account of race, &c., is constitutional, and applies to the case of officers charged with that *ministerial* duty even although *in other respects* they may be State judges, entrusted with *discretion*, &c.

In Missouri *vs.* Lewis (101 U. S., 22) it is held that the fourteenth amendment, in guarantying equal protection of the laws, does not forbid or qualify the power of the States to regulate the jurisdiction of their own tribunals by *geographical lines*, as, for instance, to give an exclusive jurisdiction over appeals from certain counties to one tribunal, and over others to another, even although the latter tribunal be for certain purposes the *superior* of the former.

The court, however, *reserves*, in this connection, the consideration of any cases that may arise in which such geographical lines are resorted to for the purpose of indirectly discriminating against *races*, &c.

In Neal *vs.* Delaware (103 U. S., 370), it is held that the mere retention upon the face of State constitutions and statutes, of provisions limiting the right of suffrage to whites, that were in force before and at the time of the adoption of the fifteenth amendment, *no subsequent State legislation to like effect existing*, does not make a case of State violation of that amendment; also, that in case citizens are excluded as jurors on account of race and color by State jury commissioners, the refusal of the State court to grant a motion to quash an indictment found by such jurors, is *error* for which a judgment against the defendant will be reversed.

Upon the whole, these cases decide that—

(1.) The thirteenth amendment forbids all sorts of involuntary personal servitude (except penal) as to all sorts of men, the word servitude taking some color from the historical fact that the United States were then engaged in dealing with African slavery, as well as from the signification of the fourteenth and fifteenth amendments, which must be construed as *advancing* constitutional rights *previously existing:*

(2.) The fourteenth amendment expresses prohibitions (and consequently implies corresponding positive immunities), limiting *state action only*, including in such action, however, action by all State agencies,—executive, legislative, and judicial,—of whatsoever degree:

(3.) The fourteenth amendment warrants legislation by Congress punishing violations of the immunities thereby secured when committed by agents of States in the discharge of ministerial functions.

Referring once more to the indictment against *Nichols*, it appears—

(1.) That the right violated by him [being indeed of the same class as that violated by *Stanley* and by *Hamilton*] is *the right of locomotion.*

(2.) That in violating this *Nichols* did not act in a capacity exclusively *private*, but in one *devoted to a public use, and so affected with a public* [*State*] *interest.*

Upon behalf of the United States it is therefore submitted, also, that—

(3.) Restraint upon the right of locomotion was a well-known feature of the slavery abolished by the thirteenth amendment.

(4.) Granting that by *involuntary servitude*, as prohibited in the thirteenth amendment, is intended some *institution*, viz, custom, &c., of that sort, and not primarily mere scattered trespasses against liberty committed by private persons, yet, considering what must be the social tendency in at least large parts of the country, it is "appropriate legislation" against such an institution to forbid any action by private persons which in the light of our history may reasonably be apprehended to tend, on account of its being incidental to quasi public occupations to create an *institution.*

(5.) Therefore, the above act of 1875, in prohibiting persons from violating the rights of other persons to the full and equal enjoyment of the accommodations of inns and public conveyances for any reason turning merely upon the race or color of the latter, *partakes of the specific character of certain contemporaneous solemn and effective action by the United States to which it was a sequel*—and is constitutional.

Discussing these topics in the order named:

1. It seems obvious that "the power of locomotion," mentioned by Blackstone (Book 1, chap. 1), is a power which draws to itself all corresponding "facilities" which being from time to time devised by human ingenuity are progressively taken up amongst the *common* needs and *common* rights of any existing generation. To make use of language employed by the court in the Telegraph Company case, 96 U. S., p. 9: this *personal* power, like the powers of government there referred to, keeps pace with the progress of this country and adapts itself to

the new developments of time and circumstances, appropriating all new agencies successfully brought into use to meet the demands of increasing population and wealth. Its earliest illustrations may have been only such as relieved persons from confinement within four walls, or established that freemen were not adscripti glebae, appendages to manors or districts of country; but successively, beginning in common-law countries before the memory of man, it has vindicated the right of everybody to the *highway*, to the use of inns, and more lately to that of *passenger carriers*, and it stands ready to advance along the path of civilization and appropriate from time to time whatever of that sort human ingenuity may devise, and common sense may pronounce to be *an advantage which must be made common to all, or otherwise the "pursuit of happiness" will degenerate into a monopoly.*

I submit, therefore, that in accordance with a general law of progressive civilization, to the effect that the luxuries of one generation become the necessities of the next, the right to use an inn or a train of cars (certain reasonable conditions common to everybody being observed), is one of the rights of locomotion, and therefore a high constitutional right.

In the passage already referred to, Blackstone speaks as follows:

> Next to personal security the law of England regards, protects, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article [Personal Security]; that it is a right strictly natural; that the laws of England do not assume to abridge

it without sufficient cause: and that in this Kingdom it cannot ever be abridged without the express permission of the laws. (Book 1, ch.1.)

It is true that, in discussing this proposition, Blackstone does not refer to the topic now under discussion, turning attention mainly to topics in connection with the writ of *habeas corpus*. Considering the state of travel one hundred years ago and before, this may be accounted for upon other grounds than by supposing that such topic was not meant to be included.

Hundreds of thousands of persons are probably at every moment of time *travelers* at some point or other within the United States. In course of the year probably *billions* of passengers make use of public conveyances here. The American Almanac for the year shows that by late returns 600 millions of passengers used conveyance by railway trains alone in Great Britain during a year; whilst in the State of New York the number of *passenger-miles* traveled by trains was more than a billion. The development occasioned during the century by a revolution in manners thus glanced at has occasioned perhaps the principal cotemporaneous expansion of jurisprudence. Attempts to digest the rights and powers of certain artificial persons created in the same connection into a system that shall not conflict with the constitutional rights of natural persons. has, in the mean time, become one of the chief troublers of the thoughts of statesmen—on the bench, in the legislature, and in the closet.

If Blackstone had written a century later, the chapter in question would no doubt have had illustrations and speculations pertinent to "the power of locomotion" more appropriate to the present topic; but as things

have turned out, the duty of filling up a part of the picture may have been devolved upon this court.

(2.) The circumstance that in violating *Agee's* right of locomotion *Nichols* did not act in a capacity exclusively private, but in one devoted *to a public use, and so affected with a public* [State] *interest*, seems proper to be mentioned here. The phrase here employed will be recognized as taken from the *Elevator* cases, in 94 United States, already cited.

It is submitted that if State law appropriates inns to public use, then innkeepers, being persons invested with the duty of distributing this use, possess to a certain extent the character of public officers, *i. e.*, officers or agents of the State. So that if they obstruct in practice that enjoyment of which by law they are the ministers, inasmuch as in the nature of the case such obstruction is practically privation of the rights (there being no way in which a *remedy in specie* can be administered), the allegations in this indictment make a case directly under the fourteenth amendment.

I submit this view, although it is to be admitted that the statute of 1875 does not limit its action to agents of the State, and may not be susceptible of division into parts, any one of which has such limitation. If so, the government here is confined to a contention that the legislature, in dealing about *institutions*, or *action* forbidden *to States*, can forbid any action by private persons *which may reasonably be apprehended as tending to such institution or action.*

It is in such matters that courts will probably be most reluctant to interfere with the legislature. The faculty

required to pass upon the situation being so peculiarly *legislative*, as distinguished from judicial, that a court, impressed otherwise with the wisdom of the maxim *obsta principiis*, would probably be more than ordinarily disposed to solve every doubt in favor of the law.

I come now to discuss more expressly the *Federal questions involved* in these cases.

(3.) Restraint upon the rights of locomotion was a characteristic feature of the particular form of slavery abolished by the thirteenth amendment.

Under either of the two theories suggested in the Opinions in the Slaughter-house cases, and traceable subsequently in the reports of the decisions of this court, the establishment of this proposition would render plainly unconstitutional any *State action* authorizing the action reprobated by this indictment; and therefore, as I have already submitted, would warrant, and even *demand*, legislation by Congress having in view the suppression of action *by anybody* which reasonably tends to bring about such State action.

It seems unnecessary to elaborate this point. It is, as has been said by this court in another connection, "too recent to be history,"—that a first requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and, by a mayhem therein of the common law, to require the whole community to be *upon the alert* in aiding the master to restrain that power. By a travesty upon ordinary

and constitutional modes of speech, "locomotion" became—"running away"; and "entertainment,"—"harboring." This incident was of the very essence of the institution. Every slave State was compelled to enforce it by statutes progressively more and more stringent—striving thereby to meet a tide of hostility to the institution that was rising from year to y ear under, amongst other matters, the powerful influence of *locomotive machinery and steam.* This legislation was treated by the courts as *remedial*, and therefore to be interpreted with favor. The State Reports present many cases to this general purpose.

In the State of Missouri, from which the case of *Nichols* comes, we have in the year 1846 the case of *Eaton s. Vaughan* (9 *Missouri*, 734), the head-note to which is as follows:

In an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the person to be a slave.

2. Ordinary diligence used in attempting to ascertain if he were a slave is no justification to the person carrying the slave away.

The facts of that case are too elaborate to be inserted here. But it appeared that the runaway had *free papers*, to *the description* in which he bore resemblance, and which were shown to the *captain* to be genuine, before the slave (a mulatto) was received. Suspicion having arisen the man was examined several times during the voyage the result being a conviction that he was the person represented in the free papers.

The court said:

Every negro [overruling in this connection a suggestion that, as held in several other States in this respect, there was a distinction betwixt *pure* and *mixed* blooded persons: the runaway in question being of the latter sort] asserting his right to freedom is presumed

a slave, and it devolves on him to show his right to the condition which he claims. It is true that slaves have volition; they may leave the service of their masters, and may impose themselves on others for free men, but it is necessary for the security of the owners of such property that they who treat them as such should do it at their peril.

The court below having instructed the jury that they might give smart money, the Supreme Court said that it was a mistake so to charge, but that as there were expenses in endeavoring to recover him, the excess of damages was not so great as to warrant them in setting the verdict aside. They add:

We do not feel assured, all things considered, that such a course would ultimately prove an advantage to the defendant. There is nothing in this transaction which throws the least suspicion upon the purity of Capt. Eaton's conduct. That some diligence was employed by him cannot be denied, but that a greater degree of diligence would in all probability have prevented the loss to the plaintiff candor compels us to avow. We think that the hope of making his escape on the boat manifestly induced the slave to run away. The facility of escaping on the boats navigating our waters will induce many slaves to leave the service of their masters. Their ingenuity will be exerted to invent means of eluding the vigilance of captains, and many ways will be employed to get off unnoticed. One escape by such means will stimulate others to make the attempt. The greater portion of our eastern frontier, being only separated by a navigable stream from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned to deprive us of our slaves, our interior being drained by large water-courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves from a relaxation of that

degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts to weaken or destroy the force of a determination necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it.

I call attention to this passage as a temperate expression of the law as received in the States in which slavery prevailed.

Inasmuch, then, as in times of slavery legislation like the act of 1875 would have touched that institution at the quick, its *specific* relation thereto can readily be recognized.

(4.) I now submit that, granting that by "involuntary servitude" as prohibited in the Thirteenth Amendment, is intended some *institution* of that sort, and, primarily at least, *not* mere scattered trespasses against personal liberty committed by private persons, yet, it is "appropriate legislation," under the second section of that Amendment to forbid any action by private persons which a legislature, in view of history or otherwise, may reasonably apprehend as threatening to result in State recognition of such an institution.

It seems that the circumstance that the sort of action forbidden by the act of 1875 is action *in the course of certain business transacted with the public* makes a substantial difference as regards such action and *crimes against life and liberty*, such as were before this court in Cruikshank's case, and as to which it is said (92 U. S., p. 553, bottom): "It is no more the duty or within the power of the United States to punish for a conspiracy, to falsely imprison or murder within a State, than it

would be to punish for false imprisonment or murder itself." There is no reason to apprehend that acts of mere violence may become a political institution. But as regards innkeepers and passenger carriers, whose conduct is so much *a mere reflection of the views of the community*, it is probably otherwise. The action of such persons testifies to, and at the same tends to enlarge, a particular current in *public opinion*, and this in its turn is fruitful of *public, i. e., State* institutions.

Is it not a mere matter of legislative discretion to decide upon the stage of growths at which it will be best to suppress such vegetation?

The significancy of the action of *Nichols* is that it is *representative.* It shows not only his private views as to accommodating this race in inns, &c., but the views of whole communities of citizens, upon whom their history has naturally imposed these views.

Congress has taken notice of this, and courts *also* will take notice of it, or, at all events, will admit that notice thereof may well be within the reach of *legislative* organs of perception, and therefore is a matter not to be criticised by themselves. It is to notice so taken by Congress that the preamble of the statute of 1875 indirectly refers. I submit that the phenomenon thus indicated points not remotely to a birth of corresponding State institutions, and that it is in the interest of national peace and good feeling to nip such institutions in the bud.

(5.) It follows that the act of 1875 is constitutional in the feature now in question.

I will add in this connection no more than that in some points of view it will be an extraordinary result

if that feature shall be found to be unconstitutional; for therein it conforms to a series of acts (as above), which began in 1866, and has received the express sanction of Congress upon four different occasions during nine years, some of the concurring members of that body at the same time being not only distinguished as constitutional lawyers, but being also persons who were in public life contemporaneously with the whole contest, in war and subsequent peace, which ended in destroying slavery; and were also active parties in considering and settling the particular terms of the constitutional provisions under which they afterwards legislated. If in respect to a great feature like this, to wit, repressing all action *by persons* that savors of an enforcement of odious characteristics of the slavery which they have met, vanquished, and abolished, they have erred fundamentally time and again during years, it is, I submit, a circumstance much to be wondered at.

In the mean time it may be believed that their Statutes are in accordance with their Amendments and with the logic of the Events of the war which they supported; that they have been right in apprehending that every rootlet of slavery has an individual vitality, and, to its minutest hair, should be anxiously followed and plucked up; and that as to scattered disparagements of persons on account of race and color, incidental to certain public callings, and by persons who notably are sensitive registers of local public opinion, the epigrammatic proposition of Junius is applicable, to wit, that what upon yesterday was only "fact" will become "doctrine" tomorrow.

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