

1892

The 13th, 14th, and 15th Amendments to the Constitution of the United States

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GRADUATION THESIS.

WRITTEN FOR THE DEGREE OF LL. B.

THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH

AMENDMENTS TO THE CONSTITUTION

OF THE UNITED STATES.

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I N T R O D U C T I O N .

The American Constitution, which was adopted by twelve of the original States on the 17th day of September, 1787, contains one of the most perfect plans of government extant. It was framed at a time when the pulse of the nation was beating fast and the minds of the people were filled with the joy caused by the possession of a blood bought freedom.

The once submissive colonies had become free and independent States. They had been almost crushed by the legislative oppression of aristocratic England and had borne with commendable patience the burdens that had been heaped upon their sturdy shoulders by the mother country; but at last the oppression became so grievous and the burdens so heavy that the colonists, having become exasperated beyond endurance, turned upon their oppressors and waged a war

with them which lasted several years, and culminated in the Declaration of Independence which was adopted July 4th 1776, and which proclaimed the political freedom of the colonies.

The colonists perceiving the truth of the maxim that " in union there is strength," drew up the Articles of Confederation, but it soon became apparent that those Articles were insufficient to preserve harmony between the States. During the period that the articles were in force a great many pamphlets were published by statesmen and publicist pointing out the weak places in them and advocating certain remedies.

Chief among these writers were Alexander Hamilton, John Jay, and James Madison some of whose writings were published in a paper known as the Federalist. A most concise and explicit exposition of the purposes and scope of the Constitution can be found in their writings, which are collated and arranged in a book bearing the name of the original paper. These papers having stirred up the public mind to a realization of the defects in the existing government, several conventions were held and on the

17th day of September, 1787, the Federal Constitution was agreed upon. (1)

By the fifth article of the Constitution two methods of amending the Constitution are recited: one being where the Congress takes the initiatory step, and the other where the States propose the amendment. Under the power conferred by this article fifteen amendments have been added to the constitution.

The first ten were adopted on December 15th, 1791, and were added with a view to the prevention of future controversies as to liberties and rights of the people. In fact the consent of a number of States to the adoption of the Constitution was conditioned upon the addition of these amendments. (2) The eleventh and twelfth amendments were adopted in 1798 and 1804 respectively. (3) were

(1) Federalist, 39.
(2) Cooley Const. Law, 206.
(3) Federalist, 47.

CHAPTER 1.

THE THIRTEENTH AMENDMENT.

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

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

There has been a great deal of discussion upon the question as to whether the Federal Constitution legalized slavery. It is clear, however, that the Constitution did recognize the institution, but its framers were careful about referring to it, and used language that did not appear flagrantly inconsistent with the theory of the government. At the time of the adoption of the Constitution slavery existed in all but one of the States, and when the

venomous institution was nurtured and fostered by the laws then extant. It flourished then, as in later years, most vigorously in the southern States where the prevailing occupation was agriculture, which of necessity required many laborers. The New England States were never fully given up to the practice of human enslavement, yet they recognized it as a legal institution and permitted it to exist within their boundaries. (1) The provisions of the fifth article of the constitution, referred to above, are that " the Congress, whenever two- thirds of both Houses shall deem it necessary, shall propose amendments to the constitution or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand

(1) Cooley Const. Law 202.

eight hundred and eight, shall in any manner affect the first and fourth clauses of the ninth section of the first article, and that no State, without its consent, shall be deprived of its equal suffrage in the senate." (1) Soon after the adoption of the constitution an article containing objections to it was circulated. These objections were formulated by the Hon. George Mason of Virginia, and were responded to by the Hon. James Iredell, of North Carolina. The tenth objection which relates to the slave trade is as follows: "The general legislature is restrained from prohibiting the further importation of slaves for twenty odd years, though such importation renders the United States weak, more vulnerable, and less capable of defence." Mr. Iredell responded in the following language: "If all the States had been willing to adopt this regulation, I should as an individual most heartily disapproved of it, because even if this importation of slaves in fact rendered us stronger, less vulnerable, and more capable of defence, I should rejoice in the prohibition of it, as putting an end to a trade which has already continued too long for the

(1) U. S. Const. Art. V.

honor and humanity of those concerned in it . But as it is well known that South Carolina and Georgia thought a further continuance of such importations useful to them, and would not perhaps otherwise agreed to the new Constitution; those States which had been importing till satisfied could not with decency have insisted upon their relinquishing advantages they themselves had already enjoyed. Our situation makes it necessary to bear the evil as it is. It Will be left to the future legislatures to allow such^(importation) or not. If any in violation of their clear convictions of the injustice of this trade, persist in pursuing it, that is a matter between God and their own consciences. The interests of humanity will, however, have gained something by the prohibition of this inhuman trade, though at a distance of twenty years." (1)

The prophecy stated in the last sentence was literally fulfilled, and from the time of the Revolution the flowers of freedom, which had blossomed on the battle field, and which were so dear to the hearts of the patriots began to send out their liberty laden fragrance to the dulled senses of an oppressed and subordinated race. The

(1) Pamphlets on Const. 367.

first clause of the ninth section of the first article of the constitution states, that the immigration or importation of such persons as any of the States now existing think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

It is a noticeable fact that great delicacy of expression is found in the preceding, showing that the framers handled the subject of slavery with gloved hands. (1) In 1808 the slave trade was abolished, and its abolition was prophetic of the subsequent extinction of slavery itself which occurred December 18th, 1865.

The amendments that have been added to the constitution, excluding the eleventh and twelfth, naturally form two classes: those containing provisions restrictive of the powers of the general government, and those whose provisions impose limitations upon the States. The first ten

(1) Cooley Const. Law, 223;
Pamphlets on Const. (Editors note)

come in the former class and the thirteenth fourteenth and fifteenth within the latter. (1) The abolitionists were divided on the question as to whether an amendment to the Federal Constitution was necessary in order to render slavery illegal. Those who supported the affirmative side of the question claimed that as slavery was legalized by statute in many of the States , and in those States not having statutes it was permitted to exist, it was certainly legal prior to the adoption of the constitution. If, then, the States possessed the right to legislate in favor of the existence of slavery, and there was no provision in the constitution depriving them of that right, it followed as a logical sequence that the States still possessed it and could at any time exercise it under the amendment which provides that " the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That this line of argument presented the correct view of the case is obvious; and no better demonstration of its accuracy could be asked for than that which has been

(1) Cooley Const. Law, 207.

made by subsequent events. The history of the origin of this amendment is very lucidly and concisely stated by Miller, J. in the prevailing opinion of the court in the Slaughter House Cases. (2) "The institution of African slavery, as it existed in about half of the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction, and those who desired additional safeguards for its security^{and} perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to sepearate from the Federal government and to resist its authority. This constituted the war of the Rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery. In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than to free the poor victims whose enforced servitude was th e

(1) 16 Wall. 36.

foundation of the quarrel. And when hard pressed these men (for they proved themselves men in that terrible crisis) offered their services and were accepted by thousands to aid in suppressing the unlawful Rebellion, slavery was at an end wherever the Federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or on the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place their main and most valuable result in the constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument." The Slaughter House Cases were first brought to the Supreme Court of the United States in December, 1870 and were five in number, two of which, however, were compromised; the cases remaining were heard

together. The facts upon which the cases arose are in substance as follows: a company was incorporated by special act of the Louisiana legislature and given the exclusive privilege of erecting buildings and enclosures for the landing, keeping, inspection and slaughtering of all the stock to be sold for consumption within an area of 1150 sq. miles including the city of New Orleans and several contiguous parishes. The butchers rose up in indignation and brought suits to restrain the corporation from exercising its franchise, claiming that the monopoly that had been given to the corporation was in violation of the thirteenth and fourteenth amendments. Counsel for plaintiffs rendered elaborate arguments which tended to show how the meat men were placed in a state of involuntary servitude, but Miller, J. disposed of this question quite summarily by saying; that a personal servitude was meant is proved by the use of the word 'involuntary', which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly under-

stood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. The cases were decided in favor of the monopoly, but turned more particularly upon the construction of the fourteenth amendment, under which head I shall give them further consideration. The courts have also held that statutes that provide for compulsory apprenticeship of colored persons and those compelling such persons to pay large license fee for following certain lines of work, were void under the provisions of the thirteenth amendment. (1) These statutes were discriminative in character and were for that reason also in violation of the clause in the fourteenth amendment which provides that, "no State shall deny to any person within its jurisdiction the equal protection of the laws." In the matter of Turner (2) the petitioner was held to service under a statute of the State of Maryland which provided for the compulsory apprenticeship of colored persons, and the court held the statute to be unconstitutional under the thirteenth amendment, as being a species of involuntary servitude which came within the prohibition of that

(1) Cooley on Const. Law, 227.

(2) 1 Abbots Rep. (N. S.) 84.

amendment. The term 'servitude' as used in this amendment, is a broader term than 'slavery' and under it Mexican peonage and the Chinese coolie system could not exist in this country . (1) It was held in the Civil Rights Cases (2) that the appropriate legislation"which by the second clause of the thirteenth amendment Congress is empowered to enact, must not be direct , but must be corrective of State action which may have been taken in violation of the terms of this section. In these cases(3)which were decided by the Supreme Court of the United States in 1883, it was held that the "denial of equal accommodations in inns, public conveyances and places of public amusement (which was forbidden by the first and second sections of the Civil Rights Act of March 1st, 1875)imposes no badge of slavery or involuntary servitude upon the party, but at most infringes rights which are protected from State aggression by the fourteenth amendment." In these cases there was an able dissenting opinion by Mr. Justice Harlan in which he said:- "They (the court) admit, as I have said, that the thirteenth amendment established freedom, that there are

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- (1) Slaughter House Cases, supra.
 (2) 109 U. S. 3.
 (3) 109 U. S. 3.

burdens and disabilities, the necessary incidents of slavery which constitute its substance and visible form; that Congress by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth Amendment was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue be parties, give evidence and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens; that under Thirteenth Amendment, Congress had to do with slavery and its incidents, and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not. These propositions being conceded it is impossible, as it seems to me, to question the constitutionality of the Civil Rights Act of 1866." The act referred to was passed April 9th, 1866 and was based upon

the authority conferred upon Congress by the second section of the amendment under consideration. Congress has plenary power under this amendment to legislate with regard to slavery and involuntary servitude and does not have to wait until the States have passed laws violating the terms of the amendment.

Such legislation by Congress must be clearly within the purview of the amendment. This is not so with regard to the Fourteenth Amendment or the Fifteenth, in each of which there is a denial of State power, and in the latter, of federal power also.

CHAPTER 11.

THE FOURTEENTH AMENDMENT

SECTION I.

Citizenship

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

The sentence just quoted is the one with which the Fourteenth amendment begins. It performed a mighty function the scope of which, though too vast for accurate conception is well defined. By it four millions of people were clothed in the habiliments of civil liberty; by it the mountains of race prejudice were shaken and partially destroyed as though a great earthquake had visited them, and by it provisions in a number of State constitutions were deprived of their vitality and became void and of no effect.

That two kinds of citizenship are recognized by this provision, there can be no doubt. (1) In delivering the opin-

(1) Slaughter House Cases, supra.

ion of the court in these cases, Miller J.said: when considering this clause, "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to make him a citizen of the Union/" The decision in Scott v. Sandford(1)had been to the effect that slaves or their descendants were not "the people of the United States" or any part of them and therefore could not be citizens. This case has been the cause of a great deal of disapproval and at the time it was rendered (1857) the Supreme Court was censured severely for handing down such a decision. The departments of government disregarded it and permitted colored persons to sue in the United States courts the same as citizens(2) This was the right which was

(1) 19 How. 393.

(2) Cooley Const. Law, 252-3.

denied to them by this case. The court also went to an unwarranted extent in the opinion and denied the right of the United States to prohibit slavery in the territories. For this it was justly censured and the court was arraigned by the press in the form^{um} of public opinion, and the verdict that was rendered was against the court. The decree of justice, however, required thousands of men for its execution which was forcibly resisted. The records of that verdict has become part and parcel of the grandest plan of government extant, and is familiarly known as the Fourteenth Amendment to the Federal Constitution. The facts of Scott v. Sanford, otherwise known as the "Dred Scott Decision", are as follows:- The plaintiff and his wife, Harriet, were in the year 1836, the property of one Dr. Emerson at Fort Snelling in Upper Louisiana and were married in that year with the consent of the latter. Two children, Eliza and Lizzie, were the fruits of their union. In 1838 Dr. Emerson took the family into Missouri. Prior to this, in 1834, Dred Scott, the plaintiff, had been taken from Missouri to Rock Island in Illinois, and from there to Fort Snelling. The plaintiff instituted an action for his free-

dom which was decided in his favor by the Circuit Court but the judgement below was reversed by the Supreme Court on a writ of error . The case was sent back to the Circuit Court where it remained pending until this case was decided as the ruling of the Federal Supreme Court would have great weight with the State courts, it being the court of last resort. The defendant Sanford purchased the plaintiff and his family from Dr. Emerson before this suit was begun. The case had two hearings before the Supreme Court and the first part of the prevailing opinion, which was written by Chief Justice Taney is taken up with questions of pleading, but the latter and greater part is devoted to a discussion of the jurisdiction of the Circuit Court of the United States.

The plaintiff contended that he was a citizen of the United States, but the court said that as he was the descendant of persons bought from Africa and sold into slavery here, he could not be such a citizen and consequently the Circuit Court had exceeded its jurisdiction in taking charge of the case.

Indians who retain their allegiance to their tribes

and are under the control of their native chiefs are not citizens of the United States although born in this country. (1) However it seems that if they become tax payers they are citizens; still it has been held that they must be naturalized before they reach that exalted state. (2) In *Jackson v. Goodell*, supra land was purchased from the heir of an Onieda Indian to whom it had been granted as a recompense for services in the Revolutionary War. The deed of the Indian was attacked on the ground that he was not a citizen, and the court held that "Indians within this State (New York) are not citizens, but are distinct tribes or nations, living under the protection of the government. No white person can lawfully purchase any right or title to land from any Indian or Indians without the authority and consent of the legislature (3) The statutes just cited (note 3) permit all citizens of the United States to take, hold, and convey land, but restrict all land contracts with Indians to such as are made with the express sanction of the legislature, thus showing very clearly that the legislature in passing those laws did not consider the In-

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(1) Cooley Const. Law, 254;
Jackson v. Goodell, 20 John., 693.

(2) 112 U. S. 94. (3) 1 N. Y. R. S. 719, 720.

dian to be a citizen . There are numerous decisions holding this way and the States are so uniform in regard to this point that a citation of more authorities would be superfluous.

By the eighth section of the first article of the constitution power is given to Congress to establish a uniform rule of naturalization in order that there might be no such conflict of laws as would issue from permitting the States to have control of this important matter. The American nation may well be styled the offspring of the Old World, for she consists of people of every conceivable nationality . There is scarcely a race or nation which has not contributed some portion of the people now inhabiting the United States. One nation in particular had contributed so largely our population that legislation was enacted for the purpose of restraining the tide of immigration which incessantly flows into this country. I refer to the Chinese. The act of May 6th, 1882 prohibited the immigration of Chinese laborers for ten years, and by the fourteenth section of this act which is chapter 126, Laws of 1882 it is provided that " no State court or court of the

United States shall admit Chinese to citizenship." This act expired May 6th 1892 and was reenacted May 5th, 1892.

An enactment of this nature is confessedly opposed to our theory of naturalization and is contrary to the spirit of our institutions, but the law is based upon expediency and necessity. The preamble states the law is enacted because "in the opinion of the government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." The localities referred to are the western States in several of which serious disturbances have taken place because of the employment of "coolies" in the mines. Officers of the Chinese government, their servants and such Chinamen as were in the United States at the time of the passage of the act or ninety days thereafter are excepted from its most rigorous provisions and may come and go subject to certain regulations as to registering.

"No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; n

nor deny to any person the equal protection of the laws." Thus reads the second and last sentence of the section of the Fourteenth Amendment.

An immense amount of litigation has been carried on in which the various clauses of this sentence have been construed , and I believe it can be safely said without fear of successful contradiction that a greater number of cases have arisen involving the construction of the various parts of this momentous sentence than have come up under any other single amendments.. For convenience and lucidity it is advisable to consider this part of our subject under sub-titles, and the more so because it naturally divides itself into these parts. These are (1) Privileges and immunities; (2) Due Process of Law; (3) The Equal Protection of the Law. These will be treated of in the order in which they are stated.

Citizenship carries with it many rights and privileges. Thus if one is a citizen of a State he can sue in the United States Courts in such cases as these courts can take cognizance, (1) Citizenship, however, does not always confer upon its possessor the right of suffrage;

(1) Scott v. Sanford, supra.

this is obvious, for infants, idiots, and females may be citizens, but they are not permitted to exercise the elective franchise. (1)

SECTION 11.

Privileges and immunities.

The words 'privileges and immunities' are also to be found in the body of the Constitution in the second section of the fourth article which reads as follows:- "The citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States. The privileges and immunities referred to by this section are those which belong to persons in consequence of their being citizens of a State. They have been held to be such as are "Fundamental and which belong of right to citizens of all free government." (2) The privileges and immunities of citizens of the United States are general in their nature, and various persons have sought to enumerate them, but as arbitrary rules are likely to do great injustice the question as to whether the right claimed by a person is one which comes within this category should be decided according to the facts in each case and not according to

'1(Minor v. Happersett, 21 Wall. 162.

(2) *Cirfield v. Coryell* 4 Wash. Circuit Court 371 .

inflexible judge made laws. (1) Women are citizens and as such are entitled to the privileges and immunities of the same, but the right to vote is not necessarily included in the privileges and immunities of citizenship. In *Minor v. Hoppersett*, cited above, (2) the court after proving that women were citizens but not voters prior to the Fourteenth Amendment, said:- "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increases the number of citizens entitled to suffrage under the conditions and laws of the States, but it operates for this purpose if at all, through the States and the State laws and not directly upon the citizen." This case arose in Missouri, Mrs. Virginia Minor a citizen of that State brought suit against the defendant, an election official for failing to insert her name in the list of registered voters, she having given it to him for registration. It was held as indicated above that she could not recover. The

(1) Cooley Const. Law, 195.

(2) See page 25.

almost
 constitutions of all the States exclude women from the exercise of the elective franchise. In some States they are permitted to vote at school elections and in four they may hold offices that pertain entirely to the management of schools. (1) The right to sell liquor is not a privilege or immunity of a citizen of the United States which is protected from State interference by the Fourteenth Amendment. (2) The amendment under consideration does not deprive the States of their right to restrain the practice of certain occupations in order that the public health and general welfare may be promoted, even though the State in so doing practically give a monopoly of such occupation to a limited number of persons. In other words The amendment does not divest the States of their right to reasonably exercise the police power. The privilege of engaging in the practice of arts, trades or professions is one which attaches to a person by reason of State and not of Federal citizenship, and therefore, is not protected by the amendment under discussion. (3) In *Bradwell v. State*, the plaintiff, a woman, attempted to secure a license to practice

(1) Stimpson's American Statute Law, 23,24.

(2) *Bartemeyer v. Iowa*, 18 Wall., 129.

(3) *Bradwell v. State*, 16 Wall., 130.

law in the State of Illinois, claiming to be entitled to such license under the Fourteenth Amendment. Bradley, J. said in his concurring opinion:- "It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State, and in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex."

Trial by jury in State courts has been held to be a privilege of State and not national Citizenship.(1)

The right of persons of African descent to be chosen as jurors was vindicated in *Ex parte Virginia*.(2) A judge was indicted for failing to include in his list of grand and petit jurors certain qualified colored citizens. The

(1) *Walker v. Sauvinet*, 20 Otto, 90.

(2) 100 U. S. 339.

court held that being a State officer his act was that of the State and came within the prohibition of the amendment.

A State may confer certain rights upon specified conditions, and such rights can not be claimed by citizens of other States, because those rights are local in their operation. Under the peculiar circumstances of that case the court in *Conner v. Elliot* (1) held that the discrimination was between cocontracts and not persons. By statute of Louisiana, women who married within the State were given a community of interest in the gains or acquets of their husbands. The plaintiff married and resided with her husband in Mississippi; her husband acquired property in Louisiana subsequent to the marriage. Plaintiff claimed a right to community under the statute but the court denied the right.

The amendment is prohibitory in form but has been held to confer a positive immunity. (2) The courts, as is evident from the foregoing discussion, have given the term privileges and immunities of citizens of the United States a liberal construction, and the manifest intention

(1) 18 How., 91.

(2) *Strauder v. West Virginia*, 100 U. S. 303.

of the framers of the amendment has been sought for, and, to a great extent, carried out. A further discussion of the cases arising under this sub-title would undoubtedly be profitable, but time and space will not permit it.

SECTION III.

Due Process of Law.

The term 'due process of law' has long been used by judges, legislators and text-book writers. It has been held to be synonymous in meaning with the expression 'the law of the land'. (1) 'Due process of law' has been said to be 'due law'. By this is meant that the operation of a rule of law must be such that it inflicts no greater hardship upon the party or parties against whom it operates than the constitution permits, and the rights of all with respect to it should be uniform. What is and what is not 'due process of law' is often a very perplexing question and the courts have wrestled with it long and arduously.

There have been cases innumerable in which it has arisen, and conflicting decisions have been rendered in

(1) Cooley Const. Law, 230.

the courts of last resort in the various States on the same state of facts. It was held in New York that a law which substantially destroys the property in intoxicating liquors owned and possessed by persons within the State when the act took effect was ^a violation of the provisions in the constitution of that State which ordered that no person should be deprived of life, liberty or property without due process of law. And a statute which caused a party charged with a crime to be tried before a court of special session, contravened the clause of the constitution guaranteeing the right of trial by jury, and was, therefore, void. (1) In the foregoing case the plaintiff was permitted to recover compensation for his loss of property. The contrary was held in the case of *Mugler v Kansas*. (2) There the court held that such a provision did not deprive a person of property within the meaning of the constitution (U. S.) as the party still retained the legal title and possession of his property. This decision is subject to criticism because

(1) *Wynehamer v. The People* 13 N. Y. 378. - - - - -

(2) 123 U. S. 623.

it fails to recognize the fact that a deprivation of the right to use property, thereby causing its value to materially depreciate, is a taking of property which is in contravention of the spirit if not the letter of the provision of the fourteenth amendment to the federal constitution. The fifth amendment to the constitution of the United States contains a provision similar in form to the one under discussion, but that amendment has been held to apply to federal legislation only and not to the States. (1) In Davidson v. New Orleans, (2) the court in speaking of "due process of law" said : "It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law" remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States." The court further stated that "due process" did not necessarily imply a regular proceeding in courts, but also applies to ministerial proceedings.

(1) King v. Wilson 1 Dill. 555.

(2) 96 U. S. 97.

The rights of individuals to life, liberty, and property is fundamental and it is the essential purpose of a government to secure these to its members. Blackstone calls them absolute rights and says they are "that residuum of natural liberty which is not required by the laws of society to be sacrificed to public convenience ." (1)

The following extract is from the speech of Daniel Webster in the Dartmouth College Case (2) and has been frequently quoted by judges and law writers : "By the law of the land is most clearly intended the general law which hears before it condemns ; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and property, under the general rules which govern society. "Life", says the learned Mr. Blackstone, "is the immediate gift of God, a right inherent by nature in every individual". For a concise definition of liberty, that laid down by Earl, J., in the matter of Jacobs (3) is by far the best, the judge said :

(1) Blackstone, Chase's 2d Ed., 68.

(2) 4 Wheat. 529.

(3) 98 N. Y. 98.

"Liberty, in ~~its~~ broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." In this case it was held that a statute forbidding the manufacture of cigars in tenement houses was in conflict with both State and Federal constitutions as it was a deprivation of liberty without due process of law. A law which discriminates between different kinds of business is invalid for the same reason. (1) It was held in *Rockwell v. Nearing* (2) that a statute permitting the confiscation of trespassing cattle is void as not being due process of law. In California a conviction was pronounced invalid because there had been no indictment by a grand jury. Where a statute gives a right of appeal, after the usual time has expired, and the decree of the lower court has been executed, it is unconstitutional as it would retrospectively deprive a

(1) *People v. Marx*, 99 N. Y. 377.

(2) 35 N. Y. 302.

a party of a vested legal right. Stated in dictum in Burch v. Newbury. (1) A citizen cannot have his taxes reduced on the ground that he is being deprived of property without due process of law, simply because he does not receive as much benefit from improvements as others. (2) The court said that in cases of taxation there might be hardship in particular instances, but the parties upon whom the hardship fell would have to stand it, as the law operated more beneficially than detrimentally to the general public. Taxes may be collected otherwise than by suit and not be a deprivation of property without due process if the tax payer is given a chance to protest before a board of tax commissioners, for due process does not mean a judicial proceeding. (3) Trial without a jury is "due process of law", otherwise our equity courts would be illegal. But a State law providing that suits in equity shall be tried without a jury is not in conflict with the provisions of the constitution or its amendments. (4) Where a statute

(1) 10 N. Y. 374.

(2) Kelly v. Pittsburgh, 14 Otto 78.

(3) McMillen v. Anderson 5 Otto 37.

(4) Walker v. Lawvinet, 92 U. S. 90.

provided that in election contests the title to an office might be tried and determined in one day, and only allowed two days in which appeals could be taken, it was held to be constitutional as due process did not imply delay. (1) This case, like the one preceding it contained statements to the effect that a jury may be omitted without impairing the legality of the proceedings. The seizure of property for taxes after due notice to the owner is due process of law. (2) The courts have declared that the word "property" includes not only tangible property, but the right to use such property and the right to enforce choses in action. (3) From this brief review of the cases it is evident that for a proceeding to be "due process of law" it is indispensable that it conform to all the requirements of the constitution and statutes of the individual state in which it is instituted and of the United States.

The question, as to whether a proceeding is or is not "due process of law" can be readily answered by a

(1) Kennard v. Louisiana 93 U. S. 480.

(2) McMillen v. Anderson, supra.

(3) Wynehamer v. People, supra. Burch v. Newbury, supra.

reference to the legislative records of the State and Nation ; and if the proceeding violates the provisions therein contained, that is to say, it deprives a person or persons of one or more of the three fundamental rights of a citizen, to wit : the right of "personal security", the right of "personal liberty", and the right of "private property", it is not "due process of law" and is consequently, unconstitutional and void. As I have previously intimated the expressions "due process of law" and "the law of the land" have been held to be synonymous, (1) and judges and law writers now use the terms interchangeably.

If a person is committed to jail by a Justice of the Peace for a crime committed outside of the county, such person is deprived of his liberty without "due process of law". (2) The reason for this is obvious as the Justice in such a case has no jurisdiction.

Where a judge charged the jury as to the first but not the second degree of murder and no exception was

(1) Cooley's Const. law, 230, Civil Rights Cases, 109 U. S. 3. Kelly v. Pittsburgh, supra.

(2) In re Kelly 46 Fed. 653.

taken to the charge at the time, the refusal of the upper court to which the case was appealed, to listen to arguments based on the insufficiency of the charge, is not a denial of "due process of law" or (1) of the equal protection of the laws.

A statute compelling the Chinese to move from the City of San Francisco outside of its limits is void, such statute being unequal in its operation and permitting the confiscation of property without "due process"(2)

Taking property because of a failure to pay an assesment of water rates, without notice to the owner, is a taking of property without "due process of law" (3)

When an action is begun against a non-resident by service of summons by publication or by personal service without the State, the judgment in such action is binding upon defendant's property in the State, and the defendant is not deprived of his property without due process. Otherwise a State could not get jurisdiction of a non-resident's property within its limits. (4)

(1) So held in Davis v. State 13 S. W. 994.

(2) In re Sing Foo Quan, In re Lee Sing 46 Fed. 259.

(3) Dasey v. Skinner 11 N. Y. sup. 821.

(4) Hogle v. Mott 20 Ab. 276.

Prior to the passage of the Fourteenth Amendment a person could not raise the question as to whether a proceeding under the laws of a State, was or was not "due process of law" unless the constitution or statutes of such State gave him the right to do so. The idea of "due process of law" first found legal expression in the instrument in which its synonym originally appeared, namely, the memorable fountain of English and American liberty, Magna Charta. Wrested as it was from King John, by the feudal barons at the point of the sword at Runnymede, England, on June 15, 1215, the English speaking people have loved and cherished not for the rights it granted, but also because it was a legislative enactment secured by the people acting in a sovereign capacity.

Men may reasonably differ at times upon the problem as to whether a certain proceeding is or is not "due process of law", hence it is necessary that there should be some guide to direct the legal mind into the proper channel of reasoning in order that a correct solution of the problem may be obtained. Such a guide I believe can be found in the rule stated on page (36). An accurate deter-

mination of the question is essential to the proper administration of justice, and it is to be hoped that the bench will always be filled with men whose acumen and perspicacity will enable them to pass safely through the wilderness of cases and secure the most appropriate rule, and whose sense of justice will be so keen that they will not be led by subordinate issues into a misapplication of that rule.

SECTION IV.

The Equal Protection of the Law.

"No State shall x x x deny to any person within its jurisdiction the equal protection of the laws." The prohibition contained in the sentences just quoted is eminently just. That the inhabitants of a State, however diversified their races, color, or previous conditions may be, shall be divided into classes, some of which are especially favored by the laws and the others are discriminated against by them is obviously unfair, unjust, and unequitable. Such, however, has been the case and the halls of justice have been thronged with litigants,

whose rights have been invaded by the State. Innumerable decisions have been rendered and a review of some of them would, perhaps, not be unprofitable. States not infrequently pass laws which are discriminations, in fact, but have been held not to be so in law, on the theory that if equal prohibitions are imposed on different classes, those classes receive the protection of the laws. It is on this ground that laws requiring colored and white children to attend separate schools.

There are a number of arguments which may be advanced in favor of such laws, but sophistries and subtlety of reasoning can not impart justice into a discriminative enactment. In *Ex Parte Francois*, the court held that a law which punished a white person for marrying a colored person was valid because it did not discriminate between persons on account of race, color, or previous condition of servitude. The court did not discuss the matter very fully, but said that the reason it considered the law just was, because such marriages are usually the

result of the influence of the former over the latter. The conclusion arrived at was not justified by the reasoning of the court as it is evident the law discriminates between persons on account of race, color, and previous condition. All the citizens of a State are entitled to the right to serve on juries of their district, or to be more accurate,; all the male citizens of whatever race, or color, should have their names placed upon the jury lists of their district in accordance with the laws applicable thereto, and the acts of the officers having charge of the compilation of such lists in excluding the names of persons by law entitled to be included in such lists, have been held to be the action of the State under whose laws they hold office.(1) A colored man, so it has been decided, is not denied the equal protection of the laws, because he is not allowed a mixed jury. (2)

Colored men have a right to be permitted to give evidence in suits or prosecutions at law. However, the Act of April 9, 1866, did not confer jurisdiction upon the United States courts in a case in which the only fact

(1) *Strauder v West Virginia*, supra.

(2) *Virginia v Rives*.

relied on to bring the case within the jurisdiction of the courts is that the material witnesses are negroes.(1) The question has been frequently raised as to who are "persons." It has almost invariably come up with regard to corporations which have gone from the State in which they were incorporated to another with the intention of carrying on their line of business.

It has been held that a State may exclude foreign corporations from doing business within its limits on the ground that a corporation being the child of the law, it is limited to the territory over which that law operates and States are not bound to give effect to the laws of other States. Corporations are citizens of the State in which they are incorporated, but cannot claim the protection of the second section of the 4th article of the Constitution.(2) It has also been decided that a corporation is a person within the section of the Fourteenth Amendment under consideration.(3) The courts are becoming more and more liberal in dealing with corporations, and they will ere long entirely relinquish

(1) Blyew v. U. S. 13 Wall. 580.

(2) Paul v. Virginia, 6 Wall. 168.

(3) Phila. Fire Ass'n v. N. Y. 119 U. S. 110.

the fiction of the indivisibility , and intangibility of the corporation and show more regard to the persons who actually compose it . There are barriers which oppose the progress of the courts when they resort to such reasoning; but time will evolve a plan by which those obstructions may be removed or surmounted and the wheels of justice will revolve with much less friction than they do at present.

In several of the southern States laws, providing for the transportation of colored and white passengers in separate cars, have been passed. These laws like those providing for separate schools, are justified upon the ground that the law operates as harshly on one class as on the other . That these laws are the offspring of prejudice there can be no doubt , and having such a suspicious origin , it is not surprising that they should possess certain undesirable characteristics.

Such statutes have a tendency to preserve rather than to destroy race distinctions. By the expressed views of the founders of our government and the statements of our most profound thinkers, the equality of the component parts of the nation is the basis of our government.

This principle became part of the organic law. These laws conflict with this principle and their abrogation is simply a matter of time.

The second section of this Amendment provides for the apportionment of representatives and changes it from the "whole number of free persons including those bound to service for a term of years, and excluding Indians not taxed" plus "three fifth of all other persons", to the "whole number of persons in each State? excluding Indians not taxed."

This section also provides that the representation shall be proportionately reduced when properly qualified "male inhabitants" are denied the right to vote.

Section third provides that "no person shall be senator or representative in Congress, or elector of President and vice president, or hold an office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebel-

lion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability. "

The fourth section affirms "the validity of the public debt of the United States " and repudiates "any debt or obligation incurred in aid of insurrection or rebellion against the same. By the fifth section Congress is given the power to enforce the provisions of the Amendment by appropriate legislation . This Amendment was adopted in 1868 and placed the recently enslaved race upon an equal plane with other races.

CHAPTER III.

THE FIFTEENTH AMENDMENT.

Section 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude.

Section 11. The Congress shall have power to enforce this by appropriate legislation.

The right of suffrage is by nearly all of the States constitutions confined to males over twenty one years of age, and by seven of them to white male inhabitants. (1) In Idaho a "Test Oath Statute" was held valid. This statute made it necessary for voters to take an oath as a qualification for voting. (2) Where State laws provide for registration in order to cast a legal vote, they do not conflict with the Fifteenth Amendment. (3) In Washington,

(1) Stimsons Am. Stat. Law, 22, 23, 240.

(2) Innis v. Bolton, 17 Pac. 264;
Hayward v. Bolton, id. 457.

(3) Parsons v. Comrs. City Buffalo, 37 N. W. 756.

Wyoming and Utah women are permitted to vote. (1)

Temporary absence from the State does not deprive a citizen of his residence there for the purpose of voting.

This Amendment has been held to confer upon colored men the privilege and duty of sitting upon juries.(2) But it does not secure to persons the equal protection of the laws.(3)

This Amendment gave to a once enslaved race the power of exercising the elective franchise. The hands which had touched nothing but the shovel and the hoe were now permitted to deposit legal votes in the ballot box. The minds which had been fettered with ignorance for centuries were freed from their bonds; those who had so long been doubly governed were at last allowed to share in the government. Those who had never grasped any situation but that of servility now rose to a higher plane of action and were clad in the habiliments of free citizenship. The new citizens rushed with great agility into the political arena and their actions were very distasteful to their former owners.

(1) Stimsons Am. Stat. Law, 240.

(2) Neal v. Delaware 103 U. S. 370.

(3) U. S. v. Harris, 106 U. S. 629.

A reaction soon set in, however, and the proteges of the Union settled down to sober and industrious lives.

Gradually adjusting themselves to the situation, the former slaves, who had demonstrated their bravery on the battle field, soon proved their ability to exercise the franchise in an honorable manner.

There had been clauses in the constitutions of a number of the States which conferred the right to vote to "white male inhabitants"; these provisions were of course annulled by this amendment, as were all statutory provisions having a similar import. The wisdom of this provision has been frequently questioned, but there is no doubt that time will conclusively settle beyond all controversy that the nation in enacting this amendment performed one act that will redound to its undying credit. States are the objects of this prohibition; together with the United States. The actions of individuals are unprovided for as it was assumed that the injured party could seek redress for the actions of the latter in the State courts.

The colored men of the southern States are hindered, delayed and prevented from voting at the elections year

after year and the federal government is powerless to aid them. Laws aimed at this crying evil have been proposed and rejected; individual influence has been exerted by various persons but all to no avail. Be it remembered, however, that ere another century has rolled into eternity there will be a turn in the tide of affairs and, as I intimated in a preceding paragraph, the wisdom of the nation in enacting the Fifteenth Amendment will be universally recognized and admitted.

Mob rule will have been abolished, Ku Klux Klans will be unheard of, Rifle Clubs will not exist, and the ballot will be accessible to all qualified citizens of the United States. This result will be brought about by education; the class to which the ballot was extended on March 30th, 1870, will thoroughly^{appreciate} its intrinsic worth, and side by side with their fellow citizens will securely dwell beneath the protecting folds of the ever glorious stars and stripes, which I hope will forever wave over the "LAND OF THE FREE AND THE HOME OF THE BRAVE."