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THE PRIVILEGES AND IMMUNITIES OF CITIZENS IN THE SEVERAL STATES. II.

IV.

TURNING now to the *positive* side of the question, the cases show that the "privileges and immunities of citizens of a state" do include:—

1. *The right of free ingress and egress.*

Dicta to this effect are found in almost every case in which the "equal privileges clause" of the constitution is discussed, beginning with *Corfield* v. *Coryell*,[1] and coming down to and including *Blake* v. *McClung*,[2] the last great case upon the clause in question.[3]

The only case directly in point seems to be *Smith* v. *Moody*.[4] Smith was a negro, born free within the state of Ohio, and was a citizen of that state. He removed into Indiana while the constitution of Indiana contained the following provisions:—

"Art. 13. *Negroes and Mulattoes.* Sec. 1. No negro or mulatto shall come into or settle in the state after the adoption of this constitution."

"Sec. II. All contracts made with any negro or mulatto coming into the state contrary to the foregoing section shall be void; . . ."

Smith sued Moody upon a promissory note. Moody answered that Smith was a negro, and always a non-resident prior to November 1, 1851 (the date upon which the aforesaid constitution went into effect), and had come into the state since that time, that defendant was a citizen of Indiana at the time of bringing suit and also at the time of making the alleged note, and that it was made in the said state. The plaintiff pleaded his citizenship in Ohio prior to his coming into the state of Indiana, and relied upon the "equal privileges clause." To this the defendant demurred, and the lower court sustained the demurrer. The supreme court of Indiana reversed this ruling, and, speaking by Mr. Chief Justice Gregory, quoted the opinion hereinbefore cited, given by Mr. Justice Washington in the case of *Corfield* v. *Coryell*, and went on to say:—

"The thirteenth article of the constitution of Indiana, and the law made to enforce the same, deprive all persons of African descent, not living in the

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[1] (1825), 4 Wash. C. C. 371.

[2] (1898), 172 U. S. 239, 43 L. ed. 432.

[3] See in particular Paul *v.* Virginia, 75 U. S., 8 Wall., 168, 19 L. ed. 357; Ward *v.* Maryland, 79 U. S., 12 Wall., 418, 20 L. ed. 449.

[4] (1866), 26 Ind., 299.

state at the time of the adoption of the constitution: 1. Of the protection of the government; 2. Of the enjoyment of life and liberty. And not only do they deprive them of all the privileges and immunities secured to every citizen by the constitution, but they denounce severe punishment upon all such persons who may come into the state, regardless of their mechanical skill, intellectual ability, or moral worth, or the services they may have rendered to the country. If persons of African descent are citizens of the United States, the legislation which denies to them every right of a citizen is void."

The court then went on to discuss the question whether or not, at the time Smith came into Indiana, it was possible for a negro to be a citizen of a state, and decided that it was, and that the aforesaid clauses of the constitution of Indiana were void.[1]

(a) But this right is subject to the quarantine regulations of the state in so far as these are not repugnant to quarantine regulations prescribed by congress.

The principal case in point here is *Morgan Steamship Company* v. *Louisiana Board of Health*.[2] The state of Louisiana had provided a quarantine station on the Mississippi, about seventy-five miles below New Orleans, and required all vessels coming up the river to submit to an inspection by the quarantine officials, and to pay therefor certain fees, and if found in any wise infected with disease, to submit to a period of quarantine and to other sanitary measures. The plaintiff in this case objected that this was an attempt at regulation of interstate and foreign commerce, and therefore void. The "equal privileges clause" did not come before the court in the case, but it is believed that the decision supports the proposition above given. Said the court, speaking by Mr. Justice Miller:—

"Nor is it denied that the enactment of quarantine laws is within the province of the states of this Union. . . . It may be conceded that whenever congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done the laws of the state on the subject are valid. . . The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities." "Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, . . . are valid until displaced by some legislation of congress."[3]

[1] To like effect are The Cynosure (1844), Fed. Cas. No. 3529, 1 Spr. 88, 6 Fed. Cas. 1102, 7 Law Rep. 226; Joseph v. Randolph (1882), 71 Ala. 499, 46 Am. R. 347.

[2] (1886), 118 U. S. 455, 30 L. ed. 237.

[3] See also, in this connection Gilman v. Philadelphia (1866), 70 U. S., 3 Wall., 713, 18 L.

They include:—

2. *The right to import and* **to export property**

This right is usually held to be secured under the "commerce clause," and subject to regulation by congress alone, but many cases upon it discuss the "equal privileges and immunities clause" also.[1]

(a) But such right does not relieve the person importing goods into the state from responsibility for any loss to others that may ensue from such importation.

The principle case in point here is *Kimmish* v. *Ball*.[2] The code of Iowa contained the following provisions:—

"Sec. 4058. If any person bring into this state any Texas cattle, he shall be fined not exceeding $1,000, or imprisoned in the county jail not exceeding thirty days, unless they have been wintered at least one winter north of the southern boundary of the state of Missouri or Kansas: *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this state on railways, or to prohibit the driving through this state, or having in possession, any Texas cattle between the first day of November and the first day of April following.

"Sec. 4059. If any person now or hereafter has in his possession in this state, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large and thereby spreading the disease known as the Texas fever, and shall be punished, as is prescribed in the preceding section."

Ball and others, contrary to the provisions of the above quoted statute, imported into and allowed to run at large in Iowa a herd of Texas cattle infected with "Texas cattle fever," which was spread and disseminated by them among Kimmish's cattle whereby they sickened and died, to his damage. To this complaint, the defendants demurred, alleging with other objections that the Iowa statute contravened the "equal privileges clause." What lead them to that belief does not appear in the record. Upon this point, said the court, speaking by Mr. Justice Field:—

"There is no denial of any rights and privileges to citizens of other states which are accorded to citizens of Iowa. No one can allow diseased cattle to

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ed. 96; Railway Co. *v.* Husen (1878), 95 U. S. 465, 24 L. ed. 527; State *v.* Rasmussen (1900), — Idaho —, 59 Pac. 933; Reid *v.* People (1902), — Colo. —, 68 Pac. 228.

[1] See Minnesota *v.* Barber (1890), 136 U. S. 313, 10 Sup. Ct. 862, 34 L. ed. 455; Ward *v.* Maryland (1871), 79 U. S., 12 Wall., 418, 20 L. ed. 449; In re Watson (1882), 15 Fed. R. 511; Swift *v.* Sutphen (1889), 39 Fed. R., 630; In re Barber (1889), 39 Fed. R., 641; State *v.* Klein (1890), 126 Ind. 68, 25 N. E. 873; Hoffman *v.* Harvey (1891), 128 Ind. 600, 28 N. E. 93; Sydow *v.* Territory (1894), 36 Pac. (Ariz.) 214.

[2] (1889), 129 U. S. 217, 9 Sup. Ct. 277, 32 L. ed. 695.

run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, does not give non-resident citizens of Iowa any greater privileges and immunities in that state than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other states and citizens of Iowa stand upon the same footing."

(b) Nor does this right apply to goods imported in violation of reasonable quarantine regulations of the state.

No case upon this, as a determining point, has been noted, but dicta to this effect occur in several. Said Mr. Justice Strong, in delivering the opinion of the court in *Railway Company* v. *Husen*:[1]

"The police powers of a state justify the adoption of precautionary measures against social evils. Under it, a state may legislate to prevent the spread of crime or pauperism or disturbances of the peace. It may exclude from its limits, convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded in the sacred law of self-defense. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of the citizens of the state; for example animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive."

Similarly in *Gilman* v. *Philadelphia*,[2] Mr. Justice Swayne, in delivering the opinion of the court, said:—

"Under quarantine laws [of a state] a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period, and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison may be committed to the flames."[3]

They include:—

3. *The right to acquire, hold and enjoy property, real and personal.*

A. To acquire—without discrimination.

(a) By operation of law alone.

The principle case upon this point is the recent case of *Blake* v. *McClung*.[4] A statute of Tennessee provided that corporations organized under the laws of other states and countries, for purposes

[1] (1878), 95 U. S. 465, 24 L. ed. 527.

[2] (1886), 70 U. S. (3 Wall.) 713, 18 L. ed. 96.

[3] See also Reid v. People (1902); — Colo. —, 68 Pac. Rep. 228.

[4] (1898), 172 U. S. 239, 19 Sup. Ct. Rep. 165, 43 L. ed. 432.

named in the act, might carry on within that state the business authorized by their respective charters, but that—

"Creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages or the rendition of such valid judgments."

The Embreeville Company was a corporation organized under the laws of Great Britain and Ireland, and in accordance with the provisions of the said statute, registered its charter and established a manager's office in Tennessee, and purchased property and did business there. McClung and other Tennessee creditors, on June 20, 1893, filed an original general creditor's bill against the company and asked for the appointment of a receiver and the administration of the affairs of the company as those of an insolvent corporation. A receiver was appointed and a decree passed, adjudicating the rights and priorities of certain creditors. Blake and others, citizens of Ohio, filed intervening petitions averring that the plaintiffs in the original bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over the other creditors of the corporation, "citizens of the United States but not of the state of Tennessee," and that the said statute, under which said claim was made, was unconstitutional so far as it gave preferences and benefits to the plaintiffs in the original bill and other citizens of Tennessee over the petitioners or other citizens of the United States. Upon this point the case finally reached the federal supreme court. Mr. Justice Harlan delivered the opinion of the court, and in the course of it he said:—

"Beyond question, a state may through judical proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the constitution of the United States permit discrimination against individual creditors of such corporations because of their being citizens of other states, and not citizens of the state in which such administration occurs?"

Mr. Justice Harlan then reviews the cases of *Conner* v. *Elliott*, *Corfield* v. *Coryell*, *McCready* v. *Virginia*, *Paul* v. *Virginia*, *Ward* v. *Maryland*, *Cole* v. *Cunningham*, and the *Slaughter House*

Cases, and, of the principles enunciated in the decision of those cases, he says:—

"These principles have not been modified by any subsequent decision of this court. The foundation upon which the above cases rest cannot however stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was (under the aforesaid statute) 'to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts.' But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors, citizens of other states, such legislation would be repugnant to the constitution upon the ground that it withheld from citizens of other states as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in states other than the one in which it is located? . . . . .

"We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several states by the

supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the constitution of the United States. . . . . We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states, are entitled, under the constitution of the United States to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union."

The case was therefore remanded for further proceedings not inconsistent with this opinion, whereupon the Tennessee court ordered that a computation of all the assets of the insolvent corporation be made, and that Blake et al., receive their proportionate part thereof, and that "all the rest and residue of the estate . . . . is applicable *first* to the payment of the indebtedness due to the creditors of said corporation *residing* within the state of Tennessee . . . and that the residue of said estate, if any, shall then be applied pro rata to the payment of the debts of the alien and non-resident creditors of the said corporation, other than the said C. G. Blake" et al. Blake et al. again went up on a writ of error, upon the ground that they were entitled to participate in the distribution of the assets in precisely the same manner as the Tennessee creditors, while the Tennessee court in its decree attempted to give the Tennessee creditors a preference. The federal supreme court held that the decree gave to the Tennessee creditors a decided advantage over Blake et al., and was therefore erroneous. It adjudged that "the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee. . . Whatever rule is applied for the benefit of the latter must be applied in behalf of the Ohio creditors."[1]

But a statute requiring a foreign corporation, before transacting business within the state, to deposit a specified sum of money which, upon the appointment of a receiver, shall be turned over to

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[1] Blake *v.* McClung (1900), 176 U. S. 59, 20 S. Ct 307, 44 L. ed. 371. To the same effect are Sully *v.* Am. Nat'l Bank (1900), 178 U. S. 289, 44 L. ed. 1072, 20 S. Ct. 935: Hannon *v.* Hounihan (1888), 85 Va., 10 Hansbrough, 429, (on right to inherit; In re Stanford's Estate 1898, 54 Pac. (Calif.) 259, (on right to inherit); Belfast Savgs. Bank *v.* Stowe (1899), 92 Fed. Rep. 100, 63 U. S. Ap. 14, 34 C. C. A. 229; Maynard *v.* Granite State Prov. Assn. (1899), 92 Fed. Rep. 435, 34 C. C. A. 438; In re Mahoney's Estate (1901), 133 Calif. 130, 65 Pac. 389.

him, to be by him distributed among resident creditors and stockholders, is not repugnant to the "equal privileges clause," since the corporation by its own act creates the trust fund.[1]

(b) By act of parties.

The case in which this question is best discussed in *Farmers' Loan and Trust Company* v. *Chicago and Atlantic Railway Company*.[2] The defendant had executed two trust deeds conveying certain of its property to the plaintiffs and others to hold in trust for certain purposes. Plaintiff now brings suit against his co-trustee and the railway company. Section 2988 of the revised statutes of Indiana, in force when the trust deeds were executed, provided that:—

"It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills) for any purpose whatever, who shall not be at the time a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers, and duties as such trustee, shall cease and the proper court shall appoint his successor, pursuant to the act to which this is supplemental."

Said Judge Gresham in giving the decision of the court:—

"It will be observed that this statute does not prohibit foreign corporations from doing business in this state. Obviously that was not the design of the legislature. It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any state of the union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others."

The learned judge then quotes the "equal privileges clause," and also quotes from the decision of the United States supreme court in

[1] People *v.* Granite State Prov. Assn. (1900), 161 N. Y. 492, 55 N. E. 1053.

[2] (1886), 27 Fed. 146.

Ward v. *Maryland*,[1] these words among others, concerning the clause under consideration:—

"The clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate. . . . . ."[2]

B. To hold and enjoy—free from discriminative burdens, e. g. discriminative taxation.

The only mode by which the states have attempted to discriminate against citizens of other states in regard to the holding and enjoyment of property, so far as the cases disclose, is in regard to taxation. The first case noted upon the subject is *Oliver* v. *Washington Mills*.[3] The state of Massachusetts had passed a statute requiring domestic corporations to retain one-fifteenth part of all dividends thereafter declared upon shares of stock owned by non-residents, and pay the same to the state treasurer within a certain limited time after the declaration of the said dividends. While this statute was unrepealed, the defendant declared a dividend but neglected to conform to the statute, and as a result the plaintiff, the state treasurer, now sues for it. One ground of defense is the repugnancy of the statute to the "equal privileges clause." The court held the statute void, and speaking through Mr. Chief Justice Bigelow, said:—

"We are unable to see how it [the statute] can be supported consistently with that provision of the constitution of the United States which secures to the citizens of each state all the privileges and immunities of citizens in the several states. . . . It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived."[4]

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[1] (1870), 79 U. S. 12 Wall., 418, 20 L. ed. 449.

[2] To like effect are:—Shirk *v.* City of Lafayette, (1892), 52 Fed. R. 857; Magill *v.* Brown, (1833), Fed. Cas No. 8952, 16 Fed. Cas. 408, Brightly N. P. 346, 14 Haz. Reg. Pa. 305; Campbell *v.* Morris, (1799), 3 Harr. & McH. (Md.) 535; Ward *v.* Morris, (1799), 4 Harr. & McH. (Md), 330; Thompson *v.* Edwards (1882), 85 Ind. 414; Bryant *v.* Richardson (1890), 126 Ind. 145, 25 N. E. 807; Robey *v.* Smith, (1892), 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792; In re Stanford's Estate (1898). —Cal. —, 54 Pac. 259.

[3] (1865), 93 Mass., 11 Allen 268.

[4] To like effect are:—Union Nat'l Bk. *v.* Chicago (1871), Fed. Cas. No. 14374, 24 Fed. Cas. 615, 3 Biss. 82, 6 Am. Law. Rev. 165; Wiley *v.* Palmer, (1848), 14 Ala. 627; Prov. Inst. *v.* Boston, (1869), 101 Mass. 575, 3 Am. Rep. 407.

So, in a recent case in Vermont[1] wherein it appeared that the tax statutes of the state permitted residents to deduct from the appraised value of their personal estate the amount of their indebtedness in excess of certain non-taxable securities, but denied such right of reduction to non-residents, it was held that there was a violation of this constitutional provision. Said the court:—

"The effect of the statute is to exempt from taxation all the personal estate of a resident of this state, except the excess in value of such estate over debts owing in excess of non-taxable bonds, stocks and deposits, and to tax a non-resident's property circumstanced the same except that the owner resides out of the state; and in so far as it does this, it provides an immunity from taxation to a resident that it denies to a non-resident, discriminates in favor of a resident and against a non-resident, and denies to citizens of other states an immunity given to our own citizens. Such discrimination and denial are clearly forbidden by the constitution of the United States which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. . . . A non-resident cannot be taxed higher for personal property, situate in this state, than a resident owning like property under like circumstances, nor can he be compelled to pay taxes on such property if like property, circumstanced the same, is exempt from taxation in the hands of a resident."

An interesting case in this connection is the recent one of *State* v. *Trav. Ins. Co.*,[2] which holds that where the laws and customs of the state do not secure to its own inhabitants equality and uniformity of taxation, a non-resident can not complain when he is taxed by a rule different from that applied to any of the residents. It seems at least questionable whether such a decision would be sustained in the federal supreme court. It certainly opens the way for very serious discrimination against citizens of sister states.

They include:—

4. *The right to contract.*

The vast majority of cases upon this point arise in attempts made by states and their municipal corporations to impose licenses upon non-resident traders who come into the state to sell their goods. Such was the case in *Ward* v. *Maryland*.[3] This leading case upon this point arose under a statute of Maryland which prohibited persons not permanent residents of the state from—

"Selling, offering for sale, or exposing for sale, within a certain district of the state, any goods whatever, other than agricultural products and articles manufactured in the state, either by card, sample, or other specimen, or by

[1] Sprague v. Fletcher, 69 Vt. 69, 37 Atl. Rep. 239, 37 L. R. A. 840.

[2] (1900), 73 Conn 255, 47 Atl. 299.

[3] (1871) 79 U. S. (12 Wall.) 418, 20 L. ed. 449.

written or printed trade list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do."

Licenses for that purpose were to be granted by the proper authorities of the state on the payment of $300. Such licenses ran for one year after date. Offenders against this prohibition were made liable to indictment and punishment by fine of not less than $400 for each offense. Ward offended against this prohibition and was indicted in the proper criminal court. He, upon arraignment, pleaded, not guilty, and also demurred upon the ground that the statute contravened the constitution of the United States. Upon being convicted in the courts of Maryland, Ward carried the case to the United States supreme court. Said that court, speaking through Mr. Justice Clifford:—

"The court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the constitution which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. . . . . Imposed as the exaction is upon persons not permanent residents in the state, it is not possible to deny that the tax is discriminating, with any hope that the proposition could be sustained by the court . . . . . Attempt will not be made to define the words 'privileges and immunities', or to specify the rights which they are intended to secure and protect beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens . . . . . Inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell, or offer, or expose for sale within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents." [1]

To the like effect are:—Beer Co. *v.* Massachusetts (1878), 97 U. S. 25, 24 L. ed. 989; Brown *v.* Houston (1885), 114 U. S. 622, 29 L. Ed. 257; Walling *v.* Michigan (1886), 116 U. S. 446, 29 L. ed. 691; Robbins *v.* Shelby Taxing District (1887), 120 U. S. 489, 30 L. ed. 694; Minnesota *v.* Barber (1890), 136 U. S. 313, 34 L. ed. 455; In re Parrott (1880), 6 Sawyer, C. C.) 349; Fire Dept. *v.* Noble (1854), 3 E. D. Smith 440; Fire Dept. *v.* Wright (1854), 3 E. D. Smith 453; Sinclair *v.* State (1873), 69 N. C. 47; *Ex parte* Robinson (1877), 12 Nev. 263, 28 Am. R. 794; Daniel *v.* Trustees of Richmond (1869), 78 Ky. 542; McGuire *v.* Parker (1880), 32 La An. 832; State *v.* Furbish (1851), 32 Me. 493; Marshalltown *v.* Blum (1882), 58 Ia. 184, 43 Am. R. 116; *Ex parte*

They include:—

5. *The right to substantial protection of all substantive rights at no greater expense than its own citizens are subject to.*

Perhaps as good a discussion of this point as is to to be found in any of the opinions of the courts is that contained in the opinion of the chancellor of the state of Delaware, in the case of *Douglass* v. *Stephens*.[1] Douglass was the administrator and was a creditor of the intestate. Stephens, a citizen of Maryland was also a creditor, and of a higher degree than Douglass. The statute of Delaware provided:—

"That no foreign debt shall be paid by any executor or administrator, till the debts due to the inhabitants of this government be first secured and paid, on penalty to pay the creditors of this government, as far as the assets in such executor's or administrator's hands would reach before such foreign debts were paid: . . . . . ; any law, act, custom or usage to the contrary hereof, in any wise notwithstanding."

The statute also prescribed the payment of the debts of a deceased person by an executor or administrator as follows: 1. Funeral expenses. 2. Debts due the crown and to the proprietary; now the state. 3. Debts due by judgment, etc. Stephens' claim was, as has been said, of a higher order under this classification than was Douglass's. Stephens got judgment from the lower court upon the ground that the statutory discrimination between resident and non-resident creditors was repugnant to the constitution of the United States and therefore void. Douglass thereupon took the case to the appellate court. Mr. Chancellor Ridgely, in giving his opinion, discussed very fully and upon fundamental principles the rights that he considered to be comprehended within the "equal

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Bliss (1884), 63 N. H. 135; State *v.* Lancaster (1884), 63 N.H. 267; Rash *v.* Holloway (1885), 82 Ky. 674; Graffty *v.* Rushville (1886), 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; Fecheiner *v.* Louisville (1886), 84 Ky. 306, 2 S. W. 65; Singer Mfg. Co. *v.* Wright (1887), 33 Fed. 121; State *v.* Wiggin (1888), 64 N. H. 508, 15 Atl. 128, 1 L. R. A. 56; Commonwealth *v.* Shaffer (1889), 128 Pa. St. 575, 18 Atl. 390, 24 W. N Cases 539; State *v.* Deschamp (1890), 53 Ark. 490, 14 S. W. 653; Commonwealth *v.* Simons (1894), 15 Pa. Co. Ct. Rep. 550, 3 Pa. Dist. R. 792, 35 W. N. Cas. 511; Sydow *v.* Arizona (1894). 36 Pac. 214; French *v.* People (1895), 6 Colo. Ap. 311, 40 Pac. 463; McGraw *v.* Marion (1896), 98 Ky. 673. 34 S. W. 18; Barnes *v.* People, (1897), 168 Ill. 425, 48 N. E. 91; Rodgers *v.* Adsit (1897), — Mich. —, 73 N. W. 381; State *v.* Board of Ins. Commrs. (1896), 37 Fla. 564, 20 So. 772. *Contra*: People *v.* Coleman (1854), 4 Cal. 46, 60 Am. Dec. 581; Ward *v.* State (1869), 31 Md. 279, 1 Am. R. 50, overruled in United States supreme court; Sears *v.* Warren Co. (1871), 36 Ind. 267; Speer *v.* Commonwealth (1873), 23 Grattan 935, 14 Am. Rep. 164; Seymour *v.* State (1874), 51 Ala. 52.

[1] (1821) 1 Del. Ch. 465.

privileges clause," and in regard to those rights, so far as they are connected with the general subject of property, he said:—

"The right of acquiring and protecting reputation and property includes all the privileges incident to such right. Property cannot be acquired and protected without the privilege of applying to courts of justice. No man can be his own arbiter. Our constitution has declared that all courts shall be open, and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by due course of law, without sale, denial, or unreasonable delay or expense. This is the assertion of a general right,—the right of all men; and it would be ineffectually declared were not the redress of wrongs and the means of enforcing contracts (by which property is acquired) secured and protected. The acquisition of property is effected by contract . . . . . and it becomes the privilege of every citizen to apply to courts of justice to enforce contracts or to obtain redress for their violation. It is a privilege whichgr ows out of the right of acquiring property. . . . . An obligation is a contract, and it is one of the various methods by which property may be acquired; and, therefore, a citizen of another state may claim from the courts of this state the enforcement of his contracts or satisfaction for their breach, precisely as the citizens of this state can; because it is the privilege of a citizen, and is secured to him by the constitution of the United States. This debt must take its place according to the order of payment prescribed to executors and administrators; otherwise the creditor will not enjoy in this state all privileges and immunities of citizens; for a common right must be enjoyed by all alike. If his obligation is postponed to a book account, and the obligation of a citizen of the state is preferred to such account, it is certain that he does not,—cannot enjoy all privileges of citizens, where those of this state are entitled to an equality, according to the dignity of their debts. To what purpose are all privileges and immunities reserved to the citizens of each state, if a state can discriminate between its own citizens and the citizens of another state in the privileges of a citizen and unless the same method to protect their property is allowed to them? If we may cut and carve, and limit and restrain other citizens in the exercise of our privileges as citizens, it is evident that they are not entitled to all privileges and immunities of citizens in this state. To recover a debt is a privilege; but unless he can recover it equally, or as fully, as a citizen of this state, something is withheld, and he has not the privilege of a citizen in this state. . . .

"The only reasonable construction to be given to this clause is that of placing all citizens of the United States on the same footing, and extending to them a perfect equality in their rights, privileges and immunities. . . . The legislature may certainly prescribe different grades for the payment of debts by executors and administrators; and in so doing, no violation will be done to the constitution of the United States, because all persons having debts of the same grade will rank equally. . . . Upon the most deliberate consideration of this question, I am of the opinion that the citizens of another state . . . . . may claim the civil rights, privileges and immunities of citizenship, in the same manner and upon the same terms that citizens of this state are entitled to them, under similar circumstances. In the payment of debts by an executor or administrator there can be no other distinction than according to the dignity of the debt. A citizen of Maryland may

recover a debt due by obligation or bill in preference to a debt due to a citizen of this state on account, because the constitution of the United States gives him the same privilege which is given to a citizen of this state."

While it is true that the opinion of the chancellor above quoted was not sustained by his court, it is believed that it is much the better opinion, and in view of the opinion of the supreme court of the United States in the case of *Blake* v. *McClung*, supra, it must now be held to be settled law.[1]

(a) And this goes to such an extent that citizens of the states of the United States may litigate their controversies in the courts of any state in the union.

This much was decided in the case of *Miller* v. *Black*.[2] Mr. Chief Justice Nash, in rendering the decision of the court, said:—

"The case presents simply the question whether one citizen of the United States can sustain an action against a citizen of another in a state where neither lives? . . . . . To many purposes, the citizens of one state are citizens of every state in the Union; they are not aliens, one to the other; they can purchase and hold, and transmit by inheritance, real estate of every kind in each state. It would be strange indeed if a citizen of Georgia, meeting his debtor, a citizen of Massachusetts, in the state of New York, should not have a right to demand what was due him, nor be able to enforce his demand by a resort to the courts of that state. It is said that the federal court is open to him; that is so, provided the sum claimed is to an amount authorizing the interference of the latter court, to wit, $500. What is to become of those numerous claims falling short of that amount? Must a citizen of California, to whom one, a citizen of Maine, owes a debt of $490, go to Maine and bring his suit there, or wait till he catches him in California? We hold not; but that the courts of every state in the union, where there is no statutory provision to the contrary, are open to him to seek redress."

In the noted case of *Cofrode* v. *Circuit Judge*,[3] this precise point arose. Plaintiffs commenced a suit in the circuit court for Wayne county by filing a declaration to which the defendants answered by their attorneys. It came to the knowledge of the circuit judge that all the parties were non-resident, wherefore, he, of his own motion, ordered the case stricken from the docket. The present

[1] To this effect are:—Morris *v.* Graham (1892), 51 Fed. 53; Kincaid *v.* Francis (1812), 3 Tenn. (Cooke) 49; Barrell *v.* Benjamin (1819), 15 Mass. 354; Opinion of the Justices (1852), 25 N. H. (5 Fost.) 537; Miller *v.* Black (1855), 53 N. C. 2 Jones L. 341; Davis *v.* Pierce (1862), 7 Minn. (Gil. 1) 13; Wilcox *v.* Davis (1862), 7 Minn. (Gil. 12) 23; McFarland *v.* Butler (1862), 8 Minn. (Gil. 91) 116; Railway *v.* Hendricks (1872), 41 Ind. 48; Morgan *v.* Neville (1873), 74 Pa. St. 52; Black *v.* Seal (1883), 6 Houston (Del.) 541; Cofrode *v.* Gartner (1890), 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511; Eingartner *v.* Illinois Steel Co. (1896) 94 Wis. 70, 68 N.W. 664, 34 L. R. A. 503; Steed *v.* Harvey (1898), 18 Utah 367, 54 Pac. 1011; *Contra*, Douglass *v.* Stephens (1821), 1 Del. Ch. 465.

[2] (1855), 53 N. C. (2 Jones L.) 341.

[3] (1890), 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511

case is a petition for a mandamus directing him to vacate the said order. In rendering the opinion of the court, Mr. Chief Justice Champlin said:—

"It is among the fundamental rights of a people under our government that they may be secured in the acquirement, possession, and enjoyment of property, and for this purpose courts are instituted as part of the organic law in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrongs and the means of enforcing contracts are of the greatest consequence to the citizen of every state."

The learned Justice then proceeds to quote the "equal privileges clause" and to quote from the opinion of the court in *Conner* v. *Elliott*, heretofore discussed. He then says further:—

"The right to bring suit in the several courts of this state having jurisdiction is a privilege of every citizen of this state. Especially is this true with reference to the enforcement of contracts. A citizen of another state may come into this, and acquire and enjoy property. He may inherit and transmit property. He may enter into contracts to the same extent that a citizen of this state can do so, and in this his rights are guaranteed and protected by the above provision of the constitution; and I think that his right to bring suit in this state, in any case where a citizen of the state may, is also guaranteed and protected by this provision of the constitution. This right does not depend upon the fact of the defendant's having property in this state which can be reached by execution. There are many cases where in a suit between citizens of this state, there can be no property found out of which to satisfy an execution; nevertheless the plaintiff has a right to plant his suit, litigate his claims, and obtain judgment."

This case was followed in the recent case of *Eingartner* v. *Illinois Steel Co.*[1]

The courts of New York and South Carolina hold to the contrary view, and permit suits between non-resident parties only when the cause of action arose within the state. The argument hinges upon an attempted distinction between the words "resident" and "citizen."[2]

(b) But this right to sue in the courts does not necessarily give the non-resident plaintiff equal benefit under the statute of limitations.

This strange conclusion was arrived at in the case of *Chemung Canal Bank* v. *Lowery*[3] The statute of Wisconsin provided that:—

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[1] (1896) 94 Wis. 70,68 N. W. 664, 34 L. R. A. 503.

[2] Robinson *v.* Navigation Co. (1889), 112 N. Y. 315, 19 N. E. 625, 16 Civ. Proc. Rep. 255, 2 L. R. A. 636. Cummings *v.* Wingo (1889), 31 S. Car. 427, 10 S. E. 107; Banking Co. *v.* Construction Co. (1890), 32 S. Car. 419, 11 S. E. 192.

[3] (1876), 93 U. S. 72, 23 L. ed. 806.

"If, when the cause of action shall accrue against any person, he shall be be out of the state, such action may be commenced within the terms herein respectively limited, after the return of said person into this state. But the foregoing provision shall not apply to any case where at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue, are residents of this state."

In 1862 the plaintiff got judgment against the defendant in New York. In 1864, the defendant became a resident of Wisconsin. In 1873, more than ten years after the judgment was obtained but less than ten years after defendant became resident in Wisconsin, this suit was brought. The statutory period of limitation of actions on judgments was ten years. The defense was grounded upon the latter part of the paragraph above-quoted from the statute. Plaintiffs contended that this was repugnant to the "equal privileges clause." Upon this point the court, speaking by Mr. Justice Bradley, said:—

"This seems at first view somewhat plausible; but we do not regard the argument as a sound one. There is in fact a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years in the state where the parties reside; and yet if the defendant should be found in Wisconsin—it may be only in a railroad train—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust."

With all due respect to the learned justice who pronounced this opinion, we must be permitted to observe that "if the defendants should be found in Wisconsin, it may be only in a railroad train," the situation would not, for them, be relieved of any of its awkwardness by the fact that it was a *Wisconsin* plaintiff who had found them. If the legislature of Wisconsin had desired to provide that any period during which the parties were resident in *the same* state after the cause of action arose should be counted against the plaintiff coming into Wisconsin to sue, it ought to have said so. We must adhere to the opinion expressed by Mr. Justice Strong in his dissent from the decision of the court.

V.

Such are the "privileges and immunities of citizens of a state," as determined by the federal and state courts in cases brought before them for adjudication. With substantial uniformity the courts

declare these privileges and immunities to consist of what are commonly known as "private rights," subject only to the police regulations prescribed for the body of people domiciled within the state. Considering the condition in which the several states were at the time of adoption of the constitution of the United States, and the objects commonly believed to have been aimed at in the adoption of that constitution, and the establishment of the United States government under it, the object of the clause under consideration would seem to be at the very least, to prevent each state from inflicting upon the citizens of other states who should come within its borders any of the disabilities of alienage. Even without this clause, the citizens of each state when within another could never have been treated less favorably than alien friends, for it was contemplated that, by the formation of the union, the states should be forever precluded from making war upon each other.

At the time of the adoption of the constitution alien friends were, according to the law of England, granted considerable privileges within the realm. Magna Charta, ch. 41, declared that:—

"All merchants shall have safe and sure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs, without any evil tolls; except in time of war, or when they are of any nation at war with us. And if there be found any such in our land, in the beginning of the war, they shall be attached, without damage to their bodies or goods, until it will be known unto us or our chief justiciary, how our merchants can be treated in the nation at war with us; and if ours be safe there, the others shall be safe in our dominions."[1]

Besides the rights thus secured to alien friends when within the realm, an alien friend might, according to Blackstone:—

"Acquire a property in goods, money, or other personal estate, or . . . hire a house for his habitation; for personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary to the advancement of trade. Aliens also may trade as freely as other people, only they are subject to certain higher duties at the custom house; and there are also some obsolete statutes of Henry VIII., prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute, 5 Eliz., ch. 7. Also, an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate." "An alien born may purchase lands, or other estates; but not for his own use, for the king is thereupon entitled to them."

Until office found, however, the alien might sustain actions for injuries to his real estate.[3] An alien can not "be of the privy coun-

[1] Creasy's translation. [2] 1 Com. 372. [3] 5 Co 526.

cil, or either house of parliament, or have any office of trust, civil or military.'"[1] And he had no inheritable blood.[2]

It would seem therefore, that even without the "equal privileges clause," in the absence of positive inhibition by the state, the citizens of any other state, or of any foreign country at peace with the United States, might freely come within the state and there trade and exercise their various arts and crafts, subject only to the same regulations as were prescribed for the citizens of the state resident therein. And it seems equally clear that, since the treaty making power and the control of foreign and interstate commerce, and of naturalization, were entrusted to the United States government, the power of such inhibition, at least with regard to the citizens of foreign countries, had been taken away from the several states. Doubtless it would be held that the citizens of one state when within another would be entitled to treatment at least as favorable as that accorded to citizens of foreign countries.

If this be true, the only incidents of alienage to be acted upon by the clause under consideration, are the disability to hold land against the state, and the incapacity to take any public office of profit or trust. As public office is not a right, but a mere delegation of authority from the state to be exercised in behalf of the state, it could hardly be claimed as a privilege or immunity of citizenship. This reduces the scope of the clause to the removal of the disability to take and hold land under the same regulations as are prescribed for the government of citizens of the state in regard to real property. The operation of the clause would thus be to round out the rights of the citizens of other states when within the state to an exact equality of civil right with the citizens of the state. This conclusion is substantially confirmed by the decisions of the courts.

But there are divergences from it, which while they seem unreasonable, are perhaps so firmly established by a long line of decisions as to be beyond overturning. The most glaring is that which permits a state to prescribe a long period of residence as a qualification requisite to the practice of medicine. The practice of medicine is one affected with a public interest undoubtedly, but it is one which is almost wholly left to be controlled by the law of contract. I am not aware of any law that directs a physician to render his services at the behest of anybody. The state does not administer medicine as it does justice. In the administration of justice there is some reason for entrusting the government with the selection of attorneys at

[1] 1 Bl. Com. 374. [2] 2 Bl. Com. 249.

law and other officers to aid in such administration. Likewise in the conduct of public hospitals and in the administration of sanitary laws, it would seem entirely proper to requires the physician and health officers to be selected by the government; but it is questionable whether beyond this there is any occasion for the government to interfere. It is well enough to provide for the examination and certification of physicians, so that anybody requiring the services of one may, if unacquainted, employ one approved by competent authority and have some reason for placing confidence in him; but further than this there seems no occasion to go. There is too much reason to believe that the requirements that all physicians be licensed, and that licenses be granted only to persons that have resided within the state for a considerable number of years (in some cases as many as ten years are required) is only a device for adding a monopoly feature to the practice of medicine, for the benefit of those members of the profession who are already within the state. It would seem to be sufficient to provide adequate civil and criminal laws for the prevention, redress and punishment of mal-practice.

Another questionable feature of some of the decisions is the tendency manifested by some of the state courts to attempt to discriminate between residence and citizenship. This tendency is with a single exception confined to the state courts. That exception is in the dissenting opinion of Mr. Justice Brewer in the case of *Blake* v. *McClung*,[1] and while the opinions of that learned jurist must ever command great respect, yet it is to be feared that here his repugnance to the decision of the court led him, in the lack of more weighty reasons for opposing it, to grasp at mere specious appearances of reason. Very few of the state statutes that have been adjudged unconstitutional on the ground of repugnance to the clause under consideration, have in so many words made citizenship the the basis of discrimination. Nearly all, in terms, confine the discrimination to that between residents and non-residents. And courts of particularistic tendencies sometimes seem to think that this fact settles the matter, and that there can be no discrimination repugnant to the clause under consideration unless it is in terms in favor of citizens of the state as against those of other states. Possibly before the passage of the Fourteenth Amendment there might have been some ground for this, but in the light of the provision in that Amendment that "All persons born or naturalized within the United

[1] 172 U. S. 239.

States and subject to the jurisdiction thereof *are citizens* of the United States and of the state wherein they *reside*," it passes my comprehension how such a contention can for a moment be considered sustainable.[1]

A question somewhat more doubtful appears in some of the cases, and that is whether a state may by itself or through one of its municipal corporations discriminate between persons residing within the territorial limits of the corporation and those residing without it, and such discrimination be good as against citizens of other states. Such discrimination was before the court in the case of *Rothermel* v. *Meyerle*.[2] A statute of Pennsylvania required all persons purchasing farm produce within three counties therein named, and intending to send the same without the limits of the said counties, to take out licenses before so doing, and made the license fees lower for persons resident within those counties than for those resident without. The court here adjudged such discrimination not repugnant to the "equal privileges clause" of the federal constitution. The supreme court of Kentucky holds directly the contrary.[3]

The opinion of the Kentucky court would seem to be the sounder, since under the Pennsylvania holding the state might erect practically all its territory into a municipal corporation and grant to the inhabitants of such territory such special and exclusive privileges as it saw fit, and the regulation yet be held consistent with the federal constitution, simply because along with non-residents of the state it discriminated also against those few of its own citizens who did not reside within the favored territory.

W. J. MEYERS

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[1] The cases in which this distinction has been attempted are:—Robinson *v.* Navigation Co. (1889), 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Cummings *v.* Wingo (1889, 31 S. C. 427, 10 S. E. 107. Central R. R. Co. *v.* Georgia Co. (1890), 32 S. C. 319, 11 S. E. 192; Welsh *v.* State (1890), 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Blake *v.* McClung (1898), 172 U. S. 239, 43 L. ed. 432. Dissenting opinion of Brewer, J.

[2] (1890), 136 Pa. St. 250.

[3] Fecheimer *v.* Louisville (1886), 84 Ky. 306, 2 S. W. 65; McGraw *v.* Town of Marion (1896), 98 Ky. 673, 34 S. W. 18.