THE KU-KLUX ACT.

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THE act of Congress familiarly known as the Ku-Klux Act is entitled "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes." The provisions of the amendment which it professes to enforce are contained in the first and fifth sections, which we reproduce as follows:

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

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

What we propose is to inquire whether the Ku-Klux Act, approved April 20th, 1871, is authorized by this amendment. The first section of the Act provides "that any person who, under color of any law, statute, ordinance, regulation, custom or usage of any state, shall subject or cause to be subjected any person within the jurisdic-

tion of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the state to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." The remainder of the section vests the power to try such issues in "the several district or circuit courts of the United States." We see no constitutional difficulty with this section, since the Fourteenth Amendment authorizes Congress to enforce its prohibitions against state action. It may, hence, pass a law to reach this result by acting upon those who execute state laws for the purposes prohibited; and this seems to be the purport of the first section of the Act. It gives a remedy against any deprivation of guaranteed rights when occurring under the color and by the agency of state law.

The second section, in nearly one-half of it, recites a series of crimes in the form of conspiracies, on the part of two or more persons, committed against the officers or property of the United States, as conspiring to overthrow the Government of the United States, to levy war upon it, to seize its property, or to intimidate or injure its officers, judges, jurors, or witnesses in its courts. There can be no doubt as to the power of Congress to pass a law punishing such offenses. The power is derived not from the Fourteenth Amendment, but from the general right of the Government to protect itself, and from its authority to establish courts of justice and furnish due protection in respect to all their proceedings.

The section, however, in another part of it goes much further than this, and provides as follows:

"That if two or more persons within any state or territory of the United States" "shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state from giving or securing to all persons within such state the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any state or territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner toward or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any territory of the United States having jurisdiction of similar offenses, shall be punished by a fine of not less than $500 nor more than $5,000, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court may determine."

The remainder of the section gives the right of recovering damages to any person who may be injured in consequence of any act or acts done by such conspirators. So far as these offenses exist in any territory of the United States there can be no debate as to the power of Congress to pass this or any other law not prohibited by the Constitution, since its jurisdiction here is exclusive and complete, not in consequence of any grant of power contained in the Fourteenth Amendment, but by the grant which places the territories of the United States under the authoritative disposal of Congress. We, therefore, raise no question as to the power of Congress when acting upon this field.

Does the Fourteenth Amendment authorize the above legislation when acting in the bosom of a state, not upon state officers doing in their official capacity the things forbidden by the amendment, but upon *private individuals* doing the things set forth in the Act? This is the question. It was in reference to this question that Judge Ballard, of the United States Circuit Court in Kentucky, in his charge to the grand jury, on the 6th of October, 1874, said:

"And now I cannot omit speaking to you in respect to another class of cases which is attracting so much attention abroad, as well as at home. I refer to what are ordinarily denominated Ku-Klux outrages. Let me say, once for all, that *in respect to them this court has no jurisdiction whatever*. For their continuance the people of the state and the tribunals of the state are *alone* responsible. . . . It is time that the people of the state had learned that they alone are responsible for these outrages, and that the authorities of the state should understand that to them belongs the duty of their suppression, and that the United States and their officers, courts, and tribunals have no power whatever over them. . . . Now, gentlemen, I have endeavored to be explicit. I have desired you to understand explicitly that in respect to a large class of cases over which it has been supposed this court had jurisdiction I disclaim such jurisdiction altogether. Over that large class of cases which relate to crimes committed upon persons generally in the state, not officers of the United States or witnesses or jurors, and upon things and property not belonging to the United States, the sole and absolute jurisdiction is with the state and its tribunals. For all the disorders of the state the United States are in nowise responsible. They have no power to punish them."

This strong language in effect declares the law unconstitutional in that part of the section we are now considering. Judge Ballard denies the existence of the jurisdiction which the law professes to give. The ground upon which he places the denial is that Congress under the Fourteenth Amendment can confer no such jurisdiction. Having quoted the first section of the amendment, the Judge proceeds to say:

"This is evidently directed at the *state* acting through its legislative, executive, or judicial department. Its legislature is inhibited from making any law which shall abridge these privileges and immunities, and its executive and judicial departments are inhibited from enforcing any existing law which abridges them. It is not directed at the *acts of individuals;* and, if there be no law in Kentucky, and there is none that I am aware of, which in any manner abridges the privileges or immunities of citizens of the United States, this provision of the Constitution of the United States is not infringed."

Prof. Pomeroy, in his recently published edition of "Sedgwick on the Construction of Statutory and Constitutional Law," appends a voluminous note, in which he refers to the cases of United States *vs.* Souders, 2 Abb. U. S. R., 456, and The People *vs.* Brady, 40 Cal., 198, "where it was decided that the Fourteenth Amendment is addressed alone to the *states* in their corporate capacity, that its prohibitory clauses execute themselves by nullifying adverse state legislation, and that Congress obtained no power under it to pass laws operating affirmatively upon *individuals*." This is precisely the view taken by Judge Ballard, on the ground of which he disclaimed all rightful jurisdiction as sought to be conferred by such laws.

Justice Bradley, of the United States Supreme Court, commenting on the Fourteenth Amendment, in the Grant Parish case, said:

"It is obvious, therefore, that the manner of enforcing the provisions of this amendment will depend upon the character of the privilege or immunity in question. If simply prohibitory of governmental action, there will be nothing to enforce until such action is undertaken. How can a prohibition, in the nature of things, be enforced until it is violated? Laws may be passed in advance to meet the contingency of a violation, but they can have no application until it occurs. On the other hand, when the provision is violated by the passage of an obnoxious law, such law is clearly void and all acts done under it will be trespasses. The legislation required from Congress, therefore, is such as will provide a preventive or compulsory remedy, or due punishment for such trespasses, and appeals from the state courts to the United States courts in cases that come up for adjudication."

The Supreme Court of the United States, in the New Orleans Slaughter House case, had occasion to expound the Fourteenth Amendment, not in its application to the enforcement laws of Congress, but in reference to the question whether a law of Louisiana is consistent therewith. The Court said that the amendment recognizes and establishes two kinds of citizenship—one of the United States and the other of the several states; that the privileges and immunities which it prohibits the states from abridging are those and those only that belong to United States citizenship; and that these are the only rights or privileges which, being abridged by the operation of state laws, Congress has the power to enforce. As to the clause which forbids any state to "deprive any person of life, liberty, or property without due process of law," the Court said:

"The law then has been practically the same as it is now during the existence of the Government, except so far as the present amendment may place the restraining power over the *states* in the hands of the Federal Government."

As to the next clause, forbidding any state to "deny to any person within its jurisdiction the equal protection of the laws," the Court further said:

"The existence of *laws in the states* where the newly-emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it *such laws* are forbidden. But if the *states* did not conform their *laws* to its requirements, then, by the fifth section of the article, Congress was authorized to enforce it by suitable legislation."

Though the specific question we are considering was not before the Court, yet all its references to the prohibitory clauses of the amendment confine their application to state action. There is not an intimation that they have any reference to the acts of *private individuals.*

We have dwelt at some length upon this point, citing the preceding authorities, not because there is any ambiguity or uncertainty in the language of the amendment, but because Congress in the Ku-Klux Act has assumed that it confers jurisdiction over the offenses and trespasses of *individual* malefactors committed in a state, but which have no reference whatever to anything done or omitted by that state. It has assumed that the power to enforce the prohibitions of the amendment against adverse state action and state laws authorizes the enactment of a municipal code for the punishment of *individual* crimes occurring in a state. For this assumption there is not the slightest warrant in the language of the Fourteenth Amendment, any more than there is for subverting the state governments or for dispensing with their functions altogether.

That we do not misstate or overstate this assumption the reader will readily see if he will recur to the several recitals of the law as previously quoted. Take one or two examples. If two or more persons within any state, no matter who they are, whether officers of law or not, shall conspire together for the purpose, either directly or indirectly, of depriving any person of the equal protection of the laws, then each of them shall be deemed guilty of a high crime, whether they do anything more or not, and be punished accordingly. If two or more persons shall go in disguise upon the public highway with the same intent, then each of them shall be deemed guilty of the same high crime, whether they do anything more or not, and also be punished accordingly. Again, if two or more persons shall go in disguise upon the premises of another with the same intent, then each of them also shall be deemed guilty of a high crime, whether they do anything more or not, and shall be dealt with in the same way. If two or more persons in any state shall do any one of the three things previously described, for the purpose, either directly or indirectly, of depriving any person, whether black or white, or any class of persons, of equal privileges or immunities under the laws, then each of them shall be guilty of this same high crime, whether anything more is done or not, and shall be punished as prescribed. So if two or more persons shall do any one of the three things mentioned for the purpose of hindering the constituted authorities of the state in securing to all persons in such state the equal protection of the laws, then we have the same penalty, whether anything more is done or not. So, also, if two or more persons shall conspire together for the purpose of hindering the due course of justice in any state, with intent to deny to any citizen of the United States the due and equal protection of the laws, then the same penalty follows.

Let us see what we have in these examples. The *body* or formal part of the crime consists in two or more persons within any state conspiring together, or going in disguise upon the public highway, or upon the premises of another. The *soul* of the crime as connected with this body is an intent or purpose to bring to pass any one of the results named. This being the intent, the crime is committed simply by conspiring together, or going in disguise upon the public highway, or going in disguise upon the premises of another, and that, too, whether the conspirators or the disguised persons do anything more or not than is contained in the body of the crime. This seems to us very extraordinary legislation for the United States of America in the nineteenth century. We do not wonder that Judge Ballard said: "Indeed, it seems that there was an attempt by loose and vague language to confer a jurisdiction which could not be conferred in direct terms."

What makes the legislation still more extraordinary is the profession of enforcing the Fourteenth Amendment thereby. The amendment, as we have previously shown, lays its only restraint upon *state* action, and authorizes Congress to enforce this restraint and nothing else. But here we have a system of municipal legislation operative in the bosom of all the states, aimed at *individual* action, to which the states are no parties and with which Congress under the Constitution of the United States has nothing to do. It is not the business of Congress to legislate in regard to the offenses here described at all, simply because it has no authority for so doing. The real offenses aimed at by this Act are outrages against the rights of person and property, which it belongs to the states, and the states only, to punish. While it is important that these offenses, whenever and wherever committed, should be punished, it is not less important that they should be punished by the authority that has jurisdiction, and not by that which has no jurisdiction. As between two evils, it is far better that justice should not be done and that *individual* crimes should go unpunished rather than that Congress should attempt to enforce the Constitution by violating it. It is well for Congress to bear in mind 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."