262 Ashland Boulevard,

Chicago, ~~Aug. 25~~ Oct 15, 1889.

Hon. Albion W. Tourgee,

Mayville, New York.

Dear Sir,-

Your letter of April 6 was duly received, and the courtesy, which prompted so lengthy a reply, merited a more prompt acknowledgement on my part, but busy days at first, and absence upon my summer vacation must be my excuse, so far as excuses are good for anything.

First-- Permit me to say that I entirely agree with you that "The insertion of the word 'white' as a qualification for the exercise of the electoral franchise in a state constitution would not be a violation of the first section of the fourteenth amendment."

Second-- a Also that "Suffrage is a thing distinct from citizenship."

b- "The XIV amendment made the negro a citizen" only and not a voter.

c. "A man becomes a voter only by an express grant etc."

d. "That the qualification of voters are remitted

to the states subject to the limitation of the XIV & XV amndments.

If anything in my note to the Forum warranted any other conclusion it must have been a slip of the pen, and your courtesy is all the greater that you undertook to enlighten one whom you supposed ignorant on these ~~pe~~a tent points. None but a tyro in the study of the constitution could hold opinions at variance with yours on matters so evident.

But if you will pardon the presumption, permit me to give you my reasons for differing with you upon other conclusions in your letter. 1st. You say:

"Under the provisions of the XV amendment the Congress has undoubtedly power to provide the qualifications of electors in all national elections" In this I cannot agree with you, as I find not one word in the amendment on which to base such a conclusion.

The first section of said amendment confers on the citizens of the U. S. the right to exemption from discrimination in the franchise by state or national law, on account of race, color, or servitude. This and nothing more. In this section the grant is to the citizen, and not to Congress or any other person or power.

The section 2nd. confers on Congress power to enforce the first section, and nothing more. This it could do only by providing a remedy, when the right above defined is violated. As for instance in affixing a penalty to any judge of election, or regis-

tration officer, who should refuse any otherwisw legal voter the franchise, on account of race, color, or previous condition of servitude. This Congress attempted to do in the Act of May 31st. 1870, but because in the 2nd. and 3rd. sections it went beyond this and attempted to include other matter, those sections were declared void by the Supreme Court in the United States vs Reese 92 U. S. 214. If you are familiar with that decision you will see that though the point we are discussing was not directly in issue, the views of the intent and extent of the XV amendment there expressed, by the whole court including the Justices Clifford and Hunt, who were dissentients from the judgment, **must** held the same interpretation and constructions, as are expressed above and below.

Prof. James Bryce says: It is practically the Supreme Court that determines such questions, and where it has declared the meaning of a law, everyone ought to accept and guide himself by it. Vol. I p. 365. And evidently, relying, on this decision, he repeatedly gives this as the meaning of the constitution. See pp. 310, 319, 320, 329, 330.

Again I do not agree with you that amendment XV makes any distinction between state and national elections. Its language is "to vote" unqualified and plain. It is intended to be taken with section 2 4 of article 1, and as a limitation upon the power of the states, otherwisw absolute and complete, to prescribe the qualifications of electors. 2nd. you say "There is no probabil-

Second You say. "There is no probability that the

Supreme Court would hold the insertion of the word "white" unconstitutional" for two reasons.

Ist. "The right of the state to prescribe the qualifications etc." But the XV amendment is a distinct and explicit limitation of that right on the very point under discussion.

2nd. "The inferential clause of the second section of the XIV amendment" But the XV amendment was passed subsequently to the XIV, and by a well known rule of law repealed any previous clause in conflict with it.

3rd. Again you say "the provisions of the XV amendment are inoperative because we have no laws to carry them into effect". In this I differ with you. The XV amendment is in the nature of a prohibition, and in this respect belongs with the 9th. and IOth. Section of Article I. Many of those prohibitions have no laws to carry them into effect, for the very reason that they are negative, and need none. Should the Congress or any State make a law in violation of any of them, it would be so far void, and would fall to the ground, and any one injured by it would have remedy against its activity in a U. S. court. Should the word "white" be inserted in any state law or constitution the same result would happen, with the same remedy. An election held at which colored voters were excluded, on account of their color, would be illegal and voidable, notwithstanding any state constitution-

See 323 again Justice Clifford as above

al provision. These views are the result of my own study of the Constitution, and coincide with all that I have read upon the subject, and are clearly supported by the authorities above.

If you or Senator Morgan have any authorities to support your position on the XV amendment, I should be very glad to have references to them. You say "I should have a poor opinion of a lawyer, who did not entertain the same views" I am very sorry to stand in the "poor opinion" of one for whom I have long had a profound respect, but must find consolation in such good company as the Justices of the Supreme Court and Prof. Bryce.

With regard to the other question discussed in your letter viz. "Would an educational qualification reduce the Representation of the Southern States in Congress? I must confess the sentense you quote from my letter was a little too strong in its assumption, and will ask you to attribute it to haste, and therefore pardon it. Nevertheless I cannot agree with you that the answer will undoubtedly be negative. As the reasons you assign do not seem to me conclusive.

First you say the educational test in Mass. has not reduced the representation there. If you will examine the Census closely you will see that twenty-nine thirtieths of the illiterate in Mass. are foreign born, largely Canadian French, and that leaves the number of actual male citizens deprived of the

ballot through illiteracy too small to effect her representation in Congress, if the question were raised. The same fact is doubtless true in the three other states that have the same test.

As to the economic qualification (paupers, poll-tax property ect.) the same fact is true viz. that the number deprived of the right of suffrage by itis too small to effect the representation. Hence the question has never been raised. But should one of the states whose illiteracy is 50 per cent now disfranchise one half of her voters, the Republican party would have an important interest in denying to that state the right to send members to the House, who ~~should~~ would misrepresent the half so disfranchised. The next Census would show the proportion thus disfranchised, and the next apportionment, if made by the Republican Party, would interpret the XIV amendment according to its spirit and intent, when adopted, which all know was to prevent the Southern States from denying the vote to the colored race, the very thing, that the insertion of the illiteracy clause in a Southern State law now would be intended to accomplish.

How, then could it be brought before the Supreme Court? It is well known that the ~~U. S.~~ Supreme Court cannot issue a mandamane to Congress, and from the foundation of our government has steadily and wisely refused to meddle with purely political questions,

or to interfere with Congress in its dealings with its own members. (See Bryce vol. I p. 365.) It would thus be a question for Congress alone, and would be settled according to the party in power, at each new apportionment. But, if in any way it could be brought before the Supreme Court, I will admit that the letter of the law may be so interpreted as to support your view, but the spibit and intent of the XIV amendment, and of the assumption of the educatical qualification in those Southern States would favor the opposite view, and doubtless, here, as in Congress, the decision would depend on the previous political bias of the Justices as in the famous 8 and 7 decisions of 1876. ×

You will pardon my seeming want of courtesy in my former note to the Forum, as it was caused by my irritation at Senator Morgan's reply to a question as to his authority for assuming as settled an interpretation of the XV amendment, contrary to all authority within my reach. This irritation doubtless tinged my note to the Forum, when I saw your coincidence with his view. Pardon also the lenght of my reply, and believe me

Yours with the highest respect,

J. F. Claflin.

× P.S. See also Lectures of Cooley & Hurst before the National Law Ass of Mich. University. Letter pp. 227-233 1886.