SUPREME COURT OF THE UNITED STATES.

No. 7.—December Term, 1856.

DRED SCOTT, (A Colored Man,)

vs.

JOHN F. A. SANDFORD.

Argument of Montgomery Blair, of Counsel for the Plaintiff in Error.

STATEMENT OF THE CASE.

This is a suit brought to try the right to freedom of the plaintiff and his wife Harriet, and his children Eliza and Lizzie. It was originally brought against the administratrix of Dr. Emerson, in the circuit court of St. Louis county, Missouri, where the plaintiff recovered judgment; but on appeal to the supreme court of the State, a majority of that court, at the March term of 1852, reversed the judgment; when the cause was remanded it was dismissed, and this suit, which is an action of trespass for false imprisonment, was brought in the circuit court of the United States for the district of Missouri, by the plaintiff, as a "citizen" of that State, against the defendant, a "citizen" of the State of New York, who had purchased him and his family since the commencement of the suit in the State court.

The defendant denied, by plea in abatement, the jurisdiction of the circuit court of the United States, on the ground that the plaintiff "is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as slaves," and therefore the plaintiff "is not a citizen of the State of Missouri." To this plea the plaintiff demurred, and the court sustained the demurrer.

Thereupon the defendant pleaded over, and justified the trespass on the ground that the plaintiff and his family were his negro slaves; and a statement of facts, agreed to by both parties, was read in evidence, as follows: "In the year 1834, the plaintiff was a negro slave belonging

to Dr. Emerson, who was a surgeon in the army of the United States. In that year (1834) said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situated on the west bank of the Mississippi river, in the territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of 36° 30′ north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, until the year 1838.

"In the year 1835, Harriet, (who is named in the second count of the plaintiff's declaration,) was the slave of Major Taliaferro, who belonged to the army of the United States. In that year, (1835,) said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as herein before stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at Fort Snelling unto said Dr. Emerson, hereinbefore named; and said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

"In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsey, north of the north line of the State of Missouri, and upon the Mississippi river; Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

"In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

"Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza and Lizzie, to the defendant as slaves, and the defendant claimed to hold each of them as slaves.

"At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza and Lizzie, and imprisoned them; doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times."

On these facts, the court instructed the jury to find for the defendants. The plaintiff excepted to the instructions. The jury found a verdict for defendant, and judgment was rendered accordingly, on the 16th May, 1854. On the 16th a writ of error issued, and the case was brought up to the December term of 1854 of this court.

1. The first question is, whether this court will consider the question raised in the circuit court, by the plea to the jurisdiction, no final judgment having been rendered on the demurrer to that plea, and the defendant having pleaded over after the demurrer was sustained, and

the final judgment assigned for error having been rendered on the issue on the merits?

2. Whether, if the ruling of the circuit court on the demurrer to the plea in abatement is subject to be reviewed here, the judgment of the court in holding the plaintiff to be "a citizen," in such sense as to enable him to maintain an action in that character in the courts of the United Statates, was erroneous?

3. Whether the facts stated in the agreed case entitles the plaintiff and his family to freedom, supposing the 8th section of the act of 1820, known as the Missouri Compromise, to be constitutional?

4. Whether the said act is constitutional?

Whether the question of jurisdiction is waived by pleading over?

1. In the case of Sheppard vs. Graves, 14 Howard, p. 510, several pleas in abatement were filed, and, among others, one to the jurisdiction, on the ground that the plaintiff was a citizen of Texas, and not of Louisiana, as alleged; pleas to the merits were afterwards filed. The court speaks of this as "a practice fraught with confusion and perplexity, and one endangering the rights of suitors," and which "it is exceedingly desirable should be reformed; and we are aware of no standard of reformation and improvement more safe or more convenient than that which is supplied by the time-tested rules of the common law. And by one of those, believed to be *without an exception*, it is ordained, that objections to the jurisdiction of the court or to the competency of the parties, are matters pleadable in abatement only; and that if, *after* such matters relied on, a defence be interposed in bar, and going to the merits of the controversy, the grounds alleged in abatement became thereby immaterial, and are waived." In the case of the United States vs. Boyd, 5 Howard, page 51, the court say: "The counsel for the defendants ask the court to revise the judgment of the court below, rendered upon the demurrer to the rejoinders of the defendants to the plaintiff's amended replication overruling the demurrer, insisting that the rejoinder was good, and that judgment should have been rendered for the defendants. The answer to this is, that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a *waiver* of the judgment. If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand."

But it is urged, that notwithstanding it is true, as a general principle, that pleading over waives the ruling on the demurrer, yet in the courts of the United States, where it appears in proof, at any stage of the case, that the court has no jurisdiction of the person, it is error to proceed to judgment on other matters; and if such further proceedings and judgment are had, the Supreme Court must reverse the judgment and remand the cause, with orders to dismiss it; that here the plea to the merits, as well as the plea to the jurisdiction, alleges that the plaintiff

is a negro, and the *agreed case*, read in evidence on the trial, admits the fact; that the same matter may be pleaded to the merits and in abatement, &c.

This does not take the case out of the reasoning of the court in the cases already cited. For pleading over not only waived the matter in abatement in the case of Sheppard and Graves, and rendered the fact immaterial; but the court say, p. 511, "The question of residence, *or the right of the parties to sue*, as incident to residence, cannot be enquired into under the general issue;" and the case of Smith vs. Kernochen, 7 Howard, 216, is cited, where the court held, that it was too late for defendant to avail himself of objections to jurisdiction on the trial of the merits. Other cases to the same effect, are Sims vs. Handley, 6 H. 1; Baily vs. Dozier, Ib. 23; Conrad vs. Atlantic Ins. Co., 1 P. 386; D'Wolf vs. Rabaud et al., Ib. 476; Evans vs. Gee, 11 Ib. 89; 1 Wash. C. C. 70, 80; 2 Sumner, 251; 2 Dall. 381; 4 Ib. 330.

In this case, as in those cited, the declaration gives jurisdiction, and the facts alleged in support of it can only be contested by making an issue, as in other cases. If that issue be not made, or be waived in the conduct of the cause, according to a well-settled practice of the court, there is no reason in this case, more than in any other, why the objection should be available at a later stage of the case. If the fact had been, that plaintiff was not a resident of Missouri, and that was the reason why he was not a citizen, no advantage could be taken of the fact at any subsequent stage of the cause. What difference does it make that another fact is relied on to show that he is not a citizen? It is the right to sue as "a citizen" of Missouri which is questioned; and it is immaterial whether the right be questioned on account of residence, or on account of any other circumstance which deprives him of the character of a citizen of Missouri.

Citizenship.

II. But if the court should be of opinion that the question raised by the plea in abatement and the demurrer thereto is not waived, and that the judgment of the circuit court thereon must be maintained before it will consider the questions affecting his right to freedom, I submit the following considerations in support of the judgment on the demurrer:

It has been decided in 1 Littell, 326, (4 Geo. 68,) Meigs, 339, and 1 English, 509, that free negroes are not *citizens* within the meaning of the 2d section of the 4th article of the Constitution, which is in these words: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The case of Amy vs. Smith, in 1 Littell, 326, is the earliest case, and is referred to, and the reasoning adopted, in the others. In that case it was held, by a majority of the court, that "to be a citizen, it is necessary that he should be entitled to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens; and unless he be so entitled, he cannot, in the proper sense of the term, be a citizen. It results, then, that the plaintiff cannot have been a

citizen either of Pennsylvania or Virginia, unless she belonged to a class of society upon which, by the institutions of the States, was conferred a right to enjoy all the privileges and immunities appertaining to the States."

"Prior to the adoption of the Constitution, the several States might make any persons they chose citizens. But as the laws of the United States do not now authorize any but a white person to become a citizen, it marks the national sentiment on the subject, and creates the presumption that no State had made persons of color citizens; and this presumption must stand, unless positive evidence to the contrary were produced. But none such was produced, either as to Pennsylvania or Virginia. On the contrary, it appears from the preamble of the abolition act of Pennsylvania, that the legislature of that State intended to confer only a portion of the freedom which they themselves enjoyed; and they could not, therefore, have designed to give them all the rights and privileges of citizens, much less could they have designed to bestow those rights and privileges upon those who, like the plaintiff, were not intended to be emancipated, but who might become free by the failure of their owners to have them registered."

This opinion, delivered in the spring of 1822, displays no research, logic or learning; and the reference found in the case, to the contest on the subject carried on in Congress at the time Missouri was admitted, gives the clew to its extraordinary conclusions. The other opinions, which are predicated on this, show even less research and thought. On the other hand, the dissenting opinion of Judge Mills, to be found at p. 337, examines the question with the fairness, independence and learning becoming his position. He disposes of the absurd test of citizenship here set up, in a few words. Judge Boyle, who delivered the opinion of the court, it seems, supposed that the "immunities and privileges" spoken of in the Constitution, meant offices, amongst other things; and that those only who were eligible to the high places, or, at least, those of the class who were so eligible, were citizens.

Judge Mills shows that the definition would exclude many who were acknowledged to be citizens on all hands; and it is obvious that, however explained, it excludes all naturalized citizens who are ineligible to the Presidency, and to the gubernatorial chair in some of the States, and perhaps to other positions. He shows that in England nativity gives citizenship, and that this is true also of Rome; but that this is immaterial, for the American colonies brought with them the common, and not the civil law.

The error, he shows, consists in not attending to the distinction between political functions and civil rights. By attending to this distinction, all perplexity is removed. The qualifications required for electors, representatives, jurors, witnesses, are, as they purport to be, tests of fitness for the several duties required, not tests of citizenship. Property, age, sex, religious belief, or the want of it, and a variety of circumstances, besides color, determine these qualifications in this country and in England without affecting the question of citizenship. For

most of such functions, it is true, citizenship is required, but there is no uniformity on the subject in the States. Thus foreigners are electors and jurors in many of the States, and may be witnesses in all. In most of the States an elector must be a free *white* male citizen, over the age of twenty-one, who has resided some time in the county where he offers to vote; but in many of the States, as Vermont, Massachusetts, Maine, New Hampshire, New York, and other of the Northern States, he is not required to be *white*, and was not so prior to 1835 in North Carolina; and when this is not required, colored men are admitted to vote, as other citizens. (See 2 Kent, p. 258, note, 4th ed., where the chancellor says they are allowed to vote in New York, and are recognised by the constitution and laws of New York *as citizens*.)

Judge Mills is fully sustained in his views of citizenship by Judge Washington, (4 Wash. C. C. 371, Canfield vs. Coryell,) where it is decided that the immunities and privileges conceded by the Constitution to citizens in the several States were to be confined to those which were in their nature fundamental, and belonged, of right, to the citizens of all free governments. Such are the rights of protection of life and liberty, and to acquire and enjoy property, and to pay no higher impositions than other citizens, and to pass through or reside in the State at pleasure, and to enjoy the elective franchise, if coming within the regulations of the State law on that subject. But this immunity does not extend to every right which may belong exclusively to resident citizens, &c.

It appears from this opinion, that the essence of citizenship is the right of protection of life and liberty, to acquire and enjoy property, and equal taxation. Suffrage is not an absolute right of citizenship; and the citizen of one State is not entitled to it in the other, unless he is of the description of citizens entitled to it in such State. He may be a citizen without having any such right anywhere, and, as already observed, he may have it in some States without being a citizen of any one of them. (See 21 Ala., p. 454, hereinafter cited, showing that free negroes are citizens.)

The supreme court of North Carolina, in an elaborate opinion delivered, in 1838, in the case of the State vs. Manuel, (4 Dev. and Bat., p. 24,) by Judge Gaston, one of the most learned and able jurists in the Union, on the precise point under consideration, fully sustains the views here contended for. The court say:

"According to the laws of this State, all human beings within it who are not slaves fall within one of two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are *unknown to our institutions*. Before our revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects: those born out of his allegiance were aliens. Slavery did not exist in England; but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity or disqualification of slavery was removed they became per-

sons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British king. Upon the Revolution no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free and sovereign State; slaves remained slaves; British subjects in North Carolina became North Carolina freemen; foreigners, until made members of the State, continued aliens; slaves manumitted here became freemen; and therefore, if born within North Carolina, *are citizens of North Carolina;* and all free persons born within the State are born citizens of the State. A few only of the principal objections which have been urged against this view of what we consider the legal doctrine will be noticed. It has been said that, by the Constitution of the United States, the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State, by its municipal regulations, to *make* a citizen. But what is naturalization? It is the removal of the *disabilities* of *alienage*. Emancipation is the removal of the *incapacity* of *slavery*. The latter depends wholly upon the internal regulations of the State; the former belongs to the Government of the United States. *It would be a dangerous mistake to confound them.*

"It has been said that, before our revolution, free persons of color did not exercise the right of voting for members of the Colonial legislature. How this may have been, it would be difficult at this time to ascertain. It is certain, however, that very few, if any, could have claimed the right of suffrage, for a reason of a very different character than the one supposed. The principle of freehold suffrage seems to have been brought over from England with the first colonists, and to have been preserved almost invariably in the colony ever afterwards.

"In the act of 1743, ch. 1, (Swann's Revisal, 171,) it will be seen that a freehold of fifty acres was necessary to entitle the inhabitant of a county to vote; and by the act of 2d September of 1746, (ch. 1, Ibid. 223,) the *freeholders* only of the respective towns of Edenton, Bath, Newbern, and Wilmington, were declared entitled to vote for members of the Colonial legislature. The very Congress which framed our constitution was chosen by freeholders. That constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one and paid a public tax; and it is a matter of universal notoriety, that under it free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color a few years since by our amended constitution. But surely the possession of political power is not essential to constitute a citizen. If it be, then women, minors, and persons who have not paid public taxes, are not citizens; and free white men who have paid public taxes and arrived at full age, but have not a freehold of fifty acres, inasmuch as they may vote for one branch and cannot vote for the other branch of our legislature, would be in an intermediate state—a sort of hybrids between citizens and not citizens. The term 'citizen,' as understood

in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people, and he who was before a 'subject of the king,' is now a 'citizen of the State.'"

The argument most relied on by those who deny the citizenship of free colored men is, that the acts of Congress on the subject of naturalization provide for naturalizing white persons only, and thus, it is contended, marked the national sentiment, that none but white persons were citizens.

Naturalization is a process by which aliens become citizens, and we would not look to the regulations on this subject to aid our inquiries as to who are citzens without naturalization. They are not *in pari materia*. But naturalization even was not limited to whites by the Constitution, and though in general the acts of Congress provide only for naturalizing whites, it has been extended repeatedly by treaty and by act of Congress to Indians and negroes. Thus, by treaty with Choctaws and Cherokees, Indians have been naturalized or acknowledged as *citizens*. (See treaty with Choctaws, art. 14, 20th September, 1830, vol. 7, p. 335; see also 12th art. treaty with Cherokees, Ib. p. 483.) This article does not stipulate expressly that the individuals who remain in the States after the removal of the tribe shall be citizens, but assumes it to result as the legal consequence of such separation from their tribe, and incorporation with the people of the State.

By the act of 3d March, 1843, § 7, p. 647, vol. 5 U. S. Laws, provision is made for the individuals of the Stockbridge tribe of Indians becoming citizens.

By the treaties of 1803 for La., of 1819 for Florida, and of 1847 for California, *the inhabitants* of those countries are to be *citizens* of the United States. There were inhabitants other than white; in fact many negroes, some of whom were free; and it has been decided in 21 Ala., 454, that such negroes are within the provisions of the treaty, and may inherit property in Alabama *as citizens*. This case shows, also, that political rights are not of the essence of citizenship, but merely the right to property, protection, liberty, &c.

The Constitution commits the subject of naturalization to Congress without limitation; and although in general it has been confined to white persons, yet, as we have seen, it has been extended to both Indians and negroes. The favorite argument, therefore, of the adversaries of negro citizenship is turned against them; and, if it had been valid, the facts would be conclusive against them. But, as Judge Gaston says, there is no connection between the subject of citizenship as acquired by birth and that acquired under the laws of Congress; and "it would be a dangerous mistake to confound them."

That citizenship is acquired by birth is a well-settled common law principle; and Vattel, ch. 19, §§ 212, 213, 214, divides the inhabitants of countries into citizens and strangers, (aliens,) and an intermediate class, who are an inferior class of citizens, but says these

divisions are inapplicable to England, where citizenship is acquired by birth.

Justinian, lib. 1, tit. v., § 3, says, formerly citizenship was extended to but one class of freed-men in Rome, but afterwards it was extended to all.

The Constitution, section 5, article 2, provides "that no person except *a natural-born citizen*" shall become President; thus not only recognising birth in the country as a mode of acquiring citizenship, but the mode in which the favored class acquire it.

If there be limitations on a principle adopted in the United States, which is of universal application in the mother country, it is for those who insist on the limitations to show affirmatively that such limitations have been established here. The Constitution of the United States certainly recognises no such limitations on this subject; it recognises but two kinds of free persons—citizens and aliens;—nobody supposes that free negroes are aliens; they are, therefore, necessarily citizens, and are, in fact, so regarded and treated. Thus, they are permitted to hold property in all the States; to carry on commerce under the laws of the United States; are entitled to bounties and pre-emptions; (see opinion of Legare, Att'y Gen'l, vol. 4, p. 147.) All these rights are held by them as "citizens;" and even where the laws discriminate against them as respects political functions or privileges, it is still as a class of citizens they are excluded. For examples:

The 3d section of the act of 6th March, 1820, 3d vol. Stat. 546, which provides the establishment of State government in Missouri, authorizes "all free *white* male citizens" to vote for members of the convention. The 6th section of the act of 1812, to form a Territorial government in Missouri, defines qualifications of electors in same terms.

The Militia act, 17th May, 1792, § 1, directs the enrolment of "every free able-bodied *white* male citizen."

The constitutions and laws of the States are to the same effect. The constitutions of some of the States—as Vermont, New Hampshire, Massachusetts, New York, and others—recognise no such distinctions among their citizens. In others—as Kentucky, Louisiana, Mississippi, Connecticut, and Missouri—the distinction is recognised. In Kentucky, the 8th sec., 2d art. of the old constitution, provided, that "in all elections for representatives, every free male citizen, (negroes, mulattoes, and Indians excepted,) &c., shall enjoy the right of an elector."

In Louisiana, by tit. 2, art. 6, no person shall be a representative who is not "a *free white* male citizen" of the United States; § 6, art. 3, of constitution of Missouri is to same effect; and so of § 1, 3d art. of that of Mississippi; and § 2, art. 6, of Connecticut.

Free blacks are thus recognised as citizens in all the States. Where the law does not prescribe, as one of the qualifications of an elector, that he shall be *white*, they vote as other citizens, and they are excepted nowhere from any duty or privilege appertaining to citizens, unless by express provision of law. And so of the United States.

See 4 Dev. and Bat.. p. 24; 2 Kent, p. 258, note *b*.

These considerations would authorize the conclusion that the framers of the Constitution and the patriots of that era regarded this class of persons as citizens, and included them in that character in the provisions of the Constitution; and this is fully confirmed by reference to the laws and records of that day.

Thus, an act was passed in Massachusetts on 6th March, 1788, forbidding any negro not a subject of the emperor of Morocco, or a citizen of the United States, from tarrying in the commonwealth.

The most satisfactory solution of the question is found in the proceedings of Congress, where it will be seen this very question attracted attention and was decided.

It was moved by South Carolina to amend the 4th article, on 25th June, 1778, which is as follows: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in the Union, the *free* inhabitants of each of these States—paupers, vagabonds, and fugitives from justice excepted—shall be entitled to all the privileges and immunities of free citizens of the several States," by inserting the word *white* before the words "free inhabitants." The motion was negatived, eight to two, and one divided. It was then moved, after the words "the several States," to insert "according to the law of the several States respectively for the government of their own *free white* inhabitants." Negatived, 8 to 2, divided one. (See Journals, vol. 2, p. 606.)

Again in 1783 it was resolved, "that all charges of war, and all expenses that have been or shall be incurred for the common defence and general welfare, &c., shall be defrayed out of the common treasury, which shall be supplied by the several States in proportion to the whole number of white and *other free citizens* and inhabitants of every age, sex and condition," &c. (Journals, 1st April, vol. 4, p. 183.)

In the organization of the Western Territory, first by the resolutions adopted 23d April, 1784, the organization was committed to the "*free males of full age;*" afterwards, by the ordinance of 1787, to "the free male inhabitants of full age," residents in the Territory for a specified time, and to "the citizens of the States" resident there. The 4th article provides for the admission of the States to be formed out of the territory into the Union on an equal footing with the original States, and the celebrated and long contested 6th article abolished slavery. The ordinance, therefore, distinctly contemplated not only the establishment of civil and political equality in Territories, but designed that its "free inhabitants," including those made free by the ordinance, should "be entitled to the privileges and immunities of *citizens* of the several States."

These proceedings show, 1st, that Congress refused emphatically to allow any distinction to be made between the *white* and other inhabitants in the privileges to be extended to them by the several States; and 2d, that others were recognised as citizens besides whites; and together demonstrate that the substitution which was made in the Constitution without debate or objection, of the word "*citizen*" for "*free inhabi-*

tant," used in the articles of Confederation, was not done to exclude such "*other citizens*" from the privileges conferred by the Constitution.

The proceedings quoted show beyond cavil, that it was designed to include free negroes in the privileges of citizenship in the several States, extended to the "*free inhabitants*" of a State by the 4th article of Confederation, and that they were not embraced in the provision by mere oversight in using general terms. The two motions made to exclude them, and lost by the vote of eight States against two, and one divided, shows what sense was then had of the rights of free persons of color. No inconvenience was found to follow from allowing them the ordinary privileges of citizenship between that date and the formation of the Constitution, or indeed since the formation of the Constitution to the present time; and therefore, when this provision was considered, no attempt was made to deprive them of these privileges. On the other hand, if the word "*citizen*," which is substituted in the Constitution for *free inhabitant* in the Confederation, had been understood to effect such exclusion, we know there would have been resistance to it from what took place when the effort was actually made in 1778.

Chancellor Kent, vol. 2, p. 258, note *b*, of the Commentaries, considers this question at some length, and concludes that free negroes are citizens. After reading the arguments against it, adduced in the decisions above referred to, and in Denny's book, he says it is a mere controversy about words, meaning, that whilst it is attempted to take away the *name* of citizen, the substantial rights which the name imports are conceded on all hands.

This question was much discussed in Congress during the session of 1820–'21, on the admission of Missouri. The 4th clause of 26th section, article 3 of the constitution presented, made it the duty of the legislature of Missouri "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State under any pretext whatever;" and the admission was refused until a second Missouri compromise was effected, by which the State agreed that the article objected to should not be construed to authorize any act excluding a citizen of any other State from the privileges and immunities to which he was entitled under the Constitution.

The laws of Missouri, accordingly, (see Rev. Laws of 1845, p. 755,) permit "free negroes or mulattoes, who produce a certificate of citizenship from some one of the United States," to reside in the State; and by the code of 1835, "free negroes who were citizens of other States" were excepted from the exclusion imposed on others, and were to be released if arrested, on producing a certificate of citizenship from any court of record. In reply to this recognition of citizenship, it was argued that this law of Missouri was an evasion of the requirements of the fundamental condition upon which the State was admitted, as it required *naturalization certificates* from the States, when it was well known the Constitution had taken the power of naturalization from the States; and it was stated by counsel that, in point of fact, no such certificates had ever been produced.

The answer to this is easy. The law does not purport to require naturalization certificates, but merely certificates attesting the citizenship of the parties in some of the States. This would be an easy condition, on the part of a free negro going from almost any of the Northern States, in which they are under no disabilities; as, for instance, from New York, where Chancellor Kent says they are recognised as citizens, both by the constitution and laws. That no such certificate was ever produced, may be accounted for by the notorious fact that the law has not been enforced.

The plea to the jurisdiction alleges that Dred was not a citizen, because he was a negro. But the law of Missouri admits that negroes may be citizens, and prescribes the evidence which shall be required.

The decisions against the citizenship of free negroes, as well as the opposition manifested in Congress in 1821 by Southern men, were dictated by the apprehension that this class of persons could not otherwise be prohibited from going into the Slave States, even when the States thought it expedient to exclude them, in order to *protect* themselves from serious mischief.

But in N. Y. vs. Miln, 11 P. 101, at page 139, the court declares the extent of police power of States, and the grounds on which it is placed, and says, "the right to punish or prevent crime does in no degree depend on citizenship;" and in Moore vs. Illinois, 14 H. 18, the power to exclude paupers, vagabonds, free negroes, &c., when the States deem such exclusion necessary to their safety or welfare, is recognised. (See also Mr. Berrien's Op. on S. C. statute, Ops. Att'ys Gen'l, vol. 11, p. 427.)

I have proceeded so far in the argument on the supposition that it was necessary to maintain not only the converse of the doctrine announced in the decisions in 1 Littell, Meigs, etc.; that is, that free negroes were citizens who were entitled to all the immunities and privileges of citizens of the several States; but, moreover, that the word citizen, when used in Art. III, sec. 2 of the Constitution, and sec. 11 of the Judiciary act, had the same signification as when used in sec. 2 Art. IV of the Constitution.

These cases all give construction to the word "citizen" in the fourth article, and do not deny the citizenship of free negroes altogether, but only that they are not the citizens referred to in that article, and are not entitled *to all* the privileges it secures. That "*a quasi* citizenship" has always been extended to them is admitted. (See 1 Eng., 509.) And, indeed, the existence of different kinds or degrees of citizenship results necessarily from the doctrine in which these cases proceed, that all the privileges, &c., are reserved only to those who belong to the class the members of which are eligible to all the dignities, &c. As has been shown, this eligibility varies much; and yet citizenship continues to be allowed to individuals and classes who are not voters, or eligible to office, on account of age, sex, religion, &c., and to naturalized foreigners, who can never become eligible to some offices, no matter what may be their age, sex, or religion, &c.

The plaintiff's claim of citizenship is consistent with this view of the subject. He is not eligible to office, and is not a voter, and therefore is not, according to these cases, a citizen entitled to all the privileges secured by the fourth article; but that he is a *quasi* citizen, or citizen in that sense of the term which enables him to acquire and hold property under the States and under the United States, is universally admitted; and it would seem to follow, necessarily, that all the incidents to these acknowledged rights of person and property, or all the rights necessary to maintain them, and which are allowed to others in the same circumstances as parts of such rights, attached also to these persons. No one can be said to have title to property who cannot maintain an action to defend it against trespassers; and, accordingly, these persons can sue and be sued as other citizens in the State court, and so suits have been heretofore maintained in the courts of the United States, without question—an instance of which is the suit of Legrand vs. Darnell, hereinafter referred to for other purposes, (reported 2 Peters, 670,) brought by the present Chief Justice of the Supreme Court, in which the defendant is described in the bill as a negro, and in which that fact also appears by the subject-matter. They are embraced in the class of citizens, without question, in the construction of the laws regulating commerce, the holding and acquisition of property, &c. The laws of the United States regulating judicial proceedings follow the same division of free persons into citizens and aliens, observed in legislating on other subjects aiming to provide for all cases under this division. Why should not the classification allowed on other subjects hold in judicial proceedings?

No reason can be imagined for permitting a suit between free white persons of different States for wrongs which the local tribunals were deemed inadequate to redress, which will not apply with equal force to controversies to which a free negro may be a party. They have equal capacity with other citizens to hold property and carry on business, and therefore to create the mischief against which the national judiciary was provided.

The words of a law are to be construed with reference to the objects of the law. (16 P. 640; 12 Wheat. 441.) The object in establishing the national courts, and giving them jurisdiction of controversies between citizens of different States, is not satisfied by limiting that jurisdiction to any particular class of citizens, and excluding from it others who are equally identified with all the different communities by birth, residence, the right to hold property, and the right to protection in the enjoyment of life, liberty, and property, and who are, besides, in many of the States, possessed also of the political privileges. But this is of no importance in a judicial aspect, because it is in respect only to the right of person and property—not the political controversies that arise in courts.

Moreover, the right of action in the Federal courts, between citizens of different States, was the mode adopted to bring before these courts questions which might affect the national peace and harmony, which

it was a special object of the Constitution to submit to the national judiciary. (See speech of Mr. Randolph and his resolutions, adopted on motion of Mr. Madison, pp. 728, 855, 2d vol. Madison Papers.) Now the position of free colored people in society is such, as is shown by this case, as to bring them even more forcibly within the reason of the constitutional provision than other citizens, not that they are citizens in any other sense than other natural-born citizens, but because questions affecting their rights are even more apt to be made the ground of controversy between the States of the Union. See Judge Scott's opinion, (15 Mo., p. 586,) where he charges certain "*States with being possessed with a dark and fell spirit*," and denies the plaintiff's rights because "it does not behoove the State of Missouri to show the least countenance to any measure which might countenance this spirit." The same judge has gone still further, and declared, in 18 Missouri R., p. 252, that a negro cannot hold slaves. This decision, like that in Dred's case, annuls the well-settled law of the land. Both are obviously the result of the strong political excitement existing in the State.

It is but a short step in this progress to decide that free negroes cannot hold any property in Missouri. However equivocal the position of persons may be in other States, whose property and liberty may be confiscated by such decisions; and however little concern or interest may be felt for them generally under ordinary circumstances, it is obvious that the course of decision I am remarking upon is calculated to create resentment, if not for the sake of those who are the victims of such injustice, yet because this injustice is avowedly dictated by resentment felt in Missouri against "*the dark and fell spirit*" ascribed to other States. The humbleness of these persons in the scale of society, which constitutes the whole argument for excluding them from citizenship, and thereby to exclude them from judicial protection, whilst it provokes and draws down upon them the spleen of tyrannical tempers, arouses a spirit of resistance to their wrongs in generous minds, and they are, therefore, just in that condition to be the cause of the beginnings of strife, to be extended, by retaliation and mutual wrong, into a general rupture of the harmony of the nation.

Consistently with these views, in Gordon vs. Longest, 16 P., 104, this court declared that the object of this provision was "to have a tribunal in each State presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress."

In 1 Payne C. C. Rep., 394, the court say that a person need not have acquired political rights; it is only necessary that he should have acquired a domicil to enable him to sue as a "citizen;" and in 3 Wash. 546, that "citizenship means nothing but residence."

For the same reason, to secure harmony between the States, provision is made in the Constitution for giving jurisdiction to the courts of the United States of suits between "citizens" of the same State claiming lands under grants from different States; and there is equal reas

for applying the term to all persons who are capable of holding the controverted rights in the one case as in the other.

Although the point under consideration has not been expressly decided by this court, suits have been entertained, and here, as already shown, without question, in which free persons of color were parties in character of "citizens."

On the question of Emancipation.

III. The next question to be considered is, Whether Dred and his family, or either of them, was emancipated by being taken to Illinois and to that part of Louisiana Territory lying north of 36° 30′, and being detained there in the manner described in *the agreed case?* I shall consider separately the validity of the 8th section of the act of 1820, (3 Stat., p. 546,) prohibiting slavery in that Territory north of 36° 30′, upon which the freedom of Harriet and her youngest child depends.

The eldest child, Eliza, having been born north of the Missouri line on the boat whilst descending the Mississippi river, it will be presumed, on well-settled principles, that she was born in Illinois, if such presumption is, for any reason, more favorable to her freedom than the supposition that she was born in the Territory. *The constitution of Illinois* (article 6, section 1,) provides, that "neither slavery nor involuntary servitude shall be introduced into this State otherwise than for the punishment of crime whereof the party shall be duly convicted." Section 2, "no person bound to labor in any other State shall be hired to labor in this State, except within the tract reserved for the Salt Works near Shawneetown, nor even at that place for a longer period than one year at a time; nor shall it be allowed there after the year one thousand eight hundred and twenty-five. Any violations of this *article* shall effect the emancipation of such person from his obligation to service."

The 8th section, act of 6th March, 1820, (3 Stat., p. 544,) provides that, "in all the territory ceded by France to the United States under the name of Louisiana, which lies north of 36° 30′ north latitude, not included within the limits of Missouri, slavery and involuntary servitude, otherwise than for the punishment of crime whereof the party shall have been duly convicted, shall be, and is hereby, forever prohibited: Provided, that any person escaping into the same from whom service or labor is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor as aforesaid."

Case of the oldest child.

It was decided by the Court of Appeals of Virginia, in the case of Spotts vs. Gillaspie, (6 Randolph, p. 572,) that a child born in the State of Pennsylvania after the act of 1780 abolishing slavery, was free, although born of a slave mother, and was free in Virginia as well as

in Pennsylvania. The same principle was decided in The Commonwealth vs. Holloway, (2 Serg. and Rawle, p. 305,) in which the child of a fugitive slave was held to be free. The other child, called Lizzie, was born in Missouri, and is free if her mother was free at the time.

Rule of Decision.

The circuit court decided against the plaintiff, because the supreme court of Missouri had so decided on the same facts, in the case of Scott vs. Emerson, (reported 15 Mo. Repts., p. 586,) construing the language used in the opinion of this court, in the case of Strader vs. Graham, (10 Howard, pp. 93, 94,) and quoted in the brief of defendant's counsel, (p. 9,) so as to require the courts of the United States to follow the decisions of the State courts on such questions. This, it seems to me, is altogether a misconception of the effect of the language of the court; and this appears plainly by quoting the paragraph next before and the sentence next after that quoted in the brief of the defendant. The brief begins with the words "every State," in the last paragraph of page 73, and ends with the words "continued to be slaves." The whole passage is as follows: "Much of the argument on the part of the plaintiff in error has been offered for the purpose of showing that the judgment of the State court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio made them free when they returned to Kentucky. *But this question is not before us.* Every State has an undoubted right to determine the *status* or domestic and social position and condition of the persons domiciled within its territory, except in so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject; and the condition of the negroes, therefore, as to freedom or slavery after their return, depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another State should or should not make them free on their return. The court of appeals have determined, that by the laws of this State they continued to be slaves; and their judgment upon this point is, *upon this writ of error*, conclusive upon this court, and we have no jurisdiction over it."

The case was a writ of error under the Judiciary act, prosecuted to reverse the judgment of the court of appeals of Kentucky, on the ground that the ordinance of 1787, which was claimed to be a statute of the United States, had been drawn in question by the decision, and a right acquired under it, to wit, the right to freedom, had been decided against. The court say, the ordinance was not drawn in question in the case at all; *first*, because it had ceased to exist on August 7, 1789, being superseded by the act of Congress of that date, passed to carry

it into full effect; and that the act had, in turn, been superseded by the constitution of Ohio; and *second*, because the decision of the court of appeals of Kentucky involved only the laws of Kentucky; and as there was no jurisdiction under the writ of error, by which the case was brought up to revise such construction, it was final and conclusive.

The court did not mean that a decision of a State court was more conclusive as to the law on this than on any other subject, but merely that a writ of error to the judgment of the State court on this subject, as on every other which involved only State laws, could give no jurisdiction, and the judgment on this particular case was therefore conclusive.

But in the form this question was presented to the circuit court, and in which it is now presented to the Supreme Court, so far from being conclusive, the decision of the supreme court of Missouri is of no weight at all, beyond what is due to the research, reason and authority which the opinion accompanying the judgment displays, or which may be due to the character of the court which pronounces it.

It is only upon questions arising upon a local law of real property, or on the construction of the statutes of a State, that the exposition given by the supreme court of a State is adopted by the courts of the United States—and then only when such exposition is settled and fixed by the decisions of the State courts, whereas, in this case, no such statute or local law is involved. But the question depends on general principles of law: and the courts of the United States, whilst they will respectfully consider the decisions of the State court, decide such questions according to their own judgment of the law. (Swift vs. Tyson, 16 Peters, 1; Carpenter vs. Providence Washington Insurance Company, Ib., 511; Lane & al. vs. Vick & al., 3 H. 476; Foxcraft vs. Mallet, 4 Ib., 379; 3 Sumner, 136.

Question of Residence.

I shall now consider what the law of Missouri is on the *agreed case*.

And first: As there is a distinction made in the cases on this subject, between the case where a residence or domicil is acquired in the State or Territory in which slavery is prohibited, into which the slave is removed, and where the removal into such State or Territory is for a temporary or transient purpose, it is important to ascertain to which of these classes this case belongs. The facts are, that Dr. Emerson took Dred to his station at Rock Island in 1834, and there remained with him for two years; then took him to his station at Fort Snelling, and remained there with him also for two years. Harriet was taken to Fort Snelling in 1835, and remained there three years, under similar circumstances. There is no evidence in the case that Dr. Emerson had or claimed a residence elsewhere whilst he was living at these posts; and this court says, in the Koskiusko case, Ennis vs. Smith, (14 Howard, p. 423,) "where a person lives is taken *prima facie* to be his domicil."

No such point was made below, nor in the case of Scott vs. Emerson, 15 Mo., decided on the same facts; but, on the contrary, it was

distinctly admitted that Emerson had his *residence* or *domicil* at these posts during the time he remained there. See also the case of Silvia vs. Kirby, 17 Mo., p. 434,—a suit for freedom,—where it is alleged, in the petition, that plaintiff was taken to *reside* in the territory north of 36° 30′, and a demurrer to the petition sustained in the circuit court, and judgment affirmed by the supreme court, on the ground that "The question involved in this case is similar *in all respects* to that which underwent consideration in Scott vs. Emerson, 15 Mo. 576."

Ex parte Grace, Commonwealth vs. *Aves, and Mahony* vs. *Ashton.*

Two grounds are taken, by the majority of the supreme court, in the opinion delivered by Judge Scott in the case of Scott vs. Emerson, 15 Mo. 576, for refusing to give judgment in that case according to the law, as settled not only by a series of more than a dozen decisions of the supreme court of Missouri, beginning with the Government, but by a multitude of decisions of the highest courts of other States. These are: 1. That by returning to Missouri to reside, the master's right, which was suspended during the residence in Illinois and in the Territory, is revived. 2. That the constitution of Illinois and the 8th section of the act of 1820 are penal statutes, which the courts of other States were not bound to enforce.

1. In support of the first position, the case of the slave Grace, 2 Hagg. 90, and the case of the Commonwealth vs. Aves, 18 Pickering, 93, are cited; defendant's counsel cites also Mahony vs. Ashton, 4 H. and McH. 295. The second case was an application for a habeas corpus, to relieve a negro named Med, brought temporarily into the State of Massachusetts by a Mr. Slater, a resident of New Orleans, and her owner there.

Chief Justice Shaw having ordered the release of the negro, observed, (and this is the language relied on,) "whether, if a slave, voluntarily brought here, and with his own consent returning with his master, would resume his condition as a slave, is a question which was incidentally raised in the argument, but is one on which we are not called on to give an opinion in this case, *and we give none.* From the principle above stated, in which a slave brought here becomes free—to wit, *that he becomes entitled to the protection of our laws, and there is no law to warrant his forcible arrest and removal*—it would seem to follow, as a necessary conclusion, that if the slave waives the protection of those laws, and returns to the State where he is held as a slave, his condition is not changed."

The Judge adds, "In the case of Ex parte Grace, 2 Hagg. Adm. R. 94, this question was fully considered by Sir Wm. Scott, in the case of a slave brought from the West Indies, and he held that she was reinstated in her condition of slavery. A different decision, I believe, has been made in some of the United States, but for the reasons already given, it is not necessary to consider it farther here."

These decisions are inapplicable to the case at bar.

The ground of Lord Stowell's decision in Ex parte Grace is that stated in the opinion of Chief Justice Shaw as the ground of his own decision in Aves's case—to wit, that whilst in England the slave was entitled to the protection of the laws, and as *"there was no law to warrant his forcible arrest and removal," he must be released on application to the courts.* "The slave continues a slave, though the law of England relieves him, in those respects, from the rigors of that (the slave) code while he is in England, and that is all that it does," says Lord Stowell, 2 Hagg., p. 117.

Again, at page 113, he says: "It (slavery) was a system not to be thrown out of use because it was incapable of being *used in the full extent in England.* * * * The fact certainly is, that it never has happened that the slavery of an African, returned from England, has been interrupted in the colonies, in consequence of this act *of limited liberation* conferred on him in England."

"Such rights could not be extinguished *by mere silence*, or by *this country declining to act.*"

(Page 109.) "The arguments of counsel, in that decisive case of Somersett, do not go further than to the extinction of slavery as unsuitable to the genius of the country, and to the modes of enforcement." "It may, perhaps, be doubted whether the emancipation of slaves in England, pronounced at the end of the last century, was not rather more owing to the increased refinement of the sentiments and manners of the people than to the decay of the two systems of villanage."

The argument is, simply, that the power of the master was partially suspended whilst in England, but his rights continued, because there was no law abrogating them.

Whether the distinction which his lordship attempts is tenable, it is not important to determine for the purposes of the present case, as all the American cases depend on an express constitutional and statutory prohibition of slavery, which the course of his reasoning concedes would make a different case altogether from that before him.

It may be observed, however, that the distinction is recognised in Maryland, where the case of Mahony vs. Ashton was decided, and in the same volume of decisions. In that case, to be found in 4 H. and McH., p. 295, it was held that the negro who had been taken from Barbadoes to England, and thence to Maryland, was not manumitted by the law of England; whereas, in David vs. Porter, Ib. p. 418, a slave was declared free by the law of Pennsylvania, he having been hired in that State; and it was decided also in Virginia, by the court of appeals, in Betty and al. vs. Horton, 1 Leigh, 615, to result from residence in Massachusetts. The court said, it having been held by the Massachusetts supreme court that slavery was prohibited there, negroes carried there to reside, and brought back to Virginia, were free there for that reason. The constitution of Illinois says, that neither slavery nor involuntary servitude shall be introduced, and declares that emancipation shall be effected if the provision is violated. The act of 1820 prohibits slavery and involuntary servitude forever. It is

in virtue of such positive regulations that all American courts which have been called to act on the subject, till the present case was presented, have declared that every vestige of slavery was extinguished where the parties, by becoming residents, and domiciliated in a community which so regulates itself, have made themselves members of the community, and thus consented, in the fullest sense, to subject their relations to its laws. It has not been so adjudged in cases where travellers and persons are only transiently in the territory where such laws are in force, because it is not assumed of them, as of the resident community, that the local law expresses their will, and is in force by their consent.

But it is just to Judge Scott to observe, that in speaking of the case of *Ex parte* Grace he says only, that "this is the law of England;" and of Judge Shaw's expression, in Commonwealth vs. Aves, that it is not an opinion, but an intimation, and says nowhere that either Lord Stowell's opinion or Judge Shaw's intimation is applicable to the present case. On the contrary, he says expressly: "On almost three sides the State of Missouri is surrounded by free soil. *If one of our slaves travels that soil with his master's assent he becomes entitled to his freedom.* Considering the numberless instances in which those living along an extreme frontier would have occasion to occupy their slaves beyond our boundary, how hard would it be if our courts should liberate all the slaves who should be thus employed. How unreasonable to ask it! If a master sends his slave to hunt his horses or cattle beyond the boundary, shall he thereby be liberated? But our courts, it is said, will not go so far. If not to the entire length, why go at all?" The real question with him was, in his language, "Now are we prepared to say that we shall suffer these laws to be enforced in our courts?"

Comity.

2. The second objection, therefore, is alone relied on by the majority of the supreme court of Missouri. It is, *that the provisions in the Constitution of Illinois, and the 8th sect. of the act of* 1820, *by which emancipation is effected, are penal regulations not to be enforced in Missouri.*

Judge Scott sustains this objection against all previous adjudications on the reasoning I here quote.

He says, (p. 582,) "cases of this kind are not strangers in our courts. Persons have been frequently here adjudged to be entitled to their freedom, on the ground that their masters held them in slavery in territories or States in which that institution was prohibited. From the first case decided in our courts, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to 'exact the forfeiture of emancipation,' as they term it, on the ground, it would seem, that it is the duty of this court to carry into effect the con-

stitution and laws of other States and territories, regardless of the rights, the policy, or the institutions of the people of this State."

(P. 583.) He says, "no State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws."

He quotes part of the 38th sect. of the Conflict of Laws, saying that "in the silence of any positive rule affirming or denying or restraining the operation of foreign laws, *courts of justice presume the tacit adoption of them by their own government*, unless they are repugnant to its policy or prejudicial to its interests."

"It is a humiliating spectacle to see the courts of a State confiscating the property of her own citizens by command of a foreign law."

"Are we concerned that such laws should be enforced, and that, too, at the cost of our own citizens?"

"On almost three sides, the State of Missouri is surrounded by free soil. If one of our slaves touch that soil," (he says, although he well knows that both in Missouri and Illinois the contrary has been decided over and over again,) "with his master's assent, he becomes entitled to his freedom."

Judge Scott seems to have been sensible that the 38th section of the Conflict of Laws, the authority he relied on, did not sustain his position. To obtain even a semblance of support for his argument, he dissevers the statement of the doctrine referred to, and omits that portion of the section which pointed to the mode of ascertaining and giving application to its principle. "Foreign laws," says his authority, "courts of justice presume the adoption of by their own governments, unless they are repugnant to its policy and prejudicial to its interest." Here the judge stops and makes his own *ipse dixit* supply the rest of the author's explanations of the law, by assuming that in this case the laws of the United States, and of Illinois, giving freedom to my client, are against "the policy and prejudicial to the interests" of Missouri. But the suppressed portion of the section, of which Judge Scott gives a part, shows that this essential point was not left to depend on his will. It continues thus: "It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of the municipal law are ascertained and guided." This "comity of nations," which is to govern the courts, is administered and ascertained and guided by the reasoning which holds in regard to municipal law. And whence do we derive our exposition of municipal law? Is it not from statutes, customs, precedents? I will quote presently from a statute of Missouri, proving that so far from its being the policy of the State to defeat persons asserting freedom, acquired under the laws of other States, that special care is taken, by positive legislation, to assist them; and that the statutes and all the precedents of the judicature of Missouri anterior to the decision announced by Judge Scott, take for granted that a man's right to freedom, no matter where acquired, is a right, not in contravention of the policy nor of the interests of the State, but one to which its courts uniformly gave, and are expected to continue to give, their

most effective sanction. In proof of this assertion, no ampler testimony can be given than that borne in this very case by Judge Scott's associate, Judge Gamble. This venerable jurist is, by the universal voice of the profession, proclaimed its chief: for learning, ability, probity, for calm and even-balanced powers of investigation, directed by long experience, he has no superior. He thus treats the topic relied on by Judge Scott to sustain his opposing opinion:

"I regard the question as conclusively settled by repeated adjudications of this court; and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodations to the temporary excitements which are gathered around it. * * * But in the midst of all such excitement it is proper that the judicial mind, calm and self-balanced, should adhere to principles established, when there was no feeling to disturb the view of the legal question upon which the rights of parties depend."

"In this State it has been recognised from the beginning of the Government as a correct position in law, that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave." (Winney vs. Whitesides, 1 Mo., 473; Le Grange vs. Chouteau, 2 Mo., 20; Milley vs. Smith, Ib. 36; Ralph vs. Duncan, 3 Mo., 194; Julia vs. McKinney, Ib., 270; Nat vs. Ruddle, Ib., 400; Rachel vs. Walker, 4 Mo., 350; Wilson vs. Melvin, 592.)

The contrast between the men, as lawyers, cannot be presented in a stronger light than is shown by their opinions in this case. Judge Gamble puts his opinion on the ground that "there is nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodations to the temporary excitements which may be gathered around it." He thinks the "judicial mind, calm and self-balanced, should adhere to the principles established, when there was no feeling to disturb the view of the legal question upon which the legal rights of parties depend."

Judge Scott, *per contra*, decides that the settled law should not prevail if there happens to be "a dark and fell spirit in relation to slavery" in another part of the Union. In such circumstances the law, as established in Missouri, to protect the freedom acquired by persons in other States must be sacrificed by the judicial tribunal, by way of rebuke to the "dark and fell spirit" exhibited elsewhere against slavery. Judge Scott thus argues for the overthrow of the established law, in favor of freedom, by the tribunal sworn to support it.

"Times are not as they were when the former decisions were made. *Since then*, not only individuals, *but States*, have been possessed with *a dark and fell spirit* in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence

must be the overthrow and destruction of our Government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of the progenitors of those who are now so sensitive on this subject ever introduced the institution among us, yet we will not go to them to learn law, morality, or religion, on the subject."

I give the whole context of this final argument on which Judge Scott rests his power for the overthrow of the whole mass of unvarying decisions rendered by the courts of Missouri, in maintaining the rights of persons suing for freedom. It never occurred to any of the predecessors of Judge Scott, more than to his associate, Judge Gamble, that when a master had liberated his slave by his own act, co-operating with the law of another State, that the recognition of that enfranchisement by the judicial tribunals of another State, whose policy allowed of manumission of slaves by masters when legally effected, could be construed into the taking away or enforcing the forfeiture of the master's property. The master ceased to have property in the slave the moment he did the act which conferred his liberty; and the question for this court now is, whether it will hold valid a right to freedom based on the ordinance of '87, the act of '89, and the constitution of Illinois—all affirmed by a succession of judicial decisions in Missouri, covering the third of a century, and recognised by statute law—or substitute Judge Scott's principle, that the existence of what he describes "a dark and fell spirit against slavery," in other portions of the country, is sufficient to subvert the law.

The supreme court of Missouri, in the case of Lagrange vs. Chouteau, 9 Missouri R., p. 20, decided that the 6th section of the ordinance of '87 was not a penal law; and the court of appeals of Virginia, in the case of McMicken vs. Amos, 4 Rand., p. 134, decided the same thing of a law of Virginia, under which a right to freedom had been acquired. If, therefore, the Missouri reports speak of "exacting the forfeiture of emancipation," which language Judge Scott purports to quote without citing the place where it is found, it is not a correct use of terms. It conveys no other meaning, however, than is conveyed by saying the negroes recovered their liberty, to which they became entitled by the voluntary act of their masters. No distinction can be made between the character of the emancipation effected in Missouri and in Illinois; the latter is not more penal than the former, because, from the nature of the relation of master and slave, no consideration can pass. In both it results from the voluntary act of the master, by operation of law. In both the maxim applies, *volenti non fit injuria.*

By the law of Missouri, (see title "Freedom," Rev. Code of 1845, p. 531,) any person held in slavery may sue for his freedom *in forma pauperis,* and during the pendency of the suit will be protected from improper treatment, by being taken from under the control of the

person claiming him as a slave. These and other provisions in the act show that such suits are favored actions; nor is this favor confined to actions in which rights are asserted, which have accrued within the State. Both the decisions and the statutes show it to be otherwise; thus the 21st sect. of the "Act concerning free negroes and mulattoes," Rev. Code, p. 757, provides that "Every free negro or mulatto, *whose right to freedom shall have accrued without this State, although such right may have been established by suit in this State*, shall be treated as if he had actually been free at the time of his coming or being brought into this State, and, as such, shall be subject to the provisions of this act."

These provisions recognise the propriety of the decisions which Judge Scott denounces "as regardless of the rights, the policy, or the institutions of this State," and make provision for the recurrence of such cases with like results. No right could accrue without the State, to be established by suit in the State, on Judge Scott's maxims; because all such rights, whether founded on deeds of emancipation or acts in pais, which by the law of the place effected it, depend on the enforcement of what he calls *"the foreign law."* But it so happens, that all the cases in the Missouri reports where the right to freedom had been established, and to which, therefore, it is fair to presume this 21st section referred, were cases founded on the identical causes for which this suit was brought.

It is, however, wholly unnecessary for the plaintiff to show affirmatively, by statute or decision, that the policy of Missouri favored his cause. It is for the defendant to show some act of the State which negatives the presumption, that the law under which he claims to be free is repugnant to the policy and prejudicial to the interests of the State. Nothing short of such evidence is admissible for that purpose, according to the requirements of this court.

In the case of the Bank of Augusta vs. Earle, 13 Peters, 590, after quoting with approval the maxim of Huberus, embodied in the 38th sec. of Story's Conflict of Laws, to the effect that, in the absence of a conflicting law, courts of justice administer foreign laws as part of the municipal law, this court, in an opinion delivered by Chief Justice Taney, says: "The intimate union of these States, as members of the same great political family; the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume *a greater degree* of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. *And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at an end. But until* this is done, upon what grounds could this court refuse to administer the law of international polity between these States?"

And in accordance with the general principle thus announced, the courts of the Slave States have invariably acted in declaring every

negro free who appealed to them, on the ground that he had been taken by his master to reside where slavery was forbidden, and so was free in a sister State; holding, in such cases, as declared by the court of appeals of Virginia, in Spotts vs. Gillespie, 6 Rand. 573, that the court does not "execute the law of Pennsylvania, but the law of Virginia, which does not now and never did permit a person, free in Pennsylvania, to be held in slavery here"—and, as in Spencer vs. Dennis, 8 Gill, 321, adopting the maxim, "*once free and always free.*"

Some of the laws on this point are: Lunsford vs. Coquellon, 2 Martin, 40; Marie Louise vs. Marot, 9 L. R. 475; Smith vs. Smith, 13 L. R. 441; Thomas vs. Generis, L. R. 483; Josephine vs. Poultney, 1 Annual R. 329; Harry vs. Decker and Hopkins, Walker, 36, (Miss.;) Griffith vs. Fanny Gilmers, 143, (Va.;) Rankin vs. Lydia, 2 A. K. Marshall, 468, (Ky.;) Bush's Reps. vs. White, 3 Mon. 104.

On the Power of Congress over the Territories.

IV. The freedom of Harriet and her daughter Lizzie depends on the validity of the 8th section of the act of 6th March, 1820, entitled "*An act to authorize the people of the Missouri Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and to prohibit slavery in certain Territories.*" (3 Stat. page 548.)

The section in question is in these words: "*And be it further enacted,* That in all that Territory, ceded by France to the United States, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be and the same is hereby forever prohibited; *Provided always,* that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid."

The validity of this section is denied, on the ground that Congress possessed no power to prohibit slavery in the Territories.

This is a question of more importance, perhaps, than any which was ever submitted to this court; and the decision of the court is looked for with a degree of interest by the country which seldom attends its proceedings. It is, indeed, the great question of our day and times, and is, substantially, the issue on which the great political divisions among men is founded in all times and countries. It is in form here a question on the construction of a few words in our fundamental law. But it is the principle involved that shapes the conclusions of political men and parties, rather than the force or meaning of the language which constitutes properly the legal question.

We take our positions in this controversy as our forefathers in England took theirs in '88, in the celebrated debate of that day respecting

the force of words on a foregone conclusion, formed upon consideration of the political effects or consequences to result from one or the other construction.

And it is only upon considerations drawn from the general nature and character of the institutions which our fathers founded for us, that a satisfactory conclusion could be formed upon such a question, or upon which it ought to be decided. They were men who used words with singular felicity, it is true, but we should do them and ourselves great injustice to decide a question which may give character through all time to their labors upon a mere verbal criticism. Our conclusions, therefore, will depend, and ought to depend mainly, upon our views of the character of that great design, and upon our views of the influence which the consequences to flow from the decision of this question, one way or the other, will have upon it.

And some consideration of the policy of the Constitution and its founders is the more proper, as I shall endeavor to show before concluding, that the question involved in the controversy is not one of power, but merely as to the direction which shall be given to it; and that the only conflict is between the policy of the Government, from its foundation, which was also the actual or contemplated policy of all the States at that day, and the present policy of some of the States.

The question is, whether Congress has the power to prohibit slavery in the Territories; or, which is the same thing, whether the Constitution carries slavery into the Territories.

I know there was for a time, and there may be now, some persons who suppose an intermediate position may be maintained; but the argument in support of what is known as *squatter sovereignty* seems to me wholly *ad captandum*, and not to rest upon any basis recognised by this court. In the American Insurance Company vs. Canter. (1 Peters,) this court said, what seems to me indisputable, that "the people of the Territory do not participate in political power; they do not share in the Government till Florida shall become a State." They are suffered to elect members of a Territorial legislature and enact laws, with the sanction of Congress, as the agents of Congress, and dependent wholly on the will of Congress for their force, and of course with no greater force than Congress could give; and it follows, that if there be no power in Congress to forbid slavery, it cannot be withstood by such portions of power as may have been committed to its agents in the Territory, and slavery must not only enter, if it be so willed by the holders of such property, but must be protected when it has entered, as other rights known to the law are protected by the Constitution. The question is, therefore, whether slavery is established by force of the Constitution in the Territories acquired by the Government, and brought under the Constitution.

The natural division among men wherever born is into those who sympathise with power and dread the people, on one side, and those who dread tyranny and fear the people less, on the other. The power party naturally associates itself with property interests, and institu-

tions which create political privileges. The other naturally allies itself with the advocates of personal rights, and opposes privileges. The contest going on under the issue here presented is but one phase of this ever-continued and ever-varying strife.

Slavery is an institution which vests political power in the few, by the monopoly of the soil, wealth, and knowledge which it causes. This is its most obvious effect on the society or States in which it exists, and an obvious consequence is the concentration of power in the hands of those to whom the authority of such societies or States is entrusted in the confederacy of which they form part.

And it is the sense of inequality and privilege which it creates, which lies at the bottom of the contest now going on to decide whether new communitjes of this character shall be created on the unoccupied lands of the confederacy.

And the principle derives its present importance from the fact that it is felt to involve the character of the continent as a free or slave continent, and a revolution in the ideas on which the Government was founded, which must subvert it if acquiesced in.

Mr. Madison, in his letter to Mr. Walsh, recently published, dated 27th November, 1819, says: "*When the existence of slavery in that Territory* [the Northwest Territory] *was precluded, the importation of slaves was rapidly going on, and the only mode of checking it was by narrowing the space open to them.*" When, therefore, the space open to it is indefinitely widened, by the adoption of the principle that the Constitution establishes slavery in the Territories, importations will again rapidly go on. It is said, indeed, and I have no doubt now with perfect sincerity, that no purpose is entertained of repealing the prohibition of the slave trade; but there was a few years ago just as little purpose to repeal the Missouri Compromise. But when the one cannot be maintained, the other cannot last long, for both depend on the same principle, and were adopted in furtherance of the same prohibitive policy. And it is truly said, that if one be a ban against the institutions of any of the States, the other is equally so. It is a question of degree only. Either is equally decisive of policy, and either necessarily draws with it the other. The power to carry slavery into Territories so vast will necessarily draw after it importation, and importation would of course have forced open Territories which were forced without it. The very principle to which I have referred, which is so controlling a passion in our people if not allowed to be satisfied in the prohibition of slavery in those vast regions, will insist on opening the slave trade, that the privilege of holding such property may be extended. And the governor of the State of South Carolina, in recently presenting his proposition for re-opening the trade, relies with well-founded confidence on this principle to effectuate his design.

But it is not possible to say what form the reactionary movement indicated by the assent of the public mind to either of these measures may take, nor is it material whether it be in the reopening of the slave trade proposed by the governor of South Carolina, or the subjec-

tion of the poor of our race, as proposed in Mr. Fitzhugh's work on Southern society. It is sufficient if the policy of extending slavery be assented to, to show that the era of the founders has passed; and that, like our prototype, the Dutch republic, we have run the career of greatness due to noble ideas, and now perhaps from similar causes, the increase of wealth and its sordid influences, having abandoned our principles, we are to share the inglorious fate of the United Provinces.

It cannot be necessary here to dwell at any length on the proposition that the policy which is involved in this denial of the right to prohibit the extension of slavery is antagonistic to the designs of the framers of the Constitution and the founders of the Government.

The provision for the prohibition of the slave trade, of itself and alone, proves conclusively that the policy of the Constitution is against the extension of slavery, but the expressive silence of the Constitution on the subject of slavery is yet more significant; for whilst it is true that it contains provisions which apply to slavery, they were on purpose contrived to apply to other relations which were not *peculiar*. The implication is, that this peculiar relation was expected to cease altogether in time, and that the other and general relations would alone subsist to give meaning to the language; and this implication is sustained and confirmed by "the history of the times, and the state of things existing when it was framed," to which this court has told us "we must look in the construction of the Constitution;" (see 12 P. 720, and also 4 Wheat. 416; 12 lb. 364, and 4 P. 431, there referred to;) and that history teaches us not only that this was the general design of the framers of the Constitution, but that the particular measure which is here questioned is borrowed from one which was framed in concert with them by the Continental Congress, which had asked for the new constitution in order that the Government might have greater powers than they possessed to carry out their designs.

The fact stated by Mr. Madison in arguing for the adoption of the Constitution, in the 38th number of the Federalist, that the measure to which I allude was adopted "*without the least color of Constitutional authority*," was not only a powerful argument for the measure for which it was offered, the adoption of the new Constitution, but, taken in connection with the fact which he adds, "*that no blame has been whispered*," and the fact that the vote of the States in Congress on the adoption of the measure was unanimous, affords the most overwhelming proof that the sentiment of the men of that day was universal that slavery should be excluded from the Territories. That such men, animated by such sentiments, should form a constitution which imposed slavery on the Territories of the Union, or, which is the same thing, did not admit of the exercise of power to prohibit its introduction, is not to be supposed; especially as the controlling spirits of both bodies—the Congress of '87 and the convention then sitting and framing the Constitution—were the same men.

It is attempted to avoid the force of this reasoning by saying it was not contemplated by the framers of the Constitution that the United

States should acquire any territory over which it would be required to organize a government; and therefore they gave no power on the subject; and it is no moment what was the spirit or sentiment of those times or of ours on the subject, if no power was given to Congress to carry it into effect.

But it cannot be supposed that the framers of the Constitution would fail to see the necessity of conferring power to establish temporary governments in the Territories. For although there was a temporary government established by the ordinance in all the territory to which the United States then had an undisputed title, it was contemplated by that very ordinance that there should be several new governments established within the limits of the territory, and it must have been foreseen that legislation would also become necessary, immediately on the taking effect of the Constitution, to adapt the ordinance to the existing government. The United States had also claims, which are referred to in the Constitution itself, to the Mississippi Territory, where it would be requisite to form one or more such governments.

Having premised so much in relation to the character of the prohibited institution, and the contemporaneous opinions and acts of the framers of the Constitution and their compeers, respecting its further introduction into the country, and the spread of it into the new and unoccupied territory, I will now examine what provisions they made in the Constitution for the government of the Territories, and the grounds upon which it is contended that Congress has no power to prohibit slavery in them.

The old government, we have seen, was found in the full exercise of all the power claimed for the new government, and among its first acts was that of the 7th Aug., 1789, to adopt the ordinance and adapt its provisions to the new Constitution. Whilst it is true, as Mr. Madison says, that there was not in the articles of confederation a formal grant of authority to exercise such powers, yet it had been granted in fact, though informally, because States which were then the constituent bodies had all, I believe, in one form or another assented—some by making the cessions of the territory asked for by Congress for the express purpose of disposing of the land and establishing governments in the territory, and with a view to the States formed within it joining the confederacy, and others by demanding that such cessions should be made. The power was therefore rightfully exercised, and "no blame was whispered" for mere defect of form in the authority.

The resolutions of Congress of 6th Sept. and Oct. 10th, 1780, 18th April, 1783, invited the cession of the "unappropriated lands," among other purposes, "to be settled and formed into distinct republican States which shall become members of the union," &c. See 4 Journals, p. 535.

This language implied the cession of jurisdiction as well as soil; and accordingly in every case the jurisdiction was ceded, and the Government entered on the exercise of it, and in virtue of it proceeded "to form into distinct republican States" the lands so ceded, beginning in

the only mode in which a State could be founded by a government, that is, by its erecting a government over the territory.

The express grant of power in the Constitution on the subject is contained in these words, in art. 4, § 3, cl. 1, p. 20: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of Congress.

"Cl. 2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

It is admitted that this language explicitly confers two of the powers exercised by the old government—the power to admit States and to dispose of the lands—but it is denied that it confers any authority to erect temporary governments, or "to *form* into distinct republican States" the lands or territory ceded which were afterwards in proper time to be admitted into the Union, because it is alleged that the word "*territory*" in the 2d clause, as there used, is merely synonomous with the word "lands," and the clause therefore authorizes only needful regulations for the disposition of the lands. It is true this Court said, in reference to this clause, in U. S. vs. Gratiot, 14 Peters, 537, that "the term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands;" and therefore it is insisted, that the power which has been so long and repeatedly exercised to institute such temporary governments has been wholly unauthorized by the Constitution, or, at most, that the power is only derived by implication from the treaty-making or war-making power, and did not extend beyond the making of the most necessary provisions for preserving the acquisitions of the Government, and therefore did not authorize any regulations discriminating against one section of the Union by forbidding the people of that section to take with them, if they chose to go to the new territory, every species of property they possessed at home, and recognised as property by the laws of the State from which they removed.

But the quotation from 14 Peters, which the opponents of Congressional authority make, is not all the court say, there and elsewhere, on the subject. Immediately after what is quoted this language follows: "And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the Territorial governments rest. In the case of McCulloch vs. The State of Maryland, (4 Wh. 422,) the chief justice, in giving the opinion of the court, speaking of this article, and the powers of Congress growing out of it, applies it to Territorial governments, and says, all admit their constitutionality. And again, in the case of the American

Insurance Company vs. Canter, (1 Peters, 542,) in speaking of the cession of Florida, under the treaty with Spain, he says, that Florida, until she shall become a State, continues to be a Territory of the United States, governed by that clause in the Constitution which empowers Congress 'to make all needful regulations respecting the territory or other property of the United States.' "

No one can read the whole passage without seeing that the quotation of the two lines in reference to the meaning of the word "*territory*," is calculated to convey an erroneous impression as to the opinion of the court on the subject of the power of Congress over the Territories; and this erroneous impression is further inculcated by saying, that the case from which it is quoted is a subsequent decision to the case of the American Insurance Company, which the advocates of the power generally quote; whereas, it appears, that the first case is cited and approved in the last, notwithstanding the definition given in the last of the word territory.

But if we construe the word by the context, and the clause with reference to the condition of the title of the United States in the subject-matter, it is evident that it has the two different significations of a district of country and the public lands within it, and of land simply. Thus, when the territory to be dealt with lies outside of the jurisdiction of a State—which was the case at bar—the language conveys the sovereignty of the district of country, and the right to dispose of the public lands within it, because it is spoken of as territory belonging to the United States, respecting which *territory* the power to make rules and regulations is given.

To limit the meaning of the words merely to a grant of power to make rules and regulations for disposition of the public lands in a particular region, under such circumstances, would be to grant no power at all. The power to grant or to hold lands presupposes the existence of a government to protect the property and the grantee in the rights granted to him. And the possession and disposition of land by a government, being in a region of country lying outside of the jurisdiction of any other government, cannot be conceived of, unassociated with the idea of political sovereignty, to be exercised under the limitations and according to the nature of its own constitution. To deny, therefore, that territory under such conditions means a district of country subject to be governed by the United States, is to deny all meaning and effect whatever to the clause. And, therefore, when the chief justice, in Canter's case, (1 Peters, 546,) speaks of Congressional legislation over such a Territory, as legislation "in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States," he does not talk "*loosely*," as has been said, but with his accustomed precision.

But the word also means land; and when the United States owns land lying within another sovereignty, the clause is so framed that it will then enable the Government to dispose of it. This was the case

with respect to the land referred to in the United States vs. Gratiot, (14 Peters, 537,) where, therefore, it was correctly said, "the term, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands." And this change in the effect of words, according to the condition of the grantor's title in the subject-matter, is nothing remarkable. It occurs every day in individual grants, where the same words will convey every quantity and quality of estate according to the interest of the grantor. This construction accords with the practice of the Government and the common understanding of the people. When a Territory, or the territory of the United States, is spoken of, every one would understand, without further explanation, that a district of country out of the jurisdiction of any State and under the jurisdiction of the United States, was intended; but if it were explained that it was territory lying within a State, every one would then understand that the public lands only were spoken of.

When so construed, the clause illustrates the observation so often made, that the Constitution is as remarkable for its literary execution as for its political wisdom, both in respect to the comprehensiveness of the language used, and the use of no unnecessary or unmeaning word. If it had been intended to grant no other power than the power to dispose of the Territory and other property belonging to the United States, it would have been granted in that language simply as the power "to lay and collect taxes," "to regulate commerce," "to establish post offices and post roads;" and other great powers were granted, without superadding the unmeaning words, "and to make all needful rules and regulations respecting the collection of taxes, or regulation of commerce, or post offices and post roads," which add nothing to the power granted, and mar the composition. Besides, the rules and regulations spoken of in the clause in question are not confined to rules, &c., relating to the disposal of the soil; but the power granted is to make rules, &c., relating to the *territory*—not to the disposal of it. And when we remember that the United States had a political sovereignty over a certain district of country, as well as proprietary rights within it, and expected, in time, to yield its political sovereignty, but to retain its lands, we see that the words were admirably adapted to the exigencies of both conditions.

If the words had been what it is contended they are in effect,—merely to grant the power "to dispose of the property of the United States, and to make rules and regulations respecting it,"—they would have authorized the disposal of the soil; and the word "property," which has a sense large enough to include the Territorial right, must have been so construed in the absence of the proper word, in order to find application for the words "to make all needful rules and regulations respecting it;" for this provision is not required, and, as already observed, does not apply to the disposal of the soil.

It would be, even on this reading, not a provision respecting the disposal of property, but a provision to make rules and regulations respecting it in every way; or, in other words, authority to deal with it according to

the requirements of its nature, for the purpose of carrying out the objects of the Government. But as Territorial rights were a class of rights not ordinarily spoken of and classified as property, but generally designated by the word "territory," that was the appropriate word to convey the idea.

Again: if this word had stood unqualified by the words "other property," besides having to make another clause to cover such other property, the authority to dispose of the public lands would not have been so clearly expressed. It might have been argued that it was intended merely to authorize the disposition of the Territorial rights, and to authorize the temporary government; but by coupling the word "territory" with "other property," the meaning is qualified, so that the power to sell as a land-proprietor is conveyed; and by coupling it with words which give the power to regulate it in all respects, it assumes, also, its ordinary signification.

It was said in reply to this view of the subject, that the primary meaning of "*territory*" was land, and that the use I contended for had obtained, in consequence of the practice of the Government, and that it was not used in the present sense before the adoption of the Constitution. I referred to many charters, treaties, laws, &c., to show that the meaning was always the same, and always implied sovereignty when the word was used in respect to a possession of a government not within the jurisdiction of any other sovereignty. It is sufficient for my purpose, however, to refer to the ordinance itself, and to every article in it almost. Take, for example, the 6th: "There shall be neither slavery nor involuntary servitude in the said Territory," &c.; here we have the same word as in the Constitution. Does it mean that there shall be neither slavery nor involuntary servitude on the public lands? or does it impose that regulation on the whole district of country comprising both the public lands and all other land? So Art. V provides that "there shall be formed in the said Territory not less than three nor more than five States," &c.

Nor is the meaning of the word in the Constitution limited to the Northwestern Territory, but it applied then to that region of country known as the Mississippi territory, to which Congress had a claim, and has been applicable, and has been applied, in fact, to every country or region which has since become definitively subject to the jurisdiction of the United States.

These considerations demonstrate that the power contained in the second clause of this article, to make needful rules and regulations respecting the territory belonging to the United States, is a power to make provision for the government of such Territories.

What are needful rules and regulations, and whether any particular law was indispensable as such, is a question not within the scope of judicial inquiry. When there is a substantive power vested in Congress, the laws passed in the exercise of it cannot be questioned in the courts, unless they violate some of the constitutional limitations of the legislative power; as, for example, provisions against "religious

tests," "bills of attainder," "trial by jury," &c., &c. If the power is conceded at all, whether derived from the clause I have considered, or from the treaty-making or war-making power, it is necessarily what the chief justice described it in Canter's case, "the combined power of a General and a State government."

As it is conceded generally that Congress has such a power—and it is questioned only when applied to a particular subject—the only legal question involved is, whether this application violates any of the express restrictive provisions of the Constitution on the legislative power. Nothing of the sort is pretended. It is only contended that its operation is prejudicial to one section of the country, and therefore violative of the *spirit* of the Constitution, which recognises the equality of the States. But this, if true in fact, is not one of those "*inevitable consequences*" which are alone the subjects of judicial consideration. If the operation of the prohibition is unequal or discriminating against any State, or against any peculiar individual rights or institutions created or recognised by the law of such State, this may be a conflict in the policy of the two governments in reference to such institutions; but to call it a violation of the constitution of either government would be to make the constitution of one government dependent on the legislation of the other; and where the policy of the States differed among themselves, as they do on many subjects, there would of necessity result a multitude of violations of the Constitution of the United States. Thus, if it is a violation of the Constitution to forbid slavery in the Territories because it is allowed in some of the States, it would be equally a violation of the Constitution to permit it to go there when other States prohibit it, and it would cease to be a violation of the Constitution if all the States should prohibit the institution, and again become so if any of them should re-establish it.

But a great jurist says: "Constitutions are not themes proposed for ingenious speculation, but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that made shall think proper to change them."

If there could be a doubt either about the power, or the extent of it, arising on the mere construction of the language of the Constitution, the indisputable principle announced by Judge Gaston in the above extract certainly applies to the present question.

As already shown, the prohibition of slavery was found in force, under the ordinance of '87, by the present Government. It was originally proposed by Mr. Jefferson on the 19th April, 1784. The proposition failed then by a single vote. It was renewed by Mr. King on 16th March, 1785, as "a regulation" which should be an "article of compact," and "remain a fundamental principle of the Constitution between the thirteen original States and each of the States described in the resolve of 23d April, 1784."

As soon almost as the Constitution took effect, early in the first session of the first Congress, the leading men in which were the framers of the

Constitution, an act was passed to give effect to the ordinance, in reference to which this Court say, in Strader vs. Graham, 10 Howard, 96, "it is undoubtedly true that most of the material provisions and principles of the six articles, not inconsistent with the Constitution of the United States, have been established law within this Territory ever since the ordinance was passed, and hence the ordinance itself is sometimes spoken of as still in force. But these provisions owed their *legal validity and force*, after the Constitution was adopted, and while the territorial government continued, to the act of Congress of Aug. 7, 1789, *which adopted and continued the ordinance of* 1787, and carried its provisions into execution with some modifications which were necessary to adapt its form of government to the new Constitution." As the ordinance, therefore, owed *its legal validity and force* wholly to the act of '89, neither the 6th nor any other article could have had any *legal validity and force* unless the Constitution authorized such legislation by Congress for the government of the Territories. The fact that this act continued in operation unquestioned till the State constitutions were formed, shows the universal understanding of the Constitution, which is the best proof of what it is. As in cases of disputed boundaries, actual possession taken with the deed, by the consent of the grantor, is conclusive; so here, where the extent or boundaries of a grant of power is disputed, when we see that Congress entered on the exercise of the disputed power immediately after the grant was made, without question from any quarter, such possession is the highest evidence of right. And the stipulation in the Georgia cession of 1802, that slavery should not be prohibited in the ceded territory, was also a contemporaneous construction to the same effect.

Then followed a series of acts to subdivide the Northwest Territory, all of which purport to continue this regulation in force, and under all of which it has been enforced. Nor has the exercise of the power to exclude slavery been confined to the Northwest Territory. It was exercised so far as to prohibit the foreign importation into the Mississippi and Louisiana territory prior to the act of 1808, which excluded importation into the States, thus exercising the powers over the subject which the State governments had exercised. All these acts, as well as the act of 6th March, 1820, for the admission of Missouri, and the resolutions of March 1, 1845, for the admission of Texas, by both of which slavery was forbidden in that part of the territory lying north of 36° 30′, were passed without the expression of doubt from any quarter as to the constitutional power of the Government to impose such a prohibition. It was not until the beginning of '47 that it was broached. It is true, that a paper was produced in the Senate during the discussion of the subject in 1848, (see App. to Cong. Globe of that year, p. 1178,) believed to be in the handwriting of Mr. Monroe, endorsed "Interrogatories, Missouri," March 4, 1820, as follows:

"To the Heads of Departments and Attorney General:

"Has Congress a right, under the powers vested in it by the Constitution, to make a regulation prohibiting slavery in a Territory?

"Is the 8th sect. of the act which passed both Houses on the 3d inst., for the admission of Missouri into the Union, consistent with the Constitution?"

But a letter, which is written on the same sheet with these interrogatories, shows that whilst the interrogatories in terms would seem to make the question afterwards raised, and here presented, that the real and only question then was, whether the prohibition continued to operate in the country to which it was applied after it had ceased to be a Territory of the United States and had become a State, a question which was created by the use of the word "forever" in the prohibition? As to the power of Congress to make a law to prohibit slavery in the territory, to operate whilst the country remained *a territory* of the Union and until it should come under a State government, I believe that neither he nor any one of that day entertained or expressed a doubt.

The letter of Mr. Monroe is as follows:

"DEAR SIR: The question which lately agitated Congress has been settled, as you have seen, by the passage of an act for the admission of Missouri as a State, unrestrained, and Arkansas likewise, when it reaches maturity, and the establishment of the 36° 30′ north latitude as a line north of which slavery is prohibited, and permitted to the south. I took the opinion in writing, of the administration, as to the constitutionality of restraining Territories, (*and the vote of every member was unanimous,**) which was explicit in favor of it, and as it was, that the 8th section of the act was applicable to Territories only, and not to States when they should be admitted into the Union. On this latter point I had, at first, some doubt; but the opinions of others, whose opinions were entitled to weight with me, supported by the sense in which it was viewed by all who voted on the subject in Congress, as will appear by the Journals, satisfied me respecting it."

Mr. Adams's Journal of the 3d, 5th and 6th March, 1820, quoted at page 1179 of the Appendix to Globe, and Mr. Calhoun's remarks in the Senate on the 11th January, 1838, reported at page 70 of Appendix to Globe for 1837–'8, confirm this.

Mr. Adams says, all the Cabinet agreed in answering the questions affirmatively, and there was no difference among them except as to the reasons for the last. Some thought the prohibition would continue after the State government was formed; others thought it would not.

Mr. Calhoun admitted, in 1838, that he had favored the measure, but regretted that he had done so—not because he had then become convinced it was unconstitutional, but because "he now believed that it was a dangerous measure, and that it had done much to rouse into action the present spirit."

Nor does the letter of Mr. Madison of 27th November, 1819, to Mr. Walsh, recently published, militate against this view. This letter was not written in reference to the question, but in reference to the restriction then proposed to be put on the State of Missouri. After arguing that the power to impose the restriction on the State could not be de-

*The words in italics are erased in the original.

rived from the 9th section of article 1, which relates to the migration or importation of persons, he says, the power to restrain the State, if it exists, must be derived from the clause "to make all needful rules and regulations respecting the territory or other property of the United States," or from that providing for the admission of new States into the Union; and then follows the passage which is quoted as questioning the power here in controversy, in these words:

"The terms in which the first of these powers is expressed, though of a ductile character, cannot well be extended beyond a power over the territory as property, and a power to make the provisions really needful or necessary for the government of settlers until ripe for admission as States into the Union. It may be inferred that Congress did not regard the interdict of slavery among the needful regulations contemplated by the Constitution, since in none of the Territorial governments created by them is such an interdict found. The power, however, be its import what it may, is obviously limited to a Territory while remaining in that character, as distinct from that of a State."

This concedes instead of denying the power. The statement that it had not been exercised by Congress is founded on a misapprehension of the effect of the act of 1789, and other acts, as shown by the decision of this court in Strader vs. Graham, 10 Howard, 96, already quoted.

On the 1st of February, 1847, Mr. Wilmot (see Congressional Globe, page 303) offered his proviso to the 3,000,000 appropriation bill, prohibiting the introduction of slavery into any territory to be acquired from Mexico. On the 19th of the same month, Mr. Calhoun introduced his *celebrated* resolutions in the Senate, asserting that "any law which, directly or by its effects, deprives the citizens of any of the States of this Union from emigrating, with their property, into any of the Territories of the United States, will be a violation of the Constitution and the rights of the States from which such citizens emigrated," &c. (See Congressional Globe, page 455.) This I believe to be the first announcement of this doctrine.

But neither he nor his friends have regarded the act as unconstitutional in the legal or judicial acceptation of the term, because they voted in a body to extend the Compromise line to the Pacific, in 1848, when the Oregon bill was pending, and for the provision in the act of 1850, known as one of the Compromise acts of that year, establishing a Territorial government in New Mexico, by which the prohibition against extending slavery north of 36° 30', in Texas, was reaffirmed.

They have always felt at liberty to vote for such a provision, as they voted for it in 1820, in 1848 and 1850, as a Compromise, thus admitting, in the fullest manner, that the sense in which they contend that such an act is unconstitutional, is not one which would render them false to their oaths to support the Constitution, or render an act null which had been passed by their votes. The solution of this apparent conflict is found in the 2nd resolution of Mr. Calhoun, of the series above referred to. The resolution is, "That Congress, as the joint agent and representative of the States of this Union, has no right to make any law or do any act whatever that shall directly, or by

its effects, make any discrimination between the States of this Union, by which any of them shall be deprived of its full and equal right in any territory of the United States acquired or to be acquired."

The Government is considered a mere agent of the States—the Constitution a contract with them severally, under which it must account to them for a full and equal share in the territory acquired, as a commercial agent, acting for several firms or individuals, must account to each of them for their distributive share of the joint property coming to his hands; where an arrangement or compromise is made, satisfactory to those assuming to represent these sovereignties, that is deemed a compliance with the contract. In this way such representatives might offer to divide territory so as to admit of the restriction against slavery being imposed on part of it, in consideration that another part should be open to the institution, and then such representatives might lawfully vote for the extension of the Missouri Compromise line to the Pacific in 1848 and 1850, and, not succeeding in obtaining a compromise on such terms, justify themselves for retracting that made thirty years previously, and also in holding any restrictive act unconstitutional which they did not assent to severally—just as a refusal of a common agent to pay over to his employers their exact share of funds in his hands would be a breach of contract.

In this sense it is common to speak of acts of Congress as unconstitutional, which no one would ever think of questioning in a court of justice. Thus it was said the tariff acts of 1824 and 1828 were unconstitutional, for a reason entirely analogous to the ground taken here—the unequal operation of those laws on the south; and, I think, with altogether better reason, as I believe the statistics did show some unequal operation in those laws. But here the statistics justify no such imputation, it appearing by the census, I am informed, that the emigration to the free Territories from the slave States, as compared with the emigration from the free States, is in due proportion to population.

But if the judiciary may consider such objections, and may declare a law void when it can be shown to work unequally, owing to adventitious circumstances, Government would become impracticable.

It is illustrative of the character of this controversy, and shows how entirely it is one of policy to observe, that the power of Congress to acquire territory by treaty or conquest, which necessarily brings with it the duty of governing it, is not denied by those who contest the power to legislate on a single subject after the acquisition, and yet it is not at all necessary to acquire territory by war or treaty. The chief justice says, that "the right to govern may be the inevitable consequence of the right to acquire territory," but does not say that the right to acquire territory is the inevitable consequence of any power granted in the Constitution; and it is well known that all parties agreed at the time of the acquisition of Louisiana, that there was no warrant for it in the Constitution. The objection might be made in this case, indeed, and goes to the very point here insisted on, and is good, *à fortiori*, if that relied on is good. The exercise of this power is, however, now acquiesced in, as the legislation for the territories under the confederation was ac-

quiesced in, "without a whisper of blame," though it is exercised without "the shadow of constitutional authority," and no one would be heard to question it. This is but the adoption of the principle announced by Judge Gaston, that the Constitution is what it is shown to be by action under it, and contented acquiescence in such action: a principle which applies with still greater force, where there is not only color of constitutional authority in the words of that instrument, but language which fully warrants the exercise of all the power which has been exerted, if the natural and common acceptation be given to the words.

The legislative construction of the Constitution which I am endeavoring to sustain is sanctioned by all commentators on the Constitution.

See Story's Commentaries, vol. 3, pp. 193, '4, '5.
Kent, vol. 1, p. 360; Rawle, p. 237.
Sergeant's Constitutional Law, p. 389.

I have already cited the decisions of this court in the cases of McCulloch vs. Maryland, 4 Wheat.; the Am. Ins. Co. vs. Canter, 1 Peters, 543; and the U. S. vs. Gratiot, 14 Peters, 537. The same general doctrine as that contained in Canter's case was announced in the case of Pollard's Lessee vs. Hagan and al., (3 Howard,) where, at p. 223, the court says: "Within the District of Columbia and other places purchased and used for the purposes above mentioned, the national and municipal powers of the Government of every description are united in the Government of the Union. And these are the only cases within the United States in which all the powers of Government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists." In Strader vs. Graham, 10 H. 96, the court refers to and adopts this exposition.

So in Cross and al. vs. Harrison, 16 H. 193, the court says: "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. * * * In confirmation of what has been said in respect to the power of Congress over this territory, * * * we refer to two decisions of this court." The remarks from the American Ins. Co. vs. Canter, 1 Peters, 542, '3, above quoted, are then quoted; and also U. S. vs. Gratiot, 14 Peters, 526, with the remark, that it repeats what is said in Canter's case.

In Harvy vs. Decker, Walker (Mississippi) Rep., p. 36; Murray vs. Alexander, 8 Martin's La. Rep. p. 699; Phœbe vs. Joy, Breese, (Ill.) 210; Rachel vs. Walker, 4 Missouri, 350; even in Scott vs. Emerson, 15 Mo. Rep., and a multitude of other similar cases, involving freedom, depending on the validity of Congressional prohibitions of slavery, the power was unquestioned, and never has been questioned till now in court.

M. BLAIR.