SUPREME COURT OF THE UNITED STATES.

No. 7.—December Term, 1856.

DRED SCOTT

vs.

JOHN F. A. SANDFORD.

Additional Brief of M. Blair for Appellant.

This is an action of trespass for false imprisonment of the plaintiff and his wife and two children, brought to try the right of these persons to freedom.

The facts on which the claim is founded are stated in *a case agreed*, inserted at page 10 of the record.

It is, in substance, that the plaintiff and his wife, who had been slaves, were taken by their master to reside in that part of Louisiana Territory lying north of 36° 30′, where one of their children, Eliza, was born, and the plaintiff himself had been previously taken to reside in Illinois; the child Lizzie was born subsequently in Missouri, to which State the plaintiff and his family had then been brought back.

The questions presented by the record are—

1st. Whether the plea to the jurisdiction, alleging that plaintiff was a negro, and therefore not able to maintain a suit as "a citizen" of Missouri, was waived by pleading to the merits, after demurrer sustained?

2d. Whether a negro is "a citizen," in such sense as to enable him to maintain an action in the courts of the United States?

3d. Whether the facts stated in the agreed case entitle plaintiff and his family, or either of them, to freedom?

4th. Whether the 8th section of the act of 1820, known as the Missouri Compromise, is valid?

The first point on which the court orders argument specially, is, whether the objection to the jurisdiction raised by the plea in abatement is waived by pleading to the merits?

It was so decided by this court in the case of Sheppard and al. vs. Graves. 14 Howard, 510.

In Parke vs. Brooke, Minor, 178, (Ala. Rep.,) the precise point stated for argument here is decided, and it is held that after demurrer sustained,

pleading over waives exceptions to the judgment of the court on the demurrer.

In the case in 14 H. it did not appear (see p. 509) whether the plea in abatement was ruled out for insufficiency, and it was a plea to the jurisdiction. See page 508.

On the second point on which the court orders argument specially—viz: as to the plaintiff's right to sue—I shall refer to my first brief, (p. 5,) and to 21 Ala. Rep., p. 454, and to a case in 4 Dev. and Bat.

On the question whether emancipation is effected by taking a slave to reside in that part of the Territory of Louisiana north of 36° 30′, or into the State of Illinois, see authorities cited in first brief, and case in 6 Rand. (See as to what shall be deemed residence, 14 Howard, Ennis vs. Smith.) There is no evidence that Dr. Emerson had a residence in Missouri, either before or after his residence at Rock Island and Fort Snelling.

On the Power of Congress over the Territories.

I shall consider how the law stood in 1789, when the Constitution went into effect.

10th Oct., 1780.—Congress invited cession of territory by the States for these purposes—1st. Selling the lands; 2d. Providing temporary governments; and 3d. Ultimately admitting States to be formed on it into the confederacy.

19th April, '84.—Resolutions reported (containing slavery prohibition) in order to effect the last two of these objects. (Jefferson, ch'n.)

7th May, '84.—Ordinance containing basis of present land system. (Jefferson, ch'n.)

13th July, '87.—Ordinance passed. (Madison and other controlling statesmen members of Congress and Convention.)

When the old government was superseded, it was thus found exercising—either of right, or by common consent—the three distinct powers respecting the public lands for which their cession was asked.

Shall a constitution, framed to supersede one found defective in power, be made more inefficient by construction than the old one? Certainly not according to the received maxims of construing a remedial act so as to suppress the mischief and advance the remedy.

The language in the Constitution on this subject is found in par. 1, sec. 3, art. IV, "New States may be admitted by Congress into this Union;" and par. 2, sec. 3, art. IV, p. 20, "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 confers explicitly two of the powers exercised by the old government; but it is contended, that Congress having used the word "*territory*" in this paragraph in the sense of land, as indicated by the words "dispose of," the words "needful rules and regulations" mean no more than rules and regulations relating to such dis-

position. But the word "territory" or "territories" includes both soil and sovereignty when used in respect to grants to or the possessions of governments. (See second charter of Virginia, of 1609.) The language used is "lands, countries, and territories."

In the second charter of Carolina, 1677, the words are "province, territory, or tract of land."

In the charter of Massachusetts, of 1691, the words are "province or territory."

In the Georgia charter, of 1732, they are "lands, countries, and territories."

The treaty of Paris, of February 10, 1763, speaks of "the limits of the British and French territories on the continent of America."

So, in 9th article of confederation, "no State shall be deprived of territory," &c.

The treaty of September 30, 1782, relinquished all claims to the Government, proprietary and territorial rights.

In the Jay treaty, 9th, 13th, 14th, 15th, and 16th articles, "territories" occurs with this meaning.

So in the treaty of 1803 with France.

In the treaty of Ghent.

In the convention with Great Britain, of 1818.

In the treaty with Spain, of 1819.

Sec. 8, act of 1820, admitting Missouri.

In the convention with Great Britain, August 6, 1827.

In the convention with Texas, April 25, 1838.

In the treaty with Great Britain, August 9, 1842.

In joint resolution annexing Texas.

In treaty of 1846, June 15, with Great Britain.

"*Rules and Regulations.*"

These words apply to all ordinary acts of legislation as well as to provisions in the frame or constitution of a government. Thus, the laws passed by Congress on the subject of commerce are *commercial regulations*, and are passed under the power given *"to regulate commerce;"* and that its signification is not strained in the particular use here claimed for it, appears conclusively by the fact, that when, in 1785, the resolutions of 1784 prohibiting slavery in the western territory were again moved by Mr. King and voted for by eight of the twelve States in Congress, it was added "that this *regulation* shall be an article of compact;" and Mr. King, who thus used the word, and many others voting on it, were members of the convention. It thus appears that the language used in the Constitution conferring power over the Territories, was the language of that day to express political as well as proprietary power over them; and it may be further observed, that the language—*"rules and regulations"*—has no meaning or use, unless it be to express political jurisdiction, as the power given in the words *"to dispose of,"* like the words "to lay and collect taxes," gave power

to make the rules and regulations required for that object. There is no other instance of such use of language in the Constitution.

Exercise of the power for sixty years.—Decisions and authorities in support of it.

The power was exercised contemporaneously and continuously ever since—is sustained by all text-writers on the Constitution; and every Court in which the laws have been drawn in question has enforced them.

References to Acts of Congress on the subject of Slavery in the Territories.

I. 1 Stat. at Large, p. 50.—The act of Aug. 7th, 1789, adopted to confirm and continue in force the ordinance of '87 ; the 6th article of which ordinance prohibits slavery in the Western Territory. This was the 8th act of the first session of the first Congress, of which 14 members had been members of the convention which framed the Constitution, and among them was Mr. Madison, and the president who signed it was president of the convention. It was adopted without a division in either house.

II. Ib. p. 551, 7 Apl., 1798.—Act to establish government of Mississippi Territory. The 3d § authorizes a government similar to that established by ordinance of '87, except the 6th art., § 7, prohibits and imposes a penalty on persons bringing slaves there from foreign parts. The bill was passed without a division in either house.

III. 2 Ib., p. 58, May 7, 1800.—Act to divide Northwestern Territory into two territories, and to establish the Territory of Indiana. § 2 establishes there a government, "in all respects similar to that provided by the ordinance of Congress passed 13th July, 1787," &c.

IV. Ib., p. 283.—"An act dividing Louisiana into two territories." The 10th § contained three provisions respecting the introduction of slaves:—1st. Prohibited carrying slaves there from foreign parts ; 2d. Prohibited introduction of any imported since '98; and 3d. Prohibited introduction of any save by a resident citizen. This act was adopted with little opposition in either House. This act continued in force till superseded by the general law, which went into force 1st January, 1808. (See Gomez vs. Bonneval, 6 Martin, 656.) § 4 of this act provided for appointment of legislature by the President.

On the 2d March, 1805, Ib., p. 322, an act was passed further providing for the government of the Territory of Orleans, which extended the provisions of the ordinance to it, except 6th article, and so much thereof as relates to descents, &c., § 5.

V. 2 Ib., p. 309, 11th January, 1805, establishing Michigan Territory, provides for "a government in all respects similar to that provided by the ordinance," &c.

VI. Ib., p. 514, act forming Territory of Illinois uses same terms.

VII. 3 Ib., p. 546, § 8 of act providing for State government in Missouri, prohibits slavery north of 36° 30′; (on the constitutionality of this act Mr. Monroe took the advice of his Cabinet, and he writes, "that the opinion of the Cabinet was explicit in favor of it," it being the opinion that "the 8th § was applicable to Territories only, and not to States when they shall be admitted into the Union.")

From which it is plain that it was not from any doubt as to the power over Territories that he took counsel, but only whether the act would be obligatory in the future States.

VIII. Vol. 4, p. 740, June 30, 1834, §§ 1 and 2 of act repealing certain acts of Florida legislative council, imposing higher tax on slaves of non-residents, and punishing the attempt to collect such tax.

IX. Ib., vol. 5, p. 10, act of 20th April, 1836, establishing Territorial government of Wisconsin. By § 12, the rights, restrictions, conditions and prohibitions of ordinance are to be in force in the Territory.

X. Ib., p. 235, June 12, 1838.—Act establishing Territorial government of Iowa. The 12th § declares that the inhabitants shall have the rights, &c., secured to the inhabitants of Wisconsin.

XI. Ib., p. 797, March 1, 1845, resolution for admission of Texas. By § 2, slavery to be prohibited in States north of 36° 30′.

XII. Ib., 9, p. 223, Aug. 14, 1848, § 14 of act to establish a government in Oregon, enforced there the prohibition of the ordinance.

XIII. Ib., 447.—Act establishing Territorial Government in New Mexico, known as Compromise Act of 1850.

Authorities.

Elementary writers.

Story's Commentaries on the Constitution, vol. 3, pp. 193, '4, '5.
Kent, vol. 1, p. 360.
Rawle, p. 237, '8.
Sargeant's Constitutional Law, 389.

Cases decided.

4 Wheat. 422, McCulloch vs. Maryland.
1 Peters, 543, American Ins. Co. vs. Canter.
5 Peters, 44, the Cherokee Nation vs. State of Georgia.
Ib. 505, Menard vs. Aspesia.
10 Howard, 93, Strader vs. Graham.
16 Ib. 193, Cross & al. vs. Harrison.
5 Ohio Rep. 410, Hogg vs. Zanesville Canal Co.
Breese Rep. 210, Phœbe vs. Joy.
1 McLean, 341, Spooner vs. McConnell.
8 Martin (La.) Rep. (N. S.) p. 699.
Murray vs. Chexnander.
Walker, 36, (Mississippi Rep.) Harvey vs. Decker.
4 Missouri, 350, Rachel vs. Walker.
3 H. 223.

The Question not Judicial.

But it is not the power to govern the Territories, but the EXTENT of the power which is questioned. Even those who deny any *constitutional* power to govern the Territories admit the power on the ground of necessity; but they also say, as necessity alone justifies the exercise of any power over the subject, where the necessity stops there the power ceases. This concedes the whole question, at least for all judicial purposes. If it be lawful to legislate at all, the *quantum* of legislation which may be necessary is certainly a purely legislative question. And indeed, whether the Constitution confers directly the legislative power in question or not is immaterial, seeing that it owns the lands and has power to pass what laws it may deem expedient to dispose of and make them available; and undoubtedly, for temporary purposes, it is indispensable that provision be made to govern the people, in order that the lands should possess any value, or that what remains, after part is sold, may not be seized and confiscated. What would be proper provisions to this end is not within the scope of judicial inquiry. If it were, it is demonstrable that the provision in question is most judicious, as a mere regulation, to facilitate the disposition of public lands.

Equality of the States and Rights of Property.

But it is alleged that the particular provision prohibiting slavery is violative of some part of the Constitution, which establishes the equality of the States and the rights of slaveholders to take that species of property into the Territories of the United States.

I admit, that whether the power of Congress to legislate be given expressly or by implication, it is given with the limitation that it shall be exercised in subordination to the Constitution; and that if it be exercised in violation of any provision of the Constitution—as, for instance, by imposing a religious test—the act would be void. Subject to this limitation, Congress is at liberty to adopt any means to accomplish its object. (McCulloch vs. State of Maryland, 4 Cond. R. 482.)

But where is it written in the Constitution that no law shall be passed prohibiting slavery in the Territories? We have seen not only that this measure was adopted as one deemed advisable and proper to the well-governing of the Territories, under both the Confederation and the Constitution, but that, when the Mississippi Territory was ceded in 1798, it was deemed necessary to stipulate that slavery should *not* be prohibited, in order to limit the discretion of Congress.

The limitation sought to be imposed is one dependent altogether on State laws, and subjects Congress to the State legislatures. The act is now unconstitutional, because a species of property recognised in the laws of the States cannot be held in the Territories. But it would become constitutional if the States should cease to recognise such property, and again unconstitutional if the States should recognise it again. The argument is the same, whatever the nature of the property made so by law or usage in the States.

How the law in question affects the States as States, either in their equality or dignity, or in any other respect, is not perceived. It is not pretended that any State has legislative rights in the Territory. By the terms of the deed of cession from Virginia, "*all right, title, and claim*, as well of soil as *of jurisdiction*," is ceded. (See deed quoted, Pollard vs. Hogan, 3 Howard, 222.)

The other cessions by the States are to the same effect; and the cessions by foreign powers are exclusively to the Union.

On other subjects there are difficulties in adjusting the rights of the General and State governments; but there can be no conflict on this. Over the Territories the General Government alone has any power; and in the exercise of that, as of all other powers, it is a government of the people. "In form and substance (this court says) it emanates from them. Its powers are granted by them, and are to be exercised on them and for their benefit."

M. BLAIR.