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AN EXAMINATION OF THE CASE OF SCOTT *vs.* SANDFORD,

19 HOWARD S. C. REP. 393.[1]

This action was commenced in the Circuit Court of the United States, for the District of Missouri, to establish the freedom of Scott, his wife and their two daughters, who were claimed and held by Sandford, the defendant, as slaves.

The courts of the United States are not courts of general jurisdiction, having a right to hear and decide controversies of all kinds, but have jurisdiction over, and authority to hear and determine only certain specified cases, all of which are designated in the Constitution of the United States. Among those cases so designated, are controversies between citizens of different States. It follows, as a natural and logical sequence from this constitution of the courts of the United States, that whenever a party commences

[1] This paper has been prepared by a very distinguished and able jurist, and is presented to our readers as an excellent legal view of a difficult question; but the editors of this journal do not wish to be understood as expressing any opinion on the subject matter in controversy. The opinions here stated are the author's own, and cannot fail to be read with interest, from the calm and strictly legal manner of the discussion, whether the reader assent or dissent.—*Eds. Am. Law Reg.*

an action in one of those courts, he must show on his pleadings that he has a right to commence his suit in that court; or, in other words, that the controversy between him and his adversary is one of those specified in the Constitution of the United States, which the courts thereof have a right to hear and decide. If he fails to show this, his suit is always dismissed for want of jurisdiction. Accordingly, Scott, in his declaration, stated, that he was a citizen of the State of Missouri, and Sandford, a citizen of the State of Massachusetts; and hence the controversy to be heard and decided was between citizens of different States.

Sandford, by his pleas, placed his defence on two grounds: *First.*—He interposed a plea in abatement to the jurisdiction of the court, and alleged that Scott was not a citizen of the State of Missouri, because he was, "a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves," and prayed judgment, that the court would not take further cognizance of the action. *Second.*—He interposed a plea in bar; and alleged, that Scott, his wife and daughters, were his slaves.

The fact stated by Sandford, in his plea in abatement, was admitted by Scott to be true—viz., that he was, "a negro of African descent," &c.

In answer to Sandford's plea in bar Scott replied and denied that he, his wife and daughters, were slaves of Sandford, and insisted that they were free.

Scott, to show that he, his wife and daughters, were free; and Sandford, to show that they were slaves; relied on and mutually admitted the following facts, (it is only necessary, however, for the present purpose, to state those which relate to Scott,) viz: That he was formerly a slave in Missouri; was taken by his then master to the State of Illinois, and held there in servitude nearly two years, and was from there taken to a territory of the United States west of the Mississippi river, and north of thirty-six degrees and thirty minutes of north latitude, and there held in servitude for more than a year, and then, and in the year 1838, brought back to Missouri, and there held in servitude, and sold, before this suit was commenced,

to Sandford. While in the territory of the United States and in the year 1836, Scott was married to his wife, with the consent of his and her then owner.

The case was twice elaborately argued. The jurisdiction of the court depended on the question, whether Scott was a citizen of the State of Missouri; and his freedom on the question, whether the taking of a slave by his master into a free State to reside, by the laws of which, slavery is prohibited, dissolves the relation of master and slave, and constitutes the slave a freeman, and so fully and absolutely, that if taken back again by his master into a slave State, and there held in slavery, he can assert and maintain his freedom.

The Chief Justice delivered the opinion of the court, and in it presents the arguments and propositions assented to and approved by the majority.

To enable us to understand and form a correct judgment of the positions advanced, we must keep in view the Constitution and law, as they were generally understood in the country before the decision of the case under consideration.

Previous to the adoption of the Federal Constitution, each of the thirteen States, then existing, was sovereign and independent. They were united by a league, called the "Confederation," but by entering into that league, they did not surrender any portion of their sovereignty. Each State had and exercised the right of determining who were, or who might become, citizens of it. The confederation not being a government, and only a league between sovereign States, had not, and could not have, citizens. The only citizens there were, or could be, before the adoption of the Federal Constitution, were citizens of the several States.

Among civilized nations, and especially those who have adopted that system of law known as the English Common Law, there are two, and only two classes of citizens. One acquire their citizenship by birth, and the other by law. They are generally known and distinguished by the appellatives "*native*," and "*adopted*."

When the Government of the United States was established by the adoption of the Constitution, there were no persons who could be citizens of it, except those who were citizens of the several States.

Our Federal Government is one of special powers. It can exercise no authority except over the subjects especially committed to its care; and every power not delegated to the United States by the Constitution, or prohibited by it, is reserved to the States. The only provision in the Federal Constitution in regard to citizenship, is that which authorizes Congress "to establish an uniform rule of naturalization." Under this provision, Congress passed a law soon after the adoption of the Constitution, prescribing the terms and manner in which any alien may become "a citizen of the United States, or any of them." The Constitution of the United States is silent on the subject of citizenship by birth, and Congress has passed no law on that subject. Hence citizenship of the United States, by birth, rests on the general principle that all persons born within the limits of the United States are citizens thereof. As there were none such at the adoption of the Federal Constitution, except native citizens of the several States, they become, like citizens of the United States. The constitution recognizes the two classes of citizens above mentioned, by the provisions, that no person shall be a representative unless he has been seven years a citizen of the United States; nor a senator, unless he has been nine years a citizen of the United States; nor president, unless a natural born citizen, or a citizen of the United States at the adoption of the Constitution. No power was prohibited to the States respecting citizenship except so far as the adoption of aliens was concerned. The States were left, and now are sovereign in respect to the citizenship of all persons except aliens. With that exception, each State may declare by law who shall, and who shall not be citizens of it. A naturalized citizen, by residence in a State, becomes a citizen thereof *Gassies* v. *Ballou*, 6 Pet. R., 762. But each State may determine by law, what rights and privileges the citizens, or any class of citizens thereof, shall have and enjoy in it. By the Constitution of the United States, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The rights, which the citizen of a State has to resort to the court of the United States, is not confined to controversies between citizens of different States but extends to several other kinds of controversies,

and is an important and valuable right.[1] Hence the power of a State to declare who shall and who shall not be a citizen thereof, has an exceedingly high value under the Constitution of the United States, in addition to the rights and privileges, which may be conferred by the State, and held and enjoyed within it.

The foregoing presents the true position of citizenship in this country, from the adoption of the Federal Constitution, to the promulgation of the opinions of the majority of the judges in this case of Scott.

The first, and controlling question in the case we are considering was, whether Scott was a citizen of the State of Missouri. Chief Justice Taney discusses it elaborately, and states the conclusions of himself and the Justices who concurred with him, in the following words: "And upon a full and careful consideration of the subject, the court is of opinion, that upon the facts in the plea in abatement, Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such, to sue in its courts, and consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment of that court on the plea in abatement is erroneous." (19 How. R., 427.)

As the State of Missouri had the sole right to determine who should and who should not be citizens thereof, (other than naturalized citizens of the United States, of whom it was not pretended Scott was one,) if the Chief Justice had confined his inquiry to the ascertainment of the fact, whether by the constitution and laws of that State, as expounded by her courts, Scott was not a citizen of Missouri, "because he was a negro of African descent, his ancestors of pure African blood, and brought into this country and sold as as slaves," then the opinions of himself and his concurring associates would have made no change in the powers and rights of the States in respect to citizenship. But the Chief Justice, did not

[1] A citizen of the United States, as such, has no right to sue in the United States Courts; but if he is a resident of, or identified with, any State in the Union, he has a right to sue in the Federal Courts, and cannot be deprived of that right, unless he is shown to be a mere wanderer without a home. Opinion of THOMPSON, Justice, in Rabaud *vs.* De Wolfe, 1 Paine C. C. R. 588.

confine himself to that inquiry. He commenced his discussion of the question of jurisdiction raised by the plea in abatement, by stating that "The question is simply this; can a negro, whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen—one of which rights is, the privilege of suing in a court of the United States in the cases specified in the Constitution." After remarking, that the plea in abatement "applies to that class of persons only, whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves," the Chief Justice proceeds and restates the question as follows: "The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word citizen is used in the Constitution of the United States." (19 How. R, 403.)

The Chief Justice then proceeds to show, by various modes of reasoning, that free colored persons of the class mentioned belonged to a degraded race, when the Federal Constitution was adopted—were not a portion of the community intended to be protected by the government then instituted—and, in his own words, "had no rights which the white man was bound to respect." (19 How. R., 407.) He then maintains, by like modes of reasoning that their condition has not since been changed, and concludes, that they are not citizens of the United States, and are not, and cannot become citizens of a State, so as to be entitled to sue in the courts of the United States.

This last proposition, viz., that they are not citizens of a State, and cannot become such, coming in conflict with the power reserved to the States to determine who shall and who shall not be citizens thereof, the Chief Justice, speaking, as already mentioned, for himself and his four concurring associates, states and maintains the proposition, "that the Constitution of the United States, upon its

adoption, took from the States all power, by any subsequent legislation, to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition." 19 How. R., 418. If this proposition was clothed with judicial authority, so as to have become the law of the land, the several States of the Union would be deprived by it of one of their important and valuable sovereign rights.

We should not omit to notice here, that in this case it was not alleged or even suggested, that there had been any legislation by the State of Missouri subsequent to the adoption of the Federal Constitution, affecting in the least Scott's right of citizenship; indeed, the proposition, in the form stated, was inapplicable to Missouri, as she did not commence her existence as a State until more than thirty years after the Constitution was adopted. But there had been such legislation in the State of Massachusetts, under which colored citizens of that State had claimed, under the Constitution of the United States, their rights as citizens of one of the States of the Union, in some of the slave States, and their rights had been in those States not only denied, but a fair trial of them prevented.[1]

In this connection, and before proceeding to examine and give an exposition of the opinions of the majority of the judges on the question, whether Scott, his wife and their daughters, were slaves, it is proper to state two principles of law, well established.

First.—The decision of a court is a binding authority only on the point or proposition, upon which the case *necessarily turned*, and was decided.

Second.—An opinion expressed or a proposition stated by a judge in delivering his opinion, which is not necessarily involved in the decision of the case before the court for judgment, is "an opinion

[1] The right which a citizen of one State has in another State, under the Federal Constitution, came under review before Justice Washington, of the Supreme Court of the United States, in the case of Lessee of Butler *vs.* Fansworth, 4 Wash. C. C. R., 102–3, and Justice Washington says, "With respect to the immunities which the rights of citizenship can confer, the citizen of one State is to be considered as a citizen of each and every other State in the Union."

given in passing, and which, not applying judicially to the case, is not to be resorted to as an authority."

In this connection attention should be given to the provisions of the Constitution of the United States, which give the federal courts their jurisdiction.

By article 3, section 1, "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." By the same article, section 2, "The judicial power shall extend to controversies between citizens of different States."

From these provisions of the Constitution, it is obviously immaterial, on a question of jurisdiction in the federal courts, in what court the action is pending, whether in the supreme or an inferior court, for the question is not, which of the courts of the United States has authority to hear and decide the given case, but whether the *judicial power* of the United States extends to the case, in whatever court it may be pending. So in this case, when the court decided, that Scott was not a citizen of the State of Missouri, they decided, that this was not a case to which the judicial power of the United States extended, and of course, no court of the United States had jurisdiction over it.

After announcing the conclusion above stated, that Scott was not a citizen of the State of Missouri, and consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment of that court sustaining its jurisdiction, was erroneous and must be reversed, the chief justice speaking, let it always be remembered, for himself and his concurring associates, proceeds to discuss and decide the case on the merits, and determine whether Scott was a slave; asserting the right and duty to do so on two grounds—*one*, that if Scott was a slave, he was not a citizen, and for that additional reason had not a right to commence this suit in a court of the United States—*the other*, that the Supreme Court has a right, and it is its duty, to review the decisions of the Circuit Court, and as that court had decided this case on the merits and adjudged that Scott was a slave, the Supreme Court ought to review that question and ascertain if it was rightly decided.

The chief justice presented a most elaborate argument to prove that Scott was a slave, and in the course of that argument expresses several very important opinions.

First.—The opinion is given, that the provision in the third section of the fourth article of the Constitution of the United States, respecting the territory thereof, in the following words, viz.—"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"—was only applicable to the territory owned by the United States when the Constitution was adopted, and did not apply to any territory subsequently acquired, (19 How. R., 432, 436, 441, 442;) and that over territory, acquired subsequently to the adoption of the constitution, Congress has not full power of legislation. 19 How. R., 447 to 450.

Previous to the announcement of this opinion, the general, and I think it should be said, the universal understanding of the country, and of the different departments of the General Government, was, that the clause in the Constitution above mentioned did apply to *all* the territories of the United States, whenever and however acquired, and gave Congress full power to legislate concerning them, without reference to the time when the right to them was acquired.

In this connection, we should recall and keep in view the fact, that Congress has exercised full power of legislation over *all* the territories of the United States, from the adoption of the Constitution to the present time; and that, too, without any reference to the time when they were acquired.

Second.—The opinion is given, that there is no "difference between property in a slave and other property;" that each is entitled to the same protection, and stands on the same footing under our Constitution and laws. 19 How. R., 451, 452.

Before this opinion was announced, the universal understanding of the country was, that there was a broad distinction between the two kinds of property in many important and marked respects, but palpably and especially in this, that while property in lands and chattels was recognized throughout the whole country, and in every State of the Union, it was with equal universality acknowledged,

that property in a slave was against natural right, and could only exist by positive law; that such law could have no operation beyond the limits of the State which enacted it; and that if the slave passed beyond those limits, he was free, with this single qualification, viz., if he *escaped* from servitude into another state of our Union, his master, under a provision of the Constitution of the United States, might reclaim him.

Third.—The opinion is given, that the Constitution of the United States extends to the territories thereof. 19 How. R., 449, 450.

Before this opinion was announced, the understanding of the country, it is believed, was universal, that the Constitution of the United States was made for the States, and for them only; that it did not, and could not, by its very terms, include the territories. It was made by "The People of the *United States*" "for the United States of America;" and "in order to form a more perfect union" between the States. All its provisions relate to the States and citizens thereof. The territories are the property of the United States, and remain their property till they become States and are admitted into the Union. When so admitted, they come under the Federal Constitution, and are governed and protected by it, and not till then. While the property of the United States, Congress exercises over them plenary power of legislation, not only under the clause in the Constitution giving Congress power to "make all needful rules and regulations, respecting the territory" of the United States, but by virtue of the sovereign power which the United States has over the territories belonging to them. This sovereign power has been freely exercised from the beginning of the government, without any regard to the provisions of the Constitution.

Fourth.—The opinion is given, that Congress has not power to prohibit slavery in the territories of the United States acquired since the adoption of the Constitution, and that the owners of slaves have a right to take their slaves into such territories and hold them there in servitude, (19 How. R., 449 to 452,) and that the law of Congress, which prohibited slavery in the territories of the United States north of thirty-six degrees and thirty minutes of north latitude, called the Missouri Compromise, (those territories having

been acquired since the adoption of the Constitution), was unconstitutional and void.[1] 19 How. R., 452.

Previous to the announcement of this opinion, the general understanding of the country was, that Congress had power to prohibit slavery in all the territories of the United States, and without reference to the time when they were acquired—that the owners of slaves had not a right to take them into a territory of the United States, where slavery did not exist by law, and if they did, the slaves became free—and that the law, prohibiting slavery in the territories of the United States north of thirty-six degrees and thirty minutes of north latitude, was constitutional and valid.

In this connection, and to enable us to understand fully and judge correctly of the opinion above stated, we should remember and keep in view, the fact, that Congress has, in nine instances, and by as many separate laws, prohibited slavery in the territories of the United States; the first act being passed in August, 1789, and the last one in August, 1848. Four of them prohibited slavery in territory acquired since the adoption of the Constitution; also the fact, that the Constitution of the United States contains a provision, that "No State shall pass a law impairing the obligation of contracts." A vested right is a contract executed; and the courts of the United States, by a series of decisions, have established the principle, that a State cannot, either by a law of its Legislature, or a clause in its constitution, destroy or injuriously disturb a vested right, as that would impair the obligation of a contract. Hence, if the owners of slaves may take them into a territory of the United States and hold them there, as they may other property, that territory, when it becomes a State, cannot by a provision in its constitution, or a law of its Legislature, put an end to slavery within it; also the fact, that if a citizen of a slave State, say of Georgia, being the owner of slaves under and by virtue of the laws of that State, has a right to take them into a territory of the United States and hold them there, while it is a territory, and after it becomes a State, he so holds them by virtue of the laws of Georgia; and thus

[1] Mr. Justice Catron, while concurring in this opinion, placed his own, on reasons different from those of his associates.

effect is given to laws of that State, not only beyond the limits of the State, but in a territory of the United States, and in another State of the Union; also, and lastly, the fact, that the law, called the "Missouri Compromise," was not only acquiesced in from its passage in 1820, to its repeal in 1854, but was re-enacted in 1845, when Texas was admitted into the Union.

Fifth.—The opinion is given, that the taking of Scott by his master into the State of Illinois, where slavery is forbidden by its constitution and laws, and holding him there in servitude nearly two years, did not emancipate him.

Previous to the announcement of this opinion, the general, and I believe the universal understanding of the country was, that the great and noble principle of the common law prevailed in all the free States of this Union; that as soon as a slave placed his foot on free soil, he became a freeman; and that the only modification of this principle was in the provision of our federal constitution, before mentioned, which entitles a master to a return of his slave, when he escapes from his service into another State.

To form a correct judgment respecting the fifth opinion above stated, we must call to mind the obvious results which follow from it. If an owner of slaves can take them into a free State for a temporary purpose, or residence, without thereby dissolving the relation of master and slave, and emancipating them, then the law of the slave State, under and by virtue of which they are his slaves, has an operation, not only beyond the limits of that slave State, but actually in another sovereign State of the Union; and thus compels the latter State to tolerate slavery within its borders and against its will. If an owner of slaves can hold them in a free State for the length of time the owner of Scott held him in Illinois, without thereby emancipating them, there seems to be nothing to prevent an owner from taking his slaves into a free State and holding them for any length of time and for any purpose, provided he does not intend to become a permanent resident of the free State, and designs at some future day to return with his slaves to the slave State from which he came, or go to some other slave State. In this way slave labor may be brought into contact and competition with free

labor in the free States. An owner of slaves may take a contract on a canal or railroad in a free State, and bring his slaves there to do the work. And if property in a slave stands on the same footing under the constitution and laws as property in lands and chattels, as the majority of the judges hold that it does, it would seem to follow, that a slave may be taken and held anywhere, in any State, and for any length of time, that a citizen may take and hold his carriage or his horse.

After expressing the opinions above stated, and making full and elaborate arguments to sustain them, the chief justice states the final judgment of the court to be, that Scott is not a citizen of the State of Missouri, "and that the Circuit Court of the United States, for that reason, had no jurisdiction of the case, and could give no judgment in it. Its judgment for the defendant (Sandford) must consequently be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction." 19 How. R. 454.

Justices Nelson of New York, and Grier of Pennsylvania, expressed no opinion on the question of jurisdiction, not considering it before the court, but discussed the case on the merits, viz., whether Scott was a slave, and were of opinion that that question should be determined by the laws of Missouri, and after a full examination of the constitution, laws and decisions of that State, came to the conclusion, that by them Scott was a slave, and they were in favor of affirming the judgment of the Circuit Court. 19 How. R. 469.

Justices McLean of Ohio, and Curtis of Massachusetts, discussed most elaborately all the questions which arose in the cause, and took opposite views and expressed opposite opinions on all of them, to the majority of the judges. Their opinions were, that Scott was a citizen of the State of Missouri, and had a right to sue Sandford in the courts of the United States; and as those courts had jurisdiction of the cause, they were bound to examine and decide it on the merits. They accordingly did examine the question, whether Scott was a slave, and came to the conclusion that he was a freeman; and as the Circuit Court had decided that Scott was a slave, they were of opinion, that for that reason the judgment of that court was erroneous, and ought to be reversed.