ACTS AND RESOLVES

PASSED BY THE

THIRTY-SIXTH LEGISLATURE

OF THE

STATE OF MAINE,

1857.

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OPINIONS

OF THE

JUSTICES OF THE S. J. COURT,

ON QUESTION PROPOUNDED BY THE SENATE, MARCH 26, 1857.

STATEMENT OF QUESTION.

STATE OF MAINE.

IN SENATE, March 26, 1857.

ORDERED, That the justices of the supreme judicial court be, and they hereby are, required to give their opinions upon the following question:

Are free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election, authorized under the provisions of the constitution of this state to be electors for governor, senators and representatives?

AND IT IS FURTHER ORDERED, That a copy hereof, signed by the president *pro tem.* and attested by the secretary of the senate, be communicated forthwith, by the most expeditious mode, to each one of the justices of the supreme judicial court, and an answer to the foregoing question be requested at the earliest possible moment. But if the legislature shall have adjourned before the answer can be prepared, the same shall be returned to the secretary of state, to be by him published in the state paper.

Read and passed.

HIRAM CHAPMAN, *President pro tem.*

Attest: JOSEPH B. HALL, *Secretary of the Senate.*

OPINION OF THE S. J. COURT.

THE undersigned, justices of the supreme judicial court, respectfully present their opinion in answer to the interrogatory addressed to them by the order of the senate under date of March 26, 1857.

The interrogatory, as propounded, is very comprehensive in its terms, and includes "free colored persons, of African descent, having a residence established in some town in this state, for the term of three months next preceding any election," &c., whether such persons are men, women, children, paupers, persons under guardianship, or unnaturalized foreigners.

Presuming it to have been the intention of the senate to confine the inquiry to free colored male persons of African descent, who are twenty-one years of age and upwards, and who are possessed of the other qualifications requisite to constitute a white citizen a voter, we will proceed to answer.

Article two, section one, of the constitution of Maine, provides that

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this state for the term of three months next preceding any election, shall be an elector for governor, senators and representatives in the town or plantation where his residence is so established."

This raises for our consideration the distinct question, whether free native born colored persons, of African descent, are recognized as "citizens of the United States" in the above provision of the constitution.

The political status of that portion of the African race, in this country, which is not in a state of slavery, has long been matter of contestation, not only among politicians, but, to some extent, also among courts and jurists.

Chancellor KENT, in a note to the 257th page of the second volume of his commentaries, (4th edition,) says:

"Citizens, under our constitution and laws, mean free inhabitants born within the United States, or naturalized under the laws of congress. If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the states respectively may deem it expedient to prescribe to free persons of color."

This doctrine, though supported by high judicial authority, is by no means universally admitted. Courts and jurists of high respectability and authority, have denied that negroes of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves, are or can become citizens of the United States, within the meaning of the constitution of the United States. This doctrine has recently been maintained with much zeal, and at great length, in the case of *Dred Scott* v. *Sandford*, 20 Howard's U. S. R., 393. Substantially the same doctrines have been promulgated in *Amy* v. *Smith*, 1 Littell's Ken. R. 333; *State* v. *Claiborne*, 1 Meigs' Ten. R. 331; *Pendleton* v. *State*, 1 Eng. Ark. R. 509; *Cooper* v. *The Mayor of Savannah*, 4 Geo. 68; and by DAGGETT, C. J., in *State* v. *Crandall*, in Connecticut.

As to the correctness of those decisions, we express no opinion. Each must stand upon its own intrinsic merits, and they will undoubtedly receive that degree of respect to which, as legal productions, they are justly entitled. They do not, however, affect the question now before us.

Our present inquiry is confined to an interpretation of the provision in our own constitution already cited, and the term "citizen of the United States," as used therein.

Article four, section one, of the constitution of the United States, provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Our inquiry, therefore, extends not only to the rights of free colored persons of African descent who were born within this state, but also to the same class of persons who may have been born in other states, but who have become residents of this state.

Chief Justice TANEY, in the opinion of the majority of the court in the case of *Dred Scott* v. *Sandford*, cited above, lays down the following propositions as to citizenship of the United States:

"It is true every person, and every class and description of persons, who were at the time of the adoption of the constitution, recognized as citizens in the several states, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty, were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members according to the provisions of the constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his state which he did not before possess, and placed him in every other state upon a perfect equality with its own citizens as to rights of person and rights of property, it made him a citizen of the United States."

Rawle in his Commentaries, says:

"The citizens of each state constituted the citizens of the United States when the constitution was adopted. The rights which appertained to them as citizens of those respective commonwealths accompanied them in the formation of the great, compound commonwealth which ensued. They became citizens of the latter without ceasing to be citizens of the former, and he who was subsequently born a citizen of a state, became, at the moment of his birth, a citizen of the United States." Rawle on the Const., p. 86.

"Every citizen of a state is, *ipso facto*, a citizen of the United States." Story on the Const., vol. 3, p. 565.

Such being the operation of that provision of the constitution of the United States which we have cited above, upon the condition of those persons who were recognized as citizens of the several states at the adoption of the constitution, it becomes pertinent to our inquiry to ascertain the political condition of the free colored people of African descent in the several states, at that time. Were they then recognized as citizens of any of the states which entered into and composed a part of the United States? Let the constitutions of the states then existing, and the practice under them, answer. The fact of citizenship may be established in various ways. The enjoyment of the elective franchise is believed to be one of the highest tests of that fact. There may be citizenship without the enjoyment of this right, as in the case of women, children, paupers, and the like; but it is believed no instance can be found in which the right to vote at our general elections has been conceded to persons born on our soil who were not at the time deemed citizens of the states in which they enjoyed the right.

The constitution of the United States was adopted September 17, 1787.

The constitution of New York, adopted April 20, 1777, section seven, provides:

"That every male inhabitant of full age, who shall have personally resided in one of the counties of this state for six months immediately preceding the day of election, shall at such election be entitled to vote for representative in said county in assembly; if during the time aforesaid, he shall have been a freeholder possessing a freehold of the value of twenty pounds, within said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the state."

By the constitution of New York, adopted in 1821, article eleven, section one, the qualification of electors was to some extent modified; the word "citizen" was substituted for the word "inhabitant," and other modifications made, among which was added the following clause:

"But no man of color, unless he shall have been three years a citizen of this state, and for one year next preceding any election shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars over and above all debts and incumbrances charged thereon, and shall have been actually rated, and paid a tax thereon, shall be entitled to vote at any such election."

The old constitution did not contain this provision discriminating against the "man of color."

The constitution of New Jersey, adopted July 2, 1776, section four, provides:

"That all inhabitants of this colony, of full age, who are worth fifty pounds, proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in council and assembly; and also for all other public officers that shall be elected by the people of the county at large."

In 1844, the constitution of New Jersey was amended, and the elective franchise was restricted to "white male citizens of the United States."

Maryland adopted a constitution in 1776, the second section of which provides that:

"All freemen above twenty-one years of age, having a freehold of fifty acres of land in the county in which they offer to vote, and residing therein, and all freemen having property in this state above the value of thirty pounds, current money, and having resided in the county in which they offer to vote one whole year next preceding the election, shall have a right of suffrage in the election of delegates for such county."

And by the fourteenth section *all persons* qualified as aforesaid to vote for delegates, were also made electors of senators.

The constitution was so amended in 1801–2 that the right of suffrage was confined to "free white male citizens above twenty-one years of age, and no others."

North Carolina adopted a constitution Dec. 18, 1776. This constitution contains the following provisions:

"SECT. 7. That all freemen of the age of twenty-one years, who have been inhabitants of any one county within the state twelve months immediately preceding the day of any election, and possessed of a freehold within the same county of fifty acres of land, for six months next before, and on the day of election, shall be entitled to vote for a member of the senate.

"SECT. 8. That all freemen of the age of twenty-one years, who have been inhabitants of any county within the state twelve months immediately preceding the day of election, and shall have paid taxes, shall be entitled to vote for members of the house of commons for the county in which he resides.

"SECT. 9. That all persons possessed of a freehold in any town in this state, having a right of representation, and also all freemen who have been inhabitants of any such town twelve months next before, and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such town in the house of commons."

In 1835, the following amendment was adopted touching the right of suffrage:

"No negro, free mulatto, or free person of mixed blood descended from negro ancestors to the fourth generation inclusive, (though one ancestor of each generation may have been a white person,) shall vote for members of the senate or house of commons."

In the case of *State* v. *Manuel*, decided by the supreme court of North Carolina, in 1838, 2d Dev. & Bat. 20, GASTON, J., in a very elaborate opinion of the Court, uses the following language :

" 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 persons, and were then either British subjects or not British subjects, accordingly 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 of 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 become 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."

Again, he says :

" That constitution [1776] 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."

The soundness of the doctrine of this opinion has since been recognized by the same court, in the case of *State* v. *Newsom*, 5 Iredell, 250.

Section two of chapter one of the constitution of Massachusetts, adopted in March, 1780, reads as follows :

" The senate shall be the first branch of the legislature ; and the senators shall be chosen in the following manner, viz : there shall be a meeting on the first Monday in April, annually, forever, of the inhabitants of each town in the several counties in this commonwealth, to be called by the selectmen, and warned in due course of law, at least seven days before the first Monday in April, for the purpose of electing persons to be senators and councilors ; and at such meetings every male inhabitant of twenty one years of age and upwards, having a freehold estate, within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant. And to remove all doubts concerning the meaning of the word 'inhabitant,' in this constitution, every person shall be considered an inhabitant, for the purpose of electing and being elected into any office, or place within the state, in that town, district or plantation, where he dwelleth, or hath his home."

Slavery has not existed in Massachusetts since the adoption of the constitution, in 1780. *Com.* v. *Aves*, 18 Pick. 193. And from that day to the present, those free men of African descent, who possessed the qualifications required of white citizens, have enjoyed the rights of the elective franchise in that state.

The constitutions of other states, adopted before and since the formation of the present federal government, contained provisions equally broad and liberal, with reference to the right of voting, as those from which we have already quoted; while in others of the thirteen states which originally composed the Union, the right of voting in the general elections was confined to "free male white citizens." The same formula of words is also used to limit and define the rights of electors in several of the constitutions of states which have been created and admitted into the Union since the constitution of the United States was adopted, and also in sundry laws passed by congress under the constitution. Whether this form of words does not carry the implication that "citizens" exist who are not *white*, we do not deem it important now to consider; nor do we deem it essential to pursue this branch of our inquiry further at this time.

Such was the condition of things in 1820, when Maine, then constituting a part of the state of Massachusetts, was erected into a new and independent state, and her citizens, after having lived under the constitution of 1780 for a period of forty years, formed the constitution under which we now live. The convention which formed that constitution was composed of our most intelligent and influential citizens. Every important provision in that instrument was closely scrutinized before it was adopted. Nor did the section which prescribed the qualification of electors pass unchallenged. When that section was under consideration, Mr. VANCE, of Calais, moved to insert the word "Negroes" after the words "Indians not taxed."

Mr. HOLMES said:

"The 'Indians not taxed' were excluded, not on account of their color, but of their political condition. They are under the protection of the state, but they can make and execute their own laws. They have never been considered members of the body politic. But I know of no difference between the rights of the negro and the white man;—God Almighty has made none—our declaration of rights has made none. That declares that 'all men' (without regard to colors) 'are born equally free and independent.'"

"Mr. VANCE and Dr. ROSE spoke in favor of the motion, but it did not obtain." Perley's Debates, p. 95.

From the adoption of the constitution to the present day, it is believed there has been no instance in the state in which the right to vote has been denied to any person resident within the state, on account of his color.

In view of these facts and considerations, we are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state; but that the term, "citizens of the United States," as used in that instrument, applies as well to free colored persons of African descent as to persons descended from white ancestors. Our answer, therefore is that

Free colored male persons, of African descent, of the age of twenty-one years and upwards, having a residence established in some town or plantation in this state three months next preceding any election, and who are not paupers, aliens, nor persons under guardianship, are authorized, under the provisions of the constitution of this state, to be electors for governor, senators and representatives.

JOHN S. TENNEY,
RICHARD D. RICE,
JONAS CUTTING,
SETH MAY,
DANIEL GOODENOW.

BANGOR, July, 1857.

OPINION OF JUDGE HATHAWAY.

To the honorable, the senate of Maine:

In obedience to the preceding order, I have considered the question proposed to the court, and herewith transmit my opinion, as one of the justices thereof.

By the constitution of Maine, article two, section one:

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship and Indians not taxed, having his residence established in this state, for the term of three months next preceding any election, shall be an elector for governor, senators and representatives, in the town or plantation where his residence is so established."

Hence the answer to the question proposed must depend upon the result of the inquiry, whether or not such "free colored persons of African descent" are "male citizens of the United States, of the age of twenty-one years and upwards," not being paupers or persons under guardianship. Citizens of the United States are those persons who are native born such, and those children of citizens, who, although born abroad, are, by law, considered as native born—and aliens, who have been naturalized under the laws of congress—and those who become such by treaty.

If aliens, free colored persons of African descent cannot, by our laws, become citizens of the United States, for the laws of congress, concerning naturalization, grant that privilege to none but "free white persons"—and congress has exclusive power to legislate upon that subject.

The question, therefore, is merely whether or not such free colored persons are native born male citizens of the United States, or those who have become citizens by treaty stipulations.

In the case of *Dred Scott* v. *J. F. H. Sandford*, the supreme court of the United States has recently decided that negroes of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, were not citizens of the United States.

In answering the question proposed to the court, it is necessary to consider the legal effect of that decision.

By the federal constitution, article one, section two:

"No person shall be a representative, who shall not have been seven years a citizen of the United States."

And by article one, section three:

"No person shall be a senator, who shall not have been nine years a citizen of the United States."

By article one, section eight:

Congress has power "to establish an uniform rule of naturalization."

And by article four, section two:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

By these last two provisions of the constitution, and the laws of congress, upon the subject of naturalization, passed in pursuance of the power granted—the laws concerning citizenship in the United States, and in each state, were made entirely uniform; for it is certain, that in the sense in which the word "*citizen*" is used in the federal constitution, "*citizen of each state*," and "*citizen of the United States*," are convertible terms; they mean the same thing; for "the citizens of each state are entitled to all privileges and immunities of citizens in the several states," and "citizens of the United States" are, of course, citizens of *all* the United States.

But it is obvious that the uniformity of the laws concerning what constitutes a citizen of each and all of the United States, cannot be authoritatively enforced, and the provisions of the federal constitution and laws upon that subject made effectual, unless there be some ultimate tribunal—some final arbiter, whose decisions upon questions arising under the constitution and laws concerning it, shall be conclusive and binding upon all the states. By the laws of one state it may be provided that if a master come within its limits with his slave, the slave shall become, *ipso facto*, emancipated, and being once free, is always free, and that being native born in the United States, he is a citizen of the state, and therefore "entitled to all privileges and immunities of a citizen in the several states." While by the laws of the state from which he came it may be provided, that if he return there he shall not be entitled to the privileges and immunities of a citizen, but that he shall return to his former servitude. If each state has the power to determine, authoritatively, who are and who are not citizens of the state, and, consequently, who are and who are not citizens of the United States, any one state may effectually resist the laws of all the other states, and of congress, and create citizens of the United States who would be repudiated as such by every other state in the Union. There might be as many different classes of citizens as there are states, all citizens of some one state, and yet utterly powerless to enforce their constitutional rights to "all privileges and immunities of citizens in every other state." If such were the true interpretation of the constitutional powers of the federal government, and of the relations existing between it and the governments of the several states, and of their constitutional powers, the government of the United States would be imbecile and powerless for the most important purposes for

which it was established. Indeed, it could not be, properly, denominated a *government*.

By the federal constitution, article six, section two:

"This constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

And by article three, section two:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution and the laws of the United States, [including among many enumerated subjects of jurisdiction] controversies between citizens of different States."

The general government, though limited as to its objects, is supreme with respect to those objects. This principle is part of the constitution, and if there be any who deny its necessity, none can deny its authority.

The necessity of uniformity as well as correctness in expounding the constitution and the laws of the United States, would itself suggest the propriety of vesting, in some single tribunal, the power of deciding in the last resort, all cases in which they are involved.

"The judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered."

[Per Mr. Chief Justice MARSHALL, in *Cohens* v. *Virginia*, 6 Wheaton's United States Reports 264.]

The supreme court of the United States is a tribunal of ultimate jurisdiction; and its judicial power rightfully extending to cases arising under the constitution and laws, its judgments must become, "*ipso facto*, conclusive between the parties before it, in respect to the points decided," and "the case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature." Story's Commentaries on the Constitution, pages 349, 350. *Natives* are all persons born within the jurisdiction of the United States. If they were resident citizens at the time of the declaration of independence, though born elsewhere, and deliberately yielded to it an express or implied sanction, they became parties to it and are to be considered as natives—their social tie being coeval with the existence of the nation. 2 Kent's Commentaries 39, lecture 25. Hence the provision in the federal constitution, art. 2, sec. 1, that "no person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president."

It is possible that there may have been colored persons, who came here from Africa *free* men, and who were always free, and that they or their descendants, native and free born, were here at the time of the

declaration of independence, and yielded to it their sanction. If so, they were citizens. Their color could not exclude them.

From a careful consideration of the question proposed, I cannot avoid the conclusion that the decision of the supreme court of the United States in the case of *Scott* v. *Sandford*, before mentioned, so long as it shall stand as the final judgment of that tribunal, must be held as legally conclusive and binding upon the several states; and it is therefore my opinion, that "free colored persons of African descent, having a residence established in some town in this state for the term of three months next preceding any election," whose ancestors were of African blood, and were brought into this country and sold as negro slaves, not being citizens of the United States, are not authorized under the provisions of the constitution of this state to be electors for governor, senators and representatives. And it is also my opinion, that all other free colored persons of African descent, if there are any such in this state, who have the qualifications required by law, to make free white persons electors for those officers, are authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives.

As I could not concur in the opinion of the majority of the court upon the question presented, it became necessary for me to give my separate opinion, which is respectfully submitted. And I beg leave to refer to the opinion of the supreme court of the United States, delivered by Chief Justice MARSHALL, in *Cohens* v. *Virginia*, 6 Wheaton 264, and also to Story's Commentaries on the Constitution, vol. 1, book 3, chap. 4, entitled "Who is final judge or interpreter in constitutional controversies," in which authorities, there is much valuable learning, and excellent reasoning, concerning the constitutional power of the supreme court, and the conclusiveness of its decisions.

JOSHUA W. HATHAWAY.

OPINION OF JUDGE APPLETON.

In pursuance of the requirements of the constitution, I have the honor to answer the inquiry proposed by the honorable senate.

The constitution of this state confers the right of suffrage on "*every male citizen of the United States* of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this state for a term of three months next preceding any election." To determine whether those of African descent, having the other required qualifications, are entitled to vote, it will become necessary to ascertain what constitutes citizenship, and whether by the constitution of the United States, the native born free man of African descent is, by its provisions, expressly and inexorably prohibited from being or becoming a citizen.

By the constitution of the United States, article four, section two:

"The citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states."

The constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—*the equality of all before the law.* It confers citizenship and entire equality of civil and political rights upon all its native-born population.

The importance of the inquiry is commensurate with that of American citizenship, and the right of suffrage to those whose rights are in issue. Its magnitude is co-extensive with that of state sovereignty and state rights. It is no less than whether a sovereign state is restricted by the constitution of the United States as to those of its native-born population upon whom it may confer the right of citizenship, and whether those, or any portion of those upon whom she has conferred that right, are or are not to be regarded as citizens of the United States. It involves the right of the citizen, and the power of a sovereign state. Its importance demands that it should receive a careful and cautious examination.

The subjects of a state, or the citizens of a commonwealth, are native-born or naturalized. Allegiance and protection are reciprocal. If allegiance is due to the state, the state is bound to protect. The right of personal security, personal liberty, and to acquire and enjoy property, are natural and inherent. All members of a civil society, bound by its laws, liable to its penalties, are entitled to its aid in the

enforcement of right, and for protection against wrong. They are none the less citizens because, in some respects, they may not have all the privileges granted to the most favored. The Cornish miner burrowing in the earth, the princely nobleman in his palatial residence, or the beggar at his gate, are alike members of the same civil community—fellow subjects and fellow citizens. The recipients of public charity, and those from whose means it is furnished, are alike citizens of the state by whose laws the wants of the former are supplied, and the obligation is imposed upon the latter of supplying them. In some of the states there are certain property qualifications, such as owning a certain amount of real estate, or having a prescribed number of slaves, which are required before one can vote, or hold any office, yet those not having the required amount of property are citizens, though from poverty they may, by the constitution of the state in which they reside, be incapacitated from voting, and be ineligible to office. So, too, minors and married women labor under numerous disabilities of person and property. They cannot control or manage their estates; they cannnot vote, nor hold office; yet, notwithstanding these disabilities, they are citizens whose interests the government is bound to protect with a care equally sedulous as those upon whom it confers the right of suffrage, and of political station. Were the right of suffrage necessary to constitute citizenship, three-fourths of the free people of the country would, by reason of age, sex, or the poverty of their condition, be disfranchised.

"It is an established maxim," says Mr. MADISON, "that birth is a criterion of allegiance. Birth, however, derives its force, sometimes from place, and sometimes from parentage; but in general place is the most certain criterion; it is what applies in the United States."

"Two things," says STORY J., in *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Pet. 155, "usually concur to create citizenship—first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, a party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and *consequently* owe obedience or allegiance to the sovereign, as such, *de facto*."

In Spain, the rights of a natural born subject are acquired by having been born in the kingdom, by being the child of a father a native thereof, or of parents who have resided there ten years with an intent of domiciliating there. In France, all are called natural born subjects who are born within its territory. There are exceptions to these rules, but they have no relation to color or descent,—but refer to considerations alien to the present inquiry.

"The citizens," says Vattel, "are members of the civil society, bound to this society by certain duties, and subject to its authority; they equally participate in its advantages."

Citizenship, as the general rule of international law, is the result of

birth in the dominion of the state to which allegiance is due. It is nowhere made to depend upon color or descent.

From the operation of these principles, slaves of African descent, as being property, must be withdrawn; for, as says Chief Justice TANEY, "no one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise," it will become necessary to consider the effect of manumission, and the condition of the manumitted.

Slavery, as an institution resting neither on the law of nature nor of nations, derives its strength only from the local law by which it is established, and is restricted to the territory in which it exists. Without those limits, there is no law which binds the slave to his master.

"Slavery," says the supreme court of Mississippi, in *Harvey* v. *Decker*, Walker's Rep. 36, "is condemned by reason, and the law of nature. It exists, and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule that courts must lean in favor of life and liberty?"

"The state of slavery," says the supreme court of the United States, in *Prigg* v. *Penn.*, 16 Pet. 611, "is deemed to be a mere municipal regulation, founded upon and limited to, the range of territorial laws."

As an institution, it ignores alike age, sex, race and condition. Under the Roman republic and empire, it held in impartial bondage the subtle Greek, the fierce Briton, the tawny Moor, and the dark Ethiopian. In our own time, it has bound to servitude the captured white man on the shores of the Mediterranean, and the black man on those of the Pacific and the Atlantic.

Slavery is therefore regarded as a condition imposed upon the individual by the municipal law. When that ceases, or is removed, his original and natural manhood is restored; he ceases to be a chattel, and becomes a free man; a member of the community in which he dwells; a citizen, where before he was the mere chattel of his master. The effect of manumission by the common law upon the *status* of the slave, is stated with great clearness and precision by GASTON J., in *State* v. *Manuel*, 2 Dev. and Bat. 20.

"According to the laws of this state," (North Carolinia,) says he, in delivering the opinion of the court, "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 persons, and were then either British subjects, or not British subjects, accordingly 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. * * * The constitution extended the elective franchise to every *freeman* who had arrived at the age of twenty-one years, 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."

Much the larger portion of the territory of the republic has been acquired by treaties with France, Spain and Mexico, made since the adoption of the constitution. In all these countries, the civil law establishes the rule of action and the basis of legal right. By the civil law, the uncontrolled power of manumission was vested in the master. All slaves manumitted by a Roman became citizens and members of his *gens* or race, of which they took the name. They were, however, considered as of an inferior order, and labored under many disabilities. At first they were enrolled in the rustic tribes, but afterwards they were confined to the two lowest of the city tribes, where they remained till a late period. The taint of servile blood was in part removed by one descent, and the second or third generation was deemed sufficiently pure for admission into the senate and the orders of nobility. Blair on slavery among the Romans, chapter 9. Besides manumission by the *census*, by will and *vindicta*, there were other modes introduced, as by banquet, amongst friends, and by letter, addressed either to the slave himself or to a third party. The formula of manumission by letter is to be found in Rosini, a great authority, (Amsterdam ed. 1743, p. 78,) the literal translation of which is as follows:

"Let this man be a Roman citizen, so that from this day he may be a freeman, and safe from the chains of slavery, as if born of free parents; so that he may, in fine, pursue such course as he may choose, and henceforth cease to owe us or our successors any of the services of his former injurious condition—and let him remain all the days of his life free and secure under sure and ample freedom, like the other Roman citizens, by this the title of his manumission and of his freedom."

The distinctions resulting from the different forms of emancipation were, however, ultimately abolished, and under the Roman empire, all slaves manumitted in the proper legal form, and under proper legal conditions, became complete Roman citizens.

"We have," says Justinian in the Institutes, Book one, Tit. five, section three, with just pride and honest exultation, as if moved by the inspiration of freedom, "made *all* the freed men in general citizens of Rome, regarding neither the age of the manumitted nor of the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which slaves may become Roman citizens, and

the liberty of becoming such is that alone which can now be conferred."

"Freemen," says Domat, "are all those who are not slaves, and who have preserved their natural liberty. Manumised persons are those who, having been slaves, are made free." Domat, Cush.'s ed., vol. 1, p. 144.

"The manumission of slaves in the colonies had the same effect as if born there." 1 Burge, 699–702.

According to the same authority, birth, even though of alien parents, constitutes the *status* of a natural born subject. It has been seen that citizenship was the result of birth. It was equally so of manumission. Such was the rule in all the colonial possessions of European nations, and such is the law now in Brazil.

By the civil as by the common law, citizenship resulted from manumission—that is the manumitted slave becomes a subject or a citizen, according to the form of government under which the manumission takes place, (2 Kent, Com. 6 ed. 258, note *B*)—subject and citizen being convertible terms, as applied to natives. *The Pizarro*, 2 Wheat. 227.

Before the revolution, the native born free men by the common law were subjects of the government to which they owed allegiance, irrespective of color or descent, and upon and by the revolution, from being subjects they became citizens.

Upon the declaration of independence, each of the United States became sovereign and independent. "Under the peculiar circumstances of the revolution," says Mr. Justice STORY, 3 Pet. 159, "the general, I do not say the universal, principle adopted, was to consider *all* persons whether *natives* or *inhabitants*, upon the occurrence of the revolution, entitled to make *their choice* either to remain subjects of the British crown or to become members of the United States." This choice was necessarily to be made within a reasonable time. In some cases, that time was pointed out by express acts of the legislature; and the fact of *abiding* within the state after its assumed independence, was declared to be an *election to become a citizen.* That was the course in Massachusetts, New York, New Jersey and Pennsylvania. In other states no specific laws were passed; but each case was left to be decided upon its own circumstances according to the voluntary acts and conduct of the party. That the general principle of such a right of electing, to remain under the old or to contract a new allegiance, was recognized, is apparent from the case of *Com.* v. *Chapman*, 1 Dal. 53, and other cases cited. Those who adhered to the new government and transferred their allegiance thereto, became citizens of the same. All who were free, had this right of election, else they were not free. No particular color nor descent was required to confer this right of election. It resulted from freedom, and the necessity resting upon all to make an election. When it was made and the individual determined to adhere to the new state, he was necessarily a member

and a citizen of the same. He sustained the same relation to the new government by choice, which he had sustained to the old by birth.

During the war of the revolution slavery existed in most of the states. In all, at its commencement, there were those of African descent who, by manumission or by legislative action, had become free.

It then becomes important to determine whether those thus free were regarded as citizens during the period of the confederation, and prior to the adoption of the constitution.

To answer this inquiry satisfactorily, it will become necessary to examine the articles of the confederation, and ascertain the action of the several states and of congress upon this subject, prior to their ratification.

The articles of the confederation, as subsequently adopted, were reported July 12, 1776, and were debated from time to time till July 12, 1778, when they were ratified by ten states. Maryland, which acceded to them last, did not become a party thereto till March 1, 1781.

The fourth article of the confederation, so far as its bearing is material to the matter under consideration, is as follows:

"ART. 4. 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 privileges and immunities of *free citizens* in the several states," &c. 1 Elliot's Debates, 79.

The expressions here used are most general, and can receive but one construction. The object of the confederation is declared to be to "secure and perpetuate mutual friendship and intercourse among the *people* of the different states." There is no restriction by reason of color or descent, upon the generality of this expression. All who were "*free*," must be regarded as constituting the people, and included in the signification of that term. The expression, "free inhabitants," implies the existence of those who were not free. It relates to condition, and distinguishes the free from those not free, that is, the slaves.

"The free inhabitants" are, with certain exceptions, to "be entitled to all privileges and immunities of free citizens in the several states." No inhabitant, who was free, but was included in the phrase "free inhabitants." But upon the comprehensive generality of this expression, a limitation is engrafted. "Paupers, vagabonds and fugitives from justice," are all of the "free inhabitants" excepted from the rights of general citizenship. The particular exception is not to be enlarged, for it specially embraces all to be excepted. The exception made, the remaining "free inhabitants" are entitled to all privileges and immunities of free citizens.

It is thus apparent, upon the natural and only construction of this article, that *free* men of African descent were embraced in the expression "free inhabitants," and that "all privileges and immunities of free citizens in the several states" were conferred upon them equally as

upon the other free inhabitants. They are not included in the particular exception. They are included in the general phrase, from which the particular exception is taken.

That this was the meaning given to the article at the time, is made unmistakably and conclusively apparent, by the proceedings of the several states and of congress, before the articles of confederation were ratified.

By the preamble to the articles, it appears that though they had been previously reported, they had not been agreed to by the delegates till November 15, 1778.

As two years had elapsed between July 12, 1776, when they were reported, and July 9, 1778, when they were adopted, it is apparent that they must have been known and understood throughout the whole country. Accordingly, we find that "alterations, amendments and additions," were proposed "by certain states to the articles of confederation," the consideration of which came before congress on the 22d June, 1778.

The delegates of South Carolina being called upon, moved the following amendments in behalf of their state: 1 Elliot, 90.

1st, in article four, between the words "free inhabitants" insert "white." 2d, in the next line after the words "these states" insert "those who refuse to take up arms in defense of the confederacy." 3d, after the words "the several states" insert "according to the law of such states for the government of their own free white inhabitants."

The fourth article, as proposed to be amended, would read thus:

ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free (*white*) inhabitants of each of these states (*those who refuse to take up arms in defense of the confederacy*,) paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states (*according to the law of such states respectively, for the government of their own white inhabitants*,) &c.

The amendments proposed by the delegates of South Carolina show that the construction just given to article four was by them regarded as the true one. Their effect upon the article to be amended is equally obvious. They would have restricted the right of general citizenship to the "free (white) inhabitants," instead of restricting it to the "free inhabitants" irrespective of color. The proposed restrictions were negatived; the first and third amendment by a vote of two ayes, eight noes, and one divided; the second by a vote of three ayes and eight noes.

These propositions are undeniably established, that by the fourth article of the confederation as *then* understood—1st, that slaves were included in the word inhabitants; 2d, that the "free inhabitants" included all who were free, without respect of color; 3d, that the rights of general citizenship were conferred alike upon the free blacks as upon the whites.

The colonies, upon the severance of their connection with the British government, being sovereign and independent states, had uncontrolled power over their own laws, and over the civil condition of their inhabitants. The continental congress having refused to impose any limitation upon the meaning of the phrase "free inhabitants," or to restrict the rights of citizenship to the "free white inhabitants" of the respective states, it is obvious that all the free inhabitants were entitled to the rights and privileges of citizens in the several states; that is, to the rights of general citizenship.

The inquiry next arises as to what was the legal condition of free men of African descent, during the revolution, and at the time of the formation of the constitution; and whether they were up to, and at that time, regarded as American citizens.

The constitution of North Carolina was formed Dec. 18, 1776. Its declaration of rights asserts "that all political power is vested in, and derived from, the *people* only." Its constitution provides "that *all persons* possessed of a freehold in any town in this state, having a right to representation, and also *all free men* who have been inhabitants of any such town twelve months next before and at the day of election, and shall have paid public taxes, shall be entitled to vote," &c.

"It is a matter of universal notoriety," says GASTON, J., in *State* v. *Manuel*, 2 Dev. and Bat. 20, "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."

By article one, section three, of the amended constitution of North Carolina, adopted in 1835, the right of voting of colored people was expressly *abrogated*, (to use the language in the debates) by a vote of sixty-six to sixty-one. Subsequently a motion was made by Mr. GASTON to allow "free negroes, mulattoes, persons of mixed blood, having the other necessary qualifications, the right to vote," which was negatived in convention, by vote of sixty-four to fifty-five. In the course of the debate on this motion, Mr. KELLEY declared it "to be rank injustice and bad policy to refuse the free colored persons the right of voting when they possessed the same property and other qualifications which were prescribed for *other citizens*. He contended for the broad principle that all men are entitled to equal rights and privileges; that nothing but arbitrary power can forbid their free exercise, and that it is contrary to all the principles of free government to tax a man and refuse him a right to vote for a member to the legislature." Debates on the Constitution of North Carolina, in 1835, page 357.

It thus appears by the constitution of 1776, by the judicial expositions of the same by their highest legal tribunals, as well as by the proceedings of the convention by which the constitution was amended, that free men of color in North Carolina were deemed citizens of the

state, and exercised the right of suffrage for more than half a century, till in 1835 it was taken from them.

In Virginia, at a general assembly in 1777, and "in the first year of the commonwealth," an act was passed for regulating and disciplining the militia. Chapter one is in these words:

"For forming the CITIZENS *of this commonwealth* into a militia, and disciplining the same for defense thereof, be it enacted by the general assembly, that *all free* male *persons*, hired servants and apprentices, between the ages of sixteen and fifty years, (except the governor and members of council, &c.) who shall have previously taken before the court of their county *an oath of fidelity* to the commonwealth," &c., "shall by the commanding officer of the county in which they reside, be enrolled into companies," &c. "The free mulattoes in the said companies, or battalions, shall be employed as drummers, fifers, or pioneers." Hening's Stat. at Large, vol. 9, p. 267.

By chapter two of the same session, it is made "lawful for any recruiting officer to enlist *all* able bodied young men, above the age of sixteen," but "it shall not be lawful to enlist any negro or mulatto into the service of this, or *either of the United States*, until such negro or mulatto shall produce a certificate from some justice of the peace for the county wherein he resides, that he is a free man." 9 Hen. 275–280.

The preamble to an act passed in 1783, chapter 3, recites that many slaves during the war "were enlisted into the army as *substitutes*, being *tendered as free men*," and "that on the expiration of the term of enlistment of such slaves, that the former owners have attempted again to force them to return to a state of servitude, contrary to the principles of justice and to their own solemn promise;" ** and "whereas it appears just and reasonable that all persons enlisted as aforesaid, who have faithfully served agreeably to the terms of their enlistment, and have thereby of course contributed *towards the establishment of American liberty and independence*, should enjoy the blessings of freedom as a reward for their toils and labors," it was therefore enacted that all such should be "held and deemed free in as full and as ample a manner as if each and every one of them were specially named in this act," only one being named who was "declared free, in as full and ample a manner as if he had been born free." 11 Hening, 308.

It has been seen that the attempt in the continental congress to restrict the rights of general citizenship to the "free *white* inhabitants" was negatived by a vote of eight to two states. In May, 1779, however, the legislature of Virginia passed an act that "the free *white* inhabitants of every of the states, parties to the American confederation, (paupers, vagabonds, and fugitives from justice excepted) shall be entitled to all rights, privileges and immunities of free citizens in this commonwealth." And the same act declared that "all *white* persons *born* within the territory of this commonwealth, shall be deemed citizens of this commonwealth." 10 Hening Stat. at Large, 129.

The act of 1779, restricting citizenship to "free white persons," being at variance with the articles of the confederation, was in 1783 repealed in express terms, and in its place was substituted an enactment "that all *free persons born within the territory* of this commonwealth, &c., all persons *other than alien enemies* who shall migrate into this state," and shall take the required oaths, "shall *be deemed citizens* of this commonwealth, and shall be entitled to all the rights, privileges and advantages of citizens." 11 Hening, 324. In 1786, this act was re-enacted in the same language, but by chapter ten, section eight, certain persons who had taken up arms were prohibited from being citizens. 12 Hening Stat. at Large, 261.

In 1777, an act was passed to "oblige the *free male inhabitants of this* state above a certain age, to assurance of allegiance to the same, and for other purposes," the preamble of which is in these words: "Whereas allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter;" and then follows the act.

It thus appears that the colored free men of Virginia, as citizens, took the oath of allegiance to the commonwealth, were enrolled in her militia, were enlisted in her service and in that of the United States, were tendered and received as substitutes, and during the revolution fought the battles of the country, and "contributed towards the establishment of American liberty and independence."

The constitution of Maryland was adopted August 14, 1776. Its declaration of rights declares "that the inhabitants of Maryland are entitled to the common law of England, the trial by jury," &c., "that the right in the *people* to participate in the legislature is the best security of liberty and the foundation of all free government;" "for this purpose, elections ought to be free and frequent, and every *man* having property in, a common interest with, and an attachment to the community, *ought to have the right of suffrage*," &c. The right of suffrage is conferred upon "all freemen" having certain qualifications of age, residence and property, without any distinctions arising from color or race. The general expressions "every man" and "all free men," leave no free man excluded. That the free colored population equally with the whites, were "entitled to the common law of England," and were to be regarded as citizens, has been fully shown by the able opinion of Mr. Justice GASTON. That they were then regarded as citizens, and were entitled to and exercised the right of suffrage, is clearly evidenced by an act of the assembly of Maryland, passed December 31, 1801, chapter ninety, being "an act to *alter* such parts of the constitution and form of government as relate to voters and qualification of voters." By this act the right of suffrage was restricted to "every free white male citizen of this state and *no other*," in the cities of Baltimore and Annapolis, in the election of such cities, or either of them, for delegates to the general assembly, &c.

By section eleven, of the same act, it was enacted that "every part of the constitution and form of government of this state repugnant to, or inconsistent with the provisions of this act, shall be, and the same are hereby *abrogated*, annulled and made void." This act was confirmed by an act passed 8th January, 1803, chapter twenty.

Another amendment to their constitution was passed in 1809, chapter eighty-three, and confirmed in 1810, chapter thirty-three, which imposed the same restriction (to free white male citizens *and no other*) on voters for electors of president and vice-president, &c., &c., in the cities of Baltimore and Annapolis.

The restriction of suffrage to the free white citizens to particular localities, is a recognition of the general and universal right in other places of citizens *other* than the white, having the required qualifications to vote. Unless the constitution had conferred the right of suffrage upon *other* than white citizens, there was no occasion for the alteration which was made in their constitution. The passage of these acts, by which the colored free men of Maryland were deprived of the right of suffrage, is conclusive proof that they were regarded as *citizens*, that they had exercised the right of suffrage previously, and that henceforth they were to be deprived thereof, notwithstanding the provision of the constitution, which declares that "*every man* having property in, a common interest with, and an attachment to the community, *ought* to have the right of suffrage."

The inhabitants of Massachusetts formed, in 1780, a constitution by which all within its territorial limits became free. Formed amid the conflicts of the revolution, it was imbued with its principles. It abolished slavery, and conferred citizenship and equality of right upon all. The bill of rights and the protection it afforded, was limited to no complexion and to no race.

On the 16th of July, 1776, the people of New York, in convention, resolved "that all *persons abiding* within the state of New York, and deriving protection from its laws, owe allegiance to the said laws and are *members* of the state." All free men, therefore, were members; and, being members, were citizens of the state. By the constitution of that state, formed in 1777, "every *male inhabitant* of full age" is entitled to the right of suffrage, if he have the other necessary qualification of residence and freehold estate.

In the convention to amend their constitution, in 1821, it appears that the constitution, as reported, confined the right of suffrage to the "*white*" citizens of the state. Mr. PETER A. JAY moved that the word "white" be stricken out. Chancellor KENT supported this motion, saying:

"We did not come to this convention to disfranchise any portion of the community, or to take away their rights. The constitution of the United States provides that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states,' and it

deserved consideration whether such exclusion would not be *opposed to the constitution* of the United States."

In the same debate, Mr. RUFUS KING, who had been a leading member in the convention which formed the constitution of the United States, said:

"Take the fact that a citizen of color, entitled to all the privileges of a citizen, comes here. He purchases a freehold; can you deny him the rights of an elector, incident to his freehold? He is entitled to vote; he comes like any other citizen; he is a citizen, and every freeholder your laws entitle to vote. He comes here; he purchases property; he pays your taxes, conforms to your laws; how can you, then, under the article of the constitution of the United States, which has been read, exclude him? As certainly as any children of any white man are citizens, so certainly the children of the black man are citizens," &c. Report of proceedings and debates of New York convention, 1821, p. 190, &c.

The amendment was carried, Kent, King and Van Buren voting in its favor.

Without examining particularly the constitutions of other states, it may be regarded as unquestionably true, that colored freemen were regarded as citizens, and entitled to the right of suffrage, in most of the states, during the whole period of the revolution.

The convention by which the constitution was formed, met on the 25th of May, at Philadelphia. From a careful examination of their proceedings, it will appear that they recognized all freemen (natives) as citizens, without regard to race or complexion, as had been the case under the confederation.

The suffrage in congress, under the confederation, had been by states, each state having a vote.

The mode of apportioning representation and direct taxation presented the most difficult problem for solution, and in reference to which there was the greatest difficulty in coming to a satisfactory adjustment.

The inhabitants of the country were divisible into free white and free black citizens, aliens and slaves; and these distinctions were never lost sight of or disregarded by the convention.

Thus much being premised, it remains to consider the course of the convention in relation to the subjects of representation and direct taxation.

On the 29th of May, Gov. RANDOLPH, of Virginia, offered his fifteen resolutions, the second of which was as follows:

"2. *Resolved, therefore*, That the right of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of *free inhabitants*, as the one or the other may seem best in different cases."

By the ninth article of the confederation, the quotas of contribution were to be "in proportion to the number of *white* inhabitants" in each state. This resolution assumes differing ratios, one or the other of which is to be adopted, as may be advisable. But "free inhabitants"

cannot be regarded as coincident with "white inhabitants;" if it were so, the propositions, instead of being alternative, would be identical.

By the latter clause of this resolution, *free* blacks were included in the phrase "free inhabitants," and were to be represented, while slaves were excluded from the basis of representation.

On the same day, Mr. CHARLES PINCKNEY, of South Carolina, offered his draft of a federal government, by the third article of which the number of delegates was to be regulated "by the number of inhabitants," and by the sixth article it was provided that "the proportion of direct taxation should be regulated by the *whole number* of inhabitants of every description," &c.

These propositions made slaves equally with freemen the basis of direct taxation and representation.

On the 30th of May, Governor RANDOLPH having moved his second resolution, it was moved by Mr. HAMILTON, of New York, and seconded by Mr. SPAIGHT, of North Carolina, that the resolution be so altered as to read as follows:

"*Resolved*, That the right of suffrage in the national legislature ought to be proportioned to the number of *free* inhabitants."

This amendment, on motion, was postponed. On June 11, in committee of the whole house, it was moved by Mr. KING, of Massachusetts, and seconded by Mr. RUTLEDGE, of South Carolina, to agree to the following resolution, viz:

"*Resolved*, That the right of suffrage in the first branch of the national legislature ought *not* to be according to the rule established in the articles of confederation, but according to some equitable ratio of representation."

This resolution passed in the affirmative. It was then moved and seconded to add to the last resolution the following words: "according to the quotas of contribution."

It was then moved by Mr. WILSON, of Pennsylvania, and seconded by Mr. PINCKNEY, of South Carolina, to postpone the consideration of the last motion, in order to introduce the following words, after the words "equitable ratio of representation," namely:

"In proportion to *the whole number of white and other free* citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and *three-fifths* of *all* persons not comprehended in the foregoing description, except Indians not paying taxes in each state."

On the question to agree to Mr. WILSON'S motion, *it passed in the affirmative.*

On the 15th of June, Mr. PATTERSON offered eleven resolutions, by the third of which the requisitions on the states, by the United States, were to be in the same proportion as the representation proposed by Mr. WILSON, thus making representation and the contributions of the several states to rest on the same basis.

On the 19th of June, the resolutions of Governor RANDOLPH were reported as altered and *agreed* to in committee of the whole house.

The second resolution, as amended, becomes the seventh, and is as follows:

"7. *Resolved*, That the right of suffrage in the first branch of the national legislature, ought *not* to be according to the rules established in the articles of confederation, but according to some equitable ratio of representation, namely: in proportion to the *whole number of white and other* free citizens and inhabitants of every age, sex and condition, including those bound *to servitude* for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes in each state." 1 Elliot, 181.

This enumeration embraces the whole population of the country.

The "*whole number of white*" citizens form one class.

The "*other free citizens*" form another class.

The "inhabitants of every age, sex and condition, including those bound to servitude for a term of years," form a third class, which embraces all free persons not included in the preceding classes, and refers to aliens and those bound to service as apprentices.

"Three-fifths of all persons not comprehended in the foregoing description," refers to the slaves.

The "Indians not paying taxes" are excepted.

The "other free citizens" are not white, for if so, they would have been included in the number of "white citizens." They were not aliens, for such are not citizens. They were not slaves, for neither are they citizens. They were citizens *other than white*, that is, *free colored citizens*.

Free colored persons, by this resolution, which was agreed to, were regarded by the convention as free citizens, and were made the basis of representation, as they subsequently were of taxation.

On July 12, the resolution "that direct taxation ought to be proportioned according to representation," was passed unanimously in the affirmative.

On the same day, it was likewise moved and seconded to add the following amendment, to the resolution to which reference has just been made:

"And that the rule of contribution by direct taxation for the support of the government of the United States, shall be the number of *white inhabitants* and three-fifths of *every other description* in the several states, until some other rule, that shall more accurately ascertain the wealth of the several states, can be devised and adopted by the legislature."

By this proposition, it will be perceived that direct taxation was to be in the ratio of white citizens and aliens, and three-fifths of the *free* blacks and the slaves, thus placing *free* blacks and slaves upon the same footing.

This amendment, however, was on the same day withdrawn.

On the 26th of July, twenty-three resolutions, which had been previously passed, were referred to a committee of five, termed the committee of detail, and the house adjourned to the 6th of August.

On the 6th of August, the committee of detail reported a draft of a constitution, by article seven, section three, of which it was provided that direct taxation should be regulated upon the basis of representation, as moved by Mr. WILSON on June 11th, which report, on the next day, was referred to a committee of the whole.

On August 9, it was moved and seconded to insert the word "free" before the word "inhabitants," by which the ratio of representation was fixed at one representative for every fifty thousand inhabitants.

On Sept. 8, a committee of five was appointed to revise the style and arrange the articles agreed to by the house, which, on the 12th of September, reported the constitution as revised and arranged, and as then agreed to, by paragraphs. Now, for the first time, the apportionment as to representation and direct taxation is merged in one and the same article.

Article one, section two, so far as it relates to the present inquiry, is as follows:

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of *free* persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons," &c.

On the 13th of September, it was agreed to compare the report from the committee of revisal with the articles agreed to by the house, and as they were read by paragraphs, it was moved to insert the word "service" instead of servitude, in article two, section one, which passed unanimously, leaving the article as it now stands.

Indians were excluded, it may be observed, not on account of race or color, but because they were members of distinct tribes or nations, living under the protection of the state or general government. "They may more correctly, perhaps, be denominated domestic, dependent nations," says MARSHALL, C. J., in the *Cherokee Nation* v. *Georgia*, 5, Pet. 1.

The last finish, to use the expressive words of Mr. MADISON, given to the style and arrangement of the constitution, fairly belongs to Mr. MORRIS of New York, by whom its last transcription was made, and who, in the language selected, carefully rejected all redundant and equivocal expressions, making it as clear as language would permit.

The words "free persons" were accordingly used instead of "white and *other* free citizens, and inhabitants of every sex and condition." The expression "free persons" embraced the same classes as that for which it was substituted, and includes free persons of color. "Indians not taxed" were in each case excepted. The remaining terms of the

basis were in fact unchanged; so that the free colored population was embraced in the terms "free persons."

The whole population is divided into two classes. The whole number of free persons including those bound to service for a term of years, and excluding Indians not taxed, and three-fifths of all other persons. The free blacks are not in the *three-fifths of all other persons*, because they were free, and being free, are included in the first class. The distinction is obviously that of *status*, not of color or descent; it is that between free men and slaves.

It had been proposed to base representation, or taxation, upon the *whole* number of inhabitants, which would have included slaves—upon the whole number of *free* inhabitants, which would have included free blacks and excluded slaves—upon the number of *white* inhabitants and three-fifths of every other description, by which the free blacks and slaves would alike have been computed at three-fifths of their numbers, and these several propositions had been rejected. The only remaining proposition to base the representation upon the "whole number of *white* and *other free* citizens and inhabitants of every age, sex and condition," evidently referred to a class of citizens *other* than white citizens, and could only relate to free colored persons, and, cleared of its redundancy by Mr. MORRIS, is found in the constitution in its equivalent and substituted phrase, "free persons." It is manifest, therefore, that free persons of African descent, being native born, were regarded by those by whom the constitution was framed, as free citizens, as they had been during the revolution, and under the confederation.

The states sovereign, independent and equal under the confederation, determined respectively the citizenship of their members. When the convention which formed the constitution, assembled, these pregnant facts existed. The citizenship of the free colored population was upon the doctrines of the common law, the necessary result of their freedom, and was recognized in very many of the southern as well as in all of the northern states. The states in congress assembled, had during the confederation, refused with great unanimity to restrict the rights of general citizenship to the free *white* inhabitants of each state. Different states had formed constitutions, which by practical construction as well as by judicial determination, conferred the rights of citizenship upon the free blacks. During the debates in the convention which formed the constitution, no proposition received its sanction, the effect of which was to deprive those, who by the law of the place of their residence, were citizens of their *then existing* rights of citizenship, or to limit or restrict those rights. On the contrary, under the words *other free* citizens, they were by the convention in committee of the whole recognized as citizens.

No language can be found in the constitution which rests citizenship

upon color or race. All free persons go to constitute the basis of representation and taxation. They equally constitute that basis, whether white, black, or mixed. Freedom respects not color, for the black man may be free. Personality is not limited to race or complexion, for the black man is included in the class of persons, whether slave or free. Citizenship does not *necessarily* depend upon color or descent, and by the constitution it is not *specially* made so to depend.

The constitution in its preamble asserts the great objects for which "we the people of the United States" "do ordain and establish this constitution for the United States of America."

As the constitution is formed for the benefit of and adopted by the people, that term must include all for whose benefit it was formed, and by whose votes it was adopted. As the free blacks were in some of the states citizens, and entitled to vote, by what rules of construction can any portion of the "people" (which certainly must include all who were legally competent to act on the question of its acceptance or rejection) be deprived of previously existing rights? What language can be found indicating the purpose of forming a new and hybrid class unknown to any system of law—neither citizens, aliens nor slaves—a class owing allegiance to the state and bound to obey its laws, and yet without their protection, "having rights which no white man was bound to respect." No express words can be found, showing an intention of thus dividing the free native born inhabitants into classes, and of conferring all rights upon one portion, and of depriving the other of those previously belonging to them. No words can be found from which by any construction, however forced, any such implication can arise.

Citizenship of the United States is derived from birth, acquired by naturalization, and conferred by treaty. Its citizens, are by the constitution, either native born or naturalized; there can be no other. So far as citizenship is derived from a state, it is by *birth* alone, congress having the exclusive power to pass naturalization laws.

It is a general rule of municipal as of international law, acknowledged alike in the new as in the old world, by every civilized nation, that birth (the parents being free) in the state to which allegiance is due, confers citizenship. If it had been the design of those who framed the constitution to change or modify in any respect this rule, and deprive any portion of free men of its benefits, such design would have been apparent in the resolutions or debates preceding its formation, as well as in the constitution when formed. The design to abolish an old and universal rule and to introduce a new and unheard of distinction, could not but be apparent. But in vain will the most careful scrutiny find any words from which such design can be inferred.

"Previous to the adoption of the constitution," remarks TANEY, C. J., in *Scott* v. *Sandford*, 19 How. 405, "every state had an undoubted right to confer on whomsoever it pleased the character of citizen, and

to endow him with all its rights." Subsequently he adds, "the constitution has conferred on congress the right to establish an uniform rule of naturalization, and this right is evidently *exclusive*, and has always been held by this court to be so." This power to "establish an uniform rule of naturalization" is the only restriction upon the states in respect to citizenship, unless the treaty making power be regarded as such. The states may confer upon an alien the right of suffrage and to hold real estate, and other privileges peculiar to citizenship, but still he would not thereby acquire the *status* of a citizen. "So, too," says TANEY, C. J., "a person may be entitled to vote by the law of the state who is not a citizen even of the state itself." Citizenship can only be by birth, naturalization or treaty. The power of the state, except so far as specially restricted, remains as it was under the confederation.

By article four, section three, new states may be admitted. By section four of the same article, "a republican form of government" is guaranteed to every state in the Union. The new as well as the old states may extend and enlarge the rights of citizenship to the native born inhabitants as they may deem advisable, without reference to race. It is only required that the form of government be republican; and if the rights of citizenship are conferred upon a free man, though his ancestor may, at some unknown and indefinitely remote period of time, have been forcibly and wrongfully taken from Africa, it would hardly seem to conflict with this guarantee of the constitution.

The tenth amendment of the constitution establishes as a rule of construction, that "the powers not *delegated* to the United States by the constitution, nor *prohibited* by it to the states, are *reserved* to the states respectively, or to the people."

No power is "*delegated* to the United States" over the subject of citizenship, except that of passing a naturalization law and the treaty making power.

The states are not *prohibited* in reference to this subject, save only in the two instances to which reference has just been made.

With these exceptions, the *reserved* power of the state to determine who shall be its citizens is sovereign and unlimited.

Nothing, then, can be found in the constitution depriving a citizen of a state of *then* existing rights, or restricting or prohibiting the states in or from the exercise of unlimited power over this whole subject matter, except in the instances just specified.

The equality of the states being the foundation upon which the Union rests, the equality of the citizens of the states, and the consequent right of general citizenship, would seem to follow as a necessary consequence therefrom. Indeed, the states could hardly be regarded as equal unless equality of rights were conceded to the citizens of the several states.

By the fourth article of the confederation, "the free inhabitants of *each* of these states—paupers, vagabonds and fugitives from justice excepted—shall be entitled to all privileges and immunities of free citizens in the several states."

By the constitution, the same right of general citizenship is conferred on the citizens of the several states in almost identical words.

By article four, section one, "the citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states."

The rights of general citizenship are not taken away even from "paupers, vagabonds and fugitives from justice." There are no exceptions whatsoever from the all-embracing generality of this section.

The states existing in full sovereignty before the constitution, the citizenship of the states must *have preceded* that of the citizenship of the United States. Neither this, nor any other clause in the constitution, defines what shall constitute citizenship of the state, and as a consequence thereof, citizenship of the United States. It leaves that to the states, with the exceptions already considered. It assumes the citizenship of the state, however it may be constituted, as the basis of general citizenship, and derives that of the United States therefrom. It assumes that the principles upon which it is conferred may be different; nevertheless, it confers the same "privileges and immunities" upon the citizens of *each* state. "Uniformity of laws in the states," says CHASE, C. J., in *Campbell* v. *Morris*, 3 Har. and McHen., 553, "is contemplated by the general government *only* in two cases, on the subject of bankruptcies and *naturalization*. While uniformity is required where citizenship is acquired by naturalization, *it is not* when it is the consequence of birth. The states are sovereign over this whole subject, except as to aliens. The privilege of general citizenship under the confederation, was not restricted as to color nor race. Under the constitution, there is found nothing which limits it to any particular portion of the citizens of the state. It is given to *all*, without even the reservation of paupers, vagabonds and fugitives from justice."

"It may be esteemed the basis of the Union," remarks Mr. HAMILTON, in the Federalist, No. 8, "that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." "It is obvious, that if the citizens of each state were to be deemed aliens to each other, they could not take or hold real estate, or other privileges, except as aliens." "The intention of this clause was to confer on them, if one may so say, general citizenship, and to communicate to all, the privileges and immunities which the citizens of the same state would be entitled, under like circumstances. Story, section 1809. Every citizen of a state is, *ipso facto*, a citizen of the United States." Ib. section 1687.

It follows, therefore, if in a single state free men of African descent (natives) were citizens thereof, they were, by that very fact, citizens

of the United States. It has been shown, that before the adoption of the constitution they were citizens, in most of the states, by virtue of their respective laws and constitutions, and that, by the constitution, no change nor deprivation of rights took place; consequently, they were, are, and must remain citizens of the United States, under and by virtue of its constitution.

The correctness of these deductions will be made, if necessary, more apparent, upon examining other portions of the constitution, and the action of government under it.

Citizenship of the United States is conferred upon aliens through the naturalization laws congress may enact, and the treaties government may make.

The power "to establish an uniform rule of naturalization" is unlimited in its extent. It covers the whole field of legislation. All races of men are within the generality of its terms. It excludes none. It may embrace the African equally with the European, the Malay or the Hottentot, if congress should deem such legislation expedient. The power is unquestionably granted to confer citizenship upon the black equally as upon the white man—a power most manifestly inconsistent with the hypothesis that, by the constitution, descent from a servile African race, was a perpetual bar to the rights of citizenship of the United States—that by its provisions there was an interdict upon the states and upon the general government, against conferring it upon them; and that those possessing it previous to its adoption, have thereby, in some mysterious and inexplicable way, been deprived thereof.

The grant of power unlimited, its exercise is a matter of discretion. It is true, as remarked by TANEY, C. J., in the case of *Scott* v. *Sandford*, that "no one of that race had ever emigrated to the United States voluntarily." It is equally true, that there was little in the then existing state of the country to induce their voluntary emigration. Neither was a change in this respect anticipated. The emigration which called for the action of congress was European. Their legislation obviously referred to the actual emergencies of the country The possible contingency of an African emigration, is not even the subject of an allusion during the debates upon this question. If the word "white" had been stricken out of the naturalization law, it would have been equally constitutional. Whether the word should be in or out, was for congress in its wisdom to determine.

The power to confer citizenship upon the alien African, is unquestionably granted. But it is absurd to suppose that power would be given, if in and by the same instrument, that right is denied to the free native of the same race. The absurdity becomes more patent, when it is remembered that the power to naturalize is undeniable, while the supposed restriction is only an asserted implication, without any words from which the most perverse and sinister ingenuity could imply it.

It next becomes important to ascertain the condition of the free *alien* inhabitants of the various territories, which, by treaties at different times, have become portions of the republic, and by legislation have become incorporated therewith; and whether any distinction is made on account of complexion or descent, by which any portion of the *free* inhabitants, resident upon the territories annexed, are to be debarred from the rights and privileges of citizens of the United States.

The civil law prevailed in all the territorial acquisitions of the republic, except those from the various Indian tribes with whom treaties have been made. By that law, as has been seen, the slave, upon emancipation, became a freeman and a citizen.

By the third article of the treaty with the French republic of 30th April, 1803, for the purchase of Louisiana, it is provided that the *inhabitants* of the ceded territory shall be entitled to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime shall be maintained in the free enjoyment of their *liberty*, &c.

By the sixth article of the treaty with Spain, by which Florida was ceded, "the inhabitants" of the ceded territory are to be incorporated into a state "*as soon* as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of *all* the privileges *rights* and immunities of the citizens of the United States," using, it will be perceived, more expressive language than the clause of the constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The word "inhabitants" undoubtedly referred only to those who were free, for by the preceding article provision is made for such of the inhabitants "as may desire to remove to the Spanish dominions."

By the fourteenth article of the treaty with the Choctaws, of September 27, 1830, "each Choctaw head of a family, being desirous to remain and become a *citizen* of the states, shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty," &c. He is to be entitled to land for himself and his children. It is further provided in the same article that "persons who claim under this article shall not lose the privilege of a *Choctaw citizen*," &c.

Extensive territorial acquisitions have likewise been made by treaty with Mexico.

On the 15th of September, 1829, Guerrero, the chief executive magistrate of the Mexican republic, himself of mixed blood, issued his decree abolishing slavery, in which are these memorable words:

"Desirous to signalize the year 1829, the anniversary of our independence, by an act of national justice and beneficence that may turn to the advancement of so important a result; that may consolidate more and more public tranquillity; that may co-operate to the aggrand-

izement of the republic, and restore to the unfortunate portion of its inhabitants *those rights which they hold from nature*, and that the people may protect, by wise and equitable laws, in conformity with the 30th article of the constitutive act:

Making use of the extraordinary faculties which have been granted to the executive, I thus decree:

First, that slavery is abolished in the republic; second, consequently, all those individuals who, until this day, looked upon themselves as slaves, are free."

Subsequently, on the 5th of April, 1837, an act of the Mexican congress was passed in these words:

"ARTICLE 1. Slavery, *without any exception*, is and shall remain abolished throughout the entire republic."

By this decree and this enactment, which are but the enunciation of the doctrine of inspiration, that God "hath made of one blood all the nations of the earth," the various races inhabiting Mexico, and confusedly mingled together, were restored to the privileges of a common humanity and the equality of human right established by God, was legislatively recognized by man. The "blue blood" of the descendants of the Spanish conquerors lost its pre-eminence, and all became members of the same civil community, "citizens," and entitled to the rights guarantied by the constitution of that republic.

By the treaty with Mexico, of Gaudaloupe, Hidalgo, of February, 1848, California and New Mexico were ceded to the United States. By the eighth article, Mexicans established in the territories ceded to the United States, were free to remain, and "those who shall prefer to remain in said territories may either retain the title or rights of Mexican citizens, or acquire those of *citizens of the United States*," and this election is to be made in one year. By article nine, Mexicans "who shall not preserve the character of citizens of the Mexican Republic," &c., "shall be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution," &c.

Where territory is acquired by treaty, "the *laws*, rights and institutions of the territory so acquired," remarks Mr. Justice JOHNSON, of South Carolina, in 1 Pet. 517, "remain *in full force* until rightfully altered by the new government." In *Strother* v. *Lucas*, 12 Pet. 410, Mr. Justice BALDWIN says, in reference to the same subject, that "the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, *continue in force* till altered by the new sovereign."

By these various treaties, those who were subjects or citizens of the state ceding, became, by virtue of the cession, citizens of the state to which it was made. As by the laws of the state ceding, freemen of European, Indian, African or mixed blood, were citizens of the state ceding, they thus became citizens of the United States, by which these

acquisitions were made. Thus has the citizenship of the states been conferred upon the Choctaw, with liberty to retain that of his tribe, thereby allowing him a *double citizenship*. Thus has citizenship of the United States been granted to the Spaniard, the Frenchman, the Indian, and the negro, to the white, the red, and the black man, to the mulatto and the mestizo, the quadroon and the quintroon, to the Chino and the Zambo, to races so commingled in blood that a foreign and uncouth nomenclature was required to designate the varying proportions of the different bloods entering into the composition of this motley population. Thus have these heterogeneous races become naturalized.

It thus appears that, by treaty, citizenship has been conferred upon those of African descent. But if African descent, from a servile stock, is by the constitution an inexorable and insuperable bar to American citizenship, then has this government entered into treaty obligations which, by the constitution, it cannot perform. But if the government can constitutionally perform its treaties, if African descent, with its servile taint, is no bar to the citizenship of the *alien* of that race, speaking a different language, having a different form of religion and different associations, it could never have been intended that the native born of that race should have been excluded therefrom. As, then, African descent from a servile ancestor does not prevent the alien from becoming a citizen of the United States, it follows that such descent is no bar to the attainment of that right, and such being the case, the state in which they reside may confer this privilege upon that portion of their native-born population, if it seem good to the people thereof so to do, by making them citizens thereof, and being so citizens, becoming by virtue of the constitution citizens of the United States.

The government of the United States, in its intercourse with other nations, has claimed the free colored man as a citizen, has asserted his rights, and demanded and received reparation for his wrongs. The British ship of war Leopard, on the 22d of June, 1807, in the exercise of the claim of its government to impress, fired on the American frigate Chesapeake, and upon her lowering her flag, British officers seized and carried away William Ware, Daniel Martin and John Straham, three sailors, enlisted in the navy of the United States, the two first of whom were colored men. On the 2d of July following, Mr. JEFFERSON, then President of the United States, issued his proclamation, countersigned by Mr. MADISON, interdicting our harbors and waters to British men of war, in which, speaking of this outrage, he says, "and that no circumstance might be wanting to mark its character, it had been previously ascertained that the seamen demanded were native citizens of the United States." Annals of Cong., (10th Cong.) vol. 1, p. 948. On the 6th of July, Mr. MADISON, writing to our

minister at London, Mr. MONROE, says, "the seamen taken from the Chesapeake had been ascertained to be native citizens of the United States." 3, Am. state papers, p. 184. Upon the receipt of this letter, Mr. MONROE at once makes reclamation on the British government for the outrage, informing the British minister of the citizenship of those seized. 3, Am. state papers, p. 186. Upon the meeting of congress, their attention was at once called to the subject, and a committee on the portion of the message relating thereto was appointed, which called on Mr. MADISON for proof of the citizenship of those seized, and this being at once furnished by him, they reported on the 17th of November, 1807, "that it has been incontestibly proved, as the accompanying documents will show, that William Ware, John Straham and Daniel Martin are citizens of the United States," &c. 3, Am. state papers, 6. From the evidence furnished by Mr. MADISON, p. 15, it appeared that two of those above named were colored. This formed the subject of perplexed and irritating diplomacy between the two nations till November 1, 1811, when Mr. FOSTER, in behalf of the British government, disavowed the unauthorized acts of the officer in command, who, in token of the king's disapprobation, had been recalled, proposed to return the men to the ship from which they had been taken, and to make satisfactory pecuniary recompense to the sufferers for the injuries they had sustained. The apology of the British government, being deemed satisfactory, was accepted.

Now, the highest good faith should be required among all governments. Three Presidents of this nation, all from Virginia, in their diplomatic intercourse with a foreign nation, have asserted the citizenship of colored men, and have demanded reparation for the insult to our flag by taking them from its protection. It would be a reproach to their intelligence to suppose that those distinguished statesmen, two of whom had taken a leading part in the formation of the constitution, could have so misunderstood the purpose of its framers as ignorantly to regard those as citizens who were not. It would be a still greater reproach to their integrity to suppose that, not regarding them to be citizens, they should falsely assert them to be so, for any purpose whatsoever. It surely cannot be erroneous, relying on the opinions of JEFFERSON, MADISON and MONROE, to hold those as citizens whom they held as such, and to the vindication of whose rights as citizens they pledged the honor of the nation.

The act of congress of May 17, 1792, provides for the enrollment of "every free able bodied *male* citizen" in the militia of the several states. The enrollment of "*white* male citizens" implies that there are citizens who, not being white, are not to be enrolled, equally as the enrollment of "able bodied" citizens implies that there are citizens who are not to be enrolled, because not able bodied.

The act of February 23, 1803, prohibiting the importation of certain

persons into the states where by the law of such states their admission is prohibited, forbids the importation of any negro, mulatto or other person *not being a citizen* or registered seaman of the United States, implies that there may be persons of color who are citizens and who may be registered seamen, and who, being citizens, are excluded from the operation of this act, and may be imported without the master of the vessel in which they are brought incurring any penalty.

The state under the confederation, being sovereign, had unlimited power over the citizenship of its inhabitants, and might confer that right upon its colored free men. *That power was left unimpaired by the constitution.*

The conclusion to which I have arrived, after a careful consideration of the question, and a full examination of the authorities bearing thereupon, is, that there is no prohibition in the constitution of the United States, express or implied, to free men of African descent becoming citizens of a state, and as such, by virtue of their state citizenship, becoming citizens of the United States. I can find no justification for any such interpolation in the clause in the constitution conferring general citizenship upon the citizens of *each* state as that it shall read "the citizens of *each* state (the *free native colored citizens of each state excepted,*) shall be entitled to all privileges and immunities of citizens in the several states." The framers of the constitution made no such article. The people adopted no such article. Interpolation is no judicial duty.

As, however, the highest tribunal of the nation is alleged to have decided otherwise in the recent case of *Scott* v. *Sandford*, the occasion would seem to impose the necessity of a brief examination of that decision, and of the authorities by which it is supported, and the reasoning upon which it rests.

It may indeed be well questioned whether the "opinion" of any court is not to be regarded rather as evidentiary of what the law is, than as the absolute law. If it were regarded as the absolute law, it would imply infallibility on the part of the court deciding. "But what court," asks Mr. Justice NELSON, in this very case, "has not changed its opinions? What judge has not changed his?" As there are no courts in which there have not been contradictory decisions upon the same question, to hold the decisions of any court as absolute law, would be to imply the correctness of opposing and conflicting decisions, which would seem to be sufficiently absurd. The true rule on this subject seems most clearly and forcibly expressed in the following language of a distinguished jurist:

"The decisions of courts are not *the law*; they are only evidence of *the law*. And this evidence is stronger or weaker, according to the number and uniformity of adjudications—the unanimity or *dissension* of the judges—the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which these reasons are expressed."

The judicial power of the supreme court of the United States is limited "to all cases in law and equity arising under the constitution," &c., as is fully defined in article three. It has been denied by Mr. JEFFERSON, and other distinguished statesmen and jurists, that their decisions upon "cases in law and equity" have any binding force, beyond the case decided, upon the courts of the several states, or on the other departments of government.

"Certainly," writes Mr. JEFFERSON, vol. 6, p. 461, "there is not a word in the constitution which has given that power to them, more than to the executive or legislative branches. Questions of property, of character and of crime being ascribed to the judges, through a definite course of legal proceedings, laws involving such questions belong of course to them, and as they decide on them ultimately and without appeal, they of course decide for themselves. The constitutional validity of the law or laws again prescribing executive action, and to be administered by that branch ultimately, and without appeal, the executive must decide for themselves, also, whether under the constitution they are valid or not * * *. And, in general, that branch which is to act *ultimately*, and *without appeal*, on any law, is the *rightful expositor* of the validity of the law uncontrolled by the opinion of the co-ordinate authorities." The supreme court of Virginia, in *Hunter* v. *Martin*, 4 Munf. 1, held unanimously that in case of a difference of opinion between the two governments as to the extent of the powers vested by the constitution, while neither party is competent to bind the other, the courts of each have power to act upon the subject, neither being bound by the decisions of the other. Recently, in *Padelford* v. *Fay*, 14 Georgia, 439, the supreme court of Georgia held, as they had done in previous instances, "that the supreme court of Georgia is co-equal and co-ordinate with the supreme court of the United States, and, therefore, the latter cannot give the former an order or make for it a precedent."

On the other hand, it was held by MARSHALL, C. J., in *Cohens* v. *Virginia*, 6 Wheat. 413, that "the necessity of uniformity as well as of correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in one single tribunal the power of deciding, in the last resort, all cases in which they are involved." In the opinion of Mr. WEBSTER and other jurists, the decisions of the supreme court are not to be limited to the particular case, but are to be regarded and followed by the co-ordinate departments of government, and are conclusive upon the judiciary of the several states.

It does not, however, become necessary to consider the authoritative force of a decision of the supreme court of the United States, deemed clearly erroneous, because, upon examination, it will be apparent that a majority of that court have not decided that freemen of servile African descent are not citizens of the United States. No occasion arises,

therefore, for the discussion of this grave, important and vexed question, as to how far, and to what extent, the decisions of that court are obligatory upon the courts of a state.

That freemen of African descent are citizens of the United States is most conclusively shown in the clear and elaborate opinions of Mr. Justice McLEAN, and Mr. Justice CURTIS, in which, with a fullness of learning and a cogency of argumentation rarely equalled, they have demonstrated their right to citizenship in the land of their birth.

The opinion of Mr. Justice CATRON is made to depend upon his peculiar views of our treaty with Louisiana, and does not touch upon the inquiry of the senate of this state as to citizenship.

That his views concur with those of Mr. Justice McLEAN and Mr. Justice CURTIS, is made most manifest by his very able opinion in *Fisher's Negroes* v. *Dobbs*, 6 Yerg. 199, pronounced by him when Chief Justice of Tennessee, in which he uses the following most explicit language:

"The idea that a will emancipating slaves, or a deed of manumission is void in this state, is ill founded. It is binding on the representatives of the devisee in the one case, and the grantee in the other, and communicates a right to the slave; but it is an imperfect right, until the state, the community of which such emancipated person is to become a *member*, assents to the contract between the master and the slave. It is adopting into the body politic a *new member*, a vastly important measure in every community, and especially *in ours*, where the majority of free men, over twenty one years of age, govern the balance of the people, together with themselves; where the *negroes vote at the polls*, is of as high value as that of any man. Degraded by their color and condition in life, the free negroes are a very dangerous and most objectionable population where slaves are numerous. Therefore, no slave can be safely freed but with the assent of the government where the act of manumission takes place. But this is a mere matter of public policy, with which the master or the slave cannot concern. It is an act of *sovereignty* just as much as naturalizing a foreign subject. The highest act of sovereignty a government can perform, is to adopt a *new member* with all the privileges and duties of *citizenship*."

The plea in abatement in the circuit court of Missouri was, that the plaintiff, being of servile origin, was not a citizen of Missouri, and therefore could not maintain his suit. This plea was overruled, but upon the *facts as agreed*, the court held that he was not a citizen, and gave judgment for the defendant. It was held by Mr. Chief Justice TANEY, and Justices WAYNE and DANIEL, that "this judgment on the plea in abatement, was erroneous."

According to the views of Mr. Justice NELSON, the plaintiff being upon the agreed facts a slave, by the law of Missouri, could not maintain this suit, and his conclusion "was that the judgment of the court below be affirmed." Mr. Justice GRIER "concurred in the opinion delivered by Mr. Justice NELSON, on the questions discussed by him."

What their decision may be on the subject matter of this inquiry, is not disclosed, but as the law favors life and liberty, and as the equality

of all before the law is the elementary principle of our institutions, it is not unreasonable to assume, in the absence of proof to the contrary, that they will coincide with the other members of the court, to whose opinions allusion has just been made, and according to which, free men of African descent are citizens.

But whatever may be the authoritative force of a decision of the supreme court of the United States, there can be no doubt that its statements, as to the past history of the country, are binding neither on the historian nor the jurist. In the case under consideration, the opinion of Mr. Chief Justice TANEY rests upon the degraded condition of the African race, and certain deductions which he claims to draw from the alleged public opinion in reference to them. "They had," he remarks, "for more than a century before, been regarded as of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no *rights which the white* man was bound to respect; and that the *negro might justly and lawfully be reduced to slavery* for his benefit. He was bought and sold, and treated as an ordinary article of merchandise, whenever a profit could be made by it. This opinion was at *that time, fixed and universal* in the *civilized* portion of the white race. It was regarded as an axiom in morals, as well as in politics, which no one *thought of disputing, or supposed to be open* to dispute; and men in every grade and position in society, daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."

On the 6th of July, 1775, the provincial government of Georgia "resolved, 4, that we will neither import nor purchase any slave from Africa, *after this day.*"

The continental congress, on the 6th of April, 1776, resolved "that no slaves be imported in any of the United States."

The convention of Delaware, on the 27th of August, 1776, article twenty-seven, resolved "that no person hereafter in this country from Africa, *ought* to be held in slavery on any pretense whatsoever, and no negro, Indian or mulatto slave, *ought* to be brought into the country from any part of the world whatever."

Virginia, in the session of 1778, passed an act for preventing the further importation of slaves by which it was enacted by chapter one, section one, that "after the passage of this act, no slave or slaves shall hereafter be imported into this commonwealth by *sea* or *land*; nor shall any slave so imported *be sold* or bought by *any person* whatsoever," and by section three of the same act, "every slave imported into this commonwealth contrary to the true intent and meaning of this act, shall, upon such importation, become free." 9 Hening, st. 471.

When the constitution was formed, the word slave was carefully excluded, out of deference to the views of a large portion of its

members. "The northern delegates," says Mr. Iredell in the North Carolina convention, Elliot, 174, "owing to their peculiar scruples, chose that the word slave should not be mentioned."

Mr. MASON, of Virginia, described the slave trade as an "infernal traffic," and held it essential in every point of view, that the general government should have power to prevent the increase of slavery. 5 Elliot, 458.

"Mr. MADISON thought it wrong to admit in the constitution the *idea* that there could be property in men." 5 Elliot, 478.

"We intend this constitution," says Mr. MADISON, addressing the convention, "to be the great charter of human liberty to the unborn millions who shall enjoy its protection, and who shall never see that such an institution as slavery was ever known in our midst."

Indeed, no historic facts are better established than that the general sentiment of the country, north and south, was against slavery, and that its entire abolition was equally desired and expected, and that none were more anxious for its utter and final extinction, than the Jeffersons and Madisons of that day.

But these remarks of C. J. TANEY, if applicable to the slave, can furnish no basis for his argument; for the slave being legally a mere chattel, cannot, while he continues such, become a citizen; and the necessary degradation of the slave affords no reason for the denial of citizenship to the free man.

If they are intended to express the condition of the free man of African descent, and of the general sentiment of the country in regard to them, no more melancholy illustration can be furnished of, no more terrible denunciation can be uttered against a system, than that its results are such that even freedom will not elevate the subject, nor free and liberal institutions humanize the dominant race; that the former dare not claim their legal rights and the latter will not respect them.

The justice of these remarks, as relating to the free men of either race, even at the south, may well be doubted. "Indeed," says CRABB, J., in *Vaughan* v. *Phebe*, Mar. & Yer. (Tenn.) "it is no light matter to be a *freeman* in these United States. Freedom in this country is not a mere name—a cheat with which the few gull the many. It is something substantial. It embraces within its comprehensive grasp all the useful rights of man; and it makes itself manifest by many privileges, immunities, external public acts. It is not confined, in its operations, to privacy, or to the domestic circle. It walks abroad in its operations; transfers its possessor, even if he be black, or mulatto, or copper-colored, from the kitchen and the cotton field to the court house and the election ground; makes him talk of magna charter and the constitution; in some states renders him a politician; brings him acquainted with the leading citizens; busies himself in the political canvass for office; takes him to the ballot box; and above all, secures to him the

enviable and inestimable privilege of trial by jury. Can it be said that there is nothing of a public nature in a right that thus, *from its necessary operation*, places a man, in many respects, on an equality with the richest and the greatest, and the best in the land, and brings him in contact with the whole community ? "

That there should be a prejudice against men just emerging from a servile condition, and against the color of those thus emerging, is neither a matter of doubt, nor a cause of wonder. The pride of race is but a more extended pride of birth, and though not particularly consistent with popular institutions, is nevertheless of unquestioned existence.

An argument is attempted to be drawn against the citizenship of the African race, from the legislation of the different states in reference to marriage between the races, and the organization of the militia.

The marriage to be prohibited, implies parties of each race desirous of forming the connection prohibited, else there would be nothing to prohibit. Being desirous of forming the connection, it is apparent that those of each race thereby prevented would equally suffer in their feelings from the prohibition, which in its operation is most impartial. The statutes, on this subject, apply equally to the white and the black, and are designed to prevent all who are desirous to enter into such marriage, from so doing. It shows that the legislature deems such unions inexpedient, and as a matter of public policy to be prohibited ; but it is difficult to perceive why it is more onerous upon one race than the other, (for the assumption is, that both desire it, and hence the prohibition,) or why it should deprive either of citizenship.

The constitution of the United States confers upon congress the power " to provide for organizing, arming and disciplining the militia," and the state regulations on this subject are based upon the act of congress which provides for the enrollment of the " white " citizen. It is not readily perceived how this can be regarded as " the entire repudiation of the African race " by a state, when it is simply in accordance with an act of congress, or why the exemption from a burthen should be deemed so conclusive a reason for the deprivation of a right.

That in many of the states, as in this, they are eligible to office, is unquestioned. Equally so is it that they are not elected. But the great mass of the population of the country are eligible, but are not elected to office. Non-election is no proof of want of citizenship in one man more than another who may not happen to be elected.

The judicial opinions to which reference has been made will be found to afford little authority for the doctrines in support of which they have been cited.

It seems, from examining the case of *Crandall* v. *State* 10 Conn. 339, that the legislature of Connecticut passed a statute prohibiting

schools for the education of free colored persons; that the plaintiff, in error, established such school in violation of the statute; that she was thereupon indicted and convicted; that the presiding judge, in his charge, instructed the jury that free negroes were not citizens of the United States; that exceptions to his rulings upon this, and other questions arising during the trial, were taken; that upon their hearing, the court above reversed the judgment of the court below, upon other grounds than that of citizenship, expressly declining to consider that, as not being necessary for the reversal of the judgment against the original defendant.

In *Amy* v. *Smith*, 1 Lit. (Ken.) 334, the Court says, "It results that the plaintiff cannot have been a citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society upon which, by the constitution of *the states*, was conferred a right to enjoy *all* the privileges and immunities appertaining to the state. That this was the case there is no evidence in the record, and the *presumption is against it.* * * It is true that when the plaintiff resided in Pennsylvania, and removed to Virginia, the constitution of the United States had not then been adopted; and prior to its adoption, *the several states might make any persons whom they chose, citizens.* But, as the *laws* of the United States do not authorize any but a white person to *become* a citizen, it marks the public sentiment upon the subject, and *creates a presumption* that no state has made persons of color citizens, and this *presumption must stand*, until positive evidence to the contrary was produced. But none such was produced, either as to Pennsylvania or Virginia."

This opinion concedes that free colored persons *might be citizens after the adoption of the constitution*, but claims that the presumption is against it, and that such presumption must stand till the contrary is established, which, in that case, was not done.

In *State* v. *Clairbourne*, 1 Meigs (Ten.) 339, the decision rests on the ground that those only are to be regarded as citizens, who are entitled to privileges and immunities of the most favored class. "The meaning is," say the court, "that no privilege enjoyed by, or immunity allowed to the most favored class, shall be withheld from the citizens of any other state."

The argument against the presumption of the citizenship of free men of African descent, is drawn in the cases cited from the fact that they labor in certain states under disabilities not incident to the white race, and from the assumption that the possession of entire equality of political power is essential to constitute them citizens. But this assumption is unsound. If it were true, a citizen removing from a state in which a property qualification is not required for the right of suffrage, into one where it is, would cease to be a citizen, unless possessing the amount made requisite by the laws of the state into which he has removed. "But surely," says GASTON, J., in *State* v. *Manuel*, "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 citizens, 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, it would be to introduce an intermediate state between citizens and not citizens. The term 'citizen,' as understood in our law, is precisely analogous to *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." These views seem to meet the cordial concurrence of Chief Justice TANEY. "Undoubtedly," he remarks, "a person may be a citizen, that is, a *member* of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote, or hold a particular office, those who have not the necessary qualifications cannot vote or hold the office, yet they are citizens." It is thus apparent that the reasoning of the cases cited in his opinion, to show that because an African may not have all political rights he is therefore not a citizen, is overruled by its own clearly expressed doctrines, and is pronounced by him to be unsound and fallacious.

In conflict with the opinion of Chief Justice TANEY, will be found the case of *Legrand* v. *Darnall*, 2 Pet. 664.

"It appears," says Chief Justice TANEY, in his account of the case, "from the report that Darnall was born in Maryland, and was the son of a *white man by one of his slaves*, and his father executed certain instruments to *manumit him*, and devised him some landed property in the state. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he *refused* to pay *the notes* until he could be better satisfied as to Darnall's right to convey. Darnall had in the meantime taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the district court of Maryland." Legrand raised no objection to the jurisdiction of the court in the suit at law, *because* he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand *thereupon filed his bill on the equity side* of *the circuit court, stating that Darnall was born a slave and had not been legally emancipated*, and could not, therefore, take the land devised to him, nor make Le-

grand a good title, and praying an injunction to restrain Darnall from proceeding to execution on the judgment, *which was granted.* Darnall answered, averring that he was a freeman, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the circuit court was of opinion that Darnall was a freeman and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, *upon the appeal of Legrand.*

This is the case as stated by Chief Justice TANEY.

"The bill alleges," says DANIEL, J., by whom the opinion of the court was given, "that the mother of Nicholas Darnall was the *slave* of the testator, and *Nicholas was born* the slave of his father, and was between ten and eleven years old at the time of the death of the testator." "The appellee *admitted all the facts stated in the bill*, except that of his inability to gain a maintenance when his freedom commenced," &c.

The reporter says, "the case was submitted by TANEY, (then at the bar and now Chief Justice,) for the appellant, without argument, he stating that it had been brought up merely on account of its great importance to the appellee, which rendered it *desirable that the opinion of the supreme court* should be had on the matter in controversy."

The supreme court has no jurisdiction except when there is the necessary averment of citizenship on the part of the plaintiff and defendant. It may be assumed that such averments were made in the suit at law; and if so, as there was no plea in abatement, the record would show a case in which the court had jurisdiction.

But the bill set forth that "Darnall was a negro of the African race," —that he was born a slave of a slave mother, and all this was admitted in the answer, and appears of record.

"When a plaintiff," remarks TANEY, C. J., "sues in a court of the United States, it is necessary that he show in his pleading that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue therein. And if he omits to do this, and should, by any *oversight of the court*, obtain a judgment in his favor, the judgment will be reversed in the appellate court for want of jurisdiction in the court below." But that Darnall was a free negro of the African race—a slave by birth—the child of a slave mother—was alleged in the bill and admitted in the answer, and appeared of record. If these facts are inconsistent with citizenship, then his want of citizenship was patent in the proceedings, and no plea was necessary, and the bill should have been dismissed; "for," remarks C. J. TANEY, "the want of jurisdiction in the court below may appear on the record without any plea in abatement." He further adds: "Where the defect of jurisdiction is *patent* on the record, this court is bound to reverse the judgment, though the defendant has not pleaded in abatement to the jurisdiction of the inferior court."

Notwithstanding all this, the court in the equity case assumed jurisdiction and adjudicated upon the rights of the parties, when, if African descent is a bar to citizenship, they had no jurisdiction whatsoever.

"Notwithstanding," says C. J. TANEY, "if anything in relation to the construction of the constitution can be regarded as settled, it is that which we now give to the word 'citizen,' and the word 'people,'—that is, that free colored men of African descent, from slave ancestors, are not citizens; yet the learned counsel for the appellant, *when the want of jurisdiction was thus apparent, appealed from one court not having jurisdiction to another court in the same category, for the purpose of obtaining its opinion in a cause in which they had no jurisdiction;* and the court before which the appeal was pending, thus without jurisdiction, and where jurisdiction could not be given by consent, instead of dismissing the action, as by law they were bound to do, heard and determined it. "And certainly," remarks C. J. TANEY, "an error in passing a judgment upon the merits in favor of either party, in a case which it is not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit."

Such is the case of *Legrand* v. *Darnall.* The jurisdiction of the court could not attach, because Darnall, if the decision of C. J. TANEY be correct, was not a citizen. It could not attach, because in another suit, sought to be enjoined, false averments of citizenship had been made. The suits were several and distinct. It would be absurd to hold, because a suit at law had been brought in which there were false averments of citizenship, and to which no plea in abatement had been filed, that such *false averments* would confer jurisdiction in equity, when the want of jurisdiction was fully disclosed by the record.

It is true the ability to convey did not depend upon citizenship; but the ability to sue or be sued, in equity, did; and that is the only matter pertinent to the question of jurisdiction.

It might have been desirable to prevent the plaintiff in the suit at law (Darnall) from enforcing his judgment "by execution, if the court were satisfied that the money was not equitably and justly due;" but howsoever desirable, it is not easy to perceive how it could be done by a court not having jurisdiction, and when such want of jurisdiction was "patent on the record."

It is true the question was not raised; but, say the court in *Rhode Island* v. *Massachusetts*, 12 Pet. 718, "whether the want of power is objected to by a party, or is apparent to the court, it must surcease its action or proceed extra judicially."

This and similar cases are only important as showing that the practical construction of the constitution by the supreme court of the United States, and by the most eminent members of the bar, has been for more than half a century in favor of the citizenship of those of African descent.

It was admitted in the *U. S.* v. *Ritchie*, 17 How. 524, that by the laws of Mexico, an equality amongst all the inhabitants, whether European, African, or Indian, was recognized, and that they were all citizens of that republic, and by treaty became citizens of this government.

Now however difficult it may be to find anything in the constitution from which an inference can be drawn that citizenship depends upon color, or descent, when there is no allusion therein in reference to citizenship, to either, it is still more difficult to find language from which it can be inferred that the native born free men of a particular race are to be debarred from citizenship, while that great privilege is to be accorded to the foreign born of the same race. But if all this can be found in the constitution, then the general proposition denying citizenship to free colored men of servile origin, must be qualified by the exception of those of foreign birth, who by treaty have become citizens.

The clause in the constitution as to general citizenship, would, according to the different judicial expositions of members of the supreme court, read thus: "Citizens of each state (the free native colored citizens of each state excepted, but including those of the same race who have become citizens of the United States by treaty) shall be entitled to all privileges and immunities of citizens in the several states."

This, to be sure, does not read much like the original article, but such is to be its reading as now claimed.

The "two clauses in the constitution which point directly and specifically to the negro race," refer only to those who were slaves, and not to the free. That the slave is a citizen, is not pretended. But these clauses refer exclusively and entirely to the slave; and while it may be conceded that they "show clearly that they were not regarded as a portion of the people, or citizens of the government then formed," it is not easily seen how they can show any such thing as to free men, to whom they do not and cannot refer.

As these clauses apply only to the *status*, or condition of a particular class, they can in no way affect the rights of those who do not belong to that class. So far as regards the free they might as well be eliminated from the constitution, for they do not directly, nor impliedly affect them.

"It is true," says Chief Justice TANEY, in the same case, "that every person and every class and description of persons, who were at the *time* of the *adoption of the constitution recognized as citizens in the several states, became also citizens of this new political body;* but none other. It was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty, were intended to embrace those only who *were then members of the several state communities*, or who should

afterwards, by *birthright* or *otherwise*, become members, according to the provisions of the constitution, and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities, into one political family, whose power for certain specified purposes was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges, outside of his state, which he did not before possess, and placed him, in every other state, upon a perfect equality with its own citizens, as to rights of person and rights of property; it made him a citizen of the United States."

It thus appears, that if in a single state the free men of African descent were, by its constitution, citizens at the time of the adoption of that of the United States, they are, in the clearly expressed and deliberate judgment of Mr. Chief Justice TANEY, citizens of the United States. Now there are no historic facts more completely established, than that during the revolution they were enlisted, and served as soldiers; that they were tendered and received as substitutes; that they were required to take, and took the oath of allegiance; that they held real estate; that (without recurring to other instances) they were citizens in North Carolina and Massachusetts, under constitutions formed before that of the United States, by the clear and express language of those constitutions; that they were adjudged to be citizens of those states, by the repeated decisions of their highest judicial tribunals; *State* v. *Manuel*, 2 Dev. and Bat. 20; *State* v. *Newcomb*, 5 Iredell 253; *Com.* v. *Aves*, 18 Pick. 210; that in North Carolina they exercised the right of suffrage, and all the privileges of citizenship, till the revision of their constitution in 1835, and that in Massachusetts they have exercised, and continue to exercise it to this day.

If these things be so, and that they are so cannot be denied or even doubted, and if they had been known to the learned Chief Justice, his conclusions would have been different, for he says "every person and every class and description of persons, who *were at the time of the adoption of the constitution recognized as citizens of the several states, became also citizens of this new political body.*" His published opinion, therefore, rests upon a remarkable and most unfortunate misapprehension of facts, and his real opinion upon the actual facts must be considered as in entire and cordial concurrence with that of his learned dissenting associates.

Each state being sovereign, and having full and uncontrolled power over the *status* of its inhabitants, the constitution of the United States having imposed no restrictions as to the color or race of those who may be citizens of a state, the people of this state, in convention assembled, formed a constitution upon principles of the purest democracy, making no distinctions and giving no preferences, but resting upon the great *idea of equality before the law.*

In the convention by which this constitution was formed, a motion was made by Mr. VANCE, of Calais, to exclude negroes from the rights of suffrage.

Upon that motion, Mr. HOLMES remarked as follows: "The Indians not taxed were excluded, not on account of their color, but of their political condition. They were under the protection of the state, but they can make and execute their own laws. They have never been considered members of the body politic. But I know of no difference between the *rights* of the negro and the white man. The Almighty has made none. Our declaration of rights has made none. That declares that all, without regard to colors, are born equally free and independent." Perley's Debates, 94.

Upon the vote being taken, the motion was negatived.

It is therefore demonstrable, by recurring to the constitution of this state, that those who framed the constitution, and the people by whom it was adopted, regarded free colored persons (natives) as citizens of the United States, and entitled to the right of suffrage.

The constitution having been adopted, the state applied for admission, and was admitted into the Union as one of the United States. Her constitution is republican. She is equal among equals. She has determined the citizenship of her inhabitants. Her citizens are entitled to that equality of right and privilege which, by the constitution, is accorded to "the citizens of each state." To discriminate between her citizens, when she has seen fit to make no discrimination, would be to trench upon her rights as a sovereign state.

Adopting, then, the views of those by whom the constitution was framed, so far as it can be gathered from their cotemporaneous action and exposition; following its plain and unambiguous language; relying upon the views of the JEFFERSONS, MADISONS and MONROES of the early days of the republic; upon the decisions of the supreme court of the United States, and upon those of the state courts; upon constitutions formed before that of the United States, and upon the judicial construction of those constitutions; upon the legislative enactments of, and the treaties made by this government; reposing upon the judicial authority of the MARSHALLS, the CATRONS, and the GASTONS, the KENTS, and the STORYS; recognizing as obligatory the acknowledged and unquestioned principles of international and municipal law; after a careful and deliberate examination of the whole subject, an examination due alike to the great questions of American citizenship and state sovereignty, the conclusions to which I have arrived, are these:

That free persons or African descent and servile origin, being natives, were citizens under the confederation;

That they were citizens in most of the states before the adoption of the constitution of the United States;

That they have not been deprived of their citizenship by the constitution;

That the constitution imposes no restriction upon the state by which any portion of its native born inhabitants are prohibited from being citizens;

That each state being sovereign has full right to determine the political condition and citizenship of its native inhabitants;

That the people of Maine in the exercise of their sovereign power have conferred citizenship upon those of African descent;

That being citizens of Maine, they are *by that fact* citizens of the United States by virtue of that clause in the constitution by which "the citizens of *each* state SHALL be entitled to all privileges and immunities of citizens in the several states";

And, that consequently, having the required qualifications, they are entitled to vote.

With great consideration,

I have the honor to be,

Your obedient servant,

JOHN APPLETON.

HON. MR. CHAPMAN, *President of the Senate of Maine.*

BANGOR, July 3, 1857.

OPINION OF JUDGE DAVIS.

To the HON. HIRAM CHAPMAN, *President of the Senate of Maine:*

I HAVE the honor herewith to present my opinion, as one of the justices of the supreme judicial court, in answer to the question propounded by the order of the senate, of March 26, 1857—"Are free colored persons, of African descent, having a residence established in some town in this state for the term of three months next preceding any election, authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives?"

By "free colored persons of African descent," I conclude that the senate, in their order of March 26th, referred only to persons of that description born within the territorial limits of the United States. For, by the naturalization laws of this country, no aliens can become citizens unless they are "white persons."

By article second, section first, of the constitution of this state, it is provided, that

"Every male citizen of the United States, of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians, not taxed, having his residence established in this state for the term of three months next preceding any election, shall be an elector for governor, senators and representatives."

This provision so restricts the right of suffrage that only about one-fifth part of the population possess it, as a personal franchise; and it is expressly limited by it to "citizens of the United States."

The term "citizen," in its general and comprehensive sense, includes all the inhabitants, or permanent residents in a country. By most lexicographers, and by some writers upon the science of law, citizenship is made to depend upon the possession of the right of suffrage, and other franchises of the government. WEBSTER defines a citizen to be "a person, native or naturalized, who has the privilege of exercising the elective franchise," and is able "to purchase and hold real estate." BOUVIER, in his law dictionary describes a citizen as "one who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers; and who is qualified to fill offices in the gift of the people."

These definitions approximate, perhaps, to the popular sense of the term. But they are far too inaccurate to be accepted in determining

personal rights under the constitution and laws of the United States. They describe but few, if any, of the essential attributes of citizenship.

All voters are not, necessarily, citizens. The right of suffrage is merely municipal, controlled by local law. Any state may confer this right on aliens; and the United States may do the same. It has, in fact, been done by some of the states, and by congress, within the territories subject to their control.

Nor are all citizens voters. Women and children, and persons under guardianship, and paupers, are all citizens, if born in this country; but they have not the right of suffrage.

Nor is the capacity to purchase and hold real estate any longer a certain test of citizenship. It was otherwise by the English common law, and it remained so in the United States during the earlier period of our history. But a more liberal policy has since prevailed, so that *aliens* are permitted to hold real estate, by special provision of the constitution or the laws of most of the states. It has never been contended, however, that they are thereby made *citizens* of the states, or of the United States. It is manifest, therefore, that citizenship, under the constitution and by the laws of the United States, is something outside and independent of the franchises and privileges which usually, but not uniformly, accompany it.

A citizen is a subject of the government within whose territorial limits he resides. To this government he owes allegiance; from it he is entitled to protection, whether he is at home or abroad. (For a clear statement of this doctrine, see Mr. MARCY'S letter of September 26, 1853, to the Austrian minister.) The term "citizen" implies *residence* and *allegiance;* but such residence is not affected by temporary absence from the country, *animo revertendi.* By the English common law, allegiance is perpetual; the citizen cannot divest himself of it, except by special consent of the government. Whether this rigorous rule is still the law of this country, has never been fully settled. But however this may be, so long as one remains a citizen of the United States, protection is due on the one hand, and allegiance on the other. And if such citizen adheres to the enemies of the country, or engages in war against it, he is guilty of treason.

It is true that aliens, residing here, are protected by our government, and, therefore, they owe a qualified allegiance. But they may expatriate themselves at pleasure, and then the duty of the government to protect them ceases; and even while here, as they are but partially clothed with the immunities of citizenship, so they are free from most of its obligations and burdens.

But all citizens, of whatever age, sex or condition, owe an unqualified, entire allegiance. Their privileges under the government may depend on age, sex or condition, and not on their allegiance; their citizenship is determined by this alone. And as no person born within

the jurisdiction can avoid this allegiance, it is not optional with him whether to assume it; so the government cannot avoid its responsibility to afford protection; it is not optional with that whether to accept such allegiance. This principle is as old as the common law, and is fundamental in all free governments. In this country, the Indian tribes have always been permitted to maintain their separate nationalities, and have never been considered within our jurisdiction. But with this exception, every person born within our territorial limits owes this allegiance, and is constituted a citizen, as an inevitable consequence of his birth; and no alien can become a citizen, until he voluntarily assumes such allegiance under the solemnities of an oath. All civilized nations have always claimed and exercised the right to determine upon what conditions an alien might become a citizen.

All persons, wherever born, residing in the United States at the time of the declaration of independence, and yielding to it an express or implied sanction, became parties to it, and are to be considered as natives, their social tie being coeval with our existence as a nation. (2 Kent's Com. 39.) There was, for a time, some doubt about the citizenship of those foreigners who came into the United States during the revolution. But it finally became the settled doctrine, that all persons, wherever born, residing in this country, and adhering to our government, at the time of the treaty of peace, in 1783, were to be considered as natives, owing allegiance. (3 Peters, 161–242.) All such persons were citizens of the United States at the time of the adoption of the federal constitution.

Under the confederation, each state exercised the power, and fixed the terms of naturalization for itself; and great confusion resulted from it. In Maryland, for instance, the Roman Catholics were numerous and influential. But in New York the feeling of hostility to this sect was so great, that they adopted a rule of naturalization which excluded them. Some states required a long residence; others one comparatively brief. And as the citizens of any one state had the rights of citizens in every other, conflicts were liable to ensue, and the evil became a serious one. It was this which led the states, when the constitution was formed, to relinquish to the federal government the exclusive power of naturalization, that there might henceforth be a uniform system. (Federalist, No. 32 and No. 42. Story's Com. 3, section 1098.) From that time, no one could be a citizen of the United States, or of any state, except by birth, or by naturalization, according to such laws as congress should enact.

It is not denied that the possession of the right of suffrage, and other franchises of the government, is some *evidence* that a person is a citizen. These privileges, though not granted to all citizens, are generally withheld from all who are not citizens. A man who has voted for twenty years in any state, may well be presumed to be a citizen.

Not that his voting does anything towards making him a citizen. It only creates the presumption that he *was born in this country*, or else *has been naturalized;* just as possession of real estate for twenty years secures a title; not that possession itself has any merit, but because it creates the presumption of *a prior grant.*

It is perfectly apparent that the term "citizen of the United States" is used in this sense in the federal constitution. It occurs but three times. In order to be eligible as a representative in congress, a person must have been "seven years a citizen of the United States;" or as a senator, "nine years a citizen of the United States;" or as president, "a *natural born* citizen of the United States." It is manifest that allusion is here made to the two modes of becoming a citizen; and there is a clear recognition of the common law principle that birth makes a person a citizen by *natural right.* And there is not in any part of the constitution the slightest foundation for the inference that citizenship should depend upon the possession of the franchises and privileges of the government; or that the federal government should have any power to deprive any citizen of his citizenship.

And it is quite as clear that the term "citizen of each state" is used in the federal constitution in the same sense. When the several states merged themselves as one nation, under one government, citizenship, in its relation to foreign nations, was national only. Allegiance abroad could not be severed by any state, but only by the United States. Still, the states retain their sovereignty, and all citizens owe allegiance to them; and, in that sense, they are citizens of the states. Treason can be committed, as well against the states, as against the United States.

Every citizen of the states is a citizen of the United States; but what relation do the citizens of the several states sustain to each other? Congress has power to naturalize *foreigners;* but if a citizen of Massachusetts removes to South Carolina, who shall say whether he must be naturalized in order to become a citizen of the latter state? If each state might decide this for itself, there would be no reciprocity, and the Union, instead of being "more perfect," would be less perfect than it was under the confederation. For by that it was provided, in the fourth article, "that the free inhabitants of each state should be entitled to all the privileges and immunities of free citizens in the several states." Accordingly a similar provision was incorporated into the federal constitution. "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (Article four, section two.) This provision, *proprio vigore*, makes every citizen of the United States a citizen of the state in which he resides; and every citizen of each state a citizen of the United States. For it is clear that the states, when they entered into this compact, reserved no right to exclude from citizenship any class of free persons

born in the United States. If otherwise, citizens of one state might be deprived of "the privileges and immunities of citizens" in another. So that every person born in the United States, or naturalized, or made a citizen by any treaty, has a right to citizenship in each state, of which that state cannot deprive him. If one state can dissolve the allegiance of any class of persons residing within its limits, and exclude them from citizenship, while the same class of persons are citizens of other states, we are still exposed to all the conflicts and troubles to which the states were liable in consequence of their separate power of naturalization under the confederation; and the evils are magnified and aggravated by their liability to fall upon native born, as well as naturalized citizens.

And as no state can exclude any class of persons from citizenship, so by granting the right of suffrage, and other franchises, to persons not citizens, they do not make them citizens. Every state may grant these franchises to *aliens*, but it does not thereby make them citizens of the state. Nor does the withholding of these franchises deprive any class of persons of any of the "privileges or immunities of citizens." The meaning of these terms, according to the highest authority, "is confined to such privileges and immunities as are fundamental, and belong of right to all free governments; such as the rights of protection of life and liberty; to acquire and enjoy property." (2 Kent's Com. 71.)

Judge STORY gives the same construction to this provision. "It is obvious that if the citizens of each state were to be deemed *aliens* to each other, they could not take or hold real estate, or other privileges, except as other aliens. The intention of this clause was to confer on them *a general citizenship*." (Story's Com. 3, section 1800.)

PARKER, Chief Justice of Massachusetts, in *Abbott* v. *Bailey*, (6 Pick. 89,) gives it the same construction. Citizens of any state "shall not be deemed *aliens* in any other; but they may take and hold real estate, and may, *according to the laws of such state*, enjoy the full rights of citizenship, *without being naturalized*."

And as no state, though it may withhold the elective franchise from citizens, can deprive them of their citizenship, so the federal government cannot deprive any class of persons of their citizenship. All free persons, native born, and all aliens, after they are naturalized, possess an *indefeasible* citizenship, of which no department of the federal government can divest them. The right of native born persons to citizenship is not within its jurisdiction. Not only is there no grant of any such power in the constitution; not only would the exercise of any such power be establishing privileged classes, in violation of its letter and spirit; but the existence of any such power would involve the total annihilation of the sovereignty of the states. Citizenship is indispensable to the security of other rights. If the federal government may

deprive any class of persons of their citizenship, it may at any time reduce the population of any state, in whom the sovereignty resides, to the condition of aliens. The mere statement of the proposition is a sufficient refutation of it.

If the foregoing principles are sound, the following propositions seem to me conclusively to follow: *that* all free persons, born within the limits and jurisdiction of the United States, are citizens thereof, and, as such, are citizens of the several states where they reside; *that* the citizens of each state have the right to become citizens of any other state, simply by a change of residence, without any consent, or right of refusal, on the part of such state; *that* the right of suffrage is not an essential attribute to citizenship; *that* as states withhold this franchise from many classes of citizens, so they have power to confer it upon aliens; *but that* neither any state, *nor the federal government*, can deprive any class of free persons, born within the United States, of their citizenship.

I need not say that these propositions affirm the citizenship of free colored persons of African descent. That this class of persons, at the time when our independence was established, were regarded as citizens throughout the United States, and that in nearly all the states they exercised the most important franchises, are facts that cannot be controverted. That they owed allegiance to the government, both state and national, and would have been held guilty of treason for the same acts that would have constituted treason in other citizens, cannot be doubted. That they were able, without regard to special provisions of statute, to purchase and hold real estate, in every state, north and south, has never been questioned. The conclusion is irresistible, that they were, and are, citizens of the United States.

Even slaves, *while remaining such*, have been regarded as, in some sense, citizens. They were once held, by the supreme court of New York, capable of holding land granted by the government for services during the American revolution. This doctrine was justified on the ground of its necessity for purposes of justice; "the gratitude of the country was due to the defenders of our rights in the revolutionary struggle." (*Jackson* v. *Lervey*, 5 Cowen, 397.) But though this may be questioned, it is true, that in contemplation of law, slaves are citizens whose rights are held in abeyance by the power of the master; whom the master alone, without any concurring act on the part of the state, subject only to some statutory regulations, can at his own pleasure, by manumission, reinvest with all the rights and obligations of citizenship. The master, by manumission, only unchains what was bound, permitting the exercise of rights that previously existed, though dormant, or suspended.

Emancipated slaves, like other free persons of African descent, may hold and transfer real estate, may sue and be sued, and they are held

as citizens, in distinction from *aliens*, in all the slave states. A few years before Mr. TANEY was appointed Chief Justice of the United States supreme court, he was counsel for one who was sued by an emancipated slave, in the circuit court for the district of Maryland. Instead of pleading this fact *to the jurisdiction of the court*, he defended on other grounds, by a petition for an injunction; but the suit was sustained, on appeal, in the supreme court of the United States. (*Legrand* v. *Darnall*, 2 Pet. 664.) The question of jurisdiction was not raised; but the fact *that it was not*, indicates that the idea that such a person is not a citizen of the United States, has had its birth since that time. And as late as 1843, an emancipated slave was held by C. J. TANEY to be capable of suing in the circuit court, and his petition for his freedom was sustained in the supreme court of the United States. (*Williams* v. *Ash*, 1 Howard, 1.)

I have already alluded to the evils arising under the confederation from the separate powers of naturalization still retained by the states, in connection with the right of citizens of each state to the privileges of citizens in every other. So that, though a Roman Catholic could not be naturalized in New York, except on such terms as he would not accept, he could become a citizen of some other state, and then, by a change of residence, could be a citizen of New York. "Thus," said Mr. MADISON, "the law of one state could be preposterously rendered paramount to the law of another, within the jurisdiction of another." (Federalist, No. 42.) And he said that it was owing to mere casualty that serious embarrassments were escaped; but that the federal constitution "had made provision against them, and all others proceeding from the defect of the confederation on this head." But if citizenship is to depend on *color*, he was greatly mistaken. The ills we have found are worse than those from which we escaped.

In order to remedy such evils, it was essential that citizenship should be a matter of *certainty* and of *uniformity*.

But if color was to be a test, there could be no *certainty*. By intercourse, either licit or illicit, the African race have so commingled with the Anglo-Saxon, that, in regard to great numbers of the population of this country, it is very *uncertain* to which race they belong. In the southern courts, it is a question of fact, constantly arising, to be decided by juries, not only upon testimony, but by personal inspection. If citizenship hangs on the issue, we shall need a new class of experts before all tribunals, from the highest national courts to the humblest judges of elections.

Neither could there be any *uniformity*. To secure this, and avoid the evils incident to the confederation, the constitution empowered congress "to establish a *uniform* rule of naturalization." But there is no uniform rule among the states as to what constitutes a "white person." In some of the states, the slightest preponderance of white blood,

though only of a sixty-fourth part, makes a person white; while in others it requires more than three-fourths, or, perhaps, more than seven eighths. (*Bailey* v. *Fiske*, 34 Maine, 77.) A person of only one-fourth African blood, in Maine, is a "white person." If color were the test of citizenship, he would be a citizen of this state; and, as such, entitled to all the privileges and immunities of a citizen in the other states. But if he should go to South Carolina, he would be denied all such rights, and be liable to be imprisoned, and, in certain cases, for no offense, to be sold as a slave. Such a rule of citizenship cannot be found in the constitution; it is repugnant to it, and cannot but tend to subvert and destroy it.

If it be said that history shows that at the time when the federal constitution was adopted, the white population of the country did not intend to admit colored persons of African descent to the privileges of citizenship, while the assertion is denied, it is also replied that we have no right to inquire what one class of persons intended, in derogation of the rights of any other class. It would be just as legitimate to inquire whether the African race intended to admit the whites to the privileges of citizenship. They all resided together, participants of that freedom which was the fruit of their common struggles and sacrifices. Whatever their disparity in numbers, or condition, neither had the right to eject the other from the common purchase, or make them aliens from the commonwealth. Such a right does not exist under any free government; certainly not under a government whose corner stone was laid upon the principle "that all governments derive their just powers from the consent of the governed."

But if the matter were pertinent, I affirm, as a historical fact, that at the time when our independence was established, the white population of this country did recognize the citizenship of colored persons of African descent, and did intend to secure to them the rights of citizens. That they at that time possessed the privileges and immunities of citizens in the states, and, in nearly all of them enjoyed the right of suffrage as a constitutional right, is beyond all question. The members of the congresses, both before and during the confederation, were chosen, in part, by such persons. They were bound to represent these persons as a part of their constituents; and no evidence exists that they were not true to their trust. On the contrary, the evidence is indubitable that, during the whole period of our struggles, from the commencement of the agitation which resulted in the declaration of our independence, to the adoption of the federal constitution in 1789, the freedom and elevation of the African race was a prominent and cherished purpose with the leading statesmen of the country, both north and south.

On the 20th of October, 1774, the first continental congress passed the following resolution:

"We, for ourselves, and the inhabitants of the several colonies whom we represent, firmly agree and associate, under the sacred ties of vir-

tue, honor, and love of country, as follows: we will neither import, nor purchase any slaves imported, after the first day of December next, after which time we will wholly discontinue the slave trade; and we will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it."

In 1775, the same congress solemnly denied that "the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others."

In 1776, the declaration of our independence was unanimously adopted, declaring "liberty" to be an unalienable right of "all men."

On the 25th of June, 1778, an effort was made to amend the fourth article of the confederation, providing that "the free inhabitants of each of these states, shall be entitled to all the privileges and immunities of free citizens in the several states," by inserting the word "white" after the word "free," and before the word "inhabitants," so that colored persons should no longer have the right of general citizenship. But the amendment was defeated, only two states voting for it. That body could not have made a more explicit declaration, that colored persons, of African descent, were citizens of the United States.

In 1787, congress unanimously adopted the ordinance for the government of the territory north-west of the Ohio river, declaring that "there should be neither slavery, nor involuntary servitude therein, except as a punishment for crime." So far as slavery is a suspension or temporary extinction of citizenship, what measure could have been better adapted to secure to colored persons the right of citizenship? And yet there was not a single vote against it, from that portion of the United States where slavery now exists.

Does not this record prove, beyond any doubt, that during this formative period of our national institutions, the people of this country, instead of entertaining any design to deprive colored persons of their rights, and exclude them from citizenship, recognized them as citizens of the United States, and adopted effectual measures to protect them as such?

If we turn to the legislation of the several states during this period, we find abundant evidence of the same historical fact. Vermont abolished slavery in 1777; Massachusetts in 1780; New Hampshire in 1784. Pennsylvania passed an act of emancipation in 1780; and Connecticut and Rhode Island in 1784. All this was under the confederation; and all persons so emancipated thereby became, without any question, at that time citizens of the United States.

Nor was any change made, or attempted, when the federal constitution was formed. Nearly one-half the states had abolished slavery, either absolutely, or prospectively; and the general expectation was that the others would do the same, at some future time; which was done afterwards by New York and New Jersey. The constitution was,

therefore, so framed, that while it should not interfere with slavery within the states, so long as it should exist, it would need no change or amendment when slavery should be abolished. *It was adapted to a free country.* Mr. MADISON declared, in the convention that framed it, that it ought to exclude "the idea that there could be property in man." That this character was given to it by the deliberate purpose of the convention, is evident from its action upon the clause for the rendition of fugitives. (Article four, section two.) As originally reported, it was as follows: "No person held to *servitude*, or labor, &c." On motion of Governor RANDOLPH, of Virginia, the word "servitude" was stricken out, and the word "service" inserted, by a unanimous vote; "the former being thought to express the condition of slaves, and the latter the obligations of free persons." (Madison papers.)

In whatever field the search is made, therefore, there is an entire failure of any evidence, contemporaneous with the adoption of the constitution, that the white population of the United States, if they had possessed the right, had any desire, or intention, to exclude the African race and their descendants from the benefits, privileges, and immunities of citizenship.

In 1823, the question was presented to the court of errors in the state of New York, whether the Indians belonging to the Six Nations were "citizens." And the court, in an elaborate opinion, pronounced by Chancellor KENT, decided that they were not citizens. The prominent ground of the decision was, that the Indians, instead of being incorporated among our own population, have always been permitted to maintain their own independent governments; "that they are not subjects, born within the purview of the law, because not born in obedience to us, but under the dominion of their own tribes"; and that from 1775, by numerous treaties and public acts, "we have recognized their tribes as national communities."

It will be noticed that not one position here taken as evidence, that Indians, living in independent tribes, are not citizens, can be applied at all to the colored population of this country.

The learned chancellor, in illustrating the subject, alludes to the privileges and obligations which usually attend citizenship. "Do we interfere with the disposition, or the tenure, or the descent of their property, as between themselves? Do we prove their wills, or grant letters of administration on their intestate estates? Do our Sunday laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them? Are they subject to our laws, and the laws of the United States, against high treason? And do we punish them as traitors, instead of public enemies, if they make war upon us? Are they subject to our laws concerning marriage and divorce; and would we sustain a criminal prosecution for bigamy, if they should change their wives,

or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend that every one of these questions must be answered in the negative. In my view, they have never been regarded as citizens or members of our body politic, within the contemplation of the constitution."

Is there one of these questions, if applied to colored persons of African descent, that *can be* "answered in the negative?" And if, in view of these facts, "it is idle to contend that Indians *are* citizens or subjects of the United States," is it not equally idle to contend that colored persons *are not citizens*? I can find no language that so fitly expresses my convictions in regard to the proposition—*that colored persons of African descent are not citizens*—as that employed by the Court in this case: "No proposition would seem to me to be more utterly fallacious, and more entirely destitute of any real foundation in historical truth. It is repugnant to all the public documents, and to the declared sense and practice of the colonial governments, and of the government of the United States." (*Goodell* v. *Jackson*, 20 Johns. 693.)

I have thus far discussed this question as if it were new. I am aware, however, that it has been raised, and opinions have been given, in the courts of several of the southern states, and that it has recently been discussed at great length in the case of *Scott* v. *Sandford*, by the supreme court of the United States. And in this case I understand it to have been distinctly decided, that colored persons of African descent, whose ancestors were slaves, are not citizens of the United States. That such is the opinion as promulgated by C. J. TANEY, cannot be questioned. It was announced by him as "the opinion of the Court;" and I do not perceive why the other members of the court should not be regarded as concurring in it, except upon those points which they have expressly disclaimed. The mandate to the circuit court could not have issued, except by order of a majority of the court. This mandate directed the case "to be dismissed for want of jurisdiction, for the reason that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the constitution." This was equivalent to an express denial that he was a citizen of the United States. And the ground of the decision was, that he belonged to a class of persons none of whom are citizens.

But though the supreme court of the United States have so decided, I do not consider their opinion as binding upon us, upon the question now presented to us. There may be cases in which we are bound to receive the decisions of that court as authority. How far this is the case is a disputed question. But it cannot extend to cases in which the powers of the state courts and of the United States courts are collateral, co-extensive and independent. Cases respecting the right of suffrage, though that right is limited by the constitution of this state

to citizens of the United States, are not cases arising under any law of the United States. (*Owings* v. *Norwood*, 5 Cranch, 344.)

And if our court, upon claim of any colored person to be admitted to those privileges which are granted by our state constitution to citizens, sustain such claim, the case is not within the appellate jurisdiction of the supreme court of the United States. (12 Wheaton, 117–129.)

The opinion of the court, in the case of *Scott* v. *Sandford*, should therefore receive that consideration, and that only, to which its intrinsic merits entitle it.

I do not propose to examine this opinion at length. A few extracts will show its scope, and the consequences legitimately resulting from its adoption as the settled doctrine and policy of the country:

"The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the constitution, and can therefore claim none of the rights and privileges which that instrument provides for, and secures to citizens of the United States." (p. 404.)

If they can claim none of the rights of citizens, should they visit the south they would have the right to no protection, except such as the sonthern states "might choose to grant them." (p. 405.) When a ship-master from Boston enters any port in South Carolina, his colored seamen may be taken from him, confined in jail, and sold into slavery to pay the jail fees, and there is no redress.

"For if they were entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws, and from the police regulations which the slave-holding states considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one state of the Union, the right to enter every other state whenever they pleased, singly or in companies, without pass or passport, and without obstruction to sojourn there as long as they pleased, &c. It is impossible, it would seem, to believe that the great men of the slave-holding states, who took so large a share in framing the constitution of the United States, could have been so forgetful or regardless of their own safety, and the safety of those who trusted and confided in them." (p. 417.)

And if free colored persons are not citizens, they may be banished from the states in which they reside; or such as will not go may be reduced to slavery again. The Governor of Virginia has more than once recommended this to the legislature of that state. "States may banish all free colored persons from their borders, or reduce such as will not go to slavery again." The Governor of Virginia, &c. The same may be done in Massachusetts, New York and Pennsylvania. And the fact that these persons have acquired property, support schools and churches, and sustain educated ministers, can make no difference. For,

"No distinction was made in this respect between the free negro or mulatto, and the slave; but this stigma, of the deepest degradation, was

fixed upon the whole race." Page 409. "The number that had been emancipated were few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population, rather than the free." Page 411. "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect." Page 407. "The state of public opinion had undergone no change when the constitution was adopted." Page 410.

It seems to me that such assertions and such doctrines need only to be stated, in order to be rejected. They are so clearly in conflict with the whole tone and spirit, both of the writings and the deeds of the great men of the revolution, that it is difficult to conceive how they can be credited by any intelligent, unprejudiced mind. The worst enemy of our institutions could hardly say anything better adapted to blacken the character of our ancestors, and cast reproach upon their memories.

If the Declaration of Independence "was not intended to include the enslaved African," but was a mere compact of their oppressors for their own advantage, while "the unhappy black race were never thought of or spoken of, except as property, and when the claims of the owner or the profit of the trader were supposed to need protection," then a decent respect for the opinions of mankind should have kept its authors silent. Such compacts had long been common enough, in limited monarchies, in aristocracies; even among brigands and pirates. Freedom of privileged classes, and equality among themselves, while trampling on the rights of others, was no new thing. The world did not need to be informed of it. As the manifesto of such a doctrine, the Declaration of Independence would not have merited the respect of mankind; it would not have justified a revolution; it would have given Washington and his compatriots no glory to fight for it, and their toil, and sacrifice, and blood, were offered in vain.

But it was not so. The Declaration of Independence was a heroic utterance of great truths, for all men; so understood by the world, so intended by its authors. They freely devoted fortune, honor, life, to sustain it. And they often avowed their purpose, as soon as the government should be established, to extend its blessings to the slaves. No man ever condemned slavery in stronger terms than Jefferson, Washington, and those who with them stood foremost in the revolutionary struggle. A resolution solemnly denying its right, was unanimously passed by the congress of 1775. The hope and the prophecy of general emancipation were the common theme of correspondence and public debate.

With this avowed purpose in view, the federal constitution was formed, and adopted by the people of the several states. It was designedly so made as to need no amendment when slavery should be abolished. Its privileges were granted to all, without distinction of

race or color. Free colored persons have always been recognized as citizens under it, and they are entitled to the same privileges and immunities which the constitution guarantees to other citizens. I am therefore of opinion that free colored persons, of African descent, if born in this country, are citizens of the United States; and that, with the same restrictions which apply to white persons, they are authorized under the provisions of the constitution of this state, to be electors for governor, senators and representatives.

WOODBURY DAVIS.