THE OPINION OF JUDGE CURTIS IN THE DRED SCOTT CASE.

The Boston *Courier* publishes a full report of the able and irrefutable Opinion of Judge Curtis, dissenting from the Opinion pronounced by Chief Justice Taney and a majority of the Supreme Court, in the Dred Scott case. It would occupy one entire number of THE LIBERATOR, in ordinary type. We can only give an extract from it this week, in which Judge Curtis takes up the subject of citizenship as regards a person of African descent. He remarks:—

I cannot, therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought; and the inquiry recurs whether the facts that he is of African descent and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri within the meaning of the Constitution and laws of the United States.

In Gassies *vs.* Ballon, 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The Court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for the purpose of jurisdiction, a citizen of that State. Now the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri, in the courts of the United States.

So that, under the allegations contained in this plea, and admitted by the demurrer, the question is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the Court that he is so; for no cause is shown by the plea why he is not so, except his descent, and the slavery of his ancestors.

The first section of the second article of the Constitution uses the language, 'a citizen of the United States at the time of the adoption of the Constitution,' and one mode of approaching this question is to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the confederation. By the articles of confederation a government was organized, the style whereof was: 'The United States of America.' This government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States, existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the confederation to govern the Territory of the United States out of the limits of the States, and consequently to sustain the relation of government and citizen in respect to the inhabitants of such Territory, it may safely be said that the citizens of the several States were citizens of the United States under the confederation. That government was simply a confederacy of the several States possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction and right not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the government of the confederation, to act on any question of citizenship or to make any rules in respect thereto. The whole matter was left to stand upon the action, and to the natural consequence of such action, that the citizens of such State should be citizens of that confederacy into which that State had entered, the style whereof was 'the United States of America.'

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the articles of confederation, it is a fact beyond the reach of the most ingenious doubts, that all free, native born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of the State *vs.* Manuel, 4 Dev. and Bat. 20, has declared the law of that State on this subject in terms which I believe to be as sound in law in the other States which I have enumerated as it was in North Carolina. 'According to the laws of this State,' says Mr. Justice Gaston, in delivering the opinion of the Court, 'all human beings within it who are not slaves, fall within one or two classes. Whatever distinctions may have existed in the Roman laws 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 in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity—the disqualification of slavery—was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British King.

'Upon the revolution, no other change took place in the laws of North Carolina than was consequent on 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, remained 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, 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 it until it was taken from free men of color a few years since by our amended Constitution.'

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An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of those people who were born on that soil, and that they were not by the constitution of 1780 of that State admitted to the condition of citizens, would be received with surprise by the people of that State, who know their own political history. It is true, beyond all controversy, that persons of color, descended from African slaves, by that constitution, made citizens of the State, and such of them as have had the necessary qualifications, have held and exercised the elective franchise, as citizens, from that time to the present. (See Com. *vs.* Aves. 18 Pick. R.)

The constitution of New Hampshire conferred the elective franchise upon 'every inhabitant of the State having necessary qualifications,' of which color or descent was not one.

The constitution of New York gave the right to vote to 'every male inhabitant who shall have resided,' &c., making no discrimination between free colored persons and others.

That of New Jersey to 'all inhabitants of this colony of full age, who are worth £50 proclamation money, clear estate.'

New York, by its constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry, except to show, what indeed is indisputable, that before they were made, no such restrictions existed; and colored, in common with white persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons; as they now are in New Hampshire and Massachusetts.

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The fourth of the fundamental articles of the confederation was as follows: 'The free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States.'

The fact that free persons of color were citizens of some of the several States, and the consequence that this fourth article of the confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the articles of confederation being under consideration by the Congress, the delegates from South Carolina moved to amend the fourth article, by inserting after the word 'free,' and before the word 'inhabitants,' the word 'white,' so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both by its terms of inclusion, 'free inhabitants,' and the strong implication from its terms of exclusion, 'paupers, vagabonds, and fugitives from justice,' who alone were excepted, it is clear, that under the confederation, and at the time of the adoption of the Constitution, free colored persons, of African descent, might be, and, by reason of their being inhabitants of certain States, were entitled to the privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

The Constitution was ordained and established by the people of the United States through the action, in each State, of those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were not only included in the body of 'the people of the United States,' by whom the Constitution was ordained and established, but, in at least five of the States, they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange if we were to find in that instrument anything which deprived of their citizenship, any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proporio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that under the Constitution of the United States, every free person, born on the soil of a State, who is a citizen of that State, by force of its Constitution or laws, is also a citizen of the United States.

The first section of the second article of the Constitution uses the language, 'a natural born citizen,' thus assuming that citizenship may be acquired by birth. After elucidating this point, Mr. Curtis proceeds to consider other clauses of the Constitution bearing upon the question, and upon the clause, 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,' he remarks:—

Nowhere else in the Constitution is there any thing concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship derived from and guaranteed by the Constitution are to be enjoyed. It would seem that if it had been intended to constitute a class of native born persons within the States, who should derive their citizenship of the United States from the action of the federal government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

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Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has attempted, practically, to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born within the several States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this that the Constitution was ordained by the citizens of the several States; that they were 'the people of the United States,' for whom and whose posterity the government was declared in the preamble of the Constitution, to be made; that each of them was a citizen of the United States at the time of the adoption of the Constitution, within the meaning of those words in that instrument; that by them the government was to be and was in fact organized; and that no power is conferred on the government of the Union to discriminate between them, or to disfranchise any of them; the necessary conclusion is, that those persons born within the several States, who, by force of their respective Constitutions and laws are citizens of the States, are thereby citizens of the United States.

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And it must be borne in mind, that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that though each State may make them its citizens, they are not thereby made citizens of the United States; because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is: 'The citizens of each States shall be entitled to all privileges and immunities of citizens in the several States.' If each State may make such persons its citizens, they become, as such, entitled to the benefits of this article if there be a citizenship of the United States, distinct from the native born citizenship of the United States, distinct from a native born citizenship of the several States.

Judge Curtis cites numerous acts of legislation on the part of Congress as going to show that in the apprehension of their framers, color was not a necessary qualification of citizenship. 'It would be strange,' he says, 'if laws were found on our statute book to that effect, when, by solemn treaties, large bodies of Mexican and North American Indians have been admitted to citizenship of the United States.' Mr. Curtis sums up his conclusions on this point as follow:—

1st. That the free native born citizens of each State are citizens of the United States.

2d. That as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

3d. That every such citizen, residing in any State, has the right to sue and is liable to be sued, in the federal courts, as a citizen of that State in which he resides.

4th. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves; and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the Court in which it holds that a person of African descent cannot be a citizen of the United States.