

THE CASE OF DRED SCOTT.

OPINION OF MR. JUSTICE CURTIS,

DELIVERED

In the Supreme Court of the United States, at Washington, March 7, 1857.

DRED SCOTT vs. J. F. H. SANDFORD.

[CONCLUDED.]

Again, the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, (9 Wheat., 192,) "a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this," I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent, as a ground of legal judgment, was relied on—that the power to regulate commerce did not include the power to annihilate commerce."

But the decision was, that under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution; and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution, imposed any restriction as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress.

On this subject, Mr. Justice Daniel, speaking for the court, in the case of the United States vs. Marigold, (9 How., 660,) says:

"Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms 'to regulate commerce,' such as would embrace absolute prohibition, may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions these statutes have received, it can scarcely at this day be open to doubt, that every subject falling legitimately within the sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States—may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it—upon what grounds can I say, that power to make all needful rules and regulations respecting the territory of the United States is subject to no exception of the allowance or prohibition of Slavery therein?

While the regulation is one "respecting the territory"—while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant—while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting Slavery; and while the practical construction for a period of upwards of fifty years forbid such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which, we are bound to believe, the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress, assisted in the opinion of the majority of the court, would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit, also, that the kind of Government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate, and no limit to that discretion has been shown or ever suggested, save those positive prohibitions to legislate which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit Slavery north of 36 degrees 30 minutes?

The only one suggested is that charge in the fifth article of the amendments of the Constitution, which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution itself, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. In *Prigg vs. Pennsylvania*, (10 Pet., 611,) this court said, "The state of Slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In *Raukin vs. Lydia*, (2 Marsh., 12, 470,) the Supreme Court of Appeals of Kentucky said: "Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law." I am not acquainted with any case or writer questioning the correctness of this doctrine. See also 1 Burge Col. and For. Laws, 738-741, where the authorities are collected.

The status of Slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; or, as those of the United States which tolerate Slavery, may treat the slave as a person, when the master takes his life. While in others, the law may recognize a right of the slave to be protected from cruel treatment. In other words, the status of Slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the status of Slavery, must depend on the municipal law which creates and upholds it.

And not only must the status of Slavery be created and measured by municipal law, but the rights, powers, and obligations, which grow out of that status, must be defined, protected, and enforced, by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring, or harboring or kidnapping him, the forms and modes of emancipation, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where Slavery has been tolerated, are among the subjects

upon which municipal legislation becomes necessary when Slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but his neither made nor provided for any municipal regulations which are essential to the existence of Slavery?

Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons hold to service under the laws of a State, are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of Slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning Slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate Slavery can hardly be denied the power of doing the same thing. And what law of Slavery does either take with him to the Territory? If it be said to be those laws respecting Slavery which existed in the particular State from which each slave last came, what an anomaly is this! Where else can we find, under the law of any civilized country, the power to introduce, and permanently continue, diverse systems of foreign municipal law, for holding persons in Slavery? I say, not merely to introduce, but permanently to continue these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject; and when any slave is sold, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the status of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact, as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is, that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting, as "the people of the United States," under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court, without arrogating to the judicial branch of the Government powers not committed to it; and which, with all the unaffected respect I feel for it, when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from *magna charta*; was brought to America by our ancestors as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the Ordinance prohibiting Slavery north and west of the Ohio was passed.

And if a prohibition of Slavery in a Territory in 1820 violated this principle of *magna charta*, the Ordinance of 1787 also violated it; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate *magna charta* by the Ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that, thereafter, no slave should be imported into that Commonwealth by sea or by land; and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave, who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it, as may be seen in *Wilson vs. Isabel*, (6 Coll. R., 425.) So also *Hunter vs. Hulshar*, (1 Leigh, 172,) and a similar law has been recognized as valid in Maryland, in *Stewart vs. Oaks*, (5 Har. and John., 107.) I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of *magna charta* incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and ever since, that under the power to regulate commerce, Congress could prohibit the importation of slaves; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of Slavery in this Territory was in the words, "that Slavery, &c., shall be and is hereby forever prohibited." But the insertion of the word *forever* can have no legal effect. Every enactment, not expressly limited in its duration, continues in force until repealed or abrogated by some competent power; and the use of the word "forever," can give to the law no more durable operation. The argument is, that Congress cannot so legislate as to bind the future States formed out of the territory, and that in this instance it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be to disturb what has been settled, every law made by Congress may be repealed, and, saving private rights, and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian territory, north of 36° 30', by or on any white man, should forever be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a Territory, that at some future day States might exist there; and so the law was invalid, because, by its terms, it was to continue in force forever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it include cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe

a different rule, the law governs those cases, though it may, in its terms, attempt to include others, on which it cannot operate. In other words, this court cannot declare void an act of Congress which constitutionally embraces some cases, though other cases, within its terms, are beyond the control of Congress, or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding Slavery from this territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law, so long as Congress has the exclusive legislative power in the territory.

But it is further insisted that the treaty of 1803, between the United States and France, by which this Territory was acquired, has so restrained the constitutional powers of Congress, that it cannot, by law, prohibit the introduction of Slavery into that part of this territory north and west of Missouri, and north of 36 deg. 30 min. north latitude.

By a treaty with a foreign nation, the United States may yet fully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept, with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation, for the exercise of those powers, is quite another matter. That responsibility is to be met, and justified to the foreign nation, according to the requirements of the rules of public law, but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty. The second section of the fourth article is, "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." This has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrevocable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way revocable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign Government. I do not consider, I am not aware it has ever been considered, that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the treaties with France, by the act of July 7th, 1798, (1 Stat. at Large, 678,) was in conformity with these views. In the case of *Taylor et al. vs. Morton*, (2 Curtis's Cir. Ct. R., 454,) I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude Slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or no a case existed sufficient to justify a refusal to execute such a stipulation, would not be a judicial, but a political and legislative question, wholly beyond the authority of this court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way, has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. (*Foster vs. Nielson*, 2 Peters, 314; *Garcia vs. Lee*, 12 Peters, 519.)

But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States respecting the territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded territory lying north of 36 deg. 30 min., and west of the present State of Missouri, was then a wilderness, uninhabited save by savages, whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this territory, which the United States might think fit to make; and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction so little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights; and the United States, as a just Government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory, which, in the language of the treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and in the mean time they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding Slavery from that part of the ceded territory then uninhabited. The first is, that, manifestly, its sole object was to protect individual rights of the then inhabitants of the territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish Governments while they held the country, as well as the United States when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation, that the then inhabitants of Louisiana should be protected in their property, can have no reference to their use of that property, where they had no right, under the treaty, to go with it, save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty, had afterwards taken property then owned by him, consisting of firearms, ammunition, and spirits, and had gone into the Indian country north of 36° 30', to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the act of Congress of March 30, 1802, (2 Stat. at Large, 139,) adopted and extended to this territory by the act of March 26, 1804, (2 Stat. at Large, 283.)

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the act of Congress, as to such rights of his, would be inoperative; but it would be valid and operative as to all other persons, whose individual rights did not come under the protection of the treaty. And, inasmuch as it does not appear that any inhabitant of Louisiana, whose rights were secured by treaty, had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed; and second, that if any did exist, the entire law was void; not only as to those cases, if any, in which it could not be rightfully operated, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to

pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the case of *New Orleans vs. De Armas et al.*, (9 Peters, 223,) the question was, whether a title to property, which existed at the date of the treaty, continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said: "This article obviously contemplates two objects: one, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any one of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were admitted to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States."

The case of *Chouteau vs. Margurita*, (12 Peters, 507,) and *Pormoli vs. New Orleans*, (3 How., 589,) are in conformity with this view of the treaty.

To convert this temporary stipulation of the treaty in behalf of ceded French subjects who then inhabited a small portion of Louisiana, into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the ceded inhabitants, but enabled them and all other citizens of the United States to go into any part of the ceded territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject-matter, and the evident design of the parties, that I cannot assent to it. In my opinion, this treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited Slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of 36° 30' north latitude, and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass, to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon, to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.