Mr. Justice CATRON.

The defendant pleaded to the jurisdiction of the Circuit Court, that the plaintiff was a negro of African blood; the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of the general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial, a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ.

The judgment was given for him conformably to the prayer of his demurrer. He cannot assign an error in such a judgment. (Tidd's Pr., 1163; 2 Williams's Saund., 46 a; 2 Iredell N. C., 87; 2 W. and S., 391.) Nor does the fact that the judgment was given on a plea to the jurisdiction, avoid the application of this rule. (Capron v. Van Noorden, 2 Cr., 126; 6 Wend., 465; 7 Met., 598; 5 Pike, 1005.)

The declaration discloses a case within the jurisdiction of the court- a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by a writ [60 U.S. 393, 519] of error. The authorities are very conclusive on this point. Shepherd v. Graves, 14 How., 505; Bailey v. Dozier, 6 How., 23; 1 Stewart, (Alabama,) 46; 10 Ben. Monroe, (Kentucky,) 555; 2 Stewart, (Alabama,) 370, 443; 2 Scammon, (Illinois,) 78. Nor can the court assume, as admitted facts, the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea. Tompkins v. Ashley, 1 Moody and Mackin, 32; 33 Maine, 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois, are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom; and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson, with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff, that his freedom (and that of his wife and eldest child) was obtained by force of the act of Congress of 1820, usually known as the Missouri compromise act, which declares: 'That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, forever prohibited.'

From this prohibition, the territory now constituting the State of Missouri was excepted; which exception to the stipulation gave it the designation of a compromise.

The first question presented on this act is, whether Congress had power to make such compromise. For, if power was wanting, then no freedom could be acquired by the defendant under the act. That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution, is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory; and, of course, to abolish slavery in all parts of it, whilst it was, or is, governed as a Territory. My opinion is, that Congress is vested with power to govern [60 U.S. 393, 520] the Territories of the United States by force of the third section of the fourth article of the Constitution. And I will state my reasons for this opinion.

Amlost every provision in that instrument has a history that must be understood, before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That 'new States may be admitted by the Congress into this Union.' 2d. 'The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State.'

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: 'We reserve it under our sovereignty, protection, and dominion, for the use of the Indians.'

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783. The colonial charters of Virginia, North Carolina, and Georgia, included it. Other States set up pretensions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. (5 Wheat., 375.)

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it, insisted that the country belonged to the States united, and that the lands should be disposed of for the benefit of the whole; and to which end, the western territory should be ceded to the States united. The contest was stringent and angry, long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783; and in 1784 the deed of cession was executed, by her delegates in the Congress of the Confederation, conveying to the United States in Congress assembled, for the benefit of said States, 'all right, title, and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia [60 U.S. 393, 521] charter, situate, lying, and being to the

northwest of the river Ohio.' In 1787, (July 13,) the ordinance was passed by the old Congress to govern the Territory.

Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do, in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country, from the British Canada line to Florida, and from the head of the Mississippi almost to its mounth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the Territory north of the Ohio, still, it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And, thirdly, to give power to govern the different Territories as incipient States, not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these powers were necessary. As early as the third day of its session, (May 29th,) Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the tenth of which is as follows:

'Resolved, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole.' August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

'To dispose of the unappropriated lands of the United States.' 'To institute temporary Governments for new States arising therein.' (3 Madison Papers, 1353.) [60 U.S. 393, 522] These, with the resolution, that a district for the location of the seat of Government should be provided, and some others, were referred, without a dissent, to the committee of detail, to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States; and secondly, to dispose of the public lands, and to govern the Territories, in the mean time, between the cessions of the States and the admission into the Union of new States arising in the ceded territory. (3 Madison Papers, 1456 to 1466.)

It was hardly possible to separate the power 'to make all needful rules and regulations' respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper, that the King of England had to grant the Virginia colonial charter of 1609, or to grant the charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old Congress, had the same right to govern that Virginia had before the cession. (Baldwin's Constitutional Views, 90.) And the sixth article of the Constitution adopted all engagements entered into by the Congress of the Confederation, as valid against the United States; and that the laws, made in pursuance of the new Constitution, to carry out this engagement, should be the supreme law of the land, and the judges bound thereby. To give the compact, and the ordinance, which was part of it, full effect under the new Government, the act of August 7th, 1789, was passed, which declares, 'Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the Territory northwest of the river Ohio, may have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States.' It is then provided that the Governor and other officers should be appointed by the President, with the consent of the Senate; and be subject to removal, &c., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern, given by the Constitution, those amendments to the ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia, further than to adapt it to the new Constitution.

It is due to myself to say, that it is asking much of a judge, [60 U.S. 393, 523] who has for nearly twenty years been exercising jurisdiction, from the western Missouri line to the Rocky Mountains, and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories, by its legislation directly, or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions; which it cannot do, as I think. It was held in the case of Cross v. Harrison, (16 How., 193-'4,) that the sovereignty of California was in the United States, in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction to hold and govern it, by force of the instrument under whose authority the country was acquired; and the foregoing was the conclusion of this court on the proposition. What was there announced, was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the ordinance of 1787, for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European Government had. And, having excluded slavery, the new Government was bound by that engagement by article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the Territorial form; for, when a new State came in, it might do so, with or without slavery.

My opinion is, that Congress had no power, in face of the compact between Virginia and the twelve other States, to force slavery into the Northwest Territory, because there, it was bound to that 'engagement,' and could not break it. [60 U.S. 393, 524] In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enjoy all the privileges and advantages of the ordinance for governing the territory north of the Ohio river, and that Congress should assume the government, and accept the cession, under the express conditions contained in the ordinance: Provided, 'That no regulation made, or to be made, by Congress, shall tend to emancipate slaves.'

In 1802, Georgia ceded her western territory to the United States, with the provision that the ordinance of 1787 should in all its parts extend to the territory ceded, 'that article only excepted which forbids slavery.' Congress had no more power to legislate slavery out from the North Carolina and Georgia cessions, than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected whilst they were governed by Congress, in like manner that they were protected before the cession was made, and when they were, respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi river? The country there was acquired from France, by treaty, in 1803. It declares, that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the colony or province of Louisiana, with all the rights and appurtenances of the said territory. And, by article third, that '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 free enjoyment of their liberty, property, and the religion which they profess.'

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony, of a proper size for a State of the Union had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfil the treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this [60 U.S. 393, 525] contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected 'in the mean time;' that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country,

he might go everywhere in it, and carry his liberty, property, and religion, with him, and in which he was to be maintained and protected, until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty.

The settled doctrine in the State courts of Louisiana is, that a French subject coming to the Orleans Territory, after the treaty of 1803 was made, and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act; that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission.

That this is the true construction, I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree-that is, due west from the city of New Orleans-and to declare that north of that line slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery, who doubts what the decision of this court would have been on such an act of Congress; yet, the difference between the supposed line, and that on thirty-six degrees thirty minutes north, is only in the degree of grossness presented by the lower line.

The Missouri compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean, stretching over thirty-two degrees of longitude, and twelve and a half degrees of latitude on its eastern side, sweeping over four-fifths, to say no more, of the original province of Louisiana.

That the United States Government stipulated in favor of [60 U.S. 393, 526] the inhabitants to the extent here contended for, has not been seriously denied, as far as I know; but the argument is, that Congress had authority to repeal the third article of the treaty of 1803, in so far as it secured the right to hold slave property, in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were treaties also, and stood on the same footing of the Louisiana treaty; on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory now the State of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory, unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise: the instrument looked to no theories of Government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts, and the condition and necessities of the country, gave rise to almost every provision; and among those facts, it was prominently true, that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western

territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded, unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution, and then engaged in war with the great confederacy of Indians, extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt, all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the treaty? How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States, for the protection of slave property. The Federal Constitution was relied on, to secure the rights of Georgia and her citizens during the Territorial condition of the country. She relied on the indisputable truths, that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States united, and held in trust for [60 U.S. 393, 527] them. The Constitution having provided that 'The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States,' the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union-the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked; nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him; and the precise question here is, whether Congress had the power to annul that title. It is idle to say, that if Congress could not defeat the title directly, that it might be done [60 U.S. 393, 528] indirectly, by drawing a narrow circle around the slave population of

Upper Louisiana, and declaring that if the slave went beyond it he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle to contend, that because Congress has express power to regulate commerce among the Indian tribes, and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. (Am. State Papers, vol. 1, p. 734.) We must meet the question, whether Congress had the power to declare that a citizen of a State, carrying with him his equal rights, secured to him through his State, could be stripped of his goods and slaves, and be deprived of any participation in the common property? If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious, indirect evasions of the Constitution have been attempted and defeated heretofore. In the passenger cases, (7 How. R.,) the attempt was made to impose a tax on the masters, crews, and passengers of vessels, the Constitution having prohibited a tax on the vessel itself; but this court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio, by her charter of cession, and that the territory was taken by the United States with this condition imposed. I also admit that France could, by the treaty of 1803, have prohibited slavery in any part of the ceded territory, and imposed it on the United States as a fundamental condition of the cession, in the mean time, till new States were admitted in the Union.

I concur with Judge Baldwin, that Federal power is exercised over all the territory within the United States, pursuant to the Constitution; and, the conditions of the cession, whether it was a part of the original territory of a State of the Union, or of a foreign State, ceded by deed or treaty; the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the Territory as its inhabitants into the Union. (Baldwin's Constitutional Views, 84.)

My opinion is, that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly, that the act of 1820, known as the Missouri [60 U.S. 393, 529] compromise, violates the most leading feature of the Constitution-a feature on which the Union depends, and which secures to the respective States and their citizens and entire EQUALITY of rights, privileges, and immunities.

On these grounds, I hold the compromise act to have been void; and, consequently, that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother, judges that the plaintiff, Scott, is a slave, and was so when this suit was brought.