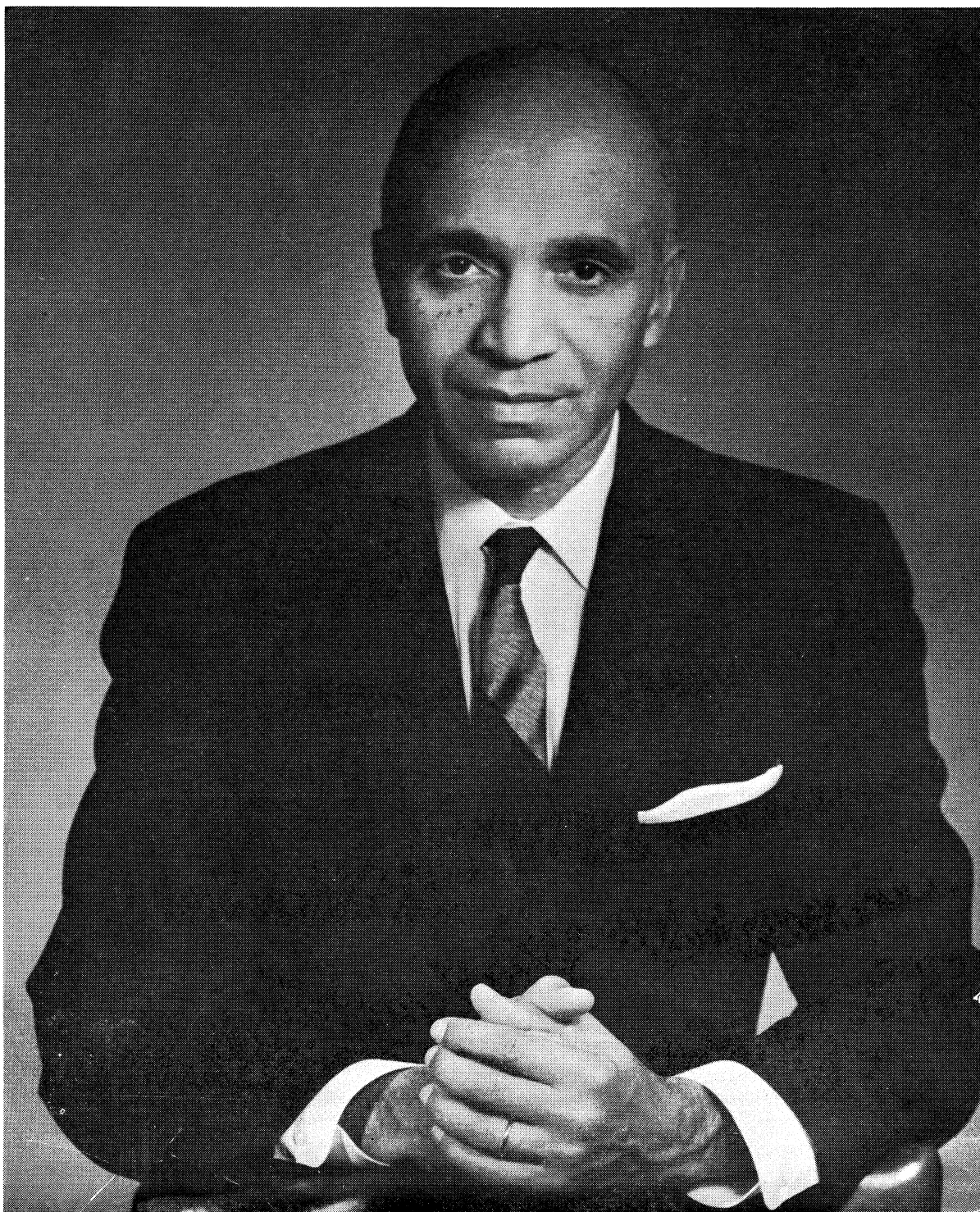
THE NEGRO HISTORY BULLETIN

JANUARY
1963
25 Cents



THE NEGRO HISTORY BULLETIN

JANUARY, 1963

Volume XXVI No. 4

PUBLISHED BY

The Association for the Study of Negro Life and History, Inc.
1538 Ninth Street, N.W.
Washington, D. C.

PURPOSE: *To inculcate an appreciation of the past of the Negro and to promote an understanding of his present status.*

This subscription fee of this periodical is $2.00 a year or 25 cents a copy. Bound volumes numbers 1 to 3 sell for $5.00 each; numbers 4 to 12 for $3.50 each; numbers 13 to 22 for $6.00 each.

Published monthly except June, July, August and September, at 1538 Ninth St., N.W., Washington 1, D.C. Advertising rates on request. Second Class Postage paid at Washington, D. C.

CONTENTS

THE DRED SCOTT DECISION: BACKGROUND AND IMPLICATIONS

By Joel E. Cohen, Harvard University

The Dred Scott Decision helped bring about a war to reverse it. Yet two of its major innovations still stand. The first established the power of the Supreme Court to declare an act of Congress unconstitutional so as to affect a judicial decision. The second applied the "due process" clause of the Fifth Amendment to the substance of laws rather than to formal legal procedure for the first time.

[Editor's Note: Authorities, such as Homer Carey Hockett and numerous others, state that the "case of Marbury vs. Madison (1830) is memorable because it was the first in which the Court passed upon the constitutionality of an act of Congress."]

The majority opinion was represented by "probably the greatest of the chief justices,"[1] Roger Brooke Taney.

It has often been attacked as "conservative," but its innovations were actually revolutionary, and began the transformation of due process into our most important constitutional restriction upon the substance of legislation."[2] These innovations were unaffected by the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and still are active principles in American constitutional law.

THE HISTORICAL BACKGROUND

The Dred Scott Decision involved a slave named Sam, born in 1795 in Southampton County, Virginia, whose owner, Mr. Peter Blow, migrated to Alabama in 1819, and to Missouri in 1827. Mr. Blow took Sam with him to St. Louis, where, under the 1820 Compromise which let Missouri enter the Union, slavery was permitted.

After four years in St. Louis, Mr. Blow died. In 1833 Sam was sold to Dr. John Emmerson,[3] an assistant surgeon in the United States Army. A year later Dr. Emmerson was moved to Ft. Armstrong, in Illinois, a free state since 1818. From there, with his slave, he went to Ft. Snelling (now Minneapolis, Minnesota) in what was then the Wisconsin Territory, free under the Missouri Compromise.

In 1836 Dr. Emmerson bought another slave, Harriet, who married Sam, whose name had been changed to Dred Scott. Their first daughter Eliza, was born on the steamboat *Gypsy as* Dr. Emmerson was returning down the Mississippi in 1838.

When Emmerson died in 1843, his will passed Scott to his widow, Irene Sandford Emmerson, for the duration of her life. In 1846 some Abolitionists advised Dred Scott to sue for his freedom, on the grounds that he had been held a slave illegally on free Illinois soil.

Scott began proceedings in April 1846, but Mrs. Emmerson won the first trial in the 1847 session of the Missouri Circuit Court. During this time Scott's second daughter, Lizzie, was born. Three years later, in January 1850, a circuit court retrial found for Scott but Mrs. Emmerson appealed the case to the Missouri Supreme Court, which on 10 April 1852 gave a 2-1 decision for Mrs. Emmerson. In effect the decision said that in spite of the legal precedents for granting freedom, it was not the duty of the Missouri courts to carry into effect the laws of other jurisdictions regardless of the rights, policy, and institutions of that state.

In 1850 Mrs. Emmerson married Dr. Calvin C. Chaffee from Massachusetts. Since Missouri laws forbade her to deal in affairs of her first husband's estate, her brother, John F. A. Sandford, from New York, executor of Dr. Emmerson's will, took the case. On grounds suggested by Roswell Field, a St. Louis lawyer, that cases involving diverse citizenship (Illinois, New York, Massachusetts, and Missouri) fall under Federal jurisdiction, the case was carried to the Federal District Court for Missouri in 1854. When Sandford argued that Scott could not sue under a government which does not recognize him as a citizen, the court instructed the jury to find in Sandford's favor.

The case reached the U. S. Supreme Court in 1856. Field asked Montgomery Blair, son of the Jacksonian editor Francis P. Blair, to take Scott's side of the case. Francis Blair and Gamaliel Bailey, editor of *New Era*, an Abolitionist paper, agreed to pay the costs of the case. Senator Henry S. Geyer of Missouri took Sandford's defense. The Supreme Court requested a re-argument and heard it in December 1856. George T. Curtis assisted Blair and Reverdy Johnson assisted Geyer.

In March 1857, two days after the inauguration of President James Buchanan, the judgment of the Supreme Court was announced.

About this time Sandford died. Chaffee sold Scott for a nominal sum to Taylor Blow, son of Scott's first owner. Blow manumitted the whole family on 26 May 1857, eleven years after Scott began procedings. On 17 September 1858 Scott died in St. Louis.[4]

---

[1] Louis B. Boudin, "Taney, Roger Brooke," *Encyc. of the Social Science* (New York, Macmillian, 1937), 7: 509-10

[2] Robert E. Cushman, "Due Process of Law," *loc. cit.*, 3:265.

[3] Current texts are about equally divided on whether to spell the surgeon's name Emerson or Emmerson, but in the orginal court records, the latter spelling was adopted .The same is true of Sandford; it sometimes appears as Sanford. Cf. Missouri Circuit Court, "Papers in the Dred Scott Case, 1847-1848," *American History Told by Contemporaries*, Albert Bushnell Hart, Ed., Vol. 4: *Welding of the Nation* 1845-1900 (New York, Macmillian, 1925) pp. 122 ff.

[4] Summarized from Vincent C. Hopkins, Dred Scott's Case (New York, McMullen, 1951).

The Decision and Its Implications

There was no one Supreme Court opinion. Each of the nine judges wrote his position. Seven said the Scotts were still slaves, two said they were not; three said that even free Negroes were not citizens, and hence could not sue; [5] six considered the Missouri Compromise unconstitutional. This majority opinion on the Missouri Compromise was the first time an act of Congress, not relating to the judiciary itself, had been held void by the Supreme Court. [6]

The decision of Chief Justice Taney roughly summarizes the majority opinion.

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? [7]

Since "no state can ... introduce a new member into the political community created by the constitution," Taney inquired whether slaves were considered part of the political community when the constitution was written:

> 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; and that the negro might justly and lawfully be reduced to slavery for his benefit. [8]

Although this is incorrectly quoted as a summary of conditions in 1857, Taney intended it as a historical summary of the situation at the time of the creation of the Constitution. The founding fathers could not have included the Negroes in "all men are created equal," for their conduct would have been inconsistent with their words. Further, the 1808 importation clause and the provisions for the return of runaways indicated that slaves were considered property.

> ... no authority beyond these two provisions can be constitutionally exercised. The government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, as each State may think justice, humanity, and the interests and safety of society, require. [9]

Since the counsel for the plaintiff stressed the power granted Congress under the elastic clause of the Constitution (Art. 1, Sect. 8, Par. 18), Taney stated that the power of the clause was restricted to the area of the United States at the time of the framing of the Constitution.

> And no word can be found in the constitution which gives congress a greater power over slave property ... The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights. [10]

The dissenting opinion of Justice Benjamin Robbins Curtis (1809-1874) was equally vigorous. [11] He argued that the Missouri Compromise was constitutional and that, since Northern states had already recognized them as such Negroes could become citizens. Regardless of the majority opinion, he said, Missouri had already adopted interstate comity, and hence was bound to respect the claims of Illinois. Further, Congressional control over expanding territories had been acknowledged for seventy years. That Congress could not deprive citizens of property without "due process of law" is correct; but, he said, "due process" refers to procedure, not substance. [12] In this, Curtis reflected the interpretation of "due process" which was dominant in 1857. [12] His decision was immediately published as an anti-slavery document. Six months later he resigned from the Court to practice law privately.

Judge McLean wrote an equally elaborate dissenting opinion, while Judge Nelson objected to the Court's entering the political arena, [13] a point supported in Benton's review.

The majority decision was reluctantly accepted in Northern, and even in some Southern, quarters. Thomas Hart Benton, U. S. Senator from Missouri for thirty years and a slaveholder, declared as early as 1844 that he was against introducing slavery into Texas, where it would be a curse. [14]

In 1857 he wrote a lengthy review of the Supreme Court's decision. [15] The power of the court, he said, was limited to cases arising "in law and equity" and hence a "political enactment" such as the Missouri Compromise was out of its jurisdiction. The decision, he felt ignored a gradual extension of constitutional powers: as early as 1803 Congress established a "despotic" government in Illinois territory, transferring three Indiana judges and the Indiana governor, William

---

[5] Vincent C. Hopkins, "Dred Scott Case," *Encyc. Americana*, 9:322 (New York, 1959).

[6] Hart, *op. cit.*, p. 126

[7] Chief Justice Roger Brooke Taney, "Dred Scott Decision," in Hart, *Loc. cit.*, p. 126.

[8] *Ibid.*, p. 127.

[9] *Ibid.*, p. 129.

[10] Ibid., p. 131.

[11] Anon., "Curtis, Benjamin Robbins," *Encyc. Britannica*, 11th Ed., 1911, 7:652.

[12] S. E. Morison and H. S. Commager, *The Growth of the American Republic* (New York, Oxford U. Press, 1950) 4th Ed., 1:626.

[13] Jesse Macy, *The Anti-Slavery Crusade: A Chronicle of the Gathering Storm* (New Haven, Yale U. Press, 1919) p. 199.

[14] Anon., "Benton, Thomas Hart," *Encyc. Britannica*, 11th Ed., 1911, 3:753.

[15] Thomas H. Benton, *Historical & Legal Examination ... of the Decision of the Supreme Court of the United States in the Dred Scott Case* (New York, 1859).

Henry Harrison. Further, of the forty-two who voted against the Missouri Compromise (against 134), all voted on grounds of expediency, rather than those of unconstitutionality. Hence the Supreme Court was nullifying the sacrificing efforts to preserve the unity of the country of both North and South. [16]

Republicans naturally suspected collusion between Democratic politicians and the members of the Supreme Court. To support his specific accusation to that effect, Seward quoted a few words in Buchanan's inaugural address referring to the coming decision, as proof that the president-elect had even been admitted to the secret. [17] In fact, seven of the nine Justices were Democrats and five were Southerners. [18]

In going beyond rendering a simple decision on Dred Scott's freedom, Taney and his supporters hoped to give a final settlement to the disrupting problem of extending slavery to the territories. Instead, the Court aroused the free-soilers and the supporters of popular sovereignty, since any individual could now bring slaves, and with them the institution of slavery, into a territory. [19]

Outraged Republicans at the time decided that everything Taney wrote not directly pertaining to Scott's freedom was *obiter dictum*, incidental opinion having no legal force. Southerners in turn were dismayed at the Northern disregard for the Supreme Court as representing the supreme law of the land.

In perspective, the Dred Scott Decision did much at the time to widen the breach between the North and the South. It was a Ft. Sumter on paper. The decision was both conservative and revolutionary: while Taney ignored the changed Federal powers which had evolved in the seventy years since the writing of the Constitution, the results of his innovations are still being felt in American jurisprudence.

---

[16] Thomas Hart Benton, "Dred Scott Decision Reviewed, 1857," in Hart, *loc. cit.*, pp. 132-38.

[17] Macy, *op. cit.*, p. 196.

[18] John D. Hicks, "Dred Scott Decision," *World Book Encyc.*, (Chicago, 1958) 4:2087.

[19] Henry W. Elson, *Side Lights in American History* (New York, Macmillan, 1937) Rev. Ed., 2:45.

(Continued on Page 155)

THE NEGRO HISTORY BULLETIN

DRED SCOTT

(Continued from Page 147)