STEPHEN A. DOUGLAS' ATTITUDE TOWARD SLAVERY

A letter written by his son, Judge Robert M. Douglas, in reply to an invitation to attend the semi-centennial celebration of the Lincoln-Douglas debates.

GREENSBORO, N. C., October 14, 1908.

HON. E. M. BOWMAN,
Chairman Executive Committee Lincoln-Douglas Celebration, Alton Ill.

My dear Sir:—Your very kind letter inviting me to attend the semi-Centennial Celebration of the Lincoln-Douglas Debates, has been received. It is deeply appreciated, not only for the invitation itself, but for the cordial and appreciative tone of your letter.

As the elder, and now the only surviving son of Senator Douglas, it would give me very great pleasure to attend the Celebration and show my respect, not only for my Father's memory, but also for that of his great rival, whom subsequent events, perhaps beginning with these debates, have placed among the greatest men in the ages.

Denied the pleasure of a personal attendance, it seems to me that one or two instances illustrating my Father's character would not be out of place.

Judge Taft, in his address at Galesburg, has tersely and correctly stated the real issues then discussed by Mr. Lincoln

and Judge Douglas. He rightly says that "neither speaker represented the extreme view of some of his party. The controversy related to the status of slavery in the territories of the United States, and its succeeding status in the states to be formed out of that territory."

He further says: "Mr. Lincoln, therefore, while he deplored the existence of slavery, believed that as a sworn legislator it was his duty to vote to provide a fugitive slave law, and such other protection to slave property as was required by the Constitution."

To this extent Mr. Lincoln and Judge Douglas agreed; but Judge Douglas insisted that the question of slavery in the territories and future states should be settled by the people themselves inhabiting such territories and states. In his opinion this would reduce the question of slavery from a national to a local issue; and would thus not only recognize the great doctrine of home rule, but would prevent future legislation which he thought would endanger the very existence of the Union. I am merely stating his position; but deem it simple justice to his memory to recall the fact that he was personally opposed to slavery. He showed the sincerity of his convictions by refusing a gift of slave property offered by his father-in-law in the contingency of a failure of heirs to his wife, which would have been worth from $100,000 to $125,000. He never owned or accepted a slave or the proceeds of a slave, directly or indirectly; nor would he permit himself to be placed in a position where the ownership of slave property might be cast upon him by operation of law. My Mother, who was the only child of Colonel Robert Martin, of Rockingham County, North Carolina, met my Father in Washington City through her first cousin, Governor David S. Reid, who was a colleague of Judge Douglas both in the House of Representatives and in the Senate. My Grandfather, Colonel Martin, died in 1848, after my Mother's marriage, but before my birth.

In his will, recorded both in this State and Mississippi, appears the following paragraph: "In giving to my dear daughter full and complete control over my slaves in Mississippi (his slaves in North Carolina having been left to his wife in fee simple) I make to her one dying request instead of endeavoring to reach the ease in this will. That is, that if she leaves no children, to make provisions before she dies to have all these negroes, together with their increase, sent to Liberia or some other colony in Africa. By giving them the net proceeds of the last crop they may make would fit them out for the trip, and probably leave a large surplus to aid them in commencing planting in that country. In this request I would remind my dear Daughter that her husband does not desire to own this kind of property, and most of our collateral connection already have more of that kind of property than is of advantage to them.

"I trust in Providence, however, she will have children; and if so, I wish these negroes to belong to them, as nearly every head of a family among them have expressed to me a desire to belong to you and your children rather than to go to Africa; and to set them free where they are would entail on them a greater curse, far greater in my opinion as well as most of the intelligent among themselves, than to serve a humane master whose duty it would be to see that they were properly protected in such rights as yet belong to them, and have them properly provided for in sickness as well as in health."

Under his oath as executor of Colonel Martin, it was the duty of Senator Douglas to protect the property belonging to his children; but it is evident from the above provision that he was never willing to own personally a slave or the proceeds of a slave.

There is another phase of my Father's character which, in the all absorbing question of slavery with its possible results, does not seem to have been sufficiently recognized. It is admirably expressed in the following quotation from a letter to me of Chief Justice Fuller. The Chief Justice says: "I knew your lamented Father very well. Popular as he was, it has nevertheless seemed to me that the extraordinary

abilities he possessed have never been fully appreciated. The slavery question compelled his attention, and so the comprehensive grasp of his mind did not get full opportunity for expression in other directions. But as time goes on I think the impression of his real greatness deepens."

His constant care for the individual welfare of his own State and its intellectual and material advancement, should not be overlooked. His establishment of the University of Chicago, not only by the use of his influence, but by a donation large for a man of his limited means, attests his interests in the higher education of the people. On the other hand, the building of the Illinois Central Railroad, and his early efforts to place all charters under legislative control, show his regard for the material interest of his State and his prophetic view of the necessity of corporate control.

In 1836, although only twenty-three years of age, Judge Douglas, then a member of the Legislature of Illinois, moved to insert in each charter granted a clause "reserving the right to alter, amend or repeal this act whenever the public good shall require it." Again, in 1851, while in the Senate of the United States, he insisted that the grant of lands that secured the building of the Illinois Central Railroad should be made directly to the State of Illinois. He then had them given by the State to the Illinois Central Railroad upon condition that the road should pay forever to the State seven per cent. of its gross receipts, in lieu of taxes upon its original line. I am informed that under this agreement the company has for several years paid to the State of Illinois an average of over one million dollars a year. For the year ending April 30, 1906, it paid $1,143,097.46.

With kindest greetings to all who feel an interest in the name and blood I bear, and with best wishes for the success of your Celebration, I remain,

Sincerely yours,

ROBERT M. DOUGLAS.

June 8. 1929.

Hey dear Mr Downes:

I send you a photo which I hope may be of some interest. I am on my way down to North Carolina & hope to drop in on you in about a week or so I am driving I cannot fix the time any closer

Friendly yours

F. K. Holden

SOME PHASES OF THE DRED SCOTT CASE

BY
F. H. HODDER

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SOME PHASES OF THE DRED SCOTT CASE[1]

By F. H. Hodder

It has come to be realized in recent years that the written history of the United States during the decades preceding the Civil War, has been based largely upon anti-slavery propaganda. With respect to no single topic is this true in so high a degree as it is of the Dred Scott case. The reason for this is clear. The dissenting opinions of McLean and Curtis, especially that of Curtis, were immediately accepted by the Anti-Slavery party as a final statement of the law of slavery, and in the South the opinion of Taney was accepted in the same way. No party ever subjects its platform to careful analysis or pays much attention to the criticism of the opposing party. The histories, written largely in the North and in New England, have followed the traditions of their section.

Before attempting an analysis of the opinions, it is necessary to review the facts in the case. Dr. John Emerson, a surgeon in the United States army, bought Dred Scott in St. Louis in 1833. Scott had belonged to Capt. Peter Blow, who died in 1831 and left Scott to his daughter Elizabeth, from whom the purchase was made. Emerson was stationed at Fort Armstrong, Rock Island, Ill., from Dec. 1, 1833 until May 4, 1836, when the fort was abandoned. Here, he held Scott as a slave in territory in which slavery had been prohibited by the Ordinance of 1787 and was then prohibited by the Constitution of Illinois.

In 1836, Emerson was transferred to Fort Snelling, in what was soon afterward organized as Wisconsin Territory, a part of the Louisiana Purchase where slavery was prohibited by the Missouri Compromise of 1820. Here Emerson bought a slave woman whom Scott married. After two years Emerson returned with his slaves to St. Louis. Two children were born of this marriage, one on the way down the Mississippi River north of 36°

[1] A paper read at the meeting of the American Historical Association in Indianapolis, December 29, 1928.

30′, and the other at Jefferson Barracks, after the return to St. Louis. From there, Emerson was sent to Florida for service in the second Seminole War. He left his wife in St. Louis with her father, Alexander Sanford, and the slaves were kept for some time at Jefferson Barracks by her brother-in-law, Col. Henry Bainbridge. Later Scott was rented out at five dollars a month, the rent to be paid to Mrs. Emerson or to her father, Alexander Sanford, as her agent.[2]

Emerson was honorably discharged from the service in 1842, and the next year died at the home of his brother in Davenport in the Territory of Iowa. He left his property to his wife and daughter. Mrs. Emerson was authorized to make any disposition of the property that she saw fit. The slaves were not mentioned in the will and could have been emancipated at any time by complying with the requirements of the law. George L. Davenport of the town of Davenport and Mrs. Emerson's brother, John F. A. Sanford of St. Louis, were named in the will as executors.

Scott was a shiftless negro. Much of the time he was out of work and at these periods he fell back upon Henry Taylor Blow, the son of his former owner, for the support of himself and his family. It naturally occurred to Mr. Blow that if Scott were to earn any money, he ought to have it for his own support. Accordingly in April of 1846, eight years after Scott's return to Missouri, suits were brought, financed by Mr. Blow, to secure the freedom of Scott, his wife, and children. Four months later, the question of the power of Congress over slavery in the territories was revived by the Wilmot Proviso but the question did not become acute for some time. It is not likely that Mr. Blow anticipated any trouble in securing the freedom of Scott and his family. From 1822 to 1837, eight cases had been decided by the Supreme Court of Missouri in which it was held that a slave, sojourning in free territory, was free upon his return to Missouri, and the circumstances in one of these cases were almost identical with those of Scott.[3] After the case got into politics,

[2] Statement of facts based on mss. in library of Missouri Historical Society in St. Louis. All mss. cited are in this library, unless otherwise stated.

[3] Helen T. Catterall, "Some Antecedents of the Dred Scott Case," *American Historical Review*, XXX, 65-68.

it was charged that the suits were brought in the interest of the Anti-Slavery party and also that they were brought in the interest of slavery. There could be no basis for either charge. It is true that Mr. Blow was opposed to slavery and later became a prominent Republican leader in St. Louis, but the original suits were brought before the question of the power of Congress over slavery in the territories was revived by the Wilmot Proviso, and the question could not have been in his mind.

It has been claimed more recently that the object of the suits was to "pave the way" for a suit against the Emerson estate to recover wages for Scott from the time of his return to Missouri.[4] This claim appears to be based upon a statement in a notice of the death of Dr. Emerson's widow, who had long been Mrs. Chaffee, that was published in the Springfield [Mass.] *Republican* in 1903. This idea may have developed in Mrs. Chaffee's mind in her later years but its emergence, nearly sixty years after the event, is too late to entitle it to serious consideration.[5] Dr. Emerson's estate could not have been large. His property in St. Louis consisted of nineteen acres of land, three miles west of the city, and a few articles of household furniture. Alexander Sanford, to whom was committed the settlement of the St. Louis property, filed a bond of $4,000 for the execution of the trust. Emerson's property in Davenport is said to have been larger but the inventory has been lost, so that its amount cannot be ascertained.[6] Whatever the amount, the estate had long been settled. It is therefore safe to say that there was no

[4] Frederick Trevor Hill, *Decisive Battles of the Law. . . .* (New York, 1907), 177.

[5] Springfield *Republican*, Feb. 12, 1903. The account of the Dred Scott case is very inaccurate. It implies that the first suit was brought just as Mrs. Chaffee was leaving St. Louis in 1848, whereas it was brought two years before. It states that a "young lawyer" brought the suit, thinking that he saw a chance to make money out of the estate. The suit was brought by David N. Hall. Mr. Hall died in 1851. His age cannot be ascertained, but his junior partner, A. P. Field, was fifty years old at that time and Hall, presumably, was considerably older. The article claims that Emerson bought Scott out of compassion, because Scott begged him to do so by reason of having been whipped. It is a local tradition that Scott took a strong dislike to Emerson and that, when the sale was made, he ran away, hid in the swamps, and could not be found for several days. Mrs. Chaffee was eighty-eight at the time of her death.

[6] Ms. transcript of will and documents relating to estate.

other purpose in bringing the original suits than to secure the freedom of Scott and his family, in order that whatever money they earned might be applied to their own support.

Scott's case in the state courts dragged through six years.[7] In the first trial in the Circuit Court of St. Louis County, judgment was against Scott, but a new trial was granted, and in the second trial judgment was given for Scott. The case was then taken on writ of error to the State Supreme Court. It was in this court that the case first assumed a political complexion. The struggle over the territory acquired from Mexico and the Compromise of 1850 had revived the slavery controversy and in particular had raised the question of the power of Congress over slavery in the territories. In March, 1852, the Supreme Court of Missouri decided against Scott by a vote of two judges against one.[8] The majority of the Court based their opinion upon the ground that the laws of other states and territories had no extra-territorial effect in Missouri, except such as Missouri saw fit to give them. They repudiated the eight Missouri precedents in Scott's favor upon the ground that "times had changed" and that the free states, by obstructing the return of fugitive slaves, refused to recognize the law of slave states. The dissenting judge, Justice Gamble, thought that the earlier precedents ought to be followed.

At this juncture, it was agreed between the parties, at the suggestion of Roswell M. Field,[9] who now appeared in the case as attorney for Scott, that the case be taken to the federal courts by bringing a new suit in the United States Circuit Court for the District of Missouri. The normal procedure would have been to take the case directly to the United States Supreme Court upon writ of error, but the Supreme Court had, in 1850, in the similar case of Strader *v.* Graham, refused to assume jurisdiction by this process. Moreover, the parties on both sides were desirous of securing the opinion of the Supreme Court on

[7] Record of local cases reprinted in John D. Lawson, *American State Trials* (St. Louis, 1914-23), XIII, 220-41. These records were missing for many years, having been withdrawn by a local attorney who removed to California and found among his papers after his death.

[8] 15 Missouri, 577-92.

[9] Field to M. Blair, Dec. 24, 1854, ms.

all the issues involved and, if the case had been taken up on writ of error, the Court, even if it had assumed jurisdiction, would have given judgment only on the points to which exception had been taken.

It is usually stated that Mr. Field was a radical opponent of slavery. That such was not the case is proved by his own letters and the testimony of Montgomery Blair.[10] Mr. Field was opposed to slavery, but in common with many moderate men, both opposed and favorable to slavery, he thought that the question of the power of Congress over slavery in the territories was a legal question and that an authoritative decision of it by the highest court in the land would bring peace to a distracted people. For this reason, as he wrote Blair, he welcomed a decision of the question even though it should be against him.

Mrs. Emerson had removed to Springfield, Mass., some years before and, in 1850, had married Dr. C. C. Chaffee, a radical anti-slavery member of Congress from 1855 to 1859. Possibly to avoid involving Dr. Chaffee in the case, Scott was transferred by a fictitious sale to Mrs. Chaffee's brother, John F. A. Sanford, who, as already stated, was one of the executors of her first husband's estate. Mr. Sanford had married a daughter of Pierre Chouteau, had made a fortune in the fur trade, and removed to New York City where he was engaged in the financing of western railroads. As he had frequent occasion to visit St. Louis on business, it is probable that the case with which service could be obtained had something to do with the transfer, since the case was brought by agreement between the parties.

Suit was therefore brought in the United States Circuit Court for Missouri by Scott as a citizen of Missouri against Sanford as a citizen of New York. Sanford, in his first plea, denied the jurisdiction of the Court on the ground that Scott was a negro and therefore could not be a citizen of Missouri and entitled, thereby, to sue in a federal court. This is the celebrated plea in abatement, repeated reference to which in the opinions tends to confuse the non-professional reader of the case. The Court overruled the plea and the suit went to trial on the merits of the case. March 15, 1854, Judge Wells ruled that the facts were with

[10] "Mr. Field never during the fifteen years that I have known him manifested any interest in politics." *National Intelligencer*, Dec. 25, 1856.

Sanford, and the jury found accordingly. Scott then excepted to this instruction and the case was taken to the United States Supreme Court on writ of error.[11] Ten days later, the Kansas-Nebraska Act was passed and the question of the power of Congress over slavery in the territories became more acute than ever.

On the very day that the Kansas-Nebraska Act was passed, it seems that Field wrote to Montgomery Blair to induce him to try the case in the Supreme Court.[12] Field was well acquainted with Blair who had lived fifteen years in St. Louis, but had recently removed to Washington to practice in the courts of the District of Columbia.[13] Blair did not receive the letter at this time as he had gone to California to settle the affairs of his brother James who had died in San Francisco. December 24, 1854, Field again wrote Blair, without referring to his former letter, in regard to taking the case. The case was docketed, December 30, 1854, and upon this date Blair, having returned from California, wrote Field that he would take the case. Field replied, January 7, 1855, in a long letter suggesting the mode of procedure.[14] It was too late to prepare for trial before the adjournment of the Court for the spring recess, February 28, and the case necessarily went over until the next term of court. Blair made strenuous efforts to secure the assistance of other counsel but without success.[15] The case was argued for the first time from the 11th to the 14th of February, 1856. Blair alone appeared for Scott. H. S. Guyer, United States senator for Missouri, and Reverdy Johnson appeared for Sanford.

[11] The record in the Circuit Court was printed in pamphlet form and reprinted in Lawson, *op. cit.*, XIII, 242-52.

[12] Bernard C. Steiner, *Life of Roger Brooke Taney* (Baltimore, 1922), 331.

[13] Blair at first lived in the town house at 1651 Pennsylvania Avenue, still occupied by the Blair family, and later built a home adjoining his father's at Silver Spring, just across the Maryland line.

[14] I am indebted to Miss Stella M. Drumm, librarian of the Mo. Hist. Soc., for copies of the Field letters.

[15] Blair in *Nat. Intel.*, Dec. 25, 1856. A part of this letter is printed in Charles Warren, *The Supreme Court in United States History* (rev. ed., Boston, 1926), II, 282, where the date is given as December 24.

One of the curiosities of the case is a long letter (ms.) from Judge Wells, dated, Feb. 12, 1856, advising Blair how to secure a reversal of his own decision in the Circuit Court. Wells's idea was that the Circuit Court was bound by the local law, but that the Supreme Court was not. The letter did not reach Blair until after his argument in the Supreme Court.

The case was taken up for conference on the 12th of May. Its disposition turned upon the point whether the question of the jurisdiction of the lower court could be raised, after Sanford had accepted its jurisdiction by pleading over to the facts and the case had come to the Supreme Court upon an exception taken to the instruction of the lower court on the facts. Upon this point, the Court divided sharply without reference to the judges' attitude toward slavery. Four of them — Taney, Wayne, Daniel, and Curtis — thought that the question of jurisdiction could be considered and four — McLean, Catron, Grier, and Campbell — thought that is could not. Nelson was inclined to the former view but, being uncertain, suggested that the case be re-argued upon the question whether or not the jurisdiction of the lower court was subject to review and, if so, whether or not Scott was a citizen of Missouri. This suggestion was accepted without objection.[16]

Years afterward, James M. Ashley, member of Congress from Ohio, charged that the real reason for postponing the case was to prevent McLean, by a dissenting opinion, from making political capital in support of his candidacy for the presidential nomination at the approaching Republican convention.[17] Ashley was such a strong partisan that the charge is open to suspicion. In any event, there is no contemporary evidence to support it. Nelson could have had no interest in McLean's candidacy one way or the other, but he might have preferred to postpone the decision of the case until after the presidential election. In November, Buchanan was elected President.

From December 15, to December 18, 1856, the case was argued before the Supreme Court for the second time. Guyer and Johnson appeared for Sanford as before. George Ticknor Curtis assisted Blair in arguing the question of the power of Congress over slavery in the territories.[18] After the second argument,

[16] Statements of Campbell and Nelson in Samuel Tyler, *Memoir of Roger Brooke Taney, LL. D.* (Baltimore, 1872), 382-85. Guyer and Johnson's brief in *Supreme Court Reports* (Lawyer's ed.) XV, 697. See discussion of this point in Dean Mikell's "Roger Brooke Taney" in William D. Lewis, *Great American Lawyers* (Philadelphia, 1908), IV, 168-70.

[17] *Congressional Globe*, 40 Cong., 3 Sess., Ap. 211, Feb. 13, 1869.

[18] Blair's argument was issued in a pamphlet of forty pages. Curtis' argument was published in the *Nat. Intel.*, Jan. 1, 1857, and in pamphlet form.

Nelson reached the conclusion that the jurisdiction of the lower court was not subject to review. With the accession of Nelson, a majority of the Court held this view. February 14, 1857, the Court agreed to dispose of the case without raising the question of jurisdiction and without discussing the territorial question, and Nelson was asked to prepare the opinion of the Court on that basis.

It immediately appeared that McLean and Curtis intended to submit dissenting opinions covering the territorial question. Under these circumstances, Wayne thought it incumbent upon the southern judges to set forth their views of the territorial question, and finally convinced the reluctant Chief Justice of the necessity of so doing. At a subsequent conference, in the absence of Nelson, a majority of the judges requested Taney to prepare the opinion of the Court covering all the issues involved. When informed of this, Nelson insisted upon adhering to the opinion that he had prepared at the request of the Court,[19] and Grier was inclined to concur with him.

When Buchanan began the preparation of his inaugural address, he was at a loss to know what to say about the Dred Scott case. Accordingly, February 3, he wrote to Judge Catron, with whom he was on intimate terms, asking whether the opinions would be delivered before the 4th of March. Catron replied on the 6th and 10th of February that the case had not yet come up in conference. On the 19th, after the conferences that began on the 14th, Catron wrote that the *Court had been forced to pass upon the constitutionality of the Missouri Compromise by the determination of two of their members to present dissenting opinions.* "A majority of my brethren will be forced up to this point by two dissentients," he said. In addition, he remarked how important it was that the majority should present a united front and asked Buchanan to "drop Grier a line" to that effect. Buchanan wrote immediately, as requested, and Grier replied on February 23, setting forth at considerable length the status of the case before the Court, remarking that the question of constitutionality would be forced upon them by the dissent of Mc-

[19] That Nelson had already written his opinion appears from the fact that throughout he used the plural "we." In submitting it as his individual opinion, he changed "we" to "I" in the first sentence only.

Lean and Curtis and adding that on account of "the weak state of the Chief Justice's health" the opinions would not be delivered until the 6th of March. It is thus clear that the primary responsibility for the discussion of the territorial question rests upon McLean and Curtis. It is eighteen years since the two letters of McLean and Curtis were published by John Bassett Moore in his edition of Buchanan's *Works*.[20] Their publication created a sensation at the time, but their import has not yet been embodied in our histories or our historical thinking.[21]

The opinion of Nelson, which but for the dissent of McLean and Curtis would have been the opinion of the Court, held that when a slave returns to a slave state his status is determinable by the courts of that state.[22] That question had been decided by unanimous opinion of the Court, in 1850, in the case of Strader *v.* Graham.[23] The Ordinance of 1787 and the Compromise of 1820, whatever their validity, had no extra-territorial force. Scott was a slave because the Supreme Court of Missouri had decided that he was a slave. The judgment of the lower court should therefore

[20] Catron's letter of February 10 and Grier's of February 23 are in John Bassett Moore, *The Works of James Buchanan. . . .* (Philadelphia, 1910), X, 106-108. The earlier letters were discovered by Philip G. Auchampaugh and published in "James Buchanan, the Court and the Dred Scott Case," *Tennessee Historical Magazine*, X, 234-38. I am greatly indebted to Dr. Auchampaugh for calling my attention to them.

[21] Edward Channing, *A History of the United States* (New York, 1925), VI, 179, says that Moore adds, "apparently as a contribution of his own," that the action seems to have been brought about by the minority rather than by the majority of the Court. This was not a contribution of Judge Moore's but the distinct assertion of both letters.

Professor Channing gives the erroneous impression that the consideration of the case was unduly delayed by the Supreme Court. In view of the fact that the plaintiff was not prepared for trial at the term at which the case was docketed and that the case was twice argued, its disposition was unusually prompt. When the case was decided, there were six cases of earlier date that were still before the Court. Among them was the famous case of Ableman *v.* Booth which was not decided until more than a year later. Plaintiff's fees were billed to Blair and promptly paid. Defendant's fees were billed to Guyer and never paid. As a result the mandate was never issued. *Supreme Court Docket for 1856.* Scott's costs amounted to $154.68. Gamaliel Bailey raised this sum by asking Republican members of Congress to contribute $2 each. Horace White, *Life of Lyman Trumbull* (Boston, 1913), 83.

Scott and his family were transferred by Dr. Chaffee to Henry Taylor Blow, by whom they were emancipated.

[22] The case is reported in 19 Howard, 393-633. The Lawyer's edition gives briefs of counsel.

[23] 10 Howard, 82-99.

be affirmed. This was the only respectable opinion delivered by the Court.[24] It was not only correct in law, but it was best for the free states. It relieved them from any obligation to give effect to the laws of slave states except as they were bound by the fugitive-slave clause of the Constitution. Immediately thereafter, the courts of New York, in the case of Lemmon *v.* People, by giving freedom to eight slaves who were temporarily landed in New York City, en route from Virginia to Texas, affirmed the principle that every state has the right to determine the status of all persons within its jurisdiction.[25] Since that time the principle has been accepted as a matter of course and innumerable decisions have been based upon it.[26] It is easy today to see that there should have been no other opinion in the Dred Scott case. Nelson is entitled to the credit of being the only member of the Supreme Court who thought clearly in the midst of seething political controversy.

McLean, the first of the two judges whose dissent forced the consideration of the merits of the case, was the only Republican member of the Court. He was a perennial candidate for the presidency. He had been a candidate in the Anti-Masonic convention of 1831, was nominated by the legislature of Ohio in 1836, was mentioned in the Whig convention of 1848, received 196 votes in the Republican convention of 1856, and, although seventy-five years of age, still hoped for the nomination in 1860.[27] He took the unusual ground that a judge was under no obligation to refrain from political discussion and stoutly defended the propriety of his candidacy for the presidency. He wrote frequent letters on political questions to personal friends, and to the press for publication.[28] He had long opposed slavery. In 1841, he had invoked the "higher law" against the inter-

[24] Cf. John Lowell and Horace Gray, *A Legal Review of the Case of Dred Scott* (Boston, 1857), 51, 57, reprinted from the *Law Reporter*, June, 1857.

[25] 20 New York, 562-644.

[26] See cases based upon this principle cited by Morris M. Cohn, "The Dred Scott Case in the Light of Later Events," *American Law Review*, XLVI, 548-57. The most famous are the New York cases refusing to give effect to divorces granted outside the state without jurisdiction of both the parties.

[27] McLean to Thaddeus Stevens, May 12, 1860. McLean Papers, Library of Congress.

[28] On McLean's political activity, see Warren, *op. cit.*, II, 269-72.

state slave trade,[29] but in 1850 acquiesced in the opinion of the Supreme Court in the case of Strader *v.* Graham that the Court had no jurisdiction in the case of negroes claiming freedom in a slave state by reason of a temporary sojourn in a free state. Nevertheless, his dissent in the Dred Scott case was not unexpected. Even before the case had come to trial, he had written a newspaper editor in Ohio stating the ground that he intended to take.[30]

Quite otherwise was it in the case of Judge Curtis. Curtis was an old-line Whig. As a lawyer, before his appointment to the Supreme Court, he had been identified with the slave interest. In 1836, in the case of the slave Med, he had maintained that an owner might bring a slave to Massachusetts and hold her there in slavery until returning to a slave state.[31] It was surely a far cry from the contention that a slave could be held in a free state to the ground that Curtis took in the Dred Scott case, that temporary residence in a free state had the effect of emancipating a slave after return to a slave state. In 1850, Curtis defended the fugitive slave law in a speech in Faneuil Hall.[32] He was doubtless right in so doing, but his course was very unpopular in Massachusetts. Immediately after his appointment to the Supreme Court, while sitting as circuit judge, he committed himself, in a charge to a grand jury, to the extreme doctrine that any combination to resist by force the operation of any law constituted treason, and that all persons in any way connected with such combinations were guilty of treason, whether or not they were present at the time of the commission of an overt act.[33]

[29] Groves *v.* Slaughter, 15 Peters, 508.

[30] McLean to Teesdale, Nov. 2, 1855. *Bibliotheca Sacra*, LVI, 737-38. Charles A. and Mary Beard's *Rise of American Civilization* (New York, 1927) II, 19 says that the McLean Papers show that McLean notified the Court of his intention to dissent. A careful examination failed to locate any such notification. Among the Papers are many letters congratulating McLean upon his opinion. Both McLean and Curtis violated the tradition of the Court by giving their opinions to the press in advance of official publication. 19 Howard, containing the opinions, was issued, May 28, and the *National Intelligencer* began reprinting them on the following day.

[31] Benjamin R. Curtis (ed.) *A Memoir of Benjamin R. Curtis* (Boston, 1879), 85-89. The *Memoir* was written by George Ticknor Curtis. Commonwealth *v.* Aves, 18 Pickering, 195-225.

[32] *Ibid.*, 123-36.

[33] 2 Curtis, 630-36.

In 1854, he procured the indictment of Theodore Parker and Wendell Phillips for obstructing legal process on account of speeches they had made on the Burns case at a public meeting, but subsequently quashed the indictment on a technicality.[34] The northern press denounced him savagely. The New York *Tribune* said: "He is not a Massachusetts judge — He is a slave catching judge, appointed to office as a reward for his professional support given to the fugitive slave bill."[35]

After the first argument in the Dred Scott case, Curtis wrote George Ticknor confidentially: "The Court will not decide the question of the Missouri Compromise line — a majority of the judges being of the opinion that it is not necessary to do so."[36] Apparently at that time he had no thought of dissenting from this opinion.[37] In 1854, before the Dred Scott case had come to the Supreme Court, Curtis had written Ticknor complaining of the salaries paid to the Court. "They are so poor," he wrote, "that not one judge on the bench can live on what the Government pays him."[38] Soon after the decision was rendered in the Dred Scott case, Curtis resigned from the bench, at the same time writing ex-President Fillmore that he had done so on account of the inadequacy of the salary.[39] Obviously if he were to return to Boston to practice law, it was necessary to rehabilitate his reputation in Massachusetts. How far that considera-

[34] Curtis *op. cit.*, 173-74, 177-78. Parker's *Trial of Theodore Parker for the Misdemeanor of a Speech in Faneuil Hall* (Boston, 1855) is violently partisan but there is no reason to doubt the correctness of his statement of Curtis' agency in procuring the indictment. The indictment was quashed in Stowell's case and nolle prossed in the others. U. S. *v.* Stowell, *Federal Cases*, 16409.

[35] Quoted in Warren, *op. cit.*, II, 262.

[36] Curtis, *op. cit.*, 180.

[37] After the first argument of the case, a correspondent of the New York *Tribune*, writing, April 10, 1856, reported that McLean, Curtis, and Grier would dissent from the majority of the Court. Quoted in Warren, *op. cit.*, II, 284. The guesses of the correspondents are so wide of the mark that they are not to be taken seriously. Certainly Grier had no thought of dissenting. C. H. Hill wrote George Ticknor Curtis, August 25, 1878: "Judge McLean and Judge Curtis were to dissent in a brief opinion to be drawn up I think by Judge McLean." Curtis, *op. cit.*, 235. This is Mr. Hill's recollection of a statement made by Judge Curtis in conversation nearly five years before, and the next sentence implies that he is uncertain about it. McLean and Curtis differed so widely on the subject of jurisdiction that they could scarcely have joined in one opinion.

[38] Curtis, *op. cit.*, 175.

[39] *Ibid.*, 250.

tion may have influenced him in deciding to dissent from the opinion that it was originally intended should be given by Judge Nelson is an interesting subject for speculation. Whether or not that was the purpose, it had that effect. Within a week after his resignation, he received seven retainers in important cases. His receipts from fees during the succeeding years amounted to $650,000 which was much better financially than being a justice of the Supreme Court.[40]

During the years that followed his retirement from the Court, Judge Curtis was strangely reticent in regard to the Dred Scott case. As he and his brother were both involved in the case, the one as judge and the other as attorney, it would have been natural for them to discuss it at some time, but they seem never to have done so. Upon one occasion Judge Curtis did discuss the case quite freely with a Mr. Clement H. Hill, and when George Ticknor Curtis wrote the *Memoir* of his brother, in 1879, he utilized the points that Mr. Hill could recall of this conversation five years after it took place.[41]

McLean and Curtis would have been justified in refusing to concur in the opinion of Nelson had they been able to present good reasons for doing so, but this they did not do. It is not necessary to summarize the whole of the two opinions. They followed different lines. McLean denied that the jurisdiction of the lower court was in question and refused to discuss it. In this way, he avoided his record in the case of Strader *v.* Graham. Curtis claimed that the question of the jurisdiction of the lower court was before the Supreme Court. He did not show that the lower court had jurisdiction, but he did show that the plea to the jurisdiction was insufficient and was improperly overruled. Then he showed that free negroes had been regarded as citizens in some states and unwarrantedly concluded that, if they were citizens in some states, they had a right to sue as citizens in any state. This might be true of free negroes, whose home was in a state in which free negroes were regarded as citizens, who happened to be sojourning in another state, but it was not true of any other negroes and was not true of Scott. Even if Scott had claimed his freedom in Illinois, he could not have sued in

[40] *Ibid.*, 264, 268.

[41] *Ibid.*, 234.

the federal courts as a citizen of Illinois because Illinois did not recognize free negroes as citizens and Lincoln, in debate with Douglas, said that he would never be in favor of doing so.

Waiving the question of jurisdiction, both opinions came to the same point, viz. the effect upon Scott of his return to Missouri. That was the vital point in their view of the case. McLean said that a proper respect for the laws of Illinois, which is inter-state comity, required that Missouri give effect to them. Curtis said that the rules of international law required that Missouri give effect to the laws of Illinois. The rules of international law applied to the states of the Union constitute inter-state comity. Thus both opinions, stripped of extraneous issues and superfluous verbiage, come to this: that inter-state comity required Missouri to recognize Scott as a free man because he might have claimed freedom in Illinois and Wisconsin Territory.

For this assumption there was no foundation whatever. In the first place inter-state comity is dependent upon reciprocity. As Nelson pointed out, if a proper respect for the laws of Illinois required Missouri to give effect to them, then a proper respect for Missouri required that Illinois give effect to her laws and Scott would not have been free in Illinois. Not only did the free states not give effect to the slave laws of slave states, but it was notorious that many people in free states were assisting slaves in slave states to escape from their masters. In the second place, no state ever gives effect to the laws of other states when they are considered against public policy. Most of the southern states prohibited free negroes from coming to and settling within their limits. This had been the subject of violent controversy at the time of the admission of Missouri. Ever since the Vesey plot in Charleston, in 1822, the South had felt that free negroes were likely to foment slave insurrection and were, therefore, an element of danger. No state admits any person or class of persons whose presence is regarded as dangerous. This is so obvious that it would never have been questioned had the public mind not been warped by the controversy over slavery. As no chain is stronger than its weakest link, the arguments of both McLean and Curtis failed because untenable at the vital point, and did not justify their refusal to concur in the opinion of Nelson.

Before taking up the opinion of the Chief Justice, it should be said that Taney was opposed to slavery. In his early life, he incurred great odium by defending a Methodist minister, indicted for inciting a slave insurrection by condemning slavery in a sermon.[42] He manumitted the slaves he inherited except two, who were too old to take care of themselves and these he supported until their death. The position that he took in the Dred Scott case was the result of a mistaken sense of duty and not of any partiality for slavery. His opinion was designated by the *Reporter* as the opinion of the Court and properly so designated, since a majority of the Court concurred in the conclusions stated although not in the reasoning upon which they were based.[43] In recent years, his opinion has been extravagantly praised,[44] but like the opinions of McLean and Curtis, it was a political opinion, and like them, it failed at the crucial point.

In the first part, Taney undertook to prove that no negro could be a citizen. He did this in order to show that the plea to the jurisdiction of the lower court, that Scott was a negro, was sufficient and ought not to have been overruled. In order to maintain this thesis he took the untenable ground that citizenship was derived from the federal government. The framers of the Constitution, in order to secure its ratification, left many things to the states that they might have liked to regulate. Among other things they expressly provided that the qualifications for suffrage should be prescribed by the states. Inferentially, they left it to the states to determine who should be citizens, except in the matter of aliens, and there it remained until the adoption of the Fourteenth Amendment. The question whether any negro could be a citizen was not properly before the Court, but only the question whether this particular negro was a citizen, and that had already been decided by the proper authority — the Supreme Court of his own state. Curtis, by way of rebuttal, showed that in some states free negroes were

[42] Tyler, *op. cit.*, 125-31. Gruber case in Lawson, *op. cit.*, I, 69-106.

[43] E. W. R. Ewing, *Legal and Historical Status of the Dred Scott Decision* (Washington, 1909) chap. v.

[44] *Ibid.* Also Cohn, "The Dred Scott Case," *Am. Law Rev.*, XLVI, 548-57. Lawson, *op. cit.*, XIII, xx.

regarded as citizens although, as a matter of fact, there was a distinct judicial opinion to that effect in only one state — the state of North Carolina.[45] It was this part of Curtis' opinion that gave it the appearance of weight. Taney undertook to distinguish between citizenship in a state and citizenship in the United States. Even if the distinction had been tenable, it was immaterial, since the right to sue in a federal court on the ground of diverse citizenship depended solely upon state citizenship. The phrase "citizen of the United States" was used in the Constitution only in prescribing the qualifications for the presidency and for members of Congress and was in no way involved in the case. At its close, Taney himself admitted that the discussion was unnecessary, since it appeared from the record that Scott was a slave and upon that ground final judgment was rendered. As it was unnecessary, it ought not to have been presented.

The second part of Taney's opinion was an argument to prove that the Court had a right to discuss the merits of the case after deciding that it had no jurisdiction. It is now conceded that technically Taney acted in accordance with what at that time was the practice of the Court.[46] Nevertheless, as Taney knew that the opinion he was about to give would create great public excitement and would be popularly regarded as *obiter dicta*, he ought to have acted with more discretion.

The third part of Taney's opinion was a discussion of the merits of the case. In this part he took the ground that the power of Congress to govern acquired territory was derived from the treaty-making power rather than from the power of Congress to "make needful rules and regulations respecting the territory and other property of the United States." One view was as good as the other, and the source of the power was immaterial as long as the power was conceded. Taney then contended that the power must be exercised subject to the re-

[45] Reversed as far as voting was concerned, in 1854, by constitutional amendment. On negro citizenship, see Report on Citizenship, 62-66, *House Document* 326, 59 Cong., 2 Sess., Serial 5175. Also, Gordon E. Sherman, "Emancipation and Citizenship," *Yale Law Journal*, XV, 263-83.

[46] Ewing, *op. cit.*, chap. vi. E. S. Corwin, "The Dred Scott Decision," *The Doctrine of Judicial Review* (Princeton, 1914), 133-40.

strictions of the Constitution, among others the prohibition to take "life, liberty or property without due process of law." Taney claimed that slaves were property nationally. In support of this claim, he could point only to the clauses of the Constitution postponing the prohibition of the slave trade until 1808 and providing for the return of fugitives. Neither furnished any basis for the contention. The provision respecting the slave trade was a distinct recognition of the fact that the trade was objectionable and should be prohibited at the earliest possible time. As pointed out by both McLean and Curtis, the fugitive-slave clause expressly recognized the fact that slaves were property by state law. "Any person held to service in any state, *under the laws thereof*," escaping into another state shall be delivered up.

Property is whatever the law protects as such. All private property is based upon local law. As a matter of comity, every state recognizes whatever is property in other states, provided it be not objectionable in character, but every state refuses to recognize as property anything that is objectionable. The fugitive-slave clause of the Constitution, instead of being a general recognition of slaves as property, was precisely the reverse, the recognition of slaves as property in a particular case, viz. in the event of their escape to a place where they might not otherwise be so recognized.[47] The prohibition to take property without due process of law, applied to slaves only where they were property, i. e., in slave states and in the event of their escape to free states. Upon this point the whole of Taney's argument falls to the ground. Moreover, an act of Congress, within the scope of its powers, would be due process of law and on this score, also, Taney's argument would fail.

It is not necessary to analyze the remaining opinions in detail. Grier concurred with Nelson but agreed with Taney in believing that the Missouri Compromise was unconstitutional. This attempt to take both sides was apparently the only effect

[47] The cases cited by lawyers (Mikell, *loc. cit.*, 177-78) to show that the federal government recognized slavery, relate either to fugitives or to slaves in slave states. The framers of the Constitution could not have intended a general guarantee of slave property, since they were almost unanimously opposed to it and believed it to be in the way of ultimate extinction.

of Buchanan's letter. Wayne and Daniel concurred absolutely with Taney. Campbell and Catron agreed with the principal opinions of Taney but reached their conclusions by different processes of reasoning. Both assumed that slavery was national but did not state the grounds of their belief. Both agreed that Congress must protect it in the territories because otherwise it would create inequality among the states. Campbell claimed that the power of Congress over the territories was limited to external regulation, while Catron claimed that it was plenary but inconsistently denied the power of Congress to prohibit slavery in them.[48] The consensus of the majority opinions was that slavery was national and that Congress could not prohibit it in the territories but must protect it there. In this way the Court sustained the so-called doctrine of non-intervention. The only point decided by the judgment of the Court was that the status of a slave, leaving a slave state and subsequently returning to it, was determinable by the courts of that state. The case was resented, not for what it decided, but for what the opinions portended.

All the territory acquired from Mexico, outside of the state of California, had been organized into the two territories of Utah and New Mexico, upon the condition that the status of slavery therein should be determined by the local courts subject to appeal to the Supreme Court of the United States. All of the territory acquired from France, north of the state of Missouri and extending from the Missouri River to the Rocky Mountains, had been organized as the territories of Kansas and Nebraska upon the same condition. It was clear that as soon as a case involving the status of slavery in any of these territories, aggregating approximately one third of the total area of the United States, should reach the Supreme Court, a majority of the Court would say that Congress could neither

[48] Catron claimed that the Missouri Compromise was "void" because in conflict with the Louisiana Treaty, but also said that "it violates the most leading feature of the Constitution." He was very emphatic in his opinion that the question of jurisdiction was not before the Court. He feared that the Court might impugn the jurisdiction that he had exercised for nearly twenty years in the territory west of Missouri. Writing to Judge Samuel Treat (May 31, 1857), he expressed the fear that his view of the case would not reach the public through the publication of his opinion in the press. Ms.

prohibit slavery nor authorize the people of the territory to do so, but must protect it. Most people believed that this decision had already been made. Buchanan in submitting the Lecompton constitution to Congress said in his message: "It has been solemnly adjudged by the highest judicial tribunal known to our laws that slavery exists in Kansas by virtue of the Constitution of the United States. Kansas is therefore as much a slave state as Georgia or South Carolina." When the President of the United States did not understand any better than that what had been done, it was not to be expected that the people would.

It is impossible to exaggerate the effect of the Dred Scott decision. It destroyed Douglas. Upon this question the issue was immediately joined between Lincoln and Douglas. Douglas was forced to fall back upon the doctrine of unfriendly legislation which he had originally promulgated in 1850. This enabled Lincoln to reply: "Judge Douglas says that a thing may be lawfully driven away from a place where it has a lawful right to be." Upon this issue the South deserted Douglas and the Democratic party divided. The Dred Scott decision revived the Republican party.[49] The party was nearly bankrupt for the lack of an issue. The Kansas issue was worn out. People were tired of hearing of "bloody Kansas." Just at the right moment, the Dred Scott case provided a new issue and upon this issue Lincoln was nominated for the presidency and elected. The Civil War might not have been averted, but the only chance of averting it lay in the election of Douglas by a united party and the adoption of a new compromise which could have tided over the crisis until a larger degree of intercommunication and a better understanding between the sections had rendered possible a peaceful solution of the problem of slavery.

The most important recent discussion of the Dred Scott case is Professor Corwin's, but unhappily, at its close, he harks back to the old anti-slavery cry that Taney was "guilty of a gross breach of trust."[50] It was rather a fatal error of judgment. But obviously, whatever measure of condemnation is meted out to Taney attaches in even greater degree to McLean and Curtis,

[49] Albert J. Beveridge, *Life of Abraham Lincoln, 1809-1858* (Boston, 1928), II, 450, 453.

[50] Corwin, *op. cit.*, 157.

whose dissenting opinions caused Taney to abandon the original decision to dispose of the case without discussing the political questions involved. Of the three, the most blame falls upon Curtis. Taney had been brought up in the tradition that slavery was national, and at his advanced age it was doubtless difficult for him to change his opinions. McLean had long been associated with the anti-slavery movement and was blinded by political ambition. Curtis had no strong prepossessions or party affiliations, and it is difficult to explain his course except on private grounds. Had Curtis concurred with Nelson, there would have been no majority opinion of the Court that slavery was national and that Congress must protect it in the territories. In that event the Dred Scott case would never have been heard of and the whole course of American history would have been changed.