

Dred Scott: A passage to "Upper Louisiana" brought dreams of freedom.

IMMORTAL LITIGANT

The defendant went insane. The President of the United States was charged with conspiracy. The case papers were stolen. The Chief Justice fell into a state of mental and physical collapse, brooding over two deaths in two days. A woman burned to death. And a Negro slave died in order to win his citizenship. This was the Dred Scott Case.

By MORTIMER SCHWARTZ, Associate Professor of Law, University of Oklahoma,
and JOHN C. HOGAN, Research Editor, The Rand Corporation

EXCEPT TO A FEW, it may seem facetious to ask whether a Negro born in the United States is a citizen of this country. Yet that very question led to a legal battle 100 years ago, March 6, 1857, and placed the name of an otherwise inconsequential individual in the annals of American constitutional history.

That man was Dred Scott. Scott's name is familiar to most Americans, but the background of his epochal march up to the Supreme Court of the United States is little remembered.

Perhaps because of the tremendous impact of the Dred Scott decision upon constitutional law, some of the lesser publicized circumstances surrounding the case tend to remain ignored if not obscured. Yet a mere cataloging of these incidents might

fire the imagination of the historical novelist.

While the case was in progress, the defendant, John F. A. Sanford, went insane. The wife of Justice Peter V. Daniel burned to death while the case was being argued. Two justices, Taney and Wayne, were ill throughout most of the case. Justice Taney returned to the Court for the first time following the death of his wife when the case was first argued.

At an early date, the original papers in the case were stolen from the files of the lower court and turned up later in the files of a California attorney after his death. The President of the United States, James Buchanan, was openly charged with conspiring with members of the Court to obtain advance notice of the decision. Justices

Curtis and McLean were accused of using their dissenting opinions for purely political or personal purposes. Justice Benjamin R. Curtis resigned from the Bench of the Supreme Court, probably as a result of this decision.

Although this was the second case in the history of the Supreme Court to declare an act of Congress unconstitutional, Court Reporter John Bancroft Davis omitted the decision from a list of federal statutes declared unconstitutional, compiled on the Centenary of the Court.

A brother of one of the justices deciding the case, George Ticknor Curtis, argued a phase of the case for Scott before the Supreme Court.

Exact information about the birth date of Dred Scott has never been established,

but the year has been estimated to be 1795. At about 33 years of age, Scott was a person of unusual appearance, just four feet, nine inches short, with dusky skin, a head of thick, wooly hair, and a black mustache which partially covered his rather full lips. He walked with a slight swagger, common to Negroes then, and was strong and active.

It was at this time, in 1828, that Peter Blow, a resident of Tennessee, moved to St. Louis, Missouri, bringing with him a number of slaves including Dred Scott. Six years later, while still in Missouri, Blow sold Scott to Dr. John Emerson, an army surgeon at St. Louis, who was then preparing to transfer to duty in Illinois.

Emerson was not liked by Scott and the little Negro ran away when he learned that the sale had been made. For two days Scott avoided capture, but finally he was found and turned over to his new master. Emerson took Scott immediately to Rock Island, Illinois, which was then a free state.

In 1836 Emerson transferred to another military post, this time in the free territory of "Upper Louisiana," where slavery was not recognized, and took Scott with him. Not too long afterwards Emerson bought

a Negro girl, Harriet, who became the lawful wife of Scott. The marriage produced two children, Eliza, born in free territory on the steamboat Gypsy on the Mississippi River, and Lizzie, born at the Jefferson City Barracks in Missouri. In 1838, Emerson returned with his slaves to Missouri and resided there until his death.

Following Dr. Emerson's death, a suit was brought in 1846 against his widow in the circuit court of St. Louis County on behalf of Dred Scott to gain his freedom. Scott's status as a slave was challenged since he had been taken by Emerson to free territory and had resided there for several years. The court rendered a judgment in Scott's favor in 1850, but the decision was reversed two years later on appeal to the Supreme Court of Missouri.

In the meantime, Mrs. Emerson had remarried, and her husband was now Calvin C. Chaffee, an abolitionist Congressman from Massachusetts. This fact made it embarrassing, if not impossible, to defend a further suit in the name of the true owner of Dred Scott. Therefore, when it became known that a suit would be brought in the Circuit Court of the United States to secure Scott's freedom, a fictitious sale was

arranged to Mrs. Emerson's brother, John F. A. Sanford of New York. Sanford thereafter "owned" Scott, his wife and two daughters. This was especially convenient since the technicalities of the law required that one of the parties must be a citizen of a state other than Missouri before a suit could be brought in a Federal Court.

Resort was made to the Federal Courts in 1853. Scott filed an action in trespass for assault and battery against Sanford in the Circuit Court of the United States. After a jury trial, judgment was rendered for the defendant, Sanford. The case was then brought before the Supreme Court of the United States, in 1854, to review certain exceptions taken to the instructions given by the judge to the jury.

The *Dred Scott Case* was first argued before the Supreme Court in February, 1856, but the Justices were so divided in their views, that a re-argument was held on December 15-19, 1856.

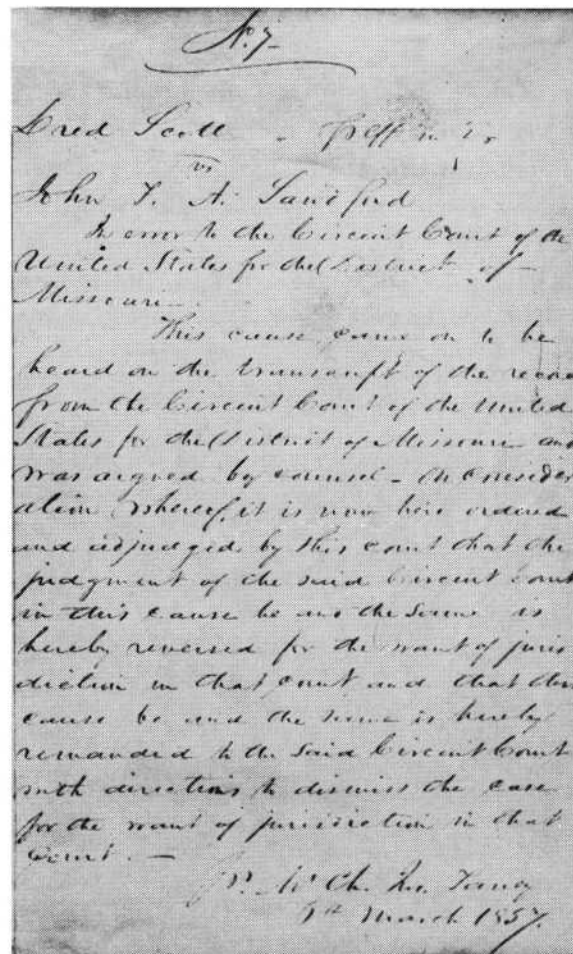
The caliber of the legal talent representing both sides in the final argument was equal to the importance of the case. Montgomery Blair and George Ticknor Curtis appeared as counsel for Scott, while Reverdy Johnson and Henry S. Geyer represented Sanford.

Blair, born in Kentucky, studied law shortly after graduating from West Point and resigning from the Army. Settling in St. Louis, Blair established a successful law practice which eventually led him to preside over the Maryland convention of the Republican party that nominated Lincoln for the Presidency in 1860. Blair subsequently served under Lincoln as Postmaster General.

Curtis, a native of Massachusetts and a graduate of Harvard University, first practiced law in Boston but later moved to New York where he achieved a high measure of success as a patent attorney. A close associate of Daniel Webster, he was one of the "Cotton Whigs" who became Democrats. He was also a prolific writer and some of his works on Constitutional history are still regarded highly.

Besides being the younger brother of Supreme Court Justice Benjamin R. Curtis, who was on the Bench when the case was argued, one further contradiction must be noted. In 1852, serving in Boston as the United States commissioner under the Fugitive Slave Act of 1850, the younger Curtis incurred the wrath of abolitionists by returning a runaway Negro to slavery.

Reverdy Johnson was no less a giant in the legal profession than his opposing colleagues. Born in Maryland, he graduated from St. John's College in his home town of



Reproduction of a photostat of the "Judgement" of the Supreme Court in the Dred Scott Case. This Opinion of the Court took some two weeks to prepare by a failing Chief Justice of the Court.

Annapolis. He won a reputation before the United States Supreme Court as one of the ablest constitutional lawyers of the period. A former member of the Maryland legislature and the United States Senate, first a Whig and later a Democrat, Johnson served in 1849 as United States Attorney General under President Zachary Taylor. Later, in 1860, he was to act as one of the defense counsel for Mary Surratt, the alleged accomplice of John Wilkes Booth.

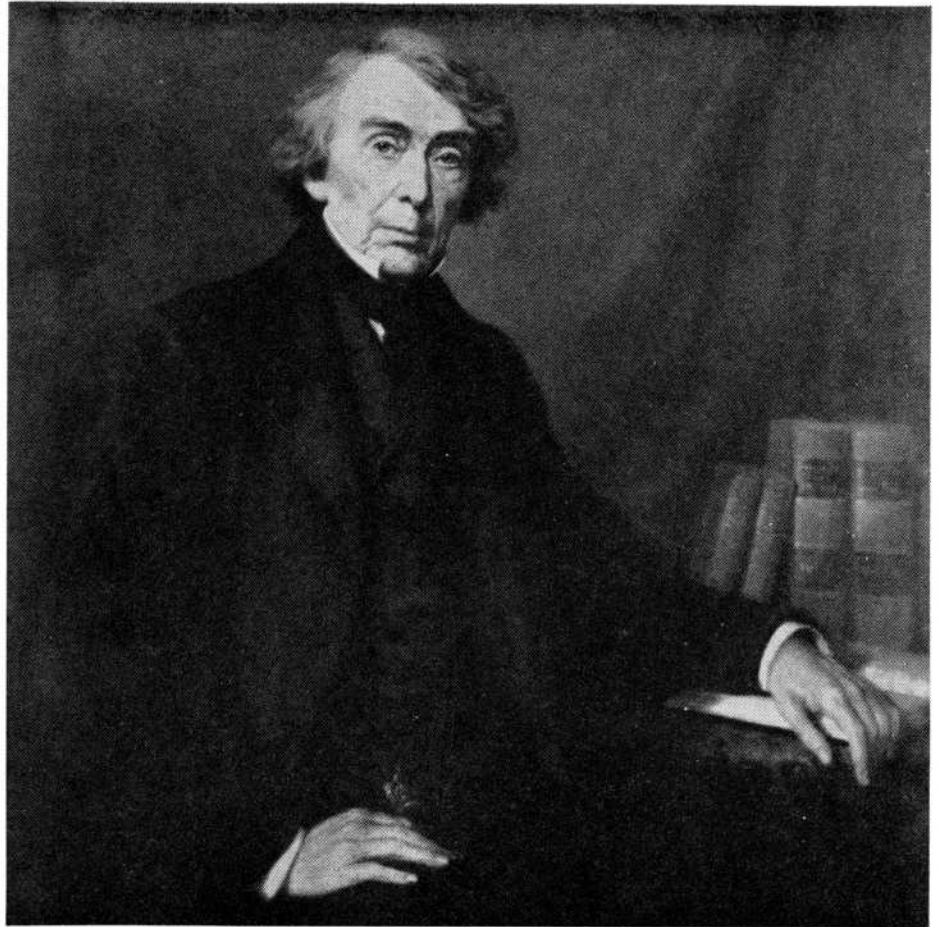
Henry S. Geyer, Johnson's colleague in Dred Scott's case, was formerly of Frederick County, Maryland. After service in the war of 1812, he settled in St. Louis where he established an outstanding law practice. Geyer was currently a United States Senator from Missouri.

Chief Justice Taney (pronounced "Tawney") was 80 years of age when he met with the Supreme Court on March 6, 1857, to deliver the Opinion of the Court in the *Dred Scott Case*. Two years before, Taney had experienced the double shock of the unexpected and sudden death of his wife, followed on the next day by the death of his youngest daughter, Alice. This unsettling episode left the grieving and overworked Chief Justice in a state of near mental and physical collapse, so that he was never able to devote himself as fully as previously to his judicial duties during the time that the *Dred Scott Case* was before the Court.

In February, 1857, the Chief Justice met with his colleagues on the Bench for a conference on the case. They decided at this conference to avoid completely the question of the constitutionality of the Missouri Compromise. Justice Nelson was assigned the task of preparing the Opinion of the Court which would go against Scott on the grounds that under Missouri law as interpreted by the Supreme Court of that state, he remained a slave despite his previous residence in free territory.

Justices Curtis and McLean, however, made it known that they intended to file vigorous dissenting opinions upholding the constitutionality of the Missouri Compromise. The Court's southern members, constituting a majority, were thus forced to consider the whole question of Federal power over slavery in the territories. The majority members came to the conclusion that congress had no power to prohibit slavery in the territories.

Justice Wayne subsequently convinced Taney that the Opinion of the Court should be over the signature of the Chief Justice because of the national interest in the case. Old and weak, and pressed by the daily Court routine and other business, Taney



Chief Justice Taney was 80 when he delivered the Court's Opinion in the *Dred Scott Case*. Two years earlier his wife died suddenly one day, his daughter the next, and the strain told upon his mind.

undertook to write the lengthy Opinion of the Court with only some two weeks in which to do the work. But on the designated day Chief Justice Taney, in a low, feeble voice, "almost inaudible" to his brethren on the Bench, read the Opinion of the Court.

The eminent political scientist and historian, Carl Brent Swisher of Johns Hopkins University, in his biography of Chief Justice Taney, has dealt with an opinion Taney wrote as Attorney General 25 years earlier and its similarity to the Opinion of the Court in the *Dred Scott Case*. And the constitutional argument made by Reverdy Johnson, Sanford's advocate, is considered by many historians as significantly influential in shaping the decision read by Chief Justice Taney.

Yet the background of Taney's health as just described and a revealing analysis of the writings of the *Dred Scott* Justices has cast some doubt upon Taney's authorship of the Opinion of the Court. There is strong evidence pointing to the hand of Justice Wayne, who had influenced Justices

Taney and Catron and busied himself also to persuade the other justices to concur in Taney's opinion, as the true writer of the Opinion.

Each of the Justices had prepared an opinion in the *Dred Scott Case*. Justice Wayne, however, announced that he would neither file nor read his opinion. His papers contain no trace of this manuscript opinion.

Justice Wayne was well acquainted with the problems of southern slaveholders. As an Alderman, he helped draft an Ordinance prohibiting the teaching of reading or writing to free Negroes in Savannah. While presiding over a court in that city in 1818, he sentenced an offender for "keeping a School for Negroes." A mortgage executed in 1821 by Wayne to Jeremiah Cuyler lists 21 slaves as security for the sum of \$8,600, while the tax records of Chatham County for the year 1856 show that the Justice had nine slaves at an assessed value of \$4,500. In Washington, D. C., Wayne employed

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OKLAHOMA'S FAIR LADY

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among the more favored choices. Outside of completing school, she has only one more obligation to perform: a return to the pageant at Atlantic City next fall to be on hand for the coronation of the next "Miss America."

One thing should be clarified—the answer given by Nancy to her approval or disapproval of boys' wearing Bermuda shorts. Her television answer was "disapproval," but that answer had to be quick at the time she gave it. The truth is that she doesn't really disapprove, but that "they look okay on some boys, and I have no objection to their wearing them. It's just that Bermuda shorts very definitely have their place—picnics, some parties, and things like that. I just don't approve of them on the streets—and on dates."

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And if anyone knows that different cuts of apparel have their place, it's Nancy. Very possibly the starting point of her renown was the production of Shakespeare's *Hamlet* presented by the University Players in January, 1956. She was a lady of the court in that play and wore a long, hot, elaborate costume which kept her on her feet constantly; if she sat down, the costume would be crushed in the wrong places and, consequently, ruined.

Then Nancy earned some extra money when summer rolled around, driving a tractor in one of the exhibits at the state fairgrounds' Oklahoma Semi-centennial Exposition. Pigtailed this time and just a mite sore from wheeling the machine about the floor and acting out in pantomime the public address system's elaboration, she now wore—coveralls.

Both costumes were a far cry from her "Miss America" pageant gowns, and neither would have been suitable, needless to say. Nancy Denner had come a long way in a very short time.

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only white labor, but it was said that he "still owned slaves back home."

It is not the poor state of the Chief Justice's health at the time he was induced to write the Opinion of the Court, nor the acknowledged influence of Justice Wayne that form the most interesting basis for speculating about the authorship of the Opinion. An analysis of the sentence structure in writings of the Dred Scott Justices reveals some additional evidence concerning the authorship of the Opinion of the Court. Fourteen pages from known opinions of Justices Taney, Wayne, and Grier, and twelve pages from the Opinion of the Court were subjected to Llewellyn M. Buell's "List of Common Words for Elimination in Style Analysis" (*Vocabulary Improvement*, New York, 1939).

By eliminating from the samples all common words which also appear in the Buell "List," there remain only the substantive or content vocabulary of the Justice, made up of rarer and less frequently used words. By subjecting this content vocabulary to the word frequency tables in Thorndike's Word Book, it has been possible to determine an exact rarity value for each word used. A comparison of the vocabulary, both content and common, found in the Opinion of the Court, with vocabularies found in

opinions known to have been written by Justices Taney, Wayne, and Grier clearly suggests the participation of Justice Wayne in the preparation of the Opinion of the Court.

But that is not all. The repetition of sounds, as well as words, is often a marked characteristic of style. An unusual effect is produced when passages taken from the Opinion of the Court are read orally, and simultaneously, with other passages taken from Justice Wayne's known opinions. A parallelism of sound, of emphasis, and of words used is immediately discernible. Repetition of words is typical of Justice Wayne's style, but not of Taney's.

It is significant too that Taney did not comply with the Rule of the Court that an opinion should be delivered over to the Clerk to be recorded immediately after it had been read from the Bench. A note designating the order in which the opinions were to appear in the official report of the case was prepared by Chief Justice Taney and Delivered to the Clerk of the Court on March 13, 1857.

A newspaper reporter calling at the Clerk's office on March 28, 1857, was told that the "opinion of the Court, as read by the Chief Justice, is not yet on file . . ." Subsequently, Justice Curtis learned that Justice Taney was revising the Opinion. On April 2, 1857, Curtis wrote to the Clerk, asking to see a preliminary print of the revised Opinion. The Clerk advised Justice Curtis that orders from the Chief Justice had forbidden the release of the Opinion to anyone until all of the opinions had been published in the official form. This sparked an angry exchange of correspondence between Justice Curtis and Chief Justice Taney, and culminated in the resignation of Curtis from the Court.

In May of 1857, Dred Scott was sold by Dr. Chaffee and Mrs. Emerson to Taylor Blow of St. Louis, the son of the man who had sold Scott to Emerson 23 years before. And three months after the United States Supreme Court rendered its decision denying that Scott had any rights as a free man, he was emancipated by Taylor Blow.

Even though he had the assurance in advance that he would be freed after the Court rendered its final decision—for the parties were actually interested only in a test case—the strain of the journey through the state and Federal courts was too much for Scott who was then in his sixties. He died 18 months after being made a "citizen."

Not too long after, the North and South were embroiled in the Civil War, and the Fourteenth Amendment that followed nullified the Dred Scott decision.