DRED SCOTT, JOHN SAN(D)FORD, AND THE CASE FOR COLLUSION

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I. INTRODUCTION

Few Supreme Court rulings have been as thoroughly examined as *Dred Scott v. Sandford*,[1] one of the Court's great "self-inflicted wounds,"[2] and perhaps the ultimate legal example of the law of unintended consequences. The purpose of this article is to explore an aspect of *Dred Scott* that has generally been overlooked or rejected: was the case collusively brought?[3] By this is meant, not collusion in the sense that both sides desired the same outcome, but rather that both sides cooperated in creating a fictitious case, with the aim of securing a Supreme Court determination despite the absence of a case or controversy. Was a key historical case, one that did much to bring on the election of Lincoln, the Civil War, and the Thirteenth, Fourteenth, and Fifteenth Amendments, based on a fictitious stipulation that John Sanford claimed Dred Scott as his slave?

A brief historical background is appropriate. The early 1850s were doubtful times for the American anti-slavery movement. The Whig party, where many anti-slavery candidates had found a home, was disintegrating. In 1850 the anti-slavery movement saw a few gains – the admission of California as a free State— and some major losses – the enactment of the appallingly draconian Fugitive Slave Act of 1850,[4] followed by the Kansas-Nebraska Act,[5] which repealed the

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1. 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.. Among the major treatises devoted to the case are: AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE, JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT 1837-1857 (2006); WALTER EHRLICH, THEY HAVE NO RIGHTS: DRED SCOTT'S STRUGGLE FOR FREEDOM (1979); DON E. FEHRENBACHER, THE DRED SCOTT CASE (1978); PAUL FINKELMAN, DRED SCOTT V. SANFORD: A BRIEF HISTORY WITH DOCUMENTS (1997); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); VINCENT C. HOPKINS, DRED SCOTT'S CASE (1951); and LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (2010).

2. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS 50 (1928).

3. *See, e.g.*, EHRLICH, *supra* note 1, at 77-78 (treating the subject as a mistake; not collusion); FINKELMAN, note 1 *supra*, at 23 n.28 (giving it a footnote); HOPKINS, *supra* note 1, at 23-24 (barely mentioning the issue raised here); VANDERVELDE, *supra* note 1, at 295 (considering it a matter of convenience to the parties).

4. *An Act to amend, and supplementary to, the Act entitled "An Act respecting Fugitives from Justice and Persons escaping from the Service of their Masters,"* 9 Stat. 462 (1850), *available at* http://www.wvculture.org/history/jbexhibit/fugitiveslave.html.

5. *An Act to Organize the Territories of Nebraska and Kansas*, 10 Stat. 277 (1854), *available at* http://avalon.law.yale.edu/19th_century/kanneb.asp.

Missouri Compromise,[6] thereby opening the northern portion of the Louisiana Purchase to slavery.

James Buchanan, a strongly pro-slavery Pennsylvanian, took over the presidency, winning not only the South, but much of the North. A rising politician named Abraham Lincoln lost his bid for the Senate, after voicing the radical prediction that the United States must become all free or all slave; friends warned him that he had committed political suicide.[7]

Then came *Dred Scott v. Sandford*.[8]

II. *DRED SCOTT* AND UNINTENDED CONSEQUENCES

In *Dred Scott*, the hitherto-respected Chief Justice Taney undertook to finish off the struggling anti-slavery movement.[9] Taney's opinion, which became accepted as the opinion of the Court,[10] stretched to reach and rule against as many anti-slavery positions as possible:

- The trial court had had no diversity jurisdiction, since no free black American could be a citizen of a State or of the United States, even if the State, or Congress, were to decide otherwise. Being a citizen of a State *for purposes of the National Constitution* was something different from being treated as a citizen by the State itself. At the framing of the Constitution, slave states would never have agreed that free blacks were State citizens; if they were such, then Article IV, Section 2 of the U.S. Constitution[11] would oblige the slave States to allow migrating free blacks rights which the ratifying slave States would never have accepted:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction,

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6. *Id.* §14.

7. 3 JOHN G. NICOLAY & JOHN HAY, EDS., COMPLETE WORKS OF ABRAHAM LINCOLN 1-2 n.1 (1905).

8. Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

9. GRABER, *supra* note 1, at 82.

10. The Justices delivered their opinions *seratim*, but Taney put his first and labeled it the opinion of the Court, even though some of his positions did not command a majority.

11. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

> to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[12]

- A slave whose master took him into a State where slavery was illegal would nonetheless return to slave status upon his return to a slave State. Local law would govern his status: once free did not mean always free.[13]
- The Missouri Compromise was unconstitutional, because Congress has no power to restrict slavery in the western territories. The Congressional power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"[14] relates only to territory owned by the States in common at the time of the framing – *i.e.*, the Northwest Territory.[15]
- Territorial governments could not ban slavery either: this would be a deprivation of property without due process of law.[16]

For half a century, a major focus of the conflict over slavery had been the creation of free versus slave territories.[17] Taney had taken that off the Congressional table: the Constitution forbade the exclusion of slavery from a territory.[18] Taney might well have concluded that he had buried the anti-slavery cause forever; certainly many of his supporters thought so:[19]

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12. *Dred Scott*, 60 U.S. at 417. Taney extensively rewrote his opinion after reading it. The version reported as read was more clumsy and did not invoke Article IV: "It cannot be supposed that the States conferred citizenship upon them; for all those States at that time established police regulations for security of themselves and families, as well as of property. In some minor cases there were different modes of trial, and it could not be supposed that those States would have formed or consented to a government which abolished this right and took from them the safeguards essential to their own protection. They have not the right to bear arms and appear at public meetings to discuss political questions or urge measures of reform, which they might deem advisable. They cannot vote as electors, nor serve as jurors, nor appear as witnesses where whites are concerned." *Decision of the Supreme Court in the Dred Scott Case – The Position of Slavery in the Constitution,* N.Y. TIMES, Feb. 7, 1857, *available at* http://lincoln.lib.niu.edu/498R/ronald/news5.html.

13. HOPKINS, *supra* note 1, at 16.

14. U.S. CONST., Art. IV, §3.

15. *Dred Scott*, 60 U.S. at 436-439.

16. *Id.* at 450.

17. *See* GRABER, *supra* note 1, at 200-202; *see also* HOPKINS, *supra* note 1*,* at 47.

18. GRABER, *supra* note 1, at 68.

19. 1 ALLAN NEVINS, THE EMERGENCE OF LINCOLN 90 (1950) ("[Buchanan's] friends assured the country that the Supreme Court had scattered his enemies and cleared his path for a successful term in office.").

> The main goal of the Republican Party was to prevent the spread of slavery in the territories.[20] From Taney's perspective, the Republican Party was a dangerous, sectional organization that might push the nation toward civil war. . . . If the nation accepted his ruling – that Congress could not forbid slavery in the territories – then the raison d'etre for the Republican Party would disappear, the sectional party would die, and the nation could get back to politics as usual.[21]

Instead, *Dred Scott* became an illustration of unintended consequences. Abraham Lincoln, then "virtually unknown,"[22] seized upon it, arguing that *Dred Scott* and the Kansas-Nebraska Act were the work of a pro-slavery conspiracy embracing all three branches of government,[23] and warning that the Court might next forbid States to exclude slavery.[24] Others argued that the case was collusive, in the sense of having a pre-ordained result. The Richland Observer called it "a fictitious case" meant to strike the Missouri Compromise and argued that the choice of Sanford, a New Yorker, as defendant was "proof of the finished cunning of these political intriguers," since "they wanted to show that northern men as well as southern men were holders of slaves."[25] The Baraboo Republic claimed, "There is every reason to believe that this case got into the Supreme Court collusively."[26]

The ruling aroused a "storm of anger" in the North;[27] Lincoln's secretaries later wrote that, while the repeal of the Missouri Compromise and the struggle in Kansas had agitated the public temper, *Dred Scott* "suddenly doubled its intensity."[28]

In the developing Lincoln-Douglas rivalry, *Dred Scott* became the ill wind that blew no one good. It had held unconstitutional Lincoln's position that Congress could stop slavery in the territories, but it did the same for Stephen

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20. GRABER, *supra* note 1, at 80-81.
21. FINKELMAN, *supra* note 1, at 44-45.
22. *Id.* at 183.
23. 3 NICOLAY & HAY, *supra* note 7, at 2-3, 9-10. Making his case in his "divided house" speech, Lincoln asserted that the nation was sliding toward becoming all slave. Congress had repealed the Missouri Compromise, the president was supporting slavery for Kansas, against the will of its people, and the Supreme Court had now joined in. His comparison was to a prefabricated building, with all parts fitting together even though made by different craftsmen, showing that they had worked pursuant to a plan. *See id*.
24. *See* PITTSFIELD BERKSHIRE COUNTY EAGLE (Mass.), Oct. 15, 1858, at 2, col. 3 ("[T]he Dred Scott decision makes slavery as legal in Massachusetts as in any other state or territory."); *Extracts from the Speech of Senator Trumbull*, OLNEY TIMES (Ill), Aug. 27, 1858 at 1, col. 6 ("Next, they will deny the power of the people when they form a State constitution to exclude it; and that such is the next step to be taken is manifest from the Dred Scott decision.").
25. *Nationalization of Slavery*, RICHLAND COUNTY OBSERVER (Wis,), Jan. 20, 1857, at 2, col. 5.
26. *The Case of Dred Scott*, BARABOO REPUBLIC (Wis.), Apr. 16, 1857, at 2 col. 5.
27. 1 NEVINS, *supra* note 19, at 96.
28. 2 JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY 58 (1914).

Douglas' position that while Congress could not outlaw slavery, the people of a territory could.[29] Douglas had presented "popular sovereignty" as a compromise – but now Taney had swept his legs from under him.

Douglas responded with his "Freeport Doctrine" – slavery could only exist where legislation supported it, so the people of a territory could exclude slavery simply by not affirmatively allowing it.[30] This was unacceptable to the pro-slavery side, which insisted that slaves were ordinary property.

> It is impossible to exaggerate the effect of the Dred Scott decision. It destroyed Douglas. . . . Douglas was forced to fall back upon the doctrine of unfriendly legislation which he had originally promulgated in 1850. . . . Upon this issue, the South deserted Douglas and the Democratic Party divided.[31]

III. BACKGROUND TO THE *DRED SCOTT* LITIGATION

A. Dramatis Personae

The events that were relevant to Dred Scott's suit spanned decades and involved a number of persons. The more important ones were:

Dred Scott was born around 1790 in Virginia as a slave to the Peter Blow family, which later moved to St. Louis. By the time he brought suit, Dred had long since married Harriett, and had two surviving daughters, Eliza and Lizzie; his wife and daughters were joined in his litigation.

Of Scott, we know regrettably little; prior to 1857, he was one more resident of St. Louis and by 1858 he was dead of tuberculosis. Only in 2009 did historian Lea VanderVelde discover his real name: Etheldred.[32]

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29. GRABER, *supra* note 1, at 239.

30. *See* FINKELMAN, *supra* note 1, at 213-15.

31. F. H. Hodder, *Some Phases of the Dred Scott Case*, 16 MISS. VALLEY HIST. REV. 3, 21 (1929). To be sure, there is a strong argument that *Dred Scott* takes second place to events in President Buchanan's drive to force a pro-slavery constitution upon Kansas, and the Kansas-Nebraska Act, in the creation of these unintended consequences. GRABER, *supra* note 1, at 39- 44. Yet those nearer in time to the events seem to see *Dred Scott* as pivotal. The *Dred Scott Decision*, N.Y. TIMES, Aug. 15, 1857 (noting that "the country was convulsed" by the ruling). Fifty years after the ruling, D. W. Grissom, a St. Louis newspaper editor, said that the ruling served the anti-slavery cause "by arousing an anti-slavery feeling in the North beyond that produced by any other case except 'Uncle Tom's Cabin.'" Typescript copy of unsigned letter dated Feb. 11, 1907 (on file with Missouri Historical Society's Dred Scott collection). The newspaper controversy is well documented in FINKELMAN, *supra* note 1, at 127-67.

32. VANDERVELDE, *supra* note 1, at 326. Prior to this discovery, it had been speculated that the name might have arisen from Scott's mispronunciation of "Great Scott!" The discovery of his real name undercuts a theory that Dred was the same person as a slave "Sam," who had been sold by Peter Blow's estate, and later came to be known as "Dred." *See* FEHRENBACHER, *supra* note 1, at 239-40. The oldest of the Blow children was Peter Ethelred Blow. EHRLICH, *supra* note 1, at 10.

The Peter Blow Family. Peter Blow brought Dred to St. Louis in 1830 and died there in 1832. He or his estate sold Dred to Dr. Emerson.[33] Peter's son Taylor Blow apparently remained Dred's close friend and supported him in his litigation.

Dr. John Emerson. Dr. Emerson was a physician and, from to time, a surgeon serving at Army posts. In this capacity, he took Dred Scott and his family for long stays in the State of Illinois, where slavery was forbidden by the Illinois Constitution, and in the Wisconsin Territory, where slavery was forbidden by the Missouri Compromise and before that by the Northwest Territories Act of 1787.[34]

Dr. Emerson died in 1843, near present-day Davenport, Iowa.[35] His will left everything but his medical books to his wife, Irene Emerson, for her life, and then to their daughter Henrietta.[36]

Irene Sanford/Emerson/Chaffee. Her full maiden name was Eliza Irene Sanford, but she usually went by Irene, and she will be so identified here. Irene was the daughter of Alexander Sanford, a minor figure in the Dred Scott litigation, and sister to John F. A. Sanford, who would become a major figure in it.

She was the Scott family's slaveholder at the outset of their litigation. In 1849 or 1850 she moved from St. Louis to Massachusetts,[37] where she soon married a congressman, Dr. Calvin Chaffee.

John F. A. Sanford. John Sanford was named the defendant in Dred Scott's Federal lawsuit; as we shall see, there is little reason to believe he had any real claim to owning Scott.

Sanford led a very interesting life. A graduate of West Point, he rose to the rank of major.[38] He became a frontiersman, then married into the Chouteau family, one of the first families of St. Louis. Eventually he became partners in Pierre Choteau Jr. & Co., which at that point had a near monopoly on the northwest's lucrative fur trade, and moved to New York City as the company's representative. He became insane in late 1856 and died in 1857, not long after the Supreme Court decision.[39]

Given the unusual character of the name, this is suggestive that Dred acquired his name while with the Blow family, not later, and it was not "Sam."

33. EHRLICH, *supra* note 1, at 12-13.

34. FINKELMAN, *supra* note 1, at 14-15.

35. Charles E. Snyder, *John Emerson, Owner of Dred Scott*, 21 ANNALS OF IOWA 440, 453 (1938).

36. *Id.* at 455.

37. KENNETH C. KAUFMAN, DRED SCOTT'S ADVOCATE: A BIOGRAPHY OF ROSWELL M. FIELD 166 (1996).

38. A significant rank in the small Army of the times.

39. 3 DAN L. THRAPP, ED., ENCYCLOPEDIA OF FRONTIER BIOGRAPHY 1264 (1988).

Dr. Calvin Chaffee. Dr. Chaffee married the widowed Irene Emerson in 1850. He served two terms in Congress, spanning 1854 - 1858. First elected to office on the American (or "Know-Nothing") ticket, he won his second election as a Republican.[40]

Roswell Field. A St. Louis attorney opposed to slavery, Field brought Dred Scott's Federal suit in the Federal Circuit Court in St. Louis. After losing there, he appealed via writ of error to the U.S. Supreme Court, and began to seek attorneys who could handle the appeal.[41]

Montgomery Blair. At Field's request, Montgomery Blair became Dred Scott's principal attorney before the Supreme Court. Blair was a member of the politically powerful Blair family of Maryland, and an experienced member of the Supreme Court bar. It was natural that Field would seek him out: they had known each other for fifteen years.[42] His correspondence with Field and with Calvin Chaffee is preserved in the Manuscript Division of the Library of Congress, and illuminates many aspects of Dred Scott's case.

B. Dred Scott*'s State "Freedom Suits"*

Scott's Federal case was preceded by two state-level "freedom suits," one of which went to judgment and appeal.[43] Such lawsuits were authorized under Missouri law[44] and were brought with some frequency. Researchers have found over 300 freedom suits filed in the St. Louis courts.[45] The most frequent basis for suit was that a slave's master had taken him or her into areas where slavery was illegal, thus legally dissolving the status of master/slave. A long line of appellate rulings had established that such a residence, unless of brief duration, caused emancipation as a matter of law, and this free status was unchanged by the

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40. *Ex-Congressman Chaffee Dead*, SPRINGFIELD REPUBLICAN (Mass.), Aug. 10, 1896, at 10.

41. Letter from Roswell Field to Montgomery Blair (Dec. 24, 1854) (on file with Library of Congress, Manuscript Division, *in* Blair Family Papers, Dred Scott folder).

42. *The Freedom Case in the Supreme Court*, Daily NATIONAL INTELLIGENCER, Dec. 24, 1856, at 3, col. 4 (reprinting letter from Blair: "I received a letter from Mr. Fields [sic] (who is a distinguished lawyer in Missouri, and one who has never, during the fifteen years I have known him, manifested any interest in politics).").

43. *See* FEHRENBACHER, *supra* note 1, at 250–51, 256–57.

44. *See* Act of December 30, 1824, § 1, *available at* http://stlcourtrecords.wustl.edu/about-1824-statute.php. Under the statute, the plaintiff applied for permission to sue; if granted, the court could give *in forma pauperis* status and even assign an attorney to the case. *Id*. *See also generally* David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53 (2006). The Missouri statute on such derived from the laws of Louisiana Territory. *Id*. at 67.

45. ST. LOUIS CIRCUIT COURT HISTORIC RECORDS PROJECT, *Freedom Suits Case Files, 1814 – 1860*, STLCOURTRECORDS.WUSTL.EDU, (last visited Sept. 22, 2013), http://stlcourtrecords.wustl.edu/about-freedom-suits-series.php; *see also* William E. Foley, *Slave Freedom Suits before Dred Scott: The Case of Marie Jean Scypion's Descendants*, 79 MO. HIST. REV. 1 (1984), *available at* http://statehistoricalsocietyofmissouri.org/cdm/compoundobject/collection/mhr/id/41510/rec/4.

plaintiff's return to Missouri.[46] Scott's state suits were aimed at freedom, not creation of a political test case, and under existing Missouri case law would have been a proverbial "slam-dunk."

Scott's first state freedom suit began in early April 1846, with F. B. Murdock representing Scott; the defendant was Irene Emerson.[47] The complaint alleged that the defendant was holding him, a free man, as a slave.[48] It also alleged that she had "beat, bruised, and ill-treated him, the said plaintiff, and kept and detained him in prison . . . ."[49] The allegations do not suggest that Mrs. Emerson was a brawler; Scott's attorneys appear to have been using old boilerplate.[50]

A defense verdict resulted, but a new trial was granted, [51] and the litigation became rather muddled for a time, as Irene attempted to appeal a non-appealable order.[52] Scott's attorneys filed, then dismissed, a second suit, this time naming as defendants Irene Emerson, her father Alexander Sanford, and a Samuel Russell.[53]

At the retrial, Mrs. Emerson's attorneys raised a defense that would become prominent as the case continued to evolve: even if the Scotts were freed by being taken into a free state and territory, their slave status resumed once they returned to Missouri. Counsel contended that:

> [T]he best considered judicial opinion is that if a slave comes back here although he has been in a free territory he becomes a slave again. . . . The voluntary return of the slave places him under the operation of our local laws and the rights of his master, if ever divested, reattach the moment they are again in a State that recognizes the institution of domestic slavery.[54]

The judge, however, instructed the jury otherwise, and the jury ruled in Scott's favor.[55]

Mrs. Emerson appealed her loss to the Missouri Supreme Court.[56] The appeal did not seem promising, given that the court's extensive case law, going back for

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46. *See* Winny v. Whitesides, 1 Mo. 472, 474–75 (1824); Merry v. Tiffin & Menard, 1 Mo. 725, 725–26 (1827); Julia v. McKinney, 3 Mo. 270, 273–74 (1833); Nat v. Ruddle, 3 Mo. 400, 401 (1834); Randoph v. Alsey, 8 Mo. 656, 656–57 (1844).

47. 13 JOHN D. LAWSON, AMERICAN STATE TRIALS 225 (Scholarly Resources, Inc., reprt. ed. 1972) (1914–46).

48. *Id.*

49. *Id.*

50. The 1845 Missouri Revised Statutes required only that "[t]he action to be brought under the leave given, shall be an action of trespass for false imprisonment, but the previous statutes had required the action "shall be in form, trespass, assault and battery, and false imprisonment."

51. 13 LAWSON, *supra* note 47, at 229.

52. *Id.* at 232. The appeal was dismissed because no final judgment had been entered. *Id.*

53. *See generally* FEHRENBACHER, *supra* note 1, at 254.

54. 13 LAWSON, *supra* note 47, at 235.

55. *Id.* at 235-37.

56. Scott v. Emerson, 15 Mo. 576 (1852).

decades, had supported the judge's instruction. Perhaps Mrs. Emerson's attorneys knew that Court's composition, and their attitudes, were changing in a more pro-slavery direction,[57] or perhaps they thought the gamble worth it.

Whatever their thoughts, the action remained a freedom suit with few political overtones. Mrs. Emerson's attorney did not attack the Missouri Compromise – "Admitting, for the sake of argument, that Congress had the constitutional power to enact this section of the law, we maintain that it is entirely local in this provision [allowing slavery in Missouri, while prohibiting it elsewhere], and by express reservation Missouri is exempted from its operation."[58]

In the Missouri Supreme Court, Mrs. Emerson won a 2-1 decision. Missouri law determined the Scotts' status: "It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of a foreign law."[59] Other States' slave laws were not entitled to comity:

> Times are not now as they were when the former decisions on this subject were made. Since they not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.[60]

IV. THE SCOTTS' FEDERAL SUIT

Scott's attorneys did not take a direct appeal to the U.S. Supreme Court, but began planning (rather slowly) a separate Federal suit. The latter was not filed

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57. *See* Dennis K. Boman, *The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri*, 44 A. J. LEGAL HIST. 405, 407 (2000). Part of the hardening was the breakdown of comity, the judicial *quid pro quo* that had evolved in the past. *Id.* This allowed a slaveholder to briefly visit free States with his slaves, without them being freed; in turn, if he resided in a free State with them, they would be free even if they returned to a slave State. *Id.* This began to break down in the 1820s and was disintegrating by the 1840s. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 11–12 (Morris S. Arnold ed., 1981).

58. *Scott*, 15 Mo. at 580–81. This was a reiteration of a theme that had arisen in British law. *See* Somersett v. Stewart (Somersett's Case), (1772) 98 Eng. Rep. 499 (K.B.) 510; Loft 1, 19. Lord Mansfield had ruled that the bringing of a slave into England resulted in legal emancipation because slavery was so extraordinary a state that only positive law could permit it. *Id.* Half a century later, Lord Stowell distinguished *Somersett*, finding that the return of the alleged slave to British territory that allowed slavery had the effect of reversing the emancipation. *See* The Slave Grace, (1827) 166 Eng. Rep. 179 (Admlty) 179; 2 Haggard 94, 94 (appeal taken from Ant.); *see also generally* William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974), *available at* http://www.jstor.org/stable/1599128.

59. *Scott*, 15 Mo. at 584.

60. *Id.* at 586.

until November 1853, a year and eight months after the Missouri Supreme Court's ruling. Since original "Federal question" jurisdiction was then nonexistent, the suit was founded upon diversity jurisdiction.[61] Roswell Field filed the lawsuit and sought thousands of dollars in damages, alleging that the defendant not only held the Scotts as slaves but had, on January 1, 1853, managed to assault all four Scotts and detain them for six hours.[62]

The Scotts' state suits had been straightforward efforts to gain their freedom, based on well-established (albeit soon to be discarded) precedent. The Federal suit was something else entirely; the parties saw it as a test case, aimed at the Supreme Court. The State freedom suit was still pending after its remand, and shortly after the Federal suit was filed, the State suit was stayed by stipulation: "Continued by consent, (awaiting decision of Supreme Court of the United States.)"[63] Both sides knew where the Federal suit was going.

The Federal complaint has a remarkable aspect. It nowhere mentions Irene Emerson. Instead, it names as defendant her brother, John F. A. Sanford, who was at this point a prominent New York City businessman. Sanford replied to the complaint that, *inter alia*, Dred Scott was "the lawful property of the defendant" and his family members were "the lawful slaves of the said Sanford."[64] His attorneys thereafter joined in an agreed-upon statement of facts, upon which the case was tried, including the statement:

> Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and defendant has ever since claimed to hold them and each of them as slaves.[65]

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61. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, § 25 (1789). Original Federal question jurisdiction was not conferred by the Judiciary Act of 1789, which in fact gave only partial appellate jurisdiction on the subject. *Id.* Even after the Civil War, and the passage of postwar civil rights acts, original jurisdiction of Federal questions was considerably narrower than it is today. *See* REVISED STATUTES OF THE UNITED STATES tit. 13, chs. 3, 13, 15, 16, 17, 18 (George S. Boutwell ed., 2d ed. 1878), *available at* http://memory.loc.gov/ cgi-bin/ampage?collId=llsl&fileName=018/llsl018.db&recNum=1.

62. 13 LAWSON, *supra* note 47, at 246–47. The sums listed in the complaint total $16,500, but the summons mentions $3,000. *Id.*

63. Dred Scott v. Irene Emerson, 24 St. Louis Cir. Ct. Rec. 33 (Mo. Cir. Ct. Jan. 25, 1854), *available at* http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;view=text; idno=dre1854.0100.102;rgn=div1;node=dre1854.0100.102%3A1.

64. 13 LAWSON, *supra* note 47, at 248–49.

65. *Id.* at 250.

The Supreme Court would later accept this statement as a summary of Sanford's interest as defendant and appellee.[66] There is one difficulty with it: It cannot possibly be true.

A. John F. A. Sanford, Calvin Chaffee, and Dred Scott

To understand John F. A. Sanford's role as the Scotts' alleged slaveholder, we must assess four possible ways in which he might have claimed that status.

1. Might Sanford Have Been the Scotts' Slaveholder?

John F. A. Sanford was at this point a wealthy New York City businessman, a partner in Pierre Chouteau Jr. & Co., and its representative to European fur buyers.[67] He was also a founding director of the Illinois Central Railroad Company, an enormous economic and technical operation,[68] and partner in Pierre Chouteau Jr., Sanford & Co., which produced railway rails.[69] He reportedly played roles in other companies[70] and was a commercial banker to boot.[71]

His work was both lucrative and time-consuming: an 1857 obituary refers to the "herculean mental labors demanded by the gigantic interests entrusted to him," his "brilliant success," and "[t]he tide of wealth that flowed upon him."[72] It is hard to see just what interest he would have had in acquiring an elderly slave in St. Louis, whose services were being rented out for five dollars a month.[73]

Moreover, if Dr. Emerson had, prior to his 1843 death, sold the Scotts to John F. A. Sanford, why had the state freedom suits (filed in 1854) named Irene as a defendant and why had she gone to the expense of defending them?

But, the most compelling proof that the stipulated facts were lies in the conduct of Irene and her new husband, Dr. Chafee. As will be shown, after the Court ruled, the pro-slavery press launched a massive attack upon their

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66. Dred Scott v. Sandford, 60 U.S. 393, 398 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Although the modern "appellant" and "appellee" here, at the time, the roles were known as "plaintiff in error" and "defendant in error." *Id.* at 399.

67. UNIV. OF MO. PRESS, DICTIONARY OF MISSOURI BIOGRAPHY 665 (Lawrence O. Christensen, et al. eds., 1999).

68. *The Illinois Central Railroad*, DAILY ILLINOIS STATE JOURNAL (Springfield), April 23, 1853, at 2.

69. 1 THOMAS J. SCHARF, HISTORY OF SAINT LOUIS CITY AND COUNTY, FROM THE EARLIEST PERIODS TO THE PRESENT DAY 183 (1883).

70. UNIV. OF MO. PRESS, *supra* note 64, at 665. After his death, his probate estate settled claims in Choteau, Sanford and Company as well as P. Chouteau, Jr. and Company. *See* Order of the Surrogate in the Estate of John F. A. Sanford, Deceased, Chouteau Collection (Dec. 12, 1859) (on file with the Missouri Historical Society).

71. PHILADELPHIA INQUIRER, May 16, 1857, at 2 (listing him as one of "three prominent merchant bankers of New York," who had died and left a total of $3,000,000 to their heirs).

72. *Died*, ALBANY EVENING JOURNAL, May 11, 1857, at 3.

73. 13 LAWSON, *supra* note 47, at 232.

reputations, asserting that Dr. Chaffee was a hypocrite. In defending himself, Dr. Chaffee never asserted the claim made in the stipulated facts, even though that would have completely cleared him: if Dr. Emerson sold the Scotts to John F. A. Sanford, then Irene had never been their slaveholder. However appealing that position might have been, the Chaffees never invoked it. From this, we can deduce it was simply untenable.

2. Might Sanford Have Controlled the Scotts as Dr. Emerson's Executor?

Dr. Emerson's will left almost all his property to Irene and their daughter:

> I give and bequeath to my Brother Edward P. Emerson all of my Medical Books. . . . All the rest residue & remainder of my estate & effects real and personal whatsoever & wheresoever & of what nature and kind soever. . . . I give, devise and bequeath to my wife Eliza Irene Emerson to have & hold to my said wife & to her assigns for & during the term of her natural life without impeachment of waste & from & immediately after her decease, I give & devise the same to my daughter Henrietta Sanford Emerson & to her heirs & assigns forever.[74]

John F. A. Sanford *was* mentioned in the will, as one of two executors. But, he failed to qualify under Iowa law and the other person named, George L. Davenport, served as sole Iowa executor.[75]

Dr. Emerson died in 1843: the probate files are lacking an executor's report and final discharge,[76] however, Dr. Emerson's realty holdings in Iowa were turned over to Irene in 1848.[77] Alexander (father of John F.A.) was named administrator for Dr. Emerson's (very limited) Missouri assets. When Alexander Sanford died in 1848, he was not replaced, presumably because the estate had been settled.[78] This is underscored by the fact that (as discussed below) in 1849, Irene, and not any probate administrator, sold the Missouri realty.

In short, it is hard to see why Dr. Emerson's estate would still have been at issue in 1857, let alone where John F. A. Sanford had had any involvement in it.

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74. Snyder, *supra* note 35, at 455 ("'Without impeachment of waste' reflects that the life tenant – here Irene – cannot be sued for waste of the assets.").

75. *Id.* at 456.

76. *Id.* at 455.

77. *Id.* at 456.

78. *See* FEHRENBACHER, *supra* note 1, at 248–49.

3. Might Sanford have Controlled the Scotts as a Manner of *De Facto* Agent for Irene?

One oft-repeated explanation of John Sanford's involvement is that, after Irene moved to Massachusetts in 1849-50, Sanford was left to manage her affairs in St. Louis, and was thus sued as her *de facto* agent.[79] But there is no reason to believe that Irene even *had* any assets in St. Louis to administer. Dr. Emerson's St. Louis probate estate was limited to a nineteen-acre parcel of realty and some furniture.[80] Irene sold the realty in 1849, before moving to Massachusetts,[81] and presumably sold the furniture or took it with her. Further, if she did have assets in St. Louis, Sanford, an extremely busy executive living in New York City, would hardly be the first choice for manager.

The only evidence cited for this understanding is Walter Erhlicht's discovery that John Sanford's estate in 1859 paid $300 to Benammi (or Benoni) S. Garland, "for ten years service attending to Dred Scott's case suing for freedom for self and family, employing counsels, attending to hires and collecting same at the request of Mr. Sanford from November 1846 to January 1857."[82]

The claim is more than a bit strange. While attorney *Hugh* Garland played major roles in both Scott's state and federal suits, there is no indication that Benammi Garland had any connection to the litigation. Did Benammi Garland pay for a decade of litigation, and forget to bill Sanford until after Sanford's death? It seems more than a bit implausible.

A Benammi Garland of St. Louis did play a role in a fugitive slave suit brought in Wisconsin.[83] During the litigation, he reportedly borrowed forty dollars from a local, then skipped town.[84] His claim against the Sanford estate may deserve some skepticism.

The evidence, in short, is that John F. A. Sanford was a fictitious defendant, a party with no legal connection to the Scott family. His nominal role in the case is underscored by the fact that his last name is mis-spelled as Sandford in the Federal complaint and in the petition for a writ of error,[85] with the result that the

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79. EHRLICH, *supra* note 1, at 39.

80. Hodder, *supra* note 31, at 5; HOPKINS, *supra* note 1, at 8 n.24.

81. Deed from Eliza Irene Emerson to Alfred Vinton (Mar. 29, 1849) (on file with St. Louis City Recorder of Deeds and Vital Records Registrar, book Y–4 at 446–47). It is noteworthy that Mrs. Emerson signed in her individual capacity; the transaction was not handled by her father, Alexander Sanford, who was the local administrator of Dr. Emerson's estate. *See id.*

82. EHRLICH, *supra* note 1, at 40, 204 n.21.

83. *See generally* H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE LAW, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2008).

84. *See* WIS. FREE DEMOCRAT, May 2, 1855, at 1.

85. *See* Files of the Clerk, Nos. 1,4, 10, 15, 16, 20, 22 U.S. Dist. (E.D. Mo.) (on file with author). The summons and complaint used "Sandford." Sanford's "plea to the jurisdiction of the court" and "plea of the defendant" (answer) used the correct "Sanford." Plaintiff's counsel and the

caption in the Supreme Court read "Dred Scott, Plaintiff in Error, v. John F. A. Sandford."[86]

4. Might the Scotts' Attorney Have Been Misinformed?

Walter Ehrlich has suggested that the Scott's attorney at the trial court level, Roswell Field, might have been told, inaccurately, that Sanford was their slaveholder.[87] Field's letters reflect that the Scotts had first consulted an attorney named Charles LeBeaume, who discussed the case with Field.[88] But Field's letter does not state that LeBeaume told him of a sale to Sanford. Moreover, it places the date of the supposed sale between the ruling of the Missouri Supreme Court, in March 1852, and the filing of the Federal suit, in November 1853:

> Several years ago Dred brought a suit for his freedom against Mrs. Emerson, the widow of his former master in the state court. In conformity with the settled course of decisions in this state, the lower court gave judgment of liberation. An appeal to the majority of the Supreme Court (Gamlele dissenting) overruled all its prior decisions & reversed the judgment, remanding the case for another trial. See the case reported 15 Mo Rep 576.
>
> At this stage of the case I was applied to by C. E. Lebeaume Esq for advice. As Dred in the meantime had been sold with his family to Sanford of New York who was accustomed to visit Missouri, I advised the institution of a suit in the Circuit Court of the United States.[89]

This sequence is inconsistent with the stipulated statement of facts, signed by Field, which stated that Dr. Emerson, who died in 1844, had sold the Scotts to Sanford. Apart from that, the letter shows that Field knew of the State freedom suits, in which Irene had been the defendant. At the very least, it demonstrates that Field filed a stipulation as to the facts that he knew were untrue and that recast the facts so as to leave Irene out of the matter.

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trial court must have caught on, since the stipulated facts, verdict, and motion for new trial used the correct name. But when plaintiff filed for a writ of error (today, a petition for certiorari), he reverted to "Sandford," and hence the Supreme Court used that name.

86. Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

87. EHRLICH, *supra* note 1, at 75.

88. Letter from Roswell Field to Montgomery Blair (Jan. 7, 1855) (on file with Library of Congress, Manuscript Division, *in* Blair Family Papers).

89. *Id.*

5. Then Why Did the Scotts Sue Sanford?

But, we might ask, why would the litigants have gone to such lengths to conceal the simple fact that Irene Emerson had a claim to owning the Scott family? After all, there had been no problem naming her as the proper defendant in Scott's State litigation, and after she relocated to Massachusetts, naming her would not have impaired diversity jurisdiction.

There is a simple reason why Irene Emerson would have wanted her role concealed. From the outset, it was foreseen that the Federal suit was not a simple freedom suit, but a case destined for the U.S. Supreme Court, that would settle the most divisive political issues of the day.[90] And in 1850 Irene Emerson had married Dr. Calvin Chaffee.[91]

Dr. Chaffee was a Republican congressman, elected and re-elected to office on an antislavery platform.[92]

B. The Chaffees' Role Is Exposed

The Chaffees' desire to avoid being named as the Scott family's owners was not, however, successful.

1. Pro-Slavery Newspapers Spotlight the Abolitionist Congressman Calvin Chaffee as the Scotts' Real Slaveholder

On March 6, 1857, the Court announced its opinion.[93] As noted above, the impact was immediate and enormous.

At that point, when slavery's supporters had gained all they could from the litigation, things began to happen to Dr. and Mrs. Chaffee. Within a week of the ruling, the *Springfield Argus*, in Dr. Chaffee's hometown of Springfield, Mass., broke the story that he and Irene were the true owners of the Scott family.

What we know of the *Argus* is extremely limited. It was apparently a pro-slavery newspaper[94] that published for about two years before it closed in late

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90. Dred Scott v. Irene Emerson, 24 St. Louis Cir. Ct. Rec. 33 (Mo. Cir. Ct. Jan. 25, 1854), *available at* http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;view=text;idno=dre1854.0100.102;rgn=div1;node=dre1854.0100.102%3A1. The State freedom suit was still pending on remand when the trial court, on January 25, 1854, entered a stipulation: "Continued by consent, (awaiting decision of Supreme Court of the United States.)." *Id.* Dred Scott's Federal suit had not yet gone to trial – that would occur in May -- but both parties were already anticipating its appeal to the Supreme Court.

91. FEHRENBACHER, *supra* note 1, at 659 n.21.

92. *See Ex-Congressman Chaffee Dead*, SPRINGFIELD REPUBLICAN (Mass.), Aug. 10, 1896, at 10 ("He was a sturdy representative of Massachusetts anti-slavery sentiment during his two terms of service . . . ."); *Dr. Calvin C. Chaffee's Death*, SPRINGFIELD REPUBLICAN (Mass.), Aug. 9, 1896, at 7; *Served Two Terms in Congress*, BOSTON HERALD, Aug. 9, 1896, at 3.

93. EHRLICH, *supra* note 1, at 173.

1857.[95] Exactly one issue, and that from 1856, is known to survive.[96] We must accordingly reconstruct its coverage from articles in other newspapers that reprinted its articles, a common practice of the time. The lengthiest such article appeared in the March 17, 1857 edition of the Syracuse, N.Y. *Daily Courier*:

> From the following article, which we copy from the *Springfield Argus*, it appears that Dred Scott and his family became, by the recent decision of the Supreme Court, the property of the wife of Dr. Chaffee, the Republican Member of Congress from the Springfield (Mass.) district:
>
> It may perhaps astonish some of our rabid Fremonters [Republicans], to know that the late decision in the Supreme Court remanding to slavery Dred Scott and his family, declaring the unconstitutionality of the Missouri Compromise, and establishing the right to slave-holders to carry their chattels into Northern States without affecting their security in them – was obtained on behalf of our present honorable member of Congress. The facts are simply these: Some years ago, Dr. Chaffee, then a widower, married the widow of Dr. Emerson, of Missouri, who had died, leaving to his wife and only daughter a considerable slave property. Among those slaves was Dred Scott and his family.
>
> . . . The suit, thus brought, was defended by the administrator of the estate on behalf, and with the consent of the wife of Dr. Chaffee and her daughter, who were the heirs at law. The decision of the bench that Dred Scott was not a citizen of the U.S. and could not sue in the U.S. Court, has remanded him and his family to the chattlehood of Mrs. Chaffee. What does the Doctor propose to do with this [illegible] property? Does he consent to the prosecution, and under cover of his wife's crinoline, propose to keep good friends with the Black Republicans, by saying that he has nothing to do with her estate, and at

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94. *See* BOSTON POST, June 8, 1857, at 1 ("[T]he attitude of Massachusetts on the slavery question is one indefensible and inconsistent with her relations to the general government. Men are becoming convinced that our duties to our own state and her material interests have been too long neglected, in the idle and insane pursuit of the abolition lobby . . . .") (quoting SPRINGFIELD ARGUS (Mass.), Mar. 1857).

95. *See* PITTSFIELD SUN (Mass.), Dec. 3, 1857, at 2 ("The *Springfield Argus,* which has been published daily and weekly about two years by Elon Comstock, Esq., has been discontinued. – The recent financial difficulties are stated as the cause of the suspension.").

96. *See* GREGORY WINIFRED GEROULD & GERTRUDE CLARKE AVIS, UNION LIST OF AMERICAN NEWSPAPERS 1821–1936 at 299 (1967). The issue of February 6, 1856 survives. *Id.* That issue is in the possession of the American Antiquarian Society in Springfield, Massachusetts. *See* Email from Margaret Humberston, Wood Museum, to author (June 15, 2012). The Wood Museum of Springfield History has no copies of the *Argus*. *Id.*

> the same times enjoy with her the benefit of the estate, which does not stop with the unfortunate Dred and his family?[97]

The *Argus* apparently ran follow-up stories, although none of these survive. From other newspapers' descriptions of its series, it sounds as if Chaffee originally denied everything. When, a few months later, the *Syracuse Daily Courier* praised the *Argus'* coverage, it referred to "Dr. Chaffee, writhing under the scathing exposures of the *Argus*" and noted that when Chaffee protested his innocence, "[t]he *Argus* followed this up with facts and statements fully authenticated, proving the falseness of this excuse, and finally copied from a St. Louis paper a history of the case, more than proving all that had previously been charged upon Dr. Chaffee."[98]

It did not remain a local story. The *Syracuse Daily Courier* retrospective claimed that "[t]he telegraph has carried the faithful message to every part of the country, and the black Republican trader in the flesh and blood of the illustrious Dred Scott, is known by this time to every gentleman who will be honored by a seat with him in the next Congress."[99] Shorter versions of the *Argus* report are found in the *Fort Wayne Sentinel* and *the Loganport Democratic Pharos (Ind.)*,[100] while the Pittsfield Massachusetts *Sun* jabbed, "It seems that while Dr. Chaffee was 'shrieking for freedom,' and receiving the support of his Black Republican friends for Congress, he was at the same time prosecuting a suit for the recovery of a runaway negro! Admirable consistency!!"[101]

The story received such widespread publicity that Stephen Douglas could invoke it during the Lincoln-Douglas debates, with the audience knowing enough to be amused by the jab. To Lincoln's claim that the *Dred Scott* case was, with the Kansas-Nebraska Act, a pro-slavery conspiracy, Douglas replied:

> He [Lincoln] ought to have known that the at time of the passage of the Nebraska bill the Dred Scott case had not yet been taken up to the Supreme Court; it was still pending in the district courts of Missouri. It had been begun by Dred Scott, and we had not possession of him because he was in the hands of abolitionist friends. (Laughter.)[102]

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97. *Dred Scott Owned by a Republican Member of Congress*, SYRACUSE DAILY COURIER, Mar. 17, 1857, at 2, col. 2, *available at* http://chroniclingamerica.loc.gov/lccn/sn87075163/1857-03-26/ed-1/seq-2/ocr/.

98. *Dred Scott and his "Republican" Owner*, SYRACUSE DAILY COURIER, May 30, 1857, at 2, col. 4.

99. *Id.*

100. FORT WAYNE SENTINEL, Mar. 28, 1857, at 1, col. 5; *Who Owns Dred Scott?*, DEMOCRATIC PHAROS (Logansport, Ind.), Apr. 1, 1857, at 4, col. 4.

101. *Interesting*, PITTSFIELD SUN (Mass.), Mar. 19, 1857, at 2.

102. DEMOCRATIC PHAROS (Logansport, Ind.), Aug. 18, 1858, at 5, col. 2.

2. Dr. Chaffee Opens His Defense

The first defenses of Dr. Chaffee did not (officially, at least) come from his own pen, but from antislavery editors. The first such defense came in Chaffee's hometown newspaper, the *Springfield Republican*, which on March 14, 1857, ran two articles on the subject. The first article took the form of a letter to the editor, at least supposedly by an anonymous and disillusioned supporter, demanding information on Dr. Chaffee's involvement. Why did Irene defend against the State freedom suits? Did Sanford act with her consent? Are there other slaves involved?

The second article carried the newspaper's defense of Dr. Chaffee. It began by noting that defendant John F. A. Sanford was indeed Mrs. Chaffee's brother, then quoted from the agreed statement of facts to the effect that the Scotts had been sold to him prior to suit, calling these "common and well known public facts" and stating:

> [W]e have been assured that these slaves long since passed out of the control of Mrs. Chaffee. We can hardly think there is anyone so foolish as to suppose that Dr. Chaffee was a party to this suit, or holds and proprietary interest in these slaves. . . . The matter is one which has assumed such a phase that Dr. Chaffee will feel called upon to declare himself definitely in the matter; and we can have no doubt he will be able to do so satisfactorily.[103]

The Lowell Daily Citizen and News (Mass.) took its cue from the *Republican*, running the agreed statement of facts and arguing:

> It is true that the defendant in this case was the administrator of the estate of Dr. Emerson. It is true that he is the brother of Mrs. Chaffee. It is true also that he bought the slaves of Dr. Emerson before his death, and that Dr. Chaffee and his wife have no more to do with them than the "man (and woman) in the moon."[104]

Dr. Chaffee quickly set out to explain himself, and it is significant that he abandoned any defense based on the stipulated facts.

His first defense was given to the *Springfield Republican* and reprinted in the *New York Herald-Tribune*. Chaffee began with a note that he had not seen the *Republican's* article until recently, adding:

> I have lived to little purpose if, after more than twenty years' service in the Anti-Slavery cause, it not necessary that I should put in a

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103. *Dred Scott – Who is His Owner – Dr. Chaffee,* SPRINGFIELD REPUBLICAN (Mass.), Mar. 14, 1857, at 4, col. 3.

104. *The Wish Father to the Thought*, LOWELL DAILY CITIZEN AND NEWS (Mass.), Mar. 16, 1857, at 2.

> formal disclaimer of my own participation in the sin and crime of slave-holding. . . . [T]here is no earthly consideration that could induce me to exercise proprietorship in any human being; for I regard Slavery as a sin against God and a crime against man.
>
> In the case of Dred Scott, the defendant [Sanford] was and is the only person who had or has any power in the matter, and neither myself nor any member of my family were consulted in relation to or even knew of the existence until after it was noticed for trial, when we learned of it in an accidental way – and I agree with you that if I had possessed of any power or influence in the case, and failed to use it then I should have been "guilty of treason to my professions and betrayal of the confidence of my constituents."
>
> But possessed of no power to control – refused all right to influence the course of the defendant in the cause – and all the while feeling and openly expressing the fullest sympathy with Dred Scott and his family, in their efforts to secure their just rights to freedom – no man in this land feels more deeply the intense wrong done, not only to them but to the whole people, by the monstrous decisions of the majority of the United States Supreme Court. And if in the distribution of the estate, of which this decision affirms these human beings to be part, I or mine consent to receive any part of the *thirty pieces of silver*, then, and not till then, let the popular judgment, as well as the public press, fix on me the mark of a traitor to my conscience, as well at the true rights of our common humanity.[105]

The *New York Herald Tribune* went further, telling its readers that Dr. Chaffee:

> [W]as utterly ignorant that Dred Scott existed, down to the present year; and even Mrs. Chaffee, to whom he had been a servant, supposed him dead throughout last year, and was only apprised in February, 1857, that the Dred Scott about whom the great law suit was going on in the Supreme Court, was the slave of her deceased husband. (He has been left to himself since Dr. Emerson's death).[106]

The date of Chaffee's alleged discovery is quite unclear. "Noticed for trial" presumably means set for argument or re-argument in the Supreme Court. The Court granted re-argument on May 12, 1856, with the argument beginning on

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105. *Dred Scott and Hon C. C. Chaffee,* N.Y. HERALD-TRIBUNE, Mar. 17, 1857, at 5. Other newspapers carried shorter forms of Chaffee's defense. *See* BOSTON HERALD, Mar. 17, 1857, at 2, col. 4; *Slow Coaches*, LOWELL DAILY CITIZENS AND NEWS (Mass.), Mar. 19, 1857, at 2.

106. N.Y. HERALD-TRIBUNE, June 6, 1857, at 4, cols. 2-3. The claims that Mrs. Chaffee had left Scott to his own devices since Dr. Emerson's death are not consistent with the evidence. Dr. Emerson died in 1843. The State suits for freedom, in which the evidence indicated that when Scott was "hired out" the funds went to Mrs. Emerson/Chaffee, occupied 1846-1852.

December 15. But the *Herald Tribune* article places his discovery in February of the next year.

3. The Pro-Slavery Press Counterattacks

Chaffee did not have the last word. The *Argus* returned to the attack, again in articles we know only from other newspapers:

> . . . Dr. Chaffee denies that has any personal influence or interest at stake in the Dred Scott case, and also that his feelings would not permit him to hold slaves. . . . The questions which now arise are: has not Dr. C. received the benefits arising from the sale of those negroes? Would he not have suffered pecuniary loss had the suit been decided for the plaintiff? Was not the DR.'s influence with his wife and brother-in-law sufficiently powerful to have stopped this suit by refunding the monies arising from their sale, and giving them their freedom without a trial? and is not the Dr. receiving benefit either from slave labor or from monies accruing from the sale of slaves. We say nothing as to the morality of thus holding slaves, or of using monies acquired, but if such really is the case, is not a little inconsistent to be shrieking for freedom and harping on the wrongs of the slave? Will the Doctor explain? *Springfield Argus*.[107]

Newspapers soon uncovered records of the Scott's State freedom suits, and the *Milwaukee Daily News* demanded additional explanation:

> Mrs. Emerson (now Mrs. Chaffee) leased these slaves out for hire during the first year after her husband's death. She has never manumitted them nor has she ever sold them. She did, however, propose to sell them in 1846, and this occasioned the instigation of the suit for freedom.
>
> Mr. Chaffee says that neither himself nor any member of his family knew of the suit until the case was noticed for trial, when it came to his knowledge accidentally. Now, the record of this case shows that suit was [illegible – filed?] in the St. Louis Circuit Court against Mrs. Chaffee herself, who had personal service of the writ on the 7th day of April, 1846. Moreover, the same record shows that she has defended that case in the courts of Missouri for more than ten years, where the case of Dred Scott v. Irene Emerson (Mrs. Chaffee) is still pending. . . . The truth is, Mr. Sanford never had anything to do with these slaves, except as the executor of Dr. Emerson, or agent of Mrs. Chaffee.
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> . . . .

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107. *Dr. Chaffee and Dred Scott*, PITTSFIELD SUN (Mass.), Apr. 2, 1857, at 3.

> Had Mrs. Chaffee surrendered her claim to Dred Scott [illegible] the first suit was brought, it would have effectually liberated that slave. Nay, had she been satisfied with the verdict of the Missouri jury, that declared Dred Scott a free man, instead of appealing to the Supreme Court of the State, the slave would now have enjoyed the inestimable privilege which Mr. Chaffee admits he deserves.[108]

The Pittsfield, Massachusetts *Sun* was more blunt:

> Dred brought his suit for freedom ten years ago, and has spent $500 in prosecuting it—This money he has been obliged to raise by overwork, and now at an advanced age finds himself minus his cash and his liberty too. – Poor old African! in falling into the hands of a Massachusetts freedom-shrieker his chains were not loosened, but his old body and soul are clutched with the same tenacity as though he were the property of some border ruffian. Why don't the Hon. Dr. Chaffee free his slave? Perhaps the Sentinel can inform the public on this point.[109]

4. The Chaffees Free the Scott Family

Dr. Chaffee was well on the way to answering that question. On April 1, 1857, Chaffee had written Montgomery Blair:

> CONFIDENTIAL
>
> Since the decision of the case Dred Scott vs. J.F.A. Sanford has so profoundly stirred the public mind and some of the pro slavery news papers have attributed to me an interest in the persons claimed as slaves, my wife, as the widow of the late doct. Emerson, and the sole legatee of the will, desires to know whether she has the legal power and right to emancipate the Dred Scott family. . . . If she has this right[ ] if you [would? forward?] the necessary papers, she will cheerfully execute them. . . . May I not hope to hear from you at an early day.[110]

The response cannot be located,[111] but ten days later Chaffee again wrote Blair, thanking him for his response and adding:

> I perceive by a communication in the Mis. Republican of the 5th or 6th inst., that Mrs. C. is the overseer of the "Scott" family – that may be

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108. MILWAUKEE DAILY NEWS, Apr. 16, 1857, at 2, col. 2.

109. *The Question Repeated*, PITTSFIELD SUN (Mass.), May 14, 1857, at 2.

110. Letter from Calvin Chaffee to Montgomery Blair (Apr. 1, 1857) (on file with Library of Congress, Manuscript Division, *in* Blair Family Papers, Dred Scott folder).

111. In the days before photocopiers and carbon paper, few persons kept records of their outgoing correspondence. Blair's outgoing letters would thus be found in Field's files … which cannot be found.

> true or not – if so I am as you may well imagine, anxious to free myself and family from the odious relationship. If not too much trouble, my dear sir, I beg of you to forward to me the [ ] of my wife's ownership & the necessary papers for the [ ] of the freedom of the Dred Scott family – my whole soul utterly loathes and abhors the whole system of slavery & not only myself but my family must be cleared from it.[112]

Blair apparently forwarded the Doctor's correspondence to Roswell Field, Scott's St. Louis attorney, who replied that Mrs. Chaffee and her daughter had full power over the Scotts, and enclosing a draft deed transferring the Scotts to Taylor Blow, explaining that "Our law requires that all deeds of emancipation be acknowledged or proved before the circuit court; and it has been thought advisable to effect the object by transfer to a citizen here who is ready to go into circuit court to make the necessary acknowledgement."[113] The letter adds an interesting human element to the tale:

> Dred desires that the copy of the will of Dr. Emerson may be returned to him. He was enabled to procure it with a dollar presented to him by Judge Catron of the United States Supreme Court, who, in his recent visit here to hold the Circuit Court, sent for Dred and treated him with much friendly conversation and Christian sympathy, showing that in the opinion of the judge if they were not fellow citizens, they were at least fellow men. Dred wishes that the copy of the will may be returned so that he may keep it as a memorial of Judge Catron's kindness.[114]

The deed was executed – an event delayed by Mrs. Chaffee's attendance at John Sanford's death[115] -- and Chaffee transmitted it with a request: "I desire now, in conclusion of the case, to be privately informed of the act of emancipation, but that there should be no publicity given the subject beyond

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112. Letter from Calvin Chaffee to Montgomery Blair, *supra* note 110.

113. Letter from Roswell Field to Montgomery Blair (Apr. 29, 1857) (on file with the Library of Congress, Manuscript Division, *in* Blair Family Papers). Some historians have assumed the transfer to Blow was necessary since only a Missouri resident could free Missouri slaves. Field's letter makes clear the real reason: the person freeing the slaves must appear in open court, and it was far easier to deed the Scotts to a local resident than for the Chaffees to travel to St. Louis.

114. *Id.* (underlining in original). Catron had voted with the majority, holding that Dred Scott remained a slave. Catron also filed a separate concurring opinion. Dred Scott v. Sandford, 60 U.S. 393, 518 (1856) (Catron, J., concurring), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

115. *See* Letter from Calvin Chaffee to Montgomery Blair (May 6, 1857) (on file with the Library of Congress, Manuscript Division, *in* Blair Family Papers) ("My wife is now in N.Y. being summoned by the fatal illness of her Br. J. F. A. Sanford the deft. of the suit which has made humanity grieve and all true Americans blush – Mr. Sanford died yesterday at 12 M. I suppose of congestion of the brain. My wife will remain there till Saturday & I hope next week to get the papers executed, of which I will apprise you.").

strict legal necessity."[116] On May 26, 1857, Taylor Blow promptly manumitted the Scott family. This did not end the controversy, however, but merely posed the question, asked in several newspaper articles -- if the Chaffees owned Dred Scott, why did they not free him sooner?[117]

We cannot know the impact of the dispute on Dr. Chaffee's political career, but in 1858, he lost the Republican primary, and retired from politics.[118]

V. TO WHAT EXTENT WAS *DRED SCOTT V. SANDFORD* A COLLUSIVE ACTION?

It seems safe to conclude that John F. A. Sanford was a nominal defendant, with no claim to the Scotts, and that the real defendants should have been Irene and Calvin Chaffee – who had obvious reasons for keeping their names out of the case. These facts would have been obvious to the attorneys beginning the Federal action, and especially to the defense, which employed Hugh Garland, the same attorney that it used in the State cases against Mrs. Emerson/Chaffee. Yet the case went forward on stipulated facts that John F. A. Sanford was the Scott's slaveholder, having purchased them from Dr. Emerson.[119]

The fact that the Chaffees' ownership hit the anti-slavery press within days of the Supreme Court's ruling[120] -- *i.e.,* as soon as its disclosure would not imperil the litigation -- further suggests that pro-slavery forces were very much cognizant of that ownership, and ready to exploit it the moment they were free to do so.

Charges of collusion were leveled even before the Court ruled. A reprinted article in the *Chicago Tribune* charged that even the choice of Sanford as defendant was part of the plot:

> Here we have proof of the finished cunning of these political intrigues. . . . They selected Sanford as the new owner of Dred, not only because

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116. Letter from Calvin Chaffee to Montgomery Blair (May 14, 1857) (on file with the Library of Congress, Manuscript Division, *in* Blair Family Papers) (underlining in original).

117. *See Dred and the Doctor*, DAILY ARGUS AND DEMOCRAT (Madison, Wis.), June 5, 1857, at 2, col. 3 ("Had Dr. Chaffee done this act long ago, there would have been no decree, and surely Dred was as fit for freedom before people found out that Dr. Chaffee owned him as after that time. Why did not the Dr. do it when he was shrieking in the House of Representatives at Washington? Why did the Dr. attempt to make the world believe that he didn't own him at all, just after the decision was made, and he was charged with ownership of the slave?"); FORT WAYNE SENTINEL, June 6, 1857, at 5, col. 5 ("[T]hey have now given him his freedom and turned him out to die, we suppose. A few years ago liberty would have been a grateful boon to Dred Scott.").

118. SPRINGFIELD REPUBLICAN (Mass.), Sept. 25, 1858, at 4, col. 1. Dr. Chaffee faced two challengers, the votes split and deadlocked, whereupon a fourth candidate was proposed, to whom Dr. Chaffee's supporters shifted their votes, in order to deprive the first challengers of the nomination. The fourth candidate won the primary.

119. *See supra* notes 64-66 and accompanying text.

120. *See supra* Part IV.B.1.

> it was necessary that the defendant in their intended suit should be a citizen of another State than Missouri, but because they wanted to show that northern as well as southern men were holders of slaves.[121]

Others, curiously, charged that the collusion more was on Dred Scott's side of the case.[122] Yet there may be some truth in both accusations. We can discard the allegations that the suit was collusive in the sense of both parties seeking to reach a single result. The attorneys on each side were firmly committed to supporting and opposing slavery, respectively.[123] Yet both *were* willing to collude – knowingly to sue a nominal defendant, and to stipulate to incorrect facts, in order to bring the action (and keep Mrs. Chaffee's name out of it). Both sides also knew that the case was targeted at the U.S. Supreme Court.

We are left with the question – why? Why would *both sides* be interested in bringing the case and taking it to the Supreme Court?

The interests of the pro-slavery side in advancing the case are obvious. The Court's membership was then split five to four in favor of Justices from slave States,[124] and the four from free States had so far "distinguished themselves by defending national power to recapture fugitive slaves."[125] Chief Justice Taney, if not the bigot that he came to appear,[126] was by this point *very* pro-slavery;

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121. The Tribune article was reprinted in *Nationalization of Slavery*, RICHLAND COUNTY OBSERVER (Wisc.), Jan. 20, 1857, at 2, col. 5. Other papers claimed that "the case had been made up by Washington politicians" for "the purposes of the Democratic party," and that "Dred was a cat's paw, and the case was urged on by some super-serviceable and ultra-sectionalists of the South." MILWAUKEE DAILY SENTINEL, Dec. 24, 1856, at 2, col. 3; *The Case of Dred Scott*, BARABOO REPUBLIC (Wisc.), Apr. 16, 1857, at 2, col. 5. The Tribune's theory is of course untenable; if the purpose was to show that Northerners owned slaves, Dr. Chaffee and Irene would have been the better defendants.

122. Newspaper editor D. M. Grissom is quoted as saying "My recollections of the Dred Scott case credits the free-spoilers, or anti-slavery party with engineering of it into and through the U.S. Court at St. Louis, with the object and expectation of extorting from the court of last resort a decision that the voluntary taking of the slave by his owner into free territory, ipso facto, made him free." Unsigned letter to Mr. Hill (Feb. 11, 1907) (on file with the Missouri Historical Society, Dred Scott collection).

123. EHRLICH, *supra* note 1, at 79.

124. Chief Justice Taney was from Maryland; Justices Wayne and Campbell from Georgia; Justice Daniel from Virginia; and Justice Catron from Tennessee. Justice Nelson hailed from New York; Grier from Pennsylvania; Justice Curtis from Massachusetts; and Justice McLean from Ohio.

125. GRABER, *supra* note 1, at 37,

126. Taney had freed his own slaves, "except for two who were too old to take care of these, and these he supported until their death." Hodder, *supra* note 31 at 17. As a young attorney he made a sensation by successfully defending an abolitionist minister, who had preached a fiery anti-slavery speech (arguing that slave owners were destined for hell) to a congregation that included slaves. Taney's argument referred to the "evil of slavery," and "a blot on our national character," noting that "every real lover of freedom" must hope that it be gradually ended. *The Trial of Rev. Jacob Gruber*, *in* 1 AMER. STATE TRIALS 69, 88 (1914). He sided with the majority in *United States v. The Amistad*, 40 U.S. 518 (1841).

moreover, he had as Attorney General ruled that free blacks were not citizens.[127] Two of the Justices had formerly held slaves, and three still did.[128] The Court had recently handed down *Strader v. Graham*,[129] ruling in favor of the slaveholder on arguments quite similar to those raised in Scott's appeal.[130] It is no wonder that pro-slavery elements were lobbying in favor of a quick decision.[131]

The real question, then, is why would an anti-slavery attorney have been cooperative?

The short answer appears to be that Roswell Field, who began the Federal litigation, was far more optimistic than circumstances could justify. In his eyes, for example, the question of citizenship would easily be won: Sanford had waived the point by continuing to proceed after his plea in abatement (essentially, a common-law motion to dismiss) on that ground had been denied.[132]

Field likewise wrote off *Strader v. Graham*,[133] a recent ruling that came in the context of an action for damages, against a steamboat owner, who had allegedly facilitated the escape of slaves. The owner's defense was that their master had previously allowed the slaves to travel to free States, thereby freeing them. The Supreme Court held that (1) local law governed the slaves' status, hence when they returned to a slave state their servile status resumed, and (2) as a result there was no Federal issue posed that could support the Court's appellate jurisdiction.

The possibility that in 1855-57 the Chief Justice was "not himself" must also be considered. On the night of September 29, 1855, while vacationing in Virginia, his youngest daughter died of yellow fever and his wife died of a stroke. Taney had opposed his daughter's plan to vacation in Rhode Island, which she considered healthier, because that belief reflected "that unfortunately feeling of inferiority in the South, which believes everything in the North to be superior to what we have." A relative wrote that he "has been in tears like an infant, and he has given way to the most bitter self reproaches. . . ." FEHRENBACHER, *supra* note 1, at 558-59.

127. FINKELMAN, *supra* note 1, at 30.

128. *Id.* at 29.

129. Strader v. Graham, 51 U.S. 82 (1850).

130. In particular, that even if a slave were freed by being sent into a free State, he became a slave again upon his return, and that the Northwest Ordinance's ban on slavery ceased to have effect when a territory became a State. *See Strader*, 51 U.S. at 93-94 ("Every state has an undoubted right to determine the status . . . of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject.").

131. Alexander Stephens, later vice president of the Confederacy, wrote that "I have been urging all the influence I could bear upon the Supreme Court to get them to postpone no longer the case on the Missouri restriction before them, but to decide it." BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY 334 (1922).

132. Letter from Roswell Field to Montgomery Blair (Mar, 12, 1856) (on file with the Library of Congress, Manuscript Division, *in* Blair Family Papers)[hereinafter Letter from Roswell Field to Montgomery Blair II].

133. *Strader*, 51 U.S. 82.

Field lightly wrote *Strader* off: "I do not think the case of *Strader v. Graham* stands in the way of Dred's suit. That case decides only that the question is not such as gives a foundation for a writ of error to a state court under the 25th section of the judiciary act."[134] That might distinguish (2), but leaves (1) applicable: the Court has diversity jurisdiction to rule that Dred Scott remains a slave.

A later letter shows how unrealistically optimistic Field was about the case. Before the decision, he wrote Montgomery Blair:

> I rec'd your brief in the Dred Scott case and your two letters relating to it. I have delayed writing to you in the expectation that the case would soon be decided & that I should have the opportunity of congratulating you on the result. . . . I entirely concur with you in the opinion that there could be no doubt at all about the issue if factious politicks did not mingle in the counsels of the court.[135]

By 1856, the slavery issue was *all about* factions and politics!

Another factor must be borne in mind. *Dred Scott*'s most stunning blow was its invalidation of the Missouri Compromise, and its holding that Congress had no power to restrict slavery in the territories. But this issue was not raised below, and did not clearly arise until the case's first oral argument in the Supreme Court.[136] Until then, both sides had proceeded on the assumption that Scott became free by being taken into areas governed by that Compromise: the question was whether he became a slave again upon his return to Missouri.[137]

Even after issue was raised, the Court initially sought to avoid it. Its first conference focused upon disposing of the jurisdictional issue. That changed when Justice Wayne successfully argued that the Court must reach all the issues raised.[138]

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134. Letter from Roswell Field to Montgomery Blair, *supra* note 88 (underlining in original).

135. Letter from Roswell Field to Montgomery Blair II, *supra* note 132.

136. EHRLICH, *supra* note 1, at 95.

137. In disposing of his State freedom suit, the Missouri Supreme Court had privately considered ruling against the Missouri Compromise, but after Justice Napton lost his bid for re-election, the issue was never taken up. Diary of Judge Napton, p. 223, *in* Napton and Dred Scott Collections, Missouri Historical Society.

138. According to Justice Curtis' son, the Court's first conference yielded a decision to rule only that Scott was not a citizen and hence the Circuit Court had had no jurisdiction. Then Justice Wayne persuaded others to reach the additional issues. George Ticknor Curtis, *The Dred Scott Case As Remembered by Justice Curtis's Family*, 10 GREEN BAG 2d 213, 217-19, 222-24 (2007). Justice Campbell had a different recollection. He wrote that there was no agreement to "duck" the issues, although the Court's focus had been on the procedural issues raised. Thereafter, Justice Wayne argued that if the substantive issues were not reached, "the Court would be condemned as failing in a performance of its duty." Letter from J. A. Campbell to George Ticknor Curtis (Oct. 30, 1879) (on file with the Library of Congress, Manuscript Division, *in* Dred Scott collection, Carl Brent Swisher folder).

If the issue of Congressional power over slavery in the territories is omitted from the strategic equation, Field's enthusiasm is at least more understandable. In his first letter to Blair, Field saw the case as raising a single issue: "The question involved is the much vexed one whether the removal by the master of his slave to Illinois or Wisconsin works an absolute emancipation of the slave."[139]

From this perspective, the anti-slavery side risked little by proceeding. If the Court sided with the Missouri Supreme Court on this issue, it would mean that a slave taken to free territory became a slave again upon returning to a slave State – which was already the legal status quo in Missouri. The harm of a loss could thus be seen as modest.

Should Scott win, however, the gains might be impressive. As Field (concerned that the opposition might spot this issue) wrote to Blair, diversity jurisdiction would offer a way for an alleged slave to make an attack on Fugitive Slave Act proceedings by challenging his status in an ordinary civil action:

> You will not fail to see the importance of the question involved here. If, in fact, as Judge Wells has decided, a black man may sue his master in the Federal courts, the right of trial by jury is still left to the slave in an action at common law which if brought in the Federal may be enforced in the judgment throughout the Union. And this jurisdiction, if it exists at all, exists by force of the constitution that no act of Congress can impair. The Fugitive Slave act would undoubtedly become of little value, and this may probably be a strong argument against allowing black men to sue as citizens.[140]

Sidestepping that statute would be a considerable gain for the anti-slavery side. The Fugitive Slave Act had created a procedure appallingly stacked against the defendant, in fact so heavily stacked that free blacks were kidnapped and enslaved with some frequency.[141] Cases were tried to a judge or a specially-appointed commissioner, not a jury. The defendant was forbidden to testify.[142] A commissioner who tried the case was entitled to a fee – which was halved if he found the defendant was not a slave![143] A diversity action, challenging the status of the alleged fugitive slave, offered a way to escape all these provisions.

Montgomery Blair, Scott's Supreme Court attorney, faced a different picture. By the time *Dred Scott* was brought to Blair's attention, the Supreme Court had already accepted the appeal. Blair' choices were down to letting the case go by

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139. Roswell Field letter to Montgomery Blair, *supra* note 41.

140. Letter from Roswell Field to Montgomery Blair, *supra* note 88 (underlining in original).

141. *See generally* CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865, (1994). Free States had responded by enacting laws forbidding such kidnapping, but these were ruled unconstitutional in *Prigg v. Pa.,* 41 U.S. 539 (1842).

142. Fugitive Slave Act of 1850, 9 Stat. 462, §6 (1850).

143. *Id.* A commissioner received ten dollars if he awarded the plaintiff a certificate allowing removal of the defendant as a slave, and five dollars if he did not.

default, letting a person with far less Supreme Court experience handle it, or tackling it himself. He chose the last.

By the close of the first argument in the case, Blair knew that the anti-slavery cause faced real risks. The issue of Congressional power to restrict slavery had been prominently raised – a printed (and doubtless condensed) version of Blair's presentation at the second argument devotes 14 pages to the subject.[144] Whatever hopes Blair could have had would have faded when newspaper "leaks" began reporting that he would lose 7-2.[145] As Blair wrote former president Martin van Buren: "It seems to be the impressions that the opinion of the Court will be adverse to my client & to the power of Congress over the territories."[146]

At this point, Blair knew his cause was facing a legal and political disaster. The fact that the wrong defendant had been named could have been used as an escape – there was no "case or controversy" here – except that Blair had never been told of that fact. Shortly after Blair expressed interest in the case, Field wrote him, claiming that the Scotts had been sold to Sanford.[147] Blair had no clue that he was arguing against a straw man until after Dr. Chaffee wrote him, weeks after the Court had ruled.

After the Scotts were freed, Blair encountered Assistant Attorney General Ransom H. Gillet and discussed the case. Gillet wrote Attorney General Cushing:

> I saw Mr. Blair this evening. He informed me that Dred Scott belongs to Emerson, & on the death of the latter he went into the hands of Sanford's hands as his executor. That Dred remained in St. Louis, while Sanford went to New York to reside. Dred instituted his suit for freedom & Sanford employed counsel to defend. That before the suit was finally ended in the Supreme Court, Sanford had finally administered on the estate & the property was disposed of under Emerson's will & that Mrs. Chaffee took him with other property as residuary legatee. That finding out the true state of the case, he, Mr. B., wrote Chaffee on the subject & desired that he might be set free. . . . He thinks that Chaffee knew nothing of the early proceedings, if he did the

144. DRED SCOTT, A COLORED MAN VS. JOHN F. A. SANFORD: ARGUMENT OF MONTGOMERY BLAIR, OF COUNSEL FOR THE PLAINTIFF IN ERROR 26-40 (n.d.).

145. *See Important from Washington*, N.Y. HERALD-TRIBUNE, Jan. 1, 1857, at 4 (reporting that Court will rule 7-2 that Congress has no power over slavery in the territories); *By Telegraph*, ALBANY EVENING JOURNAL, Jan. 8, 1857 (same: Taney will write the decision); *The Dred Scott Case*, N.Y. TIMES, Feb. 5, 1857 (reporting that the WASHINGTON UNION states vote will be 7-2, Curtis and McLean dissenting, but discounting the report since it would be "unusual" for a ruling to "leak out in advance.").

146. Letter from Montgomery Blair to Martin van Buren (Feb. 5, 1857) (on file with the Library of Congress, Manuscript Division, *in* Martin van Buren Papers, reel 33).

147. *See supra* Part IV.A.4.

> later ones, & was not aware that Dred to his wife [sic] under the residuary clause in the will.[148]

Of course, this has all the problems of double hearsay, and in places conflicts with the record (Sanford moved to New York before Dr. Emerson died, and did not administer his estate; Chaffee wrote Blair, not the other way around), but it suggests that even months after the *Dred Scott* decision, Blair continued to think that Sanford had had some manner of interest in the case.

There was perhaps another factor operating on the anti-slavery side, a dawning realization that an adverse decision might serve as a rallying cry for a movement that seemed to be faltering. As the *New York Herald-Tribune* saw it:

> Many have expressed the opinion that the question [of Congressional power over slavery] would not be met by the Court, and numbers are still of that way of thinking. It makes but little difference to Slavery whether it gets a decision in its favor now or after the public mind shall have had time to cool a little. But it would be best for Anti-Slavery that the decision should come now, while the popular heart is a fused condition. The impression it would thus make would be deeper and most distinct, and the whole series of Pro-Slavery aggressions and triumphs would then be burned into it together. The Congress, the Court and the Executive would all take their position of joint association, in the mind of the people, as confederates in the work of extending the intolerable nuisance of slavery.[149]

It was a remarkably prescient political appraisal.

VI. CONCLUSION

Dred Scott was collusively brought, with both parties falsely stipulating to facts that would give the Federal courts jurisdiction over the claims asserted. Perhaps the most telling evidence of this is that when Dr. Chaffee was being attacked as a slaveowner and a hypocrite, he did not invoke the version given in the complaint and agreed-upon statement of facts, even though that version (Dr. Emerson, while alive, had sold the Scotts to Sanford) would have completely cleared himself and his wife.

The basis for the collusion appears to be that both sides believed they had a sufficient chance of winning. Until the attack on Congressional power over the territories was raised in oral argument, the anti-slavery side could reflect that, if its odds were poor, the cost of a loss would be quite limited while the value of a win would be considerable.

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148. Letter from R. H. Gillet to Caleb Cushing (Nov. 16, 1857) (on file with the Library of Congress, Manuscript Division, *in* Caleb Cushing papers, box 81).

149. *From Washington*, N.Y. HERALD-TRIBUNE, Jan. 5, 1857, at 6.

Dred Scott underscores a lesson of experience: anything can happen in a court of law. A case that started out with limited issues, of diversity jurisdiction and whether return to a slave State revives a status of slave, became instead a case at the center of the most divisive political issue of the day and destroyed the basis of decades of political compromises.