HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE. WITH AN APPENDIX

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HISTORICAL AND LEGAL

EXAMINATION

OF THAT PART OF THE

DECISION OF THE SUPREME COURT OF THE UNITED STATES

IN THE

DRED SCOTT CASE,

WHICH DECLARES THE

UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY ALONG WITH IT.

With an Appendix,

CONTAINING:

I. The Debates in the Senate in March, 1849, between Ms. Webster and Mr. Calhoun, on the Legislative Extension of the Constitution to Territories, as contained in Vol. II. Ch. CLXXXII. of the "Thirty Years' View."

II. The Inside View of the Southern Sentiment, in relation to the Wilmot Proviso, as seen in Vol. II. Ch. CLXVIII. of the "Thirty Years' View."

III. Review of President Pierce's Annual Message to Congress of December, 1856, so far as it relates to the Abrogation of the Missouri Compromise Act and the Classification of Parties.

BY THE

AUTHOR OF THE "THIRTY YEARS' VIEW."

NEW YORK:
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INTRODUCTORY NOTE.

THE title is an index to the character of this Examination, which only goes to the two points mentioned; and goes to them because they are held to be political, affecting Congress in its legislative capacity, and on which the Supreme Court has no right to bind, or control that body: as heretofore seen in the case of the Bank of the United States, the Sedition law, &c.; cases in which Congress followed its own opinion of its own powers, regardless of the Court's decision; and the Court had no way to compel it to obedience, or to punish it for contempt.

Congress holds its powers from the Constitution, where every grant of authority is preceded by the words—"*Shall have power to:*" and to the support of which the members are sworn. The grant of power is from the Constitution, and the oath is to the Constitution; and it is written, that its words, always the same, may be always seen, and no excuse for disregarding them. The duty of the member—his allegiance—his fealty—is to the Constitution; and in performance of this duty—in the discharge of this allegiance—in the keeping of this fealty—he must be governed by the words of the instrument, and by the dictates of his conscience. The member may enlighten himself, and should, with the counsels of others: but as authority—as a rule of obligation—as a guide to conduct—the Constitution and the oath alone can govern; and were it otherwise—was Congress to look to judicial interpretation for its powers—it would soon cease to have any fixed rules to go by: would soon have as many diverse interpretations as different courts: and the Constitution itself, like the Holy Scriptures, in the hands of councils and commentators, would soon cease to be what its framers made it.

The power of the Court is judicial—so declared in the Constitution; and so held in theory, if not in practice. It is limited to cases "*in law and equity;*" * and though sometimes encroaching upon political subjects, it is without right, without authority, and without the means of enforcing its decisions. It can issue no mandamus to Congress, or the people, nor punish them for disregarding its decisions, or even attacking them. Far from being bound by their decisions, Congress may proceed criminally against the judges for making them, when deemed criminally wrong—one house impeach and the other try: as done in the famous case of Judge Chase.

In assuming to decide these questions,—(Constitutionality of the Missouri Compromise, and the self-extension of the Constitution to Territories,)—it is believed the Court committed two great errors: *first*, in the assumption to try such questions: *secondly*, in deciding them as they did. And it is certain that the decisions are contrary to the uniform action of all the departments of the government—one of them for thirty-six years; and the other for seventy years; and in their effects upon each are equivalent to an alteration of the Constitution,† by insert-

* The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, &c.—*Article III., Sec. 2.*

† "The question here is, whether they (the arguments referred to) are sufficient to authorize this Court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To ingraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this Court."—*Mr. Justice Curtis.*

ing new clauses in it, which could not have been put in it at the time that instrument was made, nor at any time since, nor now.

The Missouri Compromise act was a "*political enactment*," made by the political power, for reasons founded in national policy, enlarged and liberal, of which it was the proper judge: and which was not to be reversed afterwards by judicial interpretation of words and phrases.

Doubtless the Court was actuated by the most laudable motives in undertaking, while settling an individual controversy, to pass from the private rights of an individual to the public rights of the whole body of the people; and, in endeavoring to settle, by a judicial decision, a political question which engrosses and distracts the country:* but the undertaking was beyond its competency, both legally and potentially. It had no right to decide—no means to enforce the decision—no machinery to carry it into effect—no penalties of fines or jails to enforce it: and the event has corresponded with these inabilities. Far from settling the question, the opinion itself has become a new question, more virulent than the former! has become the very watchword of parties! has gone into party creeds and platforms—bringing the Court itself into the political field—and condemning all future appointments of federal judges, (and the elections of those who make the appointments, and of those who can multiply judges by creating new districts and circuits,) to the test of these decisions. This being the case, and the evil now actually upon us, there is no resource but to face it—to face this new question—examine its foundations—show its errors; and rely upon reason and intelligence to work out a safe deliverance for the country.

Repulsing jurisdiction of the original case, and dismissing it for want of right to try it, there would certainly be a difficulty in getting at its merits—at the merits of the dismissed case itself; and, certainly, still greater difficulty in getting at the merits of two great political questions which lie so far beyond it. The Court evidently felt this difficulty, and worked sedu-

* "The case involves private rights of value, and Constitutional principles of the highest importance, about which there has become such a difference of opinion that the peace and harmony of the country required the settlement of them by a judicial decision."—*Mr. Justice Wayne.*

lously to surmount it—sedulously, at building the bridge, long and slender—upon which the majority of the judges crossed the wide and deep gulf which separated the personal rights of Dred Scott and his family from the political institutions and the political rights of the whole body of the American people. They did their work to their satisfaction, and it is right they should have the benefit of it in their own words: which are here accordingly given:

"The principle of law is too well settled to be disputed, that a court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs, is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that Court.

"But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this Court to decide it; and it has been said that, as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that any thing it may say upon that part of the case will be extra-judicial, and mere *obiter dicta*.

"This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a circuit court, and to reverse it for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

"The correction of one error in the Court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior Court. There is certainly no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this Court, and of all appellate Courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case; and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy, and the point has been relied on by either side, and argued before the Court."

This is the justification for going into the merits of the Scott case after deciding there was no right to try it: (for the want of jurisdiction is the want of a right to try, or even to examine a case:) and the strength of this justification, compressed into a few words, seems to be, that the Supreme Court, in its appellate character, has a right, in reviewing judgments at common law, to go beyond the errors on which the appeal was taken, and search for other errors in the record: and correct all that can be discovered. Without impugning this practice in the least—admitting its entire correctness in cases where the reason for it applies—it is believed that the reason for the practice had no application in this case: that, far from applying, it was absolutely forbidden by the reason on which it was founded. That reason is, that a return of the record to the Court below with errors in it, would be a silent sanction of those errors—would cause them to be repeated by the court below, and give parties the delay and cost of another appeal; and the Supreme Court the trouble and care of a new decision. But that delay, and cost and trouble, can only be where the case is remanded for retrial, and never when it is remanded to be dismissed for want of jurisdiction. In this latter case there is no danger of a repetition of the error. In the case of such dismission there is nothing further for the Court below to do—no repetition of error for it to commit—no future trouble to be given to the Court above—nor any future cost or delay to the parties. Tested by its reason, and this rule of practice could not obtain in the Dred Scott case: tested by actual practice, if a case in point—(dismission for want of jurisdiction, and still a correction of all discoverable errors)—can be found, and it is believed the rule will fail in this case as completely for want of precedent as for want of reason. In this case, the suit was dismissed for want of jurisdiction, and that in the first step of the plaintiff in getting into court.* He was turned back from the door, for want of a right to enter the court room—debarred from suing, for want of citi-

* "Upon the whole, therefore, it is the judgment of this Court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the same sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction."—*Opinion of the Court.*

zenship; after which it would seem to be a grave judicial solecism to proceed to try the man when he was not before the Court, and when he could take nothing from its decision if the merits had all been found in his favor.

These remarks are made without reference to Scott, or to any injury, real or supposed, which might concern him: they are made wholly in relation to the two great political questions which I handle, and to show that the Court had no jurisdiction of them—no legal way to get at them—no foundation to stand upon in concatenating that chain bridge of slender links on which the Court crossed from Scott and his family, and their claim to personal freedom, to the whole people of the United States, and their political government. It was by going into the merits of the Scott case, that the Court got hold of the Constitution and the Missouri Compromise; and I think, with Mr. Justice Curtis, in his dissenting opinion,* that so grave an inquiry, going to the foundations of our government, ought not to be got hold of in that incidental, subaltern, and contingent way. Even if there had been jurisdiction in the Scott case, and the Court had got fairly at that case, I cannot consent that so momentous political questions should have been hung on to it, and tried as appendant, and been saved, or condemned, as a mere consequence of the decision of the question of personal freedom to Dred Scott, his wife and children. Such parties as the Congress and the people, their Constitution and its administration, are certainly of sufficient dignity to have a trial of their own, and to be present at it by their counsel. Who was counsel for these parties on that trial of Scott and his family? Nobody! for the

* "I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise Act, and the grounds and conclusions announced in their opinion.

"Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the Court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the Court, as described by its repeated decisions, and, as I understand, acknowledged in this opinion of the majority of the Court."—*Mr. Justice Curtis.*