

Thesis.

A DISCUSSION OF THE CIVIL RIGHTS CASES.

109 U. S., 3.

By

A. M. Burdett.

A DISCUSSION OF THE CIVIL RIGHTS CASES.

109 U. S. 5.

36283

It is the purpose of the writer to discuss in this treatise the aforesaid cases under five distinct subheads, and to deal with each subhead in the order in which it is named herein. These subheads are conveniently stated as follows:

1. What are the Civil Rights Cases?
2. Who were citizens of the United States at the time referred to therein.
3. The difference in citizenship - from a legal standpoint - at that time and prior to the adoption of the Fourteenth Amendment.
4. The effect - from a legal standpoint - of a contrary decision.
5. The demand of the times as to this decision and the attitude of the court and the effect which this decision should have upon the popular mind on the subject of Recall of Judges.

The so-called Civil Rights Cases were five cases in number founded on the first and second sections of the Act of Congress, known as the Civil Rights Act, passed March 1st, 1875, entitled "An act to protect all citizens in their civil and legal rights". 18 Stat. 335. One of these, a Tennessee case, involved an action brought by one Robinson to recover the penalty of five hundred dollars, given by the second section of the Act, from the Memphis & Charleston Railroad Company, whose conductor, he claimed, refused to allow his wife to ride in the ladies' car, because, it was stated, she was a person of African descent; two of the cases

were indictments for denying to persons of color the privileges and accommodations of an inn or hotel, and the other two cases, one on information, the other an indictment, were for denying to individuals the accommodations and privileges of theatres. All of the above cases, excepting the Robinson case, were submitted to the Supreme Court of the United States, by Mr. Solicitor General Phillips, on the 7th day of November, 1882. The Robinson case was likewise submitted on the 29th day of March, 1883, and a combined decision on all of the cases was rendered on the 18th day of October, 1883, Mr. Justice Bradley delivering the opinion of the court, in which the first two sections of the Civil Rights Act were declared to be unconstitutional and void. The decision was followed by a most able dissenting opinion delivered by Mr. Justice Harlan.

The question now arises as to who were citizens of the United States at the time referred to in these cases. The Thirteenth Amendment to the Federal Constitution had been proposed at the second session of the thirty-eighth Congress, February 1, 1865, and declared to have been ratified by twenty-seven of the thirty-six States, on the 18th of December, 1865. The Fourteenth Amendment was proposed at the first session of the thirty-ninth Congress, June 16, 1866, and declared on July 28, 1868, to have been ratified by thirty of the thirty-six states. At the time, therefore, that the Civil Rights Cases were decided, October 15, 1883, slavery had been abolished by the Thirteenth Amendment, and the Fourteenth Amendment, which specifies who are citizens of the United States, was in full force and effect. Under the

provisions of the first sentence, first section, of the Fourteenth Amendment of the Constitution "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". It may be conclusively asserted, accordingly, that at the time of the rendering of this decision, a citizen of the United States was any person or inhabitant, native or naturalized, of either sex, who owed allegiance to our government, and who, in return, was entitled to protection from it, and to enjoy the freedom and privileges which it offered.

Legally, however, there was quite a distinction between citizens of the United States at the time of the decision of the Civil Rights Cases and prior to the adoption of the Fourteenth Amendment to the Federal Constitution. Before the adoption of said amendment, persons of African descent were not legally citizens of the United States. In determining who were citizens of the United States at the adoption of the Constitution, in the famous case *Dred Scott vs. Sanford*, 19 How. 539, decided by the Supreme Court of the United States in 1857, Chief Justice Taney, speaking for the court, declared, that the legislation and histories of the times, and the language used in the Declaration of Independence, showed "that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that instrument", that the words "people of the United States" and "citizens" meant the same thing, both describing "the political body who, according to our republican institutions,

form the sovereignty and hold the power and conduct the government through their representatives"; that "they are what we familiarly call the 'sovereign people', and every citizen is one of this people and a constituent member of this sovereignty"; but that "persons of African descent were not included, and were not intended to be included, under the word 'citizens' in the Constitution"; that they could, therefore, "claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States", and that "on the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them". The Thirteenth Amendment to the Constitution liberated the slaves and granted Congress authority to enact such legislation as might be appropriate and necessary to enforce the provisions of that amendment. Acting under the authority supposed to have been granted by section two of that amendment, Congress passed, April 9, 1866, over the veto of President Johnson, the Civil Rights Bill, which stated that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States". The President, in a way, denied the constitutionality of the bill in his veto. The Democrats in Congress, and the Southerners seeking seats therein, most emphatically denied its constitutionality. To the Republicans in Congress, however, the bill appeared to have no defect, and was considered by them wholly

constitutional under a liberal construction of the Thirteenth Amendment. But, moreover, in order to set aside all contentions to the contrary, even before the Supreme Court had ruled upon the legality of the Act, its incidents were embodied in the Fourteenth Amendment and made an express provision of the Constitution.

Prior to the adoption of that amendment the question had not been settled as to whether citizenship of the United States or citizenship of the State was primary. The advocates of State sovereignty insisted, that, since there was no express clause in the Constitution defining citizenship and declaring citizenship of the United States primary, citizenship was primarily of the State, and allegiance was, therefore, due first to the State by all its inhabitants. This question was definitely set at rest by the pregnant words of the Fourteenth Amendment, and, subsequently, instead of a man being a citizen of the United States because he was a citizen of one of the States, it was now settled that he was a citizen of any State in which he might choose to reside, because he was antecedently a citizen of the United States. And, whilst it has been ably argued at different times, by eminent statesmen and jurists, that slaves were legally made citizens upon the adoption of the Thirteenth Amendment, it is now universally conceded by the leading legal and historical authorities, that they were only liberated by that amendment, and that they did not by substantial law become citizens, until the adoption of the Fourteenth Amendment - July 28, 1868.

Had the Supreme Court of the United States held that the first two sections of the Civil Rights Act, of 1875, were

constitutional, the effect, from a legal standpoint, would have been tremendously appalling, particularly to the South. Her entire social, moral and religious institutions would have doubtless been wrecked. It would have then been a criminal offense to discriminate, in any way, against negroes, or other races, in hotels, theatres, public eating-places and railroad carriages, and any one guilty of such discrimination would have been liable to prosecution in the Federal Courts. Social equality between the various races could have been enforced through the same courts; and so-called "Jim Crow" laws, and laws of similar character, could not have come into existence. Such a decision would have stripped from the States many of the powers, and vastly robbed them of the rights, which they justly held under the Federal Constitution. It would have given Congress authority to enact, generally, a code of laws for the enforcement and vindication of all rights of life, liberty and property, and would have made it constitutional for her to step into the domain of local jurisprudence and lay down rules for the conduct of individuals in society towards each other and impose sanctions for the enforcement of such rules, without the State or its authorities in any way having jurisdiction over such matters. Thus, it can readily be seen, that such a decision would have been seriously injurious to States thickly populated with persons of African descent.

It is believed, moreover, that public sentiment demanded a contrary decision, i. e., a majority of the voters of the country were ardently in favor of extending to the negroes every possible

civil and social right. The great politicians of the North had fought for nearly ten years in their effort to enact legislation which would secure to negroes equal rights in inns, public conveyances, theatres and other places of amusement, and to prevent them from being disqualified for service on juries. Senator Charles Sumner, of Massachusetts, had championed their cause, and had eagerly fought for the passage of the Civil Rights Act, but it was not until more than a year after his death, that this Act was forced through Congress as a crowning measure of the plan for reconstructing the South, on which the Republican party entered at the close of the war between the States, and under that feeling of omnipotence with regard to the South, which was the natural result of the prolonged exercise of the war power, and which survived the war fully twenty years. Several times before this act was passed similar bills had been presented in Congress, but had been defeated in various ways. Mr. Sumner, in 1872, endeavored to gain the passage of such an act by attaching same to the Amnesty Bill, but it failed under even these crafty methods. Naturally the people of the North did not wish to see the results of their victory shattered, and their "Crowning achievement" of the Fourteenth Amendment shot to pieces by a decision of the Supreme Court, which deprived the negro of many of the privileges and conveniences of citizenship which they had so long and tediously labored to secure for him. The court felt that the provisions of the Fourteenth Amendment were prohibitive against the States and did not apply directly to individuals; that actions for violation of civil rights of citizens could be

brought in United States courts only when the States had passed laws depriving these citizens of their rights, privileges and accommodations, and it so held in the decision which it handed down. That court, in its wisdom, saw the iniquity of such an enactment and the dire results to which a contrary decision would lead, and so, secured, as it was, in its lofty place, it rendered an unique decision, regardless of the sentiment of the dominating political party, which was directly at variance with that party's policies, and which rendered null and void the principal clauses of an act, the passage of which, the members of that party pointed to with pride, as the crowning feature of a decade of exhaustive reconstruction legislation.

Had it been lawful to recall judges at that time, little doubt, it seems could exist as to the probability of the recall of the eminent jurists who then sat upon the Supreme bench, and who for years afterwards, through their weighty opinions, rendered their country an invaluable service. Public feeling would have demanded their recall, and the chances are, that less worthy men and jurists not so capable and accomplished as they, would have been appointed in their places. People heated with passion and burning with prejudice would have willingly voted for their recall, when this decision was handed down, whereas, during a more placid frame of mind, after the passions had subsided and the prejudices had been swept aside, and these same people could more coolly reason with themselves concerning the matter, they would have naturally seen the unwisdom and injustice of such action. This decision, in itself, should be a great lesson to the people of the United States, and serve as a beacon light to warn them against

the folly of adopting a plan to recall our distinguished jurists, simply because they may render a decision which is not compatible with the ideas of the average layman. Great judges deal with subjects which the populace know little about; they render decisions after deep reasoning and extensive research; their decisions should be final, and unalterable by the fads and fancies of the great masses of the people.

Respectfully submitted,

CMBurdett

2nd Lieut., 17th U. S. Infantry

The following authorities were consulted in the preparation of the above thesis:

1. History of the United States, 1860-1877.
James Ford Rhodes.
2. History of the Reconstruction Period. James Schouler.
3. Twenty Years of Congress. James G. Blaine.
4. Great Epochs in American History. Francis W. Halscy.
5. Reconstruction and the Constitution. John W. Burgess.
6. The Civil War and the Constitution. John W. Burgess.
7. Black's Constitutional Law.
8. United States Revised Statutes.
9. United States Statutes at Large.
10. United States Supreme Court Reports.
11. Various periodicals, including Literary Digest, Arena and Nation.