



SAN[D]FORD

Ryan H. Nelson

PREVAILING SENTIMENT within the legal academy is that the U.S. Supreme Court misspelled the defendant's name when it reported *Dred Scott v. John F.A. Sandford*¹ in *Howard's Supreme Court Reports*.² After all, the man who ostensibly claimed ownership of

Ryan H. Nelson is an Associate Professor of Law at South Texas College of Law Houston. Copyright 2024 Ryan H. Nelson.

¹ Scott v. Sandford, 60 U.S. 393 (1857), superseded by U.S. CONST., amends. XIII, XIV, XV.

² E.g., RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 778 (3d ed. 2018); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 548-49 (1st ed. 1997); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS ix, 2 n.* (Oxford Univ. Press 1978); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 18 n.25 (Cambridge Univ. Press 2006); VINCENT V. HOPKINS, S.J., DRED SCOTT'S CASE 23 n.3 (Atheneum 1951); Roberta Alexander, Dred Scott: *The Decision That Sparked A Civil War*, 34 N. KY. L. REV. 643, 644 n.21 (2007); James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases As Badges of Slavery*, 39 HOW. L.J. 633, 642 n.37 (1996); Jennifer M. Chacón, *Citizenship and Family: Revisiting Dred Scott*, 27 WASH. U. J.L. & POL'Y 45 n.1 (2008); Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393, 417 n.126 (2007); Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37 n.3 (1993); Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49, 61 n.69 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406 n.146 (2011); David T. Hardy, *Dred Scott, John San(d)ford, and the Case for Collusion*, 41 N. KY. L. REV. 37, 49-50 (2014); William B. Meyer, *The Best Answer? Justice Nelson's Concurrence in Dred Scott v. Sandford*, 63 AM. J. LEGAL HIST. 1, 3 (2023); Stuart A. Streichler, *Justice Curtis's Dissent in the Dred Scott Case: An Interpretive Study*, 24 HASTINGS CONST. L.Q. 509, 512 n.26 (1997); John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. LEGAL HIST. 373, 373 n.1 (1988); G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1507 n.175 (2003).

the Scotts – Dred; his wife, Harriet; and their two children, Eliza and Lizzy³ – was John F.A. Sanford; his surname contains one “d,” not two.⁴ Civil procedure proves that prevailing sentiment wrong.

The Process Act of 1828 directed the federal courts in any states admitted to the Union after September 29, 1789 to apply, in suits at common law, “mesne process” laws of the state in which they sat,⁵ which was necessary after the Supreme Court held that the Process Acts of 1789 and 1792 only required federal courts to apply state procedural law in effect as of the enactment date of those Acts.⁶ Mesne process laws include laws circumscribing pleadings.⁷ Missouri was admitted to the Union in 1821,⁸ and Congress first created the Circuit Court of the United States for the Missouri District in 1837.⁹ Therefore, at all relevant times during the *Dred*

³ Transcript of Record, *Scott v. Sandford*, 60 U.S. 393 (1856) (No. 137), at 3-4 [hereinafter “*Dred Scott Record*”]. Scott’s pleading spells his daughter’s name “Lizzy,” *id.* at 4, whereas Scott’s U.S. Supreme Court briefs spell her name “Lizzie,” 3 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 180 (Brief for Plaintiff in Error, *Scott v. Sandford*), 220 (Additional Brief for Appellant, *Scott v. Sandford*) (Philip B. Kurland & Gerhard Casper eds., 1978) [hereinafter “*Dred Scott Supreme Court Briefs*”].

⁴ N.Y. DAILY TRIBUNE, at 4 (May 7, 1857), www.loc.gov/resource/sn83030213/1857-05-07/ed-1/?sp=4 (announcing the death of “John F.A. Sanford,” the “nominal plaintiff [actually the defendant] in the Dred Scott case,” two days prior); *see also* DAVID T. HARDY, DRED SCOTT: THE INSIDE STORY 29-31 (2019).

⁵ Process Act, ch. 68, § 1, 4 Stat. 278, 278-281 (1828); *see also* Kristin A. Collins, “A Considerable Surgical Operation”: Article III, Equity, and Judge-Made Law in the Federal Courts, 60 DUKE L.J. 249, 261 (2010) (noting exceptions not relevant here). All facts relevant to *Scott v. Sandford*, 60 U.S. 393 (1857), occurred well before the enactment of the Conformity Act of 1872, the Rules Enabling Act of 1938, or the ensuing Federal Rules of Civil Procedure.

⁶ *Ross v. Duval*, 38 U.S. 45, 57 (1839) (citing *Wayman v. Southard*, 23 U.S. 1, 8 (1825) (citing Process Act, ch. 36, § 2, 1 Stat. 275, 276 (1792); Process Act, ch. 21, § 2, 1 Stat. 93, 93-94 (1789))).

⁷ Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 57 n.21 (1968) (“[T]oday we begin our law suits with mesne process.”); *process*, BLACK’S LAW DICTIONARY 1460 (12th ed. 2024) (Bryan A. Garner, ed.) [hereinafter “Garner, *Black’s Law Dictionary*”].

⁸ Resolution Providing for the Admission of the State of Missouri into the Union on a Certain Condition, 3 Stat. 645 (1821).

⁹ Act of Mar. 3, 1837, ch. 34, § 3, 5 Stat. 176, 177.

Scott case – viz., when Dred Scott first filed his declaration in that Missouri federal court on November 2, 1853 (a suit at common law alleging a single cause of action for trespass seeking monetary damages)¹⁰; when John F.A. Sanford filed his plea to the jurisdiction of the court (similar to the modern Fed. R. Civ. P. 12(b)(1) motion in federal practice) on April 7, 1854¹¹; and when Sanford filed three additional pleas on May 4, 1854¹² – the Process Act of 1828 compelled that court to apply Missouri procedural law vis-à-vis the pleadings.

From 1849 until at least 1854, when Scott and Sanford filed their respective pleadings, Missouri procedural law was quite clear. On July 4, 1849, Missouri enacted its “new Code of Practice,”¹³ which remained in effect through at least 1856.¹⁴ Pursuant to the 1849 Missouri Code of Practice, the only pleadings permitted were the “petition, demurrer, answer, and in cases of offset, a reply thereto.”¹⁵ Thereafter, and similar to modern federal procedure, “[e]very material allegation in the petition, not specifically controverted as heretofore required . . . , shall for the purposes of the action, be taken as true.”¹⁶ Indeed, as the Missouri Supreme Court confirmed in 1851, “[a]ll of the averments in the petition, not denied in the answer, are to be taken as admitted.”¹⁷ In the same vein, and similar to modern federal procedure (although we have abandoned the term “demurrer” in favor of pre-answer motions to dismiss¹⁸), if the defendant demurred

¹⁰ *Dred Scott* Record, *supra* note 3, at 3-4.

¹¹ *Id.* at 5-6.

¹² *Id.* at 7-8.

¹³ *Moore v. Chamberlin*, 15 Mo. 238, 239 (1851); accord LAWS OF MISSOURI PASSED AT THE GENERAL ASSEMBLY, *Practice in Courts of Justice*, art. XXXII, § 1 (1849), www.google.com/books/edition/Laws_of_Missouri_Passed_at_the_General_A/oPIFAQAAIAAJ?hl=en&gbpv=1 [hereinafter “1849 Missouri Code of Practice”].

¹⁴ *Cf. Morgan v. Bowman*, 22 Mo. 538, 541 (1856) (citing the relevant provisions of the 1849 Missouri Code of Practice in 1856).

¹⁵ 1849 Missouri Code of Practice, *supra* note 13, at art. VII, § 1.

¹⁶ *Id.* art. VII, § 14; *see also id.* art. VI, §§ 1-2. This parallels FED. R. CIV. P. 8(b)(6).

¹⁷ *Steil v. Ackli*, 15 Mo. 289, 290 (1851).

¹⁸ *Motions to Dismiss – History of the Rule 12(b)(6) Motion*, 5B FED. PRAC. & PROC. CIV. § 1355 (Wright & Miller 4th ed. 2024).

to the petition in lieu of answering, the 1849 Missouri Code of Practice regarded all facts alleged in that petition as true.¹⁹

Accordingly, despite Scott filing what he called a “declaration,”²⁰ the 1849 Missouri Code of Practice would have described this pleading as a “petition” because it contained all of the elements of a petition (i.e., the title of the action along with the name of the court and parties, a statement of facts, and a demand for relief)²¹ and Scott’s claim for trespass, which contemporaneous Missouri caselaw acknowledged were included in a “petition.”²² In that petition, Scott asserted that “John F.A. Sandford ... with force and arms assaulted [Scott], and without law or right held him as a slave.” Thereafter, the court issued a summons for John F.A. Sandford (who, recall, does not actually exist under that name) to appear.²³ That same day, the marshal of the court contended, mistakenly, that he had served “Sandford”;²⁴ he actually served Sanford since Sanford is who ultimately appeared. At this point, had Sanford declined to appear, and had the court issued a default judgment against him, any execution thereupon likely would have been impossible given the putative absence of any assets in the name of that fictional defendant in default.

Sanford appeared nonetheless. First, he filed a plea to the jurisdiction of the court, the text of which refers to Sandford *passim*, but which is signed by Sanford (suggesting that Sanford signed the document and knew how to spell his own surname, but his attorney failed to catch the typo).²⁵ Despite Sanford labeling this a “plea to the jurisdiction,” the 1849 Missouri Code of Practice would have called this a “demurrer” because demurrers

¹⁹ Hunt v. Simonds, 19 Mo. 583, 592 (1854). This parallels federal practice both now and during the era of demurrers. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002) (“Because we review here a decision granting respondent’s motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.”); Christmas v. Russell, 72 U.S. 290, 303 (1866) (“[A] demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts as alleged are true.”).

²⁰ Dred Scott Record, *supra* note 3, at 3.

²¹ See 1849 Missouri Code of Practice, *supra* note 13, at art. VI, § 1.

²² Froust v. Bruton, 15 Mo. 619, 619-20 (1852).

²³ Dred Scott Record, *supra* note 3, at 3, 4.

²⁴ *Id.* at 5.

²⁵ *Id.* at 5-6.

included pleadings contending that “the court has no jurisdiction of . . . the subject of the action.”²⁶ Contemporaneous caselaw confirms this.²⁷ To that end, the briefs of both parties before the U.S. Supreme Court would later describe Sanford’s plea to the jurisdiction as a demurrer.²⁸

Second, Sanford filed three pleas contending that he (with his surname correctly spelled “Sanford”) “defends the wrong and injury,” that “he is not guilty of the said supposed trespass,” and that he had restrained Dred Scott and his family solely “as he had a right to do.”²⁹ Notwithstanding Sanford labeling these as “pleas,” the 1849 Missouri Code of Practice almost certainly would have recognized them as constituting an “answer.” To that end, an “answer” could contain “specific denial[s]” of “each allegation of the petition controverted by the defendant” and/or “statement[s] of any new matter constituting a defense,”³⁰ and Sanford leveraged these pleas to deny liability on the merits by refuting that he had committed a trespass. Furthermore, Sanford’s counsel would later argue before the Supreme Court that, after pleading to the jurisdiction, Sanford had then “pleaded to the merits”³¹ and “pleaded the general issue on all counts,” followed by pleading “special-ly” to each count,³² which was akin to filing a general denial and specific denials in modern federal procedure,³³ both of which are found in answers and not in motions to dismiss.³⁴ Scott’s counsel likewise concurred that Sanford had pleaded to the “merits” below,³⁵ again showing that Sanford’s pleas constituted an answer.

²⁶ See 1849 Missouri Code of Practice, *supra* note 13, at art. VI, § 3.

²⁷ *Yeatman v. Fox*, 15 Mo. 71, 71 (1851).

²⁸ *Dred Scott* Supreme Court Briefs, *supra* note 3, at 171 (Brief of the Plaintiff, *Scott v. Sandford*), 180 (Brief for Plaintiff in Error, *Scott v. Sandford*), 220 (Additional Brief for Appellant, *Scott v. Sandford*), 229 (Brief for Defendant in Error, *Scott v. Sandford*).

²⁹ *Dred Scott* Record, *supra* note 3, at 8.

³⁰ 1849 Missouri Code of Practice, *supra* note 13, at art. VI, § 7.

³¹ *Dred Scott* Record, *supra* note 3, at 231 (Brief for Defendant in Error, *Scott v. Sandford*).

³² *Id.* at 229.

³³ *issue*, Garner, *Black’s Law Dictionary*, *supra* note 7, at 994; BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 382 (2d ed. 1995).

³⁴ FED. R. CIV. P. 8(b)(3).

³⁵ *Dred Scott* Record, *supra* note 3, at 183 (Brief for Plaintiff in Error, *Scott v. Sandford*), 220 (Additional Brief for Appellant, *Scott v. Sandford*).

Theoretically, Sanford's pleas might have been characterized as a "demurrer" under the 1849 Missouri Code of Practice, but arguments for that conclusion are weak at best. Foremost, although several of the bases upon which a defendant could demur in 19th-century Missouri practice undoubtedly did not describe these pleas (e.g., contesting jurisdiction, refuting the plaintiff's capacity to sue, contending that the action was precluded by another action between the parties, claiming that there was a defect with the parties), demurrers also encompassed arguments that the petition did not state facts sufficient to constitute a cause of action,³⁶ and Sanford arguably leveraged these pleas to argue that Scott's petition did not state facts sufficient to constitute a cause of action (i.e., Sanford did nothing wrong as there could be no cause of action against a slaveholder for lawfully owning his slaves). Yet, such a reading would strain the 1849 Missouri Code of Practice's text and the contemporaneous understandings of both Scott and Sanford's counsel before the Supreme Court, so it ought to be rejected. Further, the precise labeling of those pleas under the 1849 Missouri Code of Practice was moot because, as demonstrated below, the result that follows would have been the same regardless.

If Sanford only demurred to Scott's petition *née* declaration without filing an answer, the court was required to take all allegations in that petition as true,³⁷ including the allegation that a man named "John F.A. Sandford ... held him as a slave."³⁸ If Sanford answered Scott's petition, nowhere in that answer did Sanford deny Scott's allegation that "Sandford" had owned him; on the contrary, Sanford's pleas only denied that "Sandford" was guilty of trespass and claimed that he had lawfully restrained the Scotts.³⁹ By demurring or failing in his answer to deny this claim in Scott's petition, as a matter of law, John F.A. Sandford (who existed) admitted that someone named John F.A. Sandford (who did not) owned Dred Scott and his family as slaves. Of course, Scott's allegation was inaccurate, and Sanford could have rebutted it, as a matter of fact in his answer, with great ease. He did not. To that end, the courts are not truth-finding institutions; they are finders of law and fact. Procedural laws sometimes force courts

³⁶ 1849 Missouri Code of Practice, *supra* note 13, at art. VI, § 3.

³⁷ *Supra* note 19.

³⁸ *Dred Scott Record*, *supra* note 3, at 3 (emphasis added).

³⁹ *Id.* at 7-8.

to find untrue facts.⁴⁰ Alternatively, Sanford could have filed a plea in abatement on the basis of misnomer – that is, a misspelling of a party’s name – in lieu of answering.⁴¹ He filed no such plea. Therefore, the court was required, under controlling Missouri law, to treat as correct Dred Scott’s allegation that the name of the person who had harmed Scott and his family was “John F.A. Sandford.”

For the sake of context, I should note that the remainder of the record alternated between the correct and incorrect spellings of Sanford’s surname. Scott’s replications (i.e., responses to Sanford’s pleas), the parties’ agreed statement of facts, the judgment for Sanford, Scott’s bill of exceptions, and Scott’s second motion for a new trial used the correct spelling, “Sanford.”⁴² Scott’s first motion for a new trial, the clerk’s certification of the record, the trial court judge’s admonition that the defendant appear before the Supreme Court in response to Scott’s writ of error (similar to a modern petition for a writ of certiorari), and the defendant’s acknowledgement used the incorrect spelling, “Sandford.”⁴³ The parties’ agreed statement of facts conceded that “the defendant” – which might refer to “John F.A. Sanford,” as the defendant appears in the agreed statement of facts’ caption, or “John F.A. Sandford,” as the defendant appears in Scott’s petition – “claimed to hold [the Scotts] as slaves.”⁴⁴ Procedurally, however, this agreement was immaterial. If the parties agreed that “Sandford” claimed to own the Scotts, that merely reaffirmed the effect of Sanford demurring or failing to deny that claim in Scott’s petition. In the alternative, if the parties agreed that Sanford claimed to own the Scotts, that fact did not diminish “Sandford”’s identical claim.

So, when Scott filed his writ of error, the caption listing Sandford as the defendant was correct not only because the caption remained unchanged throughout the life of the action, but also because – pursuant to the Process Act of 1828 and the 1849 Missouri Code of Practice – “John F.A. Sandford” was the defendant as a matter of law, notwithstanding his

⁴⁰ *Stambovsky v. Ackley*, 169 A.D.2d 254, 256 (1991) (defendant estopped from denying that a house was haunted).

⁴¹ *Hite v. Hunton*, 20 Mo. 285, 288 (1855) (citations omitted).

⁴² *Dred Scott* Record, *supra* note 3, at 9, 11-13.

⁴³ *Id.* at 11, 13-14.

⁴⁴ *Id.* at 10.

nonexistence. Indeed, all briefs and arguments submitted to the Supreme Court by Scott bore the name “Sandford”;⁴⁵ Sanford’s brief contained the only accurate spelling of his surname.⁴⁶ Yet, the fact remains that, as a matter of law, John F.A. Sandford, a man who never existed, was the defendant who claimed ownership of the Scotts. Therefore, the repeated references to Sandford throughout the *Dred Scott* opinion – in the case’s caption; in the syllabus; in Chief Justice Roger B. Taney’s majority opinion endorsed by Justices John A. Campbell, John Catron, Peter V. Daniel, Robert C. Grier, Samuel Nelson, and James M. Wayne;⁴⁷ in Nelson’s concurrence;⁴⁸ in Justice John McLean’s dissent;⁴⁹ and in Justice Benjamin R. Curtis’s dissent⁵⁰ – as well as the claims that this specter owned the Scotts made *passim*, were not legally flawed. The Supreme Court did not misspell the defendant’s name in the *Dred Scott* opinion; the Court correctly spelled the name of the fictional individual who, by operation of civil procedure, claimed to own Dred Scott and his family.



⁴⁵ *Dred Scott* Supreme Court Briefs, *supra* note 3, at 167-68 (Brief of Plaintiff, *Scott v. Sandford*), 179-80 (Brief for Plaintiff in Error, *Scott v. Sandford*), 219-20 (Additional Brief for Appellant, *Scott v. Sandford*), 241-42 (Argument of Mr. Curtis on Behalf of Plaintiff, *Scott v. Sandford*).

⁴⁶ *Id.* at 227-28 (Brief for Defendant in Error, *Scott v. Sandford*).

⁴⁷ 60 U.S. at 393, 396-97, 430.

⁴⁸ *Id.* at 458 (Nelson, J., concurring).

⁴⁹ *Id.* at 529, 552 (McLean, J., dissenting).

⁵⁰ *Id.* at 568 (Curtis, J., dissenting) (quoting the demurrer).