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The Historical Society *of the* Courts *of the* State of New York

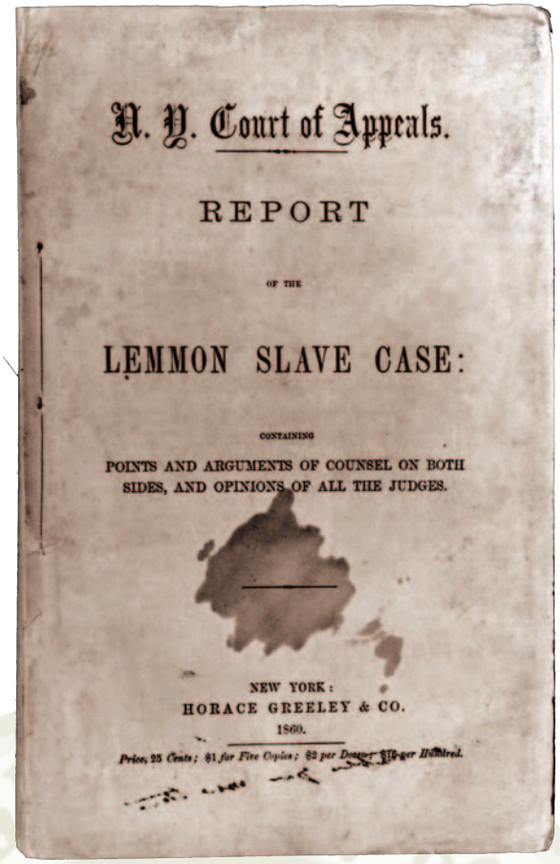
The Lemmon Slave Case

BY JOHN D. GORDAN, III

IN **LEMMON V PEOPLE**, *20 N.Y. 562 (1860)*, the New York Court of Appeals made the strongest statement against slavery of the highest court of any state before the Civil War. In those days, slavery was a ward of the federal government. Although its legal existence and attributes were individually regulated by each state, North and South, at a national level slavery was protected by the Constitution of the United States and by the Fugitive Slave Acts of 1793 and 1850.

Apart from domestic regulation within the borders of individual states, slavery was an issue in the courts in three principal categories:

> *"Every person...brought into this State as a slave... shall be FREE"*
>
> *1 Revised Statutes of New York (part I, ch XX, tit VII § 1 [3d ed 1846])*


N. Y. Court of Appeals.

REPORT

OF THE

LEMMON SLAVE CASE:

CONTAINING

POINTS AND ARGUMENTS OF COUNSEL ON BOTH SIDES, AND OPINIONS OF ALL THE JUDGES.

NEW YORK:
HORACE GREELEY & CO.
1860.

The decisions and arguments of counsel, as published by Horace Greeley and Co. (1860)

1. enforcement of the Slave Trade Act of 1807 and its progeny, which banned the importation of slaves into the United States;
2. enforcement of the Fugitive Slave Acts, which authorized slave owners to pursue their slaves fleeing across state lines and to bring them back after an abbreviated judicial hearing; and
3. legal efforts to liberate slaves carried by their owners into jurisdictions in which slavery was prohibited.

Enforcement of the Slave Trade Act was at best inconsistent, depending on time and place.[1] The enforcement of the Fugitive Slave Acts in the free states of the North was often explosive and sometimes violent.[2] As antislavery sentiment advanced in the North and resistance to repatriation of fugitive slaves increased there, abolitionists created the "Underground Railroad" to spirit fugitive slaves to freedom in Canada. If a fleeing slave were cornered within a Northern state, there might be armed resistance, arrest by state authorities of federal marshals enforcing the Fugitive Slave Act, recourse to state court habeas corpus jurisdiction for pris-

Continued on page 8

PAGE 3: DANIEL J. KORNSTEIN

THE ROBERSON PRIVACY CONTROVERSY

"...In a close four-to-three decision, the Court...dismissed (the) complaint on the ground that no "so-called" right of privacy existed in New York..."

oners in federal custody under the Fugitive Slave Act and occasionally "rescue" of a captured slave right out of the U.S. Commissioner's courtroom in the midst of the removal proceedings.[3]

The Lemmon Slave Case falls in the third category of cases listed above: legal efforts to liberate slaves carried by their owners — in this case eight household slaves in transit with their owners — into a jurisdiction that prohibited slavery. In contrast to the cases described above, the matter appears to have been entirely peaceful. The case falls into a relatively small group of like cases which resonate in the history of Anglo-American jurisprudence: *Somerset v Stewart*,[4] in which Lord Chief Justice Mansfield in the Court of King's Bench in 1772 held that slavery was too odious to exist without positive legislation, and there being none in England, any slave brought there—in Somerset's case, from Virginia —became free;[5] *United States ex rel. Wheeler v Williamson*,[6] a perverse "habeas corpus" proceeding in federal court in Philadelphia in 1855 which has inspired legal and literary outrage from the time it occurred to the present day;[7] and finally, the decision of the Supreme Court of the United States in the case of *Dred Scott v Sanford*.[8] Yet, lacking the precedential significance of *Somerset* and *Dred Scott* and the drama of *Wheeler*, the Lemmon Slave Case is almost unknown and rarely mentioned in otherwise comprehensive works.[9]

THE JUDGE AND THE COURTS

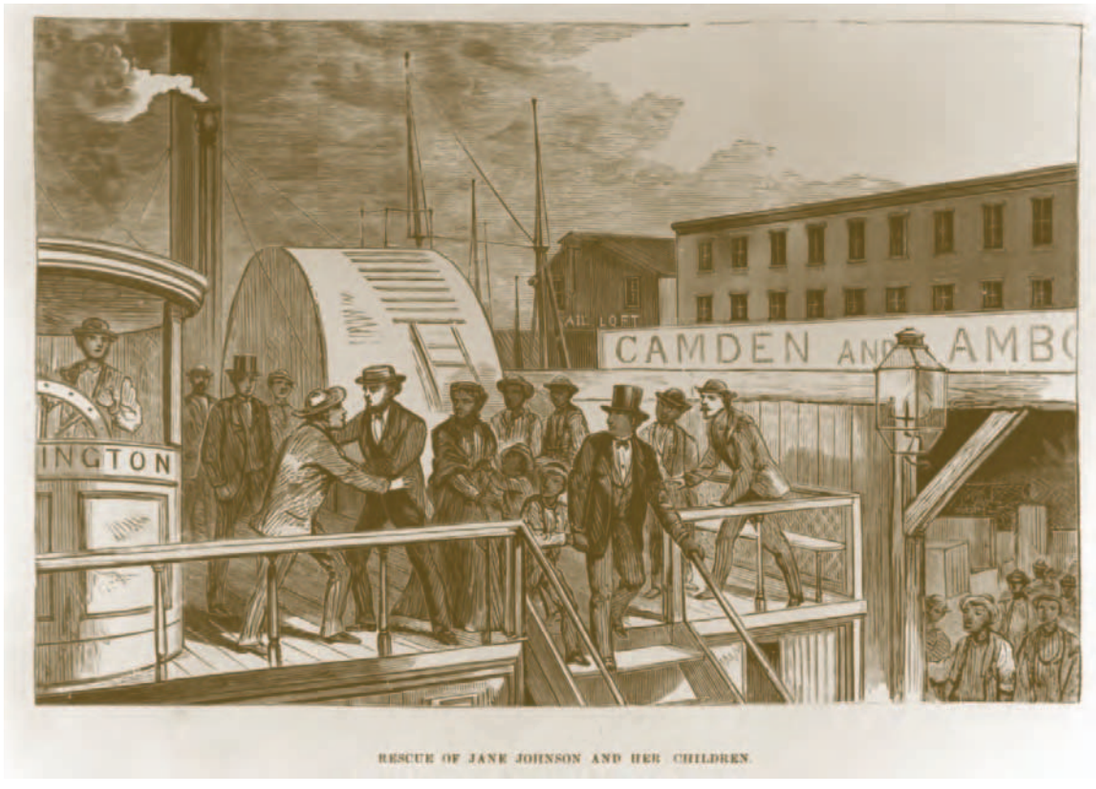
The Lemmon Slave Case originated in an application for a writ of habeas corpus filed November 6, 1852, in the Superior Court of the City of New York before Judge Elijah Paine, Jr., by Louis Napoleon, described in the record simply as "a colored man." Napoleon was a good deal more besides — a vice president of the American and Foreign Anti-Slavery Society which two years before had been instrumental in ransoming James Hamlet, a Brooklyn resident and the first person "removed" following proceedings before a U.S. Commissioner under the Fugitive Slave Act of 1850, from his owner in Baltimore.

Elijah Paine, Jr., the judge, was named for his father, a Federalist United States Senator from Vermont from 1795 to 1801 and United States District Judge for the District of Vermont from 1801 until his death in 1842. Elijah Paine, Sr.'s other children included Martyn, an accomplished physician and one of the founders in 1841 of what is now the New York University Medical School, and Charles, Governor of Vermont from 1841 to 1843.

Elijah Jr. was born in 1796, graduated from Harvard in 1814 and studied at the Litchfield Law School. He was a law partner of Henry Wheaton and assisted in the preparation of the twelve volumes of Wheaton's U.S. Supreme Court Reports from 1816 to 1827. In 1827 Paine published Volume I of *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit*. A second volume of his reports was published posthumously in 1856.

Paine was elected to the Superior Court in 1850 and served until his death in 1853. The best information available about the jurisdiction of that Court, its origins and the rather unusual court structure in New York derives from the two-volume work published in 1830, *The Practice in Civil Actions and Proceedings at Law in the State of New York in the Supreme Court and Other Courts of the State*, written by Paine and William Duer, later district attorney for Oswego County and then a congressman. The Superior Court had civil jurisdiction within the City and County of New York much like the Supreme Court, and indeed cases filed in the Supreme Court could be remanded to the Superior Court on consent of the parties. Review of its judgments lay in the Supreme Court.

The Supreme Court, despite its wide original and appellate jurisdiction at the time Paine and Duer were writing, was no more the State's highest court than it is today. From the formation of the State until ratification of the 1846 Constitution, the ultimate judicial authority was not the Court of Appeals but rather the Court for the Trial of Impeachments and the Correction of Errors,



Depiction of the rescue in United States ex rel. Wheeler v Williamson. Members of the Pennsylvania Anti-Slavery Society help the household slaves of the U.S. Minister to Nicaragua gain their freedom while in transit through Philadelphia in July, 1855

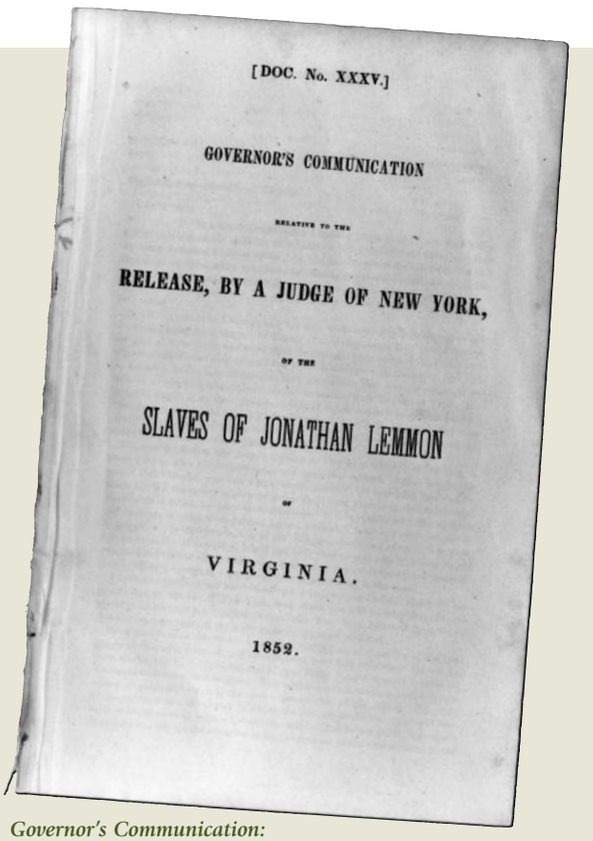
which — as strange as its name — was composed of the Justices of the Supreme Court, the Chancellor and the president and all the members of the State Senate, the latter a far larger group than all the full-time judicial participants. The Court of Appeals which would ultimately resolve the Lemmon Slave Case in 1860 was in its initial configuration, composed of four Judges of the Court of Appeals and four Justices of the Supreme Court, sitting together.

NEW YORK LAW OF SLAVERY

New York's progress towards emancipation was in substantial part the work of John Jay, its first Chief Justice and later — after his service as Chief Justice of the United States Supreme Court — its Governor, and of his son William, for many years a judge in Westchester County. John Jay had strongly supported the legislative extirpation of slavery in New York from the time of the Revolution and was the first president of the New York Manumission Society, founded in 1785. William, in addition to being a judge and founding the American Bible Society, devoted his life to the promotion of emancipation, wrote numerous tracts against slavery and appeared in court on behalf of slaves.[10] Nor did he stop there. In a December 1858 letter to his son, John Jay, shortly after William Jay's death, Stephen Myers, who ran the Underground Railroad for fugitive slaves in Albany, wrote:

> *I will just give a statement of the number of fugitives that your father has sent here within the last eight years before his death: 3 from Norfolk Va. 2 from Alexandria 2 from New Orleanes. Last tow he sent me were from North Carolia. The sevral checks your father sent me from time to time amounted to fifty Dollars on the Albany State Bank. In his death all lost a true freind to humanity. And yet he remembered the poor fugitive in defianc[e] of the Law. Yours very Respectfully,*
>
> *Stephen Myers*
> *supt of the underground RR*[11]

In 1852 when proceedings in the Lemmon Slave Case began, New York had completed its course of gradual legislative emancipation. In 1785, a bill for the immediate abolition of slavery passed the Legislature, but it was disapproved by the Council of Revision because the Assembly had insisted on including a provision withholding from freed slaves the right to vote. In February 1788, the Legislature passed, and Governor George Clinton signed, "An Act Concerning Slaves" (L 1788, ch 40), prohibiting the sale of slaves brought into the State and the exportation of any slave for sale outside of the State, and providing a mechanism for the voluntary manumission of slaves. A 1799 statute guaranteed eventual freedom to all children born of slaves after July 4, 1799 and provided a mechanism for their immediate manumission (L 1799, ch 62). After several additional enactments protecting slaves against forced expatriation and recognizing slave marriages and rights to own property, the Legislature provided for the emancipation of all slaves born prior to 1799, but permitted non-residents to enter New York with their slaves for periods up to nine months (L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GOVERNOR'S COMMUNICATION

RELATIVE TO THE

RELEASE, BY A JUDGE OF NEW YORK,

OF THE

SLAVES OF JONATHAN LEMMON

OF

VIRGINIA.

1852.

Governor's Communication:
Report by the Governor of Virginia denouncing Honorable Elijah Paine's decision

1817, ch 137). When the Legislature repealed this latter provision (L 1841, ch 247), New York State became legally slave-free.[12]

In November 1852, into this legal framework blundered Jonathan Lemmon and his wife Juliet in transit from Norfolk, Virginia, through New York to Texas, with Juliet's eight household slaves: a man, two women and five children, between the ages of two and 23.

THE PROCEEDINGS IN THE SUPERIOR COURT

The case was a simple one. On the evening of November 5, 1852, the "City of Richmond" steamship arrived in New York Harbor from Norfolk. Mr. and Mrs. Lemmon and her household slaves disembarked and lodged in a boarding house at Three Carlisle Street.

Louis Napoleon swore out his application for a writ of habeas corpus the next day, Justice Paine granted the writ and the slaves were brought before the court by a New York City constable and remanded to police custody.

The slaves were represented by Erastus Culver, a well-known anti-slavery lawyer in Brooklyn, who had been a member of the House of Representatives in the 1840s and would be appointed Minister to Venezuela by President Abraham Lincoln, and by John Jay, son of Judge William Jay and grandson of the Chief Justice.

On November 9, Jonathan Lemmon made a return that for the past several years the slaves had been his wife's inherited property under the laws of Virginia and thus not illegally confined, and that they were in transit through New York for only

Continued on page 10

so long as would be required to board another vessel bound for Texas, whose laws also would recognize their status as slaves. On this return, the Court heard argument and reserved decision until November 13, when Justice Paine found that the slaves were free and discharged them from custody.

In his opinion, Justice Paine found that in 1841, the New York Legislature had abolished slavery within the State in all forms and under all circumstances, a conclusion that was never overruled or indeed seriously challenged in the subsequent appellate proceedings. He concluded that the distinct provisions in the United States Constitution specifically addressing slavery removed it from the collateral application of more general provisions like the Commerce Clause, and that the Privileges and Immunities Clause gave the traveler the rights of citizens in the state he or she was in, not the one the traveler had come from. Finally, he ruled that the provisions of the Law of Nations, authorizing the transportation of goods in transit through other countries in the possession of their owner, could not apply by analogy because under the Law of Nations slaves were not goods.

On November 19, 1852, the Lemmons' counsel, H.D. Lapaugh, applied for a writ of certiorari to obtain review of Justice Paine's decision in the Supreme Court. Five years would elapse before that review would occur.

WAITING FOR DRED SCOTT: NOVEMBER 1852 TO MARCH 1857

According to the memorial written by Justice Paine's brother, Martyn Paine, and published as an introduction to the posthumous Volume 2 of Paine's Reports (1856), Justice Paine "felt the hardship of the case; and no sooner had he disposed of the claim, than he set on foot and headed a subscription by which the owner was reimbursed the full value of the property which had been in ignorance forfeited to the law." Newspaper accounts in 1857 cast further light on Dr. Paine's rather naïve presentation of what his brother actually did. The payment to the Lemmons was exchanged for a bond:

> *SUPREME COURT – The People of the State of New York ex rel. Louis Napoleon vs. Jonathan Lemmon*
>
> *Know all men by these presents, that we, Jonathan Lemmon and Juliet his wife of Bath County, in the State of Virginia, for good and valuable consideration, the receipt whereof we hereby acknowledge, do covenant and agree that at any time after the final decision and termination of this matter in the last court to which it can be taken, carried or appealed, in the United States of America, shall be made or pronounced, we shall manumit and discharge from labor and service the eight slaves in question herein and recently discharged and set at liberty by the Honorable Elijah Paine, upon request for such manumission and discharge in writing made of us or the survivor of us by the Hon. Elijah Paine, Walter R. Jones, esq., and James Boorman, esq., all of the City of New York, or any two of them, or of the survivor thereof.*

The bond was signed by both Lemmons and witnessed by their lawyer on November 24, 1852.[13]

The case became a political football. The Governors of Georgia and Virginia denounced Justice Paine's decision in their next annual messages. The Virginia General Assembly appropriated money to retain appellate counsel in New York to obtain a reversal of Justice Paine's ruling. In 1855, the New York State Legislature responded by providing a similar appropriation for counsel to sustain Justice Paine's ruling on the appeal the Lemmons had taken to the Supreme Court.

Finally, on March 6, 1857, the Supreme Court of the United States decided *Dred Scott*, a case which had begun its journey through the courts in 1846. Scott was purchased in Missouri, a slave state, by an army surgeon who later took him to Fort Armstrong at Rock Island, Illinois, a free state, and to Fort Snelling, near what would become St. Paul, Minnesota, an area closed to slavery by the Missouri Compromise of 1820. After returning to Missouri in 1843, Dr. Emerson died, and in 1846 Scott sued his widow in the Missouri courts for his freedom on the basis that he had been emancipated by his earlier residence in Illinois and at Fort Snelling. After two trials and two appeals to the Missouri Supreme Court, that Court applied its domestic substantive law to Scott and held that he was still and always had been a slave, reversing a favorable trial verdict for Scott and overruling its own earlier precedents. Scott proceeded to the United States Circuit Court, bringing an action in 1854 against John Sanford, Mrs. Emerson's brother, to whom ownership of Scott had been transferred. After losing at trial on the application of Missouri law he had earlier established, Scott applied to the Supreme Court of the United States for review.[14]

The case was first argued in February 1856 and reargued in December. On March 6, 1857, a seven-to-two majority of the Supreme Court held that Scott was still a slave. The greatest number of the Justices held that Scott's status was governed by the law of the state where he was, Missouri, the highest court of which had affirmed Scott's continuing status as a slave. Chief Justice Taney, joined by two concurring Justices, went much further, holding also that slaves and their descendants, whether slave or free, could never be citizens of the United States or of any individual state and thus could never sue in the courts of the United States. He also concluded that Congress had been without constitutional power to enact the Missouri Compromise excluding slavery. However, Justice Nelson's concurring opinion, which may originally have been the opinion of the Court and ultimately staked out the position most of the Justices supported, contained an aside of particular significance to the Lemmon Slave Case:

> *A question has been alluded to, on the argument, namely: the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileged secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it. 60 U.S. 393, 468.*

The relationship between *Dred Scott* and the Lemmon Slave Case was palpable. Denouncing the *Dred Scott* decision two days after *Dred Scott* came down, in its March 9, 1857 edition the *Albany Evening Journal* predicted:

...O'Conor proclaimed the "blessings" that slavery brought to its "inferior" and "dependent" victim...

The Lemmon Case is on its way to this corrupt fountain of law. Arrived there, a new shackle for the North will be handed to the servile Supreme Court, to rivet upon us. A decision of that case is expected which shall complete the disgraceful labors of the Federal Judiciary in behalf of Slavery — a decision that slaves can lawfully be held in free States, and Slavery be fully maintained here in New York through the sanctions of "property" contained in the Constitution. That decision will be rendered. The Slave breeders will celebrate it as the crowning success of a complete conquest.

The New York State Legislature responded with similar outrage. On April 7, 1857, a joint committee of the Senate and the Assembly, led by former New York Court of Appeals Judge Samuel A. Foot, reported the following resolution, which carried:

> RESOLUTIONS.
>
> *Resolved*, That this State will not allow Slavery within her borders, in any form, or under any pretence, or for any time.
>
> *Resolved*, That the Supreme Court of the United States, by reason of a majority of the Judges thereof, having identified it with a sectional and aggressive party, has impaired the confidence and respect of the people of this State.
>
> *Resolved*, That the Governor of this State be, and he hereby is, respectfully requested to transmit a copy of this report, the law above mentioned, and these resolutions, to the respective Governors of the States of this Union.

THE LEMMON SLAVE CASE BEFORE THE NEW YORK SUPREME COURT

The *Dred Scott* decision brought the appeal in the Lemmon Slave Case to the fore, and on May 7, 1857, the champions of New York and Virginia answered the calendar in the Supreme Court. New York had retained William M. Evarts, one of the two great advocates at the New York bar, destined to be Attorney General of the United States under President Andrew Johnson, Secretary of State under President Rutherford B. Hayes and later United States Senator, assisted by Joseph Blunt. Virginia had retained Evarts' only serious rival at the New York bar, Charles O'Conor. Born in New York in 1804 to a father who had fled Ireland after the uprising of 1798 and having pulled himself up by his own bootstraps to the top of the Bar, O'Conor was pro-Southern and pro-slavery, a strange and bitter man whose last important retainers were the defense of Jefferson Davis on treason charges after the Civil War and the implacable pursuit of "Boss" Tweed.

On May 7, both Evarts and O'Conor proposed an adjournment so that all concerned could obtain and digest the opinions in the *Dred Scott* case, the publication of which had been delayed while Chief Justice Taney rewrote his decision in an effort to meet more effectively the stinging dissent of Justice Benjamin Robbins Curtis. The parties had earlier submitted their briefs without benefit of that decision. In response to the request for adjournment, then Presiding Justice Mitchell asked "whether this was a *bona fide* controversy or a case made up for the purpose of having an abstract question disposed of. If the alleged owner of the slaves had been indemnified, what question was there then for the Court to pass upon?" O'Conor demurred but offered to look into it.[15]

When the case was called for argument on October 1, 1857, before five Justices of the Supreme Court, "Mr. Jay" reappeared briefly, not as counsel but as *amicus curiae*, arguing that the bond between the Lemmons and Justice Paine, quoted above, reduced the case to a feigned political controversy between two states. There seemed little pretense on the latter point, as the submissions of Evarts and Blunt identified them as "counsel for the People of the State of New York." The Court chose to let the case proceed, however, on the stated ground that, although the Lemmons had been paid for the slaves, they had not actually manumitted them and therefore still had an interest in them.[16] Perhaps the arrangement between Justice Paine and the Lemmons had been an imperfect effort by the anti-slavery forces to moot the case for appellate purposes and protect Justice Paine's decision as a precedent.

The argument proceeded on October 1, 2 and 5 before five Justices of the Supreme Court, with emphasis on the Commerce Clause of the United States Constitution by O'Conor, leading to predictions in the press that the slave trade would shortly resume in New York. But it was not to be. In a brief opinion for the Court by Presiding Justice Mitchell, with Justice Roosevelt dissenting, the Court held that the Legislature had intended to exclude slavery completely from the State, that this legislative decision was a valid exercise of state police powers, that slavery was a matter for state regulation and that interstate commerce was not implicated because the Lemmons' sea voyage had ended at the time the writ was taken out. On January 4, 1858, an appeal to the New York Court of Appeals was taken in the name of Jonathan Lemmon.

THE LEMMON SLAVE CASE IN THE NEW YORK COURT OF APPEALS

The case was argued before a full eight-judge bench on January 24, 1860, by Charles O'Conor for Virginia and William Evarts and Joseph Blunt for New York. In place of Erastus Culver, who had been attorney for respondents from the outset and was on the briefs in the Court of Appeals, a young anti-slavery attorney who had been associated with him in practice in the early 1850s appeared instead: Chester A. Arthur, a future President of the United States.

The arguments of the counsel ranged very widely over many issues involving slavery that had little to do with the legal issues before the Court, as Justice Clerke complained in his dissent. For example, O'Conor proclaimed the "blessings" that slavery brought to its "inferior" and "dependent" victims and insisted that slavery conflicted with neither law nor natural jus-

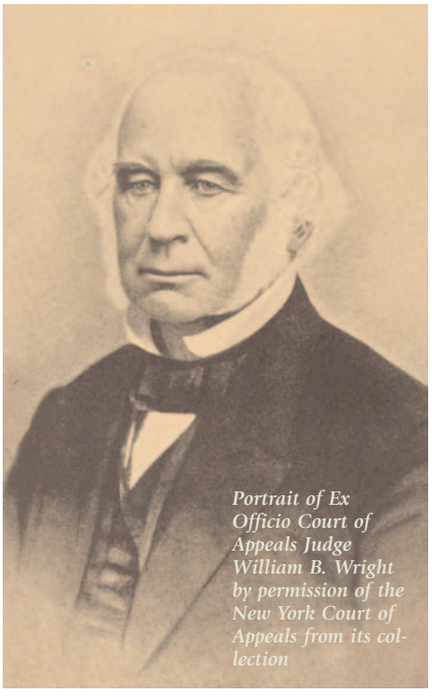
Continued on page 12

tice. He sneered at Lord Mansfield's opinion in *Somerset* – "to that opinion very little respect is due"– and distinguished it on the basis that even if slavery had never been part of the statutory law of England, it had been recognized in every colony, and by the legislature of every state, that formed part of the original thirteen states. In the end, he taunted the North for hypocrisy about slavery:

> *"But what must be thought of the inhabitants of the Free States, who know that it is wicked, who say that it is wicked, who write upon their statute books, in their supreme, sovereign capacity, that it is wicked, and who yet live under a constitution and compact by which they agree to support and sustain it to the full extent of whatever is written in that compact . . ."*[17]

Evarts's argument was far more measured, to the point and less impassioned, as was his nature. He relied upon the New York statutes' unequivocal declaration, turned to the provisions of *Dred Scott* and earlier Supreme Court decisions for categorical statements that the existence of slavery was a matter for the law of each state, and praised and justified the evolution of English law, contrasting it with more recent North Carolina jurisprudence – read into the record in full – immunizing barbarous behavior towards slaves by their owners. In answer to O'Conor's claim that the Privilege and Immunities Clause protected the Lemmons during their passage through New York, Evarts responded that the Lemmons were entitled to and had been accorded the same privileges and immunization as its citizens, not those of Virginia. Evarts left the Commerce Clause to his brief; O'Conor's lengthy argument had included it, but only in passing.

Portrait of Court of Appeals Judge Hiram Denio by permission of the New York Court of Appeals from its collection



Portrait of Ex Officio Court of Appeals Judge William B. Wright by permission of the New York Court of Appeals from its collection

The Court of Appeals announced its decision in March 1860. In contrast to the advocates arguments, the Commerce Clause issues engaged both opinions for the majority of the Court of Appeals, which split 5-3 in affirming the judgments below. For Judge Denio, who wrote one of the two opinions supporting affirmance, the clear policy of New York foreclosed arguments based on comity and the Law of Nations. The only issue was constitutional preclusion: he found none in the Privileges and Immunities Clause, and while he hypothesized particular cases in which the Commerce Clause could protect slave property in interstate commerce, this was not one of them, and congressional legislation had not exclusively occupied the field.

Justice Wright, also voting to affirm, took much more aggressive positions. He denied that the United States Constitution granted any power affecting domestic slavery except in the Fugitive Slave Clause, and that the Commerce Clause did not touch the acknowledged power of a state to refuse to allow slaves in its territory, for any purpose.

Justice Clerke dissenting, acknowledged the intent of the Legislature but held that by analogy to the Law of Nations, citizens of other states passing in transit through New York must be allowed to pass with their property unmolested by the application of New York substantive law, and that under Chief Justice Taney's opinion in *Dred Scott*, slaves were property. Chief Judge Comstock and Judge Selden, in brief opinions, expressed concern at the violation of comity and justice in interstate relations wrought by the New York statute.

THE END OF THE CASE

Professor William Wiecek, undoubtedly the most knowledgeable scholar on the subject, reports:

> *The owner appealed the decision to the United States Supreme Court, and antislavery propagandists panicked, fearing that a reversal of the New York judgment would establish slavery in the free states. The onset of war aborted this possibility, and* Lemmon *today is forgotten; but in its brief historical moment it marked the uttermost expansion of the libertarian implications of* Somerset.[18] ■

ENDNOTES

1. *See* Don E. Fehrenbacher, *The Slaveholding Republic-An Account of the United States Government's Relations to Slavery* at 135-204 (Oxford 2001); Warren S. Howard, *American Slavers and the Federal Law 1837-1862* (Berkeley 1963).
2. *See* Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829* at 161-207 (Greenwood Press 1985); Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale 1975); Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850-1860* (Chapel Hill 1968).
3. See Paul Finkelman (ed.), *Fugitive Slaves and American Courts: The Pamphlet Literature* (4 vols., Garland Publishing Co. 1988); Jacob R. Shipherd, *History of the Oberlin-Wellington Rescue,* (Boston 1859); James R. Robbins (ed.), *Report of the Trial of Castner Hanway for Treason, in the Resistance of the Execution of the*

Fugitive Slave Law of September, 1850 (Philadelphia 1852); Albert J. Von Frank, *The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston* (Harvard 1998); Gary Collison, *Shadrach Minkins: From Fugitive Slave to Citizen* (Harvard 1997); Stephen Weisenburger, *Modern Medea: A Family Story of Slavery and Child-Murder from the Old South* (Hill and Wang 1998).

4. *Somerset v Stewart*, 98 Eng.Rep. 499 (K.B. 1772).
5. *Somerset* is the subject of scholarly and popular treatments too numerous to list here. The most recent, an excellent and original analysis, is Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* (Da Capo 2005).
6. *United States ex rel. Wheeler v Williamson*, 28 F.Cas. 686 (E.D. Pa 1855) (No. 16726).
7. *See* Alfred Conkling, *A Treatise on the Organization Jurisdiction and Practice of the Courts of the United States* at 79 n. (Albany 1856); Richard Hildreth (ed.), *Atrocious Judges. Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression* (New York 1856); William Still, *The Underground Rail Road* (Philadelphia 1872); Lorene Cary, *The Price of a Child* (Knopf 1995); Hannah Crafts, *The Bondwoman's Narrative* (Warner Books 2002) (Henry Louis Gates, ed.).
8. *Dred Scott v Sanford*, 60 U.S. 393 (1856).
9. The case is discussed in Francis J. Bergan, *The History of the New York Court of Appeals, 1847-1932* at 68-70 (Columbia 1985), and in Paul Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* at 296-312 (Chapel Hill 1981).
10. See Bayard Tuckerman, *William Jay and the Constitutional Movement for the Abolition of Slavery* (New York 1893); William Jay, *Miscellaneous Writings on Slavery* (New York 1853).
11. C. Peter Ripley (ed.), *IV The Black Abolitionist Papers: the United States 1847-1858* at 407- 409 (UNC 1991)(spelling in original).
12. Edgar J. McManus, *A History of Negro Slavery in New York* at 161-179 (Syracuse 2001) (paperback).
13. *N.Y. Daily Tribune*, October 3, 1857. Boorman was one of the founders and president of the Hudson River Railroad and a founder of the Bank of Commerce. Jones was a founder of the Atlantic Mutual Insurance Co.
14. *See* Don E. Fehrenbacher, *The Dred Scott Case—Its Significance in American Law and Politics* at 239-285 (Oxford 1978).
15. The Day Book, May 12, 1857.
16. *See Note 13.*
17. The quotations from the arguments and opinions are taken from the pamphlet report of the case published in 1860 by Horace Greeley, *New York Court of Appeals—Report of the Lemmon Slave Case.*
18. W.M. Wiecek, *"Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American Word,"* 42 U Chi L Rev 86, 136-137 (1974).

Letters to the Editor *continued from page 2*

enough to argue several such applications before Judge Fuld over those four years. I had been told by more than one of my law school professors that there were three great Common Law judges in the United States at that time (the mid-1960s), the Chief Judges (or Justices) of New York (Fuld), Illinois (Schaefer) and California (Traynor). So it was with a fair degree of trepidation that I first enterered chambers at 36 West 44th Street.

My nerves were further agitated when my adversary, the highly regarded William I. Siegel, head of the Appeals Bureau in the Kings County District Attorney's Office, informed me that he, as a young lawyer, had come to these very chambers to argue a leave application before Chief Judge Cardozo.

When Mr. Siegel and I were invited to appear before Judge Fuld, the judge welcomed us, made it clear that he understood we were there on a serious matter and got right down to business. As the principal point I had raised in my leave-application letter presented an "unpreserved," i.e., unobjected-to, issue, Judge Fuld stated at the outset that the court on which he sat was a court of limited jurisdiction, restricted by Art. I, Sec. 3, of the New York State Constitution to determining "questions of law." When I, citing the majority opinion (in which he had joined) in *People v. McLucas*, 15 N.Y.2d 167 (1965), argued that deprivation of certain fundamental constitutional rights may be considered on appeal to the Court of Appeals even in the absence of a specific, timely objection, the Judge responded, "McLucas is unfortunately a 'dead letter.'" Even though it was at that point patent, even to me. that my application was not going to prevail, the always courteous, courtly jurist displayed the utmost patience, permitting me to argue at whatever length I deemed necessary the several subsidiary points I had advanced.

Moreover, unlike the Judge's manifold law clerks, such as Ken Feinberg and Judge Weinstein, I, as an outsider, never witnessed the displays of Fuldian temper described in the newsletter article. In fact, the only time I ever saw Judge Fuld lose his temper was in the Court of Appeals itself. And on that occasion the manifestation of anger was not the kind of "tough love" the judge displayed toward his clerks. It was genuine anger, the kind reserved for attorneys guilty of prevarication. On the occasion in question, the assistant district attorney appearing for respondent in the case before mine had, it was clear to Chief Judge Fuld, misrepresented the facts of his case. The Chief spun around in his swivel chair, and when the ADA was foolish enough to continue with his presentation, Judge Fuld stood and ordered the prosecutor to sit down. The latter sheepishly complied.

In sum, I am grateful to have had the opportunity to practice before the Hon. Stanley Fuld. I once told my Legal Aid boss, Will Hellerstein, now of Brooklyn Law School, that arguing before the Court of Appeals was so enjoyably challenging that I would gladly pay for the privilege of doing so.

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ROBERSON ENDNOTES

continued from page 7

1. 171 N.Y. 538 (1902).
2. *Rochester Democrat & Chronicle*, Jan. 15, 1967, at 3A, col. 3.
3. Samuel Warren & Louis Brandeis, *"The Right of Privacy,"* 4 *Harv. L. Rev.* 193 (1890).
4. *"The Right of Privacy,"* N.Y. Times, Aug. 23, 1902, at 8, col. 3.
5. Gordon, *"The Right of Privacy,"* 22 *Can. L. Times* 281, 285, 288 (1902).
6. N.Y. Times, Oct. 26, 1902, at 5, Col. 1.
7. 47 *Collier's Weekly* 3 (1902).
8. Comment, 46 *Harper's Weekly* 984 (1902).
9. Denis O'Brien, *"The Right of Privacy,"* 2 *Colum. L. Rev.* 437 (1902).
10. Current Topics, 63 *Alb. L. J.* 337 (1901).
11. *Schuyler v. Curtis*, 147 N.Y. 434 (1895).
12. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).
13. *See Rochester Democrat & Chronicle, supra* note 2.
14. *Messenger v. Gruner + Jahr Printing & Publishing*, 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52 (2000).
15. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123-24, 596 N.Y.S.2d 350, 354 (1993).