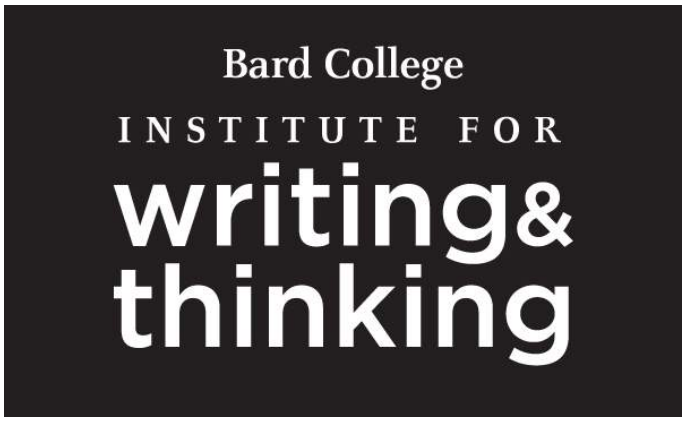

Justice and the New York Courts

The Bard College Institute for Writing & Thinking
in collaboration with the
Historical Society of the New York Courts

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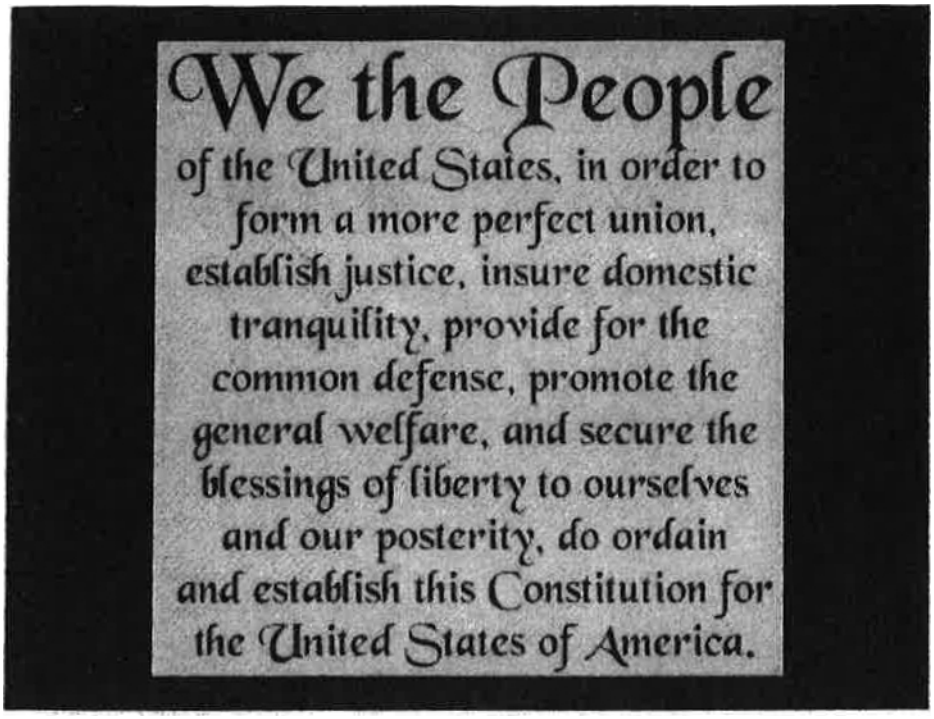
We the People
of the United States, in order to
form a more perfect union,
establish justice, insure domestic
tranquility, provide for the
common defense, promote the
general welfare, and secure the
blessings of liberty to ourselves
and our posterity, do ordain
and establish this Constitution for
the United States of America.

Federalist No. 78 (excerpt)

The Judiciary Department

From McLEAN'S Edition, New York. Author: **Alexander Hamilton**

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government. In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined…

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to

enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Lemmon Slave Case Summary:

In November 1852, Jonathan Lemmon, a resident of Virginia, took eight slaves (a young man; two young women, each with an infant; and three children) on a boat for the purpose of transferring them to a boat headed to Texas where they planned to reside. While awaiting transfer to the second boat, the slaves were placed in temporary boarding Manhattan. While the slaves were boarded in Manhattan, a freed black man (Louise Napoleon) obtained a *writ of habeas corpus* demanding that the slaves be released and freed. Ruling on Napoleon's petition for habeas corpus, the New York Court held that under New York law "No person held as a slave shall be imported, introduced, or brought into this state on any pretense whatsoever", and that in the absence of any positive law explicitly mandating otherwise, the slaves must be freed. This case was exceptional and noteworthy in large part as the *Fugitive Slave Act of 1850* had explicitly required citizens of non-slave states to participate in the return of all escaped slaves.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.

BY THE

HON. LEWIS H. SANDFORD,

LATE ONE OF THE JUSTICES OF THE COURT.

VOLUME V.

ALBANY:
LITTLE AND COMPANY.
LAW BOOKSELLERS, 52 STATE STREET.

MDCCCLII.

The People of the State of New York, *ex relatione* Louis Napoleon *v.* Jonathan Lemmon.*

By the law of nations, the citizens or subjects of one nation have a right to pass with their property, through the territories of another nation; and where there exists a necessity for such passage, arising from the *vis major*, the right so to pass is a perfect right and cannot be lawfully refused.

But the property which they have a right to take with them, is merchandise, or inanimate things. These belong to them by the law of nature; and there is no such rule of the law of nations authorizing a passage with slaves as property.

Slavery does not exist by the law of nature, but only by force of the law of the state. This principle is as old as ancient Rome, and was a part of the civil law. It is also a part of the modern law of nations, and has been recognised as such by the tribunals of the civilized nations of Europe.

By the law of nature alone, one can not have a property in slaves. By that law, all men are free, and one race of men is no more subject to be reduced to slavery than other races.

When, therefore, a master enters a state with his slave, where slavery is not upheld by law, there being no law but the law of nature, and the master and slave being equally entitled to their rights under that law, the slave has the same right to assert his freedom, that the master has to claim a passage through the country.

The law of nations was originally, no more than the law of nature applied to nations.

That provision of the constitution of the United States, which provides, that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," secures to a citizen from home, in a sister state, the privileges enjoyed by a citizen of that state, but not the privileges to which he would have been entitled in his own state.

The provision of the constitution relating to fugitives from service, or labor, has no effect to secure the right to property in slaves, unless they are fugitives. For all other purposes it is the same thing as if it were not in the constitution.

That provision of the constitution, which empowers congress to regulate commerce among the several states, does not deprive the states of the power to forbid the introduction of slaves from other states, as that is among the powers implied by reservation to the states.

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* The novelty and importance of this case, and the national interest that has attached to its decision, were deemed to justify, if not require, the early and full report, that is now given, although to make room for its insertion many practice cases, earlier in the order of time, have been omitted. They will appear in the next volume, which will be put to press in June next.

The People v. Lemmon.

The states have full power to forbid the introduction of slavery under any circumstances.

Since the law of 1841, repealing those sections of the revised statutes, which authorized the introduction of slaves into this state, under certain circumstances, slavery cannot exist in this state, except in the single instance of fugitives from service under the constitution.

A citizen of Virginia, owning eight slaves, came with them in a vessel to New York, intending to tranship them to Texas, whither he was going with them to reside. They were landed, and next morning were brought before the court by *habeas corpus*. *Held*, that under the existing laws, they were free, and entitled to be discharged.

(Before Paine, J., acting as a supreme court com.)

(November 9; 12, 1852.)

Petition 11/8/1852

ON the 8th of November, 1852, a petition was presented to Mr. Justice Paine, praying for a writ of *habeas corpus*, for the production of eight persons of color, a man, aged about eighteen, two women, of about the same age, each with a young infant, and three children. The petition stated, that these persons arrived at this port, from Virginia, in the steamer City of Richmond, whence they were taken to a boarding house, No. 8 Carlisle street. That they were held under pretence that they are slaves, and that they had, as the petitioner is informed and believes, been bought up by a negro trader or speculator, called Lemmon, by whom, together with the aid of the man keeping the house, whose name was unknown, and who was an agent of said Lemmon, they were held and confined therein; and that said negro trader did intend, very shortly, to ship them to Texas, and there to sell and reduce them to slavery; that the illegality of their restraint and detention consisted in the fact, as petitioner was advised and believes, that they were not slaves, but free persons and entitled to their freedom; that the petitioner could not have access to them to have them sign a petition; but, that they desired their freedom, and were unwilling to be taken to Texas, or into slavery.

A writ was thereupon granted and executed.

Amended return 11/9/1852

On Tuesday, Nov. 9th, the following amended return was made to the court:

Jonathan Lemmon, respondent above named, for return to the writ of *habeas corpus* issued herein, states and shows that the eight persons named in said writ of *habeas corpus* are the pro-

perty and slaves of Juliet Lemmon, the wife of this respondent, for whom they are held and retained by the respondent. That the said Juliet Lemmon has been the owner of such persons as her slaves for several years last past, she being a resident and citizen of the state of Virginia, a slaveholding state; that under and by virtue of the constitution and the laws of the state of Virginia, the aforesaid eight persons, for several years last past, have been and now are held or bound to service or labor as slaves, such service or labor being due by them as such slaves to the said Juliet, under and by virtue of the constitution and laws aforesaid. That the said Juliet, with her said slaves, persons or property, is now *in transitu*, or transit, from the state of Virginia aforesaid to the state of Texas, the ultimate place of destination, and another slaveholding state of the United States of America, and that she was so on her way *in transitu* or transit, and not otherwise, at the time when the aforesaid eight persons, or slaves, were taken from her custody and possession, on the sixth day of November instant, and brought before the said superior court of the city of New York, or one of the justices thereof, under the writ of *habeas corpus* issued herein; that, by the constitution and the laws of the state of Texas aforesaid, the said Juliet is, and would be, entitled to the service or labor of the said slaves, or persons, in the manner as they are guaranteed and secured to her by the constitution and laws of the state of Virginia aforesaid; that said Juliet never had any intention of bringing the said slaves, or persons, into the state of New York to remain or reside therein, and that she did not bring them into said state in any manner or purpose whatever, except *in transitu*, or transit, from the state of Virginia aforesaid, through the port or harbor of New York on board of steamship for their place of destination, the state of Texas aforesaid; that the said Juliet as such owner of the aforesaid slaves or persons was, at the time they were taken from her as aforesaid, on the writ of *habeas corpus*, and she was thereby deprived of the possession of them, passing with them through the said harbor of New York, where she was compelled by necessity to touch or land, without on her part remaining, or intending to remain, longer than necessary. That the said slaves have not been bought up by a negro trader, or speculator,

and that the allegation to that effect, made in the petition of one Louis Napoleon above named, is entirely untrue. That the said Juliet is not, and never was, a negro trader, nor was, nor is this respondent one. That the said persons or slaves were inherited by said Juliet Lemmon, as heir at law, by descent, or devise of William Douglas, late of Bath county, in the state of Virginia aforesaid. That it is not, and never was, the intention of the said Juliet to sell the said slaves, as alleged in the petition of the relator, nor to sell them in any manner. This respondent, further answering, denies that the aforesaid eight persons are free; but on the contrary, shows that they are slaves as aforesaid, to whom and to whose custody and possession the said Juliet is entitled. Respondent further shows that the said slaves, sailing from the port of Norfolk, in the said state of Virginia, on board the said steamship Richmond City, never touched, landed, or came into the harbor or state of New York except for the mere purpose of passage and transit from the state of Virginia aforesaid to the state of Texas aforesaid, and for no other purpose, intention, object or design whatever.

That the said Juliet, with her aforesaid slaves, was compelled, by necessity or accident, to take passage in the steamship City of Richmond, before named, from the aforesaid port of Norfolk, and state of Virginia, for the state of Texas aforesaid, the ultimate place of destination. That the said slaves are not confined or restrained of their liberty against their will, by the respondent or the said Juliet, or by any one on her behalf.

The counsel for the petitioner, demurred to this return, and the case was heard upon the questions of law thus raised.

E. D. Culver and *John Jay* appeared as counsel for the petitioners.

H. D. Lapaugh and *H. L. Clinton*, for the respondent.

Argument by E. D. Culver

The argument was commenced by *Mr. Culver*, in support of the petition.

If the court please, our petition, which is the foundation for

this writ of *habeas corpus*, states certain facts, and, we suppose, these facts are to be taken as true, unless the other side controvert them in their return to the writ of *habeas corpus*. Our petition sets forth, that these persons were brought into this city on board of the City of Richmond; that they were taken from thence after these proceedings were commenced, carried round the city, and finally lodged at No. 3 Carlisle street, where they were found. That they were there detained in custody by this defendant, Lemmon, and his agent, their return does not deny; nor does it deny, that they were brought in that vessel to this city, but admits it. It does not say anything about where they were found, but admits they were found in the city of New York, in this place; and it further alleges, that these persons are the property of Mrs. Lemmon. It admits further, that they were brought here for the purpose of being taken to another place, or, in other words, that they were *in transitu* to Texas, and that slavery is allowed by the laws of Virginia and Texas, which we knew before. In the first place, we ask the discharge of these persons upon four independent grounds. Firstly, that by the great presumption of the common law, they are entitled to their freedom. The provisions of the common law are in favor of the personal rights, liberty and freedom of every individual; and unless you can overcome that presumption, by some positive local statute, it must prevail and give to every man his freedom. The second ground is, that by the adjudications, made from time to time, not only in free, but in slave states, it is held, that by bringing these persons within, or to, a locality where slavery is not in existence, and has no legal evidence, they are made free. If I should be wrong in both these positions, which are based upon the common law, then, I maintain, that I am right, under the statute of the state of New York, and that, I believe, is pretty good law in this state. By this statute, it will be found, in sections one and sixteen, which relate to the importation of persons held as slaves, that the legislature has said, many years since, that hereafter every person born in this state is to be free, and that every person heretofore born in this state is free, and then goes on and declares, that every person imported into this state, under any pretence whatever, except as provided for in that statute, is by that act

Culver asks for discharge on 4 grounds:

(1)

(2)

made free. It will devolve upon the other side, to show, that they come within the exceptions. In looking through this statute, I find that there were some exceptions made. It was about that time, that the legislature had its eye upon Saratoga Springs, for they provided, that persons coming here, and bringing slaves, could retain them for a period of nine months, and then take them back. Sections 3, 4, 5, 6 and 7, were the only ones in which these reservations were made; this seemed to limit the general rule, which the legislature had laid down in the first section of that statute. But in 1841, as we got rid of the last dregs and abominations of slavery, the legislature, in both houses, by a large majority, swept away the fourth and fifth sections from our statute book, and no longer made it allowable for a man to come to Saratoga Springs, or to the city of New York, and sojourn with his slaves. This, therefore, leaves a cleaner sweep for the general provision. Therefore, one of those exceptions left, is that, where a person secretes himself on board a vessel, in port, in a slave state, and comes off to a free state, the legislature has provided that some of the officers of that ship might take him back again; but so jealous is the law in this state, with regard to personal rights, that they will not allow the captain to take him back. This is reported in the *Legal Observer*, in a case tried before Judge Edmonds. (3) That is the third ground upon which we move the discharge of these persons, by the positive provisions of the state of New York, unless the counsel on the opposite side, can convince the court, that the question comes up upon some of the exceptions left. The fourth ground upon which I claim to have these persons discharged is, that they are free by the act of the defendant and (4) his wife. They have admitted, in their return, that they brought these persons here, *in transitu*, with the intention of taking them to Texas. I believe it is in section nine, that any person who shall export, or carry a person, held as a slave, out of this state to another place, that, in itself, shall work the freedom of the slave; and it goes further and declares, that not only the exporting, but any *attempt* to export a person, held as a slave, makes him free. So the defendants here, by the attempt which they have made in endeavoring to procure a vessel to proceed to Texas, and keeping these persons in imprisonment, which facts they have

alleged in their return, have saved us any further trouble. That act alone works the freedom of man, woman, and child. These are the four grounds, upon which, we say, we are entitled to the freedom of these persons; and I now ask your honor's attention to some adjudications which have been made, and which have a direct bearing on this case.

I stated first, that the great presumption of the common law is in favor of personal liberty. I quote now from Wheeler's Law of Slavery, which was written in 1837, long before the agitation which shook the public mind from its balance, in which are gathered up all the decisions made on that subject in all the courts of the United States and the state courts. I find, in pages 862 and 863, some of the conclusions which Justice Shaw arrived at in a case that came before him in the state of Massachusetts. He remarks: While slavery is considered as unlawful in both this state and in England, and this because it is contrary to natural right, and to the laws designed for the security of personal liberty, yet, in both, the existence of slavery is recognised in other countries, and the claims of foreigners growing out of that condition are respected. Lord Mansfield was of opinion that slavery could not be introduced upon any reason, moral or political, but only by positive law, and that it was so odious that nothing could be suffered to support it but positive law. I read this simply to show that slavery is in derogation of personal freedom. The same doctrine is clearly stated in the full and able opinion of Chief Justice Marshall, 10th Wheaton, 120, in which he says that slavery is contrary to the law of nature, and that every man has a natural right to the fruits of his own labor, and that no person can deprive him of those fruits and appropriate them against his will. In the case of *Forbes* v. *Cochrane*, 2d Barnwell and Creswell, and in Wheeler, 866, another learned judge states that the law of slavery is a law *in invitum*, and where a party gets out of the territory where it prevails, without any wrongful act, the right of the master, founded upon municipal law of the place, does not continue. He ceases to be a slave in England, because there is no law sanctioning slavery. But we place this case upon much higher grounds here, for when these people touched within the domains of New York, they came where there was not only no

slavery, but where it was positively interdicted by statute by the government and the people of that State. I read those authorities to show this great fact, that slavery is a creature of positive law, local statutes, and municipal regulations, and it drops off the moment a person gets over the bounds that limit that local law. Mr. Webster, in his great speech on the Oregon question, in 1848, took the same ground held by Justice Shaw and the British authorities; that slavery was local in its character and not general, and that it was in derogation of personal rights and could nowhere have an existence except by the force of positive statute. There is another case reported here, which brings up some nice views, of which I will read the head note. It is in 340 Wheeler upon the Law of Slavery, and is as follows: "The treaty of cession by Virginia to the United States, which guarantees to the inhabitants of the North West territories their titles, rights, and liberties, does not render void that article of Congress of 1789, which prohibits slavery in that territory. There was a case raised here, whether a person that was a slave in the North Western territory, and taken back afterwards into a slave state, had lost his freedom by going back; or, in other words, whether he could be held as a slave in the North West territory. All this, however, was overruled by a southern judge on a slave plantation, who said: 'If Indiana had had no positive law upon the subject, if she had had no constitution upon the subject, yet that very great platform there would be sufficient to have sent slavery out. Although it was done before Indiana was a state, it was done before we had adopted the constitution, and yet it was in the nature of a compact, and as that it became part of the fundamental law of the land, and could not be touched.'" Now, sir, in relation to our state legislation on this subject, I find another adjudication here which gives to the state of New York the right to do all that she has assumed, and it is found in 346 Wheeler, 6th Randolph's reports. It says that the power of state law to change the condition of persons held in slavery under them cannot be doubted. The operation of foreign laws upon slavery is immediate and perfect, and a party cannot be again reduced to slavery. I find several cases here where persons have been taken from a slave state into a place where slavery did not exist,

and then taken back into a slave state, have been declared to be free. I have a case here where a slave was taken into France only for a short time and then taken back to Louisiana, and he was declared by the courts of that state to be free because he had been taken to a place where slavery had no legal existence, so that it necessarily follows, if these people take their slaves to Texas, they will be entitled to their freedom—there under the adjudication of the southern courts; but, for the sake of convenience, we prefer that they should be freed in this state. Here is the first section of the statute of New York: "No person held as a slave shall be imported, introduced, or brought into this state upon any pretence whatever except in the cases hereinafter specified." Now suppose they are. "Every such person shall be free." Then further: "Every person held as a slave contrary to the laws now in force shall be free." Then there are several sections which give some exceptions—some of which have been overturned by adjudications, and 5, 6, and 7, have been repealed by the law of 1841. The last section is: "Every person born within this state, whether white or colored, is free. Every person who shall hereafter be born within this state shall be free; and every person brought into this state as a slave, except as authorized by this title, shall be free." I will now ask your attention to the other point, which is penal in its character. "No person shall send, export, or carry out of this state, any person who has been held as a slave or servant for a term of years, except as herein provided; and whoever shall offend against this statute, by aiding and consenting to such exportation or attempt, shall be deemed guilty of a misdemeanor; and every person so exported, or attempted to be exported, shall be freed and discharged from all obligation and service to the individual so attempting to export him." Now I think that my positions are sustained by these authorities. In the first place these persons are entitled to their liberty until they are brought within the operation of some local municipal statute which overturns the presumptions of the common law. In the second place, they are brought to a place where slavery has no legal existence, and by that act they are made free, not only free here, but free to the end of time, and all that shall be born of them in after time. In the

third place, we meet our opponents by another of the positive statutes of the state of New York, which provides that any person brought into this state is free by that act. That leads me to look at the return they have set forth, which avows that these slaves were brought here by the claimants, and they do not say that they are fugitives within the meaning of the law of 1850 or 1793, or the constitution of the United States. The return, sworn to by the defendant, shows that these slaves were innocent of any attempt to run away; that they were brought here on board a steamer, their owners coming with them, for the purpose of being shipped to Texas; and, consequently, they do not hold allegiance to the laws of Virginia or Texas, but only to the laws of the State of New York; for it is the laws of this locality which attach to them the moment they come within its limits. Some cases may be found, of a very early date, where slaves were delivered up when vessels put into this port in consequence of stress of weather; but I apprehend no case can be found of late occurrence, as between us and foreign nations, that will show that slaves have ever been given up when a vessel has been driven into port by stress of weather. I remember a case some years ago, that there was a vessel that had slaves on board, being freighted coastwise, driven into a British port, and all had their freedom, as a matter of course, and all passed off quietly, and nothing was heard of the matter. Here it is different. No stress of weather drove them here; nothing but the free choice and free will of the owners. If your honor should decide to deliver these persons into the custody of this man and his wife, I must confess that, in my opinion, it will overturn what I think to be the well-settled adjudication of the last seventy years, and I now wait with great interest to see what arguments my friends will bring forward in support of their case.

Lapaugh and Clinton

Mr. Lapaugh and *Mr. Clinton*, for the respondent, submitted the following points in his behalf:

(1)

(I.) The slaves in question, being property, the respondent has the right to be protected in the possession of them, and to take them with him from one slave state to another slave state of

the United States, even by passing through a free state of the said Union, in order to reach his place of destination. Such right is in accordance with the comity of states. (*Commonwealth* v. *Ayres*, 18 Pickering Rep. 215 and 224; *Rankin* v. *Lydia*, 2 Marshall's Rep. 477; *Stroeder* v. *Graham*, 7 B. Monroe 572; *Willard* v. *People*, 4 Scammon's Rep. 472, '3, '4, '5, '6.) The goods even of individuals, in their totality, ought to be considered as the goods of their nation in regard to other states. (Vattel, Bk. 2, p. 225, § 81.)

The citizen or subject of a state, who absents himself for a time, without any intention to abandon the society of which he is a member, does not lose his privilege by his absence. He preserves his rights, and remains bound by the same obligation. (Vattel, Bk. 2, 235, §§ 107, 108.)

The property of an individual, does not cease to belong to him, on account of his being in a foreign country, and it is still a part of the wealth of the totality of his nation. (Id. § 109.)

II. The constitution of the United States, and the constitution and laws of the state of Virginia, make the slaves in question, property, or personal chattels, and the legislature of New York has no right or power to deprive the owner of that property. The law with us must conform to the constitution of the United States, and then to the subordinate constitution of its particular state, and if it infringes the provisions of either, it is so far void. The courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution, first, of the United States, and then of their own state, as the permanent and supreme law, to which every derivative power and regulation must conform. (1 Kent's Com. 5 Ed. 449; Const. U. S., art. 6, sub-div. 2.)

The statute must be construed according to the rules of the common law, for it is not to be presumed, that the legislature intended to make any innovation upon the common law, any further than the case absolutely required. (1 Kent's Com. 5 Ed. 463; *vide* also, Id. p. 460, as to the interpretation of statutes.)

By the constitution of the United States, congress alone has the power of regulating commerce between the several states of the Union, and no individual state has the power to deprive

the citizen of another state of his property, whilst using it as commerce, in passing from one state to another. It has uniformly been contended, by what may be termed the Abolition party, that under the power contained in that clause of the constitution which gives to congress the exclusive right of regulating commerce between the states, Congress has the power to prohibit the traffic in slaves, between the citizens of one state, and those of another state; at all events, it cannot be denied, that congress has the power, under the constitution, to pass an act authorizing the transit of slave property across one state into another. If so, no individual state government has the right to pass a law which may interfere with the power and authority of congress. (Const. of the U. S., art. 1, § 8, subdiv. 3.) For example, suppose congress should enact as follows: That any person, owning slaves in Virginia, may take the same to the state of Texas, by shipping them to the port of New York, thence to Texas, their place of destination, without in any manner impairing the owner's right of property in the same, would such a law be constitutional? No one could deny that such a law would come within the very letter and spirit of the constitution of the U. S., art. 1, § 8. If so, any law of any state of the Union, interfering with the right of congress to create such law, would be clearly unconstitutional, it being an usurpation of the authority of congress to regulate commerce between the several states.

III. The respondent possesses the right of passage, claimed by him, by virtue of the provisions contained in article 4, §§ 1, 2, of the constitution of the United States. (*Prigg* v. *Commonwealth*, 16 Peters's Rep. 539, 612.)

IV. The statute of the state of New York, upon which the petitioner's counsel rely, is not applicable where the slaves are brought into the state, *in transitu*, by a citizen of Virginia, proceeding with her slave property, through New York, to the state of Texas. In other words, that the object of the statute of New York is, to prohibit slaves being brought into the state by their masters, with the intention of residing therein, either for a longer or shorter period, and that, for this reason, a citizen of Virginia, carrying with him his slave property, *in transitu*, through the port of New York, without any intention of

residing, or remaining in the state, does not "import, introduce or bring" slaves into the state, within the purview of that statute.

Lapaugh

In support of these points Mr. Lapaugh argued as follows:

I can but approach this case with diffidence and embarrassment. But in approaching the case, however diffidently I may do it, I shall approach it in such a way, I hope, as to rest the arguments which I shall adduce upon sound law, and upon the constitution of our country; and I shall contend before your honor, that by the laws of nations, by the constitution of the United States, by the comity between nations, and by the laws of congress, these persons, who are citizens of Virginia, and under the constitution of the United States citizens of this entire Union, are entitled to that property which was property to them in Virginia and property to them in the state of New York. Now I do not propose, and if I did, it would, perhaps, be out of my power, to discuss this matter with a degree of feeling and enthusiasm, as satisfactory to those who may be listening, as my friend on the other side has done. But it seems to me that the counsel in this case has not contended for the discharge of these persons upon any ground which really entitles them to be discharged, in relation to the laws of the state of New York. The counsel has based his argument on the ground that a person coming from the state of Virginia is placed exactly in the same position as a person coming from Germany would be placed. How is it that these United States are to be thus treated in regard to each other as separate, distinct and foreign states, in the latitude and extent that one of the countries of Europe would be regarded in reference to the United States? Can it be that is the meaning of the constitution that binds these states together? Can it be that such is the intention of that instrument, which says "that the public acts of each state shall receive full faith and credit in every other state of this Union?" Are the several states, whose public acts are entitled, by virtue of that constitution, to receive full faith and credit in every state, in the same position, in respect to each other, that Germany would stand in reference to the United States? Let us

look at this constitution, and see how it is that we are entitled to have our rights protected. The right to property in the state of Virginia, it seems to me, is the same as the right to property in the state of New York. The fact being admitted by the demurrer taken to this return, that these slaves are the property of Mrs. Lemmon, there is no difficulty on that point, to perplex the argument in this case. They being the property of Mrs. Lemmon, under the laws of the state of Virginia, let us call to our aid, in order to protect this property in the possession of Mrs. Lemmon, the constitution of the United States, which has a superintending power and control over all the states of this Union, and without which they might be placed in that dilemma that one state of Europe is placed in regard to one of the states of this Union. I call your attention to the second article of the constitution of the United States, which is as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Now it would seem that this provision of the constitution disposes entirely of the objection that these persons having come into the state of New York, are to be set at liberty. It strikes me, and I shall so argue, that the gentleman misconceives the effect of the constitution, the law of nations, and the comity of the law of nations, when he says that because slavery does not exist in New York, slaves brought from other states into New York are free. Now, it must be conceded that unless there is some strong controlling authority of the courts of the United States pronounced in reference to this provision of the constitution which I have read, declaring that full faith and credit shall be given to the acts of the various states, as we contend—it must be conceded, I say, that this property must continue to be in the state of New York, as it was in the state of Virginia, the rightful property of Mrs. Lemmon. It may, perhaps, be necessary to take into view the objects and design of the law of the state of New York, which has been read, stating that no slaves shall be brought into this state. It may become necessary, in the course of this argument, to contend that the law of the state of New York which in any way prohibits the full exercise of the rights of our client under the constitution of the United States, and under the constitu-

tion and laws of the state of Virginia, is constitutional. But I shall discuss first the object of the law of New York, in order to show that it may stand, and yet not be deemed inconsistent with the rights for which we contend here. Mr. Justice Kent lays it down as a rule that, in the construction of a statute, we should first ascertain what was the common law before its passage that was designed to be remedied by the statute. Bearing that interpretation in view, we conceive that the effect of this statute was not intended to be anything more than this: that slavery, which did not exist by the common law, should not exist after the passage of that statute law in the state of New York. Let us see what rights belong to Mrs. Lemmon, and how far, by the law of nations, a party owning property in one state, has a right to its possession in another state. On this subject I will take the liberty of citing Vattel on the law of nations. [Here the counsel cited from the second book of Vattel, p. 225, section 81, showing that the goods even of individuals ought to be considered as the goods of the nation in regard to other states.] According to the authority, continued the counsel, the property of a citizen of Virginia passing through the state of New York is to be regarded as the property of the former state, and the state of New York is bound, in fidelity to the constitution of the United States and the laws of Virginia, to give that property to these persons. The statute of this state contemplated that when slaves were to be made free by being introduced into this state, they must be brought with the design of keeping them here permanently. But never was it intended, in the enactment of that statute, that persons passing through this state with slaves, should, by the mere act of transit, thereby forfeit and lose their right to their property. In the same book, section 109, I find that Vattel lays down the doctrine that the property of an individual does not cease to belong to him on account of his being in a foreign country, and that it still constitutes a part of the aggregate wealth of his nation, so that if we were to take the broad ground that Virginia and New York are to be considered as distant foreign states, yet, by the laws of nations, we have proved that the individual who comes into this state, from Virginia, with property, is entitled to it, New York having respect for the laws of Virginia. And to the

same effect also, do we find that the subject of one state who happens to go from the state to which he belongs, into another, without the intention of remaining in that state, must be regarded in the same respect as he would be in the state from whence he came, so far as the right to his property is concerned. If this is not the rule marked out by the authority from whom I have quoted, we cannot understand the design of the constitution where it says, "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The intention of this clause was to confer on them as it were, a general citizenship, and to communicate all privileges which citizens of the same state would be entitled to under like circumstances. If your honor please, I understand four distinct points to be made by the counsel for the slaves, on the first of which he claims their discharge and contends that they are free by the common law. Now, the authorities cited by me have been quoted for the purpose of showing, that, notwithstanding whatever may be the belief in this community, that all slaves who come into it in this manner are free, yet that is entirely incorrect and without foundation. On this point, I call your attention to a case recently tried in Pennsylvania, in the circuit court of the United States, before Justices Grier and King. It was an action brought by a southerner against a person named Kauffman, for the harboring of certain slaves. On the trial, the point was taken that the slaves were brought voluntarily into the state by their owners, and therefore that they were free; but I cannot do better than give it in the clear and forcible language of Justice Grier himself: "It has been contended," he says, in charging the jury, "that these slaves became free by the action of the plaintiff in voluntarily bringing them into the state of Pennsylvania; but the question depends upon the law of Maryland, and this court cannot go behind the *status* of these people in the state from whence they escaped."

Judge Paine. Were they escaping?

Mr. Lapaugh. He goes on to say, your honor, that he knew no law or decision of the courts of Maryland which treats a slave as liberated who has been conducted by his master into a free State, along the national high road. Now, we say, in the eye of the law, we are conducting these persons along the

national high road. We had no other object in view than to proceed to Texas. We were compelled, on our way thither, to embark at Norfolk, Virginia; and we never brought the slaves to the harbor of New York with any intention of keeping them in this State. We say that the mere passing of slaves over this part of the national highway is not, and should not be, regarded as an act of liberation. We have sent on to Justice Grier to get the facts in this case, so as to have them more fully stated.

Judge Paine. Read what he says about the national high road.

Mr. Lapaugh. On this subject he remarks,—"Lord Mansfield had said many pretty things,"—as the counsel for the slaves (Mr. Culver) has said here—"in the case of Somerset, which are often quoted as the principles of the common law; but they will be found to be embellished with rhetorical flourishes rather than with legal dogmas." Now, in illustration of the principle for which we contend, and in order to show the falsity of the argument advanced to prove that the intention of the statute is that every man brought into this State shall be free, let me allude to another case. Your honor is aware that we have a fugitive slave law, and you are also aware that in 1793 there was an act passed in relation to fugitives from labor. Now, supposing a slave escaped from his master into Ohio from Virginia, and after he had been delivered to him under the law of 1793, that master was by necessity compelled to take him through the State of New York, the learned counsel contends he would be free, because he was brought to New York on his way to slavery. The position we take on this point is the only one that is tenable. We say that the importation of a slave into the State was the case to which the act refers, and not his mere transient passage through it. If this were not the right interpretation, then the south could never secure her rights if a free State were allowed to declare that the very moment a slave was brought into it, under any pretence whatever, he should be free. And taking that view of the case, we perceive that the constitution of the United States and the laws of New York and Virginia harmonize and sustain each other. It is only under this relation of the States to each other that Mr. Lemmon can be

entitled to all the privileges and immunities of a citizen of the United States. Now, what sort of an argument has the counsel presented in reference to the position the State of New York and Pennsylvania occupy to each other? He has given expression to a doctrine which, if practically carried out, in less than ten years would destroy the union which now binds us together. This question is one in which the south has taken a deep interest, and it has come to the knowledge of some of the people of that section, who are determined to have a decision even in the highest courts of the United States on this matter, so that it shall be finally settled whether they shall be entitled to carry their property in the same manner and under the same protection that would be extended to any gentleman in this court who might be travelling through the state of Virginia. The counsel proceeded, at still greater length, to argue on the legality of the claimant's right to his property, and concluded by speaking of the great interests and questions of deep importance that were involved in this case.

Mr. Clinton followed in an argument on the same side.

Mr. Jay, in reply for the petitioners.

Jay for the petitioners

The great question involved in this suit, the right of a master, from Virginia, a slave-holding state, to hold his slaves in this, a free state, while *in transitu* to Texas, another slave state, was definitively decided, eighty years ago, by the court of King's Bench, after a very full argument, in the case of Somerset.

The question there was, whether the law of Virginia, fixing the *status* of Somerset, should prevail over the common law of England; and here, it is, whether the law of Virginia, which fixed the *status* of these persons as slaves within its borders, shall prevail to determine their *status* in this court, over the common law of New York, as derived from the mother country, and now expressly declared by statute.

Mr. Justice Paine. In the case of *Somerset*, I think the right of passage, *in transitu*, was not the question. Was not the slave brought from Jamaica to England to remain there?

Mr. Clinton, for the defendant.

That was so, your honor; the question was on the right of the master to continue Somerset in slavery, in England.

Mr. Jay. On the contrary, the question was, and it was so expressly declared by the court, (20 Howell's State Trials, p. 79,) as to the right of the master to detain the slave, for the purpose of sending him out of England, to be sold in Jamaica, precisely as it is here, upon the right of Mr. Lemmon to detain these persons, for the purpose of carrying them as slaves to Texas. Somerset, when brought before Lord Mansfield, on *habeas corpus*, was taken from on board a ship, lying in the Thames, bound for Jamaica; and the commander of the vessel, to whom the writ was addressed, and by whom the return was made, declared distinctly, that Somerset had been placed in his custody, by his master, one Charles Stewart, to be safely kept and conveyed in the said vessel, to Jamaica aforesaid, there to be sold as a slave. There was no pretence whatever, that he was to be held in slavery, in England. He had been brought there only *temporarily*, for his master's convenience, and was then actually leaving the country for one where slavery existed: and with all respect to the learned arguments of our opponents, there is nothing that I can perceive, in this case, to except it from the governance of these great principles of English law, then so prominently recognised, in regard to human freedom.

Somerset was a native African, and had been legally reduced to servitude, under laws enacted by the British Parliament, authorizing and regulating the slave trade. He had been held as a slave, by the laws of Virginia, a British colony; he might be so held again by those of Jamaica; he had become, by purchase, under the sanction of the British colonial law, the property of Mr. Stewart. He had been taken to England from occasion of business, with the intention still continued of returning to America, and all these facts were carefully set out in the return. The counsel for the master, strenuously urged the excessive hardship and manifest impropriety of the court *disturbing this relation* thus lawfully established between Somerset

and Mr. Stewart, and scornfully denied the doctrine that the air of England was too pure for a slave to breathe in. After prolonged and elaborate argument, and repeated postponements, the court unanimously decided that Somerset must be discharged. They declared, in language already quoted by my learned associate, but which the court will allow me to repeat, for the reason that the principle disposes at once of all the moral and political and social arguments that have been advanced in favor of allowing Mr. Lemmon a right of passage, *in transitu*, with his slaves through this port, that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law. * * * It is so odious that nothing can be suffered to support it but positive law."

The case of Somerset was decided in 1772. Its authority, excepting in the cases quoted by the respondent, and which I confess are new to us, has never, that we are aware of, been questioned. Its ruling was followed in *Knight*, a negro, v. *Weddeburn*, in Scotland, in 1778, where the court held that the dominion assumed over the negro under the laws of Jamaica, being *unjust*, could not be upheld to any extent (20 Howell State Trials, p. 2, note); and in the more recent case of *Forbes* v. *Cochran* (2 Barnwell and Cresswell 448), where the court of King's Bench decided that 38 slaves who had escaped from a plantation in East Florida to a ship of war on the high seas, became thereby free.

The decision in Somerset's case, occurring before our Revolution, became a part of that common law which, according to all our reliable authorities (Chief Justice Marshall, Mr. Duponceau, Chancellor Kent, and many other both in the federal and state courts), as absolutely belongs to us as it did to our ancestors before the separation from Great Britain. The pre-eminence of the common law is recognised on the ground that it is based upon the higher law of God; and Chief Justice Taylor, of North Carolina, in the case of the *State* v. *Reed*, declared it to be of "paramount obligation to the statute," because "founded upon the law of nature and confirmed by revelation."

In opposition to the doctrine of the Somerset case, the court is referred, by the respondent, to a newspaper report of a recent

alleged decision of Judge Grier, of Pa., in the case of *Oliver* v. *Kauffman and others*, for harboring and secreting slaves, wherein it seems to have been held, that the plea offered in defence, that the slaves had been previously made free by being carried by their master from Maryland to Kentucky, through Pennsylvania, was insufficient: since to determine the status of the slaves at the time of the escape for which the suit was brought, the court must look only to the law of the state whence they had escaped. The decision itself seems to have been expressly limited to that particular case. But Judge Grier is reported to have remarked, and the counsel for the defendants have laid great stress on his language, that "Lord Mansfield said many pretty things in the case of Somerset, which are often quoted as the principles of the common law, but that they deserve to be classed with rhetorical flourishes rather than dogmas."

Apart from the improbability that any gentleman occupying a seat on the bench of the supreme court of the United States, would permit himself thus to speak of so eminent a judge, and so well established a principle of law, which has again and again been recognised by the American judiciary (*Greenwood* v. *Curtis*, per Sedgwick, J., 6 Mass. R. 366; Mr. Justice Story's remarks thereon in Conflict of Laws, 215, note; C. J. Marshall in the case of the Antelope, 10 Wheaton 420; *Jones* v. *Wheaton*, 2 McLean 596), the court will observe at a glance, on looking at the case of Somerset, in 20 Howell's State Trials, that Lord Mansfield was most anxious to escape the necessity of pronouncing a judgment. That on its first coming before him, he strongly recommended that it be accommodated by agreement, declaring that if the parties would insist upon a decision, they must have it, without reference to compassion on the one hand, or inconvenience on the other, but simply to the law, and that the setting of 14,000 or 15,000 men (that being the estimated number of slaves then in England) at once loose, by a solemn opinion, was very disagreeable in the effects it threatened—but notwithstanding, if the parties would have judgment, *fiat justitia, ruat cœlum*.

That these distinct intimations were given on the conclusion of the argument, and before the day for pronouncing the opinion

of the court, and that when no compromise having been effected as he recommended, the court were compelled to give judgment, he rendered their judgment with unusual brevity, after a short statement of the case, and so far from indulging in "rhetorical flourishes," his opinion occupied scarcely more than twenty lines, while the arguments of counsel had been spread over 70 pages.

We respectfully submit, therefore, that it would be clearly unjust and improper, upon an unauthenticated newspaper report, to assume that Judge Grier has either denied this fundamental principle of our common law, or thrown ridicule on an opinion which he never read—a proper respect for the federal bench forbids us to regard this extraordinary report as other than an exaggerated sketch, or possibly, a malicious libel.

As to the other cases to which the court has been referred, that of *Sewall's Slaves* in Indiana (3 Am. Jurist 404), and of *Willard* v. *The People*, in Illinois, by Judge Douglass (4 Scammon 461), as affirming the right of transit with slaves through a free state, it would indeed seem that in some of the border states, a few individual judges have been, by their views of political expediency, led to ignore the inflexible principles of the common law touching the natural right of personal liberty, to meet the wishes and interests of their slave-holding neighbors, especially when no state statute like that of New York has positively declared the law, and limited the discretion of the courts. But your honor will find, on examining the reasonings of those cases, that they are *not law*.

Mr. Lemmon, then, to retain these slaves for the purpose of carrying them to Texas, must show a *positive statute, binding upon this court*, authorizing him to hold them in servitude while *in transitu* through the state of New York; calling them property, and invoking the law of nations and the comity of states, and appealing to the constitutional provisions in regard to commerce, will not help him.

The learned counsel have omitted to show, for the simple reason that it was impossible, that the law of nations recognises property in man. The *lex loci* establishing such property has no force beyond its territorial limits. The comity of states will not help them, since, for centuries past, as shown by the exam-

ples of the united provinces of Holland, the Austrian Netherlands, France, Great Britain (see authorities cited in Mr. Hargrave's argument in the Somerset case, 20 Howell State Trials, pages 61, et seq.), and America, that comity recognises neither slaves nor slavery. Even in the state of Maryland, the slaves of a St. Domingo master, who had fled to their border, was declared free, although he had been sold since his arrival (*Fulton* v. *Lewis*, Hen. & John. 564). The principle of comity has no application to systems or laws that offend against morality, that contravene the policy and principles of the state, or that violate natural justice and the law of God; and slavery, in the judgment of the common law, offends in all these particulars.

But it is contended, that apart from the doctrine of comity between foreign states, the constitution of the United States, exercising a superintending power and control over the states of the Union, has given to Mr. Lemmon the right to hold as property in the state of New York, that which was his property by the laws of Virginia, and the court is referred, in support of this proposition, to the provision "that faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state." (Art. 4, § 1.)

I confess myself unable to understand the bearing of that provision on the question before us—giving full faith and credit to the public acts of Virginia, fully admitting the averments in the demurrer, and that her laws permitted the slavery of these persons and their exportation to Texas. What has that to do with the validity of our laws, and their operation upon these persons, when brought by the respondent *within our jurisdiction?* If the question before the court related to fugitives from service under the laws of Virginia, then the validity of those laws might perhaps be questioned by those sought to be affected by them, for it is established as a general rule that the courts of one state have power to decide on the validity of legislative acts of another state when the question arises in a case within their jurisdiction (*Stoddard* v. *Smith*, 5 Binney 355, 8 Pick. 194); and it is declared to be not only their right, but their duty, to declare null and void statutes which violate the constitution of the United States, or the plain and obvious principles of common

right and common reason. (See collection of cases cited in 1 United States Digest, p. 553, of the power of courts to declare legislative acts unconstitutional.)

But here it is unnecessary at all to consider the validity of the laws of Virginia under which these persons were reduced to servitude, for they have passed beyond their sway. By the act of the claimant himself they stand in our free state, and share with him the protection of our laws.

"The relations of the United States to each other in regard to all matters not surrendered to the general government by the national constitution, are those of foreign states, in close friendship, each being sovereign and independent," (1 Greenleaf on Evid., § 489,) and the very clause in the constitution which limits the sovereignty of the states in regard to fugitives from service (Art. 4, § 3), and declares that "no person held to service or labor in one state by the laws thereof, *escaping into another*, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor shall be due," recognises, by direct implication, the *right* of each state to discharge, by such laws and regulations as it may deem fit, all persons held to service or labor in other states who may come within their territory, *otherwise than by escape*, no matter who may claim them, nor to whom, under the slave code of other states, their service or labor may be due. That right was never yielded by New York in the constitutional compact, but being thus reserved and declared in the compact, she did, of her own accord, waive it for a season, by the enactment of the law permitting slave-holders to bring their slaves into the state and take them again from the state, during a space of nine months. With the repeal of that law in 1841, the common law, as declared in the case of Somerset, resumed its sway, making every slave *other than a fugitive*, the instant he touches our soil, a *free man*. This principle Mr. Justice Story declares, and his authority will outweigh all the cases cited against it, pervades the non-slave-holding states in America (Conflict of Laws, 92), and its correctness has been repeatedly and honorably recognised by the southern courts, (*ex parte* Simmons, *Maria Louise* v. *Marot*, 9 Louis. R. 478; *Smith* v. *Smith*, 13 Louis. R. 441; *David* v. *Porter*, 4 Har. and

McHen. 418; *Davis* v. *Jaquin*, 5 Har. and J. 107, note; *Fulton* v. *Lewis*, 3 Har. and J. 564.) (*a.*)

But New York, to prevent the possibility of any mistake on the point, or any relaxation of the principle, has re-enacted and published it to the world, declaring, in language so plain as to defy the most ingenious efforts of counsel to perplex, that she will not tolerate slavery for any conceivable motive, or for an instant of time.

Upon the point submitted by the respondent, that the law is unconstitutional and should be so determined by your honor, I shall not further detain the court by submitting a reply. I will but remark in conclusion, that interesting and important as the case may be regarded by the counsel for the respondents, and by the citizens of the slave-holding states, as involving what, by their laws, are held rights of property, it is interesting and important to a large portion of our countrymen on far higher grounds, as involving the sovereign right of each state within its own limits, excepting in the single case of fugitives from service, to regulate, on principles of equal justice, its own internal polity; to reject and forbid foreign interference with our free institutions; to maintain in its purity the common law, and to protect in the enjoyment of life, liberty, and the pursuit of happiness—rights once declared by this nation at large to be inalienable—every slave who is brought within our limits, no

(*a.*) In the recent case of *Lucy Brown* v. *Persifer Smith*, in the supreme court of Louisiana, which was not quoted in the argument, Lucy claimed her freedom on the ground that she had been brought to New York during the continuance of the law allowing slaves to be detained there for 9 months, and declaring them free after that period—and that she had resided there more than one year. The opinion of the court was delivered by *Eustis, Chief Justice*, and it was "held, that under the state of facts presented, the plaintiff must be regarded as having acquired her freedom, with the consent of her master, by her residence in New York, which status she did not lose by subsequently being taken *back into slave territory*."

The view taken by the criminal court of Louisiana in 1841, of the point raised by the counsel for the respondent, that *a right of transit* with slaves is not forbidden by a statute absolutely forbidding the introduction of slaves, appears from the following letter of the attorney general of the state, which explains generally the facts of the case. Williams had been arrested *in transitu*, imprisoned, tried,

matter how humble his condition, nor how powerful the state or the parties who would reduce him again to servitude.

PAINE, J.—This case comes before me upon a writ of *habeas corpus*, issued to the respondent, requiring him to have the bodies of eight colored persons, lately taken from the steamer City of Richmond, and now confined in a house in this city, before me, together with the cause of their imprisonment and detention.

The respondent has returned to this writ, that said eight colored persons are the property of his wife, Juliet Lemmon, who has been their owner for several years past, she being a resident of Virginia, a slaveholding state, and that by the constitution and laws of that state they have been, and still are, bound to her service as slaves; that she is now, with her said slaves or property, *in transitu* from Virginia to Texas, another slaveholding state, and by the constitution and laws of which, she would be entitled to said slaves and to their service; that she never had any intention of bringing, and did not bring them into this state to remain or reside, but was passing through the harbor of New York, on her way from Virginia to Texas, when she was compelled by necessity to touch or land, without intending to remain longer than was necessary. And she insists that said persons are not free, but are slaves as aforesaid, and that she is entitled to their possession and custody.

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found guilty, his negroes, 24 in number, confiscated, and himself fined $1200, which was expiated by one year's imprisonment.

Attorney General's Office,
New Orleans, June 11, 1841.

DEAR SIR: In reply to your note of the 8th instant, I take pleasure in stating that, on the trial of Mr. William Williams, in the criminal court of the first district, for having brought or imported into this state certain slaves convicted of capital crimes in the state of Virginia, no evidence whatever was offered that Mr. Williams either sold or attempted to sell any of those slaves in the state of Louisiana. It was proved, on the contrary, by two witnesses, that when asked whether the slaves were for sale, Mr. Williams answered in the negative, and said he was going to Texas with them. I took the ground that the mere fact of bringing such slaves into the state was a violation of the statute, and constituted the offence of which Mr. Williams stood charged. This proposition was sustained by the court.

Yours very respectfully,
C. ROSELIUS.

JOHN R. GRIMES, Esq. (present).

To this return the relator has put in a general demurrer.

I certainly supposed, when this case was first presented to me, that, as there could be no dispute about the facts, there would be no delay or difficulty in disposing of it. But, upon the argument, the counsel for the respondent cited several cases which satisfied me that this case could not be decided, until those cases had been carefully examined.

The principle which those cases tend more or less forcibly to sustain, is, that if an owner of slaves is merely passing from home with them, through a free state, into another slave state, without any intention of remaining, the slaves, while in such free state, will not be allowed to assert their freedom. As that is precisely the state of facts constituting this case, it becomes necessary to inquire whether the doctrine of those cases can be maintained upon general principles, and whether the law of this state does not differ from the laws of those states where the decisions were made.

I shall first consider whether those cases can be sustained upon general principles.

The first case of the kind which occurred, was that of *Sewall's slaves*, which was decided in Indiana, in 1829, by Judge Morris, and will be found reported in 8 Am. Jurist, 404. The return to the *habeas corpus* stated that Sewall resided in Virginia, and owned and held the slaves under the laws of that state; that he was emigrating with them to Missouri, and on his way was passing through Indiana, when he was served with the *habeas corpus*.

It, however, appeared on the hearing, that Sewall was not going to Missouri to reside, but to Illinois, a state whose laws do not allow of slavery. The judge for this reason discharged the slaves. This case, therefore, is not in point, and would be entirely irrelevant to the present, were it not for a portion of the judge's opinion, which was not called for by the case before him, but applies directly to the case now before me.

"By the law," he says, "of nature and of nations, (Vattel, 160,) and the necessary and legal consequences resulting from the civil and political relations subsisting between the citizens as well as the states of this Federative Republic, I have no doubt but the citizen of a slave state has a right to pass, upon business

or pleasure, through any of the states, attended by his slaves or servants; and while he retains the character and rights of a citizen of a slave state, his right to retain his slaves would be unquestioned. An escape from the attendance upon the person of his master, while on a journey through a free state, should be considered as an escape from the state where the master had a right of citizenship, and by the laws of which the service of the slave was due. The emigrant from one state to another might be considered prospectively as the citizen or resident of the state to which he was removing; and should be protected in the enjoyment of those rights he acquired in the state from which he emigrated, and which are recognised and protected by the laws of the state to which he is going. But this right I conceive cannot be derived from any provision of positive law."

The next case relied upon is *Willard* v. *The People*, (4 Scammon's Rep. 461) and which was decided in the state of Illinois in 1843. It was an indictment for secreting a woman of color owing service to a resident of Louisiana. The indictment was under the 149th section of the Criminal Code, which provides that "If any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or a servant owing service or labor to any other persons, whether they reside in this state or in any other state, or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every such person so offending shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

It appeared that the woman of color was a slave, owned by a resident of Louisiana, and that, while passing with her mistress from Kentucky to Louisiana through the state of Illinois, she made her escape in the latter state, and was secreted by the defendant.

There were several questions raised in the case which it is unnecessary now to notice. The indictment, which was demurred to, was sustained by the court. The main objection to it was that the section of the code under which it was found was a violation of the sixth article of the constitution of the state

of Illinois, which declares that "neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted."

The court, in answering this objection, say: "The only question, therefore, is the right of transit with a slave; for if the slave upon entering our territory, although for a mere transit to another state, becomes free under the constitution, then the defendant in error is not guilty of concealing such a person as is described in the law and in the indictment. The 149th section of the criminal code, for a violation of which the plaintiff is indicted, does most distinctly recognise the existence of the institution of slavery in some of these United States, and whether the constitution and laws of this state have or have not provided adequate remedies to enforce within its jurisdiction that obligation of service, it has provided by this penal sanction, that none shall harbor or conceal a slave within this state, who owes such service out of it. Every state or government may or may not, as it chooses, recognise and enforce this law of comity. And to this extent this state has expressly done so. If we should, therefore, regard ourselves as a distinct and separate nation from our sister states, still, as by the law of nations (Vattel, B. 2, ch. 10, § 132, 133, 134) the citizens of one government have a right of passage through the territory of another peaceably, for business or pleasure, and that too without the latter's acquiring any right over the person or property (Vattel, B. 2, § 107, 109), we could not deny them this international right without a violation of our duty. Much less could we disregard their constitutional right, as citizens of one of the states, to all the rights, immunities, and priviléges of citizens of the several states. It would be startling indeed if we should deny our neighbors and kindred that common right of free and safe passage which foreign nations would hardly dare deny. The recognition of this right is no violation of our constitution. It is not an introduction of slavery into this state, as was contended in argument, and the slave does not become free by the constitution of Illinois by coming into the state for the mere purpose of passage through it."

Another case cited by the respondent's counsel, was the *Com-*

monwealth v. *Aves* (18 Pickering's Rep. 193). In this case the owner brought her slave with her from New Orleans to Boston, on a visit to her father, with whom she intended to spend five or six months, and then return with the slave to New Orleans. The slave being brought up on habeas corpus, the court ordered her discharge. The case was fully argued, and Chief Justice Shaw closes a very elaborate opinion with these words: "Nor do we give any opinion upon the case, where an owner of slaves in one state is *bonâ fide* removing to another state where slavery is allowed, and in so doing necessarily passes through a free state, or where by accident or necessity he is compelled to touch or land therein, remaining no longer than necessary."

I have quoted largely from the opinions in these cases, in order that it may be understood clearly what is presented by them as their governing principle. The respondent's counsel insists it is this: That by the law of nations, an owner of a slave may, either from necessity or in the absence of all intention to remain, pass with such slave through a state where slavery is not legalized, on his way from one slave state to another, and that during such transit through the free state the slave cannot assert his freedom.

I admit that this is the principle of these cases, and I now propose to consider it. Each case denies that the right of transit can be derived from the provision of the constitution of the United States respecting fugitive slaves, and, where an opinion was expressed, places the right upon the law of nations.

Writers of the highest authority on the law of nations agree that strangers have a right to pass with their property through the territories of a nation. (Vattel, B. 2, ch. 9, §§ 123 to 136. Pufendorf, B. 3, ch, 3, §§ 5 to 10.) And this right, which exists by nature between states wholly foreign to each other, undoubtedly exists, at least as a natural right, between the states which compose our Union.

But we are to look further than this, and to see what the law of nations is when the property which a stranger wishes to take with him is a slave.

The property which the writers on the law of nations speak of is merchandise or inanimate things. And by the law of nature these belong to their owner. (Institutes of Just., B. 1,

t. 2, § 2.) But those writers nowhere speak of a right to pass through a foreign country with slaves as property. On the contrary, they all agree that by the law of nature alone no one can have a property in slaves. And they also hold that, even where slavery is established by the local law, a man cannot have that full and absolute property in a person which he may have in an inanimate thing. (Pufendorf, B. 6, ch. 3, § 7.) It can scarcely, therefore, be said, that when writers on the law of nations maintain that strangers have a right to pass through a country with their merchandise or property, they thereby maintain their right to pass with their slaves.

But the property or merchandise spoken of by writers on the law of nations which the stranger may take with him, being mere inanimate things, can have no rights; and the rights of the owner are all that can be thought of. It is, therefore, necessary to look still further and to see what is the state of things, by the law of nature, as affecting the rights of the slave, when an owner finds himself, from necessity, with his slave in a country where slavery is not legalized or is not upheld by law.

It is generally supposed that freedom of the soil from slavery is the boast of the common law of England, and that a great truth was brought to light in Somerset's case. This is not so. Lord Mansfield was by no means, so far as the rest of the world is concerned, the pioneer of freedom. Whatever honor there may be in having first asserted that slavery cannot exist by the law of nature, but only by force of local law, that honor among modern nations belongs to France, and, among systems of jurisprudence, to the civil law. The case of Somerset did not occur until the year 1772, and in 1738 a case arose in France in which it was held that a negro slave became free by being brought into France. (13 Causes Célèbres, 49.)

But in truth the discovery that by nature all men are free, belongs neither to England nor France, but is as old as ancient Rome; and the law of Rome repeatedly asserts that all men by nature are free, and that slavery can subsist only by the laws of the state. "*Bella etenim orta sunt, et captivitates secutæ et servitutes quæ sunt naturali juri contrariæ; jure enim naturali omnes homines ab initio liberi nascebantur.*" (Institutes, B. 1, t. 2, s. 2.) "*Naturalia quidem jura, quæ apud omnes*

gentes peræque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent." (Institutes, B. 1, T. 2, S. 11; Digest, B. 1, T. 1, s. 4; B. 1, T. 5, ss. 4, 5.)

The writers on the law of nations uniformly maintain the same principle, viz. that by the law of nature all men are free, and that where slavery is not established and upheld by the law of the state there can be no slaves. (Grotius, B. 2, ch. 22, s. 11; Hobbes De Cive, B. 1, ch. 1, s. 3. Pufendorf (Barbeyrac) Droit de la Nature, B. 3 ch. 2, ss. 1, 2, B. 6, ch. 3, s. 2.)

The same writers also hold that by the law of Nature one race of men is no more subject to be reduced to slavery than other races. (Pufendorf, B. 3, ch. 2, s. 8.)

When we are considering a master and slave in a free state, where slavery is not upheld by law, we must take into view all these principles of the law of nature, and see how they are respectively to be dealt with according to that law; for it will be remembered that the master can now claim nothing except by virtue of the law of nature. He claims under that law a right to pass through the country. That is awarded to him. But he claims in addition to take his slave with him; but upon what ground? That the slave is his property. By the same law, however, under which he himself claims, that cannot be; for the law of nature says that there can be no property in a slave.

We must look still further to see what is to be done with the claims of the slave. There being now no law but the law of nature, the slave must have all his rights under that, as well as the master; and it is just as much the slave's right under that to be free as it is the master's to pass through the country. It is very clear, therefore, that the slave has a right to his freedom, and that the master cannot have a right to take him with him.

As the cases cited by the respondent's counsel all rest the master's right of transit exclusively upon the law of nations, and admit that he cannot have it under any other law, I have thus followed out that view, perhaps at unnecessary length, in order to see to what it would lead. In order to prevent any misapprehension as to the identity of the law of nature and the law of nations, I will close my observations upon this part of the case with a citation, upon that point, from Vattel. (Preli-

minaries, § 6.) "The law of nations is originally no more than the law of nature applied to nations."

I ought also to notice here that the respondent's counsel, upon the authority of the case in Illinois, insisted that this right of transit with slaves is strengthened by that clause in the constitution of the United States which declares that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The case in Indiana, on the other hand, says expressly that the right does not depend upon any positive law.

I think this remark must have found its way into the opinion of the judge who decided the Illinois case without due consideration. I have always understood that provision of the constitution to mean (at least so far as this case is concerned) that a citizen who was absent from his own state, and in some other state, was entitled while there to all the privileges of the citizens of that state. And I have never heard of any other or different meaning being given to it. It would be absurd to say that while in the sister state he is entitled to all the privileges secured to citizens by the laws of all the several states or even of his own state; for that would be to confound all territorial limits, and give to the states not only an entire community, but a perfect confusion of laws. If I am right in this view of the matter, the clause of the constitution relied upon cannot help the respondent; for if he is entitled while here to those privileges only which the citizens of this state possess, he cannot hold his slaves.

I must also here notice some other similar grounds insisted upon by the respondent's counsel.

He cites Vattel (B. 2, ch. 8, s. 81) to prove that the goods of an individual as regards other states are the goods of his state. I have already shown that by the law of nature, about which alone Vattel is always speaking, slaves are not goods; and I may add that what Vattel says in the passage to which the counsel refers has no connexion with the right of transit through a foreign country. Besides, in the case from Illinois referred to by respondent's counsel, the court distinctly declare (*Willard* v. *People*, 4 Scammon's Rep. 471) that they "cannot see the application to this case of the law of nations in relation

to the domicil of the owner fixing the condition of and securing the right of property in this slave, and regarding the slave as a part of the wealth of Louisiana, and our obligation of comity to respect and enforce that right."

The respondent's counsel also refers to those provisions of the constitution of the United States which relate to fugitive slaves and to the regulation of commerce among the several states. With regard to the first of these provisions, which the counsel insists recognises and gives a property in slaves, it is sufficient to say, that although the supreme law of the land in respect to fugitive slaves, and as such entitled to unquestioning obedience from all, it is, so far as everything else is concerned, the same as if there were no such provision in the constitution. This has been so held in cases almost without number, and is held in each of the three cases cited by the respondent's counsel, and upon which I have before commented.

As for the provision of the constitution in relation to commerce among the states, it has been often held, that notwithstanding this provision, the states have the power impliedly reserved to them of passing all such laws as may be necessary for the preservation, within the state, of health, order, and the well being of society, or laws which are usually called sanative and police regulations. (*Passenger cases*, 7 Howard S. C. R. 283; *License cases*, 5 Ib. 504; *Blackbird Creek Marsh Company*, 2 Peters, 250; *New York* v. *Miln*, 11 Peters, 130; *Brown* v. *State of Maryland*, 12 Wheat. 419; *Groves* v. *Slaughter*, 15 Peters, 511.) Laws regulating or entirely abolishing slavery, or forbidding the bringing of slaves into a state, belong to this class of laws, and a right to pass those laws is not affected by the constitution of the United States. This view of the subject is taken by the three cases upon which the counsel mainly relies.

It remains for me to consider how far the local law of New York affects this case, and distinguishes it from the cases in Indiana and Illinois.

To go back, first, to the right of transit with slaves, as it is claimed to exist by the natural law: it appears to be settled in the law of nations, that a right to transit with property not only exists, but that, where such right grows out of a necessity created by the *vis major*, it is a perfect right, and cannot be law-

fully refused to a stranger. (Vattel, B. 2, ch. 9, s. 123; Ib. Preliminaries, s. 17; Pufendorf, B. 3, ch. 3, s. 9.) In this case it is insisted that the respondent came here with his slaves from necessity, the return having so stated, and the demurrer admitting that statement. It is perfectly true that the demurrer admits whatever is well pleaded in the return. But if the return intended to state a necessity created by the *vis major*, it has pleaded it badly; for it only alleges a necessity, without saying what kind of necessity; and, as it does not allege a necessity created by the *vis major*, the demurrer has not admitted any such necessity. Where the right of transit does not spring from the *vis major*, the same writers agree that it may be lawfully refused. (Ib.)

But, however this may be, it is well settled in this country, and so far as I know has not heretofore been disputed, that a state may rightfully pass laws, if it chooses to do so, forbidding the entrance or bringing of slaves into its territory. This is so held even by each of the three cases upon which the respondent's counsel relies. (*Commonwealth* v. *Ayres*, 18 Pick. R. 221; *Willard* v. *the People*, 4 Scammon's Rep. 471; *Case of Sewall's Slaves*, 3 Am. Jurist, 404.)

The laws of the state of New York upon this subject appear to me to be entirely free from any uncertainty. In my opinion they not only do not uphold or legalize a property in slaves within the limits of the state, but they render it impossible that such property should exist within those limits, except in the single instance of fugitives from labor under the constitution of the United States.

The revised statutes (vol. 1, 656, 1st Ed.,) re-enacting the law of 1817, provide that "no person held as a slave shall be imported, introduced or brought into this state, on any pretence whatever, except in the cases hereinafter specified. Every such person shall be free. Every person held as a slave who hath been introduced or brought into this state contrary to the laws in force at the time shall be free." (S. 1.)

The cases excepted by this section are provided for in the six succeeding sections. The second section excepts fugitives under the constitution of the United States; the third, fourth, and fifth sections except certain slaves belonging to immigrants, who

may continue to be held as apprentices; the seventh section provides that families coming here to reside temporarily may bring with them and take away their slaves; and the sixth section contains the following provision:

"Any person not being an inhabitant of this state, who shall be travelling to or from, or passing through this state, may bring with him any person lawfully held by him in slavery, and may take such person with him from this state; but the person so held in slavery shall not reside or continue in this state more than nine months; and if such residence be continued beyond that time, such person shall be free."

Such was and had always been the law of this state, down to the year 1841. The legislature of that year passed an act amending the revised statutes, in the following words, viz. "The 3d, 4th, 5th, 6th and 7th sections of title 7, chapter 20, of the 1st part of the revised statutes are hereby repealed."

The 6th section of the revised statutes, and that alone, contained an exception which would have saved the slaves of the respondent from the operation of the first section. The legislature, by repealing that section, and leaving the 1st in full force, have, as regards the rights of these people and of their master, made them absolutely free; and that not merely by the legal effect of the repealing statute, but by the clear and deliberate intention of the legislature. It is impossible to make this more clear than it is by the mere language and evident objects of the two acts.

It was, however, insisted on the argument that the words "imported, introduced, or brought into this state," in the 1st section of the revised statutes, meant only "introduced or brought" for the purpose of remaining here. So they did undoubtedly when the revised statutes were passed, for an express exception followed in the 6th section giving that meaning to the 1st. And when the legislature afterward repealed the 6th section, they entirely removed that meaning, leaving the first section, and intending to leave it, to mean what its own explicit and unreserved and unqualified language imports.

Not thinking myself called upon to treat this case as a casuist or legislator, I have endeavored to discharge my duty as a judge in interpreting and applying the laws as I find them.

Did not the law seem to me so clear, I might feel greater regret, that I have been obliged to dispose so hastily of a case involving such important consequences.

My judgment is, that the eight colored persons mentioned in the writ be discharged.

Verdict !

There are two acts of congress bearing upon the questions in this case, and illustrating the views of congress, as to its power, under the constitution, over the introduction into any of the states, of free colored persons or slaves, brought from foreign countries, or transported coastwise from one state to another.

The first is the act of 1803, ch. 10, entitled "An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited." (2 U. S. Statutes at Large, 205.) This act forbids any master of a vessel, or other person, "importing, or bringing any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state, which, by law, has prohibited, or shall prohibit, the admission or importation of such negro, mulatto, or other person of color."

The other act is the first law prohibiting the foreign slave trade (2 U. S. Statutes at Large, 426, sess. 2, ch. 22, 1807). The title of the act is, "an act to prohibit the importation of slaves, into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808." The reader must judge how far the following sections of this act, are in subordination to or independent of the general purpose of the act, as expressed in its title.

"Sec. 2. And be it further enacted, That the captain, master, or commander of any ship or vessel, of the burthen of forty tons or more, from and after the first day of January, one thousand eight hundred and eight, sailing coastwise, from any port in the United States, to any port or place within the jurisdiction of the same, having on board any negro, mulatto, or person of color, for the purpose of transporting them to be sold or disposed of as slaves, or to be held to service, or labor, shall, previous to the departure of such ship or vessel, make out and subscribe, duplicate manifests of every such negro, mulatto, or person of color, on board such ship or vessel, therein specifying the name and sex of each person, their age and stature, as near as may be, and the class to which they respectively belong, whether negro, mulatto, or persons of color, with the name and place of residence, of every owner or shipper of the same, and shall deliver such manifests to the collector of the port, if there be one, otherwise to the surveyor, before whom the captain, master, or commander, together with the owner, or shipper, shall severally swear or affirm, to the best of their knowledge and belief, that the persons therein specified were not imported, or brought into the United States, from and after the first day of January, one thousand eight hundred and eight, and that under the laws of the state, they are held to service or labor: Whereupon the said collector or surveyor shall certify the same, on the said manifests, one of which he shall return to the said captain, master, or commander, with a permit, specifying thereon the number, names, and general description of such persons, and authorizing him to proceed to the port of destination. And if

any ship or vessel, being laden and destined as aforesaid, shall depart from the port where she may then be, without the captain, master, or commander, having first made out and subscribed duplicate manifests, of every negro, mulatto, and person of color, on board such ship or vessel as aforesaid, and without having previously delivered the same to the said collector, or surveyor, and obtained a permit, in manner as herein required, or shall, previous to her arrival at the port of her destination, take on board any negro, mulatto, or person of color, other than those specified in the manifests, as aforesaid, every such ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited to the use of the United States, and may be seized, prosecuted, and condemned, in any court of the United States, having jurisdiction thereof: and the captain, master, or commander of every such ship or vessel, shall moreover, forfeit for every such negro, mulatto, or person of color, so transported, or taken on board, contrary to the provisions of this act, the sum of one thousand dollars, one moiety thereof to the United States, and the other moiety to the use of any person, or persons, who shall sue for, and prosecute the same to effect."

"Sec. 10. And be it further enacted, That the captain, master, or commander, of every ship or vessel, of the burthen of forty tons or more, from and after the first day of January, one thousand eight hundred and eight, sailing coastwise, and having on board any negro, mulatto, or person of color, to sell or dispose of as slaves, or to be held to service or labor, and arriving in any port within the jurisdiction of the United States, from any other port within the same, shall, previous to the unlading or putting on shore, any of the persons aforesaid, or suffering them to go on shore, deliver to the collector, if there be one, or if not, to the surveyor residing at the port of her arrival, the manifest certified by the collector, or surveyor of the port, from whence she sailed, as herein before directed, to the truth of which, before such officer, he shall swear or affirm; and if the collector or surveyor shall be satisfied therewith, he shall thereupon grant a permit for unlading or suffering such negro, mulatto, or person of color, to be put on shore, and if the captain, master, or commander of any such ship or vessel being laden as aforesaid, shall neglect or refuse to deliver the manifest, at the time, and in the manner herein directed, or shall land or put on shore, any negro, mulatto, or person of color, for the purpose aforesaid, before he shall have delivered his manifest, as aforesaid, and if obtained, a permit for that purpose, every such captain, master, or commander, shall forfeit and pay ten thousand dollars, one moiety thereof, to the United States, the other moiety to the use of any person or persons who shall sue for and prosecute the same to effect.

Note by the present Reporter.—Although the above case was heard by Mr. Justice Paine, as a supreme court commissioner, not as a judge of the superior court, and was, therefore, decided by him without consultation with any of his brethren, yet, the extreme importance of the questions of constitutional and of national law, which its discussion involved, seemed to the reporter to justify its exception from the general rule, which he holds himself bound to observe, namely, not to publish any decision, resting only upon the authority of a single judge.

As an appeal to the supreme court, from the judgment of Mr. Justice Paine, is now pending, it would be manifestly improper, to give any intimation, as to the probable concurrence or dissent, of his associates, had they been consulted.

April 26, 1860

The Lemmon Slave Case.

If there were nothing else about Slavery and the Anti-Slavery agitation that everybody must see with regret and foreboding, their influence upon the Courts and judicial decisions would furnish ample cause for anxiety and alarm. The conflict between the supporters and opponents of the institution" has even reached such a pitch of excitement and exasperation that the judges are gradually giving way to the pressure of one side or other, and ceasing even to pretend to administer the law as they find it, or to stand by the old rules of interpretation in any case in which the interests of slaveholders are involved. It would be a waste of our space to cite in support of this assertion the rulings of Southern Courts on the trial of Abolitionists, or Anti-Slavery men, or Slave-traders. In more than one of what Mr. SEWARD chooses to call the "capital States," judges have repudiated the authority of all previous decisions in Slave cases, not on the ground of their unsoundness in point of law, but because the public opinion of the district had changed since they were made. The effect of this monstrous doctrine upon the rights of free negroes, upon the emancipation of slaves by will -- a practice once so common -- and more recently upon the revival of the Slave trade, is something with which most of our readers are tolerably familiar, and upon which it is, consequently, unnecessary for us to descant at length. The Supreme Court itself has not been exempt from the fate which has overtaken the humbler and less pretentious tribunals of the States. Whatever one's opinion may be of the authority of the Dred Scott decision, it is impossible to overlook the advocate's eagerness to make out as good a case as possible for the winning side, by which the whole judgment is marked.

In the North the evil has been less apparent, because, probably, it has had less opportunity to display itself. The only cases, or almost the only ones, in which Slavery has come directly before the Courts of the Free States, are those arising our, of attempts to enforce the Fugitive Slave law. The findings of the State Judges upon writs of habeas corpus issued in behalf of runaway negroes, or their rescuers, if less marked by passion and prejudice than Southern judgments in the interest of Slavery, have at least rarely been illustrations of judicial wisdom, moderation, and impartiality. We freely admit that errors committed in behalf of the slave are nobler errors than errors committed on behalf of the slaveholder; that it is difficult for the mass of mankind, to withhold their sympathy, and even admiration, from the sacrifice of law at the shrine of liberty; but we must express our sincere conviction, in which every thoughtful man must concur, that if the final disappearance of Slavery from this continent, or even its banishment from the Territories of the United States, be brought about by the conversion of the Judges into partisans -- by habituating the Courts of law to pay, in times of public excitement, greater attention to political expediency than to statutes and decisions -- it will be dearly bought. Freedom based on judicial corruption is but the forerunner of the worst general Slavery.

We are led into these remarks by the appearance of the opinions of the dissenting minority of the Court of Appeals of this State in the Lemmon slave case. Nothing can be further from our intention than to impute to these learned men the slightest intention to sacrifice conscientious opinions, either to Slavery or Freedom. The Court has many faults, foremost among them that of flatly reversing its own decisions semi-annually, and of doing as much as anybody in its position ever did to unsettle the law; but want of honesty and integrity is not of the number. For the fault we are about to find with it in this particular instance, we can hardly think of a better name than eccentricity; but it is, in our opinion, an eccentricity bred by that atmosphere of partisanship which, considering the mode in which our judges are chosen, and the feverish excitement of the public mind on certain subjects, it is impossible to prevent from invading even the judical bench. Judge BROWN afforded a remarkable instance of what we mean, when he held, in the Metropolitan Police case, that a policeman's want of skill in the interpretation of statute and constitutional law, justified him in refusing obedience to an act of the Legislature. Two very striking illustrations of it are seen in the following opinions in the Lemmon Slave case:

"COMSTOCK, Ch. J. -- Observed in substance that, since the last term of the Court, his time had been wholly occupied in an examination of other causes argued at that term. To this case, therefore, he had not yet been able to give the attention which its importance might justify. He had no hesitation in declaring it to be his opinion that the legislation of this State, on which the question in the case depends, is directly opposed to the rules of comity and justice which ought to regulate intercourse between the States of this Union; and he was not prepared to hold that such legislation does not violate the obligations imposed on all the States by the Federal Constitution. Without, however, wishing to delay the decision which a majority of his brethren were prepared to make, he contented himself with dissenting from the judgment.

SELDEN, J. -- I have been prevented by want of time, and the pressure of other duties, from giving to this case that careful examination which is due to its importance, and to the elaborate and able arguments of the counsel, and am not prepared, therefore, definitely to determine whether the act of 1841 is or is not in conflict with any express provisions of the United States Constitution. But, however this may be, I cannot but regard it as a gross violation of those principles of justice and comity which should at all times pervade our interstate legislation, as well as wholly inconsistent with the general spirit of our national compact. While, therefore, I am not prepared at this time to give such reasons as would justify me in holding the Jaw to be void, I am equally unprepared to concur in the conclusion to which the majority of my associates have arrived."

Now, these little opinions, short and concise as they are, are no more "judgments," with all respect be it spoken, than any observation which either of these learned gentlemen ever makes at his own dinner table. They are simply neat, chaste, unadorned stump speeches -- shorter, it is true, than most of these efforts of genius, but not the lees perfect of their kind on that account.

Judge COMSTOCK frankly confesses that he has not examined the case; that his time since its argument has been wholly occupied in other ways; "that he is not prepared to hold 'that the act of the Legislature of this State, which positively declares that any slave brought by his owner within our boundaries shall be free,' violates the obligations imposed on all the States by the Federal Constitution," -- and yet he deliberately proceeds to cast a dissenting vote, or in other words, to hold judicially that the decision of the

Court below was erroneous, and that slaves may be brought into this State, the act of the Legislature to the contrary notwithstanding.

Judge SELDEN acknowledges himself to be in precisely the same position. He has not examined the case; he is not prepared to say whether the statute is constitutional or not, and yet he deliberately declares that the judgment of the Court that the act is binding, was erroneous. The state of preparation in which both these gentlemen confessed themselves to be, made it imperative on them to abstain from taking any part in the decision. Their mental condition with regard to it was, for all judicial purposes, no better than that of any other man in the State -- no better, at all events, than that of any lawyer who had not heard the arguments.

The sole reason they give for their vote is one in the last degree absurd. They declare the statute not to be binding, simply because, in their opinion, it violates "the rules of justice and comity" which ought to regulate the relations of the States of the Union. This is a new reason for declaring the act of the Legislature of a sovereign State to be void, and one which was never heard of in any court of justice before. We congratulate these two learned judges on its discovery. If their view be correct, every law has not simply to accord with the provisions of the State and Federal Constitutions as heretofore, but with the notions of "justice and comity" entertained by the Judges of the Court of Appeals for the time being. It this rule does not arm judges with legislative power, we should like to hear of some other plan which does it more effectually. Itwould be about as sensible, practical and feasible to pass acts subject to reconciliation by a board of clergymen with their views of "absolute truth," and of the "eternal fitness of things," or of "fixed fate, fore-knowledge and free-will." CHARLES O'CONOR's rules of the "justice and comity" which ought to regulate the intercourse of the States, for instance, would differ widely from those of WILLIAM EVARTS or DAVID DUDLEY FIELD, if these gentlemen all ascended the bench.

2006

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

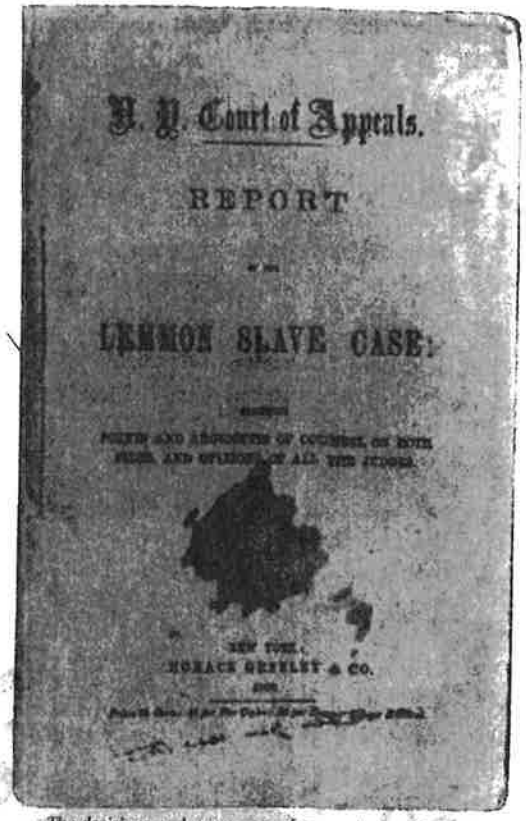
The Lemmon Slave Case

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))*



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

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

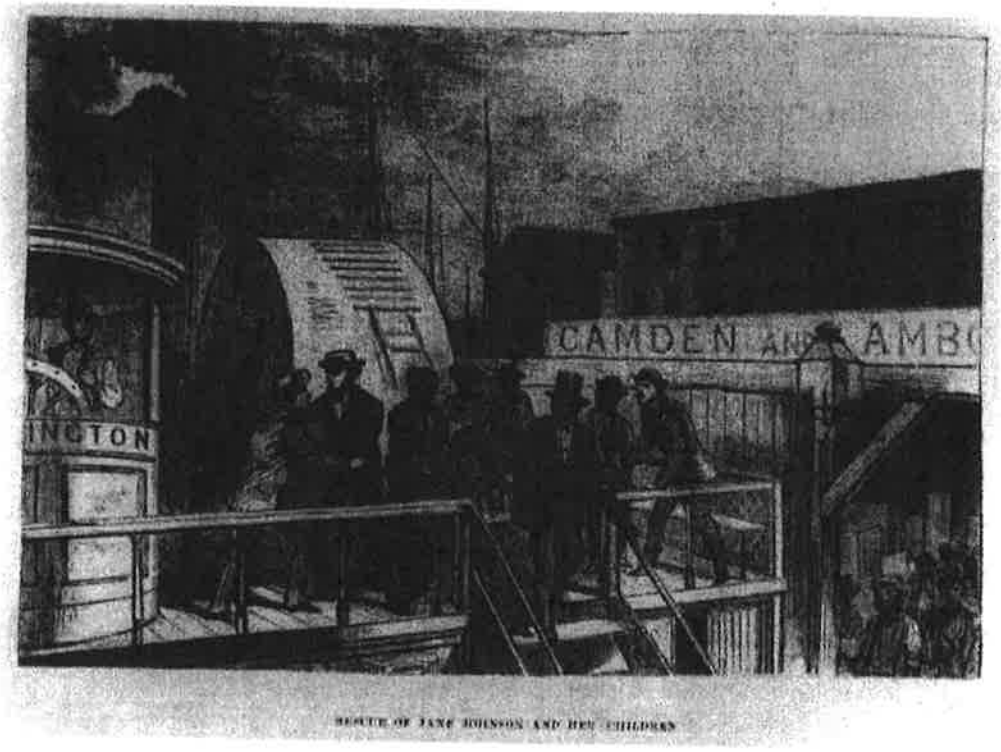
The Lemmon Slave Case originated in an application for a writ of habeas corpus filed November 6, 1852, in the Superior Court of the City of New York before Judge Elijah Paine, Jr., by Louis Napoleon, described in the record simply as "a colored man." Napoleon was a good deal more besides — a vice president 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

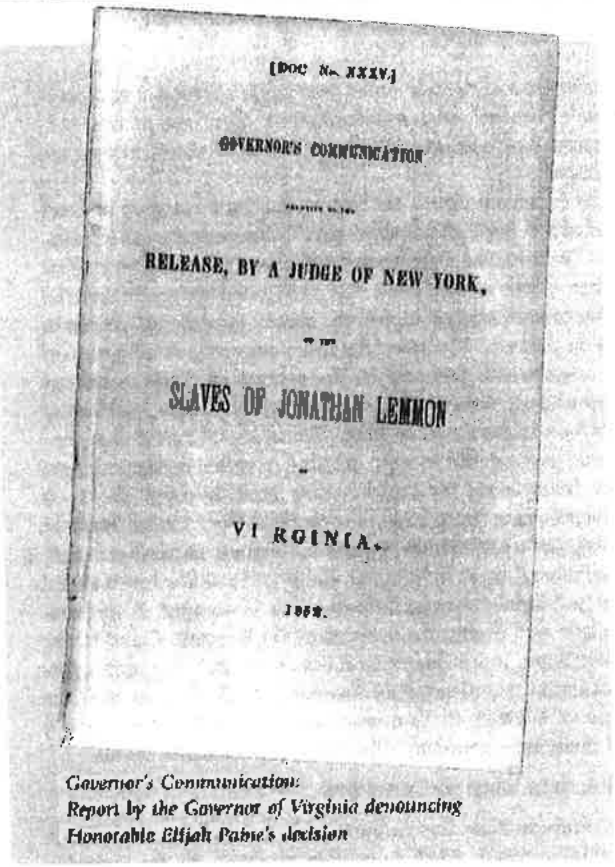
which — as strange as its name — was composed of the Justices of the Supreme Court, the Chancellor and the president and all the members of the State Senate, the latter a far larger group than all the full-time judicial participants. The Court of Appeals which would ultimately resolve the Lemmon Slave 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.[9] 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 seval 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 Respe ctfully,*
>
> *Stephen Myers*
> *supt of the und erground RR*[10]

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 1817, ch 137). When the Legislature repealed this latter provision (L 1841, ch 247), New York State became legally slave-free.[11]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GOVERNOR'S COMMUNICATION

RELEASE, BY A JUDGE OF NEW YORK,

OF THE

SLAVES OF JONATHAN LEMMON

FROM

VIRGINIA.

1852.

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

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

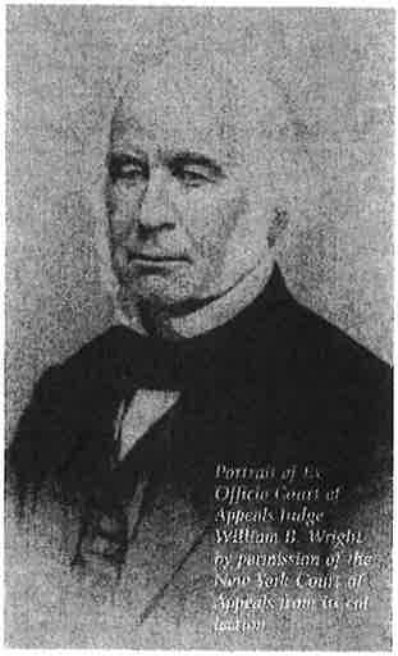
tice. He sneered at Lord Mansfield's opinion in *Somerset* – "to that opinion very little respect is due"– and distinguished it on the basis that even if slavery had never been part of the statutory law of England, it had been recognized in every colony, and by the legislature of every state, that formed 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.

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.

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

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. Covet, *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 Act

1850

The Fugitive Slave Act was part of the group of laws referred to as the "Compromise of 1850." In this compromise, the antislavery advocates gained the admission of California as a free state, and the prohibition of slave-trading in the District of Columbia. The slavery party received concessions with regard to slaveholding in Texas and the passage of this law. Passage of this law was so hated by abolitionists, however, that its existence played a role in the end of slavery a little more than a dozen years later. This law also spurred the continued operation of the fabled Undergound Railroad, a network of over 3,000 homes and other "stations" that helped escaping slaves travel from the southern slave-holding states to the northern states and Canada.

55

BE IT enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the Circuit Courts of the United States, and Who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offense against the United States, by arresting, imprisoning, or bailing the same under and by the virtue of the thirty-third section of the act of the twenty-fourth of September seventeen hundred and eighty-nine, entitled "An Act to establish the judicial courts of the United States" shall be, and are hereby, authorized and required to exercise and discharge all the powers and duties conferred by this act.

SEC. 2. And be it further enacted, That the Superior Court of each organized Territory of the United States shall have the same power to appoint commissioners to take acknowledgments of bail and affidavits, and to take depositions of witnesses in civil causes, which is now possessed by the Circuit Court of the United States; and all commissioners who shall hereafter be appointed for such purposes by the Superior Court of any organized Territory of the United States, shall possess all the powers, and exercise all the duties, conferred by law upon the commissioners appointed by the Circuit Courts of the United States for similar purposes, and shall moreover exercise and discharge all the powers and duties conferred by this act.

SEC. 3. And be it further enacted, That the Circuit Courts of the United States shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act.

SEC. 4. And be it further enacted, That the commissioners above named shall have concurrent jurisdiction with the judges of the Circuit and District Courts of the United States, in their respective circuits and districts within the several States, and the judges of the Superior Courts of the Territories, severally and collectively, in term-time and vacation; shall grant certificates to such claimants, upon satisfactory proof being made, with authority to ake and remove such fugitives from service or labor, under the restrictions herein contained, to the State or Territory from which such persons may have escaped or fled.

SEC. 5. And be it further enacted, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant, or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of such claimant, on the motion of such claimant, by the Circuit or District Court for the district of such marshal; and after arrest of such fugitive, by such marshal or his deputy, or whilst at any time in his custody under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, Territory, or District whence he escaped: and the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or posse comitatus of the proper county, when necessary to ensure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, any where in the State within which they are issued.

SEC. 6. And be it further enacted, That when a person held to service or labor in any State or Territory of the United States, ha: heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service 01 labor may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken, forthwith before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

SEC. 7. And be it further enacted, That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant

to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the District Court of the United States for the district in which such offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the District or Territorial Courts aforesaid, within whose jurisdiction the said offence may have been committed.

Sec. 8. And be it further enacted, That the marshals, their deputies, and the clerks of the said District and Territorial Courts, shall be paid, for their services, the like fees as may be allowed for similar services in other cases; and where such services are rendered exclusively in the arrest, custody, and delivery of the fugitive to the claimant, his or her agent or attorney, or where such supposed fugitive may be discharged out of custody for the want of sufficient proof as aforesaid, then such fees are to be paid in whole by such claimant, his or her agent or attorney; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery, inclusive of all services incident to such arrest and examination, to be paid, in either case, by the claimant, his or her agent or attorney. The person or persons authorized to execute the process to be issued by such commissioner for the arrest and detention of fugitives from service or labor as aforesaid, shall also be entitled to a fee of five dollars each for each person he or they may arrest, and take before any commissioner as aforesaid, at the instance and request of such claimant, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them; such as attending at the examination, keeping the fugitive in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioners; and, in general, for performing such other duties as may be required by such claimant, his or her attorney or agent, or commissioner in the premises, such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid by such claimants, their agents or attorneys, whether such supposed fugitives from service or labor be ordered to be delivered to such claimant by the final determination of such commissioner or not.

SEC. 9. And be it further enacted, That, upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force from his or their possession before he can be taken beyond the limits of the State in which the arrest is made, it shall be the duty of the officer making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled, and there to deliver him to said claimant, his agent, or attorney. And to this end, the officer aforesaid is hereby authorized and required to employ so many persons as he may deem necessary to overcome such force, and to retain them in his service so long as circumstances may require. The said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses, as are now allowed by law for transportation of criminals, to be certified by the judge of the district within which the arrest is made, and paid out of the treasury of the United States.

SEC. 10. And be it further enacted, That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said court, being produced in any other State, Territory, or district in which the person so escaping may be found, and being exhibited to any judge, commissioner,

or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production by the said party of other and further evidence if necessary, either oral or by affidavit, in addition to what is contained in the said record of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorized by this act to grant certificates to claimants or fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the State or Territory from which he escaped: Provided, That nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid. But in its absence the claim shall be heard and determined upon other satisfactory proofs, competent in law.

Approved, September 18, 1850

Historical Documents

National Center Home Page

Sotomayor Differs With Obama On 'Empathy' Issue

JULY 14, 2009 5:32 PM ET

Judge Sonia Sotomayor told senators Tuesday that she disagreed with President Obama when he said that in a certain percentage of judicial decisions, "the critical ingredient is supplied by what is in the judge's heart."

Obama made those comments in 2005, at the confirmation hearings for Chief Justice John Roberts, whom Obama voted against.

When asked by Arizona Republican Sen. Jon Kyl whether she agreed with Obama's statement, Sotomayor said, "No, sir, I wouldn't approach the issue of judging the way the president does."

"I can only explain what I think judges should do," Sotomayor said, adding, "Judges can't rely on what's in their heart. ... It's not the heart that compels conclusions in cases, it's the law."

Kyl was one of several aggressive questioners on the Senate Judiciary Committee whom Sotomayor faced Tuesday. Many took issue with President Obama's statement that "empathy" was one of the qualities he wanted in a Supreme Court nominee. Sotomayor spent the second day of her Supreme Court confirmation hearings repeatedly emphasizing her impartiality as a judge.

Sotomayor said judges must decide each case based on specific facts and law, rather than on personal, subjective considerations. She defended her record as free from personal or ethnic bias, and she affirmed the importance of Supreme Court precedent in cases ranging from abortion to gun rights.

As Tuesday morning began, judiciary committee Chairman Sen. Patrick Leahy, a Democrat from Vermont, asked Sotomayor a series of friendly questions about the appropriate role of a judge.

Sotomayor replied, "The process of judging is a process of keeping an open mind. It's the process of not coming to a decision with a prejudgment ever of an outcome." She told Leahy that judges must make "a decision that is limited to what the law says on the facts before the judge."

Her statement was a direct response to Republicans' concerns that Sotomayor will rely too much on empathy if confirmed to the nation's highest court. Ranking Republican Sen. Jeff Sessions of Alabama said those statements strike the right note, and "had you been saying that with clarity over the last decade or 15 years, we'd have a lot fewer problems today."

Sessions said he was troubled by "a body of thought over a period of years" suggesting Sotomayor believes that a judge's background will affect the result in cases.

The nominee rejected that characterization. "My record shows that at no point in time have I permitted my personal views or sympathies to influence the outcome of a case," she told

Sessions. "In every case where I have identified a sympathy, I have articulated it and explained to the litigant why the law requires a different result."

THE WALL STREET JOURNAL.

OPINION

Why Obama Voted Against Roberts

'He has used his formidable skills on behalf of the strong in opposition to the weak.'

Updated June 2, 2009 12:01 a.m. ET

The following is from then-Sen. Barack Obama's floor statement explaining why he would vote against confirming Supreme Court Chief Justice John Roberts (September 2005):

. . . [T]he decision with respect to Judge Roberts' nomination has not been an easy one for me to make. As some of you know, I have not only argued cases before appellate courts but for 10 years was a member of the University of Chicago Law School faculty and taught courses in constitutional law. Part of the culture of the University of Chicago Law School faculty is to maintain a sense of collegiality between those people who hold different views. What engenders respect is not the particular outcome that a legal scholar arrives at but, rather, the intellectual rigor and honesty with which he or she arrives at a decision.

Given that background, I am sorely tempted to vote for Judge Roberts based on my study of his resume, his conduct during the hearings, and a conversation I had with him yesterday afternoon. There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land. Moreover, he seems to have the comportment and the temperament that makes for a good judge. He is humble, he is personally decent, and he appears to be respectful of different points of view.

It is absolutely clear to me that Judge Roberts truly loves the law. He couldn't have achieved his excellent record as an advocate before the Supreme Court without that passion for the law, and it became apparent to me in our conversation that he does, in fact, deeply respect the basic precepts that go into deciding 95% of the cases that come before the federal court -- adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the

adversarial system. All of these characteristics make me want to vote for Judge Roberts.

The problem I face -- a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts -- is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95% of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95% of the cases -- what matters on the Supreme Court is those 5% of cases that are truly difficult.

In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.

In those 5% of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country, or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions, or whether the Commerce Clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce, whether a person who is disabled has the right to be accommodated so they can work alongside those who are nondisabled -- in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.

I talked to Judge Roberts about this. Judge Roberts confessed that, unlike maybe professional politicians, it is not easy for him to talk about his values and his deeper feelings. That is not how he is trained. He did say he doesn't like bullies and has always viewed the law as a way of evening out the playing field between the strong and the weak.

I was impressed with that statement because I view the law in much the same way. The problem I had is that when I examined Judge Roberts' record and history of public service, it is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak. In his work in the White House and the Solicitor General's Office, he seemed to have consistently sided with those who were dismissive of efforts to eradicate the remnants of racial discrimination in our political process. In these same positions, he seemed dismissive of the concerns that it is harder to make it in this world and in this economy when you are a woman rather than a man.

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I want to take Judge Roberts at his word that he doesn't like bullies and he sees the law and the court as a means of evening the playing field between the strong and the weak. But given the gravity of the position to which he will undoubtedly ascend and the gravity of the decisions in which he will undoubtedly participate during his tenure on the court, I ultimately have to give more weight to his deeds and the overarching political philosophy that he appears to have shared with those in power than to the assuring words that he provided me in our meeting.

The bottom line is this: I will be voting against John Roberts' nomination. . . .

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The Opinion Pages | EDITORIAL

President Trump's Real Fear: The Courts

By THE EDITORIAL BOARD FEB. 6, 2017

When President Trump doesn't get what he wants, he tends to look for someone to blame — crooked pollsters, fraudulent voters, lying journalists. Anyone who questions him or his actions becomes his foe.

Over the past few days, he's added an entire branch of the federal government to his enemies list.

On Friday, a federal judge in Seattle, James Robart, blocked Mr. Trump's executive order barring entry to refugees and immigrants from seven predominantly Muslim nations. The next day the president mocked Judge Robart, a George W. Bush appointee, in a statement on Twitter as a "so-called judge" who had made a "ridiculous" ruling.

That was bad enough, but on Sunday, Mr. Trump's taunts became more chilling. "Just cannot believe a judge would put our country in such peril," he tweeted. "If something happens blame him and court system. People pouring in. Bad!"

Where to begin? In the same week that he announced his nominee for the Supreme Court, the president of the United States pre-emptively accused not only a judge, but the whole judicial branch — the most dependable check on his power — of

abetting the murder of Americans by terrorists. It's reasonable to wonder whether Mr. Trump is anticipating a way to blame meddling courts for any future attack.

There was, in fact, a terrorist attack shortly after Mr. Trump issued his immigration order: a white supremacist, officials say, armed himself with an assault rifle and stormed a mosque in Quebec City, slaughtering six Muslims during their prayers. Mr. Trump has not said a word about that massacre — although he was quick to tell America on Twitter to "get smart" when, a few days later, an Egyptian man wielding a knife attacked a military patrol in Paris, injuring one soldier.

In the dark world that Mr. Trump and his top adviser, Stephen Bannon, inhabit, getting "smart" means shutting down immigration from countries that have not been responsible for a single attack in the United States in more than two decades. As multiple national security experts have said, the order would, if anything, increase the terrorism threat to Americans. And contrary to Mr. Trump's claim, no one is "pouring in" to America. Refugees and other immigrants already undergo a thorough, multilayered vetting process that can take up to two years.

But Mr. Trump's threats are based on fear, not rationality, which is the realm of the courts.

Judge Robart is not the first judge Mr. Trump has smeared. During the presidential campaign last year, he pursued bigoted attacks on a federal judge presiding over a class-action fraud lawsuit against his so-called Trump University. The judge, Gonzalo Curiel, could not be impartial, Mr. Trump claimed, because he "happens to be, we believe, Mexican," and Mr. Trump had promised to build a border wall and deport millions of undocumented Mexican immigrants. (Judge Curiel was born in Indiana, and Mr. Trump settled the lawsuit in November for $25 million.)

Coming from a candidate, this was merely outrageous; coming from the president, it is a threat to the rule of law. Judges can now assume that if they disagree with him, they will face his wrath — and perhaps that of his millions of Twitter followers.

Mr. Trump's repeated attacks on the judiciary are all the more ominous given his efforts to intimidate and undermine the news media and Congress's willingness to neutralize itself, rather than hold him to account.

Today, at least, the new administration is following the rules and appealing Judge Robart's decision to the federal appeals court. But tomorrow Mr. Trump may decide — out of anger at a ruling or sheer spite at a judge — that he doesn't need to obey a court order. Who will stop him then?

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A version of this editorial appears in print on February 7, 2017, on Page A20 of the New York edition with the headline: Mr. Trump's Real Fear: The Courts.
