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

## The Lemmon Slave Case

BY JOHN D. GORDAN, III

*I*N *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

*“Every person...brought  
into this State as a slave...  
shall be FREE”*

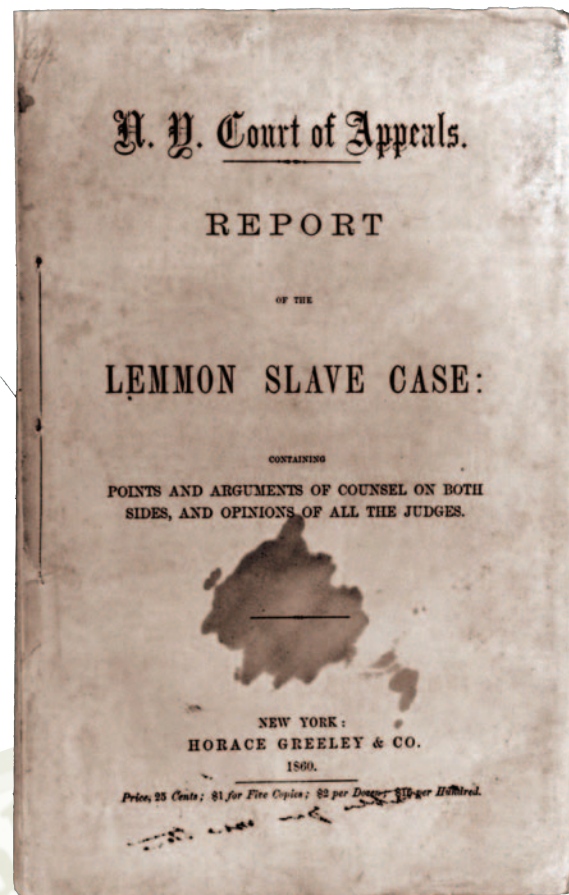
1 Revised Statutes of New York  
(part I, ch XX, tit VII § 1 [3d ed 1846])

of individual states, slavery was an issue in the courts in three principal categories:

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.<sup>1</sup> The enforcement of the Fugitive Slave Acts in the free states of the North was often explosive and sometimes violent.<sup>2</sup> 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-

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



PAGE 3: DANIEL J. KORNSTEIN

## THE ROBERSON PRIVACY CONTROVERSY

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

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## From the Executive Director

### Dear Members

**It is with great pleasure that I introduce myself as your new Executive Director.** I am so impressed with the achievements of the Historical Society since its founding only a few years ago, and am privileged to assume this position.

We are pleased to present you with our fourth publication of articles of historical interest concerning the legal and judicial history of New York. This edition features two historic and hugely consequential cases heard by the New York Court of Appeals. The *Lemmon Slave Case* article recounts how the Court spoke out in 1860 against slavery in the clearest possible terms, renouncing the then recently decided *Dred Scott* decision of the United States Supreme Court. The *Roberson Privacy Controversy* tells the story of Abigail Roberson's quest for justice as she sought protection of her right of privacy against a company that used her picture for advertisement without her knowledge or consent.

We are introducing a new feature, *Letters to the Editor*, and we welcome your opinions, comments and reminiscences responding to our articles.

I can't miss this opportunity to thank our wonderful Editor-in-Chief, Henry M. Greenberg, our Board of Editors, Associate Editors and talented Graphic Designer for making a publication of this quality possible.

By now you will have received our 2006 calendar, once again displaying with great beauty and interesting vignettes postcards of the courthouses of New York. Publication of Volume I of New York Legal History, our scholarly journal, marks a milestone in our production of legal scholarship, and we are turning our attention to the next volume. Hopefully, many of you saw the front page article in the February 2, 2006 *New York Law Journal* reporting on the oral history featured in our journal of former Court of Appeals Judge Richard D. Simons. We continue the important work of taking the oral histories of our prominent jurists so as to preserve this living legacy.

I'm delighted to report that our annual event will be held at The Association of the Bar of the City of New York on May 22, 2006 at 7:00 p.m. The program is entitled "The Scales of Justice: A Reargument of *Palsgraf v Long Island R.R. Co.*," and we hope you will join us for a "reargument" of the *Palsgraf* case, with oral argument followed by a bench that will engage in open deliberation with the audience looking on.

Finally, I want to mention our comprehensive website at: [www.courts.state.ny.us/history](http://www.courts.state.ny.us/history). It has recently been updated, and it is a fine source for the Historical Society's news, as a library and as a stop for purchasing gifts, as well as a convenient way to initiate or renew membership.

The year ahead is full of wonderful projects, expanding on our accomplishments. For example, we are developing a program in Buffalo that will tap into the rich legacy of contributions to New York's legal and judicial history by the western region of our State. We are also co-sponsoring a lecture series with The New York Court of Appeals. (See *Upcoming Events* on pg. 7.)

Furthering our mission is impossible without your support. We count on your continuing membership. Please remember that the Historical Society is an independent not-for-profit, and it is your generosity alone that makes the work of the Historical Society a reality. ■

**Marilyn Marcus**

*Executive Director*

## Letters to the Editor

### To the Editor:

Judge Jack Weinstein's warm reminiscence of his year as law clerk to [then Associate, later Chief] Judge Stanley H. Fuld, which appeared in Vol. 1, No. 2 of the Newsletter, brought back for me a flood of memories. Just a couple of years out of law school, as were my fellow Legal Aid Society and Assistant District Attorney colleagues, I had the distinct privilege of regularly appearing before Judge Fuld, both in the Court of Appeals and in chambers at criminal leave hearings, between January 1970

and his constitutionally-mandated retirement in December 1973.

A criminal leave application to the Court of Appeals (in contrast to a civil application, which entails a submitted motion to the full bench) may involve an in-chambers hearing before a single judge of the Court of Appeals. I was fortunate



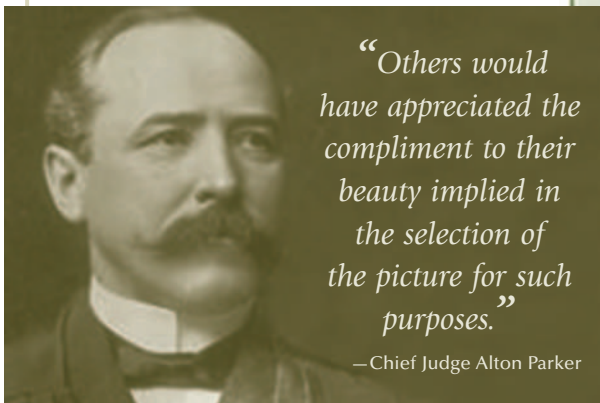
*Judge Stanley H. Fuld*



# THE ROBERSON PRIVACY CONTROVERSY

by Daniel J. Kornstein

The New York Court of Appeals is no stranger to legal controversy, although the nature of those disputes may change with the times. These days hot-button issues include the death penalty, school funding, the state budget and same-sex marriage. A little over a century ago, the great divisive issue was the right of privacy, an issue that today still generates an occasionally strong whiff of strife.



*"Others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes."*

—Chief Judge Alton Parker

Back in 1902, New York was the first state to face squarely the question of whether the common law should recognize a right of privacy. The answer given by New York's highest court was a resounding no, which immediately fueled widespread public and professional debate, provoked the State Legislature to react, was implicitly repudiated by its author, embodied the sexism of its time and continues to cast a long shadow on the law of New York and elsewhere.

*Roberson v. Rochester Folding Box Co.*<sup>1</sup> has never been a case just for New York lawyers alone. It is familiar to almost every lawyer and law student in America. It is one of those rare, special cases of first impression that stretch the limits of the law and are used by generations of law professors to illustrate the legal process and the zigzag way in which the law sometimes develops. A lightning rod of a judicial landmark, *Roberson* was the *Roe v. Wade* of its time, and 104 years later it retains great interest, stimulates much discussion and goes on yielding new insights.

The case has a heroine worth



*Likeness of Abigail Roberson appearing in Profitable Advertising (August, 1902), reproduced with the permission of the Public Library of Cincinnati and Hamilton County.*

remembering. Abigail Roberson, who lived in Rochester, was an attractive, strong-minded, sensitive, intelligent, tenacious, intrepid, plucky but shy young woman of 18 when the lawsuit started. She had some photographs made of herself at a studio, and her boyfriend told her that a friend of his was going to do a portrait from them. "Little did I realize what they were going to do with it," she reminisced in 1967.<sup>2</sup>

The teenager sued because a big milling company used her picture, without her prior knowledge or consent, and certainly without paying her, on 25,000 posters and magazine adver-

tisements to sell its flour. Rather than being flattered, Abigail was humiliated. Alleging she was an object of derision by jeering neighbors and as a result needed medical care, she sued for mental distress, seeking \$15,000 in damages and an injunction.

Although lower courts found that Abigail had stated a claim, the Court of Appeals disagreed. In a close four-to-three decision, the Court, over a vigorous, moving and prescient dissent by Judge John Gray, dismissed her complaint on the ground that no "so-called" right of privacy existed in New York. The majority opinion, written by Chief Judge Alton Parker, stressed the

*continued on page 4*



**Chief Judge Alton Parker**

*Reproduced with the permission of the Klyne Esopus Museum in Ulster Park, NY, from its collection.*

### Roberson Privacy Controversy

*continued from page 3*

lack of precedent, the purely mental character of the injury, the "vast field of litigation" that would ensue, the difficulty of distinguishing between public and private persons and the fear of interfering with First Amendment freedoms.

The Chief Judge tipped his hat to what has probably become the most famous law review article ever written. Parker pointed out that the right of privacy was first mentioned, "with attractiveness, and no inconsiderable ability" only 12 years earlier, in 1890, in a "clever" essay by Louis Brandeis and Samuel Warren in the *Harvard Law Review*.<sup>3</sup> But Chief Judge Parker and his three colleagues in the majority disagreed with Brandeis and Warren, concluding that invasion of privacy is "one of the ills that under the law cannot be redressed." The correct way to address the problem, suggested Chief Judge Parker, was to have the State Legislature, not the courts, change the law.

Today it is striking how many of the issues mentioned by Chief Judge Parker are still very much alive and unresolved. But that would be cold comfort for Abigail Roberson. After all, and despite the notion of change she stirred, she lost. Her strong spirit was unbroken, however, as she was soon to demonstrate.

Meanwhile, the decision in *Roberson*

*"I take this opportunity," the then 21-year-old Abigail wrote to presidential candidate Parker, "to remind you that you have no such right as that which you assert."*

hit a sensitive nerve and instantly produced an outburst of public and professional criticism. In a flurry of articles, the press, sympathetic to Abigail's plight, loudly opposed the Court's ruling. The *New York Times* printed several such articles, including one angry editorial that accurately described *Roberson* as having "excited as much amazement among lawyers and jurists as among the promiscuous lay public."<sup>4</sup> Typical contemporary comments were that *Roberson* was a "most unsatisfactory result,"<sup>5</sup> a decision "greatly to be regretted,"<sup>6</sup> that "one of the hopes of humanity is that courts sometimes reverse themselves,"<sup>7</sup> and that "the hour is ripe for the Legislature to step in."<sup>8</sup>

So loud and stinging was the public criticism that it led one of the Court of Appeals judges who had joined the majority to take an unprecedented and rarely repeated step. Judges do not usually defend their decisions except perhaps in later rulings. But five months after the *Roberson* ruling in June 1902, Judge Denis O'Brien published an extraordinary article in the *Columbia Law Review* in an effort to further explain and justify what he and his three fellow judges on the Court of Appeals had done in that case.<sup>9</sup>

"The right of privacy in such cases, if it exists at all," wrote Judge O'Brien, "is something that cannot be regulated by law." Even if such unauthorized commercial exploitation violated feelings and sensibilities, continued O'Brien, the "practical question" is whether regulation of such advertising would do "more harm than good." For one thing, litigation would proliferate. In a refrain familiar to modern lawyers, O'Brien pointed out that judges should not make new law but simply interpret and enforce existing law. For new laws, "resort must be had to the Legislature."

Taking its cue from O'Brien's article as well as from the *Roberson* majority opinion, the State Legislature acted quickly, and repudiated *Roberson* at its very next session. To overcome the effects of the Court of Appeals decision, the Legislature speedily passed what are now Sections 50 and 51 of the

New York Civil Rights Law. Section 50 makes invasion of privacy a misdemeanor, and Section 51 allows a private right of action for an injunction and damages where a plaintiff's name or likeness has been used for advertising purposes or for purposes of trade without written consent. Ever since 1903, this statute has been the primary if not sole source of privacy law in New York State. Abigail Roberson may not have won her lawsuit, but her case motivated the Legislature to change the law so that others after her could win.

Not only did the Legislature quickly repudiate the *Roberson* ruling, but so did its author, in a manner of speaking. Chief Judge Alton Parker, who had written the *Roberson* majority opinion, apparently had a change of heart based on his own later personal experience as a public figure. He recanted, sort of.

Parker, a politically active and prominent Democrat, became involved in national politics soon after the *Roberson* decision. At the 1904 Democratic Convention, Parker narrowly beat William Randolph Hearst for the presidential nomination and then resigned as New York's Chief Judge. Running as the Democratic candidate for President against Theodore Roosevelt in the election of 1904, Parker lost by the largest margin in American history up to that time. It is unclear if the magnitude of Parker's loss can in any way be attributed to his *Roberson* opinion.

During the 1904 campaign, Parker publicly complained about the paparazzi and how they were invading his and his family's privacy. "I reserve the right," Judge Parker declared in a press release, "to put my hand in my pockets, and to assume comfortable attitudes without having to be everlastingly afraid that I shall be snapped by some fellow with a camera." Parker refused to be photographed.

We do not know if Judge Parker's experience as a very public figure would have led him to vote differently in *Roberson*. Nor do we know if Judge Parker even appreciated the irony of his predicament. We do not even know if,



when he issued his press release about his right of privacy, he gave any thought to what he had written in the *Roberson* decision.

But we do know that at least one person did. Abigail Roberson, the feisty and articulate young plaintiff who lost, remembered. She connected the dots.

On hearing of Judge Parker's claimed "right" of privacy, she wrote a wonderfully sardonic and outraged letter to Parker that wound up on the front page of the July 27, 1904 edition of the *New York Times*. "I take this opportunity," the then 21-year-old Abigail wrote to presidential candidate Parker, "to remind you that you have no such right as that which you assert." We can easily imagine the twinkle in her eye, the wry smile on her face, and the determination in her heart as she continued, "I have very high authority for my statement, being nothing less than a decision of the Court of Appeals in this State, in which you wrote the prevailing opinion."

She pointed out to Parker that, as a "poor girl" who "never had courted publicity," she was "much more entitled" to a claim for privacy than he was as a candidate for President and "the legitimate center of public interest" who had "invited the curiosity" of the press. She concluded that "this incident well illustrates the truth of the old saying that it makes a lot of difference whose ox is gored."

We read this remarkable letter today, and we silently cheer Abigail on with an enthusiastic and admiring, "You go girl!"

Of course, Abigail was on to something deeper than one judge's inconsistency or the distinction between public and private figures. The judicial opinions in *Roberson* as well as reaction to them were suffused with sexism. (It was not until 1983 that the first woman — now our Chief Judge Judith Kaye — sat on the Court of Appeals.) The *Roberson* opinions reflected a paternalistic, protective and demeaning attitude, a pitying condescension toward women that today would be regarded as sexist, if not archaic and chauvinistic.

Chief Judge Parker's majority opinion mocked Abigail's claim, saying, with patronizing male haughtiness, "Others would have appreciated the compliment to their beauty implied in

the selection of the picture for such purposes." Fellow Judge O'Brien wondered in his law review article how it was possible to harm a woman's feelings by depicting her good looks. "A woman's beauty, next to her virtues, is her earthly crown," he wrote. "But it would be a degradation to hedge it about by rules and principles applicable to property in lands and chattels."

Imagine telling that to the likes of Naomi Campbell or Heidi Klum, or their business managers for that matter. Even the dissent mentioned the "mortifying notoriety" that "a young woman" "must submit to" as a result of the advertisements in question (which in fact were no more than a profile of Abigail from the neck up).

And the *Albany Law Journal* stated, "Every considerate person will sympathize with pretty young women in their aversion to having their portraits or photographs paraded before the public to advertise brands of flour, corsets, or mayhap, cheap cigars."<sup>10</sup>

In light of such unabashedly sexist comments, we inwardly grin as we discover how the spirit of the women's rights movement truly hovers over the *Roberson* case. Both opinions in *Roberson* refer to a case decided a few years earlier by the Court of Appeals in which a nephew of a famous philanthropist objected to his deceased aunt's statue being erected next to a statue of Susan B. Anthony, the famous suffragette and activist.<sup>11</sup> The nephew did not like Anthony's crusade on behalf of women. Inasmuch as the nephew lost, the majority in *Roberson* cited the statue case as authority, while the dissent distinguished it.

There is something symbolic and particularly apt about both *Roberson* opinions discussing the iconic Susan B. Anthony. It is as if one of the patron saints of the women's movement acted from beyond the grave as spunky Abigail's cornerperson in this fight,

*Continued on page 6*

*Above: Campaign button for Alton Parker as the Democratic candidate for President against Theodore Roosevelt in the election of 1904*

*Right (and continued on page 6): The New York Times, July 27, 1904*



## PARKER TAKEN TO TASK BY AN INDIGNANT WOMAN

*If I Can Be Photographed, Why  
Not You? Asks Miss Roberson.*

### QUOTES HIS OWN DECISION

*If the Millers May Legally Picture Her  
on Their Flour Sacks How Can the  
Judge Object to Snap-Shotters?*

*Special to The New York Times.*

ROCHESTER, N. Y., July 26.—Alton B. Parker, Democratic candidate for President, said last week that he did not propose to be photographed by camera men. This statement has called forth a protest from Miss Abigail Roberson of this city, the young woman who last year sued a big milling company for damages for publishing her likeness on one of their advertisements, and whose prayer for relief was denied by the Court of Appeals, of which Judge Parker was and still is Chief Justice. Miss Roberson yesterday sent a letter to Judge Parker. Among other things she says:

"My Dear Sir: I read in The Associated Press dispatches yesterday afternoon that Mrs. Parker was obliged to leave home to avoid the annoyance of ubiquitous photographers, notwithstanding the warning given by you and reported in the same dispatches last Saturday morning in which it was announced that that would be the last day of promiscuous photographing of yourself and family, and wherein you are quoted as saying: 'I reserve the right to put my hands in my pockets and assume comfortable attitudes without being everlastingly afraid that I shall be snapped by some fellow with a camera.'"

"I take this opportunity to remind you that you have no such right as that which you assert. I have very high authority for my statement, being nothing less than a decision of the Court of Appeals of this State wherein you wrote the prevailing opinion. The action was one in which I was the plaintiff, and the Rochester Folding Box Company and another corporation were the defendants, and is reported in 171 New York at Page 538.

"You may recollect that the facts in that case were undisputed, and that it was admitted that the defendants without my knowledge or consent, and knowing that they had no right or authority so to do, had secured my photograph, and, having caused it to be enlarged and lithographed in life size, had circulated about 25,000 copies thereof as an advertisement of the commodities in which one of the defendants dealt; that the likenesses were posted conspicuously in stores, warehouses, saloons, and other public places, and had been recognized by my friends and others; that my good name had been attacked. I desired an injunction against the defendants restraining the further use thereof.

"The question arose upon demurrer, and the Special Term held that the complaint entitled me to relief. The Appellate Division of the Fourth Department unanimously affirmed that decision, and upon the appeal to the Court of Appeals this latter court was divided, three of the Judges

*Continued on page 6*



deciding with you that the facts admitted furnished no ground for relief and three dissenting. You referred to my cause of action as a 'so-called' right of privacy, and admitted that such publicity, 'which some find agreeable,' is to plaintiff very distasteful, and that I suffered mental distress, 'when others would have appreciated the compliment to their beauty,' and in an opinion sixteen pages long you arrived at the conclusion that I had no rights that could be protected by your tribunal.

"To be perfectly fair to you, I ought to say that you expressly excused from the effect of your decision any publication under similar circumstances which was in its nature libelous. It necessarily follows, therefore, when you now say that you reserve the 'right' not to be photographed with your hands in your pockets or in other comfortable attitudes, either that you are asserting a right for yourself and your family which you are unwilling to accord to litigants before your court, or else that there is something in the attitude suggested of such a nature that a reproduction of it with photographic exactness would be necessarily libelous. It is not apparent how your likeness in the attitude suggested could be libelous, at least not as long as you kept your hands in your own pockets.

"I am forced to the conclusion that this incident well illustrates the truth of the old saying that it makes a lot of difference whose ox is gored. I sympathize with Mrs. Parker in her annoyance, but I know of no reason why you or your family have any rights of the nature suggested which do not equally belong to me. Indeed, as between us, I submit that I was much more entitled to protection than you.

"I was a poor girl making my living by my daily efforts, and never had courted publicity in any manner. I had never appeared before the public in any capacity nor solicited any favor at its hands. You, on the other hand, are a candidate for the highest office in the gift of the people of the United States, and that fact makes you the legitimate centre of public interest. You are asking the suffrage of the American public, and the American public would seem to have some legitimate right of investigation. Your candidacy is something more than merely voluntary, and it may fairly be said that you have invited the curiosity which we have both found to be somewhat annoying.

"To this extent, at least, it would seem to me that the right which you denied me, but which you now assert for yourself, was stronger in my case than in yours."

Judge Parker, in deciding Miss Roberson's case, denied that privacy existed as a legal right. In his opinion he recognized the sympathy to which she was entitled, and the impertinence of the milling company in refusing to be governed by her wishes, but he denied the right of an individual to prevent his features from becoming known outside of his circle of friends and acquaintances.

In the course of his opinion he says: "The right of privacy, once established as a legal doctrine, cannot be restrained to the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits. And were the 'right of privacy' once legally asserted, it would necessarily be held to include the same things if spoken instead of printed; for one as well as the other invades the right to be absolutely let alone. Insult would certainly be in violation of such a right, and with many persons would more seriously wound their feelings than would the publication of their picture; and so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to imply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right, enforceable by injunction."

## "The right of privacy in such cases, if it exists at all," "is something that cannot be regulated"

### Roberson Privacy Controversy

continued from page 5

lending her authority and prestige to a new generation.

Much has happened in the law of privacy (as well as in gender attitudes generally) since *Roberson* was decided by the Court of Appeals in 1902. Criticism of *Roberson* heralded what was to come. Three years later, the Supreme Court of Georgia rejected *Roberson's* reasoning, cited the *Roberson* dissent with approval, and found a common law right of privacy.<sup>12</sup> The Georgia case, not *Roberson*, was the wave of the future. Over time, that right of privacy has developed greatly throughout America, but not without struggle. Its constitutional dimensions — affecting rights of abortion, private sexual conduct, how to die and other aspects of personhood — continue to generate considerable controversy.

The case had considerable impact on Abigail's lawyer, Milton E. Gibbs, who was 30 years old when he took her case. Called "highly ambitious" by Abigail in the 1967 interview with the *Rochester Democrat & Chronicle*,<sup>13</sup> Gibbs greatly benefitted from the publicity produced by *Roberson*. Within a year of the Court of Appeals ruling, he became a judge and later sat on the bench of the State Court of Claims, where he served until 1940, when he died at age 69. In 1913, Gibbs was nominated by the Governor to become State Hospital Commissioner, but the opposition was so great that he was not confirmed. At his confirmation hearing, the testimony against Gibbs came mainly from former clients who claimed Gibbs had withheld money due them in a legal case.

And what happened to Abigail Roberson? Abigail's brother put her through music school, and she became a piano player in silent movie theaters, some of which she managed. She survived to see the right of privacy, shaped in part by her, grow and flourish. A sickly young girl, Abigail lived a long life, dying in 1977 at the age of 94. Commenting on the doctors who predicted she would not live to 21, Abigail, when she was 84, noted with mordant wit: "Well, they're all pushing

up daisies now, and I'm still going."

But the *Roberson* ruling has had an even longer life. Reports of its death are exaggerated. Though supposedly overruled by the Legislature, *Roberson* still has a lingering impact on New York law. It too is "still going." The Court of Appeals has never overruled, seriously challenged or even undercut its 1902 decision. On the contrary, that Court has consistently and as recently as 2000 invoked *Roberson* to hold, despite erroneous predictions to the contrary by federal courts in New York, that no common law right of privacy exists in New York.<sup>14</sup>

This means that beyond the confines of the Civil Rights Law, an invasion of privacy suit under New York law will probably fail — unless a court is willing to re-start an old controversy. More broadly, *Roberson* stands for a view of the legal process that even today has many adherents. Echoing what the majority stated in *Roberson* (and what Judge O'Brien said in his law review article), the Court of Appeals in 1993 again advised that adoption of a right of privacy is "best left to the Legislature."<sup>15</sup>

How times have changed! Can you imagine the legal ramifications today of taking a picture of some idle stranger and linking it to an advertisement? How many people would be out of money from just one stolen snapshot? Let's see. For starters: a model management firm, a photographer, an editor, an advertising agency corporate counsel, advertising counsel for reviewing contracts and — let's not forget — the person photographed.

In today's world of advertising, no one would think of placing an image on a poster or in a magazine without consent, contracts and commission. Perhaps Abigail Roberson realized how much she changed things. Did anyone ever thank her for all the fields of commerce that were created by her case and the reaction to it?

It is tempting to say that *Roberson* was simply bad law from the start, that the Court of Appeals just got it wrong, and that the case obviously should have been overruled long ago. It is tempting, very tempting, but it may be



wrote Judge O'Brien,  
by law."

misleading and overly simplistic. Reality is more complicated, especially given the passage of time and the intervening institutional interplay between the Court of Appeals and the Legislature.

It is one thing to consider how an issue should be decided initially, it is quite another to reconsider an issue resolved over a century earlier. Today the question posed by *Roberson* is no longer one of first impression. The slate is no longer blank. The Legislature, for example, has rejected proposed bills to expand privacy tort liability in New York. Such factors may or may not be dispositive, but they should at least be weighed.

What makes *Roberson* endlessly fascinating is its uncommon confluence of several issues that have never yet been fully resolved to everyone's satisfaction: the source and scope of the right of privacy, the respective roles of judges and legislatures in creating new legal rights, the need for the common law to keep pace with changing conditions, the way courts can speak to each other and to other branches of government, the specter (real or imagined) of increased litigation, the effect of a dissenting opinion on the future course of the law, the potential for legal periodicals to influence courts, the desirability of judges commenting on their decided cases and the importance of avoiding sexism in the law.

*Roberson* had all these debatable issues and more. It is peopled with fascinating characters. Whether or not we agree with its outcome, *Roberson* is a riveting case that still merits careful study, for the many controversies embedded in it are far from settled. Just as we can sometimes see a world in a grain of sand, so too can we occasionally see much of the legal universe in a single case.

Susan Washington, currently the Rochester public librarian for Local History and Genealogy, put it best. Responding to our request for information, she wrote: "I will be raising a glass to Abbie this weekend! Thank you for the interesting search." ■

Endnotes on page 13

# Upcoming Events

## MAY

**Annual Lecture: May 22, 2006 • 6:00 P.M.**

### **THE SCALES OF JUSTICE: A REARGUMENT OF PALSGRAF V LONG ISLAND R.R. CO.**

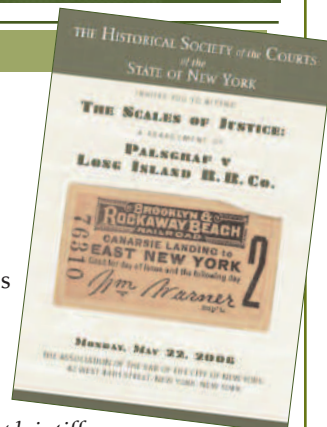
Moot Court Presentation of The New York Court of Appeals arguments in and deliberations of this famous case.

The Association of the Bar of the City of New York  
42 West 44th Street, New York City

ADVOCATES: Henry G. Miller, Esq., White Plains, NY, for the plaintiff

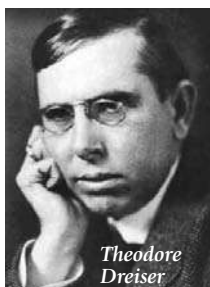
Hon. Robert S. Smith, Associate Judge NYS Court of Appeals, for the defendant

BENCH: Hon. Howard A. Levine, Albany, NY, Chief Judge; Caitlin J. Halligan, Esq.; Solicitor General, Dept. Of Law, New York, NY; Judith A. Livingston, Esq., New York, NY; Bettina Plevan, Esq., New York, NY; Roy L. Reardon, Esq., New York, NY  
(Look For your invitation in the mail.)



## JUNE Co-sponsored by: The Historical Society of the Courts of the State of New York

### **The New York Court of Appeals Lecture Series: Second Lecture Dreiser's "An American Tragedy": The Law and the Arts Court of Appeals Hall, Albany, New York • June 26, 2006 at 6:00 pm**



SPEAKERS: Francesca Zambello, director of opera and theater and Susan Herman, Centennial Professor of Law at Brooklyn Law School

The death of Grace Brown 100 years ago and the ensuing murder trial (*P. v Gillette*) argued before The New York Court of Appeals became the basis of Theodore Dreiser's famous novel, *An American Tragedy*, the Hollywood movies *An American Tragedy* and *A Place in the Sun* and the opera *An American Tragedy*. This program will examine the connection between cases-at-law and the artistic works derived from them.

**Francesca Zambello** is an internationally renowned director of opera and theater. She is the director of the world premier of Tobias Picker's opera *An American Tragedy* at the Metropolitan Opera (2005). Her American debut took place at the Houston Grand Opera with a production of *Fidelio* in 1984. She debuted in Europe at Teatro la Fenice in Venice with *Beatrice di Tenda* in 1987 and has since staged new productions at major theaters and opera houses in Europe and the USA. Collaborating with outstanding artists and designers and promoting emerging talent, she takes a special interest in new music theater works, innovative productions and in producing theater and opera for wider audiences.

**Susan Herman** conducts a Law and Literature seminar in which she examines the representation of law, lawyers and the legal process in fictional works by such writers as Melville, Twain, Faulkner, Camus, Toni Morrison and David Mamet. In the seminar, she addresses the extent to which the interpretation of law and interpretation of literature are enterprises sharing common problems and methods.

The lecture is open to the public and is free of charge. RSVP (518- 455-7795) is essential.

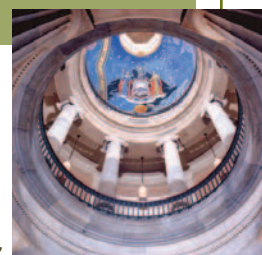
## AUTUMN Co-sponsored by: The Historical Society

### **The New York Court of Appeals Lecture Series: Third Lecture**

### **The Shape of Justice: Law and Architecture**

Further information will be provided when available.

The Rotunda of the Court of Appeals in Albany



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.<sup>3</sup>

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*,<sup>4</sup> 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;<sup>5</sup> *United States ex rel. Wheeler v Williamson*,<sup>6</sup> 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;<sup>7</sup> and finally, the decision of the Supreme Court of the United States in the case of *Dred Scott v Sanford*.<sup>8</sup> 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.<sup>9</sup>

## 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.

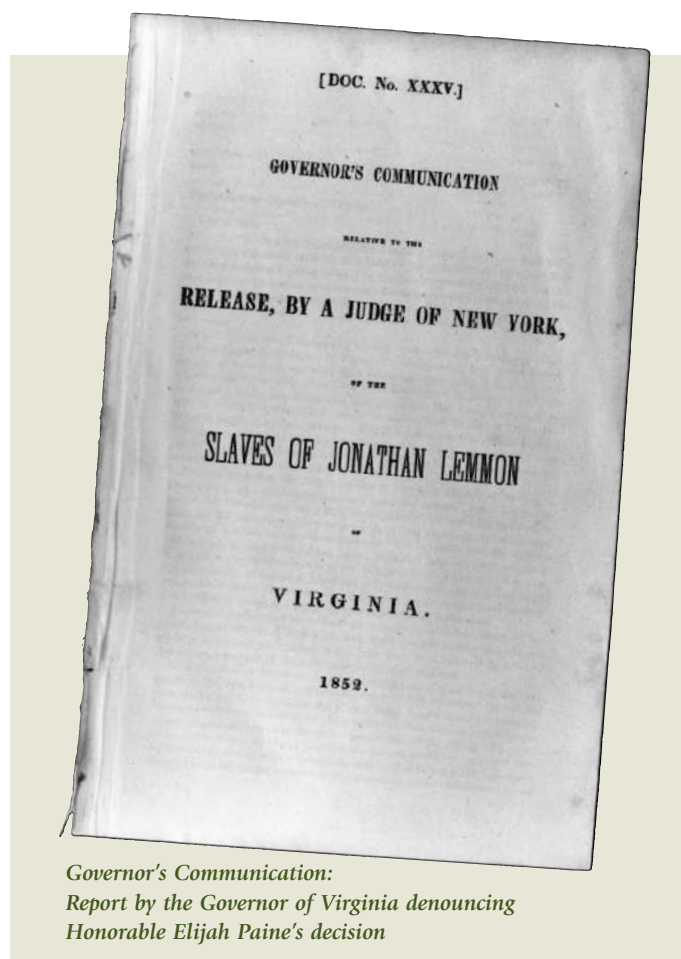
## NEW YORK LAW OF SLAVERY

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.<sup>10</sup> 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 Orleans. Last tow he sent me were from North Carolia. The sevrul checks your father sent me from time to time amounted to fifty Dollars on the Albany State Bank. In his death all lost a true freind to humanity. And yet he remembered the poor fugitive in defianc[e] of the Law. Yours very Respectfully,*

*Stephen Myers  
supt of the underground RR<sup>11</sup>*

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



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

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

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.<sup>13</sup>

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.<sup>14</sup>

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'Connor 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'Connor. 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'Connor 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'Connor 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'Connor demurred but offered to look into it.<sup>15</sup>

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.<sup>16</sup> 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'Connor, 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'Connor 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'Connor 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:

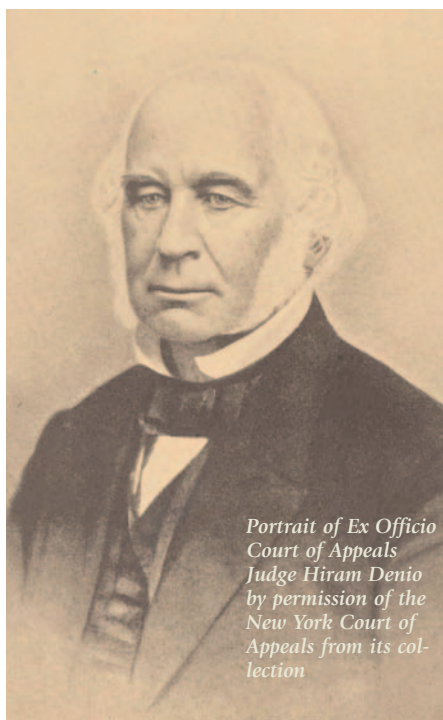
*"But what must be thought of the inhabitants of the Free States, who know that it is wicked, who say that it is wicked, who write upon their statute books, in their supreme, sovereign capacity, that it is wicked, and who yet live under a constitution and compact by which they agree to support and sustain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

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'Connor'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'Connor'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



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



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

them, and congressional legislation had not exclusively occupied the field.

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

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

## THE END OF THE CASE

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

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

## ENDNOTES

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

## Letters to the Editor *continued from page 2*

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

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

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

My nerves were further agitated when my adversary, the highly regarded William I. Siegel, head of the Appeals Bureau in the Kings County District Attorney's Office, informed me that he, as a young lawyer, had come to these very chambers to argue a leave application before Chief Judge Cardozo. When Mr. Siegel and I were invited to appear before Judge Fuld, the judge welcomed us, made it clear that he understood we were there on a serious matter and got right down to business. As the principal point I had raised in my leave-application letter presented an "unpreserved," i.e., unobjected-to, issue, Judge Fuld stated at the outset that the court on which he sat was a court of limited jurisdiction, restricted by Art. I, Sec. 3, of the New York State Constitution to determining "questions of law." When I, citing the majority opinion (in which he had joined) in *People v. McLucas*, 15 N.Y.2d 167 (1965), argued that deprivation of certain fundamental constitutional rights may be considered on appeal to the Court of Appeals even in the absence of a specific, timely objection, the Judge

responded, "McLucas is unfortunately a 'dead letter.'" Even though it was at that point patent, even to me, that my application was not going to prevail, the always courteous, courtly jurist displayed the utmost patience, permitting me to argue at whatever length I deemed necessary the several subsidiary points I had advanced.

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

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

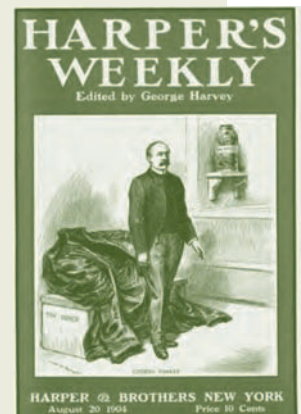
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## ROBERSON ENDNOTES

*continued from page 7*

1. 171 N.Y. 538 (1902).
2. *Rochester Democrat & Chronicle*, Jan. 15, 1967, at 3A, col. 3.
3. Samuel Warren & Louis Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890).
4. "The Right of Privacy," N.Y. Times, Aug. 23, 1902, at 8, col. 3.
5. Gordon, "The Right of Privacy," 22 Can. L. Times 281, 285, 288 (1902).
6. N.Y. Times, Oct. 26, 1902, at 5, Col. 1.
7. 47 *Collier's Weekly* 3 (1902).
8. Comment, 46 *Harper's Weekly* 984 (1902).
9. Denis O'Brien, "The Right of Privacy," 2 Colum. L. Rev. 437 (1902).

10. Current Topics, 63 *Alb. L. J.* 337 (1901).
11. *Schuyler v. Curtis*, 147 N.Y. 434 (1895).
12. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905).
13. See *Rochester Democrat & Chronicle*, *supra* note 2.
14. *Messenger v. Gruner + Jahr Printing & Publishing*, 94 N.Y.2d 436, 441, 706 N.Y.S.2d 52 (2000).
15. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123-24, 596 N.Y.S.2d 350, 354 (1993).





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