THE INDIANA SUPREME COURT AND THE STRUGGLE AGAINST SLAVERY

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James Scott of Clark County, Jesse Holman of Dearborn County and John Johnson of Knox County, took the bench for the first term of the Indiana Supreme Court on May 5, 1817.[1] Only two cases were on motion to the court in the first term, and only three in the second term.[2] By the court's second term, Isaac Blackford had been appointed to the bench to fill the vacancy left by the death of John Johnson.[3]

Indiana had just attained statehood, and its supreme court was quickly confronted with the issue of slavery. From its very first opinions dealing with slavery, the court held that Indiana was a free state that allowed neither slavery nor involuntary servitude.[4] With a few aberrations, the court held the line against slavery through numerous opinions decided before and during the Civil War era. This task was not always easy because Indiana borders Kentucky, at that time, a slaveholding state. This Article examines the historical, political and social context of a few of the court's more significant cases decided between its inception in 1817 and 1866.

Three years after its inception, the Indiana Supreme Court heard its first slavery case. *Lasselle v. State*[5] examined the Knox Circuit Court's ruling in *Polly (a woman of colour) v. Lasselle* that allowed Lasselle to exercise ownership over Polly.[6] Lasselle had bought Polly's mother from Indians inhabiting the Northwest Territory before it was ceded to the United States. While in Lasselle's custody, Polly filed for a writ of habeas corpus in the trial court seeking her freedom.[7] Polly's attorneys argued that although her mother may have been taken by Indians and sold as a slave, "yet by the laws of nature and nation," neither Polly nor her

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The author would like to thank Clarence Williams, Locke Reynolds Boyd & Weisell, Julia Orzeske, Donald Kite, Sr., Randall Thompson, Justice Richard Givan, Chief Justice Randall Shepard, and the staff of the Indiana State Library for their support, research assistance and comments during the writing of this paper.

1. 1 LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 181 (1916).
2. ISRAEL G. BLAKE, THE HOLMANS OF VERAESTAU 16 (1943).
3. 1 MONKS, *supra* note 1, at 182.
4. State v. Lasselle, 1 Blackf. 60 (Ind. 1820); *In re* Clark, 1 Blackf. 122 (Ind. 1821) (entitled in the reporter as "The Case of Mary Clark, a Woman of Color").
5. 1 Blackf. at 60.
6. *Id.* at 61.
7. Record at 1, Polly (a woman of colour) v. Lasselle (Knox Cir. Ct. 1820) (handwritten) (contained in Indiana Supreme Court case file, State v. Lasselle, July term, 1820, on file with Indiana State Archives, Commission on Public Records, Indianapolis) [hereinafter *Polly (a woman of colour)*].

offspring could be held as slaves.[8] Specifically, Polly's attorneys argued that because Polly was born after the Ordinance of 1787, which prohibited slavery and involuntary servitude in the Northwest Territory,[9] she was entitled to freedom.[10]

The Knox Circuit Court determined that: (1) because Polly's mother was a slave prior to the passage of the Ordinance of 1787 and prior to the Northwest Territory being ceded from Virginia, where slavery was legal, passage of the Ordinance of 1787 did not liberate Polly's mother[11]; and (2) because, in slave states, the master was entitled to the benefit of the slave and the slave's offspring, there is "no reason why it should not be the case here."[12] Therefore, the court held that Polly "was born a slave, [and Lasselle] can hold her as such."[13]

The Indiana Supreme Court reversed the decision of the trial court, freed Polly, and awarded her costs against Lasselle.[14] Relying on the Indiana Constitution of 1816, Judge Scott wrote:

> In the 11th article of that instrument, sec. 7, it is declared, that "There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." It is evident that by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed.[15]

The will of Indiana's people, as expressed in her constitution, was that "slavery can have no existence in the State of Indiana . . . ."[16]

In addition to being the first case decided by the Indiana Supreme Court addressing the issue of slavery, *Lasselle* is notable for a number of other reasons, including the parties and the attorneys involved. Hyacinthe Lasselle was a man of some fame as the principal tavernkeeper in Vincennes, Indiana.[17] Jacob Call, who later became a judge and eventually a congressman, was Lasselle's attorney.[18] Amory Kinney, Moses Tabbs and Col. George McDonald represented Polly.[19]

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8. *Id.* at 3.

9. Ordinance of 1787, art. 6 (1787), *in* LAWS OF THE NORTHWEST TERRITORY 1788-1802, at 69 (Cincinnati, n.p. 1833) ("There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted . . . .").

10. *Polly (a woman of colour)*, *supra* note 7, at 3.

11. *Id.* at 4.

12. *Id.* at 5.

13. *Id.* at 6.

14. *Lasselle*, 1 Blackf. at 63.

15. *Id.* at 62. *See also* IND. CONST. of 1816, art. XI, § 7.

16. *Lasselle*, 1 Blackf. at 62.

17. Dorothy Clark, *First Local News Editor Voiced Anti-Slavery View*, TERRE HAUTE TRIB.-STAR, Jan. 16, 1966, at 4.

18. *Id.*

19. *Id.*

Amory Kinney had read law in the office of Samuel Nelson who later became a U.S. Supreme Court Justice.[20] Kinney's law partner and brother-in-law was John Willson Osborn, the owner and editor of Terre Haute's first newspaper.[21] Moses Tabbs was the son-in-law of Charles Carroll, one of the signers of the Declaration of Independence.[22] Col. George McDonald was the mentor and father-in-law of Judge Isaac Blackford.[23]

One year after its decision in *Lasselle*, the Indiana Supreme Court reexamined the issue of slavery, this time disguised as a personal services contract. On November 6, 1821, the supreme court decided the case of "a woman of colour called Mary Clark."[24] Court records reveal that in 1914 Mary had been purchased as a "slave for life" by Benjamin L. Harrison in Kentucky.[25] Harrison brought Mary to Vincennes, Indiana in 1815, and freed her. Contemporaneously with her release from slavery, Mary contracted with Harrison to be his indentured servant for thirty years.[26] On October 24, 1816, Harrison "cancelled, annulled and destroyed" the contract for indenture, thereby liberating Mary.[27] On the same day, however, Mary, "a free woman of colour," bound herself to General W. Johnston, his heirs, executor, administrator and assigns as an indentured servant and house maid for twenty years.[28] On his part, General Johnston agreed to:

> find, provide and allow unto her, during all her aforesaid term of servitude, good and wholesome meat, drink, lodging, washing and apparel both linen and woollen, fit and convenient for such a servant. And upon the expiration of her term of servitude, she serving out her present indenture faithfully, give unto her one suit of new clothes (not to exceed however in value twenty dollars) and also one flax wheel.[29]

Mary's signature was indicated on the contracts with an "X."[30]

Mary filed for a writ of habeas corpus, claiming that General Johnston "without any just or legal claim" held her as a slave.[31] General Johnston argued that he had purchased Mary from Harrison for $350 that Harrison had emancipated Mary and that Mary had indentured herself to Johnston for twenty years.[32] The

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *In re* Clark, 1 Blackf. 122 (Ind. 1821).
25. Record at 4, Mary Clark v. General W. Johnston (Knox Cir. Ct. 1821) (handwritten) (contained in Indiana Supreme Court case file, Mary Clark v. G.W. Johnston, Nov. term, 1821, on file with Indiana State Archives, Commission on Public Records, Indianapolis).
26. *Id.*
27. *Id.* at 4-5.
28. *Id.* at 5.
29. *Id.* at 6.
30. *Id.*
31. *Id.* at 1.
32. *Id.* at 3.

circuit court determined that Mary should be returned to General Johnston, her putative master, to serve out the remainder of her indenture.[33] The circuit court also ordered that General Johnston "recover . . . his costs and charges" from Mary.[34]

The Indiana Supreme Court reversed. As it had in *Lasselle*, the court relied on the Indiana Constitution's unequivocal prohibition of slavery and involuntary servitude.[35] After noting that all Indiana citizens (including Mary, a woman of colour) could properly enter into contracts, the supreme court held that contracts for personal service could not be enforced through specific performance.[36] Judge Holman wrote:

> Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself. Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts for personal service.[37]

The court found that by petitioning for a writ of habeas corpus, Mary conclusively demonstrated that her servitude was involuntary.[38] Once the fact of involuntary servitude was established, the court merely applied the law. Involuntary servitude was outlawed in Indiana under its constitution.[39] Accordingly, the law could not contradict Mary's declaration to be discharged, and she was freed.[40] Mary was awarded costs of eighteen dollars and seventy-four and one half cents.[41] Apparently, however, Mary never received her costs from Johnston. The return of the writ of execution states that Johnston had no property or real estate to satisfy the judgment.[42]

Just as the attorneys and parties in *Lasselle* were notable, so too were the attorneys in the case *In re Clark*. Mary was represented by Charles Dewey, who,

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33. *Id.* at 7.

34. *Id.*

35. *In re* Clark, 1 Blackf. at 123 (citing IND. CONST. of 1816, art. XI, § 7).

36. *Id.* at 123-24.

37. *Id.* at 124-25.

38. *Id.* at 123.

39. IND. CONST. of 1816, art. XI, § 7.

40. *In re* Clark, 1 Blackf. at 126.

41. Letter from Henry P. Coburn, Indiana Supreme Court Clerk, to Harrison County Sheriff (Dec. 1, 1821) (contained in Indiana Supreme Court case file, Mary Clark v. G.W. Johnston, Nov. term, 1821, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

42. Note dated Apr. 2, 1822, on reverse side of letter from Henry P. Coburn, Indiana Supreme Court Clerk, to Harrison County Sheriff (Feb. 26, 1822) (contained in Indiana Supreme Court case file, Mary Clark v. G.W. Johnston, Nov. term, 1821, on file with Indiana State Archives, Commission of Public Records, Indianapolis).

fifteen years later, was appointed to the Indiana Supreme Court.[43] Johnston was represented by Jacob Call, the same attorney who had represented Lasselle the previous year.[44] Judge Holman, the author of the supreme court opinion, was considered a moderate abolitionist.[45] When Holman came to Indiana from Kentucky around 1810, he brought his wife's slaves with him and freed them.[46]

In 1825, the Indiana Supreme Court heard the appeal of a capital murder case from the Clark Circuit Court.[47] The appellant, designated as "Jerry (a man of colour)," had been convicted of murdering his master and sentenced to death.[48] Jerry appealed his conviction on the ground that the verdict was contrary to the evidence.[49] In an opinion written by Judge Holman, the supreme court reversed the conviction, noting "strong doubts" regarding whether the testimony supported the verdict, and the case was remanded for a new trial.[50] This decision made a strong statement about the Indiana Supreme Court's commitment to justice for all citizens, black and white.

In 1831, Judges Scott and Holman were replaced on the supreme court by Stephen C. Stevens and John T. McKinney.[51] By this time, the political tide was changing in Indiana. Whereas Indiana legislation in the early 1800s was very much aimed at protecting the rights of persons of color within Indiana, later legislation retreated from this position. For example, in 1839, the Indiana legislature passed a general resolution on the subject of slavery, declaring that "Any interference in the domestic institutions of the slaveholding states of this Union . . . either by congress or the state legislatures, is contrary to the compact by which those states became members of the Union."[52] This marked a significant change in Indiana's slavery policy and probably resulted from the pressures from Indiana's southern border state, Kentucky.[53] In response to Indiana's changed policy, Kentucky adopted a resolution praising its "enlightened, liberal, and patriotic, sister State."[54]

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43. 1 MONKS, *supra* note 1, at 198, 292.
44. 1 *id.* at 292.
45. BLAKE, *supra* note 2, at 28.
46. *Id.*; 1 MONKS, *supra* note 1, at 186.
47. Jerry v. State, 1 Blackf. 395 (Ind. 1825).
48. *Id.* at 396.
49. *Id.*
50. *Id.* at 398-99.
51. 1 MONKS, *supra* note 1, at 194.
52. Resolution of Jan. 29, 1839, ch. 302, 1838 Ind. Acts 353; *see generally* Emma L. Thornbrough, *Indiana and Fugitive Slave Legislation*, 50 IND. MAG. HIST. 201, 217-218 (1954).
53. Thornbrough, *supra* note 52, at 214-18. During this period, slaves constituted approximately 25% of the population of the South. The 1790 census found 697,642 slaves in the United States, most of them living in the South. By 1860, this population had grown to 3,922,760, all of them in the South. Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1032 (1993); U.S. CENSUS BUREAU, NEGRO POPULATION, 1790-1915, at 57 (1918).
54. Resolution of Feb. 23, 1839, 1838 Ky. Acts 390; Thornbrough, *supra* note 52, at 218.

Along with changing tide in Indiana, the federal statutory and case law became increasingly hostile towards slaves seeking freedom. In 1842, the U.S. Supreme Court decided *Prigg v. Pennsylvania*.[55] Pennsylvania had enacted a law which made it an offense against the state to seize and remove a fugitive slave. This made Pennsylvania a haven for runaway slaves and a stop on the underground railroad. Edward Prigg was indicted under this law for feloniously removing Margaret Morgan, a black woman, from Pennsylvania and taking her to Maryland for the purpose of selling and disposing of her as a slave.[56] Prigg was actually a bounty hunter for a woman who claimed that Morgan was her runaway slave.[57] In an opinion delivered by Justice Story, the Taney Supreme Court struck down the Pennsylvania law as unconstitutional.[58] The *Prigg* Court held that federal legislation dealing with fugitive slaves superseded all state legislation on the same subject and by necessary implication prohibited its enforcement.[59] As one writer put it, *Prigg* determined that southern slaveholders and their agents had a constitutional right to "self-help" to seize fugitive slaves and obtain their return.[60]

Shortly after the U.S. Supreme Court decided *Prigg*, the Indiana Supreme Court heard an appeal from the Elkhart Circuit Court. In *Graves v. State*,[61] Joseph Graves, Elisha Coleman and Hugh Longmore were tried and found guilty of inciting a riot.[62] The riot was sparked when Graves, Coleman and Longmore seized Thomas Blackman, an alleged fugitive slave from Kentucky who Graves claimed to be his property.[63] Bystanders sought to prevent the defendants from forcibly taking Blackman before the magistrate.[64] The trial court's instructions to the jury contained Indiana's procedures for seizing fugitive slaves rather than the procedures contained in the federal law on that subject.[65] (The Indiana procedures were more favorable to the alleged fugitive than the federal procedures.[66]) The jury found in favor of the state, and the court fined the defendants thirty dollars

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55. 41 U.S. (16 Pet.) 539 (1842).

56. *Id.* at 543.

57. *Id.* at 539; *see also* Graves v. State, 1 Ind. 368, 371 (1849).

58. *Prigg*, 41 U.S. (16 Pet.) at 625-26. Chief Justice Taney dissented from that part of the Court's opinion which held that states could not be compelled to enforce the provisions of the federal law regarding fugitives because this was a function of the federal government. Taney believed that all states had a binding obligation to enforce the federal law. *Id.* at 633 (Taney, C.J., dissenting). Fourteen years later, Chief Justice Taney authored the opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), holding that slaves were property and that slaveholders had constitutionally protected property rights in slaves.

59. *Prigg*, 41 U.S. (16 Pet.) at 617-18, 622.

60. Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.-KENT L. REV. 1037, 1046 (1993).

61. 1 Ind. 368 (1849).

62. *Id.*

63. *Id.* at 369.

64. *Id.*

65. *Id.*

66. *See id.* at 369-70.

each.[67] On appeal, the Indiana Supreme Court held that it was bound by the *Prigg* opinion.[68] Consequently, the court held that the trial court should have instructed the jury on federal procedures for seizing fugitive slaves. The case was reversed and remanded for a new trial.[69]

Although *Prigg* was primarily used to benefit slaveholders in retrieving alleged runaway slaves, in at least one instance it was used for the opposite effect. Three years after reversing the convictions of Graves, Coleman and Longmore for inciting a riot while trying to seize an alleged fugitive slave, the Indiana Supreme Court reversed a conviction for aiding a slave to escape. In *Donnell v. State*,[70] Luther Donnell had been convicted in the Decatur Circuit Court of "inducing the escape of" and "secreting" away a "certain woman of color, called Caroline" alleged to be the slave of George Ray of Kentucky.[71] Using the federal preemption analysis of *Prigg*, the Indiana Supreme Court held that the part of the Indiana statute under which Donnell had been convicted was unconstitutional and void because it concerned an issue upon which the U.S. Congress had exclusive jurisdiction.[72]

One of the most offensive laws during this period was the Fugitive Slave Law of 1850,[73] the strictest slaveholder protectionist measure to date. It provided that federal commissioners were to hear fugitive slave cases "in a summary manner" and could issue warrants to turn over the fugitive upon evidence that the accused was a runaway slave.[74] The evidence could be as slight as an affidavit providing the physical description of the runaway.[75] This law expressly prohibited the commissioners from admitting testimony of the alleged fugitive,[76] permitted imprisonment of any person hindering an arrest[77] and provided for the expenditure

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67. *Id.* at 368-69; Record at 5, Joseph A. Graves v. State (Elkhart Cir. Ct. 1849) (handwritten) (contained in Indiana Supreme Court case file, Graves v. State, May term, 1849, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

68. *Graves*, 1 Ind. at 370.

69. *Id.* at 372.

70. 3 Ind. 480 (1852).

71. *Id.* at 480-81; Record at 3, Luther A. Donnell v. State (Decatur Cir. Ct. 1852) (handwritten) (contained in Indiana Supreme Court case file, Donnell v. State, Nov. term, 1852, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

72. *Donnell*, 3 Ind. at 481. *Donnell* was written by Judge Samuel Perkins, who is known primarily for spending his leisure time on the bench preparing an *Indiana Digest* and later *The Indiana Practice* treatise. 1 MONKS, *supra* note 1, at 207.

73. Fugitive Slave Law of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864). The Fugitive Slave Law of 1850 amended the 1793 law. Fugitive Slave Law of 1793, ch. 7, 1 Stat. 302 (1793) (repealed 1864). The 1850 law was adopted in response to the demands of the representatives of the slave states and was part of a series of measures known as the Compromise of 1850. EMMA L. THORNBROUGH, THE NEGRO IN INDIANA BEFORE 1900, at 114-115 (1957).

74. Fugitive Slave Law of 1850, § 6, 9 Stat. at 463.

75. *Id.* § 10 at 465.

76. *Id.* § 6 at 463.

77. *Id.* § 7 at 464.

of federal funds to recover fugitives.[78] Officials were paid ten dollars if the accused was determined to be a fugitive, but only five dollars if the accused was not.[79]

Obviously, under this statute, every black person was in danger of being declared a fugitive, taken south, and sold into slavery. Armed with this weapon, many unscrupulous slaveholders and slave catchers literally kidnapped free blacks and sold them into slavery. The Fugitive Slave Law of 1850 provided a strong incentive for blacks to seek refuge in Canada, where they would be beyond the reach of the slave catchers.[80] As a result of this act, trips increased along the underground railroad, which went through Indiana on the way to Canada.[81] The act also resulted in Indiana anti-slavery jurisprudence, prompting *Freeman v. Robinson*,[82] which was decided in 1855.

Freeman was a free black man who came to Indianapolis in 1844 and "who through hard work and thrift had acquired some real estate, including a house and garden and a restaurant."[83] According to the 1850 census, Freeman was the wealthiest black person in Indianapolis, owning property valued at $7000.[84] Pleasant Ellington, a Methodist preacher and a major slaveholder in St. Louis, claimed that Freeman was his runaway slave, "Sam."[85] He and three other men came to Indianapolis to recapture Freeman who he claimed had run away eighteen years earlier, while Ellington was residing in Kentucky.[86]

Assisted by a Deputy U.S. Marshal, Ellington induced Freeman to go to the commissioner's office by telling him that he was required to give testimony before the justice of the peace.[87] While in the commissioner's office, Ellington sought to examine Freeman without his clothes on.[88] Both Ellington's attorney and the Deputy Marshal ordered Freeman to remove his clothing for inspection, but upon his attorneys' advice, Freeman refused.[89] Ellington then requested that the Deputy Marshal forcibly remove Freeman's clothing, but the Deputy Marshal did not believe he had the authority to do so and therefore refused.[90] Undaunted, Ellington telegraphed the Marshal himself and demanded that he come to Indianapolis.

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78. *Id.* § 9 at 465.

79. *Id.* § 8 at 464.

80. THORNBROUGH, *supra* note 73, at 53-54.

81. *Id.* at 40, 53-54.

82. 7 Ind. 321 (1855). For a detailed account of the historical events associated with the *Freeman* case, see Charles H. Money, *The Fugitive Slave Law in Indiana*, 17 IND. MAG. HIST. 180-97 (1921).

83. THORNBROUGH, *supra* note 73, at 115.

84. *Id.* at 142-43 n.39.

85. *Id.* at 115.

86. *Id.*; Money, *supra* note 82, at 159, 182-83.

87. Money, *supra* note 82, at 182.

88. *Id.* at 183.

89. *Id.*

90. *Id.*

When U.S. Marshal John Robinson arrived, he complied with Ellington's request, physically removing Freeman's clothing so that Ellington and his three witnesses could "inspect" Freeman.[91] Having completely examined Freeman, Ellington and his witnesses were ready to testify to all the marks on Freeman's body and swear in court that those marks established Freeman as Ellington's runaway slave, Sam.[92]

Freeman had a reputation, among blacks and whites in Indianapolis, for being a good, honest and industrious man.[93] When newspapers reported the fraudulent manner in which Freeman was induced to appear at the commissioner's office, as well as the violence of Freeman's examination, the public was outraged.[94] Freeman's attorneys went to the Marion Circuit Court and obtained a writ of habeas corpus claiming that Freeman could prove that he was a free man.[95] That court, however, determined that it did not have jurisdiction over the case and Freeman was remanded to the custody of the U.S. Marshal pending the federal commissioner's decision.[96]

Freeman's attorneys then sought bail for their client for the nine weeks he would otherwise have to remain in jail.[97] A note was drawn for $1600 and signed by 100 citizens, including Judge Blackford and well-known attorney Calvin Fletcher.[98] In addition, a bond for $4000 was signed by a number of citizens owning property with a total value of more than half a million dollars to indemnify him.[99] Despite these efforts, the commissioner denied bail and ordered Freeman held in jail.[100] U.S. Marshal Robinson, thereafter, charged Freeman three dollars per day for a guard to watch over him.[101]

To prove Freeman was indeed a free man, his attorneys traveled to his previous home in Georgia to obtain witnesses to testify on his behalf.[102] Several witnesses came.[103] Freeman's attorneys were also able to locate the real "Sam," who had fled to Canada after passage of the Fugitive Slave Law.[104] Freeman's attorneys offered to pay Ellington's expenses to Canada to verify Sam's identity,

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91. *The Freeman Case*, THE LOCOMOTIVE (Indianapolis), Sept. 24, 1853, at 1.

92. Money, *supra* note 82, at 183.

93. *Id.* at 180-81.

94. THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2; *id.* Sept. 24, 1853, at 1; *id.*, May 13, 1854, at 3.

95. Money, *supra* note 82, at 186.

96. *Id.*

97. *Id.*

98. *Id.* at 186-87.

99. *Id.* at 187.

100. *Id.*

101. *Id.*

102. *The Freeman Case*, *supra* note 91, at 1; THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2.

103. INDIANAPOLIS MORNING, Aug. 26, 1853, at 3; THE LOCOMOTIVE (Indianapolis), Aug. 20, 1853, at 2; *The Freeman Case*, *supra* note 91, at 1.

104. *The Freeman Case*, *supra* note 91, at 1.

but Ellington refused.[105] Faced with the mounting evidence, Ellington gave up the fight, and the commissioner dismissed the case.[106] This case had attracted significant attention throughout Indiana, and upon the dismissal of the case, a Fort Wayne newspaper observed that "[i]f Freeman had not had money and friends he must inevitably have been taken off into bondage."[107]

The cost of his freedom exhausted Freeman's savings and caused him great discomfort and humiliation.[108] He brought suit for $10,000 damages against Ellington in Marion Circuit Court.[109] After testimony by the Deputy Marshal who had initially tricked Freeman into going to the commissioner's office, the case was settled in Freeman's favor for $2000 plus costs of the suit. The trial court duly entered the judgment.[110] Unfortunately, Freeman never collected because Ellington sold all his property and left St. Louis.[111]

Freeman v. Robinson,[112] was the appeal of the suit Freeman filed in Marion Circuit Court against U.S. Marshal Robinson for assault and extortion in forcing Freeman to submit to a naked examination and requiring him to pay three dollars per day while in jail. Robinson challenged the jurisdiction of the Marion Circuit Court to hear the case based on the fact that Robinson was a Rush County resident.[113] This challenge relied upon an Indiana statute which provided that a suit must be commenced in the county where the defendant resided.[114] Freeman responded that under another provision of the same statute, if the cause arose against a "public officer" for an act done by him by virtue of his office, suit could be commenced in the county where the cause arose.[115] The trial court ruled in Marshal Robinson's favor, and Freeman appealed.[116]

The Indiana Supreme Court, Judge Gookins writing, affirmed the trial court on the basis of improper venue.[117] The court determined that "public officer" in the statute authorizing suits against public officers in the county where the injury occurred only referred to officers of the state and not officers of the federal government.[118] The supreme court, however, rejected Marshal Robinson's federal preemption argument and determined that because assault and battery and extortion were not part his official duties under the Fugitive Slave Law, Freeman

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105. *Id.*
106. *Id.*
107. FORT WAYNE SENTINEL, Sept. 8, 1853, at 2.
108. THORNBROUGH, *supra* note 73, at 116.
109. THE LOCOMOTIVE, Sept. 3, 1853, at 2.
110. THE LOCOMOTIVE, May 13, 1854, at 3.
111. Money, *supra* note 82, at 194-95.
112. 7 Ind. 321 (1855).
113. *Id.* at 321-22.
114. 2 IND. REV. STAT. pt. 2, ch. 1, § 33 (1852) (superseded); *Freeman*, 7 Ind. at 323-24.
115. 2 IND. REV. STAT. pt. 2, ch. 1, § 29 (1852) (superseded); *Freeman*, 7 Ind. at 324.
116. *Freeman*, 7 Ind. at 322.
117. *Id.* at 324.
118. *Id.*

could maintain his action for personal injury against the Marshal.[119]

The Freeman case was a hard-fought battle with prominent attorneys on both sides. Freeman was represented by John Ketchum, Lucien Barbour and John Coburn, all of whom were known to be excellent anti-slavery lawyers.[120] In addition, John Coburn was the son of Henry P. Coburn, who was the Indiana Supreme Court Clerk during the time *In re Clark* and *Graves v. State* were decided.[121] Ellington was represented by Jonathan Liston and Thomas Walpole, also noted attorneys of the time.[122] Jonathan Liston and Isaac Blackford represented Robinson.[123] Judge Gookins, who wrote the opinion for the supreme court, had practiced law with Amory Kinney, the attorney for Polly in the *Lasselle* case, and had served a newspaper apprenticeship under John W. Osborn, Amory Kinney's law partner and brother-in-law.[124]

Freeman's ordeal profoundly affected the people of Indiana and demonstrated that under the Fugitive Slave Law of 1850, free blacks were likely to be forced into slavery. John Freeman eventually left Indiana and moved to Canada.[125] Marshal Robinson, who had been a very high ranking political figure before *Freeman*, was never able to recover from the negative publicity he received.[126]

The same year that the Indiana Supreme Court decided *Freeman*, it also decided *Woodward v. State*,[127] an appeal from the Hendricks Circuit Court. Jordan Woodward was a black man who had been indicted for assault and battery with intent to murder a white man.[128] At his trial, Woodward offered the testimony of another black man to show that Woodward had acted in self-defense.[129] The trial court refused to allow the testimony based on an Indiana statute prohibiting blacks from testifying in any case in which any white person was a party in interest.[130]

On appeal, Woodward was represented by John L. Ketchum, one of the attorneys who had represented John Freeman. In his brief, Ketchum argued that the trial court erred in refusing the testimony because the statute did not apply.[131] Although Woodward was black, his attorney argued, the other "party" to the cause

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119. *Id.* at 322-23.

120. Money, *supra* note 82, at 181.

121. OLIVER H. SMITH, EARLY INDIANA TRIALS AND SKETCHES 367 (Cincinnati, Moore, Wilstach, Keys & Co. 1858).

122. Money, *supra* note 82, at 181.

123. *Freeman*, 7 Ind. at 321.

124. 1 MONKS, *supra* note 1, at 251.

125. Money, *supra* note 82, at 197.

126. *Id.* at 184; *see* John Robinson, *Letter to the Editor*, INDIANAPOLIS DAILY JOURNAL, Dec. 27, 1855, at 2.

127. 6 Ind. 492 (1855).

128. *Id.*

129. *Id.*

130. *Id.*; Act of Feb. 14, 1853, ch. 42, § 1, 1853 Ind. Acts 60, 60 (superseded).

131. Brief for Appellant at 1, Woodward v. State, 6 Ind. 492 (1855) (handwritten) (contained in Indiana Supreme Court case file, Woodward v. State, May term, 1855, on file with Indiana State Archives, Commission on Public Records, Indianapolis).

was the State of Indiana, which was "not a 'white person.'"[132] As Ketchum eloquently asserted in his brief, the state "is rather a lady of changeable complexion—graciously taking the hue she finds in her adversary."[133] The supreme court, in a per curiam opinion agreed, holding that the state was not a person of any particular color, and therefore, the trial court erred in rejecting the witness.[134]

A decade after the *Freeman* case demonstrated to the people of Indiana the harsh effects of the Fugitive Slave Law of 1850, the Indiana Supreme Court issued an important opinion entitled *Smith v. Moody*.[135] In that case, the court tackled article XIII of the Indiana Constitution of 1851. Article XIII prohibited blacks and persons of mixed race from coming into or settling in the state after the adoption of the constitution.[136] It further provided that all contracts made with any black person coming into the state in violation of article XIII were void.[137] In addition, at the first legislative session after the Constitution was adopted, the Indiana legislature passed "an act to enforce the 13th article of the Constitution," making it unlawful for blacks to come into, settle in, or become inhabitants of Indiana.[138]

In *Smith*, the black plaintiff (Smith) sued on a promissory note.[139] The white defendants argued that the contract at issue was void because Smith had come into and settled in Indiana after November 1, 1851, in violation of article XIII.[140] Smith responded that he was a citizen of Ohio, by birth, and, pursuant to the U.S. Constitution, was entitled to all the privileges and immunities of citizens in the several states.[141] The trial court rendered judgment in favor of the defendants.[142]

Smith appealed to the Indiana Supreme Court. In an opinion by Chief Judge Gregory, the court held that article XIII of the Indiana Constitution was void because it was repugnant to the Constitution of the United States.[143] The court also held that free persons of African descent, born within a particular state, and made citizens of that state, are thereby made citizens of the United States and entitled to all the privileges and immunities of citizens in the several states.[144]

The importance of this case is punctuated by the fact that the court previously had upheld application of article XIII in several cases.[145] The fact that an entirely

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132. *Id.*
133. *Id.*
134. *Woodward*, 6 Ind. at 492.
135. 26 Ind. 299 (1866).
136. IND. CONST. art. XIII, § 1 (repealed 1881).
137. *Id.* § 2 (repealed 1881).
138. 1 IND. REV. STAT. ch. 74, §§ 1-9 (1852) (repealed 1867).
139. *Smith*, 26 Ind. at 299.
140. *Id.*
141. *Id.*
142. *Id.* at 300.
143. *Id.* at 302.
144. *Id.* at 306-07.
145. *See, e.g.*, Barkshire v. State, 7 Ind. 389 (1856).

new court took office on January 1, 1865,[146] may explain the reversal on this issue.

From *Lasselle v. State* to *Smith v. Moody*, the Indiana Supreme Court made both bold and subtle statements against slavery and involuntary servitude. It refused to allow its halls to be used as a means for one citizen to exercise ownership over another—whether it be by trickery, force or humiliation. Over time, it withstood the erosive forces of imprudent and impudent legislation. Even though an Indiana favorite son was a party to Mary's "transfer of employment," the Indiana Supreme Court denied these slaveholders sanctuary in their attempts to circumvent anti-slavery legislation by terming it "indentured servitude." Given the political and social climate at the time these decisions were made, the court's position was nothing less than extraordinary.

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146. Robert C. Gregory, James S. Frazer, Jehu T. Elliott and Charles A. Ray were all newly elected to the supreme court in 1864. 1 MONKS, *supra* note 1, at 254, 302.