Chapter 16 (09-01-11)

"Throughout the centuries there were men who took first steps down new roads armed with nothing but their own vision."
Ayn Rand 1905-1982

What Was Davis Floyd's Part in the Indiana Constitutional Convention of 1816?

Did Floyd design the Indiana State Seal?

How did the Indiana Supreme Court rule on two early cases on slavery?

Who were the first judges of the Indiana Supreme Court

What court was Floyd appointed to?

Was there a battle over slavery in the Constitutional Convention of 1816?

Floyd and His Family Move to Corydon

The best evidence is that Davis Floyd and his family moved from Jeffersonville to Corydon in about 1813 where he continued to practice law. The capitol was relocated from Vincennes to Corydon that year. He was appointed Auditor of the Territory and served in that capacity for one year and then became the Territorial treasurer for two years. He also served as prosecutor in some outlying counties. A Louisville newspaper article in *The Kentucky Gazette* reported on May 11th, 1814 and then again on May 23rd, 1814 that John Smith, David Craig, and Davis Floyd were appointed by the Circuit Court of Harrison County to build a brick or stone Court House in Corydon and were taking three separate bids on materials, work, and carpenters to be submitted on the first Monday in June 1814.

Article 5 of the Northwest Ordinance

Article 5 of the *Ordinance for the Government of the Territory of the United States North-West of the River Ohio* read as follows:

There shall be formed in said [Northwest] Territory, not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to-wit: The western State in the said territory, shall be bounded by the Mississippi, the Ohio, and Wabash Rivers; a direct line drawn from the Wabash and Post Vincents [Vincennes], due North, to the territorial line between the United States and Canada; and, by the said territorial , to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line, drawn due north from the mouth of the Great Miami, to the said territorial line; The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided, however, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of and east and west line drawn through the southerly bend or extreme of Lake Michigan. And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and the government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and where there may be a less number of free inhabitants in the State than sixty thousand.

An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, passed on July 13, 1787.

This document represents one of the greatest governing documents in the world including the U. S. Constitution. The outstanding feature of this ordinance was that the new states would be admitted to the Union "on an equal footing with the original States in all respects whatever, and shall be at liberty to form a

permanent constitution and State government." It would have been tempting for the original states to subordinate the rights of the new states to them, but they did not. In June 1965 Donald F. Carmony wrote the introduction to the *Journal of the Convention of the Indiana Territory, 1816*. Prof. Carmony described the steps to transition from a territory to a state. The first step was the adoption and transmittal of a memorial by the Territorial General Assembly composed of a House of Representatives and a Legislative Council petitioning for approval from Congress for statehood. The second step was the referral of the memorial to a legislative committee in the U. S. House of Representatives. The next step was the receipt of a recommendation from this lower house committee favoring statehood. The fourth step was the passage of an enabling act by both houses and the signature thereto by the president. The fifth step was the election of local delegates who would meet in Corydon where the state capitol was located and draft and approve a constitution. Prof. Carmony described the men who made up the Constitutional delegation as follows:

The delegates to the Corydon convention were an able and representative selection of Indiana citizens. None of them were a native of the state whose constitution he helped write, but nearly all residents of Indiana had arrived in the previous two decades, most of them after 1810. Of the forty-three delegates, about twenty-five were natives of southern slave states. Among these were perhaps a dozen from Virginia, six from Kentucky, and five from Maryland. About fourteen came from northern states--seven from Pennsylvania. Six were natives of Europe. Mainly sons of pioneering stock, the delegates possessed good character, substantial common sense, and much practical knowledge. Since the Indians still held title to virtually the entire central and northern parts Indiana, almost all of the delegates were residents of the southern portion of the future state. The delegates had had much political experience in legislative bodies as well as in a variety of local offices. Without exception they appear to have been disciples of Jeffersonian Republicanism. Factional lines were loosely drawn, but supporters of Jennings were more numerous than were the supporters of the Harrison-Posey element.

Carmony, Donald F., "Journal of the Convention of the Indiana Territory," *Indiana Magazine of History*, Volume LXI, Number 2, June 1965, p. 81.

Floyd in the 1816 Constitutional Convention

Floyd represented Harrison County at the dual purpose convention in Corydon which started on June 10th and finished on June 29th, 1816. Corydon's temperature would have been hot at that time of year. Corydon is located in a depression surrounded by low hills, a collection point for July heat. Tradition had it that the convention men conducted some of their business outside and frequently took refuge under a huge Elm tree located several hundred yards from the Capitol Building. The tree was later known as the Constitutional Elm.

On June 10th Floyd had moved for the creation of a ways and means committee and was appointed the leading member (probably chairman) of that committee. Perhaps the purpose of that committee was to determine how to pay for the convention and for what. After all, Floyd was the Territorial treasurer. The first purpose of the convention was to consider whether it was expedient to form at that time a constitution and state government. On June 11th Floyd made a motion to the effect that it was expedient. Thirty-four members voted in favor of the motion including Floyd while eight members voted against it. It is unknown why any of these men would vote against the real reason they were sent to Corydon. One can speculate that they ran for a delegate position on the basis that statehood was unnecessary at that time. There was a lot of opposition from within their boundaries before Alaska and Hawaii became states. Puerto Rico remains a territory today. Perhaps the difference was the perception of more independence in a state and more paternalism in a territory. The second purpose was, of course, to draft and adopt a constitution and to institute a state government. On June 12th Floyd was appointed to two committees: one was over the distribution of powers of government, and the other was (1) over the change of government from a territory to a state, (2) preserving the existing laws until repealed by the state legislature, and (3) providing for appeals from

the territorial courts to the state court. Floyd was the chairman of the latter committee. On June 13th Floyd was appointed to the printing committee and on June 20 he was appointed to the committee on banks and banking companies.

The last sentence in Article VIII of the adopted Constitution provided that: "But, as to the holding any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of the constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted." On June 20th, John Johnson from Knox County moved to change some of the wording of the quoted sentence. He proposed (1) to change the words, "human Creation," to the words, "human family;" (2) to add the words, "it is the opinion of this convention, that," after the word, "tyranny;" and (3) to replace the words, "shall ever take place," with the words, "ought ever to take place." The motion was defeated by a vote of twenty-nine to thirteen with Floyd voting against the change. It is interesting to note that not only Johnson but also John Badollet, Benjamin Parke and future jurist James Scott (he wrote the famous 1820 Indiana Supreme Court decision in the *Lasselle* case) voted for the three changes. The proposed changes seemed to weaken the resolve expressed by the original and adopted language. Maybe the words, "human Creation," had too much of a religious significance for some of the opponents. The words, "it is the opinion of this convention" would limit the sentence to the opinion of the members of the current convention. Stronger words were needed to express the hatred that the majority of the convention had for slavery and involuntary servitude. They wanted slavery banned forever. The word, "shall," was a powerful legislative command which expressed that the anti-slavery provision was in perpetuity.

On June 21st David H. Maxwell from Jefferson County, who chaired the committee on general provisions, submitted the first draft of Article XI. Section 7th of that Article provided:

> **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; nor shall any male person, arrived at the age of twenty-one years, nor female person, arrived at the age of eighteen years, be held to serve any person as a servant under pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration received, or to be received for his or her service, except as before excepted: nor shall any indenture of any negro, or mulatto, hereafter made and executed out of the bounds of this state, be of any validity within the state; neither shall any indenture of any negro or mulatto, hereafter made within the state, be of the least validity except in the case of apprenticeships.**
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> *Journal of the Convention of the Indiana Territory*, Butler & Wood, 1816, p. 41-42.

The proposed Section 7 was amended by consent of the convention as a committee of the whole. The second and the last clauses were removed which left Section 7 saying:

> **§7th. 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. Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state be of any validity within the state.**
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> *Journal of the Convention of the Indiana Territory*, p.53.

The *Journal* does not offer any reason why the offending language was removed. However, it is obvious that the Convention did not want anything in the anti-slavery provision which would allow voluntary servitude that could be used as a disguise for involuntary servitude. Some of the Convention men had been through that before. Further, since slavery and involuntary servitude were both prohibited by law, it was redundant to say that any indenture entered into

by a negro or a mulatto within the state was invalid. The first sentence in § 7th mimicked the first clause in Art. 6 of the North West Ordinance of 1787. The second sentence in §7th was inserted to counter the proviso in Art. 6 of the North West Ordinance which had said: "Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." The framers wanted it perfectly clear that, henceforth, an indentured slave from one of the original states who became an indentured slave after the passage of the Indiana Constitution, could not be brought to Indiana and remain therein as a slave. The new constitution did not seem to address the issue of slaves who became involuntarily indentured in another state before statehood or weres voluntarily indentured in the Territory prior to statehood. The new Indiana Supreme Court would have to address these issues later.

Badollet's Letter to Gallatin on Sept. 10th, 1823

On September 10th, 1823 in a letter to Albert Gallatin, Badollet said to his old friend:

It is unfortunate that, when called upon to form a constitution a territory is in the most unpropitious circumstances to success for the want of men of intellect and political knowledge, attending a country in the incipient state of population. This was woefully verified in our case, for though our convention contained several thinking men, the majority was composed of empty babblers, democratic to madness, having incessantly the *people* in their mouths and their dear selves in their eyes, who resist every effort to avoid those defects which are so justly chargeable to our constitution. I was for my sins elected to that body, not through any choice or effort of my own, as you may believe, by my unconquerable timidity rendered me almost useless. I use the qualifying work *almost* because in fact some little good may in some degree be attributable to me. Convinced that to change and better the manner of a people, moral causes operate more effectually than prohibitory enactments & the disgusting repetition of penal statutes, I introduced with that view the 2d 3d 4th & 5th Sections of Article IX the

tendency of which cannot escape you. The preamble was added by another member of the Committee, it does not amalgamate well with the sequel, but I would move not amendment lest our democrats should meddle with it & substitute schools for the poor of such other wise provision.

Thornbrough, *The Correspondence of John Badollet and Albert Gallatin 1804-1836*, pp. 261-263.

Whether Floyd was among the men whom Badollet thought were "thinking men" is unknown. Badollet was an ardent anti-slavery man as well as Floyd. Floyd was able to relate to the Indians possibly because of Indiana blood in his family. Badollet knew that Floyd had strayed from the straight and narrow when he joined forces with Aaron Burr. However, he was aware of the letter supposedly from the Secretary of War which Floyd was shown by Burr sanctioning Burr's activities in the Ohio and Mississippi River Valleys. He was also aware of Burr's letter to Gov. Harrison disclaiming any evil motives in his expedition. Badollet probably believed that Floyd had been duped by Burr. Badollet may have known that Floyd refused to accept a pardon from Harrison for his involvement with Burr. Which side of the "intelligentsia" aisle that put Floyd on in the Convention is anybody's guess.

Indiana State Seal

Some authors claim that Davis Floyd designed the Indiana State Seal. There have been different versions of the seal which are identified in part with the dates of 1787, 1800, 1863, 1950, and 1963. Section 26 of Article IV of the 1816 Indiana Constitution provided "There shall be a seal of this State, which shall be kept by the Governor and used by him officially, and shall be called, the seal of the State of Indiana." The *Journal of the Convention of the Indiana Territory* shows that Floyd as a member of the Constitutional Committee on the change of government and preserving the existing laws, introduced a section in Article XII which provided that "Sect. 5th. The governor shall use his private seal until a state seal be procured." Unfortunately, such a seal was not officially approved until 1963. In the meantime there were several variations of the seal.

Later in 1816 a bill was introduced in the House of Representatives providing for a state seal. The bill passed the House and was amended in the Senate. The bill then went back to the House on November 22, 1816, and Floyd struck the Senate amendment and inserted the words: "a forest and a woodman felling a tree, a Buffaloe leaving the forest and fleeing through the plain to a distant forest and the Sun sitting in the west with the words Indiana." However the bill came out of a conference committee with Floyd's new insertion removed. Perhaps Floyd's description of the seal at this time caused some people to believe that the design was his. That could not be further from the truth.

The original seal for the Northwest Territory showed some hills in the background, a river and one or two boats on it, a standing tree, a fallen log next to the tree, a coiled snake, and the sun overhead. The hills in the background are certainly not mountains and since the sun is overhead, it could be called neither a rising sun nor a setting sun. Around the circumference of the seal were the words "The Seal of the Territory of the U.S.N.W. of the River Ohio." "U.S.N.W." referred to the "United States North West" designated as such by the North West Ordinance of 1787. It included the land known today as Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota. The river shown on the seal could be any river in the Northwest Territory and the boats could be headed in any direction, although they are probably headed downriver since that was the prevalent direction for travel of a flatboat or keelboat on a flowing river. At the bottom of the scene are the Latin words "Meliorem lapsa locavit" which mean "He has planted a better than the fallen." According to one letter from the U. S. Department of State, "The earliest mention of use of this seal was in [Governor Arthur] St. Clair's proclamation of July 26, 1788." Gov. St. Clair served as the governor of the North West Territory from 1787 until 1802.

The next seal appeared on court documents signed by Gov. Harrison in January 1801. It shows hills in the background, a sun on the horizon of the hills, a man with an axe standing next to a falling tree, two standing trees to the right of the falling tree, a fallen log in front of these trees, and a buffalo in the foreground with its tail down. The word "Indiana" appears in a scroll in the leaves of the second tree. The sun could be interpreted as either a rising or setting sun. This is probably the seal to which Floyd was referring when he submitted Section 5th of Article XII to the 1816 Indiana Constitution. There were not mountains in this seal and Floyd does not mention hills in his 1816 description of the Indiana seal. Is it possible that the conical shaped hills are two Indian mounds found south of the town center at Vincennes? One of these mounds is known as Sugar Loaf Indian Mound.

The next seal was in 1863. It showed hills in the background with a sun and its rays on the horizon, a man on the right swinging an axe at a standing tree, a buffalo on the right with its tail up, and some foliage in the foreground. In 1895 it was determined that Indiana had no official seal and that what was being used was from the Territorial days. It was noted that the chief features of the seal were a woodman with the axe and a buffalo. A bill was introduced in the Senate which said "That the device of arms of this State is hereby declared to be correctly described as follows: In a circle, a woodman felling a tree; to the right, in the perspective, the setting sun; a buffalo fleeing through a plain to the left; at the top of the device, the motto, "Loyalty.'" The bill was never passed. So at this point there are two written descriptions of the seal, one in 1816 and the other in 1895, but neither was ever adopted by the General Assembly.

In 1905 the *Indianapolis News*, in response to an inquiry from the legislature, wrote an article on the state seal. The article said: "the sun sinking in the West, behind a range of mountains, is absurdly incorrect as a feature of Indiana scenery. The western horizon of Indiana is a level one and there are no

mountains this side of the Rockies." The article then continued: "Perhaps the stationary sun about to set behind a range of mountains, but still stationary, was intended to signify that the sun of Indiana never set." About a month later Historian Jacob P. Dunn responded to the article as follows: "Of course, there is no location in Indiana that would furnish such a scene as is in this device, and the probability is that it is figurative--indicating a new community beyond the mountains, as to the older settlements.... If this were the design it would necessarily be a rising sun, a rising sun would seem a more appropriate emblem for a new State." In 1919 Historian Dunn wrote another letter to the *Indianapolis News*:

This seal has been the subject of much jest, and of many surmises as to its significance.... The interpretation for the design is merely an illustration of the utter perversity of the people of Indiana in the interpretation of works of art. It is not a "setting sun," but a sun rising on a new commonwealth, west of the Allegheny Mountains. The woodman represented civilization subduing the wilderness; and the buffalo,...going west,...represented the primitive life retiring in that direction before the advance of civilization.

Bennett, Pamela J., and January, Alan, "Indiana's State Seal -- An Overview," Indiana Historical Bureau, Indiana State Archives, Indianapolis, Indiana, http:://www.in.gov/history/2803.htm, January 21, 2005, p 4.

The seal attached to Dunn's letter to the editor showed mountains in the background, sun rays emanating from behind the mountains, trees on the back left, an axe man on the right swinging at a tree to his left, and a galloping buffalo with its tail up in the foreground. Suddenly there are mountains in the east, a rising sun, and a buffalo heading west. That took a lot of nerve especially with the information that existed at that time. Nevertheless, many early pioneers who came into Southern Indiana had traversed the Allegheny Mountains from points east and had crossed the saddle at the Cumberland Gap.

The mountains were a formidable challenge to cross and stood out in everyone's mind that had walked them or ridden on horseback over them.

Finally, in 1963 the General Assembly adopted and officially described a state seal for Indiana. The 1963 seal has hills in the background and a sun just setting on the horizon of the hills. And suddenly the mountains are gone and the sun is setting in the west again. The 1963 law read as follows:

At the bottom center, 1816, flanked on either side by a diamond, with two dots and a leaf of the tulip tree (liriodendron tulipifera), at both ends of the diamond. The inner circle has two (2) trees in the left background, three (3) hills in the center background with nearly a full sun setting behind and between the first and second hill from the left.

There are fourteen (14) rays from the sun, starting with two (2) short ones on the left, the third being longer and then alternating, short and long. There are two sycamore trees on the right, the larger one being nearer the center and having a notch cut nearly half way through, from the left side, a short distance above the ground. The woodsman is wearing a hat and holding his ax nearly perpendicular on his right. The ax blade is turned away from him and is even with his hat.

The buffalo is in the foreground, facing to the left of front. His tail is up, front feet on the ground with back feet in the air as he jumps over the log.

Acts 1963, c. 207, s. 1; IC 1-2-4-1.

The seal has come the full circle. However, misinformation has a difficult time dying. In the 2004 and again in 2005 Representative Luke Messer from Shelbyville, Indiana introduced bills in the Indiana House of Representatives to change the setting sun to a rising sun in the seal's official description. Nothing ever became of this absurdity. Maybe he was trying to give significance to the name of Rising Sun, Indiana.

Buffalos apparently run with their tails up when they are in a surprised or agitated state. Most of the Indiana seals show the tails in the "up" position.

Mark Twain in his book, *Roughing It*, described a scene where he and his horse are being chased by a buffalo.

> **And then you ought to have seen that spider legged old skeleton [of a horse] go! and you ought to have seen the [buffalo] bull cut out after him, too--head down, tongue out, tail up, bellowing like everything, and actually mowing down the weeds, and tearing up the earth, and boosting up the sand like a whirlwind. By George, it was a hot race.**

Twain, Mark, *Roughing It*, Vol. I, Harper & Brothers Publishers, New York and London, 1871, p.46.

The 1800 seal showed the buffalo with its tail down. In 1816 Floyd described the buffalo as "leaving the forest and fleeing through a plain to a distant forest." "Leaving" does not signify surprise or agitation but "fleeing" does. The 1863, 1950, and 1963 seals showed the tails up. The 1895 session of the Indiana General Assembly reported through its reading clerk that the seal in its various scenes showed the buffalo "going to the left, in others to the right, while in others it is shown in full face." The 1963 law described the buffalo as follows: "The buffalo is in the foreground, facing to the left of front. His tail is up, front feet on the ground with back feet in the air as he jumps over a log." For whatever reason the buffalo in the current seal is in a surprised or agitated state. Perhaps the buffalo is chasing Mark Twain and his horse which are just out of sight. If one knows the story Twain eventually was thrown from his horse and sought refuge in a tree. The seal contains convenient trees for this purpose. Was Twain ever chased by a buffalo in Indiana? Or was the buffalo chasing somebody else. Maybe, it was chasing Gov. Harrison who by 1816 was long gone from Indiana.

Supreme Court Clarification of Slavery

Two cases were decided by the Indiana Supreme Court during the first half of the first decade of statehood. The first case was *The State v. Lasselle*, 1 Blackford 59, 1 Ind. 69 (1820) and the second case was *In re Mary Clark, a*

Woman of Color, 1 Blackford 122, 1 Ind. 122 (1821). Both opinions are relatively short so they are set forth herein:

Appeal from the Knox Circuit Court.--Polly, a woman of color was brought before the Circuit Court by Laselle, in obedience to a writ of habeas corpus. He stated in his return that he held her by purchase as his slave; she being the issue of a colored woman purchased from the Indians in the Territory north-west of the river Ohio, previously to the Treaty of Greenville [1795] and cession of that Territory to the United States. The Court below remanded the woman to the custody of Lasselle.

Scott, J.--The question before this Court is, as to the legality of Lasselle's claim to hold Polly as a slave. This question has been presented before us with an elaborate research into the origin of our rights and privileges, and their progress until the formation of our State government in 1816. On the one hand, it is contended that, by the ordinance for the government of the Territory north-west of the river Ohio, and by the Constitution of, slavery was, and is, decidedly excluded from the State; while on the other hand, it is insisted that, by the act of cession of the State of Virginia, and by the ordinance of 1787, the privilege of holding slaves was reserved to those settlers at Kaskaskies and St. Vincents [Vincennes], and the neighboring villages, who, prior to that time, had professed to be citizens of Virginia, and that they had a vested right which could not be divested by any provision of the Constitution.

In deciding this case it is not necessary for us to recur to the earliest settlement of the country, and inquire what rights the first emigrants enjoyed, as citizens of Virginia, what privileges were secured to them when their connection with that State was dissolved. Whether the State of Virginia intended, by consenting to the ordinance of 1787, to emancipate slaves on this side of the Ohio river, or whether by the reservation alluded to, she intended to continue the privilege of holding slaves, to the settlers then in the country, is unimportant to the present case. That legislative authority, uncontrolled by any constitutional provision, could emancipate slaves, will hardly be denied. This has been done in several of the States, and no doubt has been entertained, either of the power of the Legislature to enact such a Statute, or of the binding force and efficacy of the law when enacted. By the power of the statute, an estate may be made to cease in the same manner as if the party possessing it were dead. A man may, by Statute, be made an heir, who could not otherwise be one. The

legislature have the power to change the course of descents so as to cast an estate upon those, who otherwise, could never have taken it by inheritance. This doctrine is sanctioned by the authority of Coke, Levinz, Blackstone, Bacon, and others of the first respectability. It must be admitted that a Convention, chosen to express purpose, and vested with full powers of the legislature, as well as the other branches of the government, must possess powers at least equal, if not paramount, to those of any ordinary legislative body. From these positions, it clearly follows that it was within the legitimate powers of the convention, in forming our constitution, to prohibit the existence of slavery in the State of Indiana. We are, then, only to look into our own constitution to learn the nature and extent of our civil rights, and to that instrument alone we must resort for a decision of this question. In the first article of the constitution, sec. 1, it is declared "That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which, are the enjoying and defending of life and liberty, and of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Sec. 24, of the same article, guards against any encroachment on those rights, and provides that they shall forever remain inviolable. 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.

We are told that the constitution recognizes pre-existing rights, which are to continue as if no change had taken place in the government. But it must be recollected that a special reservation can not be so enlarged by construction as to defeat a general provision. If this reservation were allowed to apply in this case, it would contradict, and totally destroy, the design and effect of this part of the constitution. And it can not be presumed that the constitution, which is the collected voice of the citizens of Indiana declaring their united will, would guarantee to one part of the community such privileges as would totally defeat and destroy privileges and rights guaranteed to another. From these premises it follows, as an irresistible conclusion , that, under our present form of government, slavery can have no existence, in the State of Indiana, and, of course, the claim of Lasselle can not be supported.

***Per Curiam*--The judgment is reversed, with costs, and the woman discharged.**

Kinney, Tabbs and M'Donald, for the State

Call, for the appellee.

The facts in the Lasselle case were simple. Polly was a descendant of a woman of color who was purchased as a slave from Indians in the North West Territory prior to 1795. It was not unusual for Indians to own slaves especially Indians who lived in the company of Frenchmen who populated the Illinois country and the area around Vincennes (St. Vincents). Lasselle, her owner and a Frenchman, argued that since he had been a self-proclaimed citizen of Virginia at one time that the provisions of the Act of Cessions by Virginia in 1781 and the North West Ordinance of 1787 "impliedly" vested in him a pre-existing right of slave ownership in the North West Territory and specifically in the Indiana Territory. In other words the privilege of holding slaves was "impliedly" reserved by these documents in the citizens of Kaskaskia, Vincennes, and surrounding villages. Of course there was nothing "expressed" in those documents creating such a pre-existing right. In deciding the case the Court never looked at the Virginia Act or the North West Ordinance as controlling. Instead, it confirmed that the issue of slavery was settled by the Indiana Constitution of 1816 and that Lasselle had no claim against Polly. The Court took the next step and discharged Polly from her slavery under Lasselle. However, slave owners were willing to use whatever subterfuge that might work to keep their slaves in harnesses. The following case, *In re Mary Clark, a Woman of Color*, was such a subterfuge.

From the Knox Circuit Court.

Holman, J.--In obedience to a writ of habeas corpus, issued by the Knox Circuit Court, G. W. Johnson [Johnston] brought before that Court the body of Mary Clark, (a woman of color,) said to be illegally detained by him; and assigned as the cause of her detention, that she was his servant by indenture, executed at Vincennes, in this State, on the 24th of October, 1816: which indenture is set out in the return, regularly executed and acknowledged, by which said Mary (being a

free servant and house maid for 20 years). This cause of detention was deemed sufficient by the Circuit Court, and said Mary remanded to the custody of the said Johnson [Johnston]. She appealed to this Court.

This application of Mary Clark to be discharged from her state of servitude, clearly evinces that the service she renders to the obligee [Johnston] is involuntary; and the Constitution, having determined that there shall be no involuntary servitude in this State, seems at first view to settle this case in favor of the appellant [Mary Clark]. But a question still remains, whether her service, although involuntary in fact, shall not be considered voluntary by operation of law, being performed under an indenture voluntarily executed. This indenture is a writing obligatory. The clause in the 7th section of the 11th article of the Constitution, that provides that no indenture hereafter executed by any negro or mulatto without the bounds of this State, shall be of any validity with this State, has no bearing on it. An indenture executed by a negro or mulatto out of this State, is by virtue of this provision, absolutely void, and can be set up neither as a demand for the services therein specified, nor as a remuneration in damages for a non-performance. But the Constitution, having confirmed the liberty of all our citizens, has considered them as possessing equal right and ability to contract, and, without any reference to the color of the contracting parties, has given equal validity to all their contracts when executed within this State. We shall, therefore, discard all distinctions that might be drawn as a writing obligatory, and test it, in all its bearings, by the principles that are applicable to all cases of a similar nature. It is a covenant for personal service, and the obligee [Johnston] requires a specific performance. It may be laid down as a general rule, that neither the common law nor the statutes in force in this State recognize the coercion of a specific performance on contracts. The principle, if not the only exceptions to this general rule, are statutory provisions, few, if any, of which are applicable to this State, and none of them has any bearing on this case. Apprentices are compellable to a specific performance of the article of apprenticeship, but their case rests on principles of a different nature. They are not considered as performing a contract on their own, but acting in conformity to the will of those whose right and duty it was to exact obedience from them. That right and duty existed by nature in the parent, and are, by legal regulations, transferrable to the master during the minority of the child: and when transferred, either by the parent, or those who stand *in loco parentis*, the duly of obedience arises, and is enforced on the ground of parental authority, and not on the principle of a specific performance of contracts, and cannot be urged as an exception to the general rule, that the coercion of a specific performance of contracts is not contemplated in law. The

case of soldiers and sailors depends on national policy, and cannot be used in the elucidation of matters of private right.

There are some covenants that may be specifically enforced in equity; but they are of a very different nature from the contract before us. They are mostly covenants for the conveyance of real estate, and in no case have any relation to the person. But if the law were silent, the policy of enforcing a specific performance of a covenant of this nature, would settle this question. Whenever contracting parties disagree about the performance of their contract, and a Court of justice of necessity interposes to settle their different rights, their feelings become irritated against each other, and the losing party feels mortified and degraded in being compelled to perform for the other what he has previously refused, and the more especially if that performance will place him frequently in the presence or under the direction of the adversary. But this state of degradation, this irritation of feeling, could be in no other case so manifestly experienced, as in the case of a common servant, where the master would have a continual right of command, and the servant compelled to a continual obedience. Many covenants, the breaches of are only remunerated in damages, might be specially performed, either by a third person at a distance from the adversary, or in a short space of time. But a covenant for service, if performed at all, must be performed under the eye of the master; and might, as in the case before us, require a number of years. 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 irritation that slavery itself. Consequently, if all other contracts were specifically enforced by law, it would be impolitic to extend the principle to contracts of personal service. Very dissimilar is the case of apprentices. They are minors, and for the want of discretion, are necessarily under the control of parents, guardians, or masters; and obedience is exacted from them, whether considered as children, wards, or apprentices. They are incapable of regulating their own conduct, and are subjected by nature and by law to the government of others; and that government, instead of humbling and debasing the mind, has a tendency to give it a regular direction, and a suitable energy for future usefulness. But it is not the master who in this case applies for legal aid. He has not appealed to a Court of justice to obtain a specific performance of this indenture. All he asks from the constituted authorities is, that they would withhold their assistance from his servant. Does this alter the case in his favor? Is it more consistent with good policy, that a man possessing power, should be left to enforce it for him? These questions are not easily answered

in the negative, but their reverse is unquestionably true. Deplorable indeed would be the state of society, if the obligee in every contract had the right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service, the exercise of such a right would be most alarming in its consequences. If a man contracting to labor for another a day, a month, a year, or a series of years, were liable to be taken by his adversary, and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party, and abject humiliation in the other. We may, therefore, unhesitatingly conclude, that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong, and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. It presents a case where legal intendment can have no operation. While the appellant remained in the service of the obligee without complaint, the law presumes that her service was voluntarily performed; but her application to the Circuit Court to be discharged from the custody of her master, establishes the fact that she is willing to serve no longer; and, while this state of will appears, the law can not, by any possibility of intendment, presume that her service is voluntary. The case of an apprentice presents a different state of things. The minor is considered as having no legal will. He has neither the power nor the right of choosing, whether he will obey or disobey the commands of the master. The law, therefore, on account of the immaturity of his will, can not presume that any of his services are involuntarily performed. The appellant in this case is of legal age to regulate her own conduct; she has a right to the exercise of volition; and, having declared her will in respect to the exercise of volition; and, having declared her will in respect to the present service, the law has no intendment that can contradict that declaration. We must take the fact as it appears, and declare the law accordingly. The fact then is that the appellant is in a condition of involuntary servitude; and we are bound by the constitution, the supreme law of the land, to discharge her therefrom.

Per Curiam.--The judgment is reversed with costs, and the woman discharged.

Dewey, for the appellant.

Call, for the appellee.

Mary Clark was an indentured servant. Supposedly she and Johnston had entered into a personal service contract at Vincennes for twenty years of work as a voluntary servant on October 24, 1816. The Indiana Constitution was approved on June 29th, 1816 but Indiana did not officially enter the Union until December 11, 1816. Mary was a free servant and a house maid. The case was brought before the Knox Circuit Court the same way that Polly brought her case against Lasselle.

Johnston's argument was that Mary Clark's obligations under the contract were voluntary by operation of law since she had voluntarily entered into the contract in the first place. This was not a disputed issue. Her actions were voluntary in 1816 but by 1821 she decided that she wanted out of the contract. The Court concluded that Mary's service, while voluntarily entered into, had become involuntary as evidenced by the initiation of her *habeas corpus* proceeding. The Court then directed attention to the provision in the Indiana Constitution regarding the equality and right of all persons to enter into contracts in the State. Negroes and Mulattos were not excluded from this provision. Next, the Court looked at the legality of the specific enforcement of personal service contracts regardless of the race or color of a person under the common law adopted by Indiana and the statutes of the state. It distinguished the situation of an apprenticeship of a child where children were apprenticed to masters by their parents or guardians during their minority. It also distinguished the situation of soldiers and sailors during their enlistments. Such contracts were subject to specific enforcement. Law and equity are two different legal principles used to collect damages or enforce contracts. Johnston argued that principles of equity or justice allowed such enforcement of personal service contracts. The Court pointed to cases where equity principles applied but concluded that Johnston's case was not one of them. The Court decided that since the contract was one of personal service, it could not enforce the contract and, consequently, Mary Clark was discharged from the service of Johnston.

The case would have been decided the same way if Mary Clark had been a white person.

Would this case have not arisen if Sec. 7 of the Article XI had not been amended? The deleted clause would have provided "neither shall any indenture of any negro or mulatto, hereafter made within the state, be of the least validity except in the case of apprenticeships." Perhaps, appellee Johnston and his lawyer thought that since this language had been removed, the Supreme Court would uphold the Knox County Circuit Court's decision. However, this argument was not made by Johnston and his lawyer. These two cases decided first, the issue of a slave enslaved in another state and second, the issue of a voluntary slave or servant indentured before statehood.

Indiana Supreme Court Justices

The three Supreme Court Justices at the time these two cases were decided were (1) the Hon. James Scott, (2) the Hon. Jesse Lynch Holman, and (3) the Hon. Isaac Newton Blackford. They were respectively the second, third, and fourth Supreme Court Justices of Indiana. The first justice was the Hon. John Johnson. He and Justices Scott and Holman were all appointed to the Court on December 28, 1816. However, Justice Johnson died on September 10th, 1817 and was replaced by Justice Blackford. Both opinions were marked *per curiam*, which meant "by the court." *Per curiam* today signifies an opinion by the entire court or a majority of the court without any notation of the judge who authored the opinion. That was not the situation in these two cases. The *Lasselle* case was authored by Justice Scott and the *Clark* case by Justice Holman.

Justice Johnson was a delegate to the 1816 Constitutional Convention from Knox County. He was the delegate who moved to change the wording of the last

sentence of Article VIII. He died during the first recess of the Court in 1817 and before any major decisions were issued.

Justice Scott was appointed as Clark County's Prosecutor in 1810 by Gov. Harrison. He would have known Floyd who probably resided in Jeffersonville until 1813 and practiced law there. Scott served in the 4th General Assembly as Clark County's representative to the House of Representatives during the first session in 1813. Later that same year he served as Clark County's member of the Legislative Council. Scott was one of the judges of the General Court from February 1st, 1813 until December 28th, 1816 and a Territorial Chancellor from June 14th, 1813 until October 1st, 1814. He served as a delegate from Clark County to the Constitutional Convention in 1816 and voted for the changes proposed by Delegate and later Justice Johnson. Scott was appointed to the Indiana Supreme Court on December 28th, 1816 and served until December 28th, 1830.

Justice Holman was appointed by Gov. Harrison as Dearborn County's prosecutor in 1811 and as Jefferson's County's Prosecutor in 1812. He served in the 5th General Assembly during the first session in 1814 but resigned in the same year to become a judge of the 2nd Judicial Circuit of the Indiana Territory. He inherited a substantial estate and when he came to Indiana in 1810 he brought his slaves with him for the specific purpose of freeing them. In 1835 he became a federal district court judge, probably replacing Benjamin Parke. Later he was a founder of Indiana University and Franklin College. He was also an ordained Baptist minister.

Justice Blackford graduated from Princeton University in 1806. He served as the Clerk in Washington County from January 7th, 1814 until September 15, 1814 and as Recorder of Deeds in Washington County from January 11th, 1814 until September 17, 1814. He was elected clerk of the Territorial House of

Representatives for the 4th and 5th General Assemblies but resigned when he became the judge of the 1st Judicial Circuit. He served in the latter position from September 14th, 1814 until January 20, 1816. He was appointed Prosecuting Attorney of Knox County on September 30, 1816. He was a State Representative from 1816 to 1817 and was chosen speaker during his term. The next year he was appointed to the Indiana Supreme Court. In 1855 he was appointed to the U. S. Court of Claims in Washington, D.C. where he served four years. He compiled the famous Blackford's Reports which included eight volumes covering the period from 1830 to 1850. It is from the Blackford's Reports that the two slavery cases discussed in this chapter were found.

Davis Floyd would have known each of these men personally. What there exact relationship was in unknown. Floyd was the Territorial Auditor of Public Accounts from June 15th, 1813 until February 1st, 1814, and the Territorial Treasurer from February 1, 1814 until November 16th, 1816. He was appointed the Prosecuting Attorney for Orange County on July 3rd, 1815, for Warrick County on October 23, 1815, and for Posey County on March 18, 1816. He was a delegate to the Constitutional Convention in 1816, a member of the first Indiana House of Representatives in 1816 and 1817, and in 1817 he became the president judge of the 2nd Judicial Circuit where he served until 1823. During all of this time Floyd lived in Corydon. The Supreme Court was on the second floor of the State Capitol building in Corydon. There the judges probably heard oral arguments on the two cases and it is not unlikely that Polly and Mary Clark were in attendance with their respective lawyers. It is likely that Floyd used this courtroom to conduct court business between the years 1817 and 1823 when he was judge of the Indiana 2nd Judicial Circuit.

The deck was stacked against Lasselle and Johnston. It is unlikely that Gov. Jennings would have appointed a Supreme Court Justice who was proslavery. It now appears that Johnston was not the author of the so-called General

Washington Johnston anti-slavery report issued by a committee of the House of Representatives in 1808. Maybe Johnston merely found it convenient at the time to issue the report. He was not a true believer. He could have sued Mary Clark and recovered damages for the breach of the contract by her depending upon his ability to show damages or her ability to pay them but the Supreme Court would not require specific performance of a contract for personal services. It would have done that whether Mary Clark was white or colored.

Battle over Slavery in the Constitutional Convention

Some commentators have said there was a huge battle in the Constitutional Convention of 1816 over the issue of slavery. The battle over slavery was won in the trenches of the Indiana Territorial General Assemblies long before the capitol was moved from Vincennes to Corydon in 1813. Most of the men who advocated slavery in Indiana had gone elsewhere by the time of the Convention. It would be mistaken to suggest that the vestiges of slavery were forever eliminated by the time the Indiana Supreme Court issued their opinions in 1820 and 1821. The nation including Indiana has undergone terrible strife over the treatment of black Americans and Native Americans since that time. Among some of those things were (1) the Indian Removal Act promulgated under the presidency of Andrew Jackson which forced Native Americans to leave the South and move to Territories west of the Mississippi River, (2) the *Dred Scott* case decided by the United States Supreme Court wherein it was declared that black Americans were subhuman and therefore were not entitled to the rights of white citizens, (3) the aftermath of the Civil War where black Americans were exposed to a worst kind of slavery than plantation slavery, the indiscrimate incarceration of blacks in the South who were forced to work in mines, in forests, and in factories all under inhuman conditions, (4) the *Plessey v. Ferguson* case which established the legal doctrine of separate but equal facilities, (5) the actions of President Woodrow Wilson to exclude black Americans from government jobs

during World War I, (6) and the wholesale slaughter of unborn black Americans through legalized abortions justified on the basis that fetuses are not human beings. In 1931 the last lynching of two black Americans in Marion, Indiana took place, said to be the last lynchings in the North. A popular book recently looked at the effect that the lynching had on the community down to the present time. It was not good but in 1998 the county in which the lynchings took place elected Indiana's first black sheriff. The lynchings were probably the work of just ordinary citizens who were aroused by rumors and falsehoods rather than by the hated Ku Klux Klan. The Klan still exists in some places but its popularity is on the decline. Indiana desegregated their public schools before *Brown v. The Board of Education* was decided in 1954.

Indiana can be proud of its men and women who took first steps down the road of racial harmony with nothing more than their vision of a better world.

Books and references relied upon other than those cited in this chapter:

(1) Ewbank, Louis B., and Riker, Riker, Dorothy L., *The Laws of Indiana Territory, 1809-1816*, Indiana Historical Bureau, Indianapolis, Indiana, 1934.
(2) Kettleborough, Ph.D., Charles, *Constitution Making in Indiana*, Vol. I, 1780-1851, Indiana historical Commission, Indiana Historical Bureau, Indianapolis, Indiana, 1971.
(3) Moores, Merrill, "Indiana in 1816," *Indiana Magazine of History*, Vol. XII, Department of History of Indiana University, Bloomington, Indiana, 1916m p. 271.

Images:

(1) First Indiana State Capitol, Corydon, Indiana (Photograph of a Drawing in the Indiana State Library).
(2) Examples of Versions of the Indiana Seal Over Time.

(3) Vintage Postcard of The Old State Capitol at Corydon.

(4) Vintage Postcard of The Constitution Elm at Corydon.