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New Evidence That *Dred Scott* Was Wrong About Whether Free Blacks Could Count for the Purposes of Federal Diversity Jurisdiction

STANTON D. KRAUSS*

Article Three, Section Two of the Constitution grants federal courts jurisdiction over "Controversies . . . between Citizens of different States."[1] In *Dred Scott v. Sandford*,[2] the Supreme Court declared that free blacks could never be "Citizens" within the meaning of this provision.[3] Chief Justice Taney, speaking for the Court, purported to base this decision on the original understanding of the Constitution, which (he said) eternally fixed that document's true meaning.[4]

Yet his opinion cited nothing that any member of the Founding generation ever did or said with respect to Article Three, Section Two. Indeed, the only historical data mentioned by the Chief Justice that spoke directly to the status of free blacks under its diversity provision was the fact that no one questioned the existence of federal jurisdiction when the

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* Professor of Law, Quinnipiac University; B.A. 1975, Yale University; J.D. 1978, University of Michigan. This article grew out of the comprehensive study of early American newspapers and legal manuscripts in which I have been engaged for over a decade. I am grateful for the generous support Quinnipiac University School of Law has provided for this research. The assistance of librarians Christina DeLucia and Linda Holt in getting me obscure papers and microfilms over the years has been invaluable. So was the help I received on this paper from Walter Hickey, Archives Specialist at the National Archives and Records Administration's Federal Records Center for the Northeast Region, Assistant State Archivist Bruce Stark of the Connecticut State Archives, and Professors Charles Heckman, David Konig, Stephen Latham, and Jamison Wilcox.

1 U.S. CONST. art. III, § 2, cl. 1.

2 60 U.S. 393 (1857).

3 There is an ongoing debate about whether a majority of the Court agreed with Chief Justice Taney's declaration that free blacks can't count as "Citizens" for the purposes of diversity jurisdiction. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 267 & n.233 (1985); DON E. FEHRENBACHER, THE DRED SCOTT CASE 322–34 (1978). It isn't my intention in this article to join this debate, but there is no convenient way to write a paper on this subject without employing rhetoric that—at least implicitly—favors one side or the other. Because Taney's opinion is denominated the "opinion of the court," *Dred Scott*, 60 U.S. at 399, was regarded by a majority of the Court as having been such on this issue, and was later so understood by the Court, *see* FEHRENBACHER, *supra* at 330, 673 n.21, that is how I'll refer to it in this article.

4 *See Dred Scott*, 60 U.S. at 405, 426.

Supreme Court decided an appeal in an interracial diversity case in 1829.[5] However, even dissenting Justice Curtis agreed with Chief Justice Taney that, given the peculiar posture of the 1829 case, no jurisdictional question was presented by its appeal.[6]

Rather than plumb the original meaning of the diversity provision by examining the Founders' words or deeds concerning it, Taney proceeded by asking a far more general (and far more abstract) question: whether the Founders intended to allow free blacks to "become . . . member[s] of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all rights, and privileges, and immunities, guarantied by that instrument to the citizen," including "the privilege of suing in a court of the United States in the cases specified in the Constitution."[7] To answer that question, he canvassed the racial views of white Americans from early colonial times until his day, and concluded that this history demonstrated beyond cavil that the politically omnipotent white race had always deemed blacks to be inferior—a unique race which, unlike all others, could never be integrated into the American people.[8] Hence, the Founders meant to exclude all blacks from national citizenship, which meant they could never be "Citizens" within the meaning of Article Three, Section Two.[9] Otherwise, Taney reasoned, the Privileges and Immunities Clause[10] would require that slave states extend rights to free blacks visiting from free states,[11] a result up with which neither the Southern Founders nor their mid-nineteenth century heirs would ever have put.

Although Taney's conclusion was vigorously denounced by Justices Curtis and McLean,[12] neither challenged his failure to adduce any evidence of what the Founders actually thought about the status of free blacks with respect to the diversity provision of Article Three, Section Two. And neither the dissenting Justices nor the lawyers for the parties cited any such

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[5] *Id*. at 423. The case in question was *LeGrand v. Darnall*, 27 U.S. 664 (1829). One of the people who failed to raise a jurisdictional objection in *LeGrand* was the white plaintiff/appellant's lawyer, Roger Taney, *see id*. at 664, which is doubtless why Dred Scott's lawyer repeatedly cited *LeGrand* in his briefs. *See* Brief of Plaintiff at 6–7 (Dec. Term, 1855), Scott v. Sanford, 60 U.S. 393 (1857), *reprinted in* 3 SOUTHERN SLAVES IN FREE STATE COURTS: THE PAMPHLET LITERATURE 17, 22–23 (Paul Finkelman ed., 1988); Brief for Plaintiff in Error at 14 (Dec. Term, 1856), Scott v. Sanford, 60 U.S. 393 (1857), *reprinted in id*., at 29, 42.

[6] *Dred Scott*, 60 U.S. at 423–25; *id*. at 589–90 (Curtis, J., dissenting).

[7] *Id*. at 403.

[8] *See id*. at 407–26. For a detailed analysis of this portion of Taney's opinion, see FEHRENBACHER, *supra* note 3, at 335–64.

[9] *See supra* note 8.

[10] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[11] *See supra* note 8.

[12] *See id*. at 531–33 (McLean, J., dissenting); *id*. at 571–88 (Curtis, J., dissenting).

evidence, on either side of the issue. It's only fair to assume that no one knew of anything to cite.

However, I recently discovered something of which they all seem to have been unaware. While looking through some eighteenth-century American newspapers, I chanced upon a story about the 1793 federal court proceedings in a pair of interracial diversity cases captioned *Elkay v. Moss & Ives*.[13] In fact, I came upon reports of this litigation in journals published throughout the country. Upon further investigation, I realized that the *Elkay* litigation provides our first solid evidence of the views of at least several prominent members of the Founding generation about the diversity question considered in *Dred Scott*. Moreover, the public's reaction to the widespread news reports of these trials sheds light on the broader, public, understanding of that issue.

In sum, this episode strongly suggests that the Founders believed free blacks could count for the purposes of federal diversity jurisdiction.[14] In other words, it indicates that Chief Justice Taney got his history—and therefore his interpretation of Article Three—wrong in *Dred Scott*.

In Part I of this paper, I will relate the story of the *Elkay* affair. In the following section, I will explain why I believe it suggests that *Dred Scott*'s Article Three ruling was, on its own terms, wrong. Finally, I will comment on the larger implications for originalist jurisprudence of my discovery of this litigation.

I. THE *ELKAY* AFFAIR[15]

Peter Elkay, a free black man, lived with his family in Stockbridge, Massachusetts. On September 10, 1786, John Ives III and Joel Moss, two white residents of Wallingford, Connecticut, took Elkay's eight and eleven year old daughters (Minty and Amy) from Stockbridge to Wallingford,[16]

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[13] (C.C.D. Conn. April Term 1793). The surviving court papers from this case may be found in Appendix B, below.

[14] I don't claim this evidence indicates that free blacks had to be considered "Citizens," merely that they could be. The *Elkay* litigation throws no light on the authority of their state of birth or residence to determine their status. *Cf. Dred Scott*, 60 U.S. at 576 (Curtis, J., dissenting) ("[E]very free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.").

[15] The documentary record upon which this account is based is set forth in the Appendices to this paper. I have been unable to find any other reference to the Elkays anywhere, including the census, town, and church records in Stockbridge, Massachusetts, and Wallingford, Connecticut.

[16] Connecticut law prohibited the commercial importation of slaves from other states and the knowing purchase of such imported slaves. An Act concerning Indian, Molatto, and Negro Servants and Slaves [hereinafter Act Concerning Slaves], *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 233, 234 (Richard Law & Roger Sherman comps., 1784), *reprinted in facsimile in* THE FIRST LAWS OF THE STATE OF CONNECTICUT (John D. Cushing ed., 1982) [hereinafter 1784 Code]. *See generally* Rupert Charles Loucks, "Let the Oppressed Go Free": Reformation and Religion in English Connecticut, 1764-1775, at 924–29 (1995) (unpublished Ph. D. dissertation, University of Wisconsin-

where the girls may have worked as their slaves and were ultimately sold.[17] Peter seems to have recovered Amy on September 10, 1791. It's not clear when Minty was returned to him.[18]

Invoking the court's diversity jurisdiction, Elkay brought two actions of trespass on the case against Ives and Moss in the Federal Circuit Court for the District of Connecticut shortly before the commencement of its April, 1793, term.[19] His declaration (i.e., complaint[20]) in each case complained of one daughter's seizure and demanded $1,000 in damages for the loss of her services. While the surviving records don't reveal whether

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Madison) (on file with the Connecticut Law Review); David Menschel, Note, *Abolition Without Deliverance: The Law of Connecticut Slavery 1784-1848*, 111 YALE L.J. 183, 192–97 (2001). The same provision mandated that "[g]rand jurors . . . enquire after, and make Presentment of all Breaches of this Act." Act Concerning Slaves, *in* 1784 Code, *supra*, at 234. Yet I have found no evidence that Moss, Ives, or the disappointed slave buyer who later sued them for breach of contract were charged with violating that law. I therefore assume that the Elkays, like the man from whom the defendants bought the children, lived in Connecticut at or before the time Moss and Ives allegedly acquired Amy and Minty. However, the slave traders may simply have been the beneficiaries of lax enforcement of the law.

[17] Amy's September 30, 1786, sale to Titus Hotchkiss is the subject of the action documented in Appendix C. The records from that lawsuit, which Amy's purchaser filed after the conclusion of the *Elkay* litigation, suggest that Ives and Moss had a partner in their asserted ownership of the girls, Edmond Field. *See infra* app. C.1. However, Field, who had moved to New York before November, 1793, isn't mentioned in the *Elkay* papers, and I've found no evidence that Elkay ever sued him.

[18] The Final Record Book entry for the claim based upon Amy's seizure suggests that she was still out of Peter's custody when he filed the lawsuit. *See infra* app. B.1. However, even though Minty was only eight when she was taken, it's hard to believe that Peter would have sought (and received) the same amount of damages for the loss of each child if he'd been deprived of Amy for five years but (after seven years) might have remained separated from Minty forever. *See id.*

[19] The Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94, *amended by* the Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276, was understood to require that a federal court in a common law case "follow the procedure" used on May 8, 1792, in the highest court of the state where the federal court was sitting. *See* JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 573–74 (1971). Under Connecticut law, service of process in civil cases before the Superior Court had to be completed twelve days before the commencement of the term at which the defendant would be obligated to reply. *See* An Act for the directing and regulating of Civil Actions, *in* 1784 Code, *supra* note 16, at 3–4. The defendants' petition for a new trial, which may be found in Appendix B.3, informs us that they were served with process on the last day permitted.

[20] Zephaniah Swift described a declaration as follows:

> The declaration . . . contains and sets forth at large the plaintiff's demand, and the foundation of the action. The gist and essence of the action on which the right of recovery is grounded, must be alledged with clearness and certainty. All the facts must be stated which are necessary to authorize the court to render judgment, and which will furnish a rule by which they can ascertain the damages that ought to be given.

2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 196 (1796). Although it was a pleading, Swift suggested that the declaration was issued along with the writ, providing the defendant with notice of the plaintiff's claim sufficient to allow the defendant to default if he had no defense to the claim. *See id.* at 194, 196. (Similarly, a modern complaint accompanies a civil summons. *See, e.g.*, FED. R. CIV. P. 4(c)(1).) *Cf.* GOEBEL, *supra* note 19, at 578 n.115 (suggesting the declaration was inscribed on the writ in Connecticut).

they denied that Peter was free (or whether he had ever been a slave), the defendants plainly claimed that his daughters were their slaves, having been purchased by them from one Joel Ives. The cases were tried in New Haven on April 28. A jury decided that the girls were actually free at the time they were taken and awarded Elkay $250 in each case. The court entered judgments accordingly. After the judges rejected (what was essentially) the defendants' motion for a new trial, Elkay was granted execution in that amount.[21] A report of this litigation, some version of which appeared in almost one-third of the English-language newspapers published in America, depicted this as a handsome award and expressed the hope that it would deter others from attempting to steal free blacks and sell them into bondage.[22]

II. THE SIGNIFICANCE OF *ELKAY*

Elkay v. Moss & Ives was a pair of nationally-publicized interracial diversity suits. Yet none of the lawyers involved in this litigation appears to have questioned the court's jurisdiction over it. Neither does anyone

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[21] Titus Hotchkiss, Amy's erstwhile purchaser, subsequently sued Ives, Moss, and Edmond Field, charging them with breach of contract. The surviving court papers concerning this case may be found in Appendix C, below.

[22] The original news report of these lawsuits, which is set forth in Appendix A.1, was published in New Haven's *The Connecticut Journal* of May 8, 1793. This article was subsequently reprinted in leading papers across the country. *See New-Haven, May 8*, AM. MERCURY (Hartford), May 13, 1793, at 3; *New-Haven, May 8*, CONN. COURANT, May 13, 1793, at 2; *New-Haven, May 8*, NORWICH PACKET (Conn.), May 16, 1793, at 2; *New-Haven, May 8*, PHENIX; OR, WINDHAM HERALD (Conn.), May 18, 1793, at 3; *New-Haven, May 8*, DEL. GAZETTE, June 1, 1793, at 3; *New-Haven, May 8*, BALT. DAILY REPOSITORY, May 16, 1793, at 2; *Connecticut*, COLUMBIAN CENTINEL (Boston), May 15, 1798, at 2; *Newhaven, May 8*, THE FEDERAL SPY (Springfield), May 14, 1793, at 2; *New-Haven*, GAZETTE OF ME., May 25, 1793, at 2; *New Haven, May 8*, GREENFIELD GAZETTE (Mass.), May 16, 1793, at 2; *New-Haven, May 8*, MASS. MERCURY, May 17, 1793, at 2; *Newhaven, May 8*, SALEM GAZETTE (Mass.), May 14, 1793, at 3; *New Haven, May 8*, W. STAR (Stockbridge, Mass.), May 21, 1793, at 3; *New Haven, May 8*, MIRROUR (Concord, N.H.), May 27, 1793, at 2; *Connecticut*, N.H. J.: OR, THE FARMER'S WEEKLY MUSEUM, May 23, 1793, at 3; *New-Haven, May 8*, WOODS'S NEWARK GAZETTE (N.J.), May 15, 1793, at 2; *New-Haven, May 8*, DAILY ADVER. (N.Y.), May 10, 1793, at 2; *New Haven, May 8*, DIARY; OR LOUDON'S REGISTER (N.Y.), May 10, 1793, at 2; *New-Haven, May 8*, N.C. J., May 20, 1793, at 2; *New-Haven, May 8*, GEN. ADVER. (Phila.), May 11, 1798, at 3; *New-Haven, May 8*, INDEP. GAZETTEER (Phila.), May 18, 1793, at 2; *New-Haven, May 8*, MAIL, OR, CLAYPOOLE'S DAILY ADVER. (Phila.), May 13, 1793, at 3; *New-Haven, May 8*, PROVIDENCE GAZETTE & COUNTRY J., May 18, 1793, at 3; *New-Haven, May 8*, FARMER'S LIBRARY, OR VT. POLITICAL & HISTORICAL REGISTER, June 3, 1793, at 2; *New-Haven, May 8*, SPOONER'S VT. J., May 20, 1793, at 2; *Newhaven, May 8*, VT. GAZETTE, May 24, 1793, at 3. The *Boston Gazette* printed a shorter version of this article, from which the identification of the defendants' state citizenship and the editorial remarks about the outcome were omitted. *Communications*, BOSTON GAZETTE, May 13, 1793, at 3. This story, which may be found in Appendix A.2, later appeared in several other newspapers. *Untitled*, PHENIX (Dover, N.H.), May 18, 1793, at 3; ESSEX J. & N.H. PACKET (Newburyport, Mass.), May 15, 1793, at 3; *Boston, May 13*, FED. GAZETTE & PHILA. DAILY ADVER., May 17, 1793, at 3; *Boston, May 13*, UNITED STATES CHRON. (Providence), May 16, 1793, at 3. For a complete list of the newspapers published in May and June, 1793, see CHRONOLOGICAL TABLES OF AMERICAN NEWSPAPERS 1690-1820, at 22–43 (Edward Connery Lathem comp., 1972) [hereinafter Lathem].

else in America. While not conclusive, these facts strongly suggest that the Founding generation believed that free blacks could be "Citizens" for the purposes of Article Three, Section Two.

A. *The Acquiescence of the Lawyers*

Four lawyers participated in these trials. Pierpont Edwards, the first (and then-current) United States' Attorney for the District of Connecticut,[23] represented Peter Elkay.[24] The defendants' lawyer was Connecticut Congressman James Hillhouse.[25] Federal District Judge Richard Law and Supreme Court Justice James Wilson presided over the proceedings.[26]

All four were excellent lawyers and extremely influential men, men who would have had personal knowledge of any original understanding of Article Three, Section Two. Edwards, the most prosperous attorney in New Haven, had been a delegate at the convention that (with his support) ratified the Constitution on behalf of the State of Connecticut.[27] His friend Hillhouse was also a first-rate lawyer[28] and a long-time member of Connecticut's political elite.[29] Richard Law, the first federal judge for the District of Connecticut, had sat on the Connecticut Superior Court from 1784 (serving as its Chief Justice since 1786) until his appointment to the federal bench in 1789.[30] When Edwards complained to Senator Oliver Ellsworth about Ellsworth's decision to recommend Law rather than Edwards for the District Court judgeship, Ellsworth replied that, among

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[23] Charles A. Heckman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards*, 28 CONN. L. REV. 669, 673 (1996).

[24] *See infra* app. B.1. For a suggestion as to why Edwards took this case, see *infra* note 51.

[25] On Hillhouse's role in this litigation, see Appendix B.1, below. On his House membership, see *infra* note 29.

[26] *See* Docket Book, Circuit Court for the District of Connecticut (Apr. 25, 1793), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 365 (Maeva Marcus ed., 1988) [hereinafter DHSC]. On the use of multi-judge trial courts in colonial America and the early Republic, including the federal circuit courts extant in 1793, see Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 113 n.6, 123 & n. 54 (1998).

[27] *See* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 609 (Merrill Jensen ed., 1978) [hereinafter DHRC].

[28] *See* LEONARD BACON, SKETCH OF THE LIFE AND PUBLIC SERVICES OF HON. JAMES HILLHOUSE OF NEW HAVEN 43 (1860).

[29] In addition to holding many governmental positions in his home state, Hillhouse was elected one of its delegates to the Continental Congress in 1786 and 1788, and he was one of its representatives in the Second House at the time of this litigation. *See* 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790, at 53 (Gordon DenBoer ed., 1984) [hereinafter DHFFE]. He was later reelected to the Third and Fourth Houses, and then chosen (in 1796) to succeed Oliver Ellsworth in the Senate, where he served until 1810. *See id.*

[30] *See* 2 DHSC, *supra* note 26, at 49.

other reasons, "I named [Law] because he stood first on the list of law characters in the State . . . ."[31] Finally, Law, like Edwards, had been a (pro-ratification) delegate at Connecticut's convention.[32] The only out-of-stater among the group, James Wilson, was one of the ablest lawyers in America and a leading force at both the Constitutional Convention of 1787 and the convention that ratified its handiwork on behalf of the State of Pennsylvania.[33] In fact, he was one of the five members of the Committee of Detail "that introduced [the] language ['Controversies . . . between Citizens of different States'] into the Constitution."[34] If anyone in America would have been privy to the original understanding of Article Three, Section Two, it would have been Justice Wilson.

Each of these men appears to have been in a position to act if he believed the Constitution didn't authorize the exercise of federal jurisdiction in these cases, yet none of them acted. Most obviously, Pierpont Edwards, who could have filed these suits in the state courts (where he had a sizeable practice), chose to bring them in the federal court. James Hillhouse filed no plea in abatement or motion in arrest of judgment, procedural devices by which a defendant could challenge the existence of party-based federal jurisdiction.[35] Further, while the defendants' petition for a new trial is larded with frivolous claims about absent witnesses and surprise testimony, no jurisdictional issue is broached therein.[36] Thus, as

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[31] Letter from Oliver Ellsworth to Pierpont Edwards (Aug. 20, 1789), *quoted in* Heckman, *supra* note 26, at 678. Ellsworth, who sat with Law on the Superior Court from 1785 to 1788, *see* 3 DHRC, *supra* note 27, at 609, was in a good position to make this judgment.

[32] 2 DHFFE, *supra* note 29, at 55.

[33] *See, e.g.*, MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON, 1742-1798, at 18–24 (1997).

[34] Caleb Nelson, *Sovereign Immunity As a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1562 (2002). *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 147, 173, 186 (Max Farrand ed., rev. ed., 1966).

[35] On the use of these vehicles for raising such jurisdictional questions, see the remarks of Chief Justice Jay in *Shedden v. Custis*, 21 F. Cas. 1218, 1218 (C.C.D. Va. 1793) (No. 12,736). *Shedden* involved the branch of federal jurisdiction covering suits between a citizen and a foreigner, *see id.* at 1218, but the use of both of these pleas to challenge the existence of the requisite diversity in federal suits is noted in GOEBEL, *supra* note 19, at 587–88.

[36] *See infra* app. B.3. Because Hillhouse argued in support of this motion before the court, I assume that nothing should be inferred from the fact that it is signed in the names of the defendants, the moving parties, except that this was proper procedure. In the absence of any circuit court rule—and none has been found—, it seems likely that this court would have followed the practice of Connecticut's Superior Court as to who should sign such a petition. *See* GOEBEL, *supra* note 19, at 573–80. While the Superior Court rules and Zephaniah Swift's treatise discuss new trial petitions in the Connecticut courts, both are silent about who should sign them. *See Points of Law Adjudged, and Rules of Practice*, *in* 1 Root 561, 573–75 (1798); 2 SWIFT, *supra* note 20, at 270–73. However, the relevant form in Simeon Baldwin's form book is also signed by the petitioner, *see Petition for a New Trial*, *in* SIMEON BALDWIN, LEGAL NOTEBOOK 1785, at 143, 144 (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series IV, Box 71, Folder 857), which supports my inference that this was the practice in the Superior Court.

far as the surviving record shows, Hillhouse never questioned the court's jurisdiction over this case. While I don't know precisely what Law's position on this question was, a leading authority wrote in 1796 that the Connecticut Superior Court had held that "the court[,] in any stage of the case[,] on discovering that it is not cognizable by them [for want of jurisdiction], are bound to dismiss it."[37] Moreover, Wilson is on record as having believed that federal judges were obligated to raise jurisdictional questions even when the parties had not broached them.[38] Yet neither judge raised any question about the legitimacy of trying these cases in their federal court, and the litigation proceeded without objection.

These men had no clear motive to ignore an original understanding barring free blacks from invoking federal diversity jurisdiction. For starters, none appears to have been a fanatical advocate of the rights of blacks. In fact, all four may have been slaveholders at the time of the *Elkay* litigation.[39] The historical record clearly indicates that Edwards, Hillhouse, and Wilson owned slaves in April, 1793.[40] Federal census data

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[37] 2 SWIFT, *supra* note 20, at 199. No reported state or federal court decision in which Law took part ever considered this question.

[38] In *Ketland v. The Cassius*, 2 U.S. 365 (C.C.D. Pa. 1796), a forfeiture case tried before Wilson and Judge Richard Peters, the court raised the question whether (under the Judiciary Act of 1789) jurisdiction lay in the Circuit or the District Court, decided it adversely to the informant, and dismissed the information. In explaining his vote to dismiss, Wilson remarked that:

> The Court is bound to take notice of a question of jurisdiction, whenever it may occur, and however it may be proposed: For, if we are satisfied, that we have not legal cognizance of any cause;—or, in terms less direct, if we are not satisfied, that we have cognizance; we ought not to proceed to a decision, or an investigation, upon its merits.

Id. at 368.

[39] *See infra* notes 40–42 and accompanying text.

[40] I am indebted to Charles Heckman for alerting me to Edwards's slave ownership, which he noted in Heckman, *supra* note 23, at 681. The federal census of 1790 records that Edwards possessed two slaves. *See* CENSUS OF THE UNITED STATES, CONNECTICUT, NEW HAVEN COUNTY 20 (City of New Haven) (1790) [hereinafter 1790 CENSUS]. Simeon Baldwin's notes report that they were Casar (age twenty-three) and Tom (age fourteen). SIMEON E. BALDWIN, LIFE AND LETTERS OF SIMEON BALDWIN 312 (1919). Ten years later, the second census states that Edwards possessed one slave. *See* CENSUS OF THE UNITED STATES, CONNECTICUT, NEW HAVEN COUNTY 12 (City of New Haven) (1800) [hereinafter 1800 CENSUS]. The New Haven land records, which should record all manumissions in the town, include none by Edwards during the 1790s. Neither do Edwards's surviving papers, the bulk of which are housed in Manuscripts and Archives, Yale University Library, The New Haven Colony Historical Society (in New Haven, Conn.), The Connecticut State Historical Society (in Hartford, Conn.), and The Huntington Library (in San Marino, Cal.). Inasmuch as Connecticut law mandated that any slave born after March 1, 1784, would automatically become free upon turning twenty-five, see Act Concerning Slaves, *in* 1784 Code, *supra* note 16, at 233, 235, it's unlikely that Edwards would have bought a new slave after 1790. I therefore assume that the slave he owned in 1800 was one of the two he had held ten years earlier, and that the other had died.

The 1790 census also reveals that Hillhouse owned one slave. 1790 CENSUS, *supra*, at 19. From Simeon Baldwin's notes, we learn that she was born after 1784. BALDWIN, *supra*, at 312. She appears to have died of scarlet fever at the age of nine, during the epidemic of 1794. *See Deaths in New Haven, in 1794*, CONN. J., Jan. 1, 1795, at 3. As a result, Hillhouse owned no slaves in 1800. 1800 CENSUS, *supra*, at 5.

also indicates that Law owned one slave in 1790, but none in 1800,[41] but there is no evidence of how, when, or why this change occurred.[42]

This does not necessarily mean that these men were passionately committed to the suppression of blacks in America. Surprisingly enough, it turns out that the ranks of leading abolitionists included many slave owners.[43] For example, Benjamin Rush owned a slave while serving as an officer of the Pennsylvania Society for Promoting the Abolition of Slavery.[44] Aaron Burr, John Jay, and possibly even Alexander Hamilton, owned slaves while leading the abolitionist movement in New York.[45] So

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On Wilson's ownership of Thomas Purcell, see HALL, *supra* note 33, at 30 & n.62 and CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER 1742-1798, at 367 (1956). Smith notes that Wilson freed Purcell on January 2, 1794. *Id.* at 367, 411 n.14.

[41] *See* CENSUS OF THE UNITED STATES, CONNECTICUT, NEW LONDON COUNTY 163 (City of New London) (1790); CENSUS OF THE UNITED STATES, CONNECTICUT, NEW LONDON COUNTY 467 (City of New London) (1800).

[42] The New London land records include no manumissions by Law during the 1790s. Nor do his surviving papers, which are principally located in Yale University's Sterling Library and the Connecticut State Historical Society (in Hartford, Conn.). The New London land records, which generally report deaths, don't report the death of Law's slave during the decade, but that could be because he or she was a slave.

[43] This was not simply a Southern phenomenon, as the text below will make clear. *Cf.* RICHARD S. NEWMAN, THE TRANSFORMATION OF AMERICAN ABOLITIONISM: FIGHTING SLAVERY IN THE EARLY REPUBLIC 19–20 (2002) (suggesting the contrary).

[44] *See* DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY 84, 104, 360–63 (1971). Rush bought William Grubber before the Revolution, joined the abolition society in 1787, promised in 1788 to free Grubber in 1794 (when Rush claimed Grubber's work would have reimbursed him for Grubber's purchase price), and then fulfilled that promise. *Id.*

[45] This trio's struggle against slavery in New York was recently examined in ROGER G. KENNEDY, BURR, HAMILTON, AND JEFFERSON: A STUDY IN CHARACTER 89–105 (2000). Kennedy notes the charge that Burr and Hamilton owned slaves while fighting for abolition. *See id.* at 93 (quoting 1 MILTON LOMASK, AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT, 1756-1805, at 119–20 (1979)); *id.* at 97 (quoting JAMES T. FLEXNER, THE YOUNG HAMILTON: A BIOGRAPHY 39 (1978)). Burr's ownership of slaves is confirmed by the federal census records, *see* CENSUS OF THE UNITED STATES, NEW YORK, CITY AND COUNTY OF NEW YORK 3 (1790) [hereinafter 1790 N.Y. CENSUS]; CENSUS OF THE UNITED STATES, NEW YORK, CITY AND COUNTY OF NEW YORK 735 (1800) [hereinafter 1800 N.Y. CENSUS], but Hamilton's is not, *see* 1790 N.Y. CENSUS, *supra*, at 18; 1800 N.Y. CENSUS, *supra*, at 661. Indeed, Forrest McDonald denies that the available evidence indicates that Hamilton ever owned a slave. *See* FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 373 n.12 (1979). (Ron Chernow's recent monumental biography deems the evidence inconclusive. *See* RON CHERNOW, ALEXANDER HAMILTON 210–11, 581 (2004).) Finally, although the census records establish that Jay owned slaves in 1790 (but not 1800), *see* 1790 N.Y. CENSUS, *supra*, at 10; 1800 N.Y. CENSUS, *supra*, at 29, and Jay claimed merely to "'purchase slaves and manumit them when their faithful services shall have afforded a reasonable retribution,'" SHANE WHITE, SOMEWHAT MORE INDEPENDENT: THE END OF SLAVERY IN NEW YORK CITY, 1790-1810, at 82 (1991) (quoting letter from John Jay, *quoted in* GEORGE PELLEW, JOHN JAY 293–94 (1980)), one scholar has written that he "purchased slaves and, after training them to earn a livelihood, gave them their freedom." EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 182 (1966) (internal citation omitted). (Other abolitionists may have justified their ownership of slaves on the ground that character training by an enlightened master was needed in order to help a slave overcome the degrading effects of enslavement. *See, e.g.*, RICHARD NORTON SMITH, PATRIARCH: GEORGE WASHINGTON AND THE NEW

did Simeon Baldwin, who owned a slave named Bristo while serving as the court clerk at the *Elkay* trials and as a secretary of the Connecticut Society for the Promotion of Freedom ("CSPF") for as long as that group is known to have had one.[46]

Indeed, there is evidence that several of the lawyers involved in the *Elkay* litigation may have been opposed to slavery, at least in principle. James Wilson had publicly condemned it.[47] Pierpont Edwards had belonged to the CSPF since 1790, the year it was founded.[48] And James Hillhouse strongly denounced slavery from the Senate floor in 1804, when he led an effort to limit slavery in the Louisiana Territory.[49]

Nonetheless, there is no evidence that any of these four men was so passionately committed to advancing the rights of American blacks as to turn his back on an original understanding that no black person could count for the purposes of diversity jurisdiction. Other than litigating these cases, joining the CSPF is the only thing Edwards is known ever to have done that might reflect opposition to slavery. However, one didn't have to be a

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AMERICAN NATION 305–06 (1993); Peter Hinks, "To give them liberty, and stop there, is to entail upon them a curse:" Slavery, Emancipation, and Yale College, 1775-1815, at 7 (unpublished manuscript on file with the Connecticut Law Review).) On the number and significance of slaveholders in the New York Manumission Society, see WHITE, *supra*, at 80–86.

[46] In 1792, Baldwin inherited a twenty-year old slave named Bristo from his father, whose will stipulated that "if Bristol [sic], my negro boy, shall serve my heirs faithfully untill he shall arrive at the age of twenty five years, he shall be set free and a new bible given him." BALDWIN, *supra* note 40, at 16, 313. On Baldwin's position as court clerk, see *id*. at 280–81. The CSPF is known to have existed from 1790 to 1795, JAMES D. ESSIG, THE BONDS OF WICKEDNESS: AMERICAN EVANGELICALS AGAINST SLAVERY, 1770-1808, at 97, 113 (1982), and evidence exists showing Baldwin as its secretary during this entire period, see *New Haven, September 15*, CONN. J., Sept. 15, 1790, at 3 (reporting Baldwin chosen to a one year term as sole CSPF secretary); *New Haven, September 21*, CONN. J. Sept. 21, 1791, at 3 (reporting Baldwin chosen again); *New Haven, October 24*, CONN. J., Oct 24, 1792, at 3 (reporting Baldwin chosen as secretary for New Haven Division); Letter from Uriah Tracey to Simeon Baldwin (Feb. 6, 1794) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series I, Box 5, Folder 82) (referring to Baldwin as CSPF secretary); Letter from Simeon Baldwin to Rev. Nathan Strong (Feb. 4, 1794) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series I, Box 5, Folder 82) (signed by Baldwin as secretary); *New Haven, September 17*, CONN. J., Sept. 17, 1794, at 3 (reporting Baldwin as chosen again). On the CSPF generally, see ESSIG, *supra*, at 97, 107–13; BERNARD C. STEINER, HISTORY OF SLAVERY IN CONNECTICUT 69–72 (Herbert B. Adams ed., Johns Hopkins Press 1973) (1893); Hinks, *supra* note 45, at 7–12.

[47] HALL, *supra* note 33, at 59–60.

[48] *See* Signature of New Haven Members [on the CSPF's constitution of 1792] (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series I, Box 5, Folder 76); Members of the Connecticut Society for the promotion of Freedom [hereinafter Membership List], *in* GREEN'S REGISTER, FOR THE STATE OF CONNECTICUT 64 (1791) [hereinafter GREEN'S 1791 REGISTER]; Original Constitution [of the CSPF] (1790) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series I, Box 4, Folder 64).

[49] WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807, at 113–18, 124–25 *passim* (Everett Somerville Brown ed., 1923) [hereinafter PLUMER].

wild-eyed radical to help vindicate the rights of a wrongly enslaved black or join the CSPF,[50] and in Edwards's case both acts smack of fraternal favors.[51] Similarly, James Wilson's liberation of his slave appears to have been a courtesy to the Justice's new, Quaker, bride.[52] James Hillhouse did condemn slavery as "evil" in the Senate a decade after the *Elkay* trials, but even then his elaboration of that charge appears to have invoked only the fear of slave rebellions and the consequent need of a standing army,[53] and he allowed that slavery should only be abolished gradually,[54] as was being done in his home state.[55] Still more importantly, Hillhouse's memorialist remarked that he didn't take on clients in whose cause he did not believe;[56] and not only did Hillhouse defend Ives and Moss in *Elkay*, but

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[50] See note 57 and the accompanying text, below. The list of CPSF members, Membership List, *in* GREEN'S 1791 REGISTER, *supra* note 48, at 64, 64–67, demonstrates the extent to which, in James Essig's words, the Society's membership included "almost every religious and political leader in the state." ESSIG, *supra* note 46, at 97. For a sense of the diversity of this group, see *id.* at 97, 107–08 and CHRISTOPHER GRASSO, A SPEAKING ARISTOCRACY: TRANSFORMING PUBLIC DISCOURSE IN EIGHTEENTH-CENTURY CONNECTICUT (1999).

[51] Edwards's oldest brother, Timothy, a Stockbridge merchant and civic leader who seems to have had some role in the events surrounding the children's departure from that town, see *infra* app. B.3, doubtless had something to do with Pierpont's decision to take this case. However, no correspondence between the two on this subject—and little on any other subject—exists. On Timothy Edwards generally, see JAMES MCLACHLAN, PRINCETONIANS 1748-1768: A BIOGRAPHICAL DICTIONARY 182–85 (1976), and Elizur Yale Smith, *The Descendants of William Edwards*, *in* 73 N.Y. GENEOLOGICAL AND BIOGRAPHICAL RECORD 173, 173–82 (1942). (Incidentally, as McLachlan notes, Pierpont spent most of the first twelve years of his life living in Stockbridge. MCLACHLAN, *supra*, at 637–38.)

Another older brother, New Haven minister Jonathan Edwards, joined the Rhode Island Anti-Slavery Society at its inception in 1789, STEINER, *supra* note 46, at 69, and helped found the CSPF the following year, *see Untitled*, CONN. J., Sept. 8, 1790, at 3. At the time of the *Elkay* trials, he was Vice President of the CSPF's New Haven Division. *New Haven, October 24*, CONN. J., Oct. 24, 1792, at 3. On Jonathan's life generally, see MCLACHLAN, *supra*, at 492–96.

[52] Justice Wilson and Hannah Gray, who met shortly after *Elkay* was decided, married on September 19, 1793, and the manumission of the Justice's slave appears to have been an act of kindness toward his new bride. SMITH, *supra* note 40, at 360–61, 366–67. Mark Hall adds that Hannay Gray was a Quaker. HALL, *supra* note 33, at 30. Enquiring minds may find contemporary gossip about the Wilsons' whirlwind romance in Letter from John Quincy Adams to Thomas Boylston Adams (June 23, 1793), *in* 2 DHSC, *supra* note 26, at 408–10, and Letter from Henry Jackson to Henry Know (June 23, 1793), *in* 2 DHSC, *supra* note 26, at 410–12. (In attempting to gauge Wilson's attitude toward blacks, one must also ponder the ambiguous remark attributed to him in James Madison's notes of the debate at the Constitutional Convention concerning the three-fifths clause: Wilson "had some apprehensions also from the tendency of the blending of the blacks with the whites, to give disgust to the people of Pena. . . .". 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1966).)

[53] PLUMER, *supra* note 49, at 113, 124–25. Of course, the absence of a moral condemnation of slavery from Plumer's account of Hillhouse's speeches may reflect reportorial error or a tactical decision against making such an argument in this context.

[54] *Id.* at 125.

[55] Connecticut's statutory scheme for gradually abolishing slavery, the centerpiece of which was the *post-nati* emancipation law mentioned in note 43, was recently examined in Menschel, *supra* note 16.

(presumably) he also arranged for his brother William to serve as their lawyer in the suit brought against them a few months later by Amy's disappointed purchaser.[57] Finally, there is no evidence that Richard Law ever did anything to oppose slavery or champion the rights of free blacks.[58]

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[56] BACON, *supra* note 28, at 43.

[57] *See infra* app. C.1. William Hillhouse signed the CSPF's constitution and joined the Committee of Correspondence for its New Haven District in the same year he defended Ives, Moss, and Field. Simeon Baldwin, Untitled Notes of a CSPF Meeting (Sept. 11, 1794) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series I, Box 5, Folder 84). On William's life generally, see 3 FRANKLIN BOWDITCH DEXTER, BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE 682–83 (1903).

I should also note that I find James Hillhouse's ownership of the slave he held at the time of the *Elkay* litigation to be quite perplexing. When he acquired her, the slave was under six years old, and unable to perform any meaningful labor in his home. *See supra* note 40. In light of Mrs. Hillhouse's perennially fragile health, *see* Mary Hewitt Mitchell, The Family Life of James Hillhouse, 1754-1832, at 13 (1950) (unpublished manuscript on file with New Haven Colony Hist. Soc., Mary Hewitt Mitchell Papers, 1929-1950, MS Group 48, Box I, Folder K), it would seem unlikely that she needed a slave baby to take care of in addition to her own children. Moreover, since this child would be free on her twenty-fifth birthday, *see supra* note 40, and couldn't legally have been sold out of the state, An Act to Prevent the Slave Trade (1788), *in* 6 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 472–73 (Leonard Woods Labaree ed., 1945); An Act in addition to an Act, entitled an Act to prevent the Slave-Trade (1792), *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 401 (1796), it's hard to believe that Hillhouse would have considered the costs of buying and raising her a sound investment. If Hillhouse had owned an older, female slave and been the kind of man who was willing sexually to exploit her, and if this child was his child, her presence in his household would make sense. But neither of these conditions appears to have obtained. Similarly, while Hillhouse's wealthy foster mother is reported in 1790 to have owned a male and a female slave, BALDWIN, *supra* note 40, at 312, and those slaves might have had a young child, it's hard to imagine why the widow Hillhouse would have given that child to James, or why (if he had any human feelings towards slaves) he would have taken her from her parents. Finally, if the child was an orphan and James had brought her into his home out of compassion or a sense of duty, why hadn't he emancipated her?

[58] Although Connecticut's *post-nati* emancipation act, see *supra* note 40, first appeared in the portion of the 1784 statutory revision assigned to Law, it was apparently not written by him, but added to the code on the floor of the state House of Representatives. CHRISTOPHER COLLIER, ROGER SHERMAN'S CONNECTICUT: YANKEE POLITICS AND THE AMERICAN REVOLUTION 194 n.** (1971). Only three reported Superior Court decisions in which Law participated touched upon race—viz., Pettis v. Warren, 1 Kirby 426 (Conn. Super. Ct. 1788); Wilson v. Hinkley, 1 Kirby 199 (Conn. Super. Ct. 1787); Arabas v. Ivers, 1 Root 92 (Conn. Super. Ct. 1784); *supra* text accompanying note 30. None of the three reports includes any individual judge's opinion. Indeed, the report of *Arabas* is a one sentence summary of the case. In any event, nothing in any of these decisions imports anything more than strict neutrality with respect to slavery and the rights of blacks. Except for *Williams' Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708), a criminal case with no racial overtones, Law has left no reported decisions from his tenure on the federal bench. Finally, while a modern reader may assume that Law's judgeships would have prevented his involvement in anti-slavery (or any other kind of) political activity, one should bear in mind that contemporary mores allowed United States Attorney Pierpont Edwards, *see supra* text accompanying notes 23 & 48, and Connecticut Superior Court Judge Asher Miller, *see Connecticut Society for the promotion of Freedom and for the relief of Persons unlawfully holden in Bondage*, *in* GREEN'S REGISTER, FOR THE STATE OF CONNECTICUT 44 (1792) [hereinafter GREEN'S 1792 REGISTER], to belong to the CSPF, and Law to be the mayor of New London during his entire judicial career, on which see 3 DHRC, *supra* note 27, at 611. *But see* Letter from John Jay to J.C. Dongan (Feb. 27, 1792), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782-1793, at 413–15 (Henry P. Johnston ed., 1970) (noting that Jay quit the New York

Nor does it seem likely that any other considerations conspired to lead these men to nullify a constitutional ban that they and their contemporaries had placed on the maintenance of the *Elkay* suits in the federal courts. Although there is no evidence to support this, Edwards could have perceived some strategic advantage in litigating these cases in federal court (e.g., out-of-state subpoena authority[59] or a more favorable bench or jury). But it's hard to imagine why he would have chosen to risk wasting his time and (perhaps his) money—and maybe even damage his reputation—by invoking a jurisdictional theory he knew to be invalid, or why Hillhouse would have allowed him an illicit strategic advantage.[60] As for the judges, perhaps Wilson hadn't yet decided that courts should take notice of jurisdictional defects *sua sponte* and Law agreed. Or maybe they didn't consider this a jurisdictional defect, but a defect of party.[61] In any event, it should be noted that Julius Goebel "found no evidence that at any Circuit the court ever raised the question of lack of diversity *sua sponte*" in this time period.[62] Indeed, the judges might even have been willing to accommodate Edwards because they were happy to expand federal

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Manumission Society on becoming Chief Justice of Supreme Court because he thought it improper for a judge to be a member).

[59] *See* Judiciary Act of 1793, ch. 22, § 6, 1 Stat. 333, 335 (codified at FED. R. CIV. P. 45(b)(2)).

[60] The defendants' motion for a new trial, *see infra* app. B.3, suggests that Hillhouse didn't know how to subpoena Massachusetts witnesses, which would be unlikely if his friend Edwards had done it. On the other hand, inasmuch as Hillhouse was a member of the five-man House committee that reported the bill authorizing such subpoenas, 2 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 851 (Gales & Seaton 1849), and appears to have been present whenever the House considered the bill, *see id.* at 876–99 *passim*, it's hard to know what to make of this claim of ignorance. In any case, the existence of the new trial motion, as well as its substance, suggests that Hillhouse wasn't granting Edwards any favors in this litigation.

[61] In *Shedden v. Custis*, 21 F. Cas. 1218 (C.C.D. Va. 1793) (No. 12,736), the plaintiff based his claim to federal jurisdiction on Article Three, Section Two's declaration that "The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The defendant filed a motion in arrest of judgment on the ground that the declaration was required to allege that the plaintiff was a foreigner and failed to do so. *See id.* at 1218. The plaintiff, in reply, argued that, by pleading to the merits, the defendant had admitted the jurisdictionally relevant facts, and that the court could not enquire into the matter unless the lack of jurisdiction was apparent on the face of the declaration. *See id.* at 1219. Chief Justice Jay and Justice Iredell agreed with the defendant and arrested the judgment. However, Jay noted that he "at first thought it questionable on the ground of a difference between jurisdiction over the subject-matter and over persons." *Id.* (opinion of Jay, C.J.); *cf.* Letter from John Wereat to Edward Telfair (Feb. 14, 1793), *in* 5 DHSC, *supra* note 26, at 163 (informing Governor that he "was right in not appearing to [Chisholm v. Georgia], the Chief Justice [John Jay] having said from the Bench [several months before *Shedden*] that had the State pleaded it would have been an acknowledgement of the jurisdiction of the Court"). *See generally* William E. Nelson, *The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws*, *in* LAW IN COLONIAL MASSACHUSETTS, 1630-1800, at 419, 454–56 (Daniel Coquillette ed., 1984).

[62] GOEBEL, *supra* note 19, at 586; *see also* Nelson, *supra* note 61, at 454–56. Nelson suggests that federal judges started dismissing collusive diversity cases *sua sponte* in 1797. *See id.* at 459–60.

jurisdiction.[63]

While it is possible that all of these stars were properly aligned, the far simpler—and therefore far more likely—explanation for the conduct of these four lawyers is that the exercise of federal jurisdiction in *Elkay* was simply uncontroversial. This explanation would also account for the fact that none of these men mentions *Elkay* in his (admittedly sparse) surviving contemporary correspondence.[64] And it fits best with the public's reaction to the reports of the litigation that were published in newspapers across America.[65]

B. *The Silence of the Public*

The public appears to have responded to the news of Peter Elkay's successful federal lawsuits with total silence. Newspapers of the day often printed letters and essays commenting on court decisions,[66] yet I have checked every extant English-language newspaper published in May and June, 1793,[67] without finding any published reaction to this story. Nor

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[63] I'm aware of no evidence that Edwards or Hillhouse was eager to expand the jurisdiction of federal courts. It is clear, however, that in 1794, Congressman Hillhouse supported what became the Eleventh Amendment. *See* Proceedings of the United States House of Representatives (March 4, 1794), *in* 5 DHSC, *supra* note 26, at 620–23; Letter from James Hillhouse to Samuel Huntington (March 5, 1794), *in id*., at 623.

[64] The principal collections of Edwards's and Law's papers are identified in notes 40 and 42, above. For Hillhouse and Wilson's papers, respectively, they are in Manuscripts and Archives, Yale University Library and The New Haven Colony Historical Society (in New Haven, Conn.), and The Historical Society of Pennsylvania and Dickenson College's Library. (I am grateful to the staffs at The Huntington Library, The Historical Society of Pennsylvania, and Dickenson College's Library for checking their holdings for me.)

[65] The newspapers carrying reports of *Elkay* are listed in note 22, above. The text of those reports is set forth in Appendix A.

[66] This practice was by no means limited to well-known Federal Circuit and Supreme Court decisions like the ones discussed later in this article. For example, a pair of adverse admiralty (prize-case) decisions by District Judge William Paca in 1793 prompted the losing lawyer to publish a letter of complaint in a leading Philadelphia newspaper, to which the judge responded by printing a defense of his conduct (including a formal opinion for *Glass v. Sloop Betsy*, one of the cases) in the principal Baltimore paper. *Untitled*, MD. J. & BALT. ADVERTISER, Oct. 1, 1793, at 1. (Excerpts from this report of Judge Paca's opinion in *Glass* may be found in 6 DHSC, *supra* note 26, at 324–32.) Nor was this practice confined to federal court decisions. Consider, for example, the newspaper debate prompted by the report of the 1791 acquittal in Virginia of a slave named Moses, who was charged with killing his overseer. *See infra* note 135. For an attack upon an infinitely more innocuous state court decision, see *Law Intelligence*, N.J. STATE GAZETTE, Feb. 5, 1794, at 1, which received an anonymous reply, *Untitled*, N.J. STATE GAZETTE, Feb. 19, 1794, at 3.

[67] It's over fifty-five years old, but Clarence S. Brigham's HISTORY AND BIBLIOGRAPHY OF AMERICAN NEWSPAPERS, 1690-1820 (1947), and his slightly more recent update, ADDITIONS AND CORRECTIONS TO HISTORY AND BIBLIOGRAPHY OF AMERICAN NEWSPAPERS, 1690-1820 (1961), contain the most complete published single source on which issues of which papers currently exist. I have also examined all of the era's newspapers that (still more recently) have been microfilmed by Readex Corp. for its Early American Newspaper series and contacted several state coordinators of the Early American Newspaper project in order to ensure that my survey covered all issues discovered since 1961.

have I found any reference to this litigation in the private papers of a number of men whose papers might have been expected to mention it if it represented as dramatic a repudiation of the original understanding of Article III, Section II, as Chief Justice Taney's opinion in *Dred Scott* would suggest. For example, although the newspaper reports didn't identify Edwards and Hillhouse as the lawyers in these cases, they were Connecticut's leading Republican[68] and a Federalist Congressman,[69] and one might have expected them to receive inquiries about such a startling occurrence in their state. The same could be said of Circuit Court Clerk Simeon Baldwin and David Daggett, first-class lawyers who were (respectively) the Secretary and a member of the Committee of Correspondence of the CSPF.[70] And then there's Yale President—and founding CSPF President—Ezra Stiles, who left us (in addition to his correspondence) a diary in which he records several occasions on which he went to court to watch trials involving African Americans but says nothing about *Elkay*.[71] On an even more national level, the four leading political

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I greatly appreciate the help in searching for and examining these newspapers that I have received from the staffs at the following libraries: The Alexander Library, Rutgers University, New Brunswick, N.J.; The Charleston Library Society; The Dyer Library, York Institute Museum, Saco, Me.; The Enoch Pratt Free Library, Baltimore, Md.; The Goshen Public Library, Goshen, N.Y.; The Library of Congress; The Library of the Virginia Historical Society; The New Canaan Historical Society, New Cannan, Conn.; The New York State Historical Association Library; The New York State Library; The Newburgh Free Library, Newburgh, N.Y.; The State Library of Pennsylvania; The Earl Gregg Swem Library, The College of William and Mary, Williamsburg, Va.; The Troy Public Library, Troy, N.Y.; and Virginia Historical Society Library.

[68] *See* Heckman, *supra* note 23, at 670, 681–82.

[69] On Hillhouse's party affiliation, see MEMBERS OF CONGRESS SINCE 1789, at 76 (2d ed. 1981).

[70] Both men's papers are chiefly housed in Manuscripts and Archives, Yale University Library and The New Haven Colonial Society (in New Haven, Conn.). On Daggett, see 4 DEXTER, *supra* note 57, at 260–64, and GRASSO, *supra* note 50. For his Correspondence Committee membership, see Membership List, *in* GREEN'S 1792 REGISTER, *supra* note 58, at 44.

It is interesting to note a bit of Daggett's surviving correspondence from this period. In a letter dated January 14, 1793, South Carolina Secretary of State Peter Freneau, a friend and client living in Charleston whose brother Philip was the editor of *The National Gazette*, asked Daggett for help in discovering whether a black man held in slavery in South Carolina was actually a free resident of Connecticut. *See* letter from Peter Freneau to David Daggett, Jan. 14, 1793 (on file with Yale University Library, Manuscripts and Archives, David Daggett Papers, MS Group 162, Series I, Box 4, Folder 129). On June 24, Freneau wrote again, informing Daggett that the slave had run away and responding to an April request for news about another man said to have been wrongly enslaved. *See* letter from Peter Freneau to David Daggett, June 24, 1793 (on file with Yale University Library, Manuscripts and Archives, David Daggett Papers, MS Group 162, Series I, Box 4, Folder 129). If *Elkay* was as revolutionary as *Dred Scott* would suggest, the latter letter would have been a natural place for Freneau to have asked or remarked about it. But it makes no such reference. (On Freneau, see Richard B. Davis & Milledge B. Seigler, *Peter Freneau, Carolina Republican*, 13 J. OF SOUTHERN HIST. 395 (1947).)

[71] The principal collection of Stiles's papers may be found in the Beinecke Library at Yale University. On his presence at the trials of other black men, *see, e.g.*, 3 THE LITERARY DIARY OF EZRA STILES 400 (Franklin B. Dexter ed., 1901) (entry for Aug. 5, 1790). For his activities during the *Elkay* trials, see *id.* at 493. (Incidentally, Stiles had a private tea with Justice Wilson and Judge Law at the

figures in America—George Washington, Alexander Hamilton, and Thomas Jefferson (who were in Philadelphia when *Elkay* was reported in its newspapers[72]) and James Madison (who was in Virginia[73]) surely would have commented themselves or received queries or comments from others if Chief Justice Taney was right. And this would be even more likely with respect to regional Southern political leaders such as the staunchly pro-slavery, racist, firebrand from Georgia, Senator James Jackson,[74] and Senators Pierce Butler and Ralph Izard of South Carolina.[75] Yet no such references exist in any of these men's surviving papers.[76] Although some of their papers have surely been lost over the past two hundred years, the absence of so much as a single reference to *Elkay* in what survives speaks volumes. Taken together with the lack of a response to this story in the press, this silence indicates that the public, too, viewed the circuit court's exercise of jurisdiction over the *Elkay* litigation as completely uncontroversial.

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conclusion of their New Haven sitting. *See id.*) On his presidency of the CSPF, see *Untitled*, CONN. J., Sept. 15, 1790, at 3.

[72] Although Congress had adjourned at the end of March, 1793, 2 DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 966 (Gales & Seaton 1849), President Washington remained in Philadelphia during the entire period in which the reports of *Elkay*, *see supra* note 22, were published. *See* 32 THE WRITINGS OF GEORGE WASHINGTON 452–513, 510 n.85 (John C. Fitzpatrick ed., 1939). So did Secretary of State Thomas Jefferson. *See* 6 THE WRITINGS OF THOMAS JEFFERSON 244–73 (Paul L. Ford ed., 1895). On Hamilton's whereabouts, see 14 THE PAPERS OF ALEXANDER HAMILTON 423–554 (Harold C. Syrett ed., 1969), 15 *id.* at 1–45. Hamilton's correspondence between May 8 and June 30, 1793, is published there. Jefferson's may be found at 25 THE PAPERS OF THOMAS JEFFERSON 679–707 (John Catanzariti ed., 1995), 26 *id.* at 3–427. I am indebted to the editors of the Papers of George Washington for examining the relevant volume of his correspondence, which has not been published.

[73] This is evident from his correspondence, which may be found in 15 THE PAPERS OF JAMES MADISON 12–43 (Thomas A. Mason et al. eds., 1985).

[74] During the 1791 debate in the House on a proposal to levy an import tax on imported slaves, then-Representative Jackson "attacked the idea of allowing free blacks in the United States, declaring 'he was opposed to the 'liberty of negroes' under any circumstances.'" PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 111 (2d ed. 2001). Some of Jackson's papers have been published in THOMAS U.P. CHARLTON, THE LIFE OF MAJOR GENERAL JAMES JACKSON (1809). Others are housed in The Rare Book, Manuscript, and Special Collections Library of Duke University, The Georgia Department of Archives and History, and The Georgia Historical Society. (Thanks to the staffs of those libraries for examining their Jackson papers.)

[75] Major collections of both men's papers can be found in the Manuscripts Division of the South Caroliniana Library of the University of South Carolina. The Pierpont Morgan Library in New York also has papers of each man. Additional Izard papers are located in The Rare Book, Manuscript, and Special Collections Library of Duke University. (I thank the staffs of those libraries for examining these papers.) Incidentally, Butler was a delegate at the Constitutional Convention. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 437–38 (1990).

[76] I have also checked, with the same result, the following sources: 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734-1803, at 600–602 (David John Mays ed., 1967), 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 484–87 (Charles R. King ed., 1894), 2 THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 385–96 (Griffith J. McRee ed., 1857), and 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 485–86 (Henry P. Johnston ed., 1891).

Given the emotional power of the issue of slavery[77] and the strength of localist opposition to the expansion of federal power, is there any way to reconcile the absence of so much as a single complaint about the adjudication of these cases in federal court with Chief Justice Taney's later historical claims? Four hypotheses suggest themselves. The first builds upon the fact that I have not found one mention of *Elkay* in any newspaper published in Virginia, South Carolina, Georgia, Kentucky, or Tennessee (the "missing" states): perhaps the Americans most likely to complain about these cases didn't know about them. Or maybe they didn't realize that Peter Elkay had invoked the Circuit Court's diversity jurisdiction. Alternatively, their attention may have been focused on other events, especially the crisis concerning Franco-American relations and the recent federal court decisions on the suability of states and British debts. Finally, the absence of reports in the newspapers in the "missing" states, coupled with the lack of published complaints about the court's acquiescence in that litigation, could signal (particularly to fans of Oliver Stone's work) a broad conspiracy of silence.

While there may be an element of truth in each of these theories, it is virtually inconceivable that they form an adequate explanation for the silence of the Nation's pens. As to the first, the notion that the *Elkay* story had been hidden from all the men most committed to the strict enforcement of the limitations within which diversity jurisdiction was originally understood to have been confined (according to *Dred Scott*) is ridiculous. For one thing, there were plenty of people in the eleven states in whose newspapers I have found published accounts of *Elkay* (the "publishing" states) who had ample reason to complain if it betrayed the original understanding of the constitutional status of blacks or unduly expanded the scope of the federal courts' jurisdiction. For example, a large number of people (constituting a substantial percentage of the population) in North Carolina, Maryland, and Delaware were slaves,[78] and there was doubtless a large slaveholding class in each of those states. Presumably, many of those planters would have had attitudes towards blacks and slavery similar to those of their brethren in the "missing" states. There were also numerous

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[77] Witness the emotional intensity of the debate in the First Congress on the petition of Pennsylvania's abolitionist society, which was recently examined in JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 81–119 (2000). Also see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 142–43, 151–52 (1993). Although supporters of the "peculiar institution" were not always that belligerent, slavery was never a dormant issue in the Founding and Federalist eras, and any federal power or action that remotely threatened slaveholding had evoked a response since the beginning. *See, e.g.*, DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001); FINKELMAN, *supra* note 74, at 1–128; WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550-1812, at 321–402 (1968); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 327–29, 344 (1998).

[78] *See* ELLIS, *supra* note 77, at 102.

slaves in more northern states like New York and New Jersey,[79] and sufficient support for the "peculiar institution" that laws for the gradual abolition of slavery in those states were blocked until 1799 and 1804, respectively.[80] There was even powerful support for slavery and the slave trade in states like Connecticut and Rhode Island,[81] where gradual abolition laws had already been passed[82] and there were few slaves.[83] Finally, the "publishing" states contained people like New York's Melancton Smith—abolitionists who were also localists, and therefore inclined to oppose the aggrandizement of federal judicial power.[84] Yet none of these people published a critical word about *Elkay*.

Beyond this, if Chief Justice Taney was right in *Dred Scott*, it is extraordinarily unlikely that the interested residents of the five "missing" states would have been unaware of the *Elkay* litigation. Slaveowning aristocrats and localists in those states had sympathetic friends in the other states, and sympathetic members of the political and social elites of the former states were present in the latter when the reports of *Elkay* were published.[85] Word of such a fundamental betrayal of the federal compact surely would have been relayed promptly by many of these men to their friends in the "missing" states.[86] What's more, interested parties in at least some of the "missing" states would have known about *Elkay* because newspapers reporting it were present, and read, in those states.

To understand why this is so, it's important to recall several respects in which the dissemination of news was different in the late eighteenth century than today. First, it was a common and accepted practice for newspaper publishers to reprint (usually without attribution) articles from other papers.[87] Indeed, that's why the *Elkay* story originally published in *The Connecticut Journal* appeared *in haec verba* in at least twenty-six

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[79] *See id.* Indeed, while slaves totaled a much smaller proportion of New York's populace than Georgia's, there were only 8,000 fewer slaves in the former state than in the latter. *Id.*

[80] *See* 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 338 (2d ed. 2002).

[81] *See, e.g.*, NEWMAN, *supra* note 43, at 37.

[82] *See* Menschel, *supra* note 16, at 184.

[83] *See* ELLIS, *supra* note 77, at 102; Menschel, *supra* note 16, at 190–91.

[84] On Smith's abolitionism, see MCMANUS, *supra* note 45, at 168. On his localism, see Speeches by Melancton Smith delivered at New York's convention to ratify the United States Constitution (June 1788), *in* 6 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 148–76 (1981).

[85] The most prominent member of the second group was that voracious reader of newspapers, Thomas Jefferson. *See supra* note 72 and accompanying text. *See, e.g.*, JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 154–55 (2001).

[86] In addition, anti-slavery or nationalist residents of the "missing" states could have learned of this litigation from fellow-travelers in "publishing" states, and friends and neighbors who, *Dred Scott* would have it, would have been appalled by Elkay's success in federal court could have learned of it from them.

[87] *See* PASLEY, *supra* note 85, at 8–9 (2001).

other journals and in at least ten other states.[88] Second, the postal system allowed the free exchange of newspapers among publishers, which facilitated this story-swapping.[89] But even if a story was not pirated from an exchange paper, copies of newspapers obtained in this manner were available for free public perusal in the local printer's office.[90] Further, "[n]ewspapers were kept on hand in many public gathering places, especially taverns, coffeehouses, and hotels, where they were often read aloud or in groups."[91] Coupled with private subscriptions to out-of-town journals and word-of-mouth reporting, this news-distribution system guaranteed that news of noteworthy developments from local and out-of-town papers would be widely disseminated.[92]

Although we have no information about precisely which papers were thus available in the "missing" states, it's virtually certain that some were journals that reported *Elkay*. First, the *Elkay* story appeared in many of the nation's leading papers,[93] which logic alone tells us would have been the subject of such exchanges. Second, although neither of the nascent political parties' "semi-official" journals ran it,[94] the *Elkay* story was printed in newspapers leaning toward each party and in each of the Nation's three main regions.[95] Third, mutual story-cribbing points to the exchange at this time of papers between specific "missing-state" journals and papers known to have published an account of the *Elkay* trials.[96]

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[88] *See supra* note 22.

[89] *See* PASLEY, *supra* note 85, at 48.

[90] Telephone Interview with Jeffrey L. Pasley, author of "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC (2001) (Apr. 17, 2002).

[91] PASLEY, *supra* note 85, at 7.

[92] *See id*. at 7–8.

[93] For a list of newspapers in which I have found reports of *Elkay*, see *supra* note 22. (One of these papers, Boston's *Columbian Centinel*, may have had the largest circulation of any paper in America. *See* PASLEY, *supra* note 85, at 422 n.2.)

[94] I refer, of course, to the Federalists' *Gazette of the United States* and the Republicans' *National Gazette*, whose rivalry was recently discussed in PASLEY, *supra* note 85, at 48–78.

[95] *See supra* note 22. Most newspapers in this era leaned Federalist. For a list of the journals that turned Republican by 1800, see PASLEY, *supra* note 85, at 407.

[96] One example should suffice. A few issues of Charleston, South Carolina's *City Gazette & Daily Advertiser* from July, 1793, deviate from that newspaper's general practice of non-disclosure of sources and cite the provenance of a series of articles reporting the libel trial of the brig William, which seems to have been taken from a paper that published the *Elkay* story, Philadelphia's *General Advertiser*. *Compare Untitled*, CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.) [hereinafter CITY GAZETTE], July 9, 1793, at 2 and *Untitled*, CITY GAZETTE, JULY 10, 1793, at 2, *with Untitled*, GEN. ADVERTISER (Philadelphia), June 19, 1793, at 2 (reporting the arguments of attorneys Duponceau and Rawle); *compare Untitled*, CITY GAZETTE, July 11, 1793, at 2, *with Law Case*, GEN. ADVERTISER (Philadelphia), June 21, 1793, at 2 (reporting the argument of attorney Ingersoll); *compare Untitled,* CITY GAZETTE, July 17, 1793, at 2, *with Law Case*, GEN. ADVERTISER (Philadelphia), June 24, 1793, at

Finally, although I haven't found a report of *Elkay* in their newspapers, the story may actually have appeared in journals published in Virginia and South Carolina. As is true elsewhere, we are missing a good many of the newspapers published in each of those states during the period in which I have found *Elkay* stories in the press (i.e., between May 9 and June 3, 1793).[97] Consider the case of Virginia. There are no known issues from this period of nine of the sixteen papers then published in the Old Dominion.[98] Only one issue exists of a tenth.[99] Complete runs exist for

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2 (reporting the argument of attorney Lewis); *compare Untitled*, CITY GAZETTE, July 25, 1793, at 2, *with Important Law Case*, GEN. ADVERTISER (Philadelphia), June 29, 1793, at 3 (reporting the decision in the case). In addition, the *General Advertiser* plainly cribbed several pieces from the *City Gazette* during the spring of 1793. *Compare Untitled*, GEN. ADVERTISER (Philadelphia), May 1, 1793, at 3, *with Untitled*, CITY GAZETTE, Apr. 16, 1793, at 3, and *Untitled*, CITY GAZETTE, Apr. 17, 1793, at 3; *compare Untitled*, GEN. ADVERTISER (Philadelphia), May 7, 1793, at 3, *with Untitled*, CITY GAZETTE, Apr. 26, 1793, at 3; *compare Untitled*, GEN. ADVERTISER (Philadelphia), May 22, 1793, at 3, *with Untitled*, CITY GAZETTE, Apr. 30, 1793, at 3; *compare Untitled*, GEN. ADVERTISER (Philadelphia), June 7, 1793, at 3, *with Untitled*, CITY GAZETTE, May 24, 1793, at 3. This pattern of mutual story copying would strongly suggest that these papers were among each other's "exchange" partners.

Of course, these stories could have been obtained from one or more intermediary newspapers; but those journals also might have copied the *Elkay* story from the *General Advertiser*, in which case the *Elkay* report would still have come to the attention—and into the hands—of the *City Gazette*'s publisher. Alternatively, the reports in each journal could have been obtained from borrowed copies of a local subscriber's copy of the other, in which case the *City Gazette*'s editor may also have seen the issue of the *General Advertiser* containing the report of *Elkay*. *See, e.g.*, *Untitled*, CONCORD HERALD (N.H.), May 23, 1793, at 3 ("The loan of a Boston Centinel of last Saturday from a gentleman in town, has enabled the editor to present his readers with the following articles of intelligence.") (brackets and italics omitted). Moreover, Charleston's subscribers to the *General Advertiser* would have been in a position to spread the word to their friends and acquaintances.

[97] See *supra* note 22 for the dates of the *Elkay*-related stories I've found. In the interest of brevity, I'll note here only two other places in which our collection of newspapers from this month is substantially incomplete, a non-state and a Northern state. The former is the District of Columbia, the home of one newspaper, *see* Lathem, *supra* note 22, at 24, none of whose issues from this period survives. *See* 1 BRIGHAM, *supra* note 67, at 97. The latter is New York, where there are no extant issues (for this period) of *The Albany Gazette*, *Goshen Repository*, *Hudson Gazette*, or *Frothingham's Long Island Herald*, which constitute about one-third of the state's contemporary newspapers. *See* Lathem, *supra* note 22, at 31–35; 1 BRIGHAM, *supra* note 67, at 532–37, 539–43, 577–78, 587, 730–31; *but see* e-mail from Rita Forrester, Local History Dep't, Newburgh Free Library, to author (July 24, 2002 11:40 A.M.) (on file with the Connecticut Law Review) (noting that the Library's *Goshen Repository* collection is gone, possibly destroyed in a flood). Also see note 106, below.

[98] See Lathem, *supra* note 22, at 41–43, for a chart identifying fourteen papers published during this period. Two others are listed in 2 BRIGHAM, *supra* note 67, at 1121 (the *Union Gazette*), 1157 (the *Staunton Spy*). The nine referred to in the text are *Virginia Gazette, & Agricultural Repository* (Dumfries); *Union Gazette* (Lynchburg); *American Gazette, and Norfolk and Portsmouth Weekly Advertiser* (Norfolk); *Independent Ledger* (Petersburg); *Virginia Gazette, and Petersburg Intelligencer*; *Virginia Gazette & Richmond Chronicle*; *Virginia Gazette and Weekly Advertiser* (Richmond); *Staunton Spy*; and *Potowmac Guardian, and Berkeley Advertiser* (Martinsburg, Va., later W. Va.). *See id.* at 1113, 1121, 1123, 1130–31, 1134–35, 1149–50, 1157, 1172.

[99] We have the *Virginia Gazette and Alexandria Advertiser* of May 16, 1793. *See* 2 BRIGHAM, *supra* note 67, at 1111.

just four.[100]

Even though these four papers didn't print an account of *Elkay*, one of the missing journals may have.[101] Only half of the papers in Connecticut and Massachusetts may have run an *Elkay* story, and those were the parties' home states.[102] Newspapers in this era were generally four pages in length, at least one of which were taken up by advertisements and official announcements,[103] and editors, like their modern counterparts, made their own judgments about which stories merited the limited available space. So, while the *Elkay* story was printed in the only paper published in Delaware,[104] it ran in one of four New Jersey papers,[105] and it may have appeared in just one of the eight newspapers published in Maryland.[106]

Similarly, a report of *Elkay* may have been printed in the South Carolina press. Of the six newspapers published at the time in the Palmetto State,[107] we have no issues of three,[108] a single issue of a fourth,[109] and

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[100] Complete runs for this period exist for the *Virginia Herald, & Fredericksburg Advertiser*; *Virginia Gazette & General Advertiser* (Richmond); *Virginia Gazette, and Richmond and Manchester Advertiser*; and *Bowen's Virginia Centinel and Gazette; or, the Winchester Repository*. *See id.* at 1116–17, 1146, 1148, 1166.

[101] In light of the practice of story cribbing and the absence of any reply to the *Elkay* story in other newspapers, the odds that the missing newspapers contained a missing reply are quite small.

[102] I haven't found a report of *Elkay* in the following Connecticut newspapers: *Litchfield Monitor*, *Middlesex Gazette* (Middletown), *Connecticut Gazette* (New London), *Weekly Register* (Norwich), and *Farmer's Journal* (Danbury). The *Litchfield Monitor* of May 15 and 22 are mutilated and we are missing the *Farmer's Journal* of May 20, but if these incomplete or missing issues contained no such story, exactly half of the Constitution State's newspapers would have omitted it. *See* Lathem, *supra* note 22, at 22–23; 1 BRIGHAM, *supra* note 67, at 14–15. The following Massachusetts newspapers, constituting half of the Massachusetts press, *see* Lathem, *supra* note 22, at 25, 27–29, appear not to have run an *Elkay* story: *American Apollo* (Boston), *Argus* (Boston), *Independent Chronicle* (Boston), *Eastern Herald* (Portland, Mass., later Me.), *Medley* (New Bedford), *Impartial Herald* (Newburyport), *Hampshire Gazette* (Northampton), *Hampshire Chronicle* (Springfield), and *Massachusetts Spy* (Worcester). However, we are missing the *Hampshire Chronicle* for May 21 and 28. *See* 1 BRIGHAM, *supra* note 67, at 406–07.

[103] *See* PASLEY, *supra* note 85, at 31.

[104] See note 22, above, and Lathem, *supra* note 22, at 24.

[105] See note 22, above, and Lathem, *supra* note 22, at 30–31.

[106] See note 22, above, and Lathem, *supra* note 22, at 26–27. However, we are missing issues of *The Maryland Herald*, *The Washington Spy* (Elizabethtown), and *Bartgis's Maryland Gazette*. *See* 1 BRIGHAM, *supra* note 67, at 255–59; e-mail from Jennifer Copeland, Assistant Librarian, H. Furlong Baldwin Library, Maryland Historical Society, to author (Oct. 8, 2004 9:43 AM) (on file with the Connecticut Law Review).

[107] *See* Lathem, *supra* note 22, at 40; 2 BRIGHAM, *supra* note 67, at 1044, 1051.

[108] The missing papers are *The Columbian Herald & Daily Advertiser*, *The Star: and Charleston Daily Advertiser*, and *The South-Carolina Independent Gazette; and Georgetown Chronicle*. *See* 2 BRIGHAM, *supra* note 67, at 1028–29, 1044, 1051.

[109] We have *The South Carolina Gazette* of May 21, 1793. *Id.* at 1048.

complete runs of two.[110] Thus, an account of this litigation could have appeared in the local press in the two biggest "missing" states, the ones that were home to more than two local newspapers.[111]

For all of these reasons, a large number of people who would have been deeply committed to upholding an original understanding of the constitutional status of blacks and the scope of federal diversity jurisdiction in accord with Chief Justice Taney's vision in *Dred Scott* would have been aware of *Elkay*. However, inasmuch as the news reports—following the standard practice—didn't specify the basis of federal jurisdiction over the litigation, could these Americans have been ignorant of the inconsistency of that vision with the exercise of federal jurisdiction in *Elkay*?

Some, perhaps. But the scope of federal court jurisdiction had been a major issue in the debates leading to the ratification of the Constitution.[112] Moreover, contrary to modern practice, the text of new federal laws—including the Judiciary Act of 1789, which vested the circuit courts with jurisdiction over civil cases[113]—was printed in newspapers across the country.[114] As there was no other plausible basis for federal jurisdiction in *Elkay*, and the parties' state citizenship was suggested by the news reports, any reasonably well-informed reader would probably have seen this litigation for what it was—a pair of interracial diversity cases.[115]

Of course, American newspaper readers also saw a number of other important things in the first half of 1793. In February, the Supreme Court decided, in *Chisholm v. Georgia*,[116] that a state could be sued in federal court by a citizen of another state. In March, the press reported the execution of French King Louis XVI.[117] The following month brought news of a European (principally British) war against France, President Washington's declaration of American neutrality in that war, and the

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[110] We have full runs of *The City Gazette & Daily Advertiser* and *The State Gazette of South-Carolina* for the relevant time period. *Id*. at 1025–26, 1044–45.

[111] Kentucky had one paper in 1793, Lathem, *supra* note 22, at 25, the weekly *Kentucky Gazette*. 1 BRIGHAM, *supra* note 67, at 163. Tennessee also had one, Lathem, *supra* note 22, at 40–41, the *Knoxville Gazette*, which was published every other week, 2 BRIGHAM, *supra* note 67, at 1058–59. Two weeklies were published in Georgia, *The Augusta Chronicle* and *The Georgia Gazette*. Lathem, *supra* note 22, at 24; 1 BRIGHAM, *supra* note 67, at 111–12, 127. None of the relevant issues of these four newspapers is missing. *See* 1 BRIGHAM, *supra* note 67, at 111–12, 127, 163–64; 2 *id*., at 1058–59.

[112] The leading voices in this debate are collected in 4 THE FOUNDERS' CONSTITUTION 227–52 (Philip B. Kurland & Ralph Lerner eds., 1987).

[113] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

[114] The federal government actually paid one newspaper per state to perform this service. PASLEY, *supra* note 85, at 48, 49.

[115] Anyone who couldn't figure out the ground of federal jurisdiction over this litigation by himself could have been enlightened, of course, by better-informed acquaintances outraged by a treacherous and blatantly unconstitutional power-grab by the circuit court.

[116] 2 U.S. (2 Dall.) 419 (1793).

[117] ELKINS & MCKITRICK, *supra* note 77, at 356.

triumphant reception given to Citizen Edmond Genet, the new French ambassador, as he proceeded from Charleston towards Philadelphia, which he reached in May.[118] May also featured the arrest of Gideon Henfield and John Singletary, two of the many Americans who had responded to Genet's calls by manning privateers preying on British ships,[119] and the inconclusive first trial in *Higginson v. Greenwood*,[120] an important federal case involving the question whether interest was due for the Revolutionary War years on British debts. Finally, in June, a federal circuit court rendered another important decision on British debts, rejecting in a test case known to us as *Ware v. Hylton*[121] the major legal arguments raised by Virginians (the biggest debtors[122]) against repayment.[123]

Each of these developments generated intense public interest. The country has rarely been as riveted by foreign news as it was in the first months of 1793 by reports about Revolutionary France.[124] News of events within France and of the European war often took up over half of the limited space allotted to news in the papers. Moreover, in city after city, public meetings, grand juries, judges, Democratic Societies, and individuals wrote addresses, essays, and letters—many of which were published in the press—debating the virtue of the French Revolutionaries' conduct and American foreign policy. And Citizen Genet generated huge, admiring, crowds—and controversy—wherever he went.

The British debt cases also commanded considerable public attention. Given the size of the pre-War debt—Virginians owed British creditors over , 2,000,000 in principal alone[125]—this may seem unsurprising. But it is a telling fact that, even though the judges' disagreement prevented the *Higginson* court from deciding the critical interest question, the newspaper

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[118] On these events, as well as the arrest and trial of Gideon Henfield and John Singletary, see the sources cited in note 124, below.

[119] *See supra* note 118.

[120] (C.C.D. S.C. 1793).

[121] Jones v. Walker, 13 F. Cas. 1059 (C.C.D. Va. 1793) (No. 7,507); *rev'd in part sub nom* Ware v. Hylton, 3 U.S. 199 (1796). The complex procedural history of this case may be found in 2 DHSC, *supra* note 26, at 339 n.4. Its documentary history is provided in 7 *id.* at 203–357.

[122] Virginians owed over £ 2,000,000 in pre-War debts, 2 DHSC, *supra* note 26, at 339, "almost as much as all the rest [of the American people] combined," ELKINS & MCKITRICK, *supra* note 77, at 90. Citizens of Maryland and the other former colonies to the south (Virginia excepted) owed "[a]nother third of the debt." STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 163 (1997).

[123] By a divided vote, the court affirmed a more limited state law defense to such suits, but that decision was later reversed by the Supreme Court. 2 DHSC, *supra* note 26, at 339 n.4. For a summary of the defenses asserted in the circuit court, see *id*. That court's decision was recently examined in JAY, *supra* note 122, at 164–65.

[124] The most thorough modern discussion of "the French Revolution in America" in 1793 is the chapter of that name in ELKINS & MCKITRICK, *supra* note 77, at 303–73. For a more recent analysis, which also takes into account the British debt cases, *see* JAY, *supra* note 122, at 113–48, 153–70.

[125] *See supra* note 122.

report of the litigation that debuted in *The South Carolina Gazette* and was reprinted across the country was over ten times as long as the *Elkay* piece, often taking up two full columns out of a three-column page.[126] And the widely-run report of the circuit court's decision in *Ware* both generated public replies and contributed mightily to Chief Justice John Jay's unpopularity in Virginia.[127]

Of course, this was nothing compared to the overwhelming, bipartisan, public reaction to *Chisholm*.[128] Within two days of that decision, corrective constitutional amendments had been introduced (by gentlemen representing Massachusetts, which had also been sued[129]) in both Houses of Congress. State legislatures took positions on the question of overturning *Chisholm* by amendment, as did newspaper essayists and private correspondents.[130] Sentiment was so strong and so united that such a provision, the Eleventh Amendment, was ratified by enough states to be declared in effect on January 8, 1798.[131]

Nonetheless, it defies belief that not one supporter of slavery, not one localist opposed to the expansion of federal jurisdiction, not one Unionist concerned about minimizing unrest in pro-slavery or localist states, would

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[126] *See Untitled*, S.C. GAZETTE (Columbia), May 21, 1793, at 4, *reprinted in*, *e.g.*, CITY GAZETTE & DAILY ADVERTISER (Charleston), May 29, 1793, at 3; DIARY (N.Y.), June 7, 1793, at 2; VA. GAZETTE & RICHMOND & MANCHESTER ADVERTISER, June 20, 1793, at 3; SALEM GAZETTE (Mass.), June 25, 1793, at 2. The report of the second trial, in which a jury disallowed wartime interest, was even longer. *See Charleston, Nov. 12*, COLUMBIAN HERALD (Charleston), Nov. 12, 1793, at 3, *reprinted in*, *e.g.*, CITY GAZETTE & DAILY ADVERTISER (Charleston), Nov. 13, 1793, at 2; AUGUSTA CHRON. & GAZETTE OF THE STATE, Nov. 30, 1793, at 4; PROVIDENCE GAZETTE & COUNTRY J. (R.I.), Dec. 7, 1793, at 1.

[127] For one report of *Ware*, see *Richmond, June 10*, VA. GAZETTE & RICHMOND & MANCHESTER ADVERTISER, June 10, 1793, at 3, *reprinted in*, *e.g.*, INDEP. GAZETTEER & AGRIC. REPOSITORY (Philadelphia), June 22, 1793, at 2; DIARY (N.Y.), June 25, 1793, at 2; NAT'L GAZETTE (Philadelphia), June 26, 1793, at 3; CITY GAZETTE & DAILY ADVERTISER (Charleston), June 26, 1793, at 4; SALEM GAZETTE (Mass.), July 2, 1793, at 2; U.S. CHRON. (Providence, R.I.), July 4, 1793, at 2; KY. GAZETTE, Aug. 10, 1793, at 3; KNOXVILLE GAZETTE, Aug. 13, 1793, at 3. For a different report of the case, see *Extract of a Letter From a Gentleman in Richmond, to His Friend in Philadelphia, Dated 7 June*, CONN. J., June 19, 1793, at 3, *reprinted in*, *e.g.*, CONN. COURANT, June 24, 1793, at 3; E. HERALD (Portland, Mass., later Me.), June 29, 1793, at 4. For one public reply to the decision, see The Rights of Man, *Untitled*, N.Y. J. & PATRIOTIC REG., Aug. 10, 1793, at 2, *reprinted in* NAT'L GAZETTE, Aug. 14, 1793, at 1. For a more direct, personal response to Chief Justice Jay, see RICHARD B. MORRIS, JOHN JAY, THE NATION AND THE COURT 89 (1967). On the effect of *Ware* on Jay's standing in Virginia, see JAY, *supra* note 122, at 165, 293 (quoting a letter from Edmund Randolph to George Washington dated June 24, 1793).

[128] The best collection of material on the points discussed in this paragraph can be found at 5 DHSC, *supra* note 26, at 217–72, 597–638.

[129] On the former point, see *id.* at 597. Process had been authorized in *Vassal v. Massachusetts* (U.S. 1793) the week before *Chisholm* was decided. *See id.* at 364. Documentary material relating to *Vassal* is collected in *id.* at 352–449.

[130] *See id.* at 607–36.

[131] *Id.* at 604.

have found the time to respond publicly to *Elkay* if it was as outrageous a decision as Chief Justice Taney's *Dred Scott* opinion would suggest. Or to do so in private writings. Or to suggest its repudiation even when Republicans tried to piggy-back their pet causes on the *Chisholm*-inspired constitutional revision.[132]

Moreover, not even a carefully managed conspiracy of the members of these three groups would suffice to explain the evidence I have discovered.[133] It would also be necessary to assume that the people who enthusiastically supported *Elkay*'s radical innovation[134] (silently) agreed to suppress all public or private expression of their sentiments. Finally, we would have to pile on one further assumption: that the newspaper editors were complicit in all of this—i.e., that the story most often run praised the verdicts in *Elkay* but said nothing about the jurisdictional issue in order to hide it, and that they printed the stories confident that their readers would all overlook the elephant in the tent.[135] Of course, we might then ask, why

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[132] While this suggestion might have divided the Republicans—e.g., as noted above, Pierpont Edwards was the leading Republican in Connecticut and there is no reason to suppose that he opposed federal court jurisdiction over interracial lawsuits—, that didn't stop extremists within the party from making divisive arguments in other contexts. *See, e.g.*, ELKINS & MCKITRICK, *supra* note 77, at 341–65.

[133] Of course, there was nowhere near the party structure or discipline required to create—or enforce—a nationwide boycott of this subject by the members of these groups. For an extensive discussion of the extent to which politics in the Federalist Era was structured around personal relationships, rather than party affiliation or ideology, see JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC (2001).

[134] One must assume the existence of such men to explain their opponents' reticence.

[135] It would be equally wrong to assume that newspapers that failed to run an *Elkay* story did so because they subscribed to Chief Justice Taney's "original understanding." First, some of these papers had printed other items inconsistent with its racist premise. A few examples should suffice. *The Hampshire Gazette* and *The Eastern Herald* (among others) ran a story warmly applauding a *qui tam* action brought under Connecticut law against three Connecticut men taking thirty blacks from Africa and selling them into slavery in Hispaniola. *See Providence, Jan. 12*, HAMPSHIRE GAZETTE (Northampton, Mass.), Feb. 6, 1793, at 3; *Providence, Jan. 12*, E. HERALD (Portland, Mass., later Me.), Jan. 31, 1793, at 1. The latter paper had given a much more extensive account of a similar Massachusetts suit against Rhode Island slavers fourteen months earlier. *See Law Case*, CUMBERLAND GAZETTE (Portland, Mass., later Me.), Nov. 21, 1791, at 1; *Law Case*, CUMBERLAND GAZETTE, Nov. 28, 1791, at 1. A report of a third such suit, which was removed to federal court because it pitted a citizen against an alien, also appeared in several "missing" papers. *E.g.*, *Untitled*, INDEP. CHRON. & UNIVERSAL ADVERTISER (Boston), Dec. 20, 1792, at 3; *Federal Court*, E. HERALD, Dec. 10, 1792, at 3; *Court at New Gloucester*, E. HERALD, Jan. 9, 1792, at 3. In a different vein, the week the *Elkay* story broke, *The New York Journal and Patriotic Register* ran an advertisement by the state's abolition society soliciting contributions for its school for black children. *Untitled*, N.Y.J. & PATRIOTIC REG., May 11, 1793, at 3. Finally, and most dramatically, a "missing" Virginia paper published a widely reprinted story praising a local court decision acquitting a slave of killing his overseer during an attempted escape on the ground that the slave had a right to use force to protect himself against the overseer's brutality. *Alexandria, Jan. 27*, VA. GAZETTE & ALEXANDRIA ADVERTISER, Jan. 27, 1791, at 3. (This report provoked several responses. A Bye-stander, *Untitled*, VA. GAZETTE & ALEXANDRIA ADVERTISER, Feb. 10, 1791, at 2; G. Chapman, *Untitled*, VA. GAZETTE & ALEXANDRIA ADVERTISER,

print an article about *Elkay* in the first place? After all, there were other cases, cases lacking this embarrassing complication, that could have been promoted to deter would-be criminal slavers.[136]

Thus, while not conclusive of the matter, the apparent failure of the American people to question the exercise of federal jurisdiction in *Elkay* is powerful evidence that they regarded the litigation of interracial diversity cases in federal court as entirely uncontroversial in 1793. This, in turn, is powerful evidence that Chief Justice Taney, who presented no contemporary evidence with regard to the specific question at issue, was wrong on his own terms in *Dred Scott*.

III. CONCLUSION

So far, I have shown that the available evidence strongly suggests that neither the lawyers involved in the case—several of whom were actual Founders—nor the public at large—including other leading Founders—appears to have had any real doubt about the propriety of the exercise of federal jurisdiction in *Elkay*. And I've noted that this strongly suggests that Chief Justice Taney's claim that the original understanding was that blacks could never count as "Citizens" for the purpose of Article III, Section Two, was wrong. It remains to make one final point.

Elkay is an object lesson in the dangers of originalist analysis based on "lawyers' history."[137] Most court cases in the Founding era were not reported in volumes like those familiar to lawyers and academics today.[138] However, that does not mean there was no law or practice. Lawyers took and kept notes of court proceedings and decisions were often reported in the newspapers, so it was possible for interested persons to be aware of judicial practices, rules, and law of which a later scholar, looking only in

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Feb. 17, 1791, at 3; Many Bye-Standers, *Untitled*, VA. GAZETTE & ALEXANDRIA ADVERTISER, Feb. 17, 1791, at 2.) Second, when, as in the case of Tennessee, there was only one paper in the state and it came out only every other week, *see supra* note 111, the most obvious reason for its failure to run *any* story would generally be a lack of space. Third, inasmuch as there were (as noted above) many important news stories competing with the *Elkay* reports for the limited space in every paper, the most obvious explanation for an editorial decision to publish one rather than another would be that the editor judged the former more important than the latter in the eyes of his readers. Fourth, the notion that an editor would seek to suppress a news story by ignoring it makes no sense when that story would be readily available from other sources.

[136] Several state court cases and a federal case involving "citizen-foreigner" jurisdiction are identified in note 135, above. For a discussion of the extensive state court litigation campaign conducted by the Pennsylvania Abolition Society, which included suits to establish the freedom of blacks alleged to be slaves, see NEWMAN, *supra* note 43, at 60–85.

[137] This term is derived from Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1710 & n.11 (1996).

[138] The first published American law reports appeared in 1789. *See* Daniel R. Coquillette, *First Flower—The Earliest American Law Reports and the Extraordinary Josiah Quincy Jr. (1744-1775)*, 30 SUFFOLK U.L. REV. 1, 2 n.3 (1996).

official reporters, would be completely ignorant.[139] While a search through surviving court documents can help bridge this gap, they may also prove insufficiently illuminating: the surviving court documents in this litigation, for example, don't reveal Peter Elkay's race.[140] And the consequence could be that a nineteenth-century Supreme Court or a twenty-first century scholar would get big questions of original meaning, and therefore of constitutional law, wrong.

APPENDIX A. THE NEWSPAPER ACCOUNTS OF *ELKAY*

1. *The Original Story*

The newspaper report of this decision from which all of the others were derived (and from which the great majority were copied) reads as follows:

> New-Haven, May 8
>
> On Wednesday the 28th ult. came on before the Circuit Court of the United States sitting in this place, two actions in favour of Peter Elkay, a free Negro, of Stockbridge, in the Commonwealth of Massachusetts, against Joel Moss and John Ives, 3d. of Wallingford, for taking away and holding in servitude two of his children who were free. Upon an elaborate investigation and discussion of these causes, the Jury were convinced that the children were, in truth, free; and that the conduct of the defendants was very reprehensible, and gave a verdict against them, with two hundred and fifty dollars damages in each case. These verdicts appeared satisfactory to the Court and to all the friends of humanity. It is hoped that such an exemplary punishment of kidnapping Negroes, will deter others from this crime, and happily tend to abolish it.[141]

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[139] Alexander Dallas recorded a request by the court in a case he was arguing to see his notes of another case, *see* Ketland v. The Cassius, 2 U.S. (2 Dall.) 365, 367 n.* (C.C.D. Pa. 1796), a practice that was surely rather common. (A similar incident, which occurred in Virginia in 1811, is reported in *Commonwealth v. Myers*, 3 Va. 188, 252–53 (1811).) Some early lawyers' notes have been published as DELAWARE CASES, 1792–1830 (Daniel J. Boorstin ed., 1943).

[140] See *infra* app. B. As the title of Connecticut's *post-nati* abolition law makes clear, not all slaves were black. See 1784 Code, *supra* note 16, at 233. On the other hand, even if this information could be inferred here, the facts not disclosed by the court records aren't always inferable.

2. *The Short Version*

The shorter form of this story, which appeared in a handful of newspapers, simply states:

> Joel Moss and John Ives, 3d, were lately fined by the Circuit Court of the United States, sitting in New-Haven, 250 Dollars Damages each, in two Cases, brought against them by Peter Elkay, a free Negro, of Stockbridge, in this State, for kidnapping two of his Children, who were free.[142]

APPENDIX B. THE SURVIVING COURT PAPERS FROM *ELKAY*

Three court documents contain significant information on this case: volume one of the Final Record Book (Law) of the U.S. Circuit Court for Connecticut (which covers 1790-1796), the Circuit Court Docket Book for Connecticut for the years 1791-1799, and the defendants' "Petition for New Trial," a motion for a stay of execution. All three are housed in the National Archives and Records Administration's Federal Records Center for the Northeast Region, which is located in Waltham, Massachusetts.

1. *The Final Record Book Entries*

The Final Record Book is a bound volume in which the clerk copied the main papers from a case at the end of the court term at which the case was decided.[143] Therefore, it is likely that the entries reproduced below include verbatim quotations from (at least significant portions of) the declarations filed in the *Elkay* cases, which is helpful because the declarations themselves cannot be found.

P. Elkay vs. John Ives &c

> John Ives the third of Wallingford in New Haven County in the District of Connecticut, & Joel Moss of said Wallingford were summoned to appear before this Court at New Haven on the first day of this present session thereof, to answer unto Peter Elkay of Stockbridge in the County of Berkshire in the commonwealth of Masssachusetts, in a plea of trespass on the Case wherein the Plf. complains and says

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[141] *New-Haven, May 8*, CONN. J., May 8, 1793, at 3.

[142] *Communications*, BOSTON GAZETTE, May 13, 1793, at 3.

[143] Incidentally, the clerk of the District of Connecticut, Simeon Baldwin, was paid by the page. Interview with Walter Hickey, Archives Specialist at the National Archives and Records Administration's Federal Records Center for the Northeast Region, Oct. 20, 2000.

that on the tenth day of September seventeen hundred & eighty six the Defts did at said Stockbridge eloign, withdraw & carry away from the service and employment of the Plf one Minty Elkay of said Stockbridge a daughter & servant of the Plf and then & there in his the Plf's actual service and employment being & living a servant to the Plf the said Minty being at that time of the age of about eight years, & her the said Minty they the Defts from that time to this, hitherto have withholden eloigned, & kept out of the service of the Plf & from the time that they the Defts did as aforesaid withdraw, eloign & carry her the said Minty from the service of the Plf as aforesaid untill this time, they the Defts have ~~with~~holden and detained her the said Minty in service & bondage, & kept her the said Minty from the service & employment of the Plf, whereby the Plf hath wholly lost the service of the said Minty from the time that they the defts did as aforesaid first eloign, and carry her the said Minty form the service of the Plf in manner aforesaid, untill this time, to the Damage of the Plf_ one thousand Dollars, for the recovery whereof with Just Costs the Plf. brings this suit_ And now the Plaintiff by Pierpont Edwards Esqr his Atty appears to prosecute his said action, and the Defendants by James Hillhouse Esqr their Atty_ also appear & severally plead & say, they are not guilty in manner & form as the Plf. in his declaration hath alledged & thereof put themselves on the Country, & the Plaintiff likewise. Therefore let a Jury of Freeholders from the body of the District aforesaid come before this Court to recognize whether the Defts are severally guilty in manner & form &c_ And thereupon the Jury summoned to attend this Court being called, Timothy Skinner, Richard Wallace, Roger N. Whittlesey_ Aaron Sherman, Gideon Judson, Dan Blakslee, Richard Hubbell, John Hide Ezekiel Hull, Job Perrit & Henry Daggett Jun. all of the Standing Jury and Levi Hubbard of the bystanders chosen by the Marshall for defect of Jurors returned, all lawful freeholders of the said District, come, who, being impanelled & sworn well & truly to try the issue or issues given them in charge, and the issue aforesaid being given them in charge & committed to them_ upon their oaths do say that the Defendants are guilty in manner & form as the Plf in his declaration has alledged. therefore they find for the Plf the sum of two hundred & fifty Dollars Damages & his Costs_ Therefore it is considered by this Court that the said Peter do recover of the said John & Joel the said sum of two

hundred & fifty Dollars damages, but without Costs. and thereupon the defendants by their Atty aforesaid moved the Court they might have Costs adjudged to them against the Plf. & the same was denied & overruled by the Court_[144] & afterwards, that is to say, on the first day of May 1793 being the same day on which the Judgt aforesaid was rendered by this Court vizt on the sixth day of the present session, the Defts moved this Court_ that execution on the Judt aforesaid may be stayed agreeable to the provisions of the Statute in such case made & provided, to give time to file in the Clerks office of this Court a petition for a New Trial,[145] for reasons in said motion assigned & supported by the affidavid of the Defts & this Court having fully heard the said parties by their Counsel on said Motion & fully understood the same for that it doth not seem to this Court that said motion & the matters therein contained, or offered in support thereof are sufficient to ~~induce them~~ to stay said Execution; Therefore it is further considered that Execution may issue without delay for the sum contained in said Judgt_ And Execution was accordingly granted Dated the second Day of May in the year of our Lord one thousand seven hundred & ninety three.

Peter Elkay vs Joel Moss &c_

John Ives the third of Wallingford in New Haven County in the District of Connecticut & Joel Moss of said Wallingford were summoned to appear before the Circuit Court of the United States of America then to be holden at New Haven in the District aforesaid on the twenty fifth day of April in the year of our Lord one thousand seven hundred & ninety three to answer unto Peter Elkay of Stockbridge in the County of Berkshire in the commonwealth of Massachusetts, in a plea of Trespass on the case wherein the Plaintiff_ complains & says that at said Stockbridge on the tenth day of Sepr AD 1786, the Defts did eloign withdraw & carry away from the service of the Plf one Amy Elkay of said

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144 Under § 11 of the Judiciary Act of 1789, the circuit courts' diversity jurisdiction could only be invoked if the amount in controversy exceeded $500. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Section 20 provides that a plaintiff invoking that jurisdiction who recovered less than $500—as did Elkay in each of his two suits—"shall not be allowed, but at the discretion of the Court, may be adjudged to pay costs." *Id*. at 83.

145 This motion, styled a Petition for New Trial, is reproduced in Appendix B.3, below. The statute in question, § 18 of the Judiciary Act of 1789, is also discussed in that Appendix.

Stockbridge, a daughter & servant of the Plf, then of the age of about eleven years & then & there in the actual service & employment of the Plf being, & being a servant to the Plf & her the said Amy did detain withhold & eloign_ from the service & employment of the Plf from the time that the Defts did as aforesaid on said tenth day of said Sepr first eloign, withhold and carry away the said Amy from the service of the Plf. untill the tenth day of Sepr of 1791_ & her the said Amy they the Defts did thro' the whole of said term of time hold in slavery & her withhold from the service of the Plf. whereby the Plf. wholly lost the service & Labour of the said Amy from the time that the Defts, did, as aforesaid, first eloign, withdraw & carry away the said Amy from the service of the Plf untill the tenth day of September AD 1791_to the Damage of the Plf the sum of one thousand Dollars, for the recovery whereof with just Costs the Plf brings this suit._ at which day the Plf by Pierpont Edwards Esqr his Atty appears & the Defendants by James Hillhouse Esqr their Atty also appear & severally plead & say they are not guilty in manner & form as the Plf in his Declaration has alledged & thereof put themselves on the Country, & the Plf by his attorney aforesaid does the like_ Therefore let a Jury of Freeholders from the Body of the District aforesaid come before this court to recognize whether the Defendants are severally guilty as aforesaid & thereupon the Jury summoned to attend this Court, ~~to wit~~, certain of them, to wit, Timothy Skinner, Richard Wallace, Roger N. Whittlesley, Aaron Sherman, Gideon Judson, Dan Blakslee, Richard Hubbell, John Hyde, Ezekiel Hull, Job Perrit & Henry Daggett Junr _ being called, come, & because one other of the Jury summoned did not appear, Levi Hubbard, chosen from the Bystanders, by the Marshall, at the command of the court, being called also comes, who together with the Jurors aforesaid being impanelled & sworn well & truly to try the issue or issues given them in charge, and the issue aforesaid being committed & given them in charge, upon their Oaths do say that the Defendants are guilty in maner & form as the Plf in his declaration has alledged & find for the Plf the sum of Two-hundred & fifty Dollars Damages & Costs_ Therefore it is considered by this Court, that the said Peter do recover of the said John & Joel the aforesaid sum of Two hundred & fifty Dollars, Damages_ which sum being less than five hundred Dollars it is further considered that he recover the same without Costs_ & thereupon the said John & Joel

> moved this Court that their Costs expended in defending this suit may be adjudged to them against the said the said Peter, & the same is overruled, & it is further considered that the said John & Joel take nothing by their motion aforesaid & that no Costs be adjudged to them. And that the said Peter may have Execution for his Damages aforesaid._
>
> Execution was accordingly granted. Dated the second Day of May in the year of our Lord one thousand seven hundred & Ninety three._[146]

2. *Circuit Court Docket Book Entries*

Circuit Court Dockett__ April Term AD 1793.__

. . . .

By New Process.__

. . . .

E 7/6[147] Edwards .33. Peter Elkay vs. Joel Moss &c.__ +	Hillhouse 4th Bonds to secure Cost on sd Tps Verdict for Plf. Dol. 250. 6th Day__ On Motion no Costs allowed the Defts__
E 7/6 Edwards .34. Peter Elkay vs. Joel Moss &c.__ +	Hillhouse On motion no Costs allowed the Defts__ Rule by Court. 4th Bond ordered to secure Cost Tps. Verdict for Plf Dol. 250. 6th Day.__[148]

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Peter Elkay)
33 v) Action of Trespass __ the Case &c.__
Joel Moss &c)
Jury Sworn__ [Timo Skinner, Richard Wallace, Roger N. Whittlesey, Aaron Sherman, Gideon Judson, Dan Blakslee, Rich Hubbell, John Hide, Ezikl Hull, Job Perrit, Henry Daggett Juno, Levi Hubbard[149]] Issue Not Guilty__ which being committed to the Jury they on the first of May being the sixth day of the sitting of the Court returned the following Verdict, vizt.__ In this Case the Jury find that the Defendants are guilty in manner

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[146] 1 Final Record Book (Law)—U.S. Circuit Court for Connecticut 194–99 (1790–96) (on file with the National Archives—Northeast Region, Waltham, Mass., Record Group 21).

[147] This number seems to have been the amount paid to Baldwin as fees. *See* Simeon Baldwin, Book for Fees as Clerk to District & Circuit Courts 4 (1792) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series IV, Box 70, Folder 843).

[148] Circuit Court Docket Book for Connecticut 44–47 (1791-1799) (on file with the National Archives—Northeast Region, Waltham, Mass., Record Group 21).

[149] This list of jurors appears in the margin of the docket book. *Id.* at 49.

and form as the Plf in his Declaration has alledged, therefore find for the Plf. the Sum of Two Hundred and fifty Dollars Damages and his Costs.__

Peter Elkay)
34 v)Action of Trespass on Case &c
Joel Moss &c)
Jury Sworn__ [As above[150]] Issue not guilty which being committed to the Jury they on the 6th Day of the Court returned the following Verdict, vizt.__ In this Case the Jury find that the Defendants are guilty in manner and form as the Plf in his Declaration has alledged.__ therefore find for the Plf. the Sum of Two Hundred and fifty Dollars Damages & his Costs.__[151]

3. *The Petition for a New Trial (Motion for a Stay of Execution)*

Section 18 of the Judiciary Act of 1789 provided as follows:

> *And be it further enacted*, That when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court, a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. And if a new trial be granted the former judgment shall be thereby rendered void.[152]

Pursuant to this enactment, the Final Record Book entries set forth in Appendix B.1 suggest that Moss and Ives filed the following document with the court on May 1, 1793:

Peter Elkay
vs.
Joel Moss &c_
Petn for New Trial-
April Term 1793

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[150] This reference to the list of jurors in case 33 appears in the margin of the docket book. *Id*.
[151] *Id.*

[152] Judiciary Act of 1789, ch. 20, § 18, 1 Stat 73, 83.

Negatived.
[Simeon] Baldwin C[ler]k.

District of Connecticut [illegible sign] Circuit Court April term 1793
Peter Elkay)
v.)
Joel Mosse) And the Defts after Judgment move this Court that Execution may be stayed according to the provisions of the 18th Section of the Act of the Congress of the United States entituled an act to establish the judicial Courts of the United States, to give time to file in the Clerk's office of this Court a Petition for a New Trial and for reasons why sd Petition should be allow'd to be filed or Exn stay'd for that purpose in sd cause as is provided in sd Act the Defts would more especially assign_

> 1st That Oliver Stanley Esqr of sd Wallingford is & would have been on the trial as the Petrs are advised a material witness in sd cause_ and the Defts from the short notice which they recd & by inevitable accident were prevented from procuring the testimony of him the sd Oliver Stanley Esqr_
>
> 2 For that Titus Hotchkiss who was call'd & with doubt admitted as a witness in sd cause altho objected to by the Defts Council & who swore to sundry material facts in the issue of sd cause was so far interested in the question as to be an incompetent witness and he the sd Hotchkiss has since giving in sd testimony & since the hearing in sd cause acknowledged himself deeply & materially interested in the event of sd Suit_ And has declared that a prosecution in his own name agst the Defts depended on the issue & verdict in question_
>
> 3rd For that sundry of the witnesses adduced on the part of the prosecution (viz) Casar ~~Elkay~~ Negro, otherwise Caesar Camp, Solomon Moss, William Jones, and Amasa Moss, are all to say no more of extremely doubtful reputation as to truth & veracity and not equal to mankind in general_ This they can prove respecting sd Caesar by the testimony of the sd Oliver Stanley Esqr of sd Wallingford, Gen James Wadsworth John Noyes Wadsworth Elias Camp Joel Parmelee and Dan Parmelee Esqrs all of Durham in New Haven County who live in the neighbourhood where sd Casar has for many years resided till within a few months past & by

sundry other witnesses

This they can also prove respecting sd Solomon Moss, and respecting sd William Jones, by the testimony of John Booth, Jeremiah Hull, Benajah Moss, Jonathan Moss Jun, Oliver Stanley Esqr, Titus Cook, Caleb Cook Esqr, Joseph Blakslee & David Hall Esqr all of sd Wallingford and who are men of indisputable character, who will likewise testify the same respecting sd Amasa Moss while & during the time he resided at sd Wallingford and respecting sd Amasa since that time they can prove the same by the testimony of Amos Moss, Ives Moss & Timothy Webster who live in the neighbourhood of sd Amasa and are men of undoubted Credit_

And the Defts were surprised by the introduction of sd witness not knowing that they were to be brought up or improved till the cause came on to trial and being totally unappraised of the facts to which they did in fact testify_

4 For that the Defts can also prove that at the time of bringing away sd Amy & sd Minta from Stockbridge on sd 10th Day of Septr 1786 that they applied to Timothy Edwards Esqr & others in authority in sd Stockbridge to advise with them respecting sd matter who advised the ~~Plt~~ to let sd Children come away & that the Plt did thereupon consent thereto & that they were brought away with the consent of the sd Plt sd Peter and with their own consent and that the Plt did not then pretend they were his property or free only on condition that he procured an indemnity to Joel Ives their original master from whom the Defts hold and that the Plt wish'd for an oportunity to satisfy & secure sd Ives and that the Defts did thereupon agree to keep sd Children at sd Wallingford for some time without letting them go out of their hands for the purpose of giving the Plt an oportunity of accomodating sd matter and that they would relinquish any claim to sd Children if sd Ives would give up all claim on them for sd Contract and that the time agreed upon was ten days_ and that sd Peter never came down or made any move in sd business nor did originate the present suit which the Defts are able to prove is done at the instance of other people and not at sd Peter's own instance_ All this the Defts are able to prove by the testimony of the sd Timothy Edwards Esqr & by the testimony of others, authority in sd Stockbridge and by the testimony of sundry other witnesses

> mony of sundry other witnesses whom the Defts cannot now name as they the Defts were then total strangers in sd Stockbridge and the Defts were unable to procure sd testimony partly from the shortness of the notice sd writ being served on the last day of service for this Court_ And the Defts not knowing of any process to constrain the attendance of witnesses, from another District_ And the Defts were surprised with testimony which to them was totally unexpected and which tended greatly to enhance the damages which are severe & heavy on the Defts as many circumstances might be fully explain'd particularly the testimony of the sd Titus Hotchkiss respecting sd Peter's sd coming down to adjust & settle the matter with sd Ives, as the testimony of sd Hotchkiss was relative to ~~a~~ sd agreement with the Plt above stated_ And the Defts can otherwise prove that from the first they treated sd Children with the utmost kindness & tenderness & refused to sell them to one Robert Walker of St Croix in the West Indies who would have given three times the price at which they were finally sold by the Defts which the Defts can prove by the sd Robert Walker & other witnesses_ For which & for other reasons the Defts pray that Exc may be staid for the purposes aforesd & to give the Petrs or Defts an oportunity to exhibit sd testimony before a Judge of this Court for his approbation
>
> Joel Moss) for
>)
> John Ives) themselves[153]

APPENDIX C: THE COURT RECORDS FROM *HOTCHKISS V. MOSS, IVES, & FIELD*

As predicted by the second point made in support of the above Petition for New Trial, Titus Hotchkiss did, in fact, sue Moss and Ives, along with one Edmond Field, after Elkay prevailed in his actions. Hotchkiss, it turns out, had bought Amy Elkay from the three defendants in the month of her abduction. (While it is unclear whether Hotchkiss ever took possession of Amy,[154] the Final Record Book entry for Peter Elkay's suit regarding her

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[153] Peter Elkay v. Joel Moss etc, Petition for New Trial, *in* Peter Elkay v. Joel Moss, "Case Folder" (April 1793) (on file with the National Archives—Northeast Region, Waltham, Mass., Record Group 21).

[154] Although the 1790 federal census records show that the Hotchkiss household included no free blacks and one slave, CENSUS OF THE UNITED STATES, CONNECTICUT, LITCHFIELD COUNTY 274–275 (Watertown) (1790), the slave probably wasn't Amy, but "Anna, [a] colored girl of Titus Hotchkiss" who died at the age of sixteen on May 19, 1791. RECORD OF MORTALITY OF THE TOWN OF

states that she was returned to her father on September 10, 1791.[155]) The gravamen of his complaint is that the defendants had warranted that Amy was a vendable slave and that they were in breach of this contractual warranty.

The papers reproduced below contain the only information I have found about this case. The first two constitute the case file from the Connecticut Superior Court. Next are excerpts from that court's docket sheets. Finally, there is an excerpt from the Superior Court record book.

1. *Superior Court Case File*

Titus Hotchkiss
vs.
Joel Moss & Others
Nonsuited Def for Cost

> To Job Austin of Waterbury, in New Haven County, indifferent person, there being no proper Officer to be had to serve this writ without great trouble & expence . . . . Greeting.—
>
> These are therefore—
>
> By authority of the State of Connecticut to command you to summon Joel Moss, John Ives 3d, both of Wallingford in New Haven County and Edmond Field, late of sd Wallingford, now residing in Catskill in Albany County, and State of New York, to appear before the County Court to be holden at New Haven, within and for the County of New Haven on the 4th Tuesday of Novr instant, then and there to answer unto Titus Hotchkiss of Watertown in Litchfield County, in an action or plea of the case, whereupon the Plf declares and says that on or about the 30th day of Septr. AD 1786, the Plf & Defts were together at sd Wallingford, and the Defendants then & there proposed to sell to him the Plaintiff a certain Negro Girl, named Amy for the Sum of ,22.. 10.. 0__ lawful Money, and the Defendants to induce

WATERTOWN, CONN. 16 (Rev. N.S. Richardson et al. comps., 1889). (Thanks to Florence Crowell of the Watertown Historical Society for bringing the latter entry to my attention.) Hotchkiss isn't listed in the Watertown census of 1800, and I have been unable to ascertain whether he owned any slaves at that time.

155 *See supra* pp. 54–55.

the Plf to purchase sd Negro Girl declared & affirmed, that sd Amy was a Slave for life, and that they had a good right to sell her as & for a Slave for life, and the Plaintiff Supposing that sd Amy was a Slave for life, accepted the proposals of the Defendants, and actually gave the Defts ,22.. 10.. 0 lawful Money, which sum the Defendants accepted of him the Plf in full satisfaction for sd Amy.__ In consideration thereof the Defendants conveyed sd Amy to the Plf as a Slave for life, & the Defendants did then & there in consideration aforesd warrant & assure to the Plf. that the Sd Amy was a Slave for life, and that they had good right to dispose of her to the Plf as such,__ Now the Plf further says that the Defts did not own said Amy, nor had they any right to sell sd Amy to the Plf, as a Slave for life; for at the time the Defendants sold said Girl to the Plf she was a free person, and the Defts had no right to sell her to the Plf as aforesaid, all of which the Defts well knew, and the Plf hath totally lost sd Amy & her services all of which is in direct Violation of the Defendants promise & Covenant as aforesd__ Which is to the Plaintiffs damage the Sum of ,35.. 0.. 0. Lawful Money, to recover which with costs the Plf brings this Suit.__

Hereof fail not; but of this writ, with your doings thereon, make due return, according to law.__

Dated at New Haven, this 11th day of Novr. AD: 1793.

State duty of two shillings is received__

Timothy Jones Jeo pacs [i.e., J. P.]

New Haven County [illegible sign] Wallingford, Nov. AD. 1793__I then left a true and attested Copy of this writ, at each of the within Defendts last usual places of abode in sd Wallingford.__

Fees 16/6.__ Test Job Austin. Indifft person.__

The foregoing is a true Copy of the original writ, and of the endorsement thereon, as on the files of New Haven County Court.

Test Ab[raham] Bishop. Clerk__

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At a County Court, holden at Newhaven, within and for the County of New Haven, on the 3d Tuesday of March AD 1794

Titus Hotchkiss)
vs)
Joel Moss & others)

In a plea of the case, for selling a Negro Girl named Amy & demanding ,35, as pr writ on file, dated Novr 11th, 1793. This cause came duly to this term and now the parties appearing, were joined in issue upon demurrer to the Defts pleas, as by the Pleadings under Hand on file, in the following words.__

> "And the Defendants defend plead & say they are not guilty in manner and form the Plf hath alledged & hereof put themselves on the Country. W Hillhouse for Defts.
>
> C
>
> "And the Plf says that the Defts Plea is insufficient.
>
> C Smith for Plf
>
> "The Defts say their Plea is sufficient
>
> Hillhouse for Defts"

This Court adjudge sd Plea etc to be sufficient & therefore that the Defts shall recover of the Plf their cost, taxed at ,-[156]

The Plf moves for an appeal from the Judgmt of this Court to the Hon: Superior Court to be holden at New Haven, on the last Tuesday of July, next, which is granted, and thereupon Charles Hall of New Haven acknd himself bound to the Defendants in a recog: of ,40, that the plaintiff shall prosecute his appeal to effect, and answer all damages, in case he make not his plea good__ Acknd in Court and duty pd

Test Ab Bishop. Clerk.

The foregoing is a true Copy of Record Examind & Certified by

[156] Presumably Hotchkiss was attempting to use *res judicata* or collateral estoppel in this suit so as to avoid the cost (and risk) of relitigating the matter.

Abraham Bishop. Clerk.[157]

2. *Superior Court Docket Entries*

pr Appeal

. . . .

59 Titus Hotchkiss vs. Joel Moss &c N Smith[158]

Actions to Come to this Court
pr Continuance

. . . .

4/6 32 Titus Hotchkiss vs Joel Moss &c o N Smith Contd[159]
Actions that Come to this Court
pr Continuance

. . . .

15—15 Titus Hotchkiss vs. Joel Moss :o: ~~N. Smith~~ J Nonsuited
W
Def for Cost J^ Hilhouse[160]

3. *Superior Court Record Book Entry*

> Titus Hotchkiss of Watertown in Litchfield County Plf vs Joel Moss & Joel Ives both of Wallingford and Edmond Field late of sd Wallingford Defendants In a plea of the Case Demanding ,35 L m Damages as per Writ on file Dated November 11th 1793. By appeal of the Plf this Case Comes legally to this Court The Plf being three times publickly Called failed to appear and the Deft apprd and prayed Judgment for Cost Whereupon it is Considered by that the Plf Recover of the Deft his Costs[161] Taxed at Seven pounds

157 Titus Hotchkiss v. Joel Moss, "Case File" (1794) (on file with Connecticut State Library, Hartford, Conn., RG 3, Records of the Judicial Department, Box 340, New Haven County Superior Court Files, 1793-95).

158 New Haven Superior Court Docket (July 1794) (on file with Connecticut State Library, Hartford, Conn., RG 3, Records of the Judicial Department, Box 106, New Haven County Superior Court Dockets).

159 New Haven Superior Court Docket (Jan. 1795) (on file with Connecticut State Library, Hartford, Conn., RG 3, Records of the Judicial Department, Box 106, New Haven County Superior Court Dockets).

160 New Haven Superior Court Docket (July 1795) (on file with Connecticut State Library, Hartford, Conn., RG 3, Records of the Judicial Department, Box 106, New Haven County Superior Court Dockets).

161 This is obviously a mistake: costs were awarded to the defendants.

Nineteen Shillings sd Exec Granted Decr 10th. 1795.[162]

APPENDIX D: DRAFTS FROM THE PIERPONT EDWARDS PAPERS

The Pierpont Edwards Papers at Yale University contain two drafts drawn on Edwards by Charles Hall, who performed the eighteenth-century equivalent of posting an appeal bond for Titus Hotchkiss in the latter's suit against Moss, Ives, and Field. These papers suggest a connection between Hall and Elkay, but they leave us wondering what it is.[163]

1. *Draft Dated October 2, 1793*

Charles Halls
Order on fees per
Edwards Esq

Sir please to pay Doct^{r} Seth Turner four pounds LM and it shall answer the Same sum ~~of~~ Towards the Judgments Recovered in favour of Peter Elkay against John Ives 3^{d} & Joel Moss before the Circuit Court of the United States Last April and in so doing you will Oblige your devoted Servant

Dated ~~New~~ Haven Octr 2^{d}, 1793 Charles Hall
Pierpoint Edwards Esqr[164]

2. *Draft Dated December 20, 1793*

Charles Halls
order on M^{r}
Edwards

Brainard fees 6/0

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[162] Hotchkiss v. Moss, (Conn. Super. Ct. 1795), 29 Superior Court Records, Sept. 1793-Sept. 1795, at 490 (on file with Connecticut State Library, Hartford, Conn., RG3, Early Superior Court Records). By defaulting, Hotchkiss obtained a dismissal without prejudice, which meant he would be free to fight another day. *See* 2 SWIFT, *supra* note 20, at 265.

[163] The same is true of a tantalizing entry in the New Haven Superior Court Docket for July, 1795. The line immediately following the entry set forth in the text accompanying note 160, above, reads as follows: "—15 Charles Hall vs. Joel Moss:o:[illegible word] [illegible word]Cont'd Edwards." Unfortunately, this is the only record of this case that I have been able to locate.

Sir please to pay John Brainard Esqr the Sum of Seven pounds Lawful Money and Charge the Same to your Humble Servant and the same Shall be discounted on Ives's note.[165]

Dated New Haven Decr 20th, 1793 Charles Hall
Pierpoint Edwards Esqr

Rec'd the [illegible word] of P. Edwards
it being applied in Elisha Whittlesey Ex^{r} v. Charles Hall
John Brainard[166]

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164 Charles Hall, Charles Hall's Order on fees (Oct. 2, 1793) (on file with Yale University Library, Manuscripts and Archives, Pierpont Edwards Papers, MS Group 1357, Series I, Box 1, Folder 7).

165 I assume this refers to a note given by John Ives III to satisfy the judgment in *Elkay*.

166 Charles Hall, Charles Hall's order on Mr. Edwards (Dec. 20, 1793) (on file with Yale University Library, Manuscripts and Archives, Pierpont Edwards Papers, MS Group 1357, Series I, Box 1, Folder 7).