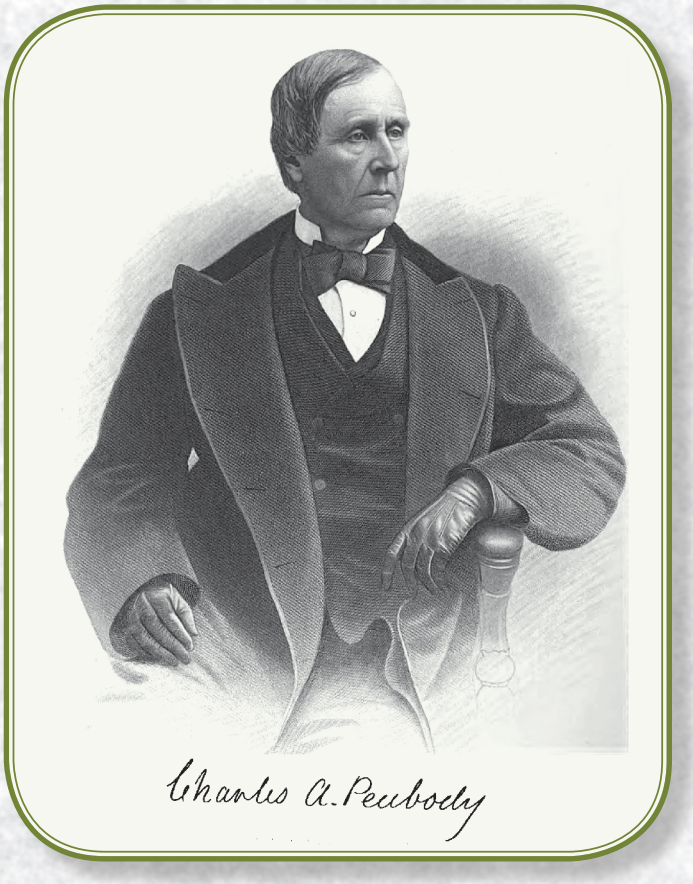
NEW YORK JUSTICE IN CIVIL WAR LOUISIANA

JOHN D. GORDAN, III



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Introduction

Recent debates about alternatives to Article III courts in wartime contexts have overlooked one of the most unusual courts in our history—the United States Provisional Court for the State of Louisiana, established after the fall of New Orleans by a proclamation of President Abraham Lincoln dated October 20, 1862, which also named its judge, Charles A. Peabody.[1] The grant of jurisdiction to that court as a "Court of Record for the State of Louisiana" was virtually universal—full civil and criminal jurisdiction, state and federal, enforced by the military, its judgments "final and conclusive." Moreover, to facilitate its exercise, three months after the Provisional Court convened, the military governor of Louisiana appointed Judge Peabody to serve simultaneously as the Chief Justice of the Louisiana Supreme Court. The Provisional Court sat until late July 1865 and was formally abolished by Congress a year later.

The disappearance of the Provisional Court from the recollections even of legal historians is not surprising, given that in the professional literature of the last hundred years it has earned merely three pages from Professor Surrency in an early issue of *The American Journal of Legal History* and a small place in a 1988 article on the judicial complexity of occupied New Orleans.[2] In its time, however, the court was the subject of several contemporaneous articles in what is now the University of Pennsylvania Law Review and, in the thirty years thereafter, three more written by Judge Peabody himself.[3] The U.S. Supreme Court sustained the Provisional Court's legitimacy as an appropriate exercise of the powers of the President as commander-in-chief in territory previously dominated by the "insurgent organization."[4] Finally, two of Judge Peabody's opinions in the Provisional Court—one in two criminal cases and the other dealing with the negotiability of interest coupons on bonds held behind enemy lines—survive.[5]

Charles A. Peabody
Sketches of Successful New Hampshire Men: Illustrated with Steel Portraits
(John B. Clark: Manchester, 1882), p. 209
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Prior to his two-and-a-half years in New Orleans, Judge Peabody had been twice appointed by the Governor of New York to fill vacancies on the Supreme Court of the State of New York, where he sat from December 1855 to March 1856 and from November 1856 to the end of 1857. His failure to prevail in an election to that court in the fall of 1855 led to a series of farcical confrontations in the courtroom between Judge Peabody and his rival who had the better claim to the single seat.

Early Adventures on the New York Bench

Little information is available about the early career of Judge Peabody. He was born in Sandwich, New Hampshire, and claimed descent on his mother's side from Sir Matthew Hale, one of England's greatest judges. His legal training started in 1834 at the office of Nathaniel Williams, United States District Attorney for the District of Maryland. Thereafter, he attended Harvard Law School, graduating in the class of 1837. He moved to New York City to practice law, but his activities are visible only from 1855, when he participated in the convention at which the Republican Party was formed. Peabody had a close relationship with William H. Seward, sometime Governor of New York, United States Senator and future Secretary of State in the Lincoln Administration.

Probably in connection with those activities, Peabody was one of several candidates in the Fall 1855 election to complete the term on the Supreme Court of the State of New York of an incumbent who had suddenly died two weeks earlier. Peabody came in last behind Henry E. Davies, later Chief Judge of the New York Court of Appeals, and three other candidates. However, on December 3, Governor Myron H. Clark voided the election for want of statutory notice to the Secretary of State. An incumbent Justice, Edward P. Cowles, with just 27 days left in his term, resigned his existing seat, and Governor Clark then immediately appointed him to fill the longer term opened up by the voiding of the election. Next, the Governor appointed Peabody to complete Justice Cowles's remaining 27-day term.

Davies, however, did not take his ouster lying down. The Attorney General commenced a *quo warranto* proceeding in the court on which Cowles was sitting, challenging his right to be there. Although the suit was dismissed both at Special and General Term, it was reinstated by the Court of Appeals at a Special Term in January, 1856, and remanded for the filing of an answer by Justice Cowles.[6]

For reasons not articulated, on February 4, 1856, two of the incumbent justices of the Supreme Court, James I. Roosevelt and Thomas W. Clerke, advised Davies that the votes he had received "were irregular and void" and that they considered that Peabody had been elected.[7] A wrestling match for the third seat then ensued at General Term of the Supreme Court, with Davies on one side, supported by the decision of the Court of Appeals, and Peabody on the other, supported by the other justices of the court. Although Cowles appears to have dropped out of the Attorney General's lawsuit, evidently Peabody's actions were intended to thwart Davies' election, despite the ruling of the Court of Appeals, to be followed by Peabody's resignation and the Governor's reappointment of Cowles, also a Republican.[8] George Templeton Strong's diary for February 13, 1856 supplies the most entertaining vignette:

> *The general term room was pretty well filled this morning, chiefly by the bar, in eager anticipation of a particularly good session. At five minutes before eleven, Peabody, Judge, was in his seat looking uncomfortable. At eleven, Davies, Judge, entered blandly and took his seat beside him, trying to look nonchalant. A few minutes thereafter, Roosevelt and Clerke walked in together, looked astounded, took their seats, and the court was opened… .*
>
> *Roosevelt didn't commit Davies, Judge; he began calling the calendar, called several cases twice, picked up papers, and turned them over incoherently, and showed himself disconcerted and unhappy. Evarts submitted one of the batch of Harper insurance camphene cases* pro forma. *Everyone hoped he'd hand up only three copies of his points and so bring matters to a crisis, but he was weak enough to furnish four. Then there was some more calendar-calling, without anybody ready, and then Roosevelt and Clerke walked out, and*

it was generally supposed that they'd come back with the power of the county at their heels and commit Davies to close custody, but they returned unattended… . It seems they only went downstairs to frame an order that this court recognizes only Roosevelt, Clerke and Peabody as justices, and that clerk and officers must act accordingly. Their spirited performance of the court's comic functions stimulated everybody's faculty of facetiousness. It was "a very general term"—"four judges out of three in attendance"… .[9]

This situation could not continue and, in March 1856, Peabody withdrew in favor of a new *quo warranto* proceeding which the Attorney General promised to institute. When the Attorney General reneged, Peabody, acting through Henry Laurens Clinton led by Charles O'Conor, instituted a mandamus proceeding in the Supreme Court for Albany County to require the Attorney General to act. His application was denied on July 29, 1856 by Justice (and future United States Senator) Ira Harris, on the ground that the court had no power to make such an order.[10] The matter ended there.

Contemporary accounts of Justice Peabody's tenure on the Supreme Court typically stop at this point, but there is more to the story. One of the other justices elected to a full 8-year term in November 1855 was James R. Whiting, District Attorney for New York County. He resigned from the court on November 1, 1856, in anticipation of being elected Mayor of the City of New York (but lost), leaving a vacancy for the balance of 1856 and all of 1857, which Governor Clark promptly filled by reappointing Charles A. Peabody.[11]

Justice Peabody's 14-month service on the Supreme Court under this appointment was no sinecure. December 1856 found him in Newburgh in Orange County, presiding at the sensational second trial, after a change of venue, of Louis Baker for shooting William Poole to death in a melee in March 1855 at a newly-opened bar called Stanwix Hall at 579 Broadway. Many other participants had been arrested, but the case was not a strong one.[12] At the Orange County trial and again at a third trial, the jury hung, and the charges were dismissed.

Map showing the defenses of the Mississippi below New Orleans and Farragut's attack, April 24, 1862

By Robert Knox Sneden
Library of Congress, Geography & Map Reading Room
Digital ID: gvhs07 vhs00197

Justice Peabody ran for a full term on the court in 1857 but lost the election once again. At the very end of his tenure he was part of the (virtually unique) five-judge panel at General Term which, on December 30, 1857, affirmed Judge Elijah Paine, Jr.'s, decision to free the slaves in the celebrated *Lemmon Slave Case*.[13] But a bigger challenge lay ahead in the second year of the Civil War.

The Occupation of New Orleans

The strategic importance of New Orleans led to an early and successful effort by Union forces to capture it. This was no easy task, as the only feasible approach to the city was by water, up the Mississippi River from the Gulf of Mexico, a passage guarded by

Rear Admiral David Farragut
Library of Congress,
Prints and Photographs Division
Reproduction Number: LC-DIG-cwppb-05211

Fort Jackson and Fort St. Philip, less than a mile from each other on opposite sides of the river. In addition, as the Union fleet neared, the Confederate command placed chains and hulks to block the passage and prepared fire rafts to send down the river against the Union ships. The C.S.S. *Louisiana*, an ironclad ram under construction in New Orleans with engines not yet operational, was towed down the river by tugs and moored above the forts; a small number of armed Confederate vessels, primarily of the River Defense Fleet, were also in the river to resist the Union fleet, which was composed of seventeen ships, including three large warships. An additional fleet of vessels with mortars mounted on them accompanied the Union warships.

After six days of bombardment of the two forts by the mortar fleet, a little after 2:00 A.M. on April 24, 1862, the Union warships began their passage past the forts in complete darkness. Shadowy forms moving on the river were observed by soldiers manning the water battery in front of Fort Jackson, which opened fire. Soon both forts, the River Defense fleet, the Confederate naval vessels and the Union fleet were pouring shot and shell on each other, lighting up the river. Flag Officer Farragut chose to direct the Union fleet from a perch atop the mainmast of his flagship, the *Hartford*, and had to be talked down by his subordinates. The *Hartford* began to pass the forts shortly after 4:00 A.M., ran aground and was set ablaze by a fire raft which the *Hartford's* signal officer managed to blow up; the fire was brought under control and the vessel managed to pull free.

By morning, the Union fleet, with only one vessel lost, was beginning to anchor at the Quarantine Station below New Orleans. All but four of the gunboats on the Confederate side were lost, and the C.S.S. *Louisiana*, her commander mortally wounded, was set afire by her crew to avoid capture, blew up and sank. General Mansfield Lovell, commanding the Confederate land forces defending New Orleans, retreated from the city. The soldiers at Fort Jackson mutinied and spiked their guns; both forts surrendered. The Union fleet continued up the river, meeting no resistance. On April 25, two naval officers landed at New Orleans and demanded its surrender. The following day the mayor capitulated.[14]

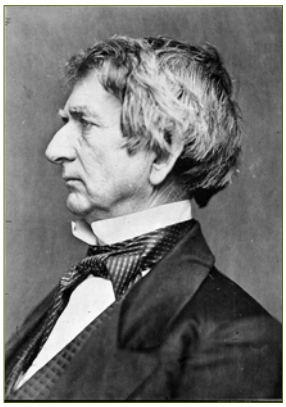
On May 1, the soon to be notorious Major General Benjamin F. Butler, commander of the Department of the Gulf, landed with troops and established his headquarters at a commandeered hotel. The civilian courts were closed. Butler estab-

General Benjamin Butler circa 1864.
Seated on the porch of a Southern mansion flanked by other Union Officers
Engraved by H.B. Hall after a drawing by Thomas Nast
www.Photos.com

lished a Provost Court, presided over by Major Joseph M. Bell, a former partner of Rufus Choate in Boston, from where Butler also came. Although Butler soon reopened three state trial courts with jurisdiction in civil actions arising within the city proper, the Provost Court was the sole court in New Orleans with criminal jurisdiction. However, Butler also felt entitled to impose, personally and summarily, lengthy periods of incarceration in military installations on recalcitrant secessionists.

The occupation of New Orleans was also the occasion for Butler's infamous General Orders No. 28 of May 15, 1862, which directed that a woman insulting a Union soldier should be treated as a prostitute "plying her avocation."[15] The depth of Butler's hostility is evident in his private correspondence:

> *We were two thousand five hundred men in a city seven miles long by two to four wide, of a hundred and fifty thousand inhabitants, all hostile, bitter, defiant, explosive, standing literally in a magazine, a spark only needed for destruction. The devil had entered into the hearts of the women of this town to stir up strife in every way possible. Every opprobrious epithet, every insulting question was made by these bejeweled, becrinolined, and laced creatures, calling themselves ladies, toward my soldiers and officers, from the windows of the houses and in the street.*[16]



Secretary of State William Seward
Library of Congress,
Prints and Photographs Division
Reproduction Number: LC-USZ62-21907

Butler's aggressive tactics in the pursuit of property of the Confederate government or in aid of its belligerency led him to search the persons and premises of foreign consuls, notably the consul for the Netherlands.[17] The consul's protests, reiterated by the Dutch ambassador to Secretary of State Seward, who was trying to maintain friendly relations with the European powers in order to forestall their intervention, led to Seward's censure of Butler in June 1862 for violating the law of nations.[18] Seward emphasized to the foreign diplomats that the War Department was appointing a separate military governor for the State of Louisiana, Colonel, later General, George F. Shepley.[19]

But Lincoln and Seward did more. They also appointed Reverdy Johnson, a United States Senator from Maryland, confidante of Lincoln and trial lawyer almost without peer, to go to New Orleans to address what Postmaster Montgomery Blair characterized in a letter to Butler as "your Consular Embroglio."[20] Johnson spent much of July as a "Commissioner," effectively overruling Butler's actions in three major cases over Butler's howls, ordering that:

1. $800,000 in coin that had been seized from the Dutch consul be returned either to the consul or those for whom he was holding it;
2. $716,196 in coin seized from the French consul be returned to the parties to whom it was to have been shipped; and
3. sugar seized by order of General Butler from Messrs. Covas and Negroponte, Greek merchants, residents of New Orleans, be returned to them because there was not "a scintilla" of evidence that they were part of "an association of Greek merchants" converting Confederate money to bullion for arms purchases.

Johnson also directed the return of property seized by Butler in several other instances before sailing on July 27.[21] In his essays on the history of the Provisional Court, Judge Peabody attributed its formation to the need for local and immediate adjudication of disputes involving foreign interests of the kind discussed above in order to avoid their escalation into diplomatic issues between the United States and foreign governments.[22]

The Establishment of the Provisional Court

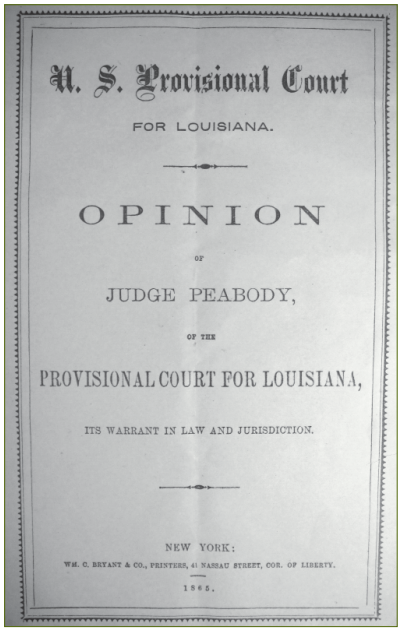
After the Provisional Court was established and Judge Peabody appointed by the Presidential proclamation on October 20, 1862, Judge Peabody,

with his Clerk, Marshal and Prosecuting Attorney, "proceeded by Government transport, under convoy, from New York to New Orleans…, [a]rriving there in early December 1862." Less than three weeks after his proclamation, President Lincoln had relieved Butler from command of the Department of the Gulf, appointing General Nathaniel Banks in his place, and by mid-December Butler had left New Orleans. Major Bell, who had been the judge of the Provost Court, left then also. The Provisional Court convened for the first time on December 31, 1862, and sat week by week until its first four-month recess began on July 3, 1863. Its last sitting was July 25, 1865, with Judge Peabody presiding.

New Orleans Custom House, where Judge Peabody presided as Judge of the U.S. Provisional Court for the State of Louisiana

McPherson & Oliver, No. 132 Canal Street, New Orleans, ca. 1864
Marshall Dunham Photograph Album Image#32410059 Courtesy of the Louisiana Digital Library

By the President's proclamation, the Provisional Court's jurisdiction extended to "all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States," and Judge Peabody exercised that authority and more.[23] During his first term alone, the docket included cases of treason, murder and manslaughter; cases under the Confiscation Acts;[24] seizure and sales of enemy property, particularly cotton; commercial litigation, particularly arising out of the consequences of change of government; contested divorce proceedings and alimony enforcement actions.[25]

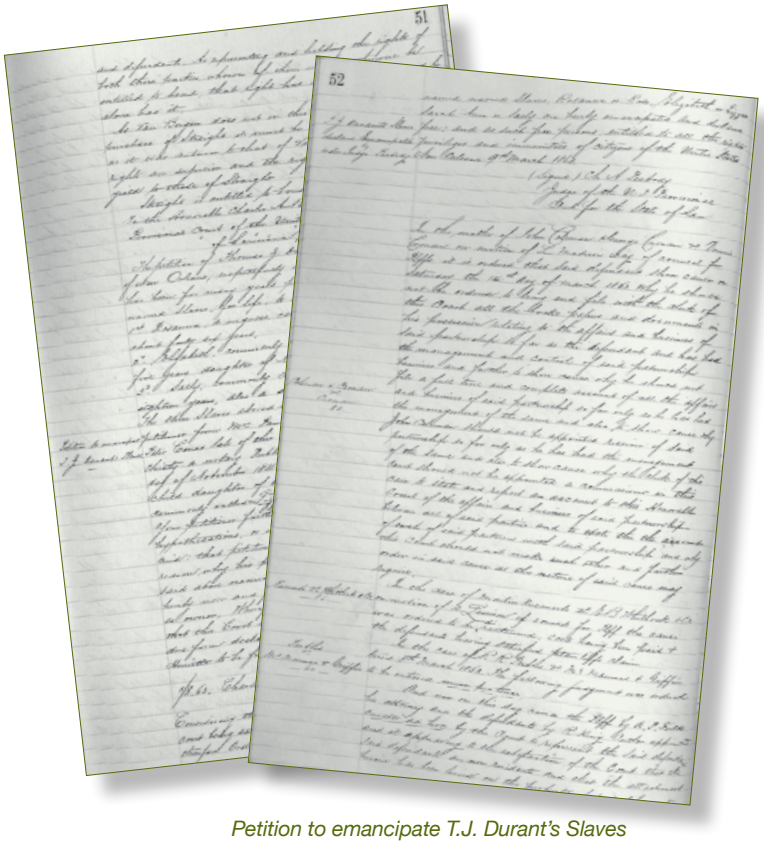

U. S. Provisional Court
FOR LOUISIANA.
OPINION
OF
JUDGE PEABODY,
OF THE
PROVISIONAL COURT FOR LOUISIANA,
ITS WARRANT IN LAW AND JURISDICTION.
NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU STREET, COR. OF LIBERTY.
1865.

Cover of Judge Peabody's Opinion in U.S. v Auguste Reiter

(Wm. C. Bryant & Co.: New York, 1865)

Judge Peabody's two surviving opinions and those of other courts concerning judgments of the Provisional Court illustrate the docket of the Provisional Court. *The Grapeshot, supra* note 4, was an admiralty action on a bottomry bond.[26] Other cases involved actions in debt or a suit on a promissory note.[27] *United States* v. *Reiter, supra* note 5, was an opinion filed in two separate cases in which the defendants, convicted after trials for murder and arson, respectively, unsuccessfully challenged the legality of the establishment of the Provisional Court. *Union Bank of Louisiana,* also *supra* note 5, established the right of the bank owning New Orleans bonds to collect the periodic interest due even though the original bonds and interest coupons were in the possession of a Louisiana state official behind enemy lines.

The minutes of the court contain additional judgments by Judge Peabody on similar sorts of issues. One improbable case, *Francisco Riancho* v. *Farragut*, was an action to recover "from the admiral… Confederate money … and obligations of the Confederate States captured by the naval forces of the United States;" Judge Peabody held: "The Confederate money was



Petition to emancipate T.J. Durant's Slaves
Minutes of the United States Provisional Court, 51-52
Courtesy of the National Archives at Fort Worth

contraband and forfeit, [and] other property of the same owner captured with it would be subject to the same disabilities…" In *Ribas* v. *Avendano Bros.*, the defendants managed Ribas's real properties in New Orleans and collected his rents in Confederate currency; they had previously advanced Ribas a loan in United States currency in anticipation of his rents. Ribas sought to offset the now worthless collections in Confederate currency against his debt to the Avendano brothers, but Judge Peabody held that the two transactions were separate and that Avendano Bros. were to recover their loan from Ribas with interest and then deliver to him the Confederate currency they had collected on his behalf.[28]

The most legally dramatic of the Provisional Court's activities was its granting of manumission petitions by slaveholders. Starting on February 3, 1863, the law firm of Durant & Horner began presenting such petitions to Judge Peabody. The first was filed for a free black woman who had purchased her own sister from the previous owners. Its second petition, on March 9, 1863, was filed on behalf of Thomas Jefferson Durant, the first named partner in the firm. It recited:

> *The petition of Thomas J. Durant who resides in the city of New Orleans, respectfully shows that he is now and has been for many years the owner of the following named slaves, for life, to wit:*
>
> *1st Rosanna, a negress, commonly called Rose, aged about forty six years,*
>
> *2nd Elizabeth, commonly called Lizzie, aged about twenty five years, daughter of Rose,*
>
> *3rd Sally, commonly called Sarah Ann, aged about eighteen years, also a daughter of Rose.*
>
> *The three slaves above named were purchased by your petitioner from Mrs Pauline Maria St. Jean widow of Peter Conas late of this city, by Public Act before William Christy a notary public of New Orleans, on the fourth day of November 1845, and 4th Henrietta an infant child daughter of the slave above mentioned as Elizabeth commonly called Lizzie and aged about 16 months.*
>
> *Your petitioner further shows that there are no mortgages, hypothecations, or encumbrances on said slaves, of any kind that petitioner is out of debt, and there is no reason why his petition should not be granted and said above named slaves declared to be free and he hereby and forever renounces all claims to them as owner.*
>
> *Wherefore petitioner prays, the premises considered, that the Court may be pleased to pass an order in due form declaring said slaves Lizzie, Sarah Ann & Henrietta to be free.*

The order made by Judge Peabody states:

> *Considering the allegations of the within petition and the court being satisfied with the*

> *correctness thereof, it is therefore Ordered, adjudged & decreed that the within named Slaves, Rosanna or Rose, Elizabeth or Lizzie, Sarah known as Sally are hereby emancipated and declared free; and as such free persons entitled to all the rights, privileges and immunities of citizens of the United States.*

At the time Judge Peabody began granting these applications, Louisiana law no longer permitted manumission: originally expansive, a slave owner's right to manumit slaves had become increasingly restricted until 1857, when the right was abolished by statute.[29] Second, although President Lincoln had issued the Emancipation Proclamation on January 1, 1863, it applied only to "the States and parts of States…in which the people, respectively, shall be in rebellion against the United States" and specifically excluded from its operation the City of New Orleans and surrounding Parishes occupied by Union troops. Finally, in the opinion for the Court in *Dred Scott* v. *Sandford* (60 U.S. 393, 403-404 (1857)), Chief Justice Roger B. Taney—who in March 1863 was still Chief Justice just as *Dred Scott* was still good law—had written:

> *The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, granted by that instrument to the citizen…*
>
> *We hold that they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.*

It thus appears that in granting these petitions as he did, Judge Peabody was exercising a power unavailable under state law, freeing slaves which the President's Emancipation Proclamation expressly excluded and granting them the privileges of citizens of the United States which the Supreme Court had recently and authoritatively held the Constitution did not extend to them. On what basis he did so, other than the personal enlightenment reflected by his vote at General Term in the *Lemmon Slave Case*, does not appear. However, there are two hints in the historical record.

The first is found in Judge Peabody's reminiscences of the Provisional Court. Its boldest statement appears in the 1878 edition:

> *Commissioned broadly to administer justice, and no rule or law for its action being prescribed, it was left to the court to decide by what law it would be governed. It decided, naturally, to adopt as the rule of its action the law theretofore of the State of Louisiana, as it seemed probably that that law, having had the sanction of the previous government, would be found best suited for the business, wants and interests of the State. This, however, the court announced would only be the general rule, and the court would decide in each case whether any reason existed for a departure from the law of the State, and would make exceptions whenever sufficient reasons for it existed. Exceptions had to be made frequently in the altered condition of things brought about by war and conquest, and the power to make them was one of the most beneficent possessed by the court.*

A footnote in the 1878 version also records Judge Peabody's post-war dinner table conversation with Chief Justice Salmon P. Chase and Secretary of State Seward, where Seward teased the Chief Justice with the claim that the Supreme Court "has some power in time of peace, no doubt, but it is limited to appellate jurisdiction always, and that in a very small class of cases, and in those it is bound by law prescribed for its guidance," but "Peabody, all the power of his court is not a circumstance to what you had in Louisiana, and I made you judge there." In addition, according to the footnote:

> *Chief Justice Chase had always told Judge Peabody, familiarly, while the court was in existence, that he did not approve of the act of the President giving him such unlimited powers as he had, and that he would never have consented to give any one such powers if he had been consulted.*

Second, Judge Peabody's willingness to grant these applications may have been supported by the advocacy of the counsel and, in the case discussed, the applicant, Thomas J. Durant, who was active in the Provisional Court from its inception. Born in Philadelphia but moving to New Orleans at an early age, Durant had been United States District Attorney in the Polk administration and a state senator. Although he remained in Louisiana after its secession, he was committed to the Union and both recognized as such by General Butler and his colleagues and relied on by President Lincoln until their political rupture in January 1864.[30] In June 1863, General Shepley, the Military Governor, appointed Durant Attorney General of Louisiana. Durant was an opponent of slavery and a vigorous advocate of suffrage for freeborn Blacks in the reorganization of Louisiana, and doubtless the same zeal was demonstrated in his appearances before Judge Peabody.[31]

Judge Peabody's Other Judicial Duties in New Orleans

Early in his tenure, Judge Peabody announced that he would accept transfer to the Provisional Court of cases filed in the United States Circuit and District Courts prior to their secession; *The Grapeshot* was such a case. But he went further, announcing on January 27, 1863:

> *That in consideration of the fact that the late Supreme Court of this State, to which appeals were heretofore taken from the other and lower courts; that a large number of such appeals are now pending many of which appeals are apparently taken more for the purpose of delay; and considering that the powers of this court are ample for affording the needed relief; that in view of these facts the Court will fix an early term in which such appeals may be heard before the bar of this Court, in cases where the amount involved shall exceed $300 and proceedings had according to law, to hear and finally determine the rights of the respective parties to such suits.*

This assertion of state appellate jurisdiction was not well received by the lower state civil courts, which refused to send up their records, or by the Bar, which in early March petitioned General Shepley to reestablish the Louisiana Supreme Court.[32] With remarkable pragmatism, in April General Shepley conferred on Judge Peabody the additional position of Chief Justice of the Supreme Court of Louisiana and appointed two additional justices.

Quite apart from these duties, the departure of Major Bell left the Provost Court without a judge. Until July 1863 Judge Peabody also presided in the Provost Court. Thus, in contrast to the New York Supreme Court in 1856, where Judge Peabody was at best a supernumerary, here he was simultaneously a federal judge, a state Chief Justice and a military judge, doubtless a record.

Unfortunately none of this played well in New Orleans. Feelings were pretty raw, and the Unionists, encouraged by General Butler's bumptiousness, thought they were entitled to payback for what they had endured when the Confederates were in charge. They complained about Judge Peabody to President Lincoln; a broadside letter dated May 7, 1863, stated in part:

> *The undersigned,* loyal *citizens of the United States and the city of New Orleans, most respectfully ask for the removal of Judge Peabody from his present position among us. This we solicit solely for the good of the Union cause.* * *
>
> *When Judge Joseph M. Bell was here, Union men were protected from secession insolence and abuse, and* traitors *were made to know their places.*
>
> *But now, alas ! the scene is changed, and such a change !*

*Secessionists and traitors no longer fear to be insolent, and to give vent and expression to their pent-up wrath, and we are sorry to say that this is owing to the course pursued by Judge Peabody on the bench.****

Punishments have been of such a trifling nature and character when Judge Peabody has been on the bench, that Union men have been discouraged from prosecuting secessionists for expressing disloyal sentiments publicly in the streets, while, on the other hand, rebels and traitors feel and act as though they had a friend and protector in Judge Peabody, and well they might.

For instance, secessionists have been fined from two and a-half dollars to three dollars for hurrahing for Jeff. Davis & Co. in the streets. But when a "secesh" calls a United States officer a d—n Yankee, with other opprobrious epithets, and is knocked down for his politeness, Judge Peabody fines the United States officer one hundred dollars, and sentences him to three months imprisonment in the Parish Prison.[33]

Unionist denunciation was more than matched by the outrage expressed over Judge Peabody's appointment as Chief Justice of the Supreme Court, despite—or perhaps because of—the fact that he apparently never conducted judicial business in that capacity.[34] According to a report made to the Louisiana Constitutional Convention in 1864:

As to the Hon. Charles A. Peabody, your committee are of opinion that he never was chief justice of the state of Louisiana, for the irresistible reasons that neither the military authorities, nor the civil powers of this State, ever created a Supreme Court since the arrival of the honorable gentleman in this State, nor was he eligible to a seat on the bench of the one created previous to his arrival, because he was not, and is not, a citizen of the State of Louisiana. And, further, because he was and is a judge created by the president of the United States to preside over a court created by the same authority, "the United States Provisional Court for the State of Louisiana." That as a judge of said court he has been receiving a salary from the United States government—and therefore, he has received the sum of $3,541.66 from the treasury of the State of Louisiana, as salary, under the pretense of being the chief justice of the State, without any authority and in open violation of the constitution and laws of the State of Louisiana.[35]

Epilogue

In the summer of 1863, while Judge Peabody was away, the original Provost Court was abolished, and the United States District Court for the Eastern District of Louisiana was reopened with a newly appointed District Judge. Business began to gravitate there instead of the Provisional Court; for example, the confiscation proceedings against the property of John Slidell, the Confederate emissary to France captured by a Union gunboat in the celebrated Trent affair, seem to have migrated from the Provisional Court to the District Court.[36] In January 1865, President Lincoln nominated Judge Peabody to be the United States District Attorney for the Eastern District of Louisiana. This new appointment, accepted by Judge Peabody, presumably contemplated relinquishment of his judicial position, but whether he ever actually took up his newest position is unclear.

Congress abolished the Provisional Court by statute on July 28, 1866. All pending cases were transferred to the District Court for the Eastern District of Louisiana except for those of which the Circuit Court "could take jurisdiction," in which case they went there. Existing judgments of the Provisional Court "shall at once become the judgments…of said district court, or said circuit court, unless the same are inconsistent with the rules and proceedings thereof and may be enforced by those courts." However, under Section 2, in pending cases "which could not have been instituted in said circuit

or district court, the record shall remain in said district court without further action therein." And, in *Edwards* v. *Tanneret*, 79 U.S. 446 (1870), Durant prevailed in the Supreme Court on the issue which Section 2 of the statute obviously left open—the unenforceability in the Circuit Court of a preexisting judgment of the Provisional Court in an action "which could not have been instituted there."

Judge Peabody returned to New York City and resumed the practice of law in his family firm, Peabody, Baker & Peabody. Treated as a senior statesman, his extracurricular professional focus was in international law. He died in early July 1901, just days before his 87th birthday.

The author thanks Conrad K. Harper, Kent Newmyer, Judith K. Schafer and Christian G. Fritz for their help and encouragement.

39TH CONGRESS, 1ST SESSION.

H. R. 468.

IN THE SENATE OF THE UNITED STATES.

JULY 25, 1866.

Read twice and referred to the Committee on the Judiciary.

AN ACT

To provide for the suits, judgments, and business of the United States provisional court for the State of Louisiana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all suits, causes, prosecutions, and proceedings in the United States provisional court for the State of Louisiana, with the records thereof, be, and the same are hereby, transferred to the United States district court for the eastern district of Louisiana; and all suits, causes, prosecutions, and proceedings so transferred shall be proceeded with in said court and tried and determined, and process and judgment issued and executed therein and by said court in the same manner and with like effect as if the same had been commenced originally in said district court: *Provided, however,* That any suit or proceeding so transferred, of which the circuit court could take jurisdiction under the laws of the United States, shall in like manner be heard and determined in the circuit court held in said district.

ENDNOTES

1. The court is not completely unique. In 1899, following the Spanish-American War, the commander of the American forces of occupation in Puerto Rico established a court in some ways similar to it as the United States Provisional Court for the District of Puerto Rico. Guillermo A. Baralt, *History of the Federal Court in Puerto Rico: 1899-1999* (Publicaciones Puertorriquenas 2004). I am grateful to the Honorable Jose Cabranes, a leading historian of the federal courts in Puerto Rico, for bringing this court to my attention.
2. Erwin C. Surrency, *The Provisional Court in Louisiana*, 2 Am. J. Legal Hist. 86-88 (1958); Thomas W. Helis, *Of Generals and Jurists – The Judicial System in New Orleans under Union Occupation, May 1862-April 1865*, republished in *A Law Unto Itself –Essays in the New Louisiana Legal History* 117-140 (Warren M. Billings & Mark F. Fernandez, eds., LSU 2001).
3. *United States Provisional Court for the State of Louisiana*, 13 Am. Law Reg. 65-74 (1864); *Provisional Judiciary of Louisiana*, 13 Am. Law Reg. 257-269 (1865); *The Authority of the "Provisional Court" of Louisiana*, 13 Am. Law Reg. 385-390 (1865). Judge Peabody's first and last articles about the Provisional Court are signed by him; the second is not, but it contains much the same text as the first and the third and is catalogued with him as its author. Charles A. Peabody, *Provisional Judiciary of Louisiana*, 3 Alb. L. J. 348-353 [1871]; *The United States Provisional Court for the State of Louisiana*, 5 Int'l Rev May-June 1878, 313-325; Charles A. Peabody, *United States Provisional Court for the State of Louisiana, 1862-1865* in Annual Report of the American Hist. Assn. For the Year 1892, 197-210 (GPO 1893).
4. *The* Grapeshot, 76 U.S. 129, 132 (1869); *Burke v. Miltenberger*, 86 U.S. 519 (1873).
5. *United States v. Reiter*, 27 F. Cas. 768 (No. 16,146) (1865); *Union Bank of Louisiana v. City of New Orleans and First Nat'l Bank of New Orleans*, 24 F. Cas. 550 (No. 14,351) (1866 [sic]). Federal Cases dates the latter 1866, which is clearly wrong. However, Judge Peabody had *Reiter* printed in New York, apparently for distribution, and copies of it survive outside the Provisional Court record in that form; although it is undated, the Provisional Court docket indicates that a "printed opinion" was filed on Feb. 6, 1865.
6. *People ex rel. Davies v. Cowles*, 13 N.Y. 350 (1856).
7. The secondary sources ascribed the justices' reasoning to the holding of the Court of Appeals. Henry Laurens Clinton, Extraordinary Cases 210 (New York 1896).
8. 2 The Diary of George Templeton Strong 254-255 (Allan Nevins ed., 1952).
9. *Id.* Justice Clerke also vacated one of Davies' orders on the ground that Davies was not a judge.
10. *People (ex rel. Charles A. Peabody) v. Attorney General*, 3 Abb. 131(22 Barb. 114; 13 How. 179) (1856). *See generally* Laurens Clinton, supra note 7, at 209-218. Norman Kee, *Henry Ebenezer Davies* in The Judges of the New York Court of Appeals: A Biographical History 72-77 (Albert M. Rosenblatt ed., Historical Society of the Courts of the State of New York, 2007).
11. *See* Volumes 21 (1856) and 22 (1863) of Barbour's Reports at iv.
12. *People v. Baker*, 10 How. Pr. 567 (1855). Baker, however, had fled.
13. *Lemmon v. People (ex rel. Napoleon)*, 26 Barb. 270 (1857), *affd sub nom People v. Lemmon*, 20 NY 562 (1860). Other decisions by Justice Peabody appear in that same volume 26 of Barbour's Reports at pages 10, 16, 23, 39, 46, 55, 61,78, 122, 177, 262 and 267.
14. Charles L. Dufour, The Night the War Was Lost (Doubleday 1960); Chester G. Hearn, The Capture of New Orleans 1862 (LSU 1995); Michael D. Pierson, Mutiny at Fort Jackson – The Untold Story of the Fall of New Orleans (UNC 2008).
15. 1 Private and Official Correspondence of Gen. Benjamin F. Butler During the Period of the Civil War 490 (The Plimpton Press, Northwood MA . (1917) (hereinafter "Butler").

16. Butler, *supra* note 15, vol. 2, at 35.
17. Butler, *supra* note 15, at 466-471, 566. The British ambassador also complained to Seward. Chester G. Hearn, When the Devil Came Down to Dixie 142- 160 (LSU 1997).
18. Butler, *supra* note 15, at 556-558.
19. Butler, *supra* note 15, at 552. However, this gesture was merely a ruse, because Shepley was Butler's subordinate and on his staff. *See* Hearn, *supra* note 17, at 151.
20. Butler, *supra* note 15, at 553, 581. Blair's letter continues: "I objected to the appointment to Gov. Seward, and told him that Johnson had lied to you when you were at Baltimore [Butler's first command]. Seward answered, "'Yes; but he was paid for that. Now he is paid to lie the other way.'" *Id*. at 580.
21. Message of the President of the United States transmitted December 22, 1862. Ex. Doc. 16, U.S. Senate, 37th Cong., 3d Sess. *See also* Butler, *supra* note 15, at 605-607; Butler, *supra* note 15, Vol 2, at 80-82.
22. Judge Peabody makes express reference to Reverdy Johnson's mission but misdescribes the complaining Greek merchants as "Rodocorachi & Franghiadi". There was a firm in London which traded at the time in New Orleans called *Franghiadi and Rodocranachi*, but its problems were with the legendary Confederate raider the "Alabama", not General Butler. *See Burnand v. Rodocranachi*, 5 CPD 424 (1880), *revd* 6 QBD 633, *affd* 7 A.C. 333 (H. L. 1882). General Butler released the sugar claimed by Covas and Negroponte on September 16, 1862, on orders of the State Department, according to his letter of that date to the Greek consul. Butler, *supra* note 15, Vol. 2, at 300.
23. The text of President Lincoln's proclamation in pertinent part is as follows:
    The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional court, which shall be a Court of Record for the State of Louisiana; and I do hereby appoint Charles A. Peabody, of New York, to be a provisional Judge to hold said Court, with authority to hear, try and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings so far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive.
24. *See generally* Daniel W. Hamilton, The Limits of Sovereignty – Property Confiscation in the Union and the Confederacy during the Civil War (Chicago 2007).
25. *Freitas v. Freitas* was frequently on his calendar. The wife accused her husband of adultery and of having her arrested and taken to the Provost prison in the pouring rain. He accused her of habitual drunkenness and of threatening to kill their child. Judge Peabody awarded a divorce and alimony to the wife, but getting her ex-husband to pay was a task that often required Judge Peabody's intervention.
26. *The Grapeshot, supra* n. 4, also illustrates another facet of the Provisional Court's exercise of jurisdiction. It had been tried and decided in the District Court in New Orleans and was on appeal to the Circuit Court when the war broke out. On January 13, 1863, the parties stipulated to its transfer from the Circuit Court to the Provisional Court, where Judge Peabody enforced the bond.
27. *Edwards v. Tanneret*, 79 US 446 (1870); *Burke v. Tregre*, 22 La. Ann. 629 (1870), *affd* 86 U.S. 519 [1873]; *Cocks v. Izard*, 5 F. Cas. 1154 (No. 2, 934) (C.C.C.D. La. 1871).
28. Minutes of the Provisional Court, May 7, 1863 (National Archives, Southwest Region, Fort Worth, Texas); *see also* 3 American Annual Cyclopedia and Register of Important Events in the Year 1863, 770-776 (New York 1872).
29. Judith Kelleher Schafer, Becoming Free, Remaining Free: Manumission and Enslave-

ment in New Orleans, 1846-1862 (LSU 2003); *see also* Judith Kelleher Schafer, Slavery, the Civil Law and the Supreme Court of Louisiana (LSU 1994).

30. Butler, *supra* note 15, at 567, 573; Butler, *supra* note 15, Vol. 2, at 488-489; Butler, *supra* note 15, Vol. 3, at 560-563. LaWanda Cox, Lincoln and Black Freedom – A Study in Presidential Leadership 46-139 (USC 1991); 2 Samuel P. Chase Papers 322-324 (Kent State 1994) (hereinafter "Chase Papers"). Chase himself wrote: "Mr. Durant is very honest, very earnest & very able – taken for all in all, I think, about the ablest man on our side in the gulf States." *Id.*, Vol. 4, at 234.
31. Cox, *supra*, note 30; Carl J. Guarneri, The Utopian Alternative – Fourierism in Nineteenth-Century America 262-266 (Cornell 1991); Chase Papers, *supra* note 30, Vol. 4, at 207, 234. Ironically, when president of the Free State General Committee, Durant noted that the President himself had said that the legality of the Emancipation Proclamation would have to be tested in civil actions in the courts. *Id.* at 257-259. After the Civil War Durant practiced law in Washington, D.C. and was counsel in most of the Supreme Court decisions cited above. He was also counsel for the prevailing parties in *The Slaughterhouse Cases* (83 U.S. 36 [1873]) opposing former Justice John A. Campbell, who had moved his practice to New Orleans after his release from confinement at Fort Pulaski.
32. Helis, *supra* note 2, at 130-131.
33. Alfred Whital Stern Collection of Lincolniana.
34. Henry P. Dart, The History of the Supreme Court of Louisiana, *in* An Uncommon Experience: Law and Judicial Institutions in Louisiana 1803-2003, 566, 590-92 (J.K. Schafer and W. M. Billings eds., USL 1997).
35. Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 512-520 (New Orleans 1864).
36. *The Confiscation Cases: Slidell's Land*, 87 U.S. 92 (1873).